

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2018/8803

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

[5 July 2021]


SIGNATURE

In the matter between:

BHENGU, ZANDILE

PLAINTIFF

and

PASSENGER RAIL OF SOUTH AFRICA

DEFENDANT

J U D G M E N T

MUDAU, J:

- [1] The Plaintiff in this matter (Ms Zandile Bhengu), a fare paying train passenger, instituted action for payment of a certain sum of money in damages against the Passenger Rail Agency, South Africa ("PRASA") arising out of an incident where she was allegedly pushed out of a train owned and/or managed and under the control of PRASA ("Defendant"), and sustained injuries. At the

beginning of the trial, the Plaintiff applied for a separation of the issues of liability from that of quantum in terms of Rule 33(4) of the Uniform Rules. The application was supported by the Defendant. As the balance of convenience sustained such a separation, I accordingly granted the order.

[2] The Plaintiff's claim is founded in delict. However, she wishes to hold PRASA liable because of the alleged wrongful acts or omissions of its employees when they were acting in the course and scope of their employment. In order to succeed, the plaintiff would have to establish that: (a) the Defendant's employees owed a legal duty to the plaintiff to protect her; (b) they acted in breach of such a duty and did so negligently; (c) there was a causal connection between such negligent breach of the duty and the damage suffered by the plaintiff.¹

[3] PRASA's defence rests on a mutually destructive version that, the plaintiff attempted to board the train when the doors were already closed, and the train was already in motion at the time of the incident. The question to be answered, therefore, is whether the plaintiff has presented sufficient evidence to establish, on a balance of probabilities, that the PRASA employees acted in the manner that she says they did. The classic test for establishing the existence or otherwise of negligence, quoted with approval in numerous decisions of this Court, is that formulated by Holmes JA in *Kruger v Coetzee*:²

"For the purposes of liability *culpa* arises if –

(a) a *diligens paterfamilias* in the position of the defendant –

¹ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at para [25].

² 1966 (2) SA 428 (A) at 430E-G.

- (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
 - (ii) would take reasonable steps to guard against such occurrence; and
- (b) the defendant failed to take such steps.”

- [4] Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case.³
- [5] I turn to the evidence presented by the parties. The plaintiff testified that, on 15 February 2018 at approximately 10am, while in the company of her sister, Nompumelelo Bhengu and a friend (Lindiwe), she boarded a train at Daveyton train station to East Rand station in search of employment. They changed trains at Dunswart station, heading to Johannesburg. The train was not overcrowded as every passenger had a seat. There were no standing passengers.
- [6] She testified that the train was in motion with open doors from Dunswart station. She further testified that she was not familiar with train stations after Dunswart. She was in phone communication with a person who was to meet them at the East Rand station. She testified that she used that particular route between Daveyton and Johannesburg about 5 or 6 times and she knew, from previous experiences, that she had to change trains at Dunswart. On her version, the person they were to meet up with at East Rand mall had told them that the East Rand train station is two stations away after Dunswart. Out of caution, she had also been requested to ask anyone in her coach to show her where East Rand

³ *Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Limited and Another* 2000 (1) SA 827 (SCA).

station is. To that end, she asked a woman in the same row of seats as her to let her know when they get to the East Rand station.

[7] At the next station, the train stopped and commuters embarked. There were no commuters that disembarked. She got up from her seat and proceeded to the door to check where they were at that point. By the door with the train still stationery, she held onto a steel pole, leaned forward and peeped to her right. From a distance, she could see a board written Boksburg East. She explained that she did not know the name of the station because she had never disembarked at Boksburg East station before that incident. The train started to move. After turning to go back to her seat, two boys came running and bumped her such that she fell outside of the train. She fell on her back and landed on the platform. She became unconscious upon falling. She regained consciousness at Tambo Memorial hospital.

[8] Under cross-examination, she testified that she wanted to check if this was their intended destination that's why she got up to peep at the door. She remained at the door for approximately 2 minutes. She testified that the name of the station was written on a board in big letters, which she saw clearly. When asked why it took her 2 minutes to look for the name, she replied by saying that she just stood there. The reason why it took her two minutes is because she was inside the train and if she was outside, it would have taken her less than two minutes. After being pressed to clarify this evidence, she then explained that she did not take notice of how long she was standing at the door and the station was in the "veld".

