



IN THE NORTH GAUTENG HIGH COURT, PRETORIA /ES

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED. ✓

DATE 5/9/11

SIGNATURE

CASE NO: A891/2008

DATE: 16/9/2011

IN THE MATTER BETWEEN

SOUTH AFRICAN RAIL COMMUTER
CORPORATION LTD

FIRST APPELLANT
(FIRST DEFENDANT *A QUO*)

METRORAIL

SECOND APPELLANT
(SECOND DEFENDANT *A QUO*)

AND

ANNEX THABANG MOJAPELO

RESPONDENT
(PLAINTIFF *A QUO*)

JUDGMENT

PRINSLOO, J

[1] The appellants, as defendants in the court *a quo*, were ordered to compensate the respondent (then the plaintiff) for damages flowing from injuries sustained by the respondent while he was a passenger on a train under the control of the appellants.

[2] With the leave of the Supreme Court of Appeal, the appellants launched this appeal to the full court of this division against the judgment of 3 August 2007, handed down by the learned judge *a quo*, VICTOR, AJ, as she then was.

[3] Before us, Mr Ferreira appeared for the appellants and Mr Pieterse for the respondent.

Introduction and background

[4] On 17 February 2005, which, according to a calendar I consulted, was a Thursday, at approximately 17:45 the respondent boarded a passenger train at the Dube station which is in the Greater Johannesburg Metropolitan area.

[5] The respondent had a valid ticket to be on the train.

[6] The next station, barely a kilometre away, was Ikwezi station.

[7] The respondent stood in the carriage he had entered, holding a pole ("the grab pole") installed in the middle of one of the two doors of the carriage. The

respondent faced backwards and his upper torso protruded from the open door of the train.

- [8] As the train was still picking up speed, and barely 300 metres away from the Dube station platform, the respondent was hit on the back of the head by a temporary pole ("the pole") installed by servants of the appellants allegedly some 77cm away from the edge of the train. This was a temporary makeshift pole erected to support overhead cables damaged in an earlier train derailment accident.

- [9] The impact caused the respondent to fall from the train and sustain serious bodily injuries. He also lost his consciousness.

The injuries are described in the particulars of claim as a severe head injury with accompanying subarachnoid haemorrhaging, extensive lacerations and bruises to his head and face and extensive injuries to his mouth and teeth.

- [10] The respondent sued the appellants for compensation for the damages he sustained as a result of his injuries.

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- [11] In the particulars of claim it is alleged that the first appellant is the owner of trains operated by the second appellant on its behalf within the metro district of the Greater Johannesburg area. This allegation is admitted in the plea.

Although she did not say so, I assume that the learned judge *a quo* gave the judgment against the appellants jointly and severally. A remark was made in the heads of argument presented by the counsel for the appellants to the effect that "the trial judge did not make a finding in respect of the liability to be attributed as between the first and second defendants. It was only found that the defendant 'bears the most blame'." This point, such as it is, was not raised in argument before us, neither was it raised in the notice of appeal. In the circumstances, I do not consider it necessary to deal with this issue any further.

- [12] In the trial before the court *a quo*, the *quantum* of the claim was separated for later adjudication. Only the question of liability, or so-called "merits" had to be decided. The learned judge apportioned blame between the parties and ordered the appellants to pay 80% of the damages sustained by the respondent, apportioning 20% of the blame to the respondent.

Brief remarks about the pleadings

- [13] In the particulars of claim, the respondent alleges that "the aforesaid incident was caused due to the sole negligence of the first and second defendants and/or their employees acting within the course and scope of their employment with the defendants". There was never a suggestion that the servants or employees of the appellants, singled out for having negligently caused the respondent damages,

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were not acting within the course and scope of their employment, so that the question of vicarious liability was not in issue.

