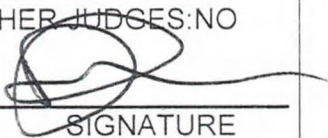


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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO	
(2) OF INTEREST TO OTHER JUDGES: NO	
12/01/2018	
DATE	SIGNATURE

12/1/18

CASE NUMBER: 7392/16

MORENA NARE RODGERS

Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Defendant

JUDGMENT

RANGATA AJ

INTRODUCTION

[1] The Plaintiff, Mr Nare Rodgers Morena, is claiming damages in the amount of R3 350 320.00 allegedly suffered as a result of injuries sustained from falling off a moving train on the 19 October 2015. The defendant is disputing liability as alleged or at all. The Defendant alleges that the accident was caused by the sole negligence of the Plaintiff.

[2] The parties agreed on the separation of merits and quantum in terms of Rule 33(4) of the uniform Rules of court. The matter proceeded on the issue of merits only and the Quantum is postponed sine die.

BACKGROUND

[3] On the 19 October 2015, at around 18h00 the Plaintiff boarded a train at Elantsfontein station to Tembisa, his place of residence. When he entered the train he could not sit as the train was full. He stood on the passageway and supported himself with the hanging straps for standing passengers. He stood in the middle of the passageway, approximately 1 metre from the door facing the door through which he entered the train. When the train approached Kempton park station, there were a number of commuters who wanted to board the train and those that wanted to disembark from the train. In the process of commuters entering and some alighting from the train, he was pushed from where he was standing and he fell through the open doors onto the platform. He was hit by an object to his right leg, which was later amputated above the knee.

[4] The plaintiff testified that on the date of the incident he was from work at Cargo Logistics, Jet Park, Elantsfontein on his way home at Tembisa. He boarded the train at

Elantsfontein train station ("Elantsfontein"). The train was full to the extent that he could not find a seat as they were all occupied and had to remain standing. Whilst standing he supported himself with the hanging straps used by standing passengers.

[5] He testified that the doors of the train were, at least the door he used when entering the train not closed from the time the train arrived at Elantsfontein station and when the train left the said station. The couch he occupied was the second couch from the rear. The train proceeded to the next station, Isando, then Rhodesfield station without any incident. At all times the train was full, but passengers continued to embark on the train and others disembarking. At Kempton park station which is the next station after Rhodesfield station, the train stopped at the platform. Passengers disembarked and others embarked onto the train. The plaintiff averred that there were a lot of passengers at this particular station unlike the other stations that they passed. As the commuters entered the carriage and others leaving the carriage, there was a lot of pushing, however he managed to hold onto the railings designed for standing passengers. He held on the railings with one hand as others (railings) were already occupied by the other passengers.

[6] He averred that at some point the train started to move whilst the passengers were still embarking and disembarking from the train. The movement of the train caused the passengers to panic and started pushing each other. He lost the grip of the railing and was pushed through the open door and fell onto the platform. As he landed onto the platform he had his head away from the train and his legs were nearer to the train. He was hit by an object from the body of the train on his right leg leaving him with an injured right leg which was later amputated. After he fell, the train stopped and he was assisted by the security guards. He was later taken to the hospital by ambulance.

[7] The defendant called one witness, the driver of the train, Mr Tshabalala to testify. He averred that on the date of the incident he was the driver of train no 0659. Due to the signalling problem at the platform, wherein the train control office could not read the signal, the train could not proceed at Jeppe station for an hour. The delay created

backlog on the scheduled trains and as a result, there were many people who wanted to board on the train causing further overloading. After the signalling problem was attended to, the train proceeded to pass Jeppe station and train stopped at the Kempton park station. It stopped for some time to allow commuters to board and to disembark. He furthermore averred that he did not witness the incident; as a result he does not know how the accident happened. He further averred that he heard of the incident in 2016 when he was contacted by the investigator employed by the defendant, Ms Mojapelo requesting the details of the incident.

[8] He averred that he was assisted by the metro guard, Mr Johannes Selepe, who was seated at the rear coach. He could not confirm as to whether the train doors were open when the train was in motion; however he averred that if the doors were opened when the train was in motion, he would have seen the signal from the train panel showing the sign of opened doors. He averred that the guard is the right person who could testify on this aspect as it is his responsibility to check if the doors are working and the condition of the carriages.

