

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE Number: 99978/2015

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

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

(3) REVISED: YES/~~NO~~

08/04/2024

In the matters between: -

A[....] M[...]

PLAINTIFF

And

TRANSNET SOC LTD

FIRST RESPONDENT

JUDGMENT

BAQWA, J

Introduction

- [1] This is a claim for damages instituted by M[....] M[...] M[...] on behalf of A[....] M[...], her minor child who was 11 years old at the time of the incident which has given rise to this action. Plaintiff alleges that the minor child sustained injuries as a result of the negligence of Transnet or its employees.

Separation of issues

- [2] At the pre-trial conference on 25 February 2020, the parties agreed in terms of Rule 33 (4) of the Uniform Rules of Court to separate liability from quantum and the trial proceeded on liability only.

The Facts

- [3] The plaintiff (A[....]) then 11 years old and his brother Lukas resided with their maternal grandmother M[....] M[....] M[....] (Ms M[....]) at place called Freedom Park next to a Transnet line.
- [4] On the morning of 1 January 2011, Ms M[....] sent A[....] and Lucas to go and ask their mother to come to her house to assist her to prepare food.
- [5] Upon arrival at the mother's house she informed them that she would come after completing her tasks for the day after which A[....] proceeded to report to their grandmother.
- [6] After making their report to the grandmother A[....] noticed a stationary train and decided to walk to the train out of curiosity. Lucas did not accompany him. After arrival at the stationary train, he joined a group of onlookers who stood next to the train. He stopped approximately 0,5 metres from the train.
- [7] When the train began to move, a person by the name of Hakalani pushed A[....] who fell under the train where his leg was caught between the moving train and the railway line. His leg was ultimately amputated below the hip.
- [8] The plaintiff pleads a legal duty on the part of Transnet to maintain reasonable safety measures at the relevant railway line next to Freedom Park to guard against members of the public, including A[....], from being injured by trains.
- [9] Transnet defence is a complete denial which is couched as follows:
- “Each and every allegation contained in paragraph 5 of the particulars of claim is denied as if specifically set forth and traversed and plaintiff is put to the proof thereof.”
- [10] Further, Transnet pleads as follows:

10. 1 Volenti non fit iniuria

“6.2 Alternatively first defendant avers that M[...] voluntarily assumed the risk of injury in that:

6.2.1 He saw and was fully aware that the train was already in motion when he attempted to board the train.

6.2.2 He knew that it was dangerous to board the train whilst it was in motion;

6.2.3 He knew that there was a risk that he might fall and get injured:

6.2.4 He knew the nature and extent of the risk associated with falling from the train;

6.2.5 He consented to the risk of injury by proceeding to board the moving train;

6.2.6 The first defendant is not liable for the damages suffered by plaintiff due to M[...] having voluntarily consented to or assumed the risk of injury.”

9.3 Plaintiff's sole fault

“6.3 Alternatively, first defendant avers that the incident was caused as a result of the sole reckless, alternatively negligent conduct of M[...] who acted recklessly, alternatively negligently in the following respects:

6.3.7 He boarded first defendant's train whilst it was in motion;

6.3.8 He subsequently became dislodged from the train, alternatively attempted to disembark from the train which was at all relevant times in motion;

6.3.9 He failed to avoid injuries to himself when by the exercise of reasonable care, he could and should have done so.”

Common cause facts

[11] It is common cause that the incident had happened and that the relevant train was a Transnet train and that the photographs presented as part of the evidence depicted the location thereof.

The dispute

[12] What is in dispute is how the plaintiff suffered his injuries and whether or not he suffered his injuries as a result of the negligent conduct of the defendant or its employees.

The evidence

[13] Ms M[...] testified that:

13.1 She resided at the Freedom Park informal settlement with the plaintiff and Lucas and confirmed having sent them to summon her daughter to her home on 1 January 2024.

13.2 She also testified that upon their return the plaintiff went to the stationary train and later was informed that the plaintiff was injured.

13.3 According to her there was no warning sign at or near the foot path where the community crosses the railway line but she had warned the boys about the dangers of the train and the railway line.

13.4 Under cross-examination when asked why plaintiff went to the railway line the said it was the first time the train had stopped there and as a child, he was curious to find out why the train had stopped there.

[14] The plaintiff testified that after they returned with his brother Lucas from their mother’s house he went to the stationary train because he was curious to see the train. Whilst they were watching the train with other people who had

gathered there and standing about 0.5m from the train, a boy by the name of Hakalani pushed him just as the train started moving. The push caused him to fall causing his right leg to get caught between the wheel of the wagon and the railway line.

[15] Plaintiff confirmed that his grandmother had warned them about the dangers of the railway line and the train.

[16] Plaintiff stated that he knew that a train is dangerous- and that the wheels and undercarriage of the train are the dangerous parts however he did not know that the train would move without any warning.