14] It is convenient to quote the acts of negligence relied upon by the respondent in his particulars of claim:

- "6.1 They failed to ensure the safety of their fare paying passengers, more specifically the safety of the plaintiff;
- 6.2 they allowed the train in which the plaintiff was a passenger to travel with open doors, thus causing a serious safety hazard;
- 6.3 they failed to take any alternatively any reasonable precautions to prevent the train in which the plaintiff was a passenger from becoming over-crowded;
- 6.4 they failed to implement any alternatively any proper and/or adequate safety measures to ensure the safety of their fare paying passengers;
- 6.5 they failed to take any, alternatively any reasonable precautions to prevent the support pole from becoming a safety hazard, alternatively from causing harm and/or injury to their fare paying passengers, more particularly the plaintiff;
- ~~6.6 they failed to exercise the degree of care and skill that could reasonably be expected of a public conveyer of passengers;~~
- 6.7 they failed to avoid the incident when by the exercise of reasonable care and skill they could and should have done so."

[15] In their initial plea, the appellants simply denied these allegations of negligence and pleaded in the alternative that if negligence were to be found, such negligence was not causally related to the incident.

[16] In a later amendment of their plea, the appellants, in the alternative, alleged contributory negligence on the part of the respondent. They alleged that the respondent was negligent in failing to stand or sit "within the confines of the train coach" before the train was set in motion and while the train was in motion. They pleaded that the respondent prevented the doors of the train from closing and he failed to avoid the accident when he could have done so by the exercise of reasonable care. As a further alternative, the appellants introduced a plea of *volenti non fit iniuria* ("*volenti*"). They pleaded that the respondent was aware of the risks of conducting himself in this particular manner by not staying wholly within the confines of the train. They pleaded that he accepted and appreciated this risk and therefore consented to be subjected to the risk of injury.

Concise summary of the evidence

[17] This brief summary is aimed at highlighting what I consider to be important aspects of the evidence.

The evidence of Lesley Mmako

[18] He was the only eye-witness and actually saw the respondent being hit at the back of the head by the pole.

[19] He did not know the respondent before this incident.

[20] He was considered to be a truthful and impressive witness by the learned judge *a quo*.

[21] He boarded the same train as the one carrying the respondent. He was on his way from Wits to his home in Naledi.

[22] He regularly used the train for transport. He boarded this particular train at Dube station, after having switched over from an earlier train.

[23] At that time of day (peak hour) the station was very busy. The trains were not on schedule. The train was full. The train was so full that he had to stand at the door grabbing hold of the arm rail.

[24] There were no people regulating the number of passengers boarding the train.

[25] He was in the fourth carriage from the front and he saw the respondent in the third carriage from the front, standing only some ten to fifteen metres ahead of him.

Although the respondent was in the next coach, he was standing in the next door following on the door in which the witness was standing.

[26] When the respondent boarded the train he was not able to go and sit down. He was holding the grab pole in the centre of the door. He actually saw the respondent boarding the train and holding the grab pole.

[27] When the train set off the doors were not closed. The door where the witness was standing was open and so was the door where the respondent was standing. He saw no doors of the train that were closed.

[28] He denied the allegation made on behalf of the appellants in their pleadings that the respondent prevented the doors from closing. He explained that this would have required the respondent to stretch his legs further than he would have been able to do. There were people standing, presumably next to the respondent and between him and the door.

[29] The respondent was holding the grab pole with both hands facing backwards, in other words with his back in the direction that the train was travelling.

[30] The witness could see the pole approaching as the train was moving and that there would be a collision between the pole and the respondent. When this happened, the witness moved his head into the train. People screamed and the respondent

fell off the train. If there was no pole, there would not have been an injury to the respondent. The incident happened when the train was about 300 metres past the Dube station platform.

[31] There were no warnings to the commuters about the presence of the pole.

[32] The witness estimated the distance between the pole and the train at about 45cm.

[33] In cross-examination, the witness repeated that there were people on the side of the respondent and did not dispute a suggestion that they were keeping the doors open. In this doorway where the respondent stood, there were a number of other people.

[34] He could not see what was happening inside the coach in which the respondent was.

