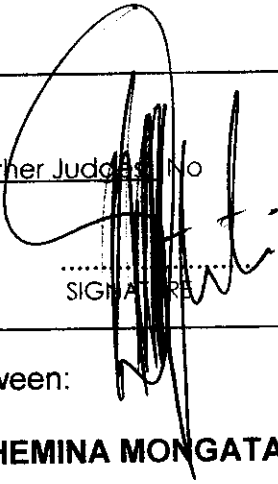


REPUBLIC OF SOUTH AFRICA



GAUTENG HIGH COURT
PRETORIA LOCAL DIVISION

CASE NO: 85538/2014

Reportable: No	
Of Interest To Other Judges: No	
22/02/2017	
Date	SIGNATURE

22/2/2017

In the matter between:

NTHETHE WELHEMINA MONGATANE

Plaintiff

and

PASSENGER RAIL AGENCY SOUTH AFRICA

Defendant

JUDGMENT

Senyatsi AJ

Introduction

1. This is a claim for damages of bodily injuries amounting to R2 million arising out of injuries sustained by the plaintiff as a result of allegedly being pushed as he was getting out of a train owned by the defendant at Shortpark Station on the 27th of September 2013.

2. By agreement between the parties the issue of quantum was deferred to a later date and the court was required to make a determination of the merits.
3. The plaintiff testified and called one witness in support of her evidence. The defendant called three witnesses to testify on its behalf.

Facts

4. On the 27th of September 2013, the plaintiff was a passenger in a train.
5. She had boarded the train at Olifantsfontein. The station was full of passengers due to the delays occasioned by other trains which had not yet arrived to ferry the passengers.
6. She forced her way into the coach which was jam-packed with other passengers. The coach was so full that she could not see her handbag and had to hold on to it whilst standing in the train.
7. She stood all the way from Olifantsfontein to Sport Park station where she was going to alight. She had boarded train number 0611 in the morning at about 6h00 that day.
8. There were no train guards in her coach. Some passengers alighted at the stations between Olifantsfontein and Sports Park station which is on the way to Pretoria.

9. When she reached Sports Park station with the train still full, she forced her way through to alight and according to her she was pushed by other fellow passengers. She tripped as a result, and fell on to the platform.
10. She sustained a fracture to her ankle. No evidence was led on the extent of her injuries.
11. The second witness for the plaintiff was Polumia Kgadimisha Kgare who testified that the train from Olifantsfontein was full. She was not a friend of the plaintiff and only knew her as a fellow passenger as they always used the same train to work from Olifantsfontein station. She became acquainted with the plaintiff.
12. She confirmed that the train was full on the day in question.
13. As she alighted the train from Sports Park station, she heard the scream of a woman from behind her as she was walking away from the platform. When she looked back, she discovered that it was the plaintiff on the ground who was sitting down.
14. She went back to assist her and was informed by the plaintiff that she had fallen from the train. The plaintiff asked her to use her(the plaintiff's) mobile phone to let her daughter know of the accident which she did. She did not see how the plaintiff fell from the train.
15. She confirmed that the coach she was in was full of passengers.

16. The train had no guards on board save for one who sat in the back seat of train. The passengers were pushing one another to get on board and alight from the train when they left Olifantsfontien station. It appeared to her that there were delays of other trains as the volume of passengers on the platform at Olifantsfontein station was unusually high.
17. She provided pictures of a full train with the passengers hanging over doors and at the back. She testified that she normally takes those pictures if she could not board the train due to over congestion of passengers to use as evidence for the reporting late to work.
18. On the day in question however, she was able to board the train although it was full. She did not for that reason take the pictures of the extend of the passengers on board the train.
19. She was joined by a female security officer and together they helped the plaintiff to a nearby bench where then proceeded to sit down.
20. An ambulance was called and the plaintiff was taken to hospital.
21. Three witnesses testified on behalf of the defendant.
22. Fumani Brony Mashaba testified that he was employed by the defendant as a train guard from 2012 to date with eight years of experience in that role.
23. He was on duty on 27 September 2013 and went to Johannesburg from Pretoria at 3h30 in the morning on train number 044. He then, on

the same morning, took train number 0611 from Johannesburg to Pretoria as part of his guard duties.

