



IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE NO: 6942/12

DELETE WHICHEVER IS NOT APPLICABLE

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

30/7/2013
DATE SIGNATURE

2/8/2013

In the matter between:

J MOLOI

PLAINTIFF

and

PASSENGER AGENCY S.A

DEFENDANT

JUDGMENT

NKOSI AJ:

INTRODUCTION

- [1] The plaintiff sued the defendant, a legal person established in terms of Section 22 of the Legal Succession of the South African Transport Services Act. No.9 of 1989, initially known as the South African Rail Commuter Corporation Limited until

commencement of Legal Succession to the South African Transport Services Amendment Act No 38 of 2008.

- [2] The action is for damages suffered as a result of injuries sustained in a train collision that occurred between Pholomong and Mzimhlophe railway stations in Soweto on the 19th of May 2011.
- [3] The matter became defended and it proceeded to trial on 22 July 2013. On the date of trial, the parties had agreed to separate merits and quantum. We had to determine the merits first.

ISSUE TO BE REGARDED AS COMMON CAUSE

- [4] The parties were *ad idem* that a train collision did take place on the 19th of May 2011 between Phomolong and Mzimhlophe railway station in Soweto. And further that the passenger train collided with a stationery train causing some injuries to some passengers.
- [5] **ISSUE TO BE DECIDED:** is whether the plaintiff was a passenger of the train which collided with the stationery train on the date in question.

- [6] The defendant denies that plaintiff was a passenger on the date in question.

EVIDENCE OF THE PARTIES AND WITNESSES

- [8] The plaintiff Joseph Moloi testified under oath that the defendant, at all relevant times
 - (a) Owned, controlled and regulated trains travelling between Braamfontein Station and Merafe Station;
 - (b) Controlled regulated the Braamfontein Railway Station, the Merafe Railway Station and the relevant platforms at the railway stations.
- [9] It was plaintiff's evidence that he resides at 1245 Makapan Street Mapetla in Soweto and works at Lancet Laboratories situated at Richmond next to Auckland Park in Johannesburg for the past 24 years. He is employed as a driver.

- [10] He further testified that he used a train as his mode of transport from home to work on daily basis except when not on duty. He used the same mode of transport to travel from work to his place of abode.
- [11] He used to buy a monthly ticket from the defendant's office to travel from Merafe to Braamfontein. His departure station is only a five minutes' walk from his house and the destination is a fifteen to twenty minutes' walk which he did every day of his work days.
- [12] On the date in question he went to work as usual and made use of the train service as provided by the defendant as he often does. He states that on his return from work he boarded a train, as usual for his way back home, from Braamfontein Station.
- [13] Plaintiff was a standing passenger as the train was packed to its capacity. While on board travelling to Soweto there was a stationery train at Phomolong Station which he described as an Express Train, which they collided with.
- [14] On a question as to what made him aware that there was a collision he indicated that a big impact and caused him to hit the standing pole by his chest and he fell down. He found himself lying on the floor of the train. The time was about 17H45.
- [15] It was his further testimony that medical personnel arrived sooner to assist those were seriously injured and some of them were transported to Baragwaneth Hospital for further medical attention and treatment.
- [16] He, himself and a few others, did not receive medical treatment at the scene. He got a lift from an unknown person whom he referred to as a sympathiser for helping to transport a few passengers who were not seriously injured. There were seriously injured people. The lift dropped him at his place and went on to deliver other passengers.

- [17] The collision happened on a Thursday and stated that he started feeling pains on Saturday complaining of chest pains and headache. He said that he experienced these pains for the first time after the accident.
- [18] He went to consult a medical practitioner on Monday 24 May 2011 who attended to him medically and booked him off from work on 24-25 May 2011. This was his first consultation after the accident and was given a medical certificate to that effect.
- [19] The next day he went to PRASA offices to hand over his train ticket and medical certificate as it was announced that there would be a R7500.00 compensation for the passengers who were involved in the train accident. He state's that there was a closing date hence he had to expedite the claim by completing the claim forms. All was done but he was never contacted and decided to approach his lawyers to assist him.
- [20] He was confronted in cross-examination, that he was never a passenger on the date of the accident and only heard about a rumour that there is a compensation of R7500.00 to be paid to some passengers who were involved in the train accident and decided to claim as well hence he only went to consult a doctor four days later faking to have been part of those who got injured. He denied all these emphasising that he was a passenger on that day of the accident though he did not experience pains immediately like those who were seriously injured.
- [21] It was further put to him that the train ticket he submitted was for a trip between Ikwezi Station and Germiston according to the PRSA Final Report. A copy of this train ticket was not shown in court or to the plaintiff. Plaintiff denied this averment that he only used to buy a train ticket to travel between Merafe Station and Braamfontein enabling him to go to work and had nothing to do with Ikwezi Station and Germiston Station.
- [22] It was put to him that the particulars of claim on paragraph 8 lists:
- (a) Blunt force to the chest;
 - (b) Blunt force trauma to the stomach;
 - (c) Soft tissue injury to the body;

(d) Various cuts and bruises.