[35] The witness was shown two photographs, to be found on exhibit "A", depicting the pole next to the train. According to the version of the appellants the pole was about 77cm away from the train. A passenger leaning out of the train and stretching his hand towards the pole still did not touch the pole. The witness felt that the pole that he saw was closer to the train. The scene depicted on exhibit "A" was reconstructed for purposes of this litigation. The pole is covered with what is described as "danger tape".

- [36] In my view, the witness was not in any way discredited in cross-examination. The finding by the learned judge *a quo* that he was a truthful and impressive witness is, in my view, justified.

The evidence of Christoffel Francois Potgieter

- [37] He is a technical superintendent employed by Metro Rail. He has thirty five years service with Transnet (and, presumably, its predecessors).
- [38] The pole was installed on 25 January 2005, some three weeks before the incident on 17 February.
- [39] According to him, the pole was there for about four months. It was removed at the end of May 2005.
- [40] Some time later, the witness was instructed to recreate the scene for purposes of the taking of photographs, presumably for this litigation: "Toe is ek gevra om die hele proses weer te gaan herhaal om foto's te neem en om mates te kry." He also said "Ek het hulle persoonlik self geneem en dit is die Sondag wat ons die tydelike mas weer gaan opsit het om die hele storie oor te doen."
- [41] According to him, the pole was about 77-78cm from the edge of the train. He testified that the pole installed for the photograph session was installed at the

same place where the pole was which collided with the respondent. According to him the clearance was adequate and the prescribed regulations allow for the temporary structure to be installed at such a distance.

[42] In cross-examination, he conceded that the temporary structure (the pole) was installed closer to the train than a permanent structure would have been. Under those circumstances the pole has to be covered with "danger tape". The following exchange then occurred between him and counsel for the respondent:

"Maar daar moet 'danger tape' aangebring word want dit is gevaarlik. Die 'danger tape' is om aan te toon dit is gevaarlik nie waar nie? --- Ja ek meen, vernaam vir 'guards' en vir treindrywers wat baie keer uitkyk by 'n trein dit is waarom dit daar is,"

[43] There was also the following exchange:

"U sal met my saamstem hoe nader aan die trein hoe gevaarliker? --- Dit is reg.

Goed, nou dan sê u verder 'n tydelike struktuur kan opgerig word volgens die regulasie 300mm nader as die minimum maar dan is dit volgens regulasie maar dit is nie noodwendig veilig nie want dan moet daar 'danger tape' aangebring word? --- Dit is reg."

[44] The witness also said that if a passenger is found to be leaning out of the train with the upper part of his body the train, according to regulation, is not supposed to be allowed to depart.

The testimony of Emily Khensani Legodi

[45] She was the second and last witness called on behalf of the appellants, with the respondent having closed his case after calling Mr Mmako.

[46] She was employed as a guard on the train and had ten years experience in this capacity.

[47] She was the guard on this particular train.

[48] She did not witness the incident and had no personal knowledge about it. She was informed about it afterwards.

[49] The trip between Dube station and Ikwezi station only lasts for about four minutes.

[50] When she was first informed about the incident by telephone, on the same day, she was told that three people had fallen off the train but this turned out to be incorrect.

[51] According to her evidence, which she repeated a few times, she got off the train when it pulled into Dube station, stood on the platform and observed the platform and saw commuters boarding and disembarking. When she was satisfied that the people had finished boarding and disembarking she blew her whistle to alert the people to step away from the train and to make sure that "those who were on the train must make sure that they are completely on the train". She then blew her whistle, got onto the train, looked again, blew her whistle again and then closed the doors by pushing a button. She then gave the driver a signal to ride away. She then watched the platform as the train pulled off right up to the end of the platform. She says when you press the close button, "it gives you a sound, a click that tells you that the doors are closing".

[52] She said that it was her duty to make sure that when she presses the close button to also look if the doors are in fact closing. Dube station is positioned "in such a way that a guard can see the entire length of the train. When I pressed the close button, I did see that the doors did in fact close."

