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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No.: 13338/17

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

_____ **Date:** _____

In the matter between:

SITHEMBISO

OSCAR

NDLOVU

Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

First Respondent

Date of trial: 29/05/2023, 30/05/2023, & 06/06/2023

Date of delivery of the judgment: 24/07/2023

JUDGMENT

MTEMBU AJ

Introduction

- [1] The plaintiff, Sithembiso Oscar Ndlovu, claims damages against the defendant, Passenger Rail Agency of South Africa (PRASA), arising from personal injuries he sustained after he apparently fell from a moving train on 23 May 2016 at Limindlela train station, Tembisa. He, in the particulars of claim, alleges that he had a valid train ticket for the trip he was taking. He was pushed off the train by other commuters who were jostling for space and consequently fell out of a moving train. He pleads that the incident, as described above, was as a result of the negligence of the defendant and or its employees in that they allowed the moving train to be travelling with its doors open, and accordingly, failed to avoid the incident when, by the exercise of reasonable care and diligence, it could and should have done so.
- [2] In its Plea, the defendant denies liability on the basis that the plaintiff informed the defendant's employees that he was pushed by other commuters whilst trying to board a stationary train at platform 2 of Limindlela station, and that the train doors were closed at the time of the incident.
- [3] Before the trial commenced, the parties agreed that the merits of the plaintiff's claim should be separated from the quantum of the plaintiff's claim for damages and that the merits should be decided first in terms of Rule 33(4) and the issue of quantum to be postponed *sine die*.
- [4] The issue to be determined is whether the defendant is liable for the damages suffered by the plaintiff as a result of being pushed out of a moving train, or whether the train was stationary at the time of the incident.

Plaintiff's evidence

- [5] The plaintiff testified that on 29 May 2016 at around 5:00, in the morning, he boarded a train at Limindlela train station. On this day, he was going to the Fairmart factory looking for employment. He was in company of his brother, Mdumiseni Ndlovu, who was an employee of that firm. Mdumiseni had advised the plaintiff that there was a vacant post for cleaning. Mdumiseni did not come to court to testify because he was sick. He has a stroke.
- [6] The plaintiff testified that he had a valid train ticket on that day. It was safely kept in his wallet. His brother bought this ticket for him. He testified that he had never used a train ticket before, and it was his first time boarding a train. He was also adamant that he will never use a train again. The train ticket got lost on the date of the incident. On that day, he lost his wallet with R40, a smart Identity (ID) card, a bank statement, and a train ticket inside. Upon arrival at the train station, he was not asked to produce a train ticket and neither was he asked to produce it after the incident.
- [7] He did not know the platform number where he was boarding the train. He arrived at the train station simultaneously with the train. He then boarded the train. The train coach was full. Upon boarding the train, it started pulling away from the platform. He then fell from the train when it was moving. He landed two (2) metres away from the platform. When narrating a story of how he fell, the plaintiff stated that a male person came running and collided with him. He did not pay attention as to which side the male person was coming from. He also did not know whether this male person wanted to go past him. This male person collided with him, and he fell by the door side which was open. He, therefore, fell on the ground, which was rocky, next to the railway lines. As a result, he sustained injuries on his left

hand which got broken. He demonstrated the injuries in court which was the left elbow. Upon falling, immediately thereafter, people with reflectors arrived. It is assumed, it was security personnel.

- [8] He testified that from these people, a certain lady took him to the chair to sit. This lady also asked him about the details of his next of kin. Nothing else was asked from him except the details of his next of kin. He was adamant that he provided his personal details and particulars to the ambulance personnel. He was then taken to the hospital for medical treatment where he remained as an inpatient for about 9 – 13 days. When asked about his brother, in evidence in chief, he stated that his brother proceeded with his trip to work. The train never stopped. However, upon arrival at his work, his brother called him to check how he was feeling.
- [9] Under cross-examination, when asked about the train ticket, he testified that it was a weekly ticket. He admitted that he never checked whether the train ticket corresponded with his train trip at the time. He was staying with Mdumiseni at the time. He admitted that it was not guaranteed that he would be employed, he nonetheless bought a weekly ticket. Upon arrival at Limindlela train station, his brother managed to secure a seat on the train. When asked about providing the details of his next of kin, he testified that he did not give the nurses the contact details of his brother but gave the contact details of his landlord.
- [10] He was asked whether Mdumiseni saw him falling and answered in the affirmative. He stated that Mdumiseni proceeded to go to work because no one was going to work as a substitute for Mdumiseni. He further testified that Mdumiseni stated that he would visit him at the hospital after work. He was confronted about allegations made in the particulars of claim that he was pushed by fellow passengers who were jostling for space, not by one male person as he testified. He stated that the averments in the particulars of claim are incorrect.

