REPUBLIC OF SOUTH AFRICA

THE OF THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, PRETORIA

Case no: 85853/16

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

13/03/2019
DATE

SIGNATURE

In the matter between:

SHABANGU SIMON Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA Defendant

JUDGMENT

MNGQIBISA-THUSI J:

[1] The plaintiff, Simon Shabangu, has instituted a claim against the defendant, the Passenger Rail Agency of South Africa ("PRASA"), for damages arising from

loss suffered as a result of injuries he sustained after allegedly falling out of one of the defendant's trains. The incident occurred on 21 April 2016 between the Elandsfontein and Isando train stations.

[2] At the hearing of this matter the parties agreed on a separation of issues of liability and quantum[1]. The issue for the determination of quantum was postponed *sine die*.

[3] The defendant provides rail transport services to the public.

[4] In its particulars of claim the plaintiff alleges that the incident was caused by the sole negligence of –

4.1 The defendant, in that it:

4.1.1 "Failed to exercise reasonable duty of care to conduct its operations resulting in injuries sustained by the plaintiff.

4.1.2 Failed to take reasonable and expected steps to guard against/prevent the incident from occurring (closing of doors).

4.1.3 Failed to provide adequate security guards to ensure passenger's safety and security in the train by not deploying enough security guards at the station crime (*sic*) and to ensure that all doors were closed before departure.

[1] The agreement to separate the issues is in terms of Rule 33(4) of the Rules of Court.

4.1.4 Failed to prevent the incident where the plaintiff was pushed out of the moving train whilst the doors were open.

4.1.5 Failed to apply necessary care expected of a reasonable person in its duty where diligent care is required".

4.2 The conductor or the driver, in that he/she:

4.2.1 "Opened all the doors of a train including doors which were not on the side of the platform.

4.2.2 Failed to close the doors of a train at all whilst it was full of passengers.

4.2.3 Failed to ensure that the doors not on the side of the platform are closed at all times when passengers were disembarking.

4.2.4 Allowed lots of passengers to board a train and therefore causing the train and/or the coach to be overcrowded.

4.2.5 Caused conditions of the train and/or of the coach to pose danger to commuters in general and plaintiff in particular.

4.2.6 Failed to apply necessary care expected of a reasonable person in his/her duty where diligent care is required".

4.3 The driver, in that:

4.3.1 "He/she set the train in motion whilst the doors were open, therefore causing the plaintiff to fall.

4.3.2 He/she travelled at an excessive speed in the circumstances whilst the doors of the train were open.

4.3.3 He/she failed to realise that it was dangerous to drive at an excessive speed whilst train was full of passengers and whilst the doors were open.

4.3.4 He/she failed to stop the train in order to avoid the incident.

4.3.5 He/she drove the train in total disregard of the safety of the passengers.

4.3.6 He/she failed to prevent the said incident when by the excessive (*sic*) of due and reasonable care, he could and should have done so".

[5] The defendant has denied liability for the loss suffered by the plaintiff. It is the defendant's contention that the plaintiff sustained his injuries not by being pushed by other passengers out of the train but through him jumping out of the train whilst it was in motion.

[6] The issue to be determined is whether the defendant and/or its employees were negligent.

[7] The parties agreed that the plaintiff bears the onus of proving negligence on the part of the defendant through its employees.

[8] The test for negligence involves the questions whether (a) a reasonable person in the defendant's position would foresee the reasonable possibility of his or her

conduct causing harm resulting in patrimonial loss to another; (b) would take reasonable steps to avert the risk of such harm; and (c) the defendant failed to take such reasonable steps[2]. Further, the negligent act or omission must have been wrongful.

[9] The plaintiff's evidence is as follows. On the morning of 21 April 2016 he left his home in Tembisa at around 05h00, heading for the Leralla train station. At the Leralla station the train he intended catching arrived at 05h30. He boarded the train and sat about four paces from the door of the train. The train was full. Between Isando and Elandsfontein the train stopped at a robot. When the robot turned green and as the train started moving slowly, he got up and stood next to the door preparing to alight when the train reached the platform. The plaintiff testified that people inside the train, also started moving, preparing to disembark. It was at that stage that he was pushed out of the train through an open door and fell between the train rails, injuring both his legs. He further testified that some people who had also alighted from the moving train had come to his assistance by carrying him outside the station and leaving him next to some shops. Once outside the station he phoned his father who arrived at approximately 07h30. When his father arrived he used his father's cell phone to summon an ambulance, which arrived approximately 15 minutes thereafter. He also phoned his colleague at work who also arrived.