[17] He did not hear any bell whistle before the train started moving.

[18] He did not recall any Transnet representatives visiting their school.

[19] During cross examination he was told that Transnet visited the school in February 2011 which was confirmed by the school principal and that he (the plaintiff) voluntarily stated to Mbulaheni that he got injured whilst trying to steal a light from one of the train wagons. He still denied such visit.

The Transnet evidence

[20] Transnet first called Moses Mbulaheni a security guard who attended community campaigns accompanied by the now deceased Ms Winsome who was also present during the visit at M[...] Primary School.

[21] Mbulaheni testified that the Transnet put up safety measures by conducting campaigns in communities and schools when learners were told not to play at or near railways.

[22] In February 2011 when they visited M[...] Primary they first obtained permission from the principal. The principal told them that they had a learner who was injured by Transnet train. He then called the learner who came and

volunteered that he got injured when he attempted to steal lights from the wagon of a train.

[23] The second witness called was Lucky Munonde, the assistant to the deceased train driver.

23. 1 Munonde has been a train driver assistant for 37 years but is now retired. He travelled the railway line on which the incident occurred since 1992 on average three times a week.

23.2 On 1 January 2011 he was on duty and when it stopped he alighted and operated the signal point manually and before re-entering the train he checked both sides of the train. There were no people on either side of the train. He then re-entered the train and the driver sounded the bell to indicate that the train was about to move.

23.3 He explained during cross examination that before re-boarding the train he checked also for any obstructions underneath the train and that there were no wheels on fire. He also didn't see any child on the train.

[24] The third witness was Mr Rasemati Baloyi who was the current Transnet corridor manager between Pyramid and Beitbridge since 2015.

24.1 He testified that the stone embankment alongside the railway line was built in 1920 to keep sand from railway line.

24.2 He also stated that when an incident occurs, it is regarded as a risk for the entire railway line. There had been no similar incident in the M[....] area before 2011.

The Law

[25] Where parties present versions that are mutually destructive the general approach by the court is to conduct a qualitative assessment of the plausibility, cogency, coherence, truthfulness and inherent probabilities in the

two versions tendered by way of evidence. The aim of the assessment is to establish in an objective manner which of the two versions is more probable than not *Stellenbosch Farmers Winery Group Ltd vs Martell*¹.

[26] What the plaintiff is required to prove is conduct, that is negligent, unlawful and wrongful as a probable cause for his injuries. Put differently, the plaintiff must present an account which is consistent with the objective evidence and the probabilities and one that is more likely than not *Yende vs. Prasa*.²

Analysis

[27] Plaintiff does not allege that the cause of the accident was the driver's negligence. He alleges that he was pushed under the train by one Hakalani a short distance from where the driver would have sat.

[28] The claim against Transnet is that its negligence was by failing to reinstall a fence and not putting up warning signs.

[29] Munonde's train journal regarding train 8282 confirms that it had 40 wagons and according to Baloyi this means it was 800 metres long. Munonde further testified that he did not see any person standing alongside the train shortly before it moved away. It is also his evidence that before moving, the train driver sounded the bell as per standard procedure.

[30] In the circumstances no negligence can be attributed to the driver and his assistant.

[31] Munonde's evidence seems to be consistent with that of Mbulaheni who stated that a boy at the M[....] Primary School reported to him that he had fallen off a train when he attempted to remove a reflector from the rear of the train.

Knowledge of the danger

¹ 2003 (1) SA 11 (SCA) at 14 J-15E.

² [2015] ZASCA 49 at [9-11].

[32] Whilst it is common cause that there were no warning signs in and around Freedom Park, Ms M[...], his grandmother testified that she had taught the plaintiff about the dangers of playing or walking near the railway lines and that the plaintiff understood that it was dangerous to do so.

[33] The plaintiff confirmed in his evidence that his grandmother had indeed taught him that it was dangerous to play at or near the railway lines however in his response to question by the court he denied that his grandmother had taught him about such a danger.

[34] Regarding this aspect of the danger at or near the railway line the defendant argues that the contradiction between the plaintiff and his grandmother demonstrated an inconsistency in their evidence and that the court should find that the plaintiff knew about the danger but nevertheless voluntarily put himself in a position where the danger could occur. His evidence also showed a tendency to prevaricate and lack reliability.

Absence of warning signs

[35] It does not follow, so the defendant argues, that the absence of warning signs caused the collision. The plaintiff did not proceed to the railway line due to ignorance of the danger of proximity to the railway line. He changed course when questioned by the court because he realised that knowing of the danger would not help his case regarding the absence of warning signs. Moreover, his evidence was not that he injured because he was not aware of the danger of the railway line but that one of the onlookers, Hakalani pushed him under the train.

Other inconsistencies

[36] Ms M[....] testified that the day of the accident was the first day that a train had stopped there. When weighed against other evidence this version is not plausible.

