

IN THE SUPREME COURT OF SOUTH AFRICA(APPELLATE DIVISION)

In the matter between:

NZONDELELO RALPH DENNIS BEKWA Appellant

AND

SOUTH AFRICAN RAILWAYS AND HARBOURS Respondent

CORAM : VILJOEN, HEFER, JJA et ELOFF, AJA
HEARD : 8 NOVEMBER 1984
DELIVERED : 29 NOVEMBER 1984

J U D G M E N T

VILJOEN, JA

The appellant (to whom I shall hereinafter refer
as the plaintiff) sued the respondent (to whom I shall
refer as the defendant) in the court a quo for payment

of R50 000,00 damages alleged by him to have been suffered when he fell off a train and sustained severe bodily injuries. He alleged in his particulars of claim that one Jan Coetzee, a ticket inspector employed by the defendant, assaulted him and caused him to fall off the train (the accident). The trial judge found that the plaintiff failed to prove that he had sustained the injuries as a result of an assault committed by Coetzee at the stage when he fell off the train but found that Coetzee had previously assaulted the plaintiff in a compartment of the train. He awarded him R100,00 damages for the latter assault and made no order as to costs. An appeal has now been brought against this judgment, the plaintiff contending that the learned

trial judge should have awarded him damages in the amount of R30 000,00 (which amount, the learned judge said, he would have awarded the plaintiff had he found for him in full) and costs:

The accident happened during the night of 1 December 1979. The final school term for that year had come to an end on the previous day and the plaintiff was on his way home to Port Elizabeth from Dalinwonga school at Cofimvaba where he had completed his matriculation year. With certain other pupils who were also going home he travelled by bus from Cofimvaba to Queenstown where they bought tickets for the train journey to their various destinations and where they boarded a train. It is common cause that Coetzee was the ticket inspector on that train (train 54025) and

that he was acting within the course and scope of his employment. After the train had left Queenstown (according to Coetzee it was shortly before the train reached Birch station; the first station after Queenstown) Coetzee entered the compartment wherein the plaintiff was and requested the passengers to produce their tickets for examination. The plaintiff produced his ticket which turned out to be a bus ticket and not a train ticket. As to the events which occurred thereafter the versions of the parties differ widely.

The plaintiff's witness Xolani Kundayi testified that he was standing in the doorway of the compartment when the plaintiff produced his ticket at the request of Coetzee. The next thing he heard was Coetzee

remarking "This is a bus ticket" and "You are a bloody chancer" and he saw Coetzee slapping the plaintiff across his face with his open hand. The witness and other friends of the appellant offered to pay for a train ticket for the plaintiff and one Malusi Mpakati actually produced R10,00 but Coetzee simply ignored them, caught the plaintiff by the scruff of his neck and marched him out of the compartment. That was the last he saw of the plaintiff before he later visited him in hospital.

The plaintiff told the court that when at Queenstown he asked for a single train ticket to Port Elizabeth he was handed a ticket and paid for it. He never looked at the ticket to make sure it was a

train ticket. This was the ticket he produced when Coetzee demanded to see his ticket. Coetzee told him it was a bus ticket. When he rose from his seat to ask for an explanation Coetzee slapped him across his face with his open hand and said he was a bloody chancer. Xolani Kundayi and Malusi Mpakati entered the compartment and offered to pay for his train fare. Malusi actually took out money. He himself had money to pay for a train ticket, the plaintiff said, but Coetzee ignored the offers to pay his fare, took hold of him by the scruff of his neck and marched him out of the compartment. In the next carriage, an empty one, Coetzee commenced to assault him. He tried to protect himself but was overpowered. He broke loose from Coetzee and