[10] Under cross examination, the plaintiff could not explain why in his particulars of claim it is alleged that he got injured at the Elandsfontein station. He testified

[2] *Kruger v Coetzee* 1966 (2) SA 429 (A) at 430E-F.

that he was pushed out of the train approximately 500m from the platform of the Elandsfontein station. Further on being questioned about the fact that none of the train security guards saw him after he fell out of the train he testified that there were no security guards where he fell since they were stationed at the platforms. Furthermore, the plaintiff could not explain the inconsistency between his evidence that he boarded a train at Leralla at 05h30 although in his particulars of claim it is alleged that he boarded a train at 05h00, and further in his response to the defendant's request for further particulars it is stated that he boarded a train at 04h00. Furthermore, the plaintiff did not respond to a statement made by counsel for the defendant that the first train from Leralla leaves the station at 04h10 heading for Elandsfontein where every passenger alighted as the train does not proceed any further. The plaintiff also could not explain why his hospital records reflect that he was admitted at 07h35 whereas he testified that he was admitted to hospital at 09h00.

[11] The next witness called by the plaintiff was Mr Meluleki Ncube ("Mr Ncube"). His evidence is as follows. On the day in question the plaintiff phoned him and told him that he was injured after falling from a train and that some people had carried him outside the station. Mr Ncube further testified that either after 06h00 or 07h00 he found the plaintiff lying on the ground.

[12] Thereafter the plaintiff closed his case.

[13] The first witness to testify on behalf of the defendant was Miss Edith Fikile Kgatuke ("Ms Kgatuke") who testified that on 21 April 2016 she was a train

assistant at Elandsfontein and had started her shift at 03h00, knocking off at 10h30. Miss Kgatuke testified that as part of her functions is to make sure that the doors of the train are opened for passengers alighting and that before a train departs from a station, the doors are closed after passengers have boarded the train. Before closing the doors of the train and in preparation for the departure of the train, she is required to blow her whistle. Thereafter she presses a button, indicating to the driver that it is safe to set the train in motion. Miss Kgatuke further testified that on the day in question she was on duty on train number '1802' which left the Leralla train station at 04h30 headed for Elandsfontein station where it would arrive at 4h45 and all passengers would disembark as the train is normally not scheduled to proceed further. Furthermore, Miss Kgatuke testified that on the day in question and when the rain reached Elandsfontein, she moved from the back of the train to the front and during her walk she did not see any incident. Further that had a person fallen from the train, she would have been alerted by the noise the other passengers would invariably have made.

[14] The next witness for the defendant was Mr Swabang Letsie ("Mr Letsie"). Mr Letsie testified that he is employed by Security Changing Tide and is based at the Elandsfonein train station. On 21 April 2016 and his 18h00 to 06h00 shift, he was patrolling, checking cables and checking whether there was any person who fell from a train as he was informed by investigators from Metro Rail that there was a person who had fallen off a train. He found nothing.

[15] After Mr Letsie's evidence, the defendant closed its case.

[16] On behalf of the plaintiff counsel argued that the defendant and its employees were negligent in that the evidence showed that they had left the doors of the train open while the train was in motion. In this regard counsel relied on the matter of *Mashongwa v PRASA*[3] where the Constitutional Court held that *PRASA* was in breach of its public duty to provide safety and security measures for its rail commuters. Counsel submitted that even though there were contradictions in the evidence of the plaintiff, these should be ignored as they were not material.

[17] On behalf of the defendant, it was argued that this matter is matter (*supra*) as it related to the plaintiff being attacked by criminals inside the train. Defendant's counsel submitted that there were serious discrepancies between what is alleged by the plaintiff in his particulars of claim and the evidence he presented in court. Counsel pointed out that even though in his particulars of claim the plaintiff had alleged that he boarded a train at Leralla at 05h00, in his evidence in chief he testified that he boarded a 05h30 train.

[18] The onus rests on the plaintiff to prove that the defendant was negligent and that the plaintiff took all reasonable steps to prevent harm.