[53] She could not dispute the evidence of Mmako that there were twelve coaches on that particular train. According to a sketch plan presented on behalf of the appellants, exhibit "F", a coach is approximately 20 metres long. This would mean that the length of the train (presumably without the locomotives) would have been about 240 metres.

[34] She disputed the plaintiff's case that there were commuters standing in the doors of the train and people protruding partially out of the doors of the train. She said that if there were people hanging out of the train she would have informed the security guards and if the doors were faulty she would have had to report that to the authorities. If there is a problem she will give a signal that the train is not to depart.

[35] She also did not see anybody preventing the doors from closing.

[36] She denied that the train was over-crowded. This denial was not put to Mmako when he was cross-examined.

[37] She was shown two documents, exhibits "E1" and "E2", discovered by the appellants, which are reports of the incident in which it was stated that the train was over-crowded. In the incident report of 17 February 2005, it was stated "the person allegedly fell from Metro 9464 ... that was apparently over full". In exhibit "E2", a Spoomet report by L P A Britz, it was reported "that the person is unknown and he fell from a moving train because it was too crowded between Dube and Ikwezi ... He had a weekly ticket from Naledi to Johannesburg ... He sustained mouth and right eye injuries, two cuts on the forehead and a cut behind the head". On exhibit "E1" it is also stated that the witness was the conductor on the train. She offered very little comment on these reports other than to say that

she took note of what was stated therein. The following exchange also took place about these reports:

"It was reported on the same day. Is it your evidence that you told them that it was not too crowded? --- Yes, but I did not write this report."

[58] The learned judge *a quo* was not impressed with this witness. On a reading of the record, it appears that the witness was at times argumentative and at times evasive.

It is also quite clear, that the testimony of the witness that all the doors were closed before the train departed must be false. The eye-witness, Mmako, testified that the doors were open when the train departed. The reports presented by the appellants themselves indicate that the train was over-crowded. The incident happened during peak hour. Moreover, if the doors were closed, the incident would not have happened, barely 300 metres beyond the end of the Dube platform. It is common cause between the parties, and recorded in the pre-trial minute, that the respondent was struck on the back of the head by the pole. Counsel for the appellants conceded, during argument before us, that the doors must have been open otherwise this accident could not have taken place. On the witness Legodi's version, the acts of contributory negligence, alleged by the appellants, have no foundation.

[59] In my view, the learned judge was well justified in rejecting the evidence of Ms Legodi and accepting that of Mmako. As was stated in the well known case of *R v Dhlumayo and Another* 1948 2 SA 677 (AD) at 705:

"The trial judge has advantages – which the Appellate Court cannot have – in seeing and hearing the witness and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked."

It was held in the same well-known judgment, at 706, that these general principles "will guide an appellate court both in civil and criminal cases". It is trite that a court of appeal will be slow to interfere with the findings of fact in the absence of a material misdirection. In this case, I see no such misdirection.

[60] So much for the evidence.

Is there room for an adverse inference to be drawn against the respondent because he did not give evidence?

[61] In her judgment, the learned judge recorded that counsel for the respondent (then plaintiff) placed on record during the hearing that the appellants (defendants) had been requested to admit the plaintiff's head injury. Counsel pointed out to the learned judge that the respondent "would not be able to testify because he did not remember any of the events that had occurred on that day". The appellants refused to make this admission. When the admission was requested, the plea had

not yet been amended and no contributory negligence on the part of the respondent had been alleged.

[62] It appears from the record that the amendment was only moved at the commencement of the trial.