ran into a toilet. Inside the toilet he removed his pair of long white trousers and threw them through the window of the train. He was left wearing a pair of short black running shorts, a black lumber jacket and a khaki shirt. He left the toilet, ran to the front of the train and asked for help from some men who were in another compartment. They allowed him to hide under a bunk. When these men told him that the train had arrived at Cathcart he came out from under the bunk and alighted from the train. His object in doing so was to meet a man whom he knew and with whom he thought he could possibly travel to Port Elizabeth. This man saw him as he was alighting from the train but told him that he was not going home but to some other place. The

plaintiff thereafter hid in some place where he could not be seen by anybody on the platform. When the train commenced to pull out of Cathcart station he decided to get back onto the train. He jumped onto the steps leading to one of the carriage doors and held onto the rails on either side of the door. As he was about to put his leg in at the door of the carriage the door opened to reveal Coetzee standing in the doorway. Coetzee started knocking him on the knuckles of his hands with his metal clipper and told him to get off. He told Coetzee he could not get off because the train was running fast. He begged Coetzee to allow him to get onto the train but Coetzee continued to assault him. Eventually, when he could

endure the pain of the assault on his hands no longer he released his grip on the rails and fell. The first thing of which he became aware thereafter was the presence of the ambulance people who found him next to the railway line and who transported him to the Cathcart hospital. Some time thereafter that same night he was removed to the Mount Frere hospital at East London where, inter alia, his legs were amputated.

Coetzee denied that he had assaulted the plaintiff at all. What happened, he said, was that when he arrived at a certain compartment in which there were approximately eight non-white passengers one of the passengers produced a bus-instead of a train ticket. He explained to this person (who, by

inference, could only have been the plaintiff) that he could not travel with a bus ticket on the train and that he would have to buy a train ticket. The person told him that he did not have the money whereupon Coetzee advised him to try and obtain money from someone else and if he was not successfull in doing so to return to Coetzee in which event, said Coetzee, he would have prepared a T589 report. According to his and other evidence this was a report which, according to the regulations applicable, had, in the event of a passenger failing to pay his fare, to be completed to reflect the name and address of the passenger and full particulars of his default. At the passenger's destination station the passenger would be handed over

at the ticket office to the responsible clerk or

official who would try to collect the fare for the

ticket either there and then or would enter into an

arrangement with the passenger for payment of the

fare. The report would be remitted to the office

of the System Manager who would, in the event of the

passenger not having paid, take steps to recover the

fee and who would in a case such as the present also

refund to the passenger the fare wrongly paid for a

bus ticket. Coetzee continued his narrative of the

events by testifying that when the train arrived at

Birch station he saw this person jump off the train

and run away. The train thereafter passed through

Essex siding and when it stopped at Imvani station one

Van den Berg, a conductor on a goods train which was stationary there and waiting for train 54025 to pass, reported to Coetzee that when the latter train had pulled into the station he had noticed somebody standing on the goose necks of the vacuum pipes between two coaches. Coetzee walked down the length of the train but saw nobody. When the train arrived at Cathcart the station foreman, one Durrheim, reported to him that he had seen somebody without trousers travelling on the vacuum pipes between two coaches. He remarked to Durrheim that he was the second person to report to him that a person was travelling thus on the train. He again tried to find this person but without success and he gave Durrheim the signal for the train to depart. As the

train was pulling out of Cathcart station he started

conducting a search for the person. His search was

rewarded when, between the third and the fourth coach,

he saw a person standing on the two vacuum pipes.

It was a Black person whose age he estimated at around

18 or 19 years. The person was wearing a black sweat

suit top but his legs appeared to him to be bare. He

was standing with his hands between his upper legs.

He spoke to the person and told him to enter the

coach. The person did not reply. He stood back and

held the door open for the person to enter but there was

no response. When he looked again the person was no

longer there and was nowhere to be seen. At the next

station, Surbiton, he requested the station foreman.

to notify Durrheim at Cathcart station that he had

seen the person about whom Durrheim had made the report

but that the person had disappeared; that he suspected

that the person had either fallen off or jumped off.