Plaintiff confirmed the chest pain only and not the last three diagnoses. He denied that he was not a passenger and stuck to his version that he was injured during the accident after he collided with the pillar where he was standing.

- [23] It was further put to him that PRASA investigated the claim based on the injuries as indicated in the particulars of claim and the medical certificate. He remained adamant that the pains were from the chest.

- [24] Plaintiff's statement made with the South African Police Service referred to pain from ribcage. He denied that he is the one who wrote this word "ribcage" and denied ever putting words into doctor's mouth.

- [25] Plaintiff further confirmed that he had never used a train since the train accident occurred. It was again put to him that he was not a passenger of the train that was involved in an accident as he was not at work on that day of 19 May 2011. He refused this as untrue.

- [26] Lydia Moleko testified under oath as plaintiff's witness. It was her evidence that she came to know plaintiff as they used to travel together on the same train almost daily commuting from Merafe Station to Braamfontein, where plaintiff alights, and to Park Station for her. On the date of the accident they boarded the same train. She explains how it collided with a stationery train called Business Express. She was a standing passenger like the plaintiff according to her.

- [27] Her evidence was that they left the Park Station by 17H10 via Braamfontein where the plaintiff boarded. She did not check the exact time of the accident as she fell after the collision and was transported to Baragwaneth hospital for treatment.

- [28] She was asked if she knew the plaintiff other than being a co-passenger. Her response was positive to the effect that four years prior to the accident he delivered a cake at her birthday party. His wife bakes birthday cakes. She denied ever having another relationship with plaintiff and further denied ever talking to him about the accident except when he requested her to be a witness. She only saw him at the Merafe Station

but did not ever see him in a train after the accident. She further confirmed that he told her that he is no longer using a train but a bus.

- [29] It was put to her that plaintiff was not at work on the date of the accident and she said that they are not working together and could not know that, but he was co-passenger in the train.

Plaintiff closed his case without calling further witnesses.

- [30] Defendant called Mr Steven Moshabane as a witness. He testified under oath that he is currently the plaintiff's supervisor at work. He testified on his responsibilities as a supervisor and to keep a watchful eye on those drivers who came to work or not, amongst other things. He confirmed that he was not plaintiff's supervisor on the date of accident. He only became his supervisor in January 2013.

- [31] He was subpoenaed to bring a certain document marked as exhibit "A" purporting to be a print-out from a computer indicating access to work by employees. The document indicates a "O" which the witness testified that it meant that he was not at work on the 19th of May 2011.

- [32] He conceded during cross-examination that he could not admit or deny that plaintiff was not or was present at work as he was not his supervisor in the year 2011. He testified that he only obtained this print-out and that plaintiff was not reporting to him at the date of the accident.

The defence closed case without calling further witnesses.

WEIGHING OF EVIDENCE AND ARGUMENTS

- [33] Plaintiff led evidence of himself as claimant that on the 19th of May 2011, he was a passenger of train travelling between Braamfontein to Merafe Station. That the train was involved in an accident where he suffered injuries which started feeling pains a few days after the collision. He consulted a doctor who gave him a medical certificate which he used to lodge a claim for compensation with PRASA and also handed over

his monthly train ticket. His claim was not acknowledged nor repudiated in writing hence he engaged services of his attorneys of record to lodge the present court action.

- [34] Plaintiff's evidence was supported by a witness who was also involved in the same accident where she testified that she knows the plaintiff and were usually travelling on the same train including on 19 May 2011 when an accident occurred between Phomolong and Umzimbhlophe Station in Soweto. She confirmed that they were co-passengers and were both standing as the train was packed.

- [35] No evidence was led to rebut that this witness was not a passenger on that day.

- [36] No evidence of the narrator of the PRASA Final Report was led to disprove that plaintiff was not a passenger on the date of accident or the production of the ticket allegedly written Khwezi Station to Germiston.

- [37] The defence witness could not assist whether he knew that plaintiff was at work or not on the 19th of May 2011. No attendance register was presented except for a computer print-out which he himself had difficulty to explain. This witness could not link being absent from work could automatically prove that plaintiff **was not** a passenger of a train where, himself, was there.

- [38] Plaintiff's claim based on pains from chest and headache was not confronted with any medical disproof except to say that he contradicted himself with the medical certificate or a written statement of which he was not the narrator.

- [39] The plaintiff and his witness evidence corroborated each other on material terms:
 - (i) they were on the same train when it collided with a stationery train;
 - (ii) they both suffered injuries differing in degrees and had to be treated differently;
 - (ii) confirmed the arrival of Metro Rail medical personnel and ambulance;
 - (iv) the Business Express train collided with;
 - (v) the witness, with demeanor, related the whole story without being led.

