

REPUBLIC OF SOUTH AFRICA



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

Case Number: 19806/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

8 May 2023

DATE

SIGNATURE

In the matter between:

David Kangola

Plaintiff

and

Passenger Rail Agency of South Africa

Defendant

Neutral Citation: *David Kangola vs Prasa* (Case No: 19806/2021) [2023] ZAGPJHC 436 (08 May 2023)

JUDGMENT

Mia, J

Introduction

- [1] The plaintiff sues the defendant for damages as a result of injuries he suffered on 21 October 2019 whilst travelling on a train from Stretford Station to Park Station in Johannesburg. According to the plaintiff, the train was overcrowded and he was pushed out of the door during passengers jostling to embark and disembark. He fell out and landed with his head next to the railway lines and the moving train pulled him without stopping. The action was defended. The plaintiff's claim was opposed. The defendant refuted the plaintiff's version, by submitting that the plaintiff had not paid the fare to travel on the train and was attempting to embark on the train after it had left the station.
- [2] At the outset, both counsel indicated that the following issues were not in dispute and were common cause:
- a. The injury occurred at Lawley Station.
 - b. The train involved in the incident was train 9021.
 - c. The plaintiff sustained injuries at about 10h00.
 - d. The plaintiff was alone at the time the injuries were sustained.
 - e. The plaintiff was approached by the defendant's staff or agents at the time the injuries were sustained.
- [3] The issues in dispute were:
- a. That the plaintiff was a passenger in train 9021 and was ejected from the moving train.
 - b. That the plaintiff sustained injuries at Platform 2 at Lawley Station.
 - c. The plaintiff had a valid train ticket.
 - d. The plaintiff boarded the train at Stretford Station and was travelling to Johannesburg
- [4] The issues to be determined by this court were the following:

- a. Whether the plaintiff was a passenger in the train from Stretford to Johannesburg?
- b. Whether the plaintiff was ejected from the moving train at Platform 2 at Lawley Station or between the train lines travelling between Johannesburg and Vereeniging?
- c. Whether the plaintiff had a valid train ticket at the time the incident occurred?
- d. Whether the plaintiff sustained the injuries after he attempted to climb onto the train?
- e. Whether the defendant is liable for the damages as a result of the injuries sustained by the plaintiff?

[5] The plaintiff's case is that the defendant is in breach of its obligation to members of the public in general and to the plaintiff in particular as it failed to take precautions to prevent the plaintiff from being injured. This was so as it failed to employ an adequate number of employees to guarantee the safety of its passengers or to ensure that its passengers were not injured whilst embarking or travelling on the train. Moreover, it failed to take steps to ensure that the doors of the coaches did not open whilst the train was in motion and it allowed the doors to be open whilst the train was in motion thereby exposing commuters and specifically the plaintiff to danger. The plaintiff also contends that the defendant failed to maintain the train, coach, land, and infrastructure in safe and proper condition and failed to maintain adequate crowd control in and around the station to ensure commuters and or the plaintiff from falling from or inside the train.

[6] The plaintiff was the only factual witness for the plaintiff regarding the injuries sustained. The second witness for the plaintiff Ms Buhle Kangola, a cousin of the plaintiff could not recall what she did on the day. She did not observe the plaintiff falling and could not assist this court in determining how the plaintiff sustained his injuries as she was at home. Her evidence was limited to her recollection that he was intending to travel from home to Greenside where he worked and that he left home at 09h00 after the children left for school. Her vague recollection was

that the plaintiff would place his train ticket in his identification document. She did not specifically see it that morning or after the incident.

- [7] The plaintiff's evidence was that he boarded the train at Stretford Station, there were four stations before they arrived at Lawley Station namely: Grasmere, Made, Annadale and Anglas. Whilst on the train stopped at Lawley station. passengers embarked and disembarked. The train was full and passengers pushed each other to get onto the train. He did not see officials on the train nor did he see officials on the station. During the jostling he fell off the train as the doors were open. He lost consciousness and when he regained consciousness he was in hospital. He could not find his bag with his belongings and his train ticket.
- [8] During cross-examination he explained that the train filled to capacity during peak hour which was between 7h00 and 8h00. On this occasion, he was traveling to work in Greenside. He indicated that he caught the train at 9h45 and that this was outside of peak hour. He had a monthly ticket in his bag. The train was full and he was standing in the aisle between seats holding onto a belt. When the train stopped between stations, passengers boarded and disembarked. This caused the train coaches to become overcrowded and he was pushed toward the door. The doors were open and he did not see security personnel. When the train arrived at Lawley Station passengers embarked and the train left the station. During this embarkation passengers had pushed him off and the train had commenced moving when he fell off the train. He explained that he held onto his bag whilst on the train but could not explain how he lost it.
- [9] The plaintiff was the only passenger who fell out of the train he could not explain how in the overcrowded cabin other passengers who were pressed against him did not fall out of the moving train. He also could not explain how in the crowded cabin on the journey from Stretford Station along each of the four stations that the train stopped at, until they reached Lawley Station, no other passenger fell out of the moving train despite being pushed and shoved when passengers embarked and disembarked. He was the only person who fell from the train and he could not recall who assisted him. He did not recall anyone assisting him and did not recall Ms. Mashele speaking to him or that he informed her about his

personal details. He admitted however, that he was not employed and worked informally as a car guard in Greenside. His recollection was poor generally and he posed questions instead of responding to the questions posed to him. When he was shown the photograph depicting the platform and railway track at Lawley Station, he was not able to point out where he had fallen from the train nor was he able to point out the place where he was found between the railway tracks after the train had dragged him for some time, on his version.

