

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEAL CASE NO: A5015/2014
CASE NO: 16217/2014

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

.....
DATE

.....
SIGNATURE

In the matter between:

PASSENGER RAIL AGENCY SOUTH AFRICA

Appellant/Defendant

And

MOABELO, MMAKGABO SIMON

Respondent/Plaintiff

ORDER:

On appeal from the judgment of Monama J, Gauteng Local Division, High Court, Johannesburg.

1. The appeal is dismissed with costs.
-

SUMMARY

Delict – railways – safety and security fare paying passengers on trains – plaintiff alleging that he was pushed out of moving train – with open doors – overcrowded – and sustained injuries – mutually destructive versions of plaintiff and defendant's (PRASA's) witnesses and train driver – approach of courts – version of train driver improbable and somewhat fabricated – appeal dismissed with costs, and PRASA held to be liable for plaintiff's proven damages.

DRAFT JUDGMENT

MOSHIDI, J: (MASIPA J AND FRANCIS J Concurring)

INTRODUCTION

[1] The appellant appeals against the whole of the judgment of Monama J (*"the court a quo"*) in finding that: the appellant is liable to compensate the respondent for all proven damages suffered by him as a result of an incident at Kaalfontein station on 3 August 2009; and ordering the appellant to pay the costs of the action in the court *a quo*. The present appeal is with the leave of the court *a quo*.

[2] It appears appropriate to commence this judgment, in proper context, by recalling what was said over eighty years ago by Wessels JA, in *National Employers' Mutual General Insurance Association v Gany*:¹

“... But it must be remembered that an appeal is in substance a new trial, and this Court must be satisfied that there are sound and substantial reasons for the Court a quo to hold that an onus resting on the plaintiff, as it does in this case, has in fact been discharged. Where there are two stories mutually destructive, before the onus is discharged, the Court must be satisfied upon adequate grounds that the story of the litigant upon whom the onus rests is true and the other false ...”

More about this legal principle later below.

THE RESPONDENT'S CLAIM A QUO

[3] In the court a *quo*, and indeed in this appeal, the only issue for determination was the merits of the respondent's claim against the appellant. The issue of the quantum of damages stood down indefinitely. In essence, the respondent's claim, as mirrored in the particulars of claim, and his evidence, came to this: based on the allegation that at the time of the incident in question, namely 3 August 2009, he was a fare paying passenger on the appellant's train, and was injured in transit, in the manner as described later below. As a consequence, he claimed damages for personal injuries which he sustained.²

¹ 1931 (AD) 187 at 199.

² See particulars of claim pp 507 and 523, vol, 7 pleadings.

[4] The circumstances, the background, as well as the geography where exactly the incident occurred, leading to the instant litigation, were sketched extensively in the court *a quo*'s judgment.³ It is, for present purposes, truly unnecessary to do so again.

THE ORIGIN OF THE INCIDENT

[5] The tragic incident had its origin at the Kempton Park train station when the respondent boarded a train at about 18h00. It was already dusk. He was en-route to Tembisa township and would disembark at Tembisa train station. For what is relevant, there are two train stations between Kempton Park train station and Kaalfontein train station, namely Van Riebeeck Park and Birchleigh stations. These stations have four platforms, and called platforms 1 to 4, with four lines or lanes that traverse these platforms.

[6] The down slow lines ("*dsl*"), run from Kempton Park station to either Leralla station in the Tembisa area or Pretoria station on platform 4, at all the mentioned stations. On the other hand, the down main lines ("*dml*") pass on platform 3 at Kempton Park station, in a south to north direction, until Kaalfontein station. The up lanes operate from north, i.e. from Tembisa or Pretoria, to the south (Kaalfontein). These lines are divided into two lines, i.e. the upper main line ("*uml*"), and the up slow line ("*usl*").

³ See appeal record vol 3, from p 225.

[7] On the version of the respondent, when he boarded the train at Kempton Park station, the train was full of passengers. It picked up more passengers along the way at Van Riebeeck, Birchleigh and Kaalfontein stations. On the respondent's version, from Kempton Park station, the train's doors were open. He was standing in the middle of the coach and surrounded by other passengers.