24. He sat at the last coach in back of the train. His job was to open and close all the train doors after the passengers have boarded or alighted the train. He did this by sticking his head out of his coach and once satisfied that all have boarded or alighted he would close the doors that he had opened before the train came to halt.
25. Usually when the station is on a straight line platform , this would require him to stick his head through the window to see ahead ,but he has to alight the cabin of his coach if the station has a curved line to ensure that passengers safely board or alight the train before he goes back to his cabin to close the doors.
26. His testimony was that when train no. 0611 arrived at Olifanstfontein station, the station was not unusually full of passengers. According to him, the volume of passengers was quite normal. He did not observe any pushing of the passengers alighting or getting aboard the train.
27. When arriving at the Sports Park station, the passenger volume was also normal and not unusually full. He did not see the plaintiff or the platform as the train was pulling away from the station. He conceded that where he sat in the train he did not have an idea as to how full the coaches were. He was also the only guard on the train the day of the incident.

28. He testified that Olifantsfontein is an average station with neither too many nor too few passengers thereof. Sport Park on the hand, is a small train station with a low volume of passengers.
29. According to him he has never seen a train full of passengers and said passengers hanging onto the door handles. He further testified that he had never seen passengers pushing and shoving one another to either board or alight the train. He did not see the plaintiff fall to the platform or see her lying down as the train was leaving Sport Park station.
30. Konani Constance Mudau, a female security officer working for R1 Security contracted by the defendant testified as a second witness.
31. She was on duty and based at Sport Park station on the day the incident occurred. She did the patrolling and observation duties on behalf of the defendant having started working on a 06h00 to 18h00 shift. She was at platform 2 where train 0611 came to a halt which arrived at Sports Park station at about 07h00.
32. Her duties involve observing passengers getting aboard or alighting the train. After train No: 0611 departed , she noted two ladies standing and enquired as to if all was well upon which she was told by one of them that she slipped when she was getting out of the train due to her sandals. She took the injured lady, the plaintiff, to a chair nearby and informed her colleague who then called the supervisor.

33. An ambulance was called as it was clear that the plaintiff was injured. When her colleague arrived at the scene, the plaintiff stated that she slipped and fell due to the sandals she wore on the day.
35. Upon arrival of the ambulance personnel at about 8h00, the plaintiff was asked about the cause of injuries in her presence and she stated that she slipped at the platform whilst getting off the train. The plaintiff was taken to Tshwane District Hospital for treatment.
36. According to this witness, the train was not full and she did not see people pushing one another to board or disembark the train on the day in question. She also that she had never seen people hanging on the doors of the train due to it being full.
37. She conceded under cross examination that she did not prepare the statement of the incident but same was prepared by one Donald Macwele who works for the defendant. She conceded that she signed the statement at the same time that Molimi , the other witness, signed his statement.
38. Another witness, Mr Mahlatse Nicents Molimi, testified for the defendant. He was on guard duty on the day of the incident as he was employed by R1 Security as a security officer and was stationed at Sport Past Station.
39. He observed a lady being assisted by his colleague, the second witness, Constance Modau at the exit point of the station. The lady, who we now know was the plaintiff, was injured from a fall which she claimed was caused by her slipping on the platform as she left the train due to the sandals she had put on.
40. This witness also testified that the plaintiff claimed that the cause of her injury was due to slipping caused by the sandals shoes she wore.
41. He called his supervisor who contacted the Joint Operation Centre of the defendant as a result of which an ambulance was called to take her to hospital.

42. He also testified that he was present when the plaintiff informed the ambulance personnel that she slipped and fell as she disembarked the train due to the sandals she wore on the day of the incident.
43. He confirmed that when he saw the plaintiff for the first time, she was in the company of his colleague Ms Mudau and another unknown lady and they were about 10-20 metres away from him
44. This witness was not helpful regarding the volume of passengers inside the train as he was patrolling the platform parameters. He however conceded under cross-examination that the statement that formed part of the bundle of evidence was taken by one Donald Macwele, who is employed by the defendant and read out to him to sign. He confirmed that he was employed by R1 Security and was stationed at Sport Park Station

Legal issues to be determined

45. The issue to be determined is whether or not 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. Furthermore, the Court needs to determine as to whether failure by the plaintiff to amend her particulars of claim to support the evidence to be adduced at trial was fatal to her claim.

