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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 61756/2018

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

REVISED

20 /01/2023

In the matter between:

MASHEGO DUMISANI PROMISE

Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Defendant

JUDGMENT

PHOOKO AJ

INTRODUCTION

[1] The Plaintiff in this matter instituted an action for damages against the Defendant for injuries that he allegedly sustained when he was robbed and pushed out of an open door of a moving train that was travelling from Johannesburg to Pretoria on 25 April 2018. The action is Defended.

[2] The trial only dealt with the issue relating to liability.

THE PARTIES

[3] The Plaintiff is Mashego Dumisani Promise, an adult male person residing at [....] V [....] Street, [....] A [....] Accommodation in the Gauteng Province.

[4] The Defendant is the Passenger Rail Agency of South Africa ("PRASA"), a public company established in terms of the South African Transportation Services Act 9 of 1989 and trading as Metro Rail, which *inter alia* provides transport services to the public. PRASA's principal place of business is at PRASA House, 1040 Burnett, Hatfield, Pretoria, 0083.

JURISDICTION

[5] The Defendant conducts its business within the jurisdiction of this Court. Therefore, this Court has the power and competency to preside over this case.

THE ISSUE

[6] The issue to be determined by this Court is whether the Defendant is liable in delict for injuries sustained by the Plaintiff.

THE FACTS

[7] On 25th April 2018, between 14:00 and 16:00, the Plaintiff was allegedly robbed by three other passengers and pushed out of a moving train through open carriage doors that were at all times opened when the train left Park Station for Pretoria.

[8] According to the particulars of claim¹ and a request for further particulars², the Plaintiff fell between the "rail way track and/or "between the train and the train platform whereby the train hit him by the side". Further, the Plaintiff stated that he was transported by an ambulance to Charlotte Maxeke hospital.

¹ Particulars of claim para 5.

² Reply to Defendant's request for further particulars paras 2.18 and 2.24.

[9] The Plaintiff avers that the incident was caused due to sole negligence of the employees of the Defendant, who acted within the scope of their duty and subject to the control of the Defendant to promote the Defendant's business in providing public service.

[10] In particular, the Plaintiff alleges that the Defendant, and/or its employees, were negligent in that they *inter alia* failed to prevent the incident by exercising reasonable care and attention, failed to ensure that all doors of the coach were closed before departure, and allowed the train to depart at a time when it was dangerous and inconvenient to do so.

[11] As a result, the Plaintiff avers that he sustained various injuries ranging from head to nasal bone fracture.

APPLICABLE LAW

[12] It is now settled that the standard of proof in a civil case is proof on the balance of probabilities.³ This entails that the Plaintiff, who bears the burden of proof, must prove that his version is more probable than that of the Defendant. Even though the Defendant has some duty to adduce evidence, the burden of proof remains on the Plaintiff throughout the trial. As was correctly stated by Van der Spuy, in *Salamolele v Makhado*,⁴:

“It is common cause that plaintiff bears the overall onus of proof . . . It may be that defendant has some duty of adducing evidence in support of the latter version but the onus of proof in the overall case never shifts and remains on plaintiff.”

[13] There are two different versions of this matter. On one hand, the Plaintiff is adamant that he was pushed out of a moving train whose carriage doors were always opened and sustained injuries as the train approached Doornfontein Station and/or near the Doornfontein station. On the contrary, the Defendant is adamant that no incident occurred at Doornfontein Station on 25 April 2018. It is apparent that this

³ See *Pillay v Krishna and Another* 1946 (AD) 946 at 952-3.

⁴ 1988(2) SA 372 (V), at 374.

Court is faced with two mutually destructive versions which cannot co-exist.

[14] The courts have provided guidance about how to resolve cases such as the present one. For example, in *National Employers' General Insurance Co Ltd v Jagers*,⁵ when dealing with two mutually destructive versions, the court said:

“It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only 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 rests 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 balance of probabilities favours the plaintiff, then 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 any more than they do the 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.”

[15] Similarly, in *Stellenbosch Farmers' Winery Group Ltd. and Others v Martell & Cie and Others*, the court held as follows:

“On the central issue as to what the parties actually decided there are two irreconcilable versions, so too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally

⁵ 1984(4) 437 (ECD) 440 D-G. See also *Stellenbosch Farmers' Winery Group Ltd. and Others v Martell & Cie and Others* 2003 (1) SA 11 (SCA) at para 5.

employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities...in the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus succeeded in discharging it”.

[16] Based on the above, I now turn to consider whether the Plaintiff has adduced evidence on a balance of probabilities, having due regard to the credibility and reliability of the witnesses, that the Defendant was negligent and that his testimony is true and accurate, and therefore acceptable and that the version of the Defendant falls to be rejected. To avoid liability, the Defendant must produce evidence to disprove the inference of negligence on his part, failing which he/she risks the possibility of being found liable for damages suffered by the Plaintiff.

EVIDENCE

[17] This section deals with the testimony of the Plaintiff and his attorney, Mr. Muhangane. Further, it also covers the Defendant's three witnesses namely, Mr. Bhengu, Mr. Munyai, and Ms. Phaladi.

Mr. Mashego Dumisani Promise (Plaintiff)

[18] The Plaintiff is the sole witness who testified about the events that resulted in his injuries. He testified that on 25 April 2018, at about 12:00pm, he travelled roughly 45 minutes by taxi from Bosman Station in Pretoria to Johannesburg to meet his former girlfriend, Ms. Maggie Aphane (“Ms. Aphane”) who lived in Soweto. On arrival in Johannesburg, the Plaintiff met Ms. Aphane and they bought food together.