He requested Durrheim to send somebody to look for the

person. He also told the driver of another train which

was on the point of departing in the opposite direction

to keep a lookout, when his train approached Cathcart,

for a person on or next to the railway line.

Van den Berg and Durrheim confirmed the

evidence of Coetzee in so far as it involved them.

Van den Berg said that he was standing on the platform

at Imvani station towards the rear end of his train

when train 54025 pulled into the station. He noticed

a Black man standing on the vacuum pipes between two carriages. When he saw the man there was no proper lighting and he was, therefore, unable to describe the man's clothing. As far as he could recollect the man was wearing long trousers. When the train stopped this person jumped off and ran to the front end of the train. Durrheim testified that when train 54025 came in from the Queenstown side he noticed a Black man standing on the goose necks of the vacuum pipes. The man was standing straight up with each foot on a goose neck and with his hands between his legs. He had no trousers on. He was wearing a top, the witness said, but he could not remember what the top was like. He could not see whether the person was wearing underpants because he had his hands in front of him,

but his impression was that the man was naked from the waist down. When the train stopped and Coetzee stepped off the train onto the platform he reported to Coetzee who went to the front of the train to investigate. He, Durrheim, proceeded with his duties. In due course, after the necessary signals had been given, the train departed. Some time thereafter he received a report from the station foreman at Surbiton station and subsequently from the driver of a train which arrived at Cathcart from Surbiton. As a result of these reports the plaintiff was found seriously injured next to the railway line some 1040 metres from Cathcart station and was removed to hospital.

The first important factual dispute which

in the view of the learned trial judge fell to be resolved concerned the events which occurred immediately after the plaintiff had produced his invalid ticket.

Allied to this, he said, was a dispute concerning when in point of time or where in relation to Birch siding the incident occurred. In this respect, he said, he had the evidence of the plaintiff and Xolani on the one hand, and that of Coetzee on the other. The judgment proceeds as follows:

"Whether shortly after the ticket incident, whatever that incident involved, the plaintiff hid away under a bunk in a compartment, or sought refuge outside the inner confines of the train carriages, it is virtually common cause that he went into hiding in apparent fear of someone or something. What, on the probabilities, could have induced that fear? On the defendant's version of what occurred the plaintiff had nothing to fear. Although the meaning of "ticket report" had not been explained to him, he had no reason to believe

that he would be put off the train. Nor was there anything in Coetzee's behaviour to have caused him to go in fear of Coetzee. On the defendant's version of the events there was therefore no need for the plaintiff to seek refuge, and it is highly unlikely that he would have done so. There was no need for him to go in fear of anyone or anything.

By contrast, on the plaintiff's own version he had every reason subjectively to fear Coetzee. He had been subjected to an assault for not having a valid ticket, and the fear of further assault or ejection from the train would have been a real one. It is very likely that in those circumstances he would have endeavoured to escape detection by Coetzee by hiding away. The probabilities inherent in his hiding away in my view clearly favour the plaintiff having been subjected to some form of assault or threat which caused him to go into hiding."

He accepted the evidence of Xolani supported by that of the plaintiff and the overall probabilities in preference to that of Coetzee. In spite of the view expressed by the learned judge that the question of

whether or not the ticket incident occurred before or after train 54025 stopped at Birch siding did not assume significant importance he nevertheless seemed to have accorded it considerable weight. He, preferred, he said, the evidence of Xolani and the plaintiff (which he said was to the effect that the incident occurred after Birch siding) to that of Coetzee and strongly relied thereon in finding that the person who was seen by Van den Berg at Imvani could not have been the plaintiff. The learned judge reasoned as follows:

"I have already found that it is unlikely that the ticket incident occurred before Birch siding. If it occurred beyond Birch siding it could not have been, or is unlikely to have been, the plaintiff who was seen on the vacuum pipes at Imvani by Van den Berg. According to Van den Berg the person seen by him was wearing long trousers.

He is not able to identify the person concerned as the plaintiff. He claims that the person in question, when the train stopped, jumped off and ran away to the front of the train. Despite a search by Coetzee he could not be found.

