



IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

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

CASE NUMBER: 27200 / 2013

13 / 08 / 2015

DATE

SIGNATURE

In the matter between:

HENDRICKS: CRANE

PLAINTIFF

AND

THE PASSENGER RAIL OF SOUTH AFRICA

DEFENDANT

MAVUNDLA J;

- [1] The plaintiff instituted a claim against the defendant for damages he allegedly suffered as a result of personal injuries he sustained on the 15 February 2013, when he attempted to board the stationary train, while the doors were still open, the train moved off, causing the plaintiff to lose balance and fall under the train at the platform.
- [2] At the commencement of the trial, by agreement between the parties, this Court granted separation of the merits from quantum in terms of rule 33(4) and ruled that the issue of quantum be postponed sine die and the matter proceed only on the merits. The only issue to be decided was the question of liability.
- [3] The plaintiff in his pleaded case alleged that the defendant owed the duty of care to members of the public, including the plaintiff, to ensure the safety of the plaintiff and failed to take adequate steps to avoid the incident in which the plaintiff was injured; and allowed, inter alia, the train to be set in motion without ensuring the doors of the train and the coach in which the plaintiff travelled were closed before the train was set in motion; allowed the train to pull off the platform while the plaintiff was still in the process of boarding the train.
- [4] It is trite that the plaintiff bears the *onus* of proving his case against the defendant. In this regard it is apposite to cite from *Macheke and Passenger Rail Agency of South Africa* (2013 / 16571) [2015] ZAGP JHC 22 (9 February 2015) the following:

“APPLICABLE LAW

[32] The case advanced by the plaintiffs is premised on two negligent omissions, namely, the alleged breach of duty of care 'PRASA' owes to the general public and to 'Grant' as a result of an alleged failure to put reasonable measures to prevent the incident.

[33] The first question for this court is whether or not the plaintiff has discharged the *onus* of establishing on the balance of probabilities the breach of this duty. Related to this question is an aspect of the burden required to be discharged by the plaintiff, namely whether, 'but for' the inadequate measures allegedly employed, the accident would not have occurred.

[34] It is not disputed that 'PRASA' provides a rail commuter service in the public interest, and as an organ of state bears the obligation to protect the rights to dignity, life and security of commuters as well as the general public that utilizes facilities under its control. This obligation was affirmed in Rail Commuters Action Group 11 and in considering factors relevant, the court held that:

"Factors that would ordinarily be relevant would include the nature of the duty, the social and economic context in which it arises, the range of factors that are relevant to the performance of the duty, the extent to which the duty is closely related to the core activities of the duty-bearer - the closer they are, the greater the obligation on the duty-bearer, and the extent of any threat to fundamental rights should the duty not be met as well as the intensity of any harm that may result. The more grave is the threat to fundamental rights, the greater is the responsibility on the duty-bearer. Thus, an obligation to take measures to discourage pickpocketing may not be as intense as an obligation to take measures to provide protection against serious threats to life and limb. A final consideration will be the relevant human and financial resource constraints that may hamper the organ of State in meeting its obligation."

Vide also South African Railway v Almma Philisiwe Thwala 2011 JDR 1242 where it was held that:

"The *onus* to prove negligence rests on the plaintiff and it requires more than merely proving that harm to others was reasonably foreseeable and that a reasonable person would probably have taken measures to avert the risk of such harm. The plaintiff must adduce evidence as to the reasonable measures which could have been taken to prevent or minimise the risk of harm."

[5] The defendant in his plea denied the version of the plaintiff and pleaded that the cause of the incident was the plaintiff, in placing himself in the railway lines and by so doing assuming *volenti non fit injuria*.

[6] The defence of *volenti non fit injuria* as pleaded by the defendant is well articulated in the matter of *Santam v Vorster* 1973 (4) SA 764 (A) at 764E as follows: "In an action for damages for bodily injury caused by negligent driving, in which the defendant raises the defence of *volenti non fit injuria*, if it be shown that, in addition to knowledge and appreciation of the danger, the claimant foresaw the risk of injury to himself, that will ordinarily suffice to establish the 'consent' required to render him *volens* - provided always that the particular risk which culminated in his injuries falls within the ambit of the thus foreseen risk."

[7] The evidence of then plaintiff was as follows:

He is [.....] years old and a South African citizen. On the 15 February 2013 he was involved in an incident. He was on his way from work to get a train at Sports Park in Centurion on his way home. He had his monthly train ticket. He works at Centurion. It was 16h30 to 17h30. It was late in the afternoon and still light outside in February.