[19] According to the Plaintiff, there was a strike on the day in question by members of the South African Federation of Trade Unions (“SAFTU union”), and Ms. Aphane supported the said strike. The Plaintiff testified that Ms. Aphane had intended to participate in the strike. They, therefore, proceeded to join the group of

strikers who were at that stage leaving the Anglo-American offices in Johannesburg to another location. The Plaintiff testified that, upon arrival of the strikers, he and Ms. Aphane walked behind them.

[20] The Plaintiff testified that he was not part of the strike but had merely gone to see Ms. Aphane who had an interest in the strike. He testified that he did not accompany Ms. Aphane to hand over a memorandum but walked with her up to the Mandela Bridge. Thereafter, he left Ms. Aphane with other strikes and took a different route to Park Station where he arrived after 14:00 but before 16:00. At Park Station, he purchased a single train ticket to Pretoria.

[21] The Plaintiff testified that he was not a regular train user but had only elected to use a train on the said day as he was not in a hurry. The Plaintiff gave testimony: that he *inter alia* does not remember the costs of the train ticket; that the ticket was lost when he was robbed, he didn't know where the platforms were; and that he could not remember the platform that he boarded the train from. Furthermore, the Plaintiff testified that he went to wait for the train towards the end of the platform where he eventually boarded the second or third carriage (from the back) of a train that arrived after 14:00. The Plaintiff stated that the train entered and left the platform with its doors opened. The Plaintiff does not recall the number of the train.

[22] Further, the Plaintiff testified that inside the train, he found two other male commuters who were about his age. According to the Plaintiff, one of them had a schoolbag and he does not remember anything else about them.

[23] The Plaintiff further testified that the said commuters were seated about 4 to 5 meters away from him and that he was seated approximately two meters away from the door of the train carriage.

[24] According to Plaintiff, when the train was leaving Park Station, three unknown men entered the carriage from the doors between the carriages. The Plaintiff saw one of these men wearing a brown shirt and does not remember anything about them as he had his earphones on. He further testified that he saw two of these men when they started searching the other commuters, and the school bag that one of

the commuters had. The man with a brown shirt stood approximately 1 meter away from the Plaintiff.

[25] Two other men suddenly approached the Plaintiff and stood approximately 30cm to 1 meter away from him. This is when the man in a brown t-shirt started demanding that the Plaintiff should empty his pockets and/or enquired about what he had in his hands. This was followed by similar demands from other two men. The Plaintiff refused to accede to their demands and asked who they were and what they wanted from him. Consequently, a scuffle ensued, and the three men assaulted the Plaintiff.

[26] The Plaintiff then heard the loud noise of people from outside the train as the train was approaching the next station which he later learned that it was Doornfontein which is approximately 4-5 minutes away from Park Station. The Plaintiff testified that people who were making noise also seemed to be throwing stones at the train. The three men told the Plaintiff that he knew too much and then pushed him out of the carriage of the open door whilst the train was in motion and entered Doornfontein Station.

[27] As a result of being thrown out of a moving train, the Plaintiff testified that he became unconscious and could no longer remember anything at Doornfontein Station. According to him, he woke up later at Charlotte Maxeke Hospital with head injuries, and a broken nose. He was hospitalized and discharged after 9 days.

[28] The Plaintiff testified that he did not report his encounter ON the train to the Defendant or the police but went to consult with his attorneys.

Mr. Muhanganei

[29] Mr. Muhanganei's testimony was brief. He attested that he interviewed the Plaintiff and took handwritten notes. Post taking the notes, he *inter alia* drafted the particulars of claim and served them on the Defendant without giving the Plaintiff an opportunity to confirm the contents thereof.

[30] Mr. Muhanganezi further testified that he unsuccessfully tried to get legible copies of the medical records. To this end, he indicated that the appointment of an assessor did not yield any positive results. Consequently, he took it upon himself to *inter alia* visit the offices of EMS headquarters in Johannesburg and Charlotte Maxeke hospital but also failed. According to him, these are the reasons that he did not call the paramedic personnel to testify.

Mr. Bhengu (Defendant)

[31] Mr. Bhengu testified that on 25 April 2018, he was employed by the Defendant as a Protection Officer at Doornfontein Station. He testified that he reported for duty at Park Station at 5:53am for a shift that commenced from 6:00am to 15h00. According to Mr. Bhengu, he travelled by train from Park Station to Doornfontein Station and this took him approximately 3 – 4 minutes. Mr. Bhengu further testified that once he is deployed at a station, he cannot leave that station until the end of his shift.

[32] Mr. Bhengu testified that he commenced his shift alone until 07:00am when he was joined by his colleague, Mr. Munyai. Their duties included periodically patrolling the premises at Doornfontein which consisted of four platforms, a ticket office, station manager's office, and a concourse., Mr. Bhengu testified that it took them approximately 10 minutes to patrol the entire premises.

[33] Mr. Bhengu testified that either he or Mr. Munyai would periodically report the situation at Doornfontein Station to the control room via radio, and their report would be recorded in the Occurrence Book.

[34] Mr. Bhengu testified that in the case of an incident occurring at Doornfontein Station such as the one narrated by the Plaintiff, he was required to attend to the incident. If a person was injured, he had to take down the details of such a person, establish whether that person had a valid train ticket, ascertain the circumstances of the incident if he had not himself seen it occur, and report the incident to the control room where it would be recorded in the Occurrence Book.