The impression which Durrheim formed of the person seen by him was that he was naked from the waist down. This person apparently also left the train as he could not subsequently be found by Coetzee. Nor did Durrheim see anyone mount the vacuum pipes before the train left Cathcart. The defendant's evidence does not in my view establish that the person seen by Van den Berg and Durrheim was the plaintiff. There is insufficient evidence to conclude that the person seen by Van den Berg was the same person seen by Durrheim or, for that matter, the injured person found alongside the railway line by Thorncroft. There was no positive identification of such person as the plaintiff, nor any matching descriptions to fit the plaintiff. Furthermore, it seems unlikely that the plaintiff would have travelled all the way from Birch siding to Cathcart railway station on the vacuum pipe coupling, bearing in mind how long the journey would have taken and the discomfort and danger it would have entailed. While it might seem too great a coincidence that different people travelled on the vacuum pipe

couplings on the same train during the same journey, albeit at different times, there is evidence, as I have previously mentioned, that it is not uncommon to find people travelling in that position. Having regard to the whole conspectus of evidence it has not been shown that it was the plaintiff who was seen by Van den Berg and Durrheim. I do not therefore find support in their evidence for that of Coetzee."

In the view of the learned judge it followed that when it came to the events immediately preceding the plaintiff's fall from the train he was basically left with the plaintiff's evidence against that of Coetzee. Coetzee did not favourably impress him as a witness, said the learned judge. He was in his view a trifle overbearing and somewhat aggressive and he sought to argue away certain aspects of the plaintiff's evidence, often without conviction. Coetzee also, to his mind,

exaggerated the disability from which his left hand suffered in an attempt to convince him that he could not have behaved in the manner deposed to by the plaintiff. Equally unconvincing, said the judge, were his efforts to persuade him of the difficulty of keeping the door open and striking blows at the hands of someone holding on to the handrails in the manner deposed to by the plaintiff. He found it difficult to accept that Coetzee did not see or hear the plaintiff fall off the train having regard to where he claimed he was at the time. The overall impression left by Coetzee was not a convincing one, said the learned judge. Coupled with that was the fact that he had held his evidence concerning the ticket incident to be untrue.

In the circumstances he was, therefore, not prepared to accept Coetzee's evidence as correctly reflecting what had happened immediately before the plaintiff fell off the train.

It did however not follow from the fact that Coetzee's evidence was not acceptable that the plaintiff's version of what happened was, he said. On the plaintiff's evidence, he pointed out, Coetzee was guilty of a sadistic, sustained assault having regard to the likely consequences of the plaintiff's releasing his hold on the handrails. With this consideration in mind he proceeded to assess the plaintiff's evidence and its acceptability. The plaintiff on the whole created a favourable impression

in the witness box, said the learned judge, but certain features emerged from the evidence which rendered his version of what occurred suspect.

The learned judge proceeded to deal in some detail with the allegations in the pleadings, the particulars in the notice of demand in terms of s64 of Act 70 of 1957, the contents of a statement the plaintiff made on 2 December 1979 to constable Kirton and the version put on his behalf during the criminal proceedings instituted against him on a charge of unauthorised travelling upon a train. He came to the conclusion that these allegations were in certain respects at variance with one another and with the evidence he gave before him. He also held that the plaintiff tried to embellish his evidence

by introducing, during cross-examination, certain details of which he made no mention during his evidence-in-chief. Having regard to the principle enunciated by Watermeyer JA in Gates v Gates 1939 AD 150 at 155, the shortcomings in the plaintiff's evidence and the different versions given by him of what occurred, the learned judge found himself unable to accept his evidence that he was otherwise assaulted save for the assault upon him in the compartment where his evidence was supported by Xolani and the probabilities. It followed, in the learned judge's view, that his damages should be limited to those suffered in respect of that assault.