[19] In *Carmichele v Minister of Safety and Security*[4] the court held that in order for a plaintiff to succeed with his claim he has to establish that:

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[3] 2016 (3) SA 528 (CC).
[4] 2001 (4) SA 938 (CC).

1. The defendant owed a legal duty to the plaintiff to protect her;
2. That its employees or agents acted in breach of such duty and did so negligently; and
3. That here was a causal connection between such negligent breach of the duty and the damage suffered by the plaintiff.

[20] With regard to PRASA's obligations towards its passengers, the Constitutional Court in the *Mashongwa* matter *(supra)* held at paragraph [20] that:

> "Public carriers like PRASA have always been regarded as owing a legal duty to their passengers to protect them from suffering physical harm while making use of their transport services. That is true of the taxi operators, bus services and the railways, as attested to by numerous cases in our courts. That duty arises, in the case of PRASA, from the existence of the relationship between carrier and passenger, usually, but not always based on a contract. It also stems from its public law obligations. This merely strengthens the contention that a breach of those duties is wrongful in the delictual sense and could attract liability for damages".

Further at paragraph [26] the held that:

> "Safeguarding the physical well-being of passengers must be a central obligation of PRASA. It reflects the ordinary duty resting on the public carriers and is reinforced by the specific constitutional obligation to protect passengers' bodily integrity that the rests on PRASA, as an organ of state".

[21] It is not in dispute that on the day in question the plaintiff had a valid ticket.

[22] The plaintiff's version is that he was pushed out of the moving train by commuters who wanted to get off the train whilst it was still in motion and before

it reached the platform. On the other hand, it is the respondent's version that the plaintiff sustained his injuries when he jumped out of the moving train.

[23] The versions of the plaintiff and the defendant as to how the plaintiff fell from the train and sustained his injuries are mutually destructive. In *National Employers' Insurance Association v Gany*[5], the court stated that:

> "Where there are two stories mutually destructive, before the onus is discharged the Court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false....it must be clear to the Court of first instance that the version of the litigant upon whom the onus rests is the true version..."

[24] As pertains to the issue of onus, the court in *National Employers' General Insurance Co Ltd v Jagers*[6] the held that:

> "It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rest on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the probabilities favour the plaintiff, the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case more than they do the

[5] 1931 AD 187.
[6] 1984(4) SA 437 (E) at 440D –G.

defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false[7]."

[25] The plaintiff was an impressive witness. Even though there were contradictions in his evidence with regard to the time he boarded the train at Leralla, these inconsistencies are not material as it is not in dispute that on the day in question a passenger did fall off the train as confirmed by the defendant's witness, Mr Letsie, who testified that he was informed by investigators from Metro-Rail that he should look out for a person who had fallen off the train. The defendant's witnesses were not bad witnesses. However, on probabilities, the plaintiff's evidence that the train doors were open when the train was in motion is more probable. Ms Kgatuke, the defendant's witness, could not with certainty assert that all the doors of the train were closed when the train left the robot where it had stopped. The defendant's version that the plaintiff sustained his injuries when he tried to jump from the moving train is speculative.

[26] On probabilities, I am satisfied that the incident in which the plaintiff sustained his injuries happened in the manner in which the plaintiff testified. It is improbable that a person could have fallen off a moving train if its doors were closed whilst it was in motion. I am convinced that the defendant was negligent in not ensuring that the doors of the train were closed whilst it was in motion. The plaintiff has proven, on a balance of probabilities, that the defendant failed to discharge its obligations towards train commuters by failing to make sure that the doors of its train were closed when it left Leralla station, resulting in the plaintiff being injured after being pushed out of the train by other commuters.

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[7] See also *Govan v Skidmore* 1952 (1) SA 732 (N) where the court stated at 734 C-D that: "... in finding facts and making inferences, in a civil case, it seems to me that one may, as Wigmore conveys in his work on *Evidence* (3rd ed., para. 32), by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one".

[27] Accordingly, the following order is made:

1. That the defendant is liable to pay the plaintiff's proven damages.

2. That the defendant is ordered to pay the costs of the action.

NP MNGQIBISA-THUSI
Judge of the High Court

For Applicant Adv UB Makuya (instructed by Rapfumbedzani Attorneys)
For Respondent B Shabangu (instructed by Ledwaba Mazwai Attorneys)