- [10] The defendant's witness, Ms. Mashele, is the senior officer responsible for protection. She supervises security officers employed by PRASA on a contract basis and her area of responsibility extends from Vereeniging to Soweto and Carltonville. Upon report of an incident, she receives a call from the Joint Operational Centre and then attends the site to establish what transpired. When she attended the site at Lawley Station she found three police officers standing next to the injured plaintiff between the railway lines. They informed her that the plaintiff sustained injuries whilst crossing the train track and trying to board a moving train. She introduced herself to the plaintiff who gave his name and address. He indicated he crossed the line and tried to board the train whilst it was in motion. He had no ticket. She contacted his relatives from her personal phone and waited until paramedics arrived to take him to Chris Hani Baragwanath Hospital by ambulance.
- [11] Under cross-examination she indicated that the railway police are trained and equipped adequately to deal with commuters. At Lawley Station, railway police were on duty to manage crowds and commuters and were responsible for safety at the station. She did not investigate what measures they had in place for the safety of the commuters on the day of the accident. She indicated she does not supervise railway police and deals only with contracted security officers. She was unable to confirm that private security was present on the platform or the train as she was not present. She also indicated that where railway police were allocated there were no contract security officers appointed. She however indicated that when passengers board the train at Lawley they board on the Lawley Platform monitored by railway police responsible for the safety and security at the station. When they attempt to enter a moving train they usually embark from the

Vereeniging side which is where they found the plaintiff on the track, as the doors open on both sides at the station.

[12] In considering the evidence, the plaintiff is required to meet the onus of proof before he can succeed with his claim.

[13] Counsel for the plaintiff argued that the plaintiff's version that he fell out of the overcrowded train should be accepted and that the defendant failed in its duty to ensure the plaintiff's safety as a passenger on the train. Counsel relied on the decision in *Minister of Safety and Security v Van Duivenboden*¹ where the Court said:

"When determining whether the law should recognise the existence of a legal duty in any particular circumstances what is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms. Where the conduct of the State, as represented by the persons who perform functions on its behalf, is in conflict with its constitutional duty to protect rights in the Bill of Rights in my view the norm of accountability must necessarily assume an important role in determining whether a legal duty ought to be recognised in any particular case."

[14] He continued to argue that the State was required to fulfil its constitutional mandate and that the defendant failed to fulfil its mandate in the present matter. In submission he placed reliance on the decision of *Transnet Ltd t/a Metrorail and Ano v Witter* 2008(6) SA 549 (SCA), to argue that the defendant could not operate with railway doors open. This submission was based on the plaintiff's uncorroborated version that he fell from the train whilst the doors were open in contrast to the defendant's version that the plaintiff was crossing the track attempting to board a moving train. The versions are mutually destructive and the submission can only succeed if the plaintiff's version is accepted. I deal with the versions below. The submission with regard to foreseeability also depends on the version which is found to be plausible and accepted. This too is deal with after deciding upon the versions below.

¹ *Minister of Safety and security v Van Duivenboden* 2002(6) SA 431 SCA

- [15] Counsel for the defendant argued that the plaintiff pleaded his case inadequately and submitted that this court should have regard to the view in *Minister of Safety and Security v Slabbert*,² where the Court held

“A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a Plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.”

The plaintiff could not make submissions and argue a case it had not pleaded counsel submitted. This pertained specifically to the submissions made to accept the plaintiff's version where the plaintiff had not challenged the defence's version or not put a version to the defence witness, Ms. Mashele. This contributed to creating the two mutually destructive versions before this court.