[11] When asked about the direction he was facing, he stated that he was facing the direction in which the train was traveling. He was asked as to which side of his body parts collided with the male person. He testified that it was his right-hand side. He was holding hinges with his right hand facing the direction the train was heading, and his left was on the side of the open train door. So, the gentleman who pushed him was from inside the coach, from his right side.

[12] The plaintiff was confronted with a request for further particulars where it was asked whether the plaintiff has a witness who observed the occurrence of the incident and his reply to the request for further particulars was no. He could not explain as to why his brother, Mdumiseni, was not mentioned as a person who witnessed the incident. In response to the question of where exactly he was standing on the train, he testified that he was standing in the aisle between the seats of the coach. There were also other commuters standing. In a confusing manner, he also stated that there were seats on his left side as well, which is in contrast with a version that sought to say, on his left side was the open door.

[13] The plaintiff remained adamant that he was never asked anything by security guards except the details of his next of kin. He was therefore confronted with the defendant's witness statement of Ms Lerato Boshomane, a security guard at the time. The statement reads as follows:

"We found a male commuter who identified himself as Sthembiso Oscar Ndlovu sitting down, Identity Number: 9[...], residing at 1[...] Ivory Park ext 10, contact number 071[...]. He alleges to have been pushed by commuter when was boarding an overcrowded stationary train number: 0506 at platform two (02). He sustained a painful twisted left elbow. He was not in possession of train ticket. We reported the incident .."

- [14] His answer was that he could not recall giving the security guards his details. He denied having told them that he fell from the stationary train.
- [15] It was put to the plaintiff that Ms Kgatuke, the defendant's witness who was a train guard on that day, will testify that upon arrival at Limindlela train station, the train stopped for commuters to disembark and embark. She, as a train guard, stepped out of her cabin to check if there were still passengers disembarking and boarding. She was satisfied that all passengers were in and thereafter went back to her cabin to signal to the train driver that it was now safe to depart and pressed the button to close all doors. The plaintiff disputed these allegations. During re-examination, he testified that where he was standing there were seats on both sides.
- [16] After the plaintiff's testimony was finalised, counsel for the plaintiff closed the plaintiff's case.

Defendant's evidence

- [17] The defendant called Ms Boshomane as a witness who was a security guard at the time. On that day she was on duty. She made a statement regarding the incident that occurred. On the day of the incident, she together with her colleagues met a gentleman who informed them that he got injured. He was pushed when he was boarding a train. Upon questioning this gentleman, he informed them about the train number that he was boarding. He informed them that he was not in possession of a train ticket. He furnished them with his personal details. She recorded this information in the Occurrence Book ("OB"). She thereafter reported the incident to the control office. Upon reporting the incident, the ambulance

arrived. After the injured person was taken to hospital they then proceeded with their day-to-day duties.

[18] Under cross-examination, she confirmed that the information recorded in the OB was received from the plaintiff. It was put to her that the plaintiff had no prior knowledge of boarding a train. She disputed this version and stated that he knew the process because he provided them with a train number. She admitted that she did not see the train when it arrived at the station. She also admitted that she did not see the plaintiff boarding the train and did not see the plaintiff getting injured.

[19] She disputed the plaintiff's version that he never gave them his personal details. She was asked about the place where the statement was signed, whether Tembisa or Limindlela. She admitted that she might have made a mistake when she said the statement was signed at Limindlela station. The correct version is that it was signed at Tembisa police station. It was put to her that the plaintiff was pushed inside the moving train, and she disputed this by saying that the plaintiff gave them a different version. It was put to her that the plaintiff lost his train ticket. She stated that it was not possible because the plaintiff told them that he did not have a train ticket.