On behalf of the plaintiff it was submitted that the learned trial judge correctly accepted the

evidence of Xolani, supported by that of the plaintiff and the overall probabilities, in preference to that of Coetzee, in holding that the plaintiff had established on the requisite balance of probabilities that Coetzee did assault the plaintiff in the compartment in the manner deposed to by him and Xolani. The learned judge was also correct in stating that on the evidence as a whole it seemed to be more likely that the incident in the compartment occurred after the train had reached Birch station, it was urged. Proceeding from this premiss counsel for the plaintiff argued that the court, having found that the plaintiff was deliberately and without provocation assaulted by Coetzee and that Coetzee, in giving his version of what happened, deliberately lied,

there was no inherent improbability in regard to Coetzee's conduct as testified to by the plaintiff. The plaintiff's evidence was not free from what the learned judge described as shortcomings, counsel conceded, but he submitted that the learned judge gave too much weight thereto.

The issue as to whether the appellant stood on the goose necks is, even though not vital to the outcome of the case, an important one. Although I do not fully agree with counsel that because this issue was decided in favour of the plaintiff the decision substantially affected the other issue relating to the cause of the plaintiff's fall from the train. I nevertheless, in view of the importance of the issue

and in view of counsel's argument that the learned trial judge gave too much weight to the shortcomings in the plaintiff's evidence on the other issue, propose to deal with it in the context of the case as a whole.

The learned judge's remark that it is virtually common cause that the appellant went into hiding in apparent fear of someone or something may be correct but the implication that that fear was induced or partly induced by an assault by Coetzee upon the plaintiff is not justified. I do not agree with the conclusion of the learned judge that on the defendant's version the plaintiff had no reason to believe that he would be put off the train. That probably was what he did fear. On Coetzee's version he did not explain to the plaintiff what would happen if he failed to find the money

to pay for a train ticket. He simply told him to try and find the money. That a person who did not pay was liable to be put off the train is what Xolani believed, as is evident from the following excerpt from his evidence under cross-examination:

"Do you know what happens to a person who travels on a train without a ticket?... I think I know it. What happens?.... He is generally arrested or taken out of the train."

This might have been a belief generally held by Black passengers on the train. There was evidence that a passenger who refused to pay for his ticket and with whom no satisfactory arrangement could be made could under certain circumstances be arrested. That he was liable either to be arrested or put off the train might

also have been feared by the plaintiff. But the finding that the probabilities inherent in the plaintiff's hiding away clearly favour the plaintiff having been subjected to some form of assault which caused him to go into hiding was not, in my view, warranted.

As I read the evidence there does not appear to have been a serious dispute concerning when in point of time or where in relation to Birch siding Coetzee entered the compartment. Coetzee said it occurred before the train reached Birch siding and that the plaintiff ran away while the train was stationary there. That Coetzee entered the compartment before Birch siding was never disputed by either Xolani

or the plaintiff. Under cross-examination the following evidence was given by Xolani:

"And it is correct that the ticket examiner came to examine your tickets before you had got to Birch station? In that respect I do not know."

The plaintiff denied that he left the train at Birch siding but he never said that the incident involving the first assault occurred beyond the siding. He goes no further than stating that Coetzee entered the compartment after the train had left Queenstown, as appears from the following extract from his evidence-in-chief:

"Now, do you recall that a ticket examiner came at some stage after the train had left Queenstown, and asked for your ticket? Yes I do.
Did he come into the compartment?

32/....Yes,

Yes, he entered the compartment."

Reasoning that it could not have been the plaintiff who travelled on the vacuum pipes the learned judge, under the impression, apparently, that the two versions clashed, referred to the evidence of Van den Berg that when he saw the person at Imvani he was wearing long trousers whereas Durrheim formed the impression that the person seen by him was naked from the waist down. The evidence of these two witnesses does not, in my view, conflict, nor is the evidence of Durrheim inconsistent with the evidence of Coetzee. It would only be such if one were to proceed from the hypothesis, as the learned judge apparently did, that the plaintiff removed his

trousers in the toilet. Is the hypothesis correct?