- [16] In *National Employers' Mutual General Insurance Association v Gany*,³ the Court said:

“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. “

- [17] The onus in the matter rests upon the plaintiff and the version before this court indicates that the plaintiff cannot recall aspects which would have supported his version. It is thus the plaintiff's version that must be considered alongside that of the defendant's. In considering which of the versions is more probable regard is had to all of the evidence and the surrounding circumstances as indicated in *AA Mutual Insurance Association Ltd v Manjani*,⁴ where Court said

"The question to be decided will always be: which of the versions of the particular witnesses is more probable considering all the evidence that

² *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA)

³ *National Employers' Mutual General Insurance Association v Gany* 1931 AD 187 at p 199

⁴ *AA Mutual Insurance Association Ltd v Manjani* 1982 (1) SA 790 (A) at 793G - H.

was led by plaintiff and defendant and all their respective witnesses as well as all the surrounding circumstances of the case”

[18] In the present matter, where there are mutually destructive versions the principles summed up in *Stellenbosch farmers' Winery Group Ltd and Another v Martell et cie and Others*,⁵ find application. “*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.*”

[19] The plaintiff as indicated above could not recall aspects that were put to him. He could not recall why no other passenger fell off the overcrowded train when he said passengers were jostling and shoving on the train at the four stations before they arrived at Lawley Station. He did not recall how he ended up on the side of the train track close to the Vereeniging side of the track rather than on the Lawley side near Platform 2 where passengers board at Lawley station. If he had been pulled under the train carriage his injuries would have been fatal if not near fatal. In his evidence in chief, he said he was unconscious and woke up in the hospital, but recalled during cross-examination being told he was injured, suggesting he was conscious after being injured and lying on the railway track. In his particulars of claim, the plaintiff stated that he was employed and is now unemployed as a result of the injury, whilst under cross-examination, he indicated that he travelled to Greenside to work as an informal car guard and was not formally employed. He did not have a fixed income prior to the incident. There was no evidence of a monthly income at all. He was dependant on donations he received when worked as a car guard in Greenside. He did not recall how he lost his bag.

[20] The above version of the plaintiff is compared with the defendant's witness whose evidence is was consistent and candid. She responded to the questions under cross-examination. She was truthful about her lack of knowledge concerning the whereabouts of the railway police when the incident occurred. She explained that she did not supervise the railway police only contracted security officers. She found the police with the plaintiff on the railway track. They informed her that the plaintiff was crossing the railway track to board a moving

⁵ *Stellenbosch farmers' Winery Group Ltd and Another v Martell et cie and Others* 2003 (1) SA 11 (SCA)

train when he sustained the injury. The plaintiff informed her that he was not in possession of a ticket and was trying to board the train whilst it was moving.

- [21] When regard is had to the plaintiff's version beset with internal contradictions. The submissions made on behalf of the plaintiff when compared with the case pleaded the version is unreliable and improbable. He was not employed and pleaded that he was. He could not explain how other passengers did not fall out of the overcrowded train or why the train would have been overcrowded beyond peak hours. He conceded that the train was not crowded after 9h00 and he boarded the train after 9h00. He could not recall speaking to Ms Mashele but it was not disputed by counsel for the plaintiff that the plaintiff furnished information and that she called his family to inform them about his accident.
- [22] The second witness contradicted the plaintiff with regard to where the ticket was kept. The plaintiff informed Ms Mashele that he did not have a ticket and this was not put to Ms Mashele by counsel for the plaintiff. The plaintiff's version that he could be standing along with other passengers without holding onto the belt overhead or inside of the coach is unlikely as is the possibility that the plaintiff fell out while passengers closer to the door remained in the coach. As indicated the plaintiff's version is not regarded as plausible. Moreover, the suggestion that the defendant should guard against all passengers crossing the tracks attempting to board a moving train is not reasonable.
- [23] The plaintiff may have wished to travel on train 9021 from Stretford Station to Johannesburg Station, however he was not able to show that he was in possession of a ticket or that he was on the train. It is unlikely that he was ejected from the moving train at Platform 2 at Lawley station given the point on the track he was found lying at. The probability suggest that he was attempting to board the moving train from the Vereeniging side of the track and failed to access the moving train. The injuries may have been sustained whilst he attempted to board the moving train from the wrong side of the train where there was no platform access and because he was boarding a moving train. It was not reasonable to do so. The defendant cannot be held liable for the plaintiff's unreasonable conduct. It was not clear whether railway police were on the opposite of the platform. Passengers were boarding on platform 2. It would in any event have

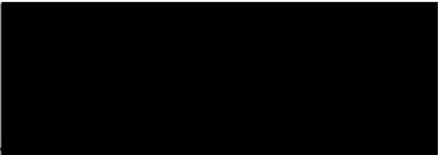
been an unnecessary dispatch of resources to place railway police where there were no passengers boarding to monitor and manage passengers as the plaintiff was not meant to be on the train tracks. The defendant cannot be held liable for the injuries incurred by the plaintiff on 21 October 2019 on the basis of the evidence before this court.

[24] I move on to the question of costs. The normal order should follow.

[25] For the reasons above, I grant the following order:

Order

The action is dismissed with costs.


SC MIA
JUDGE OF THE HIGH COURT
JOHANNESBURG

Appearances

For the Plaintiff:

Adv T Buthelezi
instructed by Bila Mashamba Attorneys

For the Defendant:

Adv JMW Malema
instructed by Padi Inc

Heard: 01, 02, 03, 04 AUGUST
2022 AND 8
SEPTEMBER 2022

Delivered: 08 May 2023