[20] Ms Edith Thepe Kgatuke testified on behalf of the defendant. She was employed as a metro guard by the defendant at the time of the incident. She was on duty on that day. Her duties as the metro guard were to ensure that commuters embark and disembark safely. It was her duty to ensure safety. When it is safe for the train to depart, she would signal to alert the commuters that now the train is about to close its doors.

[21] Upon arrival at Limindlela station, after the train had completely stopped, she opened the doors. Thereafter, she checked whether there were commuters disembarking and embarking on the train. She stepped out

and observed the commuters. When the platform was clear, she went inside the train. She again observed through the window and saw nothing. Thereafter, she blew the whistle to let them know that she was closing the doors. When the yellow line was clear, she then gave the driver the right of way.

- [22] During cross-examination, she admitted that she deposed to a statement where she stated that she did not witness any person who was injured on 23 May 2016. She only learned about someone having gotten injured when Mr Coetzee was conducting an investigation. She still maintained that she never saw a person getting injured on that day. When asked whether she disputes that the plaintiff got injured on 23 May 2016, she stated that she only disputes the area of impact. She disputed that the train moved with open doors on that day. Upon questioning by the court, she testified that the train is thoroughly checked for any faults before collecting commuters and that the train signals if there is a forceful entry, in that regard, she would ensure the train doors are closed before the train moves. She also stated that while the train is in motion, the doors remain closed and there is no way they could be opened unless there is a faulty.

Submissions

- [23] It was submitted on behalf of the plaintiff that the plaintiff's testimony was probable and given in a satisfactory manner. No criticism could be labelled against it. Cross-examination did not elicit any facts to the contrary. It was further contended that the narration of the event demonstrates that he was boarding a train for the first time. The plaintiff's evidence that he was ejected from a moving train, with its doors open, remained unchallenged. Mr Makhubu, appearing on behalf of the plaintiff, submitted that the defendant must be liable 100% for proven damages and no contributory negligence should be considered on the part of the plaintiff.

[24] On the other hand, it was submitted on behalf of the defendant that the plaintiff was not a reliable witness. He, sometimes, contradicted himself. He struggled to answer simple questions. His evidence contradicted his pleadings. Mr Mphela, appearing on behalf of the plaintiff, submitted that this court should look at the probability that the plaintiff might have been pushed when the train was stationary during embarkation and disembarkation. It was contended that there is no liability if the plaintiff cannot show that he fell while the train was in motion but when it was stationary.

[25] In the event that I find the defendant liable, it was submitted that the plaintiff should also be blamed for his contributory negligence. The defendant's contention is that he stood on the train next to its open door and this was unsafe and dangerous to do so. Therefore, under these circumstances, an apportionment of 30% would be reasonable, the submission goes.

Legal position and analysis of the facts

[26] The onus to prove negligence rests on the plaintiff. The plaintiff is required to prove that harm to others was reasonably foreseeable and that a reasonable person would have taken steps to guard against such harm occurring. The plaintiff must adduce evidence as to the reasonable steps the defendant should have taken to prevent or reduce the risk of such harm.¹

¹ Passenger Rail Agency of South Africa v Moabelo [2017] 4 All SA 648 (SCA) at para [30]

- [27] The Constitutional Court held the following in ***Mashongwa v Passenger Rail Agency of South Africa***²:

“That PRASA’s conduct was wrongful and negligent, does not quite resolve the question whether liability should be imputed to it. Its concern in the Supreme Court of Appeal was that the element of causation was not established. The question is whether there was a causal link between PRASA’s negligent conduct or omission and Mr Mashongwa’s injuries. It must also be determined whether there is a close enough connection between PRASA’s negligence and Mr Mashongwa’s injuries. Before these questions are answered, it must first be determined whether the Lee test or a different approach to causation applies.”