Legal Principles

46. The plaintiff bears the onus of proving her case.
47. In Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC) Ackermans and Goldstone JJ held that in order to succeed with the claim, the applicant would have to establish at the trial that:-

"

- (a) *the defendant owed a legal duty to the plaintiff to protect her;*
- (b) *Its employees or agents acted in breach of such a duty and did so negligently;*

(c) *There was a casual connection between such negligent breach of the duty and the damage suffered by the plaintiff*'. The court went and held that if such onus is not discharged by the plaintiff, the defendant's denial of liability should be found to be reasonably possibly true, and the only probable evidence before the court.

48. The principle had been confirmed in National Employers' General Insurance v Jagers 1984 (4) SA 347 AT 440 E-G by Eksteen AJP where he held at 440D-F that *"It seems to me, with respect, that in any civil case,, the onus can ordinarily only be discharged by adding credible evidence to support the case of the party on whom the onus rest. Where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderate of probabilities that his version is true and accurate and therefore acceptable, and that the version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true not the Court will weigh up and that the plaintiff's allegations against the probabilities. The estimate of the credibility of a witness will therefore be inexplicably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however 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, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."*
49. In Stellenbosch Farmers Winery Group Pty Ltd and Another v Mutual Ex cie and Other 2003(1) SA 11 SCA at 141 the Court held that :- *" The technique generally employed bby Courts in resolving factual disputes of this naturethe Court must make a finding on (a) the credibility of the various factual witnesses; (b) their reliability and (c) the probabilities ...as to (c) this necessitates an evaluation of the probalbilities or improbability of each party's version of each of the disputed issues."*

50. As to whether or not the defendant owes a duty of care to the public making use of their trains as a mode of transport, the court in Mashongwa v Prasa 2016(3) SA 588 CC held that:- *"Public carriers like PRASA have always been regarded as owing a legal duty to their passengers to protect them from suffering physical harm while making use of their transport services. That is true of the taxi operators, bus services and the railways, as attested to by numerous cases in our courts. That duty arises, in the case of PRASA, from the existence of the relationship between carrier and passenger, usually, but not always based on a contract. It also stems from its public law obligations. This merely strengthens the contention that a breach of those duties is wrongful in the delictual sense and could attract liability for damages. Safeguarding the physical well-being of passengers must be a central obligation of PRASA. It reflects the ordinary duty resting on the public carriers and is reinforced by the specific constitutional obligation to protect passengers' bodily integrity that rests on PRASA, as an organ of state. The norms and values derived from the constitution demand that a negligent breach of those duties, even by way of omission, should, absent a suitable non-judicial remedy, attract liability to compensate injured persons in damages."*
51. Overcrowding in trains has been held by our courts as a breach of such duty of care. See Rail Commuter Action Group v Transnet/ Metrorail 2005(2)SA 359 (CC) and Phalane v PRASA (71408/203[2015] ZACTPPHC 804.
52. In Shabalala v Metrorail 2008 (3) SA 142 (SCA) the court held that the onus to prove negligence rest on the plaintiff and it requires more than the onus to prove that harm was reasonably foreseeable and that a reasonable person would probably have taken measures to avert the risk of such harm.
53. I now turn to deal with the issue of failure to amend the pleading. Rule 28(10) of the Uniform Rules of this Court provides as follows on amendment of pleadings and documents:- *"The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit"*.

54. Our Uniform Rules of the High Court require each party to set out in its pleading a clear and concise statement of material facts upon which it seeks to rely for its claim with sufficient particularity to enable its opponent to reply thereto. See Minister of Safety and Security v Slabbert 20102 ALL SA 474 (SCA).
55. In other words, the opponent must be properly informed of the case he has to meet and not be ambushed at trial with material evidence that deviates from the material facts pleaded. See Hillman Brothers Ltd v Kelly and Hingle 1926 WLD 153.
56. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at trial. It is also impermissible for a trial court to have recourse to issues falling outside the pleadings when deciding a case. See Minister of Safety and Security v Slabbert (supra).