[35] In addition, Mr. Bhengu testified that the incident would in turn be escalated to the Joint Operations Centre (“JOC”), which would also record the event in an Occurrence Book. Thereafter, JOC would call an ambulance to the scene of the injured person. Mr. Bhengu testified that whilst the ambulance was being contacted, he was required to remain with the injured person until the ambulance personnel arrived. According to Mr. Bhengu, JOC is the only entity that is authorised to call an ambulance.

[36] Mr. Bhengu further testified that when the ambulanced, he was obliged to take down the ambulance’s registration number, the details of the ambulance personnel, and establish the hospital that the injured person was being transported to. Further, Mr. Bhengu testified that he was required to complete a liability report recording all the information as indicated above.

[37] Mr. Bhengu testified that he was not aware of any incident that took place on 25 April 2018 at Doornfontein Station during his shift from 6:00am to 14:45 as he kept reporting to the control room that everything was “all in order” during the periods; 08h33, 10h06; and 12h06.

[38] Ultimately, Mr. Bhengu testified that there was no way that an incident as described by the Plaintiff could have occurred at Doornfontein Station without being noticed either by himself, Mr. Munyai, customer services personnel, cleaners, other commuters, and hawkers present at the station.

[39] Mr. Bengu left the Doornfontein Station at approximately 14:45 to knock off at Park Station at 15:00.

Mr. Munyai

[40] Mr. Munyai’s testified that on 25 April 2018, he was employed by the Defendant as a Platform Marshall at Doornfontein Station. His duties were similar to those of Mr. Bhengu. He reported for duty at Park Station at 6:47am as his shift was to start from 7:00am to 16:00 at Doornfontein Station.

[41] Mr. Munyai's testimony to a large extent echoed that of Mr. Bhengu in so far as it relates to traveling time from Park Station to Doornfontein Station, reporting of an incident such as the one described by the Plaintiff, the duty of JOC, and that nothing occurred on the day in question at Doornfontein Station. Therefore, it is not necessary to repeat it except that on two occasions namely, 13:17 and 14:45 where Mr. Munyai also reported to the Control Room that everything was in order.

[42] Ultimately, Mr. Munyai testified that he left Doornfontein Station between 15:50 and 15:55 for Park Station as his shift was to end at 16:00.

Ms. Phaladi

[43] Ms. Phaladi testified that on 25 April 2018, she was employed by the Defendant as the Station Manager to ensure that Doornfontein Station generates income. Further, she testified that the Doornfontein Station consisted of various personnel such as Access Control Officers, Ticket Officers, TSA officers, Security Guards, and Cleaners.

[44] Ms. Phaladi testified that the Doornfontein Station operated from 2:00am to 20:00; Access Control, Ticket Officers, and TSA officials worked from 4:00am to 20:00; Cleaners resumed duty from 07:00am to 16:00; Security Guards worked from 6:00am until 18:00 and from 18:00 until 6:00am. Accordingly, Ms. Phaladi testified that it was impossible that all the aforesaid people could have missed the incident as described by the Plaintiff.

[45] Finally, Ms. Phaladi testified that the entrance to the platform or railway tracks at Doornfontein Station was only possible through an access point as the other parts were closed off by a palisade fence. She further testified that the ambulance personnel could also only gain access via the access control point. This part of the testimony somehow became unclear but was confirmed via an inspection *in loco* which proved that prior the station was vandalised in 2020, accessed could only be gained via the access control point.

PLAINTIFF'S SUBMISSIONS

[46] Counsel submitted that the Plaintiff was a credible and reliable witness as he gave his evidence clearly and without any contradiction. Counsel for the Plaintiff further contended that the Plaintiff had an independent recollection of the events of 25 April 2018 and showed good character in the witness box.

[47] Counsel submitted that when the Plaintiff was questioned by the Defendant's counsel about his oral testimony which differed with the information contained in his pleadings regarding how *inter alia* he fell, the train hit him and got transported to the hospital, he gave a reasonable explanation.

[48] Counsel argued that even though there are inconsistencies in the Plaintiff's evidence and what was pleaded, this Court should not give "undue weight" to the inconsistencies because the Plaintiff is not the author of the particulars of claim and that he did not have sight of the request for further particulars prior they were served on the Defendant. According to counsel, the Plaintiff's evidence is clear in that he "does not know where he fell after being thrown out of the coach and does not know how he was transported to the hospital".⁶ Instead, he got to know via the hospital personnel that he was transported by ambulance to the hospital.

[49] Furthermore, counsel submitted that the fact that the Plaintiff did not *inter alia* remember the price of the train ticket and/or description of robbers "does not render his evidence improbable, nor does it justify a conclusion that he is fabricating his evidence".⁷ Counsel submitted that the Plaintiff should not be faulted for failure to describe his robbers given the situation at the time of the incident.

[50] Counsel contended that the failure by the Plaintiff to report the incident to law enforcement officers is not important because the Plaintiff followed the advice that he was given at the hospital to consult with an attorney. Counsel said that in any event many crimes occur but are not reported.

[51] Counsel argued that the Plaintiff's evidence that he was thrown out of a moving train that had its doors open went unchallenged.

⁶ Plaintiff's closing heads at para 73.

⁷ *Id* at para 76.