- [28] The question is whether the plaintiff discharged the onus of proof.
- [29] The plaintiff had no other witnesses to corroborate his testimony. In this case, the critical issue is whether the train was still in motion, at the time of the incident or it had come to a complete stop, and if the train had come to a complete stop, the defendant would be exonerated from any form of liability. In ***South African Railway Commuter Corporation Ltd v Thwala***³, the Supreme Court of Appeal held that once the court accepted that the train was stationary when the plaintiff disembarked and the accident occurred, that should have been the end of the plaintiff’s case. Only a finding that the train was in motion when the plaintiff was pushed and fell would give rise to liability.
- [30] I must say at the outset that there were sharp conflicts on topics pertinently relevant to the disputes in the action between the testimonies of the plaintiff and the defendant’s witnesses. I would therefore endeavour to decide the issue of negligence upon adequate grounds that the story of the litigant upon whom the onus rests is true and the other is false.

² 2016 (3) SA 528 (CC) at para [63]

³ (661/2010) [2011] ZASCA 170 (29 September 2011) at para [18]

[31] In deciding whether evidence is true or not I am required to weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the case and, if the probabilities favour the plaintiff, then the court must accept his version as being probably true. If the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's case, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's case is false or mistaken⁴

[32] In a nutshell, to resolve mutually destructive versions, I must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.⁵

[33] The plaintiff's testimony is hard to believe even if one tries to ignore discrepancies in his testimony, his demeanour during the trial also compounds the difficulty I have in believing his evidence. The circumstances surrounding his ejection from the moving train do not support a plausible explanation. Firstly, the plaintiff testified that while he was standing on the aisle, a certain man came running and collided with him from the right side. What baffles me is how plausible it is that a passenger can run in a crowded or full train. What compounds the plaintiff's implausible story is how a person could run from the seat row on the right side to the aisle. Although there was no evidence led as to the distance from the right seats to the aisle, surely it cannot be such a distance that a commuter could be able to run. This appears to be far-fetched.

⁴ National Employers Mutual General Insurance Association v Gany 1931 AD 187 at 199; see also National Employers' General Insurance Co Ltd v Jagers 1984 (4) SA 437 (E) at 440D - G; See also Mbungela and Another and Others 2020 (1) SA 41 (SCA) at para [22]

⁵ Stellenbosch Farmers Winery Group and Another v Martell at Cie and Others 2003 (1) SA 11 (SCA) at p 14I – 14D at para [5]

- [34] One must not lose sight that his testimony during examination-in-chief was that he did not pay attention as to which side the male person was coming from. He also did not know whether this male person wanted to go past him. However, in cross-examination, he then finetuned his testimony and stated that the gentleman that pushed him was from inside the coach from his right side. His further evidence was that where he was standing, the open train door was on his left side. While trying to follow that testimony, in a perplexing manner, he also stated that there were seats on his left side as well, which is in contrast with a version that sought to say, on his left side was the open door. Regrettably, his testimony was littered with inconsistencies and contradictions.
- [35] This plaintiff's testimony that a certain passenger dislodged his right hand from the hinges of the train for passengers to balance when standing also does not correspond with the case made in his particulars of claim. In his particulars of claim, he pleaded that he was pushed by fellow passengers who were jostling for space, not by one male person as he testified.
- [36] Another interesting part of the plaintiff's testimony is in relation to his brother. The story about the plaintiff's brother is a complex tale to comprehend. His brother observed the occurrence of the incident but nonetheless proceeded with his journey to work and never bothered to come back to check on his brother. I respectfully agree with the defendant's counsel, Mr Mphela, that any family member would not just proceed with the journey in a situation where his or her family member is involved in a tragic incident that involves a life-and-death situation. It would be expected that a person in such a situation would come back to check on his or her family member as soon as possible.

[37] The defendant sought a request for further particulars during the pleading stages. The defendant sought a response on whether the plaintiff had a witness who observed the occurrence of the incident. His reply to the request for further particulars was no. He could not explain as to why his brother, Mdumiseni, was not mentioned as a person who witnessed the incident. He was only mentioned during the trial. Conveniently, he was sick, which is why he did not come to testify. This appears to be tailor-made evidence. When the plaintiff was requested to provide the contacts of his next of kin, instead of providing his brother's details, he provided the landlord's contacts. This also poses doubts if there was ever a brother.

[38] As if this intriguing story was not enough, the plaintiff also gave two contradictory versions. His first version was that his brother called him upon arrival at his workplace and indicated to him that he would check on him after work at the hospital. Although such an approach lacked compassion from his brother, who was expected to arrive on the scene as soon as he could, nonetheless, one can accept it. In sharp contrast, the plaintiff's testimony was that his brother proceeded to work as he had no substitute to work for him. It is unclear as to what stage they had an opportunity to have this conversation because according to the plaintiff, upon falling, his brother proceeded with the train.