[9] After the two-minute observation, she returned to her seat, which was 3-5 paces away when the 2 boys came running towards her and pushed her out of the

train. She does not know where they were coming from. The train was already in motion with the doors open. The plaintiff's sister testified and confirmed her evidence. It is on record that, Nompumelelo was present in Court throughout the plaintiff's evidence-in-chief and part of the plaintiff's cross-examination up to the point where these two boys allegedly came running towards the plaintiff. She only left the Court room after there was clarification sought as to who she was.

[10] During cross-examination, she testified that there is only one door on a coach and if anyone says otherwise that person would be wrong. It was then put to her that the plaintiff testified regarding the two doors on either side and she remained adamant that there was only one door. On her version the incident happened after the plaintiff had turned her back to the door, and was a step away. This was Nompumelelo's first journey from Daveyton to Johannesburg by train. She explained that she was not anxious or excited and she was only thinking about the job.

[11] According to Nompumelelo, she and Lindiwe provided the plaintiff's details to the officer in uniform but disputed that the plaintiff attempted to embark the moving train as per the entry in the JOC occurrence book. It was put to her that all the details are recorded save for the manner in which the incident happened. The entry also recorded that the injured person was bleeding from the nose and right ear. Nompumelelo was adamant, after correcting herself twice, that the plaintiff was bleeding from the ears only. Although there were people around the plaintiff, approximately 20, she could not tell whether anyone attended to the plaintiff. When she spoke to the plaintiff, the plaintiff was quiet. As to a question whether anyone else spoke to the plaintiff, her response was she did not pay attention.

- [12] During the clarification questions by the court regarding the door inside the coach where the plaintiff was, Nompumelelo blurted: “[T]he one she (Zandile) went out through?” The question had to be repeated to which she stated, it was opposite her. As to the height of her fall onto the platform, she testified that, it was about 30 cm. It is common cause from the hospital records that the plaintiff, upon admission at the hospital, was fully conscious with the Glasgow Coma Scale (GCS) reading of 15/15 and complained of bleeding from the right eye, with no visible injuries.
- [13] The defendant's sole witness, Mr Philani Ngcobo who was a metro train guard at the time with seven years' experience, testified that he was the train guard in charge of the relevant train 0344 on the day in question stationed at the middle of the train. The train was not busy because it was outside peak hour. He testified that the train arrived at Boksburg East station on this day and that the train doors were closed. He testified that the commuters disembarked and embarked after he opened the train doors.
- [14] He testified that his duty was to ensure that passengers embark and disembark under safe conditions, and insisted that he had done his job diligently and properly and had made sure that the doors of the train were closed after the passengers had alighted from and boarded the train before he signalled to the driver, sitting in the front of the train, that it was safe for the train to leave the station. He stated that there was a button in the coach which, when pushed, closed all the doors of the carriages. He testified that when the train was handed over, no faults were reported. There was no indication that the doors were dysfunctional as he and the driver would manually test the doors and also check the train for any air pressure leakages, which they did.

- [15] Mr Ngcobo also testified that he would observe as the train would enter and leave different stations, especially when it is a curved platform, that would inform him if there was a problem with the doors. He explained that if the doors of the coaches beyond the middle coach were open, commuters would make noise and tell him that there is a problem with the doors. He could not see commuters “breaching” the doors and that would give him an indication that the doors are not functioning. He testified that in the passage of the train coach three people could stand next to each other and agreed that there is enough space for people to move and pass each other. He estimated the space to be 2.5 meters.
- [16] He then explained that the platform and the safety yellow line intended to prevent commuters from encroaching was clear, and he blew the whistle to warn that the train was leaving. He then closed the doors and gave the driver the “right away” signal. As the train was leaving platform 2 and as he was leaning out of his cabin to observe the platform on the left side of the train, he saw a young lady running towards the train attempting to get onto the step of the coach but slipped and fell as it had been raining. The plaintiff was the only person on the yellow safety line when she crossed in an attempt to embark the moving train. He then rang the three emergency bells which is a signal for the driver to stop the train, which he did.
- [17] He phoned Brakpan Assets Protection Service to report the incident. After the train stopped, he disembarked from his cabin and went straight to where the plaintiff was. He noticed that she was bleeding from her nose. He spoke to the plaintiff and asked her what she was doing. According to him, she explained that she got off at the wrong station and the people inside the train called her to

come back. He was the first to reach the plaintiff who, at that stage, was next to the name board of the Boksburg East station.

