



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)

Case number: 29906/2011

Date: 1 October 2013

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHERS JUDGES: YES/NO
(3)	REVISED
1/10/2013	<i>Pretorius</i>
DATE	SIGNATURE

In the matter between:

IRVINE VAN SAM MASHONGWA

Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA (PRASA)
t/a METRO RAIL

Defendant

JUDGMENT

PRETORIUS J.

[1] The plaintiff has instituted action against the defendant for damages suffered as a result of personal injuries sustained when the plaintiff was

pushed or thrown from a moving train on 1 January 2011 at or near Rissik station, Pretoria.

[2] The parties had reached an agreement that the issues of quantum and merits of the case should be separated in terms of Rule 33(4) of the Uniform Rules of Court which the court ordered. The present case deals with the merits of the case only.

[3] According to the plaintiff's evidence he boarded the train at the Walker Street station on 1 January 2011. It is common cause that there were no security guards on the train. The plaintiff was the only person in the coach and according to him the doors did not close when the train pulled away. Three men entered the coach from an adjoining coach and demanded his wallet and his cellphone from the plaintiff. He complied and gave them his wallet and his cellphone. Thereafter they hit the plaintiff, he fell to the ground and they kicked him. They threw the plaintiff out of the moving train as it was approaching Rissik Street station. He landed just before the platform at Rissik Street station where his cries for help remained unanswered. He crawled onto the platform and was assisted by two security guards.

[4] The plaintiff was the only witness for the plaintiff. The defence called Ms Mathotsi who gave evidence that she had been on duty on 1 January 2011 when this incident occurred. She was doing duty as a

security guard at Rissik Street Metro Station on 1 January 2011 between 11h00 and 11h30. Her evidence was at first that she had heard a scream and as the train, M10, was departing she saw four men opening the train's door and throwing the plaintiff out. It was never suggested to the plaintiff that he was wrong when he mentioned that it was three men who had attacked him and threw him from the train, contrary to Ms Mathotsi's evidence.

[5] According to Ms Mathotsi the train entered the station from her right hand side as it was travelling from right to left. This fact is strange as her evidence was that when she first saw the men opening the train door the train was moving and the door where the incident took place, was right in front of her. Her evidence that the plaintiff was lying on her right can thus not be correct, as he was thrown from the train whilst it was moving and should have landed to her left. The only inference the court can make from these facts is that the plaintiff must have been lying on her left hand side. Her further evidence under cross-examination was that the first time she had heard the plaintiff screaming was when he was already outside the coach- contradicting her previous evidence that she had heard him screaming and then she saw the incident.

[6] She had completed a report on 2 January 2011 regarding this incident. She did not state that she had witnessed the incident in this statement. Her evidence is also at variance with the pleadings of the defendant as

it was expressly denied that the plaintiff was a passenger on 1 January 2011. It is further expressly denied that he was thrown from the train.

[7] On 5 September 2013 a pre-trial meeting was held and the question was asked:

- " - Does the Defendant admit that the Plaintiff was pushed / thrown out of the train on 1 January 2011;*
- Does the Defendant admit that the Plaintiff was injured as a result of the incident as set out supra on or about 1 January 2011."*

[8] The answers to both questions were "no", which is directly in contrast to the defendant's own witness's evidence.

[9] Mr Vermaak's evidence was that he had been employed by the defendant from 1993 to 2007. He was an expert as to safety on trains and stations. His evidence was that he was aware of passengers being thrown from trains. He testified that the method of raiding stations and trains at various times randomly is the most effective to combat crime. Police and security guards swoop on a train or a station, and search everybody for illegal dangerous weapons, which are then confiscated. This does not prevent criminals without weapons boarding the train.

[10] He conceded that even if there was only one security guard on a train it would serve as a deterrent. His opinion was that to prevent all crime on the trains it would be necessary to have three armed security guards in each coach of the train. Each train has 12 to 14 coaches. At the time he worked for the defendant there were less than a 1000 security guards for all the stations and trains in North Gauteng.

[11] Mr Vermaak conceded that he could not give an opinion on the financial implications of employing security guards on the trains.

[12] Mr Raphudu's evidence was that he was employed by Metro Rolling Stock as an electrical fitter. His duties were to inspect the coaches of the trains. He inspected train M10 on 21 December 2010 and there were no malfunctioning doors. On 18 January 2011 he did the same inspection regarding train M10 and found all the doors to be in order. His further evidence was that there were vehicles that went out to a particular station or place should a train have a problem. He did not know whether such a problem with the doors of train M10 developed between 21 December 2010 and 18 January 2011 which could have been attended to by a team who was sent out.

[13] Mr Khumalo, the provincial security manager of the defendant, gave evidence that he was involved in the preparation of the budget for security, although he had not compiled it. According to him there were

100 security guards in the employ of the defendant and 600 security guards on contract in the North Gauteng Region. Later in his evidence he maintained that he had prepared the budget, contrary to his earlier evidence.