[52] Furthermore, counsel argued that the Plaintiff's evidence – that he sustained injuries because of being thrown out of a moving train as it entered Doornfontein Station – was supported by “undisputed” evidence which showed that he was transported by an ambulance from the scene to Charlotte Maxeke hospital situated approximately 5km from the Doornfontein Station. According to counsel, the fact that he was transported to a nearby hospital renders the Plaintiff's version that he was injured at Doornfontein Station more probable.

[53] Counsel further contended that the Plaintiff's testimony that he lost consciousness after being thrown out of a moving train and regained it approximately after 3 days at the hospital suggests that he sustained a head injury that can be suffered when one is thrown out of a moving train. Consequently, counsel contended that “the nature of the injury renders the Plaintiff's version that he was thrown out of the moving train more probable”.⁸

[54] Counsel submitted that the Plaintiff boarded a train that left Johannesburg at around 15:00 or 15:20 and that there is no credible evidence that any of the Defendant's employees were present at Doornfontein Station.

[55] Counsel submitted that the Plaintiff's version about the incident which took place on 25 April 2018 about the location, and time of the incident is credible, reliable and more probable than that of the Defendant's witnesses and should be accepted as true.

DEFENDANT'S SUBMISSIONS

[56] The Defendant submitted that there was no objective corroboration or confirmation of the Plaintiff's testimony with any external facts such as Ms. Aphane who could have confirmed the Plaintiff's presence in Johannesburg, and his departure thereof via a train to Pretoria from Park Station around 14:00.

[57] Counsel for the Defendant further submitted that even though the Plaintiff discovered the ambulance and legible hospital records, he chose not to call any

⁸ Id at para 80.

evidence from the ambulance personnel and/or a supervisor who would have explained their procedure on arrival at Doornfontein Station and whether the ambulance personnel would have entered the said station without informing any of the Defendant's personnel.

[58] Furthermore, counsel for the Defendant submitted that the hospital staff who recorded the information in the medical records were also not called to testify before this Court. According to counsel, "such evidence would not constitute hearsay in that the probative value of the evidence would not be its correctness – but rather from whom the information was obtained".⁹ In addition, counsel contended that such information was crucial in so far as it related to where the Plaintiff was picked from, the circumstances under which he ended up at Charlotte Maxeke Hospital, and that such a serious crime was not reported.

[59] The Defendant further submitted that the Plaintiff's version involved occurrences that are highly improbable in that he was *inter alia* assaulted by three unknown men who were about 30cm – 1m away from him, during the day, and in a confined space but he can only describe one of them who wore a brown shirt. This is even though the said three men prior to assaulting the Plaintiff, had also robbed two other commuters in proximity of about 4-5 meters from him in a confined space. Again, counsel submitted that the Plaintiff could not remember the other two commuters except that they were the same age as him and that one of them had a school bag.

[60] Counsel further submitted that even though the Plaintiff was being assaulted by three men, he was able to notice and hear the loud noise of people who were outside the train and who seemingly, because of the noise, be throwing stones at the train.

[61] Ultimately, counsel submitted that the Plaintiff's evidence of a group of persons throwing stones at a train, being thrown out of a moving train, and being likely transported by an ambulance to the hospital by necessary implication involves the Plaintiff's acceptance of the proposition that none of the Defendant's personnel

⁹ Defendant's heads of argument at para 17.5.2.

who were present at work saw it or *inter alia* recorded the arrival of the ambulance personnel “past the manned access control point” and the “removal of the unconscious Plaintiff by stretcher from the station via the manned access control point”.¹⁰

[62] Counsel submitted that the Plaintiff’s version was fabricated and should not be preferred over that of the Defendant.

INSPECTION *IN LOCO*

[63] The testimony of Ms. Phaladi was interrupted when the Plaintiff’s counsel made an application for inspection *in loco* of Doornfontein Station as there appeared to be a difficulty with the description of the entrance that leads to the platforms. The Plaintiff’s application was granted.

[64] An inspection *in loco* assists the court in achieving two purposes, namely, it enables the court to follow the oral evidence including observing real evidence which is additional to the oral evidence.¹¹ At the inspection, Ms. Phaladi *inter alia* showed this Court that three different stairway paths led to the first floor where the main entrance that leads to the platforms was situated. When one comes from the direction of Park Station towards Doornfontein Station, there are two stairway paths on the left-hand side of the road, and one stairway path on the right-hand side of the road.

[65] Ms. Phaladi stated that although one can presently access the platforms from either side of the road without using the main entrance, this was not possible during 2018 because the platforms were fenced with a palisade fence. However, the palisade fence was stolen after the station was vandalised sometime in 2020. Therefore, anyone can access the station from anywhere without having to go via the controlled access entrance.

EVALUATION OF EVIDENCE AND SUBMISSIONS

¹⁰ Id at paras 21-23.

¹¹ *R v Mokoena* 1932 OPD 79 at 80.

[66] The resolution of a civil dispute such as the present one turns on the probabilities of the competing versions, coupled with the evidence presented before this Court by both parties.

[67] The Plaintiff was a single witness regarding the events that occurred on the day in question. However, this does not necessarily entail that the Plaintiff is automatically in a disadvantaged position. His evidence still needs to be considered holistically to arrive at an objective conclusion. The Court, in *S v Saulus and Others*,¹² correctly found that—

“[t]here is no rule of thumb test or formular to apply when it comes to a consideration of the credibility of the single witness. The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told . . .”