[39] The plaintiff denied even what appeared to be simple facts. He denied not having a valid train ticket on that day. When failing to support this version, he conveniently stated that he lost it during the incident. The plaintiff also denied having given his personal details to the security personnel. He was adamant that he only gave them the contacts of his next of kin. He denied having provided the following information:

"Sthembiso Oscar Ndlovu sitting down, Identity Number: 9[...], residing at 1[...] Ivory Park ext 10, contact number 071 [...]."

There is no way that the security guards could obtain this information other than from the plaintiff. The plaintiff's testimony that he never provided them his personal details is nothing else but an attempt to escape the consequences that apart from furnishing his personal details, he also provided information as to how he got injured. Ms Boshomane, the security guard, testified that she made a statement on what she was told by the plaintiff, in particular, the following:

"He alleges to have been pushed by commuter when was boarding an overcrowded stationary train number".

[40] Considering the aforesaid, and based on the impression that Ms Boshomane made on me in the witness box, there is no reason why her evidence regarding the interview with the plaintiff can be rejected.

[41] The plaintiff was interviewed by Ms Boshomane when the events were still fresh in his mind. His narration of the events at that time was not polluted or contaminated by any opportunistic motives. This seems, in my view, to suggest that the plaintiff might have fallen when the train was stationary during embarkation and disembarkation. When the doors of the stationary train opened, it seems more likely that the plaintiff was engulfed in the throng of embarking and disembarking passengers, pushed, and lost his balance. It was his testimony that he and the train arrived simultaneously. This, in my view, suggests that the plaintiff might have attempted to board a train in extreme haste and lost the balance or got pushed while engulfed in the throng of passengers.

[42] There is no basis to conclude that Ms Boshumane and her colleague who interviewed the plaintiff directly after the accident, for an unknown reason and for no obvious gain to them, somehow concocted a story to cover for

the defendant and, to achieve that goal, falsified documentation by deliberately recording a report contrary to what the plaintiff told them.

[43] In this regard, the causal link between the defendant's negligent conduct or omission and the plaintiff's injuries is not ascertainable. There is insufficient evidence to support a conclusion that the plaintiff's injuries were caused by the defendant's negligent actions. In terms of the cautionary rule, the court must warn itself against uncorroborated evidence of a single witness.⁶ In other words, the evidence must not only be credible but also reliable.⁷

[44] Once I accept that the train was stationary when the accident occurred, that is the end of the plaintiff's case. Only a finding that the train was in motion when the plaintiff was pushed and fell would give rise to liability.⁸

[45] The plaintiff's version's improbabilities lead to only one conclusion, that is, he has failed to discharge the onus on him to prove that the defendant was negligent and that the injuries he sustained were as a result of a foreseeable occurrence that the defendant could have taken reasonable measures to avert it. On the other hand, the defendant's witness, Ms Kgatuke provided an irrefutable description of the safety precautions taken on that day.

Conclusion

[46] I find that the plaintiff has failed to discharge the onus of proof. Therefore, the general rule is that the successful party should be given his costs, and

⁶ R v Mokoena 1956 (3) SA 81 (A) at 85H

⁷ S v Janse van Rensburg and Another 2009 (2) SACR 216 (C) at 220G

⁸ 661/2010) [2011] ZASCA 170 (29 September 2011) at para [18]

this rule should not be departed from, except where there are good grounds for doing so. In this matter, there is nothing that warrants deviation from the general rule.

Order

[47] Consequently, the following order is made:

- (i) The action is dismissed with costs.

A.M. MTEMBU AJ

Acting Judge of the High Court of South Africa

Gauteng Division, Pretoria

"This judgment was prepared and authored by the Judge whose name is reflected herein, duly signed, and is submitted electronically to the Parties/their legal representatives by email. This judgment is further uploaded to the electronic file of this matter on Case Lines by the Judge or his Secretary. The date of this judgment is deemed to be 24 July 2023."

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Instructed by: Oupa Ledwaba Attorneys

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