[14] His evidence was that there were approximately five incidents of crime on the trains per month, although he could not confirm it with any information which was documented. He furthermore testified that crime increases during the festive season and that there is normally less crime on trains that are full.

[15] In this matter there are two versions before court which are mutually destructive. The court has to implement the technique as set out in **Stellenbosch Farmers' Winery Group and Another v Martell et Cle and Others 2003 (1) SA (11) SCA** at paragraph 5:

"...To come to a conclusion on the disputed issues a 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 about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the 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, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or 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." (Court's emphasis)

- [16] The plaintiff made a favourable impression as a witness. He gave evidence in a calm and collected manner, without exaggerating the incident. He conceded where it was necessary and the court finds that he was truthful and accepts his evidence. His evidence that the train doors were open when the train departed from Walker Street station was unchallenged. The witness for the defendant, Ms Mathotsi, did not give evidence as to the state of the train doors when the train entered Rissik Street Station. According to the plaintiff there were no

security guards on Walker Street station, a fact that could not be denied by the defendant. In these circumstances the court has to accept the evidence of the plaintiff that the train doors were open when the train left Walker Street station. His evidence was never challenged as being untruthful. He did not contradict himself or the version set out in the particulars of claim on his behalf.

[17] The same cannot be said about Ms Mathotsi, the security guard, who testified on behalf of the defendant. Her version was at variance to the plea, as well as to the fact that at the pre-trial meeting on the eve of the trial, it was still denied that the plaintiff had been pushed or thrown from the train resulting in injuries.

[18] Her incident report was patently incorrect in more than one instance. Her evidence was that she was first alerted to the incidence when she heard a scream from inside the train, but she later changed this version during her evidence that she only heard the plaintiff shouting when he was pushed or thrown from the train.

[19] Her evidence was that at that stage the train was moving fast and in spite of her attention being on what was happening on the platform after the passengers had disembarked, she saw the four men forcing the doors of the fast moving train open and throw the plaintiff out. Her evidence that he fell to her right hand side has already been

dealt with by the court as an impossibility. The court cannot find her evidence to be probable if the court takes into consideration all the discrepancies in her evidence, the plea and the minutes of the pre-trial meeting.

[20] The plaintiff alleged in the particulars of claim that the defendant was negligent due to the following:

- “8.1 *Hy het versuim om enige stappe, alternatiewelik voldoende stappe te neem om die insident te voorkom, waar deur die uitoefening van redelike sorg en aandag gemelde insident wel voorkom kon word.*
- 8.2 *Hy het versuim om spoorpendelaars in die algemeen, en spesifiek die Eiser, se reg op veiligheid in ag te neem en/of te beskerm.*
- 8.3 *Hy het versuim om enige, alternatiewelik genoegsame, personeel aan te wend ten einde die veiligheid van spoorpendelaars in die algemeen, en spesifiek die Eiser, te verseker.*
- 8.4 *Hy het versuim om enige, alternatiewelik genoegsame, personeel aan te wend, hetsy op die trein, hetsy op die stasie, ten einde te voorkom dat lede van die publiek, en spesifiek die Eiser, beseer word op die wyse soos gemeld.*
- 8.7 *Hy het versuim om te verseker dat al die deure van die passasierwa behoorlik toe was.”*

[21] The question this court has to answer is whether the harm to the plaintiff in these particular circumstances was foreseeable and whether the defendant had acted negligently in not foreseeing the harm and acting to prevent it. The test is what a reasonable person would have done under these circumstances.

[22] In **Minister of Safety and Security v van Duivenboden 2002**

(6) SA 431 SCA Nugent JA held at paragraph 21:

*"[21] When determining whether the law should recognise the existence of a legal duty in any particular circumstances what is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms. **Where the conduct of the State, as represented by the persons who perform functions on its behalf, is in conflict with its constitutional duty to protect rights in the Bill of Rights, in my view, the norm of accountability must necessarily assume an important role in determining whether a legal duty ought to be recognised in any particular case.**" (Court's emphasis)*

and p446 and 447:

*"However, where the State's failure occurs in circumstances that offer no effective remedy other than an action **for damages the norm of accountability will, in my view, ordinarily demand***

the recognition of a legal duty unless there are other considerations affecting the public interest that outweigh that norm." (Court's emphasis)

[23] In **Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC)** the Court found at paragraph 88:

"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. This last criterion will require careful consideration when raised." (Court's emphasis)

[24] If these principles are applied to the present case the court has to determine whether a reasonable person who could foresee the harm should have taken steps to prevent it. In this instance the harm was to the plaintiff's life and limbs, which involved great risks. A heavier burden is placed on a defendant in circumstances where great risks exist.