[68] This entails that the single witnesses’ evidence should not merely be rejected or discounted because the witness has an interest or bias in the proceedings but rather, should be assessed as a whole and with caution taking into account all the relevant considerations.

[69] Regarding the Plaintiff’s testimony in so far as it relates to the attack from three men who robbed him on the train, the other two commuters who were also mugged, that the assailants were about his age group, the description of one of the robbers who wore a brown shirt, and the other commuter who seemed to be carrying a schoolbag, this Court is satisfied with the Plaintiff’s narration of events. The Plaintiff cannot be criticised for failure to recall his assailants given the circumstances at the time the alleged robbery occurred. It would be unfair, regardless of how close the robbers were, to expect any person in a situation of panic to remember everything about his assailants let alone about other objects and/or people that were around. People react differently to situations of fright.

¹² 1981 (3) SA 172 (A) at 180E-G.

[70] The Defendant seemed to be placing too much emphasis on the Plaintiff's inability to also recall the price of the ticket, the train number and/or the platform that the Plaintiff used to board the train. In my view, the Plaintiff did indicate that he was not a regular train commuter but had on that day opted to use a train. Again, one cannot be questioned for preferring any mode of transport over the other at their disposal to reach their desired destination. Equally, I find it difficult to comprehend how a non-regular train commuter would be expected to keep records of a train number that he boarded and/or memorise the platform where he boarded his train. The Plaintiff's testimony in this aspect is satisfactory.

[71] Regarding the train ticket, this Court also finds the Plaintiff's explanation in that he lost his train ticket during the scuffle with the three men who robbed him trustworthy, and satisfactory.

[72] Regarding how the Plaintiff sustained injuries allegedly being pushed out of a moving train whose doors were open, and being transported by an ambulance to the hospital, the Plaintiff's testimony before this Court was that he was pushed out of a moving train as it was approaching the Doornfontein Station and that he lost consciousness. He further testified to the effect that he only woke up in the hospital approximately 2-3 days and learnt that he was transported there by an ambulance. However, during cross-examination regarding the contradiction between his evidence-in-chief and information contained in his particulars of claim¹³ and a request for further particulars¹⁴ indicating that he fell between the "railway track and/or between the train and the train platform whereby the train hit him by the side" and that he was transported by an ambulance to the hospital, he responded that he did not know where he fell because he was unconscious. He further stated that, although he had consulted with his attorney, he did not see the pleadings and that he would have corrected such information if he had seen it before.

[73] I find the above contradiction to be unfortunate as it affects several key aspects that I will refer to shortly. The truth of the matter is that this is a material contradiction that cannot simply be brushed aside. I am mindful of Mr. Muhangane's

¹³ Particulars of claim para 5.

¹⁴ Reply to Defendant's request for further particulars paras 2.18 and 2.24.

evidence, the Plaintiff's attorney, who was called as a witness to address the said contradiction. His testimony was that when he prepared the particulars of claim and answers to the request for further particulars, he consulted with the Plaintiff, took handwritten notes, typed the particulars of claim and the answers after the consultation, and served them on the Defendant without verifying them with the Plaintiff. This explanation is not satisfactory. It remains unclear how the handwritten notes that were taken during an interview with the Plaintiff suddenly portrayed a different story when reduced to typing. In addition, I find it strange that an officer of the court with a wealth of litigation experience in the High Court, served a piece of information without first verifying it with his client. Further, the information contained in the Plaintiff's pleading raises more questions than answers such as how could have an unconscious person, who only remembered being pushed out of a moving train, knew that he fell between the "railway track and/or between the train and the train platform whereby the train hit him by the side". In *Molusi v Voges N.O.*,¹⁵ the Constitutional Court held:

"It is impermissible for the plaintiff to plead a particular case and seek to establish a different case at the trial . . . "

[74] I find the above principle applicable in this case. I agree with counsel for the Plaintiff in that Mr. Muhangane's evidence was not challenged by the Defendant. But that is not the case that the Defendant was called upon to answer. It is trite that one stands or falls by his or her pleadings.¹⁶ Accordingly, it is impermissible for the Plaintiff to make out a new case at the trial stage and thereby in the process ambush the Defendant.

[75] The Defendant was, in my view, correct to enquire about the whereabouts of the hospital staff who recorded the information in the medical report because such witnesses were crucial in so far as where the Plaintiff was picked from, how did he sustain the injuries, and the circumstances under which he ended up at Charlotte Maxeke Hospital. I highlight this because a simple perusal of the medical report *inter alia* states that

¹⁵ 2016 (3) SA 370 (CC) at paras 27-8.

¹⁶ *Kali v Incorporated General Insurances Limited* 1976 (2) SA 179 (D) at 182A; *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107.

the Plaintiff was “pushed onto a rail road”,¹⁷ “assault to head”,¹⁸ “patient assaulted during the strike, mainly to head”,¹⁹ “assaulted physically”,²⁰ “pushed off train”²¹ “thrown out of a train”,²² and “pushed off a train platform”.²³ This Court is placed in a difficult situation about which version to accept on this aspect. Therefore, the Plaintiff’s version and the information contained in the pleadings and the medical reports paint a blurred picture that contains material discrepancies.