In my view not because it has no probative basis

other than the word of the plaintiff. It was

certainly not common cause. That the plaintiff

might have lied in this respect was never considered

by the learned judge. It seems somewhat strange

that, if he did remove the trousers in the toilet,

he did not hide them somewhere on the train to be

retrieved by him if and when opportunity presented itself.

His explanation that he threw them out of the window

because it was an old pair for which he had no

further use is, in my view, all but convincing. It

simply does not sound true. If he jumped off the

train at Birch siding and fled while he was fully

clothed, as Coetzee said he was, he might still have worn the trousers when he was seen by Van den Berg at Imvani. It is very likely that he realised that he had been seen at Imvani and that he shortly thereafter removed his trousers so as to be less conspicuous in the dark underpants than in the white or, as Coetzee's recollection was, light grey pair of trousers.

True, there was no positive identification of the plaintiff as the person who travelled on the vacuum pipe couplings but I do not agree with the learned judge that it seems unlikely that the plaintiff would have travelled in that position all the way from Birch siding to Cathcart railway station. Somebody

did travel there. That two people travelled there, as it were in relay, appears to me to be too great a coincidence to be regarded seriously as a probability. As appears from the excerpt of his judgment quoted above this was appreciated by the learned judge himself. He disposes of his own misgivings in this regard by having regard to the evidence that it is not uncommon to find people travelling in that position. In the circumstances of this case it is a possibility but hardly a probability. In my view the learned judge should have found the balance of probabilities to have been in favour of the inference implicit in the evidence of Coetzee, Van den Berg and Durrheim that it was the plaintiff who travelled on the vacuum pipe couplings from Birch siding to a spot where he fell

off somewhere beyond Cathcart station.

Counsel for the appellant virtually conceded that if this Court were against him on the issue of the identity of the plaintiff as the person who travelled on the vacuum pipe couplings he had little hope of persuading the Court that the learned judge was wrong in regard to the further issue relating to the cause of the plaintiff's fall. Counsel's presentiment is well-founded but I am not disposed to dismiss his submissions in this regard summarily. I shall therefore, even though a consideration thereof would serve merely to reinforce the learned judge's reasoning, deal with this issue.

The accident happened during the early hours of 1 December 1979 and the plaintiff underwent an operation the same morning. On the next day in

hospital a railway police constable, one Kirton,

took the following statement from him:

"On 79/12/01 at about 00h01 a ticket examiner came to me and asked me for my ticket. I gave him the ticket. The ticket examiner told me it was a bus ticket (SAR) and not a train ticket. The ticket examiner then told me I must follow him. The train was in motion just outside Cathcart station and they told me I must get off the train. I told them the train was moving I can not get off. I did not know that it was a bus ticket.

They then told me that I am a tsotsi and they pushed me out of the train while the train was moving. That is all I remember."

On 12 February 1980 a notice in terms of s64 of Act 70 of 1957 was addressed to the System Manager of the South African Railways, East London, by an attorney on behalf of the mother of the plaintiff, who was still a minor at the time, in which it was

38/....alleged

alleged that "my client's son was wrongfully and unlawfully and maliciously pushed off the train by one ticket inspector."

In a criminal case in which the plaintiff was charged with having travelled on a train without a ticket he was not required to give evidence but was discharged at the end of the State case on the ground that he had not been properly identified as the person who had travelled on the vacuum pipe couplings. However, from what was put to Coetzee on his behalf it can be gleaned what his case was during July 1980 when the matter was heard. The following extracts from Coetzee's evidence under cross-examination are relevant:

"Q. The accused ran away from the compartment when you assaulted him.

A. Ek het hom nie aangerand nie. Hy het geloop."

The compartment referred to here was the one in which the plaintiff and his friends were. 39/...."Q. The

"Q. The accused will say that you confronted him as he was about to enter a coach from outside. One leg was already inside the coach and the other still on the steps leading into the coach.

