

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2018/40091

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<i>15 June</i> 2020	
<i>Ramapuputla</i> RAMAPUPUTLA AJ	

ZALENI ZANOXOLO

Plaintiff

And

THE PASSENGER RAIL AGENCY OF SOUTH AFRICA

Defendant

JUDGMENT

RAMAPUPUTLA AJ

[1] The plaintiff seeks an order holding the defendant liable for damages suffered as a result of injuries sustained during an incident which the plaintiff alleges occurred at the Mpilisweni Station, Katlehong on 24 May 2017.

[2] The court is called upon to determine liability only. The court is confronted with a version advanced by the plaintiff and his one witness, Senzo Nxele. The defendant has no eyewitnesses to the incident, however a witness from Prasa it intended to call decided not to come on the date of the trial and no reason was provided for such change of decision.

[3] The defendant does not have a version but hopes that through cross-examination, the plaintiff and his witness will fail to prove that the incident and injury were caused by the negligence of the defendant. The defendant intends to highlight the contradictions in the pleadings and the testimony. The court is informed that the contradictions will impeach the credibility of the plaintiff and his witness and the probability of their testimony and evidence.

PLAINTIFF'S EVIDENCE

[4] In summary, the plaintiff testified that on 24 May 2017, late in the afternoon, he and his friends boarded a train at Germiston station. They were returning from seeking employment. He was seated at the second last carriage. The train seats were full and there were people standing and some were even standing near the door. The train doors were open and remained open even when the train was moving. The train stopped at other stations and as a result became fuller.

[5] There was pushing by incoming and outgoing passengers. When the train reached Natalspruit Train Station, it was full and he stood up to ready himself to be near the door. When the train was about to reach the platform of his destination, the train was moving slow. While standing there, the other passengers started pushing and jumping. It was at that time that he was pushed off the moving train. He fell to the ground where there were stones, three meters away from the platform of the Mpilisweni Station. He lost consciousness. His right foot became

lodged between the rail line and the moving train. The moving train severed his right foot. As a result thereof he suffered a traumatic amputation of the right ankle.

[6] When he regained his consciousness he realised that his leg was severed and he screamed for his friend Senzo Nxele. Senzo Nxele and his other friend removed him from the scene of the incident. There were no security personnel at the scene and a private car was called to take him to hospital before an ambulance arrived. He was taken to Thelle Mogoerane Regional hospital by a private motor vehicle where he received treatment.

SENZO NXELE'S EVIDENCE

[7] He and the plaintiff were from seeking employment and they boarded a train at Germiston Station. The train got fuller as it arrived at other stations. He and the plaintiff were in the same coach. According to him, there were many people between the plaintiff and the open door of the train. He did not count their number. The plaintiff was not the first in line next to the open door. He also confirmed that while in the train, people were pushing and some were jumping off but he did not see who pushed the plaintiff and did not see him fall. After alighting from the train he heard people screaming. He heard the plaintiff calling for his name from the direction where the plaintiff was lying which was the gravel three meters away to the platform. There were no security personnel on duty. He never consulted with the plaintiff's attorneys.

[8] There were people screaming and after alighting from the train he followed them. He heard his surname being called and he went where the calling was coming from and he found the plaintiff who was lying with his legs on the rail track. He was injured with his right foot amputated. He removed the plaintiff's boot and put it in the plastic bag together with the severed foot. He called a private car to take the plaintiff to the hospital as the ambulance was delayed. When they arrived at the hospital he told the personnel what happened and they wrote the information on the file.

[9] In light of the testimony of the plaintiff and his witness, both the plaintiff and the defendants applied for amendment of their pleadings. Both parties did not object to the amendment of their respective pleadings which amendments were granted.

[10] As regards the amendment of pleadings, the following is of relevance and self-explanatory:

“The function of pleadings

[11] Pleadings are a means by which parties to an action bring the issues upon which reliance is to be placed to the notice of the Court.¹ In drawing their pleadings a plaintiff must state clearly and concisely on what facts he bases his claim and he must do so with such exactness that the defendant will know the nature of the facts which are to be proved against him so that he may adequately meet them in court and tender evidence to disprove the plaintiff's allegations.² This in turn will prevent ambush at the trial.