The train pulled, stopped and the doors opened. Just as he wanted to get in the train it pulled off and he fell. Normally the train is full and one must wait for the people to disembark. Just as he placed his foot on the train the train pulled off and he fell. He said that it is everyday busy on the train. Asked whether there were security guards he said that there was a lot of movement at that time. He said that it was busy at that moment. He said that during that time of the day in the evening as well as in the morning it is very busy. It is very busy at that time and it is difficult to see who is getting in and off the train on the platform. He was asked exactly what happened he said that when he placed his foot on the train, the train pulled off and he fell and when he recovered he was underneath the platform but not on the train rails. When he tried to board, the doors were open and the train pulled off while the doors were still open.

- [8] Under cross examination the plaintiff said that he fell and when he opened his eyes he was underneath the platform. He cannot say he was unconscious. Asked whether he lost consciousness he said that he does not know how to answer that. He was referred to paragraph 7.3 of his particulars of claim where it was alleged: "Loss of consciousness". He responded that he does not know how to explain this. He does not know how long he was underneath the platform. He said that when a person is injured automatically he does not know how to explain what happened. He stays at Eersterust and was going home. He was referred to paragraph 1 where it is stated that he currently resides at [.....]. He said that he did not tell this to his attorneys. He said that he made a mistake about the time he gave earlier and the correct time was 16:45. When he started working at his place of employment, he always used a train. There is something on which one can place his foot (foot plate) when the door opens. It was a busy time of the day and people were getting off the train while others were boarding. As he placed his foot on the foot plane the train pulled off. There is a pole at the entrance of the door. He did not hold to the pole as he tried to get in the train. He cannot dispute that it would have helped had he held the pole and that could have prevented his falling underneath the platform. He cannot say that even if he had held the pole the accident would not have occurred. He conceded that his other foot was on the platform. To the Court's question he said that he was on motion with one foot in the train and the other in the air. He said that he cannot tell whether his body automatically landed on the platform. When he opened his eyes he was underneath the platform, he cannot say whether he automatically landed on the platform. He does not know how to answer. To demonstrate what happened he lifted his arms over his head and moved backward as if he is falling. He said that he did not say that the train came, stopped and pulled off. He said that the train stopped and waited for the people to board. There were lots of people. Those who were on the platform waited for the people to alight. He does not know exactly where he was, but he was not in the front of the boarding people, but could have been in the middle of the people boarding. He conceded that people were jostling to get off and in but he does not know where exactly he was in

the jostling people. He said that when the train pulled off it did so suddenly and strongly and that is when he fell. He was in between the railways and the platform. He cannot remember whether he noticed the train wheels. He does not know where precisely the train was when he fell underneath. Although not certain it is possible that the train was still there. He has used the Sports park station before. He conceded that the platform is straight. When he entered the platform he went past the gate manned by security ticket guard. There are 2 or 3 compartments entries. There is a gate on the right side and that is the one he used to enter. When one enters the station he can go to the right or to the left. He went to the right. He did not hear the train serene blown when it came in because there was a lot of movement. As one gets in on the right there are ticket guards. He was not far from the front end of the train. Asked whether there was any one who came to assist him, he said that he was in pain and thinks there was someone who came to his assistance, as he was lying there. He thinks it is a security officer who came to help him. The security personnel was a man and spoke to help him No one assisted him. The person removed his ticket and he did not give anyone his personal details as he was in pain. He said that the pain, although difficult to answer, emanated from the whole body, from the left leg, head and stomach. At that stage he did not know whether his leg was fractured, the left leg it was towards the hip, the left upper leg. He is not sure whether the train left. He cannot dispute that the train left, as would be testified to by the train driver. It was put to him that just before the train left the train guard had blown his whistle. He said that he cannot dispute that. Someone of the paramedics helped him from the platform where he was lying. He cannot dispute that the incident occurred in train number 0653 and that it was from Johannesburg. He does not have children. He conceded that a train is dangerous and to walk in the vicinity of a train track. It is dangerous to place one or to walk in the vicinity of the train and it is suicidal to do so.

[9] It was pointed out to him that the defendant denies the plaintiff's version. It was put to him that the plaintiff was running next to the train tracks when the incident occurred. The plaintiff denied this version and said that he entered the train precinct saying that he entered the place at the correct place. He denied that he was running and that he was doing so in the company of another person. It was put to him that the second person vaulted on the platform while the plaintiff failed to do so. He said that he cannot dispute this. It was put to him that the train clipped him as he was trying to climb on the platform. His response was that if they say so there is nothing he can do. He cannot dispute that the train left after necessary steps were taken by the guard who blew his whistle.

[10] Under re-examination the plaintiff was referred to annexure A. He said that was his monthly ticket. The fracture of the leg was on the upper part of his left leg. After the accident there were lots of lacerations. The lacerations on the head were as the

result of the injuries on his head. The address in paragraph 1 is not his. 480 Tames Avenue in Eersterust. His foot was on the foot plate. He said that he did not chase after the train nor stand in front of the train. The train stop for not even a minute. People push one another in order to get into the train. He was not sure when the train was to leave. He did not hear the whistle. When people disembark or get on the train it is chaotic. Asked whether he at any stage, ran next to the train, the plaintiff said that there are some times when he had to push in order to get into the train. He denied that he ran along the railway tracks with any person on that particular day. The train stopped at the platform and it was then he tried to board.