THE INCIDENT

[8] As to the exact incident, the respondent testified broadly in the following terms: the train entered Kaalfontein station at platform 3. He was facing the door of the coach. More passengers entered. He was due to alight at the next station, i.e. Tembisa station. However, as the train was leaving Kaalfontein station, there had been pushing and shoving by passengers, and whilst the respondent was readying himself to alight at his destination (Tembisa station). As the train left Kaalfontein station, the respondent was pushed violently by other passengers towards the doors. He turned in order to hold on to the aisle in the middle of the coach. However, due to the force of the pushing, the respondent was pushed out of the moving train door. He fell backwards out of the train and landed on his back. The doors were open. On landing outside the train, the respondent lost consciousness, which he regained in the ward at the Tembisa hospital. He sustained the injuries as described in the particulars of claim. The injuries are not in dispute. Whilst in hospital, the respondent's wife visited him. She was handed his personal belongings including his cellphone, clothing, as well as his train ticket. In turn,

these items were handed to a Mr Khuzwayo at hospital who undertook to secure legal advice on behalf of the respondent. The respondent was cross-examined extensively, and although limited holes were dug out of his evidence, he was adamant in his core version.

SOME COMMON CAUSE FACTS

[9] The following were not in dispute, or not seriously challenged in evidence. The train which left Kaalfontein station, travelling towards Tembisa, shortly before the respondent was thrown out of the train, was train no. 0547, which was on the dsl line. This train was scheduled to depart from Kaalfontein station at about 18h52, but it was more than 21 minutes late. On the evidence of the appellant, this train passed the cabin signal at Kaalfontein station at about 19h13. This was the same time when train no. 1886, driven by one of the appellant's witnesses, Mr G F Van der Mescht ("*Van der Mescht*"), entered the Kaalfontein station passed the cabin signal, entering Kaalfontein station. This train too, like all the other trains that day, was late. It was some 40 minutes late as it passed Kaalfontein station at approximately 19h13. The trains from Tembisa station and Pretoria station and from Kaalfontein station and beyond, were running late as well and were overcrowded. These trains, and this is significant, were operating with open doors, in particular, the train in which the respondent was a passenger.

THE RESPONDENT'S WITNESSES

[10] Several witnesses testified for the respondent. One of whom was Mr Pelani Sam Baloyi ("*Baloyi*").⁴ At the time of the incident, he was on duty and employed by a security company called Singobile at Kaalfontein station. He came on duty at about 18h00 that day. He and a colleague, Mr M Ramalafa, patrolled the area around Kaalfontein station. The area was well-lit and visibility was satisfactory. He received a call from the control office about a passenger who fell from a train. On investigation and search, the respondent was found between 19h00 and 20h00. The respondent was injured severely and had to be rushed to the nearby Tembisa hospital. The area next to the signal cabin was securely fenced off, and in particular the location where the respondent was discovered. Significantly, Baloyi denied in rather strong terms, that the respondent was running across any trains' tracks, and kneeled down on the uml lane, as alleged by the appellant. If this had occurred, Baloyi testified that he would have observed it. Baloyi was equally cross-examined closely, but kept to his core version in the end.

THE RESPONDENT'S PERSONAL CIRCUMSTANCES

[11] What appears to be crucial in the context of this matter, was the evidence covering the respondent's personal circumstances presented by two witnesses. These were Mr Peter Mathebula ("*Mathebula*"), at the time the operations manager at the respondent's place of employment, and the

⁴ See appeal record, vol ?, page ?.

respondent's wife, Mrs Mavis Moabelo ("*Mrs Moabelo*"). The evidence is so, when comparing the appellant's evidence through Van der Mescht that the respondent was attempting to commit suicide at the time of the incident by throwing himself in front of the train driven by him on the evening in question.

[12] I deal briefly with the evidence of Mathebula. En passant, he too, like all the respondent's witnesses, was cross-examined intimately. I must also hasten to mention that the first witness for the respondent at the trial was Mr Luyanda Jona ("*Jona*"), a candidate attorney of the respondent's attorneys of record at the time. He attended an inspection *in loco* at the Kaalfontein station on 24 March 2011. If necessary and relevant, I shall deal with his evidence later below.