[12] Departure from pleadings is permissible unless such departure will cause prejudice. The court has discretion in this regard.³ In Beck's Theory and Principles of Pleadings in Civil Actions⁴ other principles of pleadings are laid out thus:

Once pleadings are filed the parties are bound by them. If the pleadings raise certain issues and the evidence adduced at the trial does not substantiate them, the action (or defence as the case might be) would fail unless amendments are granted.⁵

ISSUES FOR DETERMINATION

[13] The court has to decide what is probable, whether the plaintiff and his witness are credible and whether their evidence can be relied upon.

The defendant has no witnesses on its side. Therefore, the probability can only be assayed by the court from the factual testimony of the plaintiff and his witness.

¹ *Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) at 1082

² *Benson and Simpson v Robinson* 1917 WLD 126

³ *Robinson v Randfontein Estates G.M Ltd* 1925 AD 173 198

⁴ H.Daniels 6th Edition 2002

⁵ At page 46

[14] The court has to decide whether the defendant or its staff acts/omissions constitute negligent conduct. If the court finds that the defendant or its staff conduct constitute negligence, whether the plaintiff assumed voluntary risk by moving near the door of a full train or whether the defendant contributed to such negligence.

[15] The court has to determine the issue of factual and legal causation. Could the plaintiff have suffered the injury had the incident not occurred. Whether there is a connection between the defendant's failure to carry out its duty to close the doors and the injury suffered by the plaintiff.

DEFENDANT'S SUBMISSIONS

The defendant's Counsel approach is three-pronged.

[16] He seeks to attack the credibility of the plaintiff and his witness, the reliability and probability of their testimony. This he says, he is going to do by indicating the contradiction between the oral testimony and the answers to a request to further particulars for trial drafted by the plaintiff's attorney of record, entries made in the hospital records and the amendment to further particulars. The defendant further submitted hospital records from Mpilisweni hospital indicating the place where the plaintiff is injured is different from the oral testimony.

[17] His second strategy is to raise voluntary assumption of risk as defence based on the fact that the plaintiff went near the open doors of a slow moving train. According to him, the plaintiff, unlike his witness Senzo Nxele who stood in the middle of the coach of the moving train, was not cautious because he went near the open doors of the coach of the train despite the fact that it was dangerous to do so.

[18] The third strategy is to deny that there is a causal link between the fall from the slow moving train with open doors and the amputation of the leg. This he submits, will prove that even if the court finds that the defendant was negligent in failing to close the doors of the moving train,. Such negligence did not cause the plaintiff's injury (but the plaintiff was contributorily negligent by moving near the open doors.

[19] He argues that:-

[19.1] The plaintiff's oral evidence was neither credible nor probable and such version should be dismissed as untrue and improbable being completely and materially contradictory of the pleaded version. This is as a result of the answers to the defendant filed an extensive request for further particulars for trial which elicited very detailed answers. The defendant submits that these answers did not reasonably emanate from the plaintiff's attorney but must have been obtained from the plaintiff after a comprehensive consultation with the plaintiff. According to defendant's Counsel, the answers given are of specific relevance to the question of credibility and probabilities and are quoted verbatim to assist the court in understanding the extent to which the plaintiff contradicted the pleaded version.

The defendant submits these contradictions further contradict Senzo's evidence and are material to the credibility of the plaintiff.

[19.2] Both the plaintiff and Senzo were evasive witnesses who failed to give direct answers to pressing questions and had to be directed to answer questions, particularly on causation, contributory negligence and voluntary assumption of risk.

[19.3] The defendant's further submits that the onus of proof rests upon plaintiff convincing the Court, through credible evidence, that plaintiff's version is more probable than that of defendant. He further submits that concluding on factual disputes where the version of a plaintiff collides with that of the defendant a Court must examine the credibility, reliability and probability of the evidence of various factual witnesses. He quoted cases such as Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others 2003 (1) SA 11 (SCA) at 14J - 15E, AA Onderlinge Assuransie Assosiasie Bpk v De Beer 1982 (2) SA 603 (A quoting Govan v Skidmore; Selamolele v Makhado; National Employer's General Insurance; Santam Bpk v Biddulph). The above authorities are quoted to support his attempt to impeach the credibility of the plaintiff and his witness, and the probability of the incident

happening as alleged.

[19.4] The defendant's submits that the version of the plaintiff should be dismissed as untrue and improbable, alternatively the plaintiff did not proof the essential element of causation (more particularly legal causation);

[19.5] The defendant argues therefore that it should be absolved from the instance and the plaintiff should be ordered to pay the defendant's costs to date.