- [11] Under further re-examination he conceded that he is neither a doctor nor a psychologist. He said that he cannot say whether his head injury led to his unconsciousness. The time of a minute for the train to stop and leave was a general time frame, which is a normal time. He conceded that he was the only one injured and that the leaving of the train was not abnormal.
- [12] The defendant called 3 witnesses, namely Mr Nicholus Mullman, Mr Jabulani Timothy Mabuza and Ms Mapule Gladys Mekwa
- [13] The defendant's first witness was Mr Nicholus Mullman who testified that he is employed by Metro Rail as a train driver for 27 years. He said that on the 15 February 2013 he was the driver of train number 0653 between Pretoria and Johannesburg. His train started in Johannesburg travelling to Pretoria. When he was in Centurion he left from there to Pretoria. As he was approaching Sports Park station a person ran from Westerly direction towards the railway station. The person ran next to the train in the direction of the platform. In front of the station there is palisade to stop people. The only way the person could reach the platform was to run along the railway line towards the platform. This person continued running while he (Mullman) blew his whistle. The person was busy trying to climb the platform from where it starts. The train clipped this person. He was supposed to stop at the station and he had already applied his brakes and hit the person. There was no way of avoiding hitting the person. After the train stopped Mullman walked towards the back of the train. The person was lying underneath the platform but behind the train. He made certain that the person was not on the railway tracks. He noticed that the person was in his full sense. He and a security guard spoke to this person and they made sure that that he was free and off the railway lines. There were other people around the scene. He spoke to another person who took over at the scene so that he could proceed further with his duties. Before he proceeds, the train conductor would blow a whistle to inform him he could leave the station.

[14] Under cross examination he said that when the person was running towards the westerly direction, he was not on the train lanes. He was running and looking at the train. He must have seen him. He conceded that it was irresponsible of this person to run along the railway tracks as he did. There is no other way that this person, from that direction he was running from, could have reached the platform without running along the railway lane. The palisades start about 5 to 10 meters from the beginning of the platform and run up to the edge of the platform. He said that he struck the person at 60 kph. He said that he cannot tell whether the injuries would have been more severe than they were at the speed he was travelling. To his observation it appeared that there was a cut on the leg of this person and he was conscious. The person was lying underneath the platform where it starts, but not on the railway lanes. He disputed that the person was on the platform and fell under the platform. He would not say that there would be nothing left of the person being hit by a train travelling at 60 kmh. Plaintiff's counsel said that he is not certain whether the plaintiff is the right person. He said that the investigating personnel of Metro came to take a statement and he explained to them what happened.

On re-examination Mullman said that his train on that particular day was not involved in any other incident or similar incident.

[15] The defence called Mr Jabulani Timothy Mabuza who testified that he is employed by PRASA as a Metro Train guard since 1996. His function as a guard is to open and close the train doors at stations and thereafter he would blow his whistle to signal the train driver to pull off. His duties as a guard is, inter alia, to check whether those who want to get off the train are indeed off and those who want to board the train have done so before he blows his whistle for the train driver to leave the platform. As the guard he stays at the back of the train. His driver was Nicho Mullman on that particular day. On this day they moved from Centurion and the train approached Sports Park station where it stopped. He saw the driver coming towards the back of the train. The driver informed him that there was a person who was knocked down by the train as he was trying to jump to the station. They both went to see underneath the train and saw a person underneath the platform. They called for assistance. If the person is not on the railways lane they would tell the driver to leave. After noting that there was no one on the platform and those who wanted to board have done so, he then blew the whistle for the driver to leave. He closed the windows before closing and blowing the whistle. Before closing the doors, he first blows his whistle and then closes the doors. On that particular day he did exactly that and the doors were closed when the train left from the station. Once satisfied that there were no people wanting to board the train he then blows the whistle for the driver to leave.

- [16] According to Mabuza he was not approached by the investigators about this incident. He does not remember having been approached to give his version of what happened. In most of the cases when an investigation is made he must also be confirmed, which has not been done. He saw the person for the last time when he saw him underneath the platform. The person was more underneath the platform, facing towards it. The person was of light in complexion. On his recollection the person was not lying on but far from the rail. He said that Mullman may have seen properly how the person was lying. The person was not lying on the platform but underneath it. The person was lying underneath the platform and the person was behind the train underneath the platform. He did not see the person being hit by the train. He does not believe that the person was hit by the train while on the platform; otherwise he would not have been where the platform commences. It was unlikely that the person was on the platform trying to board because it is impossible that he could have landed at the position he was. The person was at the back of the train and could not have been in the middle trying to board the train. On re-examination he said that on that particular day this was the only incident that occurred with his train and train driver.