[13] Mathebula, despite what appeared to be his casual and somewhat lackadaisical composure, however testified convincingly and almost indisputably, that the respondent was due to proceed on annual leave from 11 August 2009 (about seven days before the incident) until 1 September 2009. He explained satisfactorily too, the reason why the respondent had in his possession a weekly ticket only for the ensuing week of August 2009 to September 2009. At the time, the respondent had applied for, and was granted leave as requested. His evidence, regarding the respondent's work circumstances could hardly be countered in cross-examination.

[14] Mrs Moabelo testified simply and incontestably, in the following terms: she proceeded to the Tembisa hospital pursuant to a telephone call she

received. There she found her husband, the respondent, injured severely. The hospital staff handed to her, the respondent's personal belongings, as described above. One of the items included a weekly train ticket. Her uncontested evidence was that at the time of the incident in question, their marriage was a happy one, bereft of any notable problems.

THE EVIDENCE OF THE APPELLANT

[15] For the appellant, about five witnesses testified. The most crucial and relevant of which, was Van der Mescht. His evidence, which was clearly in direct contrast to that of the respondent, came to this: at the time of the incident, he had been a train driver for Metrorail for some four years, having been a guard previously. On the day of the incident, he was the train driver of train no. 1886, operating from Leralla station to Elandsfontein station and back. His train guard was Ms Beauty Masete ("*Masete*"). His train, and others were running late the whole day on the day of the incident.

[16] Van der Mescht testified that that evening, at about 18h43, his train (1886) came from the direction of the Tembisa side, approaching Kaalfontein station on the up main line. On approach at Kaalfontein station, he crossed another train, train no. 0547, travelling on the slow line, in the opposite direction. In other words, in the direction of Tembisa station, and Leralla station. The latter station is a turnaround point, where trains turn around and restart journeys. His train's headlights were set on bright.

[17] At that point, and crucially too, Van der Mescht observed a movement coming from the right-hand side of his train, underneath the bridge. On closer observation, the movement emanated from somebody running over the rails in the direction of his train. That movement of a person, which later turned out to be the respondent, proceeded to the front of Van der Mescht's train. That person, suddenly kneeled in front of the train, and Van der Mescht ran him over. At that time Van der Mescht was travelling at about 30 kilometers per hour, driving a train that was some 41 minutes late. He and his guard, Masete, later discovered that it was the respondent that was run over by the train and had sustained certain severe injuries. Upon close analysis and scrutiny the evidence of Van der Mescht, where it conflicted with that of the respondent, suggested in no uncertain terms, that the respondent attempted to commit suicide.

[18] The appellant's witness Mr R M Kgare ("Kgare"), the signalman on duty at Kaalfontein station, testified about the movement of the trains on that day. The court *a quo* dealt with his evidence as reflected in exhibit "D701", of the trial bundle. It is noteworthy that the evidence of Kgare, as against that of the respondent, to an extent, was also conflicting. For example, in regard to the platforms at Kaalfontein station. However, Kgare confirmed that Van der Mescht's train was late. He also confirmed the existence of a bridge as testified by Van der Mescht. The other witnesses for the appellant were Mr J A Lesley, and Mr D S Kapelus. The evidence of the respondent's first witness, Jona, in essence, did not help much in resolving the critical issues in dispute here. He and members of the respondent's legal team attended an

inspection *in loco* at the Kaalfontein station on a public holiday in March/April 2011. Indeed, this was long after the pleadings were closed, and after the trial was initially postponed. At the inspection, the respondent could not point out the exact spot where he was pushed out of the moving train, and fell. Jona took photographs of the scene, the album whereof formed part of the exhibits at the trial. He was cross-examined intimately about his observations at the scene as well as the photos he took. However, in my view, the limited value of his testimony came to this: he observed trains entering and leaving Kaalfontein station; some of the trains departed to Tembisa station; some of the trains were over-crowded, with passengers hanging to the outside; and whilst others travelled with open doors. I can put the limited value of the evidence no higher since it was after the incident, and on a public holiday.

THE FINDINGS OF THE COURT A QUO

[19] At the end of the trial, the court *a quo*, in finding for the respondent, acknowledged that the versions of the respondent and Van der Mescht were indeed mutually destructive. Further that when all factors are equipoised, the probabilities prevailed in favour of the respondent. Indeed, this, and other grounds, form the subject-matter of the current appeal before us. It is conceded equally by the respondent in the heads of argument that the versions presented *a quo*, were in fact mutually irreconcilable.