[25] In **Ngubane v South African Transport Services 1991 (1) SA 756 AD** Kumleben JA held at G – J:

"As regards the requirement in para (a) (ii) above in this judgment, it is acknowledged that reasonable steps are not necessarily those which would ensure that foreseeable harm of any kind does not in any circumstances eventuate. The contributor (Prof J C van der Walt) in Joubert (ed) The Law of South Africa vol 8 sv 'Delict' para 43 at 78 comments in this regard that:

'Once it is established that a reasonable man would have foreseen the possibility of harm, the question arises whether he would have taken measures to prevent the occurrence of the foreseeable harm. The answer depends on the circumstances of the case. There are, however, four basic considerations in each case which influence the reaction of the reasonable man in a situation posing a foreseeable risk of harm to others: (a) the degree or extent of the risk created by the actor's conduct; (b) the gravity of the possible consequences if the risk of harm

materialises; (c) the utility of the actor's conduct; and (d) the burden of eliminating the risk of harm."

[26] In **Shabalala v Metrorail 2008 (3) SA 142 (SCA)** Scott JA found at paragraph 9:

*"But even assuming that the presence of a security guard in the coach would have served as a deterrent sufficient to thwart the attack, the question remains whether it would be reasonable to require the respondent to have a security guard, whether armed or otherwise, in each and every coach of every train. **If regard is had to the large number of railway coaches employed by the respondent to convey commuters many kilometres each day, such a requirement would, in my view, exceed by far the precautionary measures that could reasonably be expected of an enterprise operating a commuter train service**" (Court's emphasis)*

[27] Both counsel referred the court to the Shabalala matter. The plaintiff's counsel argued that this case should be distinguished from the Shabalala case as the plaintiff was attacked by three unarmed men who approached him from another coach as he had been the only passenger in his coach. It is thus clear that a security guard on this particular train would have been able to move between coaches.

[28] If the court applies the principles as set out by O'Regan J in the **Rail Commuters** case, it is clear, that the defendant knows that these incidents of throwing people from the trains are not isolated incidents. Therefor there is an obligation to take measures to provide some form of protection on trains. The defendant's own witness conceded that if there had been one armed security guard on the train, it may have prevented these actions. The test is not whether all incidents may be avoided by putting armed security guards in each coach, but whether the defendant should have foreseen that harm would come to the plaintiff, knowing that these incidents take place on trains, even more so during the festive season and where train doors did not close.

[29] This incident took place during the festive season, which according to the defendant's own witnesses posed a greater risk of incidents of this nature taking place. There was no evidence before court that the defendant could not afford one armed security guard per train, although it was conceded by Mr Vermaak, for the defendant that it would have had a deterrent effect on unarmed criminals. The uncontested evidence was that the altercation had lasted several minutes and if there had been a security guard on the train, he could have intervened. Due to the fact that the court accepts that the train doors were open it stands to reason that it would have been much easier to push or throw a person from the train.

[30] Although Mr Khumalo conceded that more crime occurred during the festive season, there was no evidence that the defendant had deployed more security guards to prevent such incidents. The presence of security guards at Walker Street station could have prevented the train leaving the station while some train doors were still open and causing a greater risk to the plaintiff.

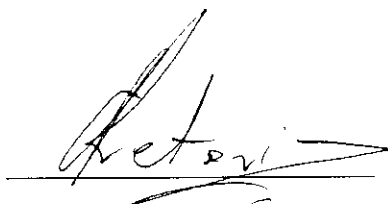
[31] The court has taken into account that the grave harm the plaintiff had sustained was reasonably foreseeable and placed a heavier burden on the defendant to prevent such an incident. No reasonable steps were taken to prevent the harm, even with the knowledge that incidents of crime were higher during the festive season and open doors on trains could increase the risk of having the plaintiff thrown from the train.

[32] The defendant did not explain or rely on the cost implications if only one armed security guard was present on each train, but only dealt with the huge costs involved should there be three armed guards per coach on each train consisting of 12 to 14 coaches. The court accepts that it would not be economically viable to have three armed guards in each coach. However it was not explained why there was not even one guard on train M10.

[33] In these circumstances I find that the defendant was negligent by not ensuring that the train doors were closed when the train left Walker Street station, by not deploying at least one armed guard per train during the festive season as a deterrent to potential criminals and by not having security guards at Walker station to ensure that the train doors closed before departure. There is a duty on the defendant to ensure passengers on trains safety, although it must be accepted that crime can never be totally prevented. The defendant is held liable for the incident where the plaintiff was apprehended, robbed and thrown from the moving train whilst the doors were open.

[34] The following order is made:

1. The defendant is liable for 100% of the plaintiff's proven or agreed damages;
2. The defendant to pay the plaintiff's costs relating to the merits of the action;
3. The question of quantum is postponed sine die.



Judge Pretorius

Case number	: 29906/2011
Heard on	: 10 September 2013
For the Plaintiff	: Adv SG Maritz
Instructed by	: CP van Zyl Ing
For the Defendant	: Adv JG Cilliers SC
Instructed by	: Stone
Date of Judgment	: 1 October 2013