The train was from the direction of Johannesburg towards Pretoria, South to North. The person was lying on the southern side. The person was lying on the eastern side of the railway line. In this regard he drew a sketch showing the railway tracks running from South to North with the platform on the western side of the railway lanes. The person was shown lying on the southern westerly just where the platform starts. The sketch was marked and accepted as exhibit "A".

Under cross examination he said that sketch is correct. The platform is long and on the western side of the platform there is enough space. The train was stopped in the platform and not before the platform.

- [17] The defence called Ms Mapule Gladys Mekwa she works at the investigation section of the defendant for 10 years. The incident happened in February 2003. She was acting as a supervisor, when she received a call informing her of a person having been hit by a train at Sports Park station. The investigator Officer Mphahla was informed of this call. At the time she was at Centurion offices. She and Mphahla went to the Sportpark. They both went to where the platform starts where a person was lying. There was an unknown injured male person lying underneath the platform. A lady who said that she was the mother of the injured person gave them his details. They waited for some few minutes until an ambulance came and the paramedics attended to the person, where after they transported the person to the hospital.

Under cross examination Ms Mekwa said that the plaintiff was under the platform. On her arrival there was no train. She knows Sportspark. There are only two railways. The person was not lying on the tracks but under the platform. At the

station there is no bridge. It is common that people would walk over the railway lines. There was investigation over this matter. She did the investigation. She did not witness the incident happening.

[18] To the Court's questions she said that the person was found at the beginning of the platform. The person was found at the point from Johannesburg to Pretoria at the begging of the platform. The train would be in the middle of the platform and the person was at the back of the train.

[19] Under re-examination she said that the bridge she referred to earlier is the bridge carrying cars. There is a pedestrian bridge enabling the passenger to reach the platform. The witness drafted a sketch which was substantially similar to that drawn by Mabuza. It was accepted as exhibit B. The defence closed its case.

[20] *In casu*, there are two mutually destructive versions of the parties. The Court must apply the principle propounded in *the Stellenbosch Framers' Winery Group Ltd and Another v Martell ET CIE and Others* 2003 (1) SA (SCA) 11 at par [5] at H 14I - 15:as follows:

"The technique generally employed by courts in resolving factual disputes where there are two irreconcilable versions before it may be summarised as follows. To come to a conclusion on the disputed issues the 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 of the veracity of the witness. That in turn will depend on E a variety of subsidiary factors such as (i) the witness' candour and demeanour in witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put 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, and (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v), on (i) the opportunities he had to experience and 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 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."

- [21] The plaintiff as a witness was not an impressive. He was not spontaneous in answering questions. He generalized when asked simple questions which required a simple answer. In other instances he was vague. When asked whether he was unconscious after falling underneath the platform, according to his version, he resorted in saying that he does not know how to answer the question. He contradicted his earlier version that he was unconscious. He later said that he was not unconscious. The cross examination of the plaintiff revealed that the plaintiff does not know what happened, if he does, he was not candid with the Court. He was unable to deny the version of the defendant as put to him.
- [22] On the other hand the defendant's witnesses were impressive, forthright and spontaneous in their answers. Exhibit A and exhibit B which were handed by the defendant's witness, respectively Mr Mabuza and Ms Mekwa are schematic drawings of the platform and the railway tracks. The train according to both these witnesses would have been from South to North with the platform on the western side of the railway tracks. The injured person was at the beginning of the platform that is on the western but southern part of the platform. This version was corroborated by the train driver who said that after he had stopped the train he walked to the far end at the beginning of the platform where he and Mr Mabuza spoke to the plaintiff as he was lying underneath the platform.
- [23] The position where the plaintiff was placed by the defendant's witness makes the version of the plaintiff that he was on the platform when struck by the train improbable. The position where he was found according to the defendant's witness was not disputed. The version of the defendants' witness, I find it to be probable than that of the plaintiff, and as the result I accept the defendant's version and reject that of the plaintiff.
- [24] In so far as any failure to have avoided the incident happening, on the accepted version of defendant, there was no evidence placed by the plaintiff, calculated to demonstrate that the defendant ought to have done more or whatever, to prevent people accessing the platform from the direction mentioned by Mullman.
- [25] In the result this Court find that the plaintiff failed to acquit the onus resting on him to prove his case against the defendant and consequently the action is dismissed with costs.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

HEARD ON THE : 11-12 AUGUST 2015

DATE OF JUDGMENT: 13 AUGUST 2015

PLAINTIFF'S ATT : RAPAHAE & DAVID SMITH INC

PLAINTIFF'S ADV : ADV D. BISSCHOFF

DEFENDANT'S ATT : LEDWABA MAZWAI

DEFENDANT'S ADV : W LUSENGA