

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

CASE NO: 14228\17

1. REPORTABLE: YES / NO 2. OF INTEREST TO OTHER JUDGES: YES/NO 3. REVISED. 21/01/2019 DATE	 SIGNATURE
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In the matter between

Banze Antonio Yonge

Plaintiff

and

Passenger Rail Agency of South Africa

Defendant

Coram: Munzhelele AJ

Heard: 22 October 2018

Delivered: 21 January 2019

JUDGMENT

MUNZHELELE AJ:

Introduction

[1] The plaintiff, Antonio Yonge Banze has instituted an action against the Defendant, Passenger Rail Agency, South Africa claiming for damages arising from an incident in which the plaintiff was injured, at Kempton Park Station on the 5th August 2016. Summons were issued and duly served upon the Defendant and the Parties agreed, at pre trial and in terms of Rule 33 (4) of the Uniform Rules of Court to separate merits and quantum. The trial proceeds to deal with the issue of liability.

[2] The issue to be determined is whether the defendant owed duty of care to the plaintiff and whether the defendant failed to take reasonable steps to ensure the safety of the plaintiff as a passenger in the train.

Evidence

[3] The plaintiff testified that during the day he was working piece job at Bonearo Park, painting a house. During that time he was staying at Ivory Park, Thembisa. He took off after finishing the piece job to the train station. He testified that his employer had bought him a monthly train ticket. The plaintiff proceeded to Kempton Park Train Station near Shoprite and waited for the Train to Thembisa at platform 1. The train arrived. However during cross-examination it became clear that platform 1 trains goes to Johannesburg and not Thembisa. The Plaintiff and other commuters proceeded to board the train. The train was not full, as testified by the Plaintiff that there were seats available where he could seat. The train pulled off with the doors closed. But later under cross examination the plaintiff changed his version to say that the doors of the train were open when the train took off.

[4] The Plaintiff, despite the availability of seats and or other places where he could be seated, took a conscious decision to stand near the door of the train holding a belt on the hand rail of the train. Then the train started moving. The Plaintiff was allegedly pushed by other commuters and fell at the platform. However during cross examination the plaintiff was confronted with his hospital records which show that he was pushed and fell while getting off the train, again on cross examination he alleged that he was pushed while getting into the train. Plaintiff also alleged during his evidence that he fell on the platform but his legs were on the gap between the train and the platform. The plaintiff during his evidence insisted that he fell at platform 1 but the evidence of the security was that plaintiff was found fallen at the end of platform 4. Mr. Payi's evidence was not challenged by the Plaintiff.

[5] The security personal, by the name of Andile Payi "Mr Payi", was called by a commuter and told that there is a male person who has been injured on his legs and is on the end of Platform 4, Mr. Payi went to the scene and discovered that the injured person was not actually on the Platform but on the floor next to Platform 4. Mr. Payi further testified that it is not possible for a person to fall in a gap between the platform and the train as there is no gap when the train at the platform.

[6] Mr Payi spoke to the injured person who, from the evidence, identified himself as the Plaintiff, this means that the Plaintiff was conscious, and this can also be confirmed by the hospital records submitted by Plaintiff that he was awake. The Paramedics were called and arrived at the scene. They searched the

plaintiff and found a R20.00 note in his possession only. Plaintiff was not found with any train ticket.

Issue to be determined

[7] The court has to find whether the Plaintiff discharged his burden of proof on a balance of probabilities, that he was pushed out of a moving train. Plaintiff should further prove that he did indeed board the train and it moved without the doors closed. If the plaintiff boards the train, whether the defendant owed a duty of care to the plaintiff and whether the defendant failed to take steps to ensure the safety of the plaintiff.

Legal principles applicable

[8] It is trite principle that the onus can ordinarily be discharged by adding credible evidence to support the case of the plaintiff on whom the onus rest. Where there are two mutually destructive stories, the plaintiff can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable and the version of the defence is false or mistaken and falls to be rejected (see *National Employers' General Insurance v Jagers* 1984 (4) SA 437(E) at 440D-G).

[9] In *Loveness Mhlongo v Passenger Rail Agency of South Africa* (20594/2014)[2016] ZAGPJHC353(15 December 2016) it was held that:

‘where it was found that the plaintiff was pushed out of the open doors of the carriage while the train was in motion, negligence was readily found to have been established’ (see also *Hlongwane v Passenger rail agency of South Africa* (26582/2016)[2018] ZAGPJHC 401 (29 May 2018) para 9).