[18] Not long thereafter, a security officer arrived at the platform to help him. He maintained and was emphatic that the plaintiff was conscious and she could even stand up. The train remained stationary for less than 10 minutes after which he handed over the scene to the station guard who had arrived. When the version of how the plaintiff allegedly came to fall was put to him he was adamant that he could not testify about what he had not witnessed, but maintained his version.

[19] During cross-examination, he strongly denied the plaintiff's version. He was adamant that he had already rang the ride away bell and closed the doors when the plaintiff tried to board the train, which was already in motion. He recorded the incident in his pocketbook which was subsequently left at their offices. However, because of the Covid-19 lockdown regulations, the offices were broken into and vandalized. After the breaking-in his pocketbook could not be found. He further testified that he obtained her name and cell phone number from the plaintiff. Had the plaintiff been unconscious he would have applied CPR as he had received training for that situation.

[20] In answer to clarification questions by the court, he testified that he found the plaintiff seated on the platform after the train had come to a halt. The plaintiff stood up when he approached her with a yellow reflective jacket on. He confirmed that the height in between the door of the train and the platform is about 25 to 30 cm.

- [21] The Constitutional Court has made it clear that PRASA has a public duty to provide public rail transport in a safe manner.⁴ However, the plaintiff, as indicated, bears the onus of proving that in the present case, that duty was not discharged and fell short of what the reasonable rail provider would have done to ensure commuter safety in the circumstances.⁵
- [22] The Court is faced with two mutually destructive versions. In summary, the plaintiff contends that she was pushed from inside the coach through the open doors and fell backwards onto the platform. The defendant's version is that the plaintiff attempted to board a moving train as it was leaving Boksburg East station. It is trite that the onus of proof rests with the plaintiff in this matter for an entitlement to her claim.⁶ It is a time honoured onus.⁷ However, in circumstances where mutually destructive versions are presented to the court, certain well established principles apply. This court is bound to approach these versions by applying the principles enunciated in the decision of *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*⁸ where Nienaber JA held as follows:

"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. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put

⁴ *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC).

⁵ Kruger note 2 above.

⁶ *Aegis Insurance Company Limited v Consani NO* [1996] 3 All SA 547 (A) at 558.

⁷ See *Passenger Rail Agency of South Africa v Sithuse* [2021] ZASCA 78 at para 26.

⁸ 2003 (1) SA 11 (SCA) at 14I-15D.

on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[23] However, findings of credibility cannot be judged in isolation, but should be considered in light of the proved facts and the probabilities of the matter under consideration.⁹ In addition, each case will depend on its own particular facts.

[24] In my view, the plaintiff, as the defendant correctly contended, did not make a favourable impression as a witness, she was evasive. She came up with different versions as her reason for going to the door at Boksburg East station. The plaintiff's initial explanation was that she had not been at this station and wanted to check the name of the station. Another explanation was that she wanted to check the name of the station so that she could see whether it was their intended destination because the person who she was in contact with told her that the station is after Dunswart station. A third version was then given by

⁹*Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA).

her witness, Nompumelelo, in that the plaintiff looked in order to report to the person at the intended destination where they were. The plaintiff, for example, could not recall how long she was standing at the door after estimating two minutes and then stating that the station is in the “veld”. I find it improbable that the plaintiff stood at the door for approximately two minutes just to verify the name of the station, written in bold letters in three separate boards as a defence witness testified. She had difficulty to explain where the two boys came from whereas she had taken a step towards her seat at the very least, before being pushed out.

[25] The fact that the plaintiff’s witness, Nompumelelo, was in court when the crucial evidence was led requires that her evidence be considered with the necessary caution. The poor quality of the plaintiff’s version is exacerbated when Nompumelelo, as indicated, blurted “the one she (Zandile) went out through” with reference to the door, which is consistent with the defendant’s case. The statement was unsolicited. Realising her mistake, she tried to explain it away but was unimpressive in the process. Nompumelelo testified that the plaintiff stepped out of the train but attributes it to the fact that she was confused between left and right. Both witnesses for the plaintiff paused on several occasions when pushed for an answer and came up with long explanations. The plaintiff, for example, could not recall how long she was standing at the door after estimating two minutes and then stating that the station is in the “veld”.

[26] It was not placed in dispute that Mr Ngcobo was on duty as the train guard on the Boksburg East train on the day in question. Accordingly, I accept that he was there and that he was an eye-witness to what occurred. There is no reason to doubt that he had a good view of what occurred at platform 2 as, on the

common cause evidence, the incident happened out of peak hours. There was nothing in the demeanour of this witness to suggest that he was being untruthful. In comparison to the plaintiff and her witness, he was not evasive in his answers, nor did he hesitate when asked questions under cross-examination. Where applicable, he made favourable concessions to counsel on behalf of the plaintiff, in particular, to what happened inside the coach which the plaintiff and her witness occupied.