[63] According to the record, the trial commenced on 31 July 2007. It appears from the record that counsel for the respondent (plaintiff) informed the learned judge, before commencement of the proceedings, that on 20 June (presumably 2007) the "plaintiff requested the defendant to admit that the plaintiff suffered a head injury and he filed an affidavit wherein he states that he has no recollection of the incident itself and the plaintiff sought that admission. Only on 3 July did the defendant inform the plaintiff that the admissions sought is not made. That was at the stage when contributory negligence was not even an issue." Counsel further informed the learned judge that the respondent then filed a notice in terms of rule 36(9)(a) recording the intention of the respondent (plaintiff) to call a neurosurgeon as an expert witness to testify about the head injury and the fact that the plaintiff could not remember the incident. The rule 36(9)(b) summary of the expert witness' testimony was filed out of time and objected to by the appellants (defendants). The respondent then proceeded with the trial without calling the neurosurgeon or giving evidence. The affidavit filed by the respondent about his state of amnesia did not form part of the papers before us.

164 In her judgment, the learned judge recorded these developments very briefly at the outset and later declined to draw an adverse inference.

165 In my view, this approach of the learned judge cannot be criticised. If the appellants were sceptical about the memory loss suffered by the respondent, they could have allowed the neurosurgeon to testify or they could have postponed the trial in order to have the respondent independently examined. The appellants, when contending for an adverse inference to be drawn, relied on well-known authorities, such as *Galante v Dickinson* 1950 2 SA 460 (A), dealing with the general proposition, as I understand it, of a litigant failing to call an eye-witness which is available to assist the court or failing to testify himself, for example where the litigant was the driver of a motor vehicle facing an allegation that a collision was caused by his negligence. The present case, in my view, is distinguishable in the sense that there are clear indications that the respondent was not "available" to assist the court because of his representations to the court, albeit through his counsel and by affidavit, that he could not remember the events surrounding the incident leading to his injuries. Considering the circumstances of the incident, which are not in dispute, the probabilities are also overwhelming that he must have sustained a serious head injury, as was also pleaded, *supra*. It was also not all together clear to me what the adverse inference is that the appellants are contending for. When counsel for the respondent raised this issue during the proceedings, counsel for the appellants indicated that the inference which the appellants contend for is that the respondent was reckless in his conduct. When

dealing with the question of whether or not to draw an adverse inference, the learned judge also remarked that it was not necessary to call the plaintiff in order to prove the incident because it was common cause between the parties that the plaintiff was injured by the pole and that he was picked up unconscious after the incident.

[66] In all the circumstances, I am of the view that this is not a proper case to draw an adverse inference such as the one contended for by the appellants. I fail to see how this court of appeal can interfere with the decision of the learned judge not to draw such an adverse inference.

[67] Counsel for the appellants conceded that, in the absence of such an adverse inference being drawn, there is no room for the defence of *volenti*. In these circumstances, I will not give further consideration to the *volenti* defence, other than remarking that, in my view, it was in any event not proved on the evidence that the respondent was aware of or should have been aware of the danger posed by the pole and that he reconciled himself with such danger. Indeed, the undisputed evidence of Mmako is that the commuters were not warned about the danger presented by the pole. Legodi could not contest this state of affairs. There is no basis to assume on the probabilities that the respondent knew about the pole at an earlier stage.

The apportionment of negligence applied by the learned judge

[68] Our courts have held repeatedly that a railway authority, such as the appellants, allowing a train to travel with open doors, particularly an over-crowded suburban train, is negligent. One of the leading cases on this subject is that of *Khupa v South African Transport Services* 1990 2 SA 627 (W). The over-crowded train travelled with open doors. The plaintiff tried to disembark from the train while it was still in motion. He was carrying a number of parcels. The court held that there was contributory negligence on his part in seeking to alight from such a train laden as he was with parcels but the percentage negligence attributed to him was only 25%. By comparison, the present respondent, in my view, did not make himself guilty of conduct as negligent as that of the plaintiff in *Khupa*. The present respondent did not attempt to disembark from the moving train. He leaned out of the train which was over-crowded and was surprised by the collision with the temporary pole obviously constructed too close to the train. He was not warned about the existence of the pole. The witness Potgieter conceded that the pole posed a danger. The pole, in my view, had to be closer to the train than what is depicted on exhibit "A", because on the exhibit "A" scenario, with the passenger leaning out of the train with his whole body and stretching out his hand and still not being able to touch the pole, it is inconceivable how this particular incident could have happened, bearing in mind the undisputed evidence of Mmako that the respondent was holding on to the grab pole with both his hands.