[76] Regarding the Plaintiff’s version that Mr. Bhengu could not see an incident downstairs on the platforms if he was on the first floor where the offices are situated, Mr. Bhengu conceded but maintained that he would have known because someone would have informed him. I do not see this as augmenting the Plaintiff’s case in any way. The inspection *in loco* revealed that there is only one entrance situated upstairs which leads to the platforms that are downstairs. This means that even if an incident had occurred whilst Mr. Bhengu and/or Mr. Munyai were patrolling upstairs, the paramedic personnel who had a stretcher to carry the injured Plaintiff downstairs would have passed through them (first floor-where there is a main entrance) on their way to the platforms downstairs where the incident had taken place. Post carrying the injured person from downstairs using a stretcher, the paramedic personnel would have still had to use the same route and exit via the main entrance upstairs. It is difficult to accept that everyone at the station could have missed this exercise especially given the fact that evidence before this Court shows that Mr. Munyai was still at the station as he left the station at around 15:50. In my view, an incident such as this could have potentially attracted attention from other commuters and/or other two commuters that were also robbed. I find it difficult to accept that in a broad daylight, and at a train station a huge incident such as this one was missed by almost everyone including the general public.

[77] Why no medical personnel were called to give testimony before this Court and help to understand the multiple and contradictory versions contained in the medical

¹⁷ CaseLines 002-41.

¹⁸ CaseLines 00-24.

¹⁹ CaseLines 002-5.

²⁰ CaseLines 002-9.

²¹ CaseLines 002-10.

²² CaseLines 002 -38.

²³ CaseLines 002-52.

report remains unclear. Mr. Muhanganezi tried to remedy this by testifying that he *inter alia* tried to obtain a legible patient report form and trace the paramedics who assisted the Plaintiff without success. He further testified that the appointment of an assessor (tracer) also did not bear fruitful results. According to him, he then decided to personally try to locate a clear patient report from the fire station at Protea Glen, Brixton, EMS headquarters in Johannesburg, and Charlotte Maxeke hospital without success. As a result, he was unable to call the paramedics. This does not address the issue of why the medical personnel at the hospital were not called to testify. The court in *Elgin Fireclays Ltd v Webb*²⁴ stated:

“It is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial Court, this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him...”

[78] The aforesaid case is in my view relevant to the present one. Mr. Muhunganezi indicated that he even went to the Charlotte Maxeke hospital to try and obtain legible records. I find this difficult to comprehend. But this does not mean that the failure of the Plaintiff to call the medical personnel should count against him at this juncture. In *Kock v S.K.F. Laboratories* it was stated that:

“... The pre-requisite for the drawing of an inference adverse to a party is that the witness must be available. By that I do not understand the authorities to mean available in a narrowly circumscribed and defined notion such as that he must have been present in the precincts of the Court at the time of the trial. It seems to me that a witness is available if his testimony in the case could have been procured by the party against whom it is sought to draw an adverse inference. ...”.

[79] In light of the above, a simple reading of the medical record on the day on which the Plaintiff was admitted, 25 April 2018, has a doctor's name even though that name is not clear. However, a further reading of the medical report contains

²⁴ 1947 AD 744 at 745.

visible names of various hospital personnel such as Dr. Photolo²⁵, Dr. Magasane²⁶ and Sr. Maluleke,²⁷ and Sr. Shiaka²⁸ who may have been of assistance with the name of the doctor who first saw the Plaintiff. In my view, all these are key witnesses who could have corroborated the Plaintiff's version and/or assisted this Court. Instead, the medical records contain contradictions about how the Plaintiff got injured. Regrettably, all these medical personnel were never called before this Court. Further, there is no tracer's report whatsoever before this Court stating that they were traced without success except Mr. Muhangane's testimony. There is also no suggestion that they are no more. This Court is not persuaded that sufficient efforts were done to get the said witnesses.

[80] Regarding the counsel's submission that the Plaintiff's head injury can be sustained when one is thrown out of a moving train, this is contradicted by the Plaintiff's evidence. The Plaintiff's medical record in some parts reads, "patient assaulted during the strike, mainly to head".²⁹ This is a material contradiction of the evidence of the Plaintiff. This opens another possible inference that the Plaintiff was injured at the strike. It further contradicts the Plaintiff's version that he did not participate in the strike. This alone raises doubt about the Plaintiff's counsel submission where he stated that "the fact that he was transported to a nearby hospital renders the Plaintiff's version that he was injured at Doornfontein Station more probable". Additionally, it also raises reservations as to where the Plaintiff was situated at the time when he sustained injuries. This is where the paramedics, hospital staff and/or Ms. Aphone would have in my view assisted this Court. Unfortunately, they could not be found as per the Plaintiff's testimony.

[81] About the Plaintiff's submission that there was no one at the station between 14:50 and 18:00 because Mr. Bhengu had already knocked off and that there was no evidence to show that the Defendant's employees were present at the station, counsel for the Plaintiff is missing the point. Mr. Bhengu's shift started an hour earlier than Mr. Munyai's shift. It was his time to knock off. In any event, he was also alone

²⁵ CaseLines 002-9.

²⁶ CaseLines 002-10

²⁷ CaseLines 002-10.

²⁸ CaseLines 002-33.

²⁹ CaseLines 002-5.

in the morning when he commenced his shift at 06:00am and was only joined by Mr. Munyai at 07:00 am. Consequently, it does not follow that when Mr. Bhengu left the station it meant that Mr. Munyai also left his post unattended. It was clear on evidence that Mr. Munyai's shift commenced from 07:00 am to 16:00. This is further confirmed by the Occurrence Book which is kept at Park Station where they sign in and off duty.³⁰ This entails that he remained at his post and continued working because he was still on duty even though he was no longer in the company of Mr. Bhengu. Therefore, Mr. Munyai was still on duty when the alleged incident occurred at 15:00 or 15:20. Furthermore, Mr. Munyai testified that once he was posted at a particular point for a day, he would not leave until the end of his shift. In my view, this addresses all the Plaintiff's submissions regarding the absence of all the Defendant's employees at Doornfontein Station when the incident allegedly occurred.