A. Dit is nie waar nie. .

Q. Accused will say he was then holding onto the bars at the door as he climbed in.

A. Ek weet niks daarvan nie.

Q. Accused will say that you then struck him on the hands with your ticket clipper.

A. Ek weet niks daarvan nie.

Q. Accused will say that he could not take the punishment any more and you pushed him.

A. Ek het nie aan Beskuldigde geraak nie."

The plaintiff's instructions to his legal representative therefore seem to have been, in the first instance, that he ran away from Coetzee when he was assaulted in the compartment. No mention was

made of another assault in another carriage.

Secondly, the assault which caused him to fall

comprised both an assault with the clipper and

a push.

Summons was issued on 21 November 1980. In the particulars of claim accompanying the summons it was alleged that Coetzee assaulted the plaintiff and "caused him to fall off the said train."

In a request for further particulars the plaintiff was required to state:

"Precisely how was the plaintiff assaulted? Full particulars are requested of each and every unlawful act upon which the plaintiff intends to rely."

The reply dated 13 March 1981 was:

"Plaintiff was assaulted by the hand of the ticket examiner and with a ticket clipper."

What exactly the pleader meant to convey by the words ".... by the hand of the ticket examiner" is not clear but, judging by what was put on his behalf in the criminal trial, it seems that the plaintiff was at this stage still relying both on his having been beaten on the hands with the ticket clipper and on his having been pushed. However, during the trial in the Court a quo he clearly at first, jettisoned the allegation that he had been pushed, as appears from the following extract from his evidence:

"He did not push you out of the train did he?
.... No, he never pushed me. And you have never suggested that he pushed you out of the train? What I understand is that I fell of my own because my hands could hold no longer."

Under further cross-examination he was not so definite. When he was referred to the notice written by his mother's attorney, he took refuge in his inability to remember but, on balance, he was not relying on the push any longer:

"Now did you tell anybody that you had been pushed off the train? I do not remember well.

You cannot have said that if it did not happen, can you? It is difficult for me to answer that question.

You are here to tell the truth, I take it? According to me, the way he was assaulting me, I cannot know what else he was doing, because the most important thing that I felt was the pains.

You have described to us how you were caused to - what caused you to fall off the train? Pardon?

You have told us what caused you to fall off the train? Yes.

And in your evidence-in-chief you said that - you gave a very graphic description of how he struck your hands with a ticket clipper until the pain became too much and you let go and you fell off?

.... Correct.

43/..... And

And I take it that you were telling the truth? Correct.

Before lunch I asked you whether that was the only cause of you falling off the train? I cannot remember everything that happened on that particular night, because it is a long time since this happened.

Your answer was, that was the only thing that caused you to fall off the train? Correct.

Just now I asked you directly whether you had been pushed off the train, and you said no? I said I cannot answer that, because I am not sure.

No, your answer was, no, you were not pushed out? Well, I do not know.

Were you or were you not pushed out? I do not remember being pushed out.

Who told your attorneys that you had been pushed out if you do not remember such a thing? I cannot remember now whether he pushed me, but what I remember well was, is that I could not withstand any longer being hit as he was doing on that day."

He similarly prevaricated when he was cross-

examined about the version put to Coetzee on his behalf

during the criminal trial.

I expressed the view above that, regard being had to the history of the allegations, my interpretation of the reply to the defendant's request for further particulars regarding the nature of the assault is that the pleader at that stage relied both on the push and the assault with the clipper. I do not therefore agree with the learned judge's construction that the reply was intended to embrace the assault in the compartment immediately after the plaintiff was found in possession of an invalid ticket but I agree with the following comment of his in respect of another unsatisfactory feature of the plaintiff's evidence:

"In relation to these incidents the plaintiff in his evidence-in-chief only made reference to Coetzee striking him with his open hand and "assaulting" him. No reference was made to Coetzee kicking him. Yet under cross-examination he claimed that Coetzee kicked him a number of times with his booted foot. Not only is this in conflict with his pleadings, but I find it strange that it was not mentioned by him in his evidence-in-chief. I am left with the impression that the plaintiff tried to embellish his evidence by introducing the allegation that he was kicked by Coetzee as well."