[69] In *Transnet Ltd t/a Metro Rail & Another v Witter* 2008 6 SA 549 (SCA) the trial court apportioned 50% against the plaintiff who had attempted to board a moving

train through an open carriage door. The Supreme Court of Appeal was not prepared to interfere with this apportionment. In *Ngubane v South African Transport Services* 1991 1 SA 756 (AD) the plaintiff had boarded an overcrowded train. He was jostled by other passengers and lost his grip on the overhead strap and fell out of the open door. It was held that the railway authorities were solely to blame for the injuries.

[70] In *Transnet Ltd t/a Metro Rail v Tshabalala* [2006] 2 All SA 583 (SCA) the plaintiff was in a state of intoxication when he ran alongside a moving train trying to board same and fell. It was held that his damages had to be reduced by two thirds.

[71] It was common cause between the parties before us, that a court of appeal will be slow to interfere with the apportionment of damages decided upon by the trial judge. In *South British Insurance Co Ltd v Smit* 1962 3 SA 826 (A) the following was said at 837F by the learned judge of appeal:

"From the very nature of the enquiry, apportionment of damages imports a considerable measure of individual judgment: the assessment of 'the degree in which the claimant was at fault in relation to the damage' is necessarily a matter upon which opinions may vary ... were this court readily to interfere with a trial court's apportionment of damages, dissatisfied litigants would be encouraged to appeal in well-nigh every case. Where, therefore, the trial court has correctly found the facts and has

made no error in principle, this court as was indicated by SCHREINER ACJ will not lightly disturb the apportionment decided upon by the trial court."

[72] In the present case, the appellants (through their servants acting within the course and scope of their employment) were clearly negligent in allowing the train to travel with open doors particularly where it was over-crowded and some passengers were visibly protruding beyond the confines of the train. The negligence of the servants of the appellants was compounded, in my view, by the fact that they knew about the presence of the pole posing a danger and still allowed the train to travel under those circumstances without warning the commuters about the existence of the pole.

[73] The contribution of the respondent, if any, was in my view far more limited in the sense that he allowed the upper part of his body to protrude beyond the confines of the train while he was hanging on to the grab rail under crowded circumstances. There is no evidence to the effect that he knew about the existence of the pole and, on the probabilities, he did not, otherwise he would have taken precautionary measures. The learned judge found, correctly, that the allegations of contributory negligence mentioned in the plea were not proved (bearing in mind that the *onus* to prove contributory negligence was on the appellants) but the learned judge nevertheless found a degree of contributory negligence because the

plaintiff did put himself in some danger by positioning himself on that journey in the way that he did.

[74] In all the circumstances, I am of the view that, on the evidence, the degree of fault on the part of the appellants was clearly well in excess of that on the part of the respondent. I find no basis to interfere with the apportionment applied by the learned judge. I am particularly mindful of the fact that this court must be slow to do so, as illustrated. Consequently, I am of the view that the appeal cannot be upheld.

The order

[75] I make the following order:

1. The appeal is dismissed.
2. The appellants, jointly and severally, are ordered to pay the costs.

A891-2008

I agree


W R C PRINSLOO
JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree


N M MAVUNDLA
JUDGE OF THE NORTH GAUTENG HIGH COURT


T J RAULINGA
JUDGE OF THE NORTH GAUTENG HIGH COURT

HEARD ON: 10 AUGUST 2011
FOR THE APPELLANTS: E J FERREIRA
INSTRUCTED BY: JACQUES VAN DER MERWE ATTORNEYS
FOR THE RESPONDENT: J C PIETERSE
INSTRUCTED BY: CORNE VAN DE VENTER