Discussion

[10] The Plaintiff has more than one version regarding the allegations that he was pushed by other commuters from an open moving train and fell on platform 1. The Plaintiff himself was the only witness to his case to prove the allegation. The legal principle of cautionary rules is applicable and has been trite to mean that the evidence of such a witness must be “clear and satisfactory in every material respect”, and such evidence must be approached with caution (see *R v Mokoena* 1956 (3) SA 81 (A) at 85 H). In other words, the evidence “must not only be credible but also reliable” (see *S v Janse van Rensburg & Another* 2009 (2) SACR 216 (C) at 220 G). There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see *S v Webber* 1971 (3) SA 754 (A) at 758). The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told (*S v Sauls & others* 1981 (3) SA 172 (A) at 180 E – F).

[11] The plaintiff's evidence is riddled with contradictions regarding material issues of his boarding the train. There is uncertainty as to which platform was the plaintiff boarding the train, whether it was platform 1 or 4. Plaintiff testified that he was on platform 1 but the security found him lying injured at platform 4. Platform 1 at which the plaintiff alleges that he was boarding, leads to Johannesburg yet he said that he was going to Thembisa. Plaintiff could not be said to mean that he does not know Thembisa platforms as he had a monthly train ticket to Thembisa and had been travelling by train to his home every day since the beginning of the month. This version of the plaintiff is not clear and is unreliable.

[12] The plaintiff in his testimony said that he was pushed out of a moving train by the commuters while inside the train standing holding a belt, whereas his hospital records reflects that he was pushed out of the train when he was getting off. On the other hand the plaintiff said on cross examination that he was pushed out of the train while he was getting inside the train. On the evidence of the plaintiff getting in and out of the train it was not clear whether the train at that time was stationery on not. It is clear from the evidence of the plaintiff that he was modifying his story as the questions were posed to him. The evidence of the plaintiff should be credible and reliable. With so many versions given by the plaintiff it is difficult for the court to rely on his evidence.

[13] During his evidence in chief the plaintiff was certain that the train doors were closed when the train took off, but the following day while under cross-examination the plaintiff changed his version and said that the doors of the train were open as the train took off.

[14] These contradictions are material to the case of the plaintiff. The evidence of the plaintiff should have been clear and satisfactory in all material aspects in order to discharge the onus to prove his case and to show to the court that the defendant had a duty to protect him and to guarantee a safe trip on train.

[15] Another important issue which the plaintiff should prove was the issue of a ticket to board the train. The security testified that plaintiff was searched by the paramedics in his presents and plaintiff was found without a train ticket. Plaintiff testified that he had a ticket which was bought for him by his employer. He produced a ticket as an exhibit. This ticket did not have any

identifying feature to show that it was his ticket, it could be anyone's ticket. In this regard it is the word of the security against the word of the plaintiff. However the plaintiff had a duty to prove his case that this was indeed his ticket. He should have called the employer to corroborate his version.

[16] The reason(s) for such a failure was not mentioned to the court, and such a failure has an adverse and detrimental effect towards the Plaintiff's case in the circumstances. Where there are two mutually destructive stories, the plaintiff can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable and the version of the defence is false or mistaken and falls to be rejected (see *National Employers' General Insurance v Jagers* 1984 (4) SA 437(E) at 440D-G). The Plaintiff could and should have done more to prove his case and or allegations.

[17] I have found that the Plaintiff failed to prove through clear and satisfactory evidence that he was pushed out of a moving train while the train doors were open. I have also found that the plaintiff failed to prove that he had a ticket to board the train on 5 August 2016. The plaintiff failed to show on a balance of probabilities through evidence that the defendant had a duty of care to the plaintiff and to take steps to ensure the safety of the plaintiff. The plaintiff's version is false and stands to be rejected. The version of the defendant is on a preponderance of probabilities reasonable in the circumstances.

[18] In the result the following order is made:

1. The plaintiff's claim is dismissed with costs.



M.M. Munzhelele

Acting Judge of the High Court
PRETORIA

Counsel for the plaintiff: Advocate N.R Shithlelana

Instructed by: Rapfumbedzani Attorneys

Counsel for the defendant: Advocate F.F. Operrman

Instructed by: Jerry Nkeli & Associates Inc