Analysis of the Evidence

[20] I have had ample opportunity to observe the plaintiff and his witness. I was highly impressed by their demeanour in the witness box. The plaintiff was very clear in his testimony and was able to answer questions relating to how the incident occurred. He was not confused by the defendant's Counsel attempt to assail his credibility by asking him why his testimony differs with the answers to a request for further particulars for trial(drafted by his attorney of record) and hospital records notes. He explained that he could not give an explanation why those differ with his testimony because those differences were made without his knowledge. He was not the person who gave that information. It became clear to me that he is correct because those differences consisted of actual inaccuracies which he could not have said. For example, it was stated that he was from work when in fact he was from seeking work. It was stated in the hospital records that Senzo is his relative when in fact Senzo is his friend.

[21] The plaintiff has proven to be an impressive witness whose evidence contained probabilities. There were no contradictions in his testimony and he was very consistent when it came to the essential facts of the matter.

[22] I was struck by the alacrity with which Senzo Nxele answered questions under cross-examination. The fact that Senzo Nxele confirmed that he did not see the plaintiff falling and did not see who pushed the plaintiff shows that he is an honest witness. He

confirmed the place where he found the plaintiff and this substantiated the place where the incident occurred as stated by the plaintiff. He also confirmed that there were no security personnel on duty and he himself had to organise transport from the nearby township as the ambulance was taking too long to arrive.

[23] I conclude that both the plaintiff and his witness were very impressive. They both did not exaggerate. They stuck to the truth. They honestly answered questions pertaining to where the plaintiff was standing in the train, the fullness of the coach of the train, the pushing and jumping by passengers, the movement of the train, the fall of the plaintiff, the place where the incident happened, the nature of the injury suffered by the plaintiff, the lack of security guards on the platform and station, and the fact that they were from seeking employment.

[24] Defendant's Counsel attempt to characterise the absence of other general bruises and injuries as irreconcilable with plaintiff's version. This argument is flawed because the defendant's counsel is not medically qualified to come to such conclusion.

[25] Senzo Nxele's evidence removed any doubt as to whether the plaintiff was in fact pushed. His evidence confirmed that he did not jump from a moving train contrary to what defendant's counsel suggested. His evidence further revealed that there was no danger in moving near the door because there were other people in the space between the plaintiff and the open door. This evidence put paid to any suggestion of voluntary assumption of risk and/or contributory negligence. The fact that he does not claim having seen anyone in particular pushing his friend (the plaintiff) demonstrates his integrity.

[26] The evidence of the plaintiff is credible and that of Senzo corroborates his version in so far as is alleged that the doors of the train were open, the fact that there was pushing in the train, and the place where he found the plaintiff after the incident.

[27] I accept the whole version advanced by the plaintiff as highly probable.

REASONS FOR JUDGMENT

[28] The defendant's Counsel correctly submits that the onus of proof rests upon plaintiff convincing the Court, through credible evidence, that plaintiff's version is more probable than that of defendant. His further submission that concluding on factual disputes where the version of a plaintiff collides with that of the defendant a Court must examine the credibility, reliability and probability of the evidence of various factual witnesses is correct.

[29] As I have already stated that the defendant has no witnesses and as such no version of its own, then the above submissions are not applicable in this case. The bulk of cases he relied upon are about mutually destructive versions and how a court must assess those versions. Since the defendant has no witnesses on its side, I am therefore not going to be dealing with the above submissions and I conclude that the use of the above authorities is incorrect.

[30] The estimate of credibility of a witness is inextricably bound up with a consideration of the probabilities and the Court is required to consider these concepts simultaneously.⁶ The best assessment of credibility is an independent assessment of a witness' spoken words as the Court has the ability to listen and observe demeanour, degree of hesitancy or uncertainty in any concession by witness or in affirmation thereof.⁷

[31] I have observed the plaintiff's demeanour and I am satisfied that he has acquitted himself with dignity in the witness box. The honesty with which he met the questions under cross-examination left a positive impression.