[82] Mr. Bhengu clearly explained his duties including how an incident such as the present one is procedurally handled prior to, and post being reported to JOC. He stood his ground that it took them ten minutes to patrol the entire train station. However, this Court is mindful that under cross-examination, Mr. Bhengu failed to explain why entry number 1845 in the Occurrence Book indicated that he reported about George Goch Station when he in fact was posted at Doornfontein Station for the duration of his shift. Further, Mr. Bhengu stated that he was the only one reporting to the Control Room as he had a radio. However, it later turned out that Mr. Munyai also had a radio and had made reports to the Control Room too. This is something that Mr. Bhengu later changed his position about and said that he was not sure whether Mr. Munyai also had a radio. In *S v Mkhohle*,³¹ the then Appellate Division said the following:

“Contradictions per se do not lead to the rejection of a witness’ evidence. ... [T]hey may simply be indicative of an error. ... [N]ot every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness’ evidence.”

³⁰ CaseLines 001-211.

³¹ 1990 (1) SACR 95 (A) at 98F-H, with reference to *S v Oosthuizen* 1982 (3) SA 571 (T) at 576B-C.

[83] In my view, the aforesaid contradictions are inconsequential. It does not matter who provided the reports to the Control Room. I do not think that a report about George Goch Station should affect Mr. Bhengu's testimony because the evidence before this Court shows that he was deployed at Doornfontein Station. He reported what was happening where he was posted. Consequently, he could not be faulted for having said the entry was correct. Counsel for the Defendant on this aspect resorted to selective reading because a glance of entry 1845 in the Occurrence Book also shows a report about Faraday Depot. It is unlikely that Mr. Bhengu could have been able to explain the events that were occurring at Faraday where he was not deployed at. Overall, I find Mr. Bhengu's testimony credible and acceptable.

[84] Mr. Munyai's testimony to a large extent echoed that of Mr. Bhengu and does not need to be repeated except where it differed. Mr. Munyai testified that Mr. Bhengu left Doornfontein Station approximately 10 or 5 minutes before 15:00. This differs from the testimony of Mr. Bhengu whose evidence was that he left at 14:45. According to Mr. Munyai, they were not allowed to leave their posts 10 minutes before the knock off time. I do not see how this helps the Plaintiff's case as Mr. Munyai also testified that he left Doornfontein Station *inter alia* around 15:50 which is ten minutes before his actual knock-off time. Mr. Munyai further testified that they were required to report hourly to the Control Room, and that he was required to patrol with his colleague. In addition, counsel for the Plaintiff highlighted that there was no evidence led and/or challenged about what occurred when either Mr. Bhengu or Mr. Munyai had not yet arrived or left the station. I have already addressed this elsewhere – a reading of the Occurrence Book shows that different people reported at different intervals without specifically adhering to the hourly time frame. Further, it cannot be said that when one of the security guards has not yet arrived at the post or has gone to the bathroom, the remaining security guard stops working because he is only required to patrol with his colleague. Logic dictates that he continues with his duties until his colleague arrives at the post and/or returns from the bathrooms. Otherwise, there will be no need to have one security guard whose shift starts an hour earlier than the other who will just be on duty for a mere presence and not work.

[85] Ms. Phaladi's evidence also echoed that of Mr. Bhengu and Mr. Munyai in that

she *inter alia* confirmed that the last shift for security personnel ended at 16:00. Under cross-examination, she stated that she does not remember whether she was at work or not on 25 of April 2022. The Plaintiff raised a concern about Ms. Phaladi's non-recollection of whether she was at work or not. Consequently, the Plaintiff concluded that there was no "sufficient, credible and reliable evidence that any other person employed by the Defendant, other than Ms. Phaladi's evidence that employees are always at the station". According to the Plaintiff, Ms. Phaladi could not give credible evidence about the presence of other employees. To this end, counsel for the Plaintiff indicated that the customer service personnel and cleaners were not called to establish their presence at the time of the incident. I agree with the Plaintiff's proposition that there is no evidence before this Court supporting the suggestion that other employees were present at the station. However, I do not see the relevance and/or weight of the presence or absence thereof of the cleaners and/or customer service personnel because the people who were tasked with primary responsibility to ensure the safety of commuters, patrol the station and report all incidents occurring at the station were at the station on 25 of April 2018.

[86] According to the Plaintiff, Ms. Phaladi's evidence indicating that paramedics could not have accessed the station without being noticed as they used one entrance to enter and exit bolsters the Plaintiff's "submission that it is highly probable that the defendant's employees were not present at the station when the incident occurred".³² I have already addressed this issue elsewhere and *inter alia* stated that Mr. Munyai left the Doornfontein Station at around 15:50, a time that is well within which the alleged incident occurred. Further, his knock-off time at Park Station was recorded in the Occurrence Book. Contrary to what the Plaintiff's counsel suggested, I have not found any evidence which shows that Mr. Munyai also left the station when Mr. Bhengu knocked-off and/or that he was no longer active when he remained alone at the station.