ISSUES

[9] The issues to be determined by this court are as follows:

9.1 Whether there is a possibility that the doors of the train were not closed at the time of the incident;

9.2 Whether the defendant should have taken steps to guard against such possibility and such possibility was foreseeable

9.2 Whether the plaintiff contributed to such negligence.

THE LAW

[10] The law for negligence was formulated in the case of *Kruger v Coetzee* 1966 (2) SA 428(A) 430E-G, wherein it was held that:

"The purpose of liability, culpa arises if-

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

(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"

ANALYSIS

[11] In the case at hand it is common cause that the train was full on the date of the accident, in particular immediately prior thereto. The plaintiff submitted in his evidence in chief that when he entered the train at Elantsfontein he could not secure a seat and had to stand at the passageway of the train. The defendant submitted that when the train stopped at Kempton park station, there was a lot of people. When asked as to whether all the people who were at the station could board the train prior to the train moving, he responded that, 'the train guard would be the best person to answer the question as he is the one who would see to it that the passengers have safely boarded and thereafter signal to the driver if all is in order'.

[12] It was further submitted by the plaintiff that from the time he boarded the train at Elantsfontein station, the doors of the train were opened. The train driver on behalf of the defendant submitted that the train went through the inspection process prior to the journey and there was no report as to the problems on the train doors. The train panel did not report any malfunctioning. In addition thereto he submitted that he would have relied on the train guard who would have also noticed if the doors were not closing. The train guard was a crucial witness who would have shed more light on the events of the date in question, as it is the train guard's duty to ensure that the train is safely operated

and the passengers are safe. The decision of the defendant not to call the train guard to testify compromised its case in disputing the version of the plaintiff. From the evidence of the plaintiff it can be accepted that the doors of the train were not closed, as the plaintiff fell whilst the train was moving. Had the doors been closed when it started to move the plaintiff would not have fallen onto the platform when the passengers were pushing each other.

[13] In the case of *Transnet Ltd t/a Metro Rail and Another v Witter* (517/2007)2008ZASCA 95 (16 September 2008) the court remarked that, “a train leaving with open doors constitute negligence. Further that the duties of the train guard is to ensure that all train doors were closed before he gave signal to the driver”.

[14] In the case of *Mashongwa*¹, the Constitutional court stated that:

[66] “...it is on this basis of the traditional test that causation will be determined. Had the doors of the coach in which Mr Mashongwa was travelling been closed, it is more probable than not that he would not have been thrown out of the train. ...”.

[67] “In all likelihood, he would not have been thrown out of the train had the strict safety regime of closing coach doors, when the train is in motion, been observed. Contrary to what the Supreme Court of Appeal held, it strikes me as highly unlikely , based on the evidence tendered , that the three attackers would have found it easy to force the doors open and throw out Mr Mashongwa, who was resisting , as quickly as they did taking advantage of the already open doors. On a preponderance of probabilities Mr Mashongwa would not have sustained the injuries that led to the amputation of his leg had PRASA kept the doors closed’

[14] PRASA has an obligation to protect its passenger’s bodily integrity and failure to do so attracts liability to compensate for damages suffered as a result thereof. In dealing with the question whether the defendant should have foreseen that the passengers would be exposed to danger , if the train travelled with open doors, the

¹ *Mashongwa v PRASA* (CCT03/15)[2015] ZACC 36; 2016(2) BCLR 204(CC); 2016(3) SA 528(CC) (26 November 2015)

court is guided by the evidence of the plaintiff which confirms that the doors of the train were opened at the time when the train was in motion. The situation of an overloaded train and the doors being opened whilst the train is in motion was extremely insecure and exposed the passengers to imminent danger. The defendant has not provided any evidence to contradict the plaintiff's evidence that the doors of the train remained opened from Elantsfontein station until at the place of the incident, at Kempton park station. Being pushed out of the train by passengers pushing in and out of the train is more likely if the doors of the train are opened.

[15] The plaintiff on the other hand, had the responsibility to ensure that he does not expose himself to danger when entering and disembarking from the train. In his evidence he averred that he used train as his daily mode of transport and that he had bought a monthly ticket. Being a frequent train commuter, it is expected of the plaintiff to know that he should not expose himself to danger.