In addition to what was pointed by the learned judge as "shortcomings" there are, in my view, a number of other improbabilities arising from the plaintiff's version. For the fall to have happened as he said it did he had to get off the train and onto it again. The reason he furnished for getting off the train was to meet an acquaintance of his with whom he expected

to be able to travel to Port Elizabeth. How did he know that this person would be on the platform in the middle of the night? On this point he did not enlighten the court, but it is in itself an improbability. According to his evidence and by the sheerest chance, there, lo and behold, this person was on the platform ready to talk to him when he stepped off the train. This happy concurrence of events is too much of a coincidence to be seriously considered to be the truth. I am convinced that he invented this gentleman for his own purposes.

What renders his version in this regard more improbable is his evidence regarding his movements after this mysterious gentleman had disappointed him.

He said he hid from sight until the train was about to leave. But why hide away from people, including presumably Coetzee, who might see him?

He said he removed his trousers so that Coetzee would not recognise him when he would, as he apparently had every intention to do, pay for a train ticket when he met Coetzee again on the train. What he wished to avoid, it seems, was to be recognised as the person who had presented the bus ticket instead of the train ticket. He said:

"And when you got back or when you tried to get back on the train at Cathcart, was it your intention to go and hide again? I did not want him to know me, or identify me, but when I do meet him again, I should pay him.

I do not understand the answer, I am afraid. When I got down from the train, I knew

that he would be able to identify me with the white pair of trousers. So when I went in now, in the short pair of trousers, my aim was that when he demanded tickets, I would pay him, because he would probably not know that I am that person who had a white pair of trousers."

His evidence about the chance appearance of Coetzee at the door through which he intended to board the train is also, in my view, highly suspect. Train 54025 consisted of fifteen coaches. Yet, miraculously, at the very door through which he intended to enter the coach Coetzee suddenly appeared and proceeded to assault him with the clipper. This is too much of a coincidence to be regarded seriously as a probability. In this regard Coetzee's evidence that he walked

from coach to coach to try and find the person who

had been seen by Durrheim is much more probable.

For these reasons I have come to the conclusion that

the plaintiff did not tell the court the truth and

that the finding of the learned judge that he was

unable to accept his evidence on the cause of his

fall cannot be disturbed.

In respect of the award of R100,00 damages

there was no cross-appeal and I do not deem it

necessary to deal fully with the issue relating to the

first assault. However, in fairness to Coetzee whose

career may be jeopardised if he were found to have committed

the assault I point out that there are certain features which

render the evidence of the plaintiff and Xolani in this regard

highly suspect. In the statement made by him on 2 December 1979 he said that "they" told him he was a "tsotsi". His and Xolani's evidence in court was that Coetzee told him he was a chancer. In his statement he said he was told by Coetzee to follow him. His and Xolani's evidence was to the effect that he was taken by the scruff of the neck and forcibly taken out of the compartment. In his statement no mention was made by him of the offer of some of his friends to pay for his ticket. The evidence given by Xolani and himself in court was that his friends offered to pay for a train ticket and that he himself had money to pay for it. It is not uncommon for passengers to pay their train fare on

the train. If the evidence of the plaintiff and Xolani that they had money and offered to pay for a train ticket were the truth it is, in my view, highly improbable that Coetzee would have gone to the trouble of removing the plaintiff from the compartment - let alone foolishly incur a risk fraught with dire consequences inherent in an assault on the plaintiff in the presence of his friends.

The appeal is dismissed, with costs.

JUDGE OF APPEAL

HEFER, JA) - CONCUR
ELOFF, AJA)