Reasons for the judgment

57. It can never be argued in general that the defendant, as a commuter rail carrier of passengers owes the duty of care towards its passengers to ensure that their safety is guaranteed when boarding its trains.
58. That duty of care would include ensuring that the coaches of its trains are not over crowded.
59. On the day of the incident, the Plaintiff was a commuter in the train owned by the defendant.
60. In her particulars of claim, she alleged that she was pushed by other commuters whilst disembarking and the train was pulling out of the train station with its doors open.
61. In her reply to further particulars required by the defendant the plaintiff alleged that she was pushed whilst sitting and this is on page 160 of the reply to further particulars by the defendant.
62. The court has not been asked to consider the amendment of the plaintiff's particulars of claim and this contradiction remained throughout the trial. It was contended on behalf of the defendant that the plaintiff fell as a result of the

sandals she was wearing. This contention was denied by the plaintiff and she claimed that the sandals she wore on the day of the incident were reasonably new.

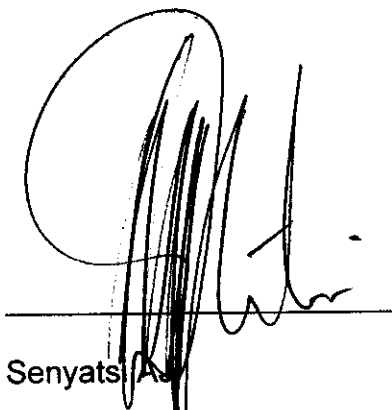
63. The court heard and has no reason to doubt that the train was probably full on the day in question. This was not only established by the plaintiff but also collaborated by Ms Kgare who was a commuter on the day of the incident.
64. The court is not persuaded by the evidence of the train guard Mr Mashaba as to the volume of passengers in the coaches as he sat at the last coach of the train and was not, in my view, able to see the extent of volume of the passengers in the coaches. He was at pains to show that the train was carrying a normal volume of passengers and that as train guard; he had never seen a full train with passengers hanging on the doors. I am not convinced by his evidence on that assertion.
65. Having made that conclusion, I am having difficulties with the evidence in support of her claim pleaded in the particulars of claim by the plaintiff.
66. The case pleaded in the particulars of claim is that the plaintiff was pushed as she was disembarking the train and fell as the train was leaving the platform but in her reply to further particulars to the defendant, the incident took place whilst she was seated.
67. No application was brought to this court to amend the pleadings to be consistent with the particulars of claim and this is in my view fatal to the case of the plaintiff.
68. As stated is trite that in any civil case, each party is required to set out in its pleadings a clear and concise statement of the material facts upon which it seeks to rely for its claim with sufficient particularity to enable its opponents to reply thereto.¹ This requires that the opponent must be properly informed of the case he has to meet.

¹ (See Minister of Safety and Security v Slabbert(*supra*)).

69. The evidence adduced by the plaintiff as to the reason for her fall, is not supported by any documentary evidence. On the contrary, the hospital records stated that the plaintiff advised that she slipped and fell due to the shoes was wearing. The hospital personnel had not reason to record the information as such and did so on the strength of what the plaintiff told them.
70. The defendant called two witnesses who contended that they were informed by the plaintiff that the reason she slipped was due to the sandals she wearing on the day of the incident.
71. As a consequence of these material contradictions and failure to allege a consistent concise statement of her case in the particulars of claim, the Court is not persuaded that the plaintiff has discharged her onus to prove her case on the balance of probabilities that she was pushed from an overcrowded train and sustained injuries as a result.
72. If that were so, the plaintiff would have been consistent in her statement to all concerned that she was pushed from an overcrowded train by fellow passengers and sustained injuries as a result of falling.

ORDER

73. The claim is dismissed with costs.

A handwritten signature in black ink, appearing to be 'M.E. Phiyega', written over a horizontal line.

Senyatsi A.

Gauteng High Court, Johannesburg Local Division

Appearances:

For the Plaintiff: Advocate M.E. Phiyega

For the Defendant : Advocate M.T. Mankge

Date of hearing: 1 November 2016

Date of judgment: 22 February 2017