[87] About the ticket examiners and customer service personnel, the Plaintiff is adamant that the fact that they did not see the paramedic personnel and reported their presence leads him to conclude that they were not present at the station when the ambulance arrived is difficult to appreciate. This is also contradicted by the

³² Plaintiff's closing heads of argument at para 105.

medical report which suggests that the Plaintiff might have been injured during the strike. Accordingly, it follows that ticket examiners and customer service personnel could not have noticed paramedics who may have attended to a person injured outside the boundaries of the station. In my view, it is improbable that a huge station such as Doornfontein which consists of four platforms could be left without ticket examiners on a normal day when the manager's primary responsibility was to ensure that such station generates income. I do not see any reason that renders the testimony of Ms. Phaladi questionable. In my view, she was a good witness even though at times she had no recollection of the events.

[88] In light of the above, I consider whether the Plaintiff has, on balance of probabilities, discharged the onus of proof that rests with him. In *Selamolele v Makhado*³³, the court said that the approach to the question of whether the onus has been discharged was dealt with as follows:

“Ultimately the question is whether the onus on the party, who asserts a state of facts, has been discharged on a balance of probabilities and this depends not on a mechanical quantitative balancing out of the pans of the scale of probabilities but, firstly, on a qualitative assessment of the truth and/or inherent probabilities of the evidence of the witnesses and, secondly, an ascertainment of which of two versions is the more probable.”

[89] Further, in *Maitland and Kensington Bus Co (Pty) Ltd v Jenningswhere*³⁴ Davis J said:

“For judgement to be given for the plaintiff the Court must be satisfied that sufficient reliance can be placed on his story for there to exist a strong probability that his version is the true one.”³⁵

[90] I have already referred to the improbabilities of the Plaintiff's version. These

³³ 1988 (2) SA 372 (V) at 374J–375B.

³⁴ 1940 CPD 489 at 492.

³⁵ It was further stated in *Ocean Accident and Guarantee Corporation Ltd J v Koch* 1963 (4) SA 147 (A), at 157D that the evidence present by the burdened party must be such that the court can say that “[w]e think it is more probable than not” for the burden to be discharged. However, if the probabilities [in relation to the evidence of all the parties] are equal, then the burden has not been discharged by the burdened party.

improbabilities allude regrettably to material discrepancies in the evidence of the Plaintiff. He is a single witness and there is no corroboration to his evidence especially about how an unconscious person could tell word to word how he got injured, fell between the rail tracks, and was transported to a hospital by an ambulance. Contrary to the Plaintiff's pleaded case, the evidence before this Court is not conclusive that there is any incident that occurred at Doornfontein Station. I need to state that the reading of the Occurrence Book suggests that there is no specific time upon which to report the status of affairs at any of the train stations. Different people reported at various intervals with the accounts of the strike on the 25 of April 2018 dominating the report. In addition, the Occurrence Book has also recorded various incidents such as where four people were assaulted by strikers (entry 1324),³⁶ an injured male at Jeppe Station (entry 1325),³⁷ and two people were injured at Germiston platform (entry 1327).³⁸ The Defendant has shown that one of its personnel was still at the Doornfontein Station when the alleged incident occurred. Therefore, if it had occurred, it would have been reported just like other incidents that were reported elsewhere.

[91] On the assessment of the probabilities, logic dictates that it is not irrefutable that the Plaintiff was injured when the train entered (or approaching) the Doornfontein Station. Whilst I accept that he sustained injuries, the circumstances of this case especially the Plaintiff's testimony, and his pleadings coupled with the medical report do not constitute objective evidence that supports the Plaintiff's version.

[92] In the present matter, I consider that the Plaintiff's evidence was adduced in a most haphazard and unsatisfactory manner – the medical record not only contradicted the Plaintiff's testimony but also less effort was made to bring the authors of the medical record to clarify many inconsistencies that are contained there. The contradictions were material and affected the overall credibility of the Plaintiff's testimony.

[93] I am, therefore, of the view that the totality of the facts of this case does not

³⁶ CaseLines 001-193.

³⁷ *Id.*

³⁸ CaseLines 001-194.

justify a finding of an act or omission that can be ascribed to the Defendant. This is so because of *inter alia* the uncertainty surrounding how the Plaintiff sustained injuries. Consequently, I deem it not necessary to comprehensively deal with issues of negligence, wrongfulness, and causation as eloquently dealt with by the Constitutional Court in a similar matter.³⁹

[94] In the circumstances, I am not able to find that sufficient reliance can be placed on the Plaintiff's version. I find it to be highly improbable when measured against that of the Defendant.

[95] Therefore, there are no adequate grounds to satisfy me that sufficient reliance can be placed on the Plaintiff's version.

[96] There is no basis on which to find that the costs of the action should not follow the results.⁴⁰

ORDER

[97] I, therefore, make the following order:

- (a) The Plaintiff's claim is dismissed.
- (b) The Plaintiff is ordered to pay the costs of this action.

M R PHOOKO

**ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal

³⁹ See *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC).

⁴⁰ *Neuhoff v York Timbers Ltd* 1981 (1) SA 666 (T).

representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 20 January 2023.

APPEARANCES:

Counsel for the Plaintiff: Adv RM Mphela

Instructed by: Mashudu Muhanganei Attorneys

Counsel for the Defendant: Adv SM Tisani

Instructed by: Diale Mogashoa Attorneys

Date of Hearing: 19 September 2022

Date of Judgment: 20 January 2023