- [40] No contributory negligence was alleged except the denial that plaintiff was a passenger on the date in question.
- [41] Plaintiff argued and submitted that he has proven his case on a balance of probabilities that he was a passenger on the train that was involved in a collision with a stationery train on the date in question. Further argued that defendant's denial was unsupported by any evidence.
- [42] Defendant prayed that an absolution from the instance be considered against plaintiff's claim.

FACTS FOUND TO HAVE BEEN PROVEN

- [43] Having heard both parties to the action it became clear as testimony unfolded that plaintiff was a passenger in the train that was involved in a collision on 19 May 2011 as supported by direct evidence and witness testimony. Both plaintiff and his witness were impressive witnesses whose testimony stood and their evidence is accepted as reasonably possibly true on a preponderance of probabilities.
- [44] Defendant's denial that plaintiff was a passenger could not be supported by direct or indirect evidence and the witness could not assist in this denial that he was not a passenger. Defendant's evidence is therefore rejected as not probable at all.

CASE LAW

- (a) The parties did not refer me to any case law to support their submissions, except a referral to *Hoffman and Zeffert: Law of Evidence 5th Edition at page 124* by plaintiff's counsel: in short that plaintiff had made out a *prima facie* case calling defendant to rebut it.

MERITS OF A CASE/LIABILITY

In this matter the plaintiff had to prove that he was a *de facto* passenger in the train which collided with another train on 19 May 2011. All what he need to do was to

establish a *prima facie* case that he was indeed a passenger on that date. Above all he had to show that he had the necessary train ticket.

According to the SA Law of Evidence by *Zeffert and Paizes 2nd Edition at page 136*:
“No such inference can be drawn against a party merely because he fails to testify or call (relevant) evidence in refutation of a weak or improbable case against him,” as enunciated by Colman AJ in *Putter v Provincial Assurance Co Ltd 1963 (3) SA 145 w at 150 c*.

According to *Keocon v Ned Equity Versekeringmaatskappy Bpk 1984 (1) SA 656 (A) at 664 C-H*: *“where the plaintiff’s evidence is “so vaag en ontoerekenend ten opsigte van die basiese feite is dat die enigste fetebevestigings of afleidings wat gemaak kan word as blote bespeeling bestempel moet word.”*

In this matter the plaintiff had testified and had a witness whose testimony remains unshaken. The defendant called a witness who could not be of assistance to court in proving that plaintiff was never a passenger in the train which was involved in a accident.

The defendant had ample of time to subpoena the compiler of its Final Report and to show to the court (positively) that plaintiff had no train ticket or the one he referred to (Merafe Station to Braamfontein Station) as per his testimony. The defendant could have caused plaintiff to be examined by an independent doctor regarding the claimed injuries.

The court is entitled in the absence of relevant evidence from the defendant, to accept that one which favours the plaintiff as opposed to the defendant.

One should not lose sight of the fundamental consideration that this is not an invariable rule that an adverse inference can be drawn and in the final result the decision must depend in large measure upon “the particular circumstances of the litigation in which the question arises”.

The plaintiff had made a *prima facie* case which the defendant had to rebut not only by denial but leading of relevant evidence.

On the question of a witness being labelled as lacking independence it is for the court to make observation upon the correct approach to various facts which may tend to show whether the witness was truthful during the trial or during his or her testimony. This only helps in question of facts. The plaintiff's witness was straight to the point on all questions put to her and her demeanor could not be questioned. The defendant's witness was honest in relation to his inability to say that he could not say anything about the train as he was not a passenger and could not assist the court.

The Appellate Division decision of *Galante v Dickson 1950 (2) SA 460 A* finds its application in this matter as it was subsequently applied in the *Jordan v Bloemfontein Transitional Local Authority 2004 (3) SA 371*: in essence that plaintiff leads evidence supported by a witness with relevant testimony making a *prima facie* case calls for the defendant to rebut by leading relevant evidence and not merely crusading on a denial of facts. The court is entitled to find for the plaintiff.

MY FINDING

[45] It is therefore my finding that plaintiff succeeded to prove that he was a passenger of the train which collided with a stationery train between Phomolong and Umzimhlophe Station in Soweto on 19 May 2013.

[46] Defendant's defence is dismissed.

Consequent upon the above the Court orders as follows:

(i) **Plaintiff's case succeeds with costs.**



VRSN NKOSI

Acting Judge of the High Court, Pretoria

DATE OF HEARING: 22 JULY 2013

JUDGMENT DELIVERED:

APPEARANCES:

FOR THE APPELLANTS: ADV G. SCHEEPERS

INSTRUCTED BY: VAN ZYL LE ROUX HUNTER ATTORNEYS

FOR THE RESPONDENTS: ADV T. C. MAPHELELA

INSTRUCTED BY: MAKHUBELA ATTORNEYS