[16] In the case of Chauke v Passenger Rail Agency of South Africa (8394/13), para 81, Motepe AJ stated that:

".. the plaintiff was pushed by other commuters while he was already standing inside the train securing herself on the rails inside the train. She did not attempt to board a moving train. In my view it will be unfair to hold it against her that she boarded the train that was already full and remained inside despite more people coming in. She testified that she had a ticket for the train and could not afford to miss it because she did not have money to go catch a taxi to work. In any event, there is no suggestion that when she boarded the train she was aware that the doors of the train were not going to be closed once it departed. I can find no conduct in her part which indicates contributory negligence".

[17] Section 1(1) (a) of the apportionment of damages Act 34 of 1956, enjoins a court to reduce damages suffered by a claimant 'to such extent as the court may deem just

and equitable' having regard to the degree to which the claimant was also at fault. A failure to exercise reasonable care in one's own interest constitutes negligence on the part of the plaintiff. The court must therefore determine whether the claimant's actions or omissions, causally linked to the harm, deviated from the norm of the bonus paterfamilias in the plaintiff's position.

[18] Taking into account the legislation referred to above, the court has to interrogate the evidence of both parties to determine any issues related to contributory negligence. The plaintiff submitted that the defendant was negligent as indicated at paragraph 5, 6 and 7 of the particulars of claim and that such negligence was the sole cause of the accident. The plaintiff submitted that the doors of the train were not closing when the train was in motion. He further submitted that the train was overloaded, and started to move whilst the passengers were still alighting and others entering the train. In that process the passengers panicked and started to push each other. Whilst pushing each other the plaintiff fell off from the moving train and sustained his injuries.

[19] It is submitted by the defendant that the plaintiff's version as to how the incident took place is not probable. It was submitted that the fact that when he fell from the train as a result of being pushed, he was the only one who fell off from the train and was injured. The defendant submitted that this raises questions as to why other commuters did not fall off the train. The defendant submitted that the plaintiff caused and/or contributed to the accident as alleged at paragraph 4 of the defendant's plea. It is the submission of the plaintiff that he boarded the train at Elantsfontein en route to his place of residence at Tembisa; he had no reason to be alighting from the train at Kempton park station.

[20] The defendant in its evidence did not disprove the allegations by the plaintiff that the doors of the train were not closed when it was in motion. Further that at no stage from the time the plaintiff boarded the train did the doors close. Failure to ensure that the doors of the train are closed when the train is in motion is failure by the defendant to ensure safety of the commuters and exposing them to danger. The defendant should have foreseen the possibility of danger by overloading the train and not ensuring that

the doors are safely closed before the train moved. Considering the case Mashongwa, had the doors of the train been closed when it started to move, it is highly unlikely that the plaintiff would have fallen off from the train onto the platform.

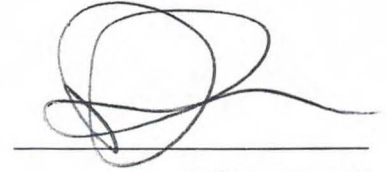
[21] The defendant submitted that the plaintiff was the cause of the accident as he was staff riding the train, and as a result was injured. It further submitted that should the court find that the plaintiff's version is probable, it should also find in the alternative that the plaintiff entered a full train and knowingly exposing himself to the risk of being injured, further that he attempted to embark and disembark from the train at the moment when it was inopportune to do so, then the plaintiff contributed to the accident.

[22] The plaintiff testified that at no stage had he attempted to alight from a moving train or enter the train whilst in motion. There is no reason for the court not to accept the version of the plaintiff as no evidence was led by the defendant to disprove it. The defendant elected not to call the train guard to testify in the matter, as he would have been the right person to provide the details of the occurrence as opposed to the driver. The driver of the train could not assist as to the circumstances surrounding the accident. He submitted that he did not see the accident; also that he was not aware that a passenger from the train that he was driving fell and sustained injuries. He submitted that he heard of the incident from some of the commuters. He further submitted that he was made aware of the incident by the investigator appointed by the defendant. As a result he could not assist the court in responding to the version of the plaintiff.

[23] Therefore it is accepted that the plaintiff sustained his injuries as a result of falling from the train. The defendant failed to take reasonable steps to ensure that the commuters are safe and not unnecessarily exposed to danger. There is no sufficient evidence to sustain that the plaintiff contributed to the accident.

In the result I make the following order,

- (a) The plaintiff is entitled to recover from the defendant 100% of his proven damages; and
- (b) The defendant is ordered to pay the plaintiff's costs of the action

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right, positioned above a solid horizontal line.

B RANGATA
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISIO (PRETORIA)