THE PERTINENT QUESTIONS AND LEGAL PRINCIPLES

[20] Based on the above, as well as the relevant overall evidence to be accounted for, the pertinent questions are these: firstly, the conventional approach of courts to mutually destructive versions on the same issue. More so, that, on appeal, it is alleged that the court *a quo* ignored the two mutually destructive versions, in particular, the versions of the respondent and Kgare, where these conflicted.⁵ Secondly, the powers of this Court, on appeal, to interfere with the factual findings of a trial court. I deal with the first question immediately below.

[21] I have already referred above to the approach enunciated in *National Employers' Mutual General Insurance Association, supra*. Much later, and in *SFW Groups Ltd & Another v Martell et Cie & Others*,⁶ the Court said:

“The technique generally 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. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’s candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness’s reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to

⁵ See appellant’s heads, pp 13 to 14 paras [21] to [23].

⁶ 2003 (1) SA 11 (SCA) para [5].

experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. 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 of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

See also *Motor Vehicle Assurance Fund v Dubuzane*,⁷ and *Santam Bpk v Biddulph*,⁸ and *Grancy Property Ltd v Manala and Others*.⁹

[22] In regard to specifically, Van der Mescht's evidence, the court *a quo* firmly found that his evidence stood to be rejected on account of the evidence of Baloyi, who testified for the respondent. The court *a quo* went further to find that, in the circumstances of the case, it was reasonable to infer that the respondent was on the train (no. 0547) that passed train no. 1886, driven by Van der Mescht, and that the respondent fell from that train in and around the area of cross-over by Van der Mescht's train.¹⁰

[23] Based on the above legal principles, which the court *a quo* applied, correctly so in my view, the findings cannot be faulted at all. Indeed, the version of Van der Mescht, in particular that the respondent was attempting to commit suicide when he sustained the injuries, was either extremely disingenuous or fabricated. The version plainly lacked credibility. It was

⁷ 1984 (1) SA 700 (A).

⁸ 2004 (5) SA 586 (SCA) at para [7].

⁹ [2013] 3 All SA 111 2015 (3) SA 313 (SCA).

¹⁰ See judgment *a quo*, para [29].

improbable for several reasons. In the first place, the version was discounted overwhelmingly and convincingly by the positive aspects of the evidence of the respondent's personal circumstances as described by his wife, Mrs Moabelo, and employer, Mathebula, as set out in paragraphs [11] to [14] of this judgment. In short, the respondent was in fulltime employment at the time, and due to go on annual leave at the time of the incident. He was happily married with a family. He was in possession of a valid train ticket when he was pushed out of the moving train.

[24] In addition, the record of the proceedings shows that when it was put to Van der Mescht in cross-examination, whether it appeared to him that the respondent was trying to commit suicide, he replied in the following terms:

*"I do not think so sir. I do not know but he was running over the rails. He was running over the rails and then he was kneeling down between the rails."*¹¹

This response from Van der Mescht questions highly his reliability and credibility, to say the least. Furthermore, as argued by the respondent, in his evidence and his extracurial statements, Van der Mescht alleged that prior to knocking down the respondent, he noticed someone running from under the bridge towards the rails. This aspect was never mentioned to any of the witnesses to whom he later reported what had happened, including his guard, Masete. He mentioned seeing a movement only, and was unsure what it was at the time.¹² In addition, the version of Van der Mescht was discounted

¹¹ See supplementary appeal record, vol 5, p 381, lines 15 to 20.