[32] The essence of the plaintiff and his witness testimony is that they were from seeking employment, they boarded a train which was full and they were in the same coach, there were many people between the plaintiff and the open door of the train, the plaintiff was not the first in line to open the door, when the train was approaching

⁶ *National Employer's General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (A) at 440E–441A

⁷ *Johnson v Road Accident Fund* 2001 (1) SA 307 (C) at 310J–311A

the platform it moved slow and there was pushing and jumping, there were people who jumped behind the plaintiff, the plaintiff fell from the same train and after falling the plaintiff ended up lying on the gravel three meters away from the platform. The plaintiff called Senzo Nxele who found him lying with his legs on the rail track. He was injured with his right foot amputated. Senzo Nxele removed the plaintiff boot and put it in a plastic bag together with the severed foot. He called a private car to take the plaintiff to the hospital as the ambulance was delayed. When they arrived at the hospital Senzo Nxele (and not the plaintiff) told the hospital personnel what happened and they wrote the information on the hospital file.

[33] Senzo Nxele further confirms that the train was moving with open doors and that there were no security personnel on duty neither in the train, on the platform nor at the station. These facts prove that defendant was negligent.

[34] The plaintiff and Senzo Nxele's testimony confirms that it is improbable that the plaintiff would have been pushed out of the train had the open doors been closed. This clearly proves that there is a causal link between proven negligent conduct or omission and the injuries. Had the plaintiff not fell, his legs would not have been lodged between the train and the rail line and he would not have been injured. As a result factual causation is established.

[35] I further have to consider whether had there been adherence to the strict safety regime of closing doors when the train is in motion by the defendant, the plaintiff would have sustained a traumatic amputation of the right ankle.⁸

LEGAL CAUSATION

[36] The failure by Prasa to close the doors of a moving train reinforces the legal connection between PRASA's failure to take preventative measures and the amputation of the plaintiff's leg. Therefore, the failure to close the doors of a moving

⁸ *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC)

train, is too closely connected to the train severing the plaintiff's right foot. PRASA has imposed the duty to secure commuters on itself through its operating procedures and such failure proves legal causation.⁹ I therefore impute liability to PRASA.

[37] The defendant's Counsel has stated that it should be accepted that if the doors were not open it is more probable than not that the plaintiff would not have sustained the injuries. This is correct.

CONCLUSION

[38] The material evidence in this case is how and where the incident took place. The incorrectness of the few answers to the request to further particulars does not change the fact that the plaintiff was pushed, fell from an overcrowded, moving train, with open doors. The evidence of plaintiff and his witness is credible and probable. His version is admitted as true. Both the plaintiff and Senzo gave direct answers to questions relating to causation, contributory negligence and voluntary assumption of risk. Their answers put paid to submissions of contributory negligence and/or voluntary assumption of risk.

[39] The fact that there were no security guards on the train, the platform and at the station constitutes an omission on the part of the defendant which omission amounts to failure to carry out its duty to act. The fact that the carriage doors were open at all relevant times is a dereliction of duty which certainly arouses the moral indignation of society. This conduct amounts to wrongfulness and is legally reprehensible.¹⁰

[40] Further, the fact that the defendant allowed the train to be overcrowded, with open doors while in motion constitutes negligence.

[41] Furthermore, the fact that other passengers pushed the plaintiff until he fell, with the result that his leg got amputated, amounts to harm caused to the plaintiff.

⁹ *Ibid.*

¹⁰ *Ibid*

The incident was reported to the defendant and the defendant duly investigated, but the results of the investigation are not disclosed and the witness from PRASA failed to come to testify on the date of trial. I can only draw a negative inference from this failure to come and testify.

[42] Counsel for the defendant has dismally failed to disprove that the pushing passengers, open doors of an overcrowded coach of a moving train constitute all the elements of wrongfulness, fault, negligence and resultant damage.

[43] I therefore conclude that the amputation to the plaintiff's leg was caused by a moving train from which the plaintiff was pushed.

[44] It is thus reasonable, fair and just that liability be imputed to the defendant (PRASA). Therefore the defendant is 100% liable for the damages suffered by the plaintiff.

I therefore make the following order:-

ORDER

The defendant is to pay 100% of:

1. The agreed or proven damages of the plaintiff.
2. The cost of plaintiff's attorneys and counsel's fees including those in respect of preparation of trial.

**NE RAMAPUPUTLA
ACTING JUDGE OF THE HIGH COURT,
GAUTENG LOCAL DIVISION,
JOHANNESBURG**

Appearances

Counsel for Plaintiff : Adv E Coleman

Attorney for Plaintiff : MED Attorneys

Counsel for Defendant : Adv P Uys

Attorney for Defendant : Norton Rose Fulbright Inc.

Date of hearing 17 March 2020
Date of judgment