[27] I gained a distinct impression that Ngqobo was giving honest evidence based on the best of his recollection from the incident in question. The fact that the train came to a halt shortly before it cleared platform 2, lends credence to his version that he witnessed the accident and notified the driver of the train who responded. Accordingly, I find no reasons to conclude that he was not a credible witness.

[28] With regards to a report of the incident relied upon by the plaintiff from Singobile Security that she “jumped off a moving train and fell”, its evidential status, as discovered by the defendant in respect of which no evidence was led regarding its authenticity and reliability, this court (per Sutherland J) stated aptly:

“[19] Controversy also arose about reference to documents in the bundle. The almost universal practice of preparing a bundle of all the documents that might be referred to in evidence is a boon to orderly litigation. However, it invariably occurs that not all the documents in a bundle are traversed in evidence. In my view, a document not traversed in evidence is not before the court, unless a prior agreement exists that it be admitted in a fashion other than through legitimate reference in evidence by a witness competent to comment thereon. The customary mantra that ‘all documents in the bundle are what they purport to be without any admission to the truth of their contents’ confers no evidential status on a document unless it is introduced through a witness capable of addressing the contents, called by one or other of the opposing parties. (See, eg:

Howard & Decker Agencies & Fourways Estates (Pty) Ltd v De Sousa 1971(3) SA 937 (T) at 940 F – G) The problems that arise for a litigant who itself cannot adduce evidence about a document can sometimes be addressed by compelling, when competent, a person under a subpoena to appear and address the document. Accordingly, no reliance may be placed on such documentary material, however relevant, in the absence of these two methods of adducing it.

[20] Therefore, where for example, a mine of data is contained in the bundle that would be most useful in the cross-examination of a given witness who might testify for the adversary, but that witness is not called, thereby depriving the cross-examiner of the chance to advance the case by challenging the absent witness with the data, it is not open to a party, later in argument, to allude to such material, however relevant it might be to any issue in dispute.”¹⁰

[29] This is exacerbated by the fact that the incident, as initially recorded on JOC 918, apparently by a security guard, Mantswi states that she “attempted to embark on a moving train 0344” when she fell and sustained injuries. The Singobile Security report was compiled based on a report by Mantswi, which is contradictory.

[30] It is highly unlikely and therefore improbable that the plaintiff would have been pushed out of the train by unspecified third parties, in this instance two boys whereas the train on the common cause evidence was not overcrowded. These unidentified boys would on the probabilities, have had an option to go around past the plaintiff or use other exit points to disembark the train. The alleged presence of these two boys who rushed out of the train as it pulled out of the platform when there was no stampede and with no one else in the plaintiff’s version disembarking, is opportunistic.

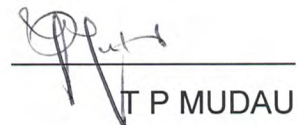
¹⁰ *Thomas v BD Sarens (Pty) Ltd* [2012] ZAGPJHC 161 at paras 19-20.

[31] Having had regard to all the evidence I consider it very probable, and I find accordingly, that the plaintiff got off the train to confirm the name of the station on the written boards. Understandably, she was anxious not to miss her appointment at the intended destination. Of the three of them, she was the only one with the train experience. However, as it was off-peak times and the station was not busy, she miscalculated the time spent outside the train. For on her version, she waited for commuters to board the train before proceeding to the door. On the defence version, there were commuters who boarded and those who disembarked. Valuable time was, on either version, lost before she stepped out of the train.

[32] The injuries sustained on her right eye, right ear and nose, on the probabilities, are consistent with the defence version that she slipped and fell as opposed to the plaintiff's version that she was pushed and fell on the platform from a height of approximately 30 cm on her back. It follows, accordingly, that this claim must be dismissed.

[33] I make the following order:

The plaintiff's claim is dismissed with costs.

A handwritten signature in black ink, appearing to read 'T P MUDAU', is written over a horizontal line.

Judge of the High Court,
Gauteng Local Division,
Johannesburg

Date of Judgment:

5 July 2021

APPEARANCES

For the Plaintiff:

Adv. M Mthombeni

Instructed by:

Mngqibisa Attorneys

For the Respondent:

Adv. F F Opperman

Instructed by:

Majavu Inc.