¹² See supplementary appeal record, vol 5, p 333, lines 5 to 6, and p 347, lines 24 to 25.

credibly by the evidence of the security guard, Baloyi. One more cynicism in the version of Van der Mescht, is this: if the respondent indeed kneeled in front of his oncoming train between the rails, and he knocked him down, one would reasonably have expected the entire body of the respondent to have been smashed to smithereens and not with the present injuries. The body of the respondent would also not have been found, as it was, at the back of the train. In his extra-curial statements, immediately after the incident, Van der Mescht, asked his guard, Masete, to look for the body at the back of the train. This she did, after peeping through the back window of the train. She observed, and later discovered the body of the respondent at the back of the train, in an injured state. This was also confirmed by the report made by Van der Mescht to Mr Z D Tshuma, the Segment Security Commander at Kaalfontein station, immediately after the incident. It appears to me that Van der Mescht deliberately evaded the obvious probability that the respondent fell out of train number 0547 (which crossed his train), as alleged by the respondent, and invented carefully the suicide fiction, to the detriment of the appellant. In short, logic tells that it is highly improbable to be hit by a train head-on, on the rails, and land up at the back of such train, with the calibre of the injuries sustained by the respondent in this case. The entire contents of the statements he make to various persons immediately after the incident, supported partly by the evidence, contradicted rather substantially, his version. It is truly difficult to accept his version. The evidence of Kgare equally did not entirely persuade the court *a quo*. The reasons are not far to

find. In short, Kgare had no independent recollection of the incident. This much he admitted.¹³ He did not witness how the respondent was injured.

CONCLUSION

[25] For all the above reasons, I have come to the conclusion that, when accounting for the totality of the evidence, the credibility findings, and the probabilities found by the court *a quo*, cannot be faulted at all. There was no irregularity or misdirection in the findings and conclusion reached. To suggest that the respondent was not a fare paying passenger on the train, but a trespasser running along the railway lines, as suggested by the appellant, would be highly illogical, unreasonable and unfounded, in the circumstances of this case. There were truly no credible reasons advanced why this Court on appeal, should interfere with the factual findings of the court *a quo*. See for example, *Ndlovu v AA Mutual Insurance Association Ltd*,¹⁴ and *Rex v Dhlumayo and Another*.¹⁵ The appeal must therefore fail. What is particularly worrying in this case is this: it is not in dispute that the trains were running late on the day of the incident. In addition, the respondent consistently and rather credibly contended that the doors of the train, shortly before and during the incident, were open. However, in view of the described conflicting versions, it is purely unnecessary to make a definitive finding on some of these aspects, save to refer briefly to what was said recently in *Mashongwa v PRASA*¹⁶ at para [18]:

¹³ See supplementary appeal record, vol 6, p 441, lines 23 to p 442, line 10.

¹⁴ 1991 (3) SA 655 (E) at 659E-F.

¹⁵ 1948 (2) SA 676 (A) at 706.

¹⁶ [2015] ZACC 36.

“The vulnerability of rail commuters and the precarious situation in which they often find themselves ought, by now, to be self-evident. It is 10 years since Metrorail in effect highlighted the need to keep coach doors closed to secure rail commuters and the significance of failing to provide safety and security measures for them when a train is in motion. Even then it was not a new problem as there were reported decisions in other courts, that dealt with it. This underpins the utmost importance of PRASA’s duty to ensure that reasonable measures are in place to provide for the safety of rail commuters.” (footnotes omitted)

[26] I must mention prior to concluding that: the appellant initially applied for condonation for the late filing of the appeal record, as well as the late application for the allocation of a date for the hearing of the appeal. The respondent opposed the application. However, this issue was not in serious contention at the hearing, and the appeal proceeded on the basis that the condonation sought was granted.

THE COSTS

[27] I deal briefly with the issue of costs. It is tritely a discretionary matter. There was no reason advanced by either party why the costs should not follow the result. Both parties engaged the services of two counsel. I must add that, in my discretion, it would be proper that the appellant ought to pay the costs of the condonation applications, as well as all the reserved costs.

ORDER

[28] In the result the following order is made:

28.1 The appeal is dismissed with costs.

28.2 The costs should include the costs consequent upon the employment of two counsel. The costs shall also include the costs in the condonation applications as well as all reserved costs.

D S S MOSHIDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I concur:

T M MASIPA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I concur:

E J FRANCIS
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR THE APPELLANT
ASSISTED BY

T J BRUINDERS SC
UNKNOWN

INSTRUCTED BY

NORTON ROSE FULBRIGHT SA INC

COUNSEL FOR THE RESPONDENT
ASSISTED BY

M CHAITOWITZ SC
M SIBUYI

INSTRUCTED BY

MAFORI LESUFI INC

DATE OF HEARING

27 JANUARY 2016

DATE OF JUDGMENT

31 MAY 2016