[37] The corridor manager (Baloyi) and Munonde the train assistant testified that the railway line was a freight or goods line and that many trains travel that line

past Freedom Park daily. About a kilometre just past Freedom Park trains had to change lines. Due to vandalism, this had to be done manually in order to switch lines. For this reason, trains had to stop before the switch point. Evidently it is improbable that the day of accident was the first time that a train had stopped at or near the settlement. Even in this regard the defendant's version would seem to be the more plausible one.

Not necessary to enter railway reserve

[38] The defendant submits that it is implausible that a good view of the train was 50 cm from the wagon as testified by the plaintiff.

38.1 The photographs show a rough footpath that stopped at a wall forming an embankment between the railway and the reserve and the area adjacent to Freedom Park. The wall is fairly high up from the level of the railway lines.

38.2 By all appearances there would have been no need to go within 50cm of a wagon to look at a train.

38.3 The plaintiff is a single witness on this very important point regarding the causation elements of the delictual claim, yet there is no witness to corroborate his evidence from the crowd of local people who were allegedly looking at the train with him.

The plaintiff not near middle of train

[39] The version that plaintiff was near the middle of the train when the accident occurred is also not plausible when considering the following factors:

39.1 Baloyi testified that train 8282 was about 800m long and that the switch point is not far from Freedom Park.

39.2 If the train stopped before the switch point, the back of the train would have been in the vicinity of the photographs.

39.3 Plaintiff said he was near the middle of the train where it had stopped. He did not testify that he had walked some 400m along the line to get to the middle of the train to look at a wagon.

39.4 In all probability, he could not have been at the middle of the train. He must have been at the back of the train which would be consistent with the evidence of Mbulaheni. He testified that a boy at the plaintiff's school said his leg was amputated when he tried to remove a reflector from a train. It is not disputed that the reflectors are at the back of a train.

39.5 Munonde also consistently testified that before the train took off, he checked both sides of the train and he did not see any persons standing alongside the train.

The collision

[40] The plaintiff's version appears to be implausible and incoherent when he describes how he collided with the train.

40.1 According to Mr Baloyi the dimensions of a wagon are that it extended about 90cm on either side of the railway line and the ground clearance is about 35cm.

40.2 The plaintiff said he stood about 50cm from the wagon which means that he was about 1.5 m from the railway line and the wheels of the wagon.

40.3 He said he was pushed at the top of his back from behind. When questioned by the Court he said he was pushed from the side. This was yet another inconsistency on a critical issue.

40.4 Be that as it may, it makes no sense that he fell feet first under the wheels of the wagon where his leg was injured resulting in an amputation at the hospital.

40.5 If pushed at the top of his back, he would have been pushed into the wagon extending 1m beyond the railway line. The most likely possibility would have been into or against wagon, rather than under the wagon. His version is so implausible as to invite a conclusion that the truth has not been told.

No fence at time of accident

[41] It has not been disputed that at the time of the accident there was no fence at Freedom Park in the vicinity of the railway line or railway reserve. According to Baloyi and Mbulaheni there was a fence. After the informal settlement started the fence was torn down by the residents. It was not replaced due to the assumption that it would be torn down again.

The cause of the accident

[42] According to the evidence tendered by the plaintiff, the cause of the accident was not the absence of fencing of the railway reserve from Freedom Park but the criminal conduct of one Hakalani who pushed the plaintiff under the train

[43] It would be wrong to merely draw an inference that the absence of a fence at or near the railway reserve caused or lead to plaintiff's injury. It is instructive to be guided by the Supreme Court of Appeal on the issue of inferences which in the matter of Mr Pasquale Della Gatta MV Filippo Lembo Imperial Marine Co v Delulemar Compagnia di Navigazione Spa³ held that:

“The drawing of inferences must be carefully distinguished from conjecture or speculation. As Lord Wright said in his speech, in *Caswell v Powell Duffryn Associated Collieries Ltd*: ‘inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish But if there are no positive proved facts from which the

³ 2012(1) SA 58 (SCA) at para 24.

inference can be made, the method of inference fails and what is left is mere speculation or conjecture.”

This court cannot engage in factual speculations beyond what could permissibly be inferred from the common cause facts especially where such inference would run contrary to plaintiff’s testimony.

[44] The test for negligence is reasonable foreseeability by Transnet that without fencing children would wonder into the railway reserve and push each other under the train *Kruger v Coetzee*⁴. It cannot be reasonably suggested that the test is applicable to the facts of this case where the evidence shows that the cause of the plaintiff’s injury was a criminal act of another individual person, Hakalani.

Conclusion

[45] Having considered all of the above I am of the view that the following order be made:

Order

45.1 The plaintiff’s claim is dismissed with costs.

SELBY BAQWA

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 23 October 2023

Date of judgment: 25 March 2024

Appearance

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⁴ 1966 (2) SA 428 AD at 430.

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