

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: A115/23

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
18/03/2025	[REDACTED]
DATE	SIGNATURE

In the matter between:

PALE ALPHIOS TSHELETSHE

Appellant

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Respondent

JUDGMENT

Motha J (Teffo and Lenyai JJ concurring)

Introduction

- [1] Following the train accident which left him with both his legs and right arm amputated and the dismissal of his claim against the Passenger Rail Agency of South Africa (PRASA), the appellant brings this appeal. In terms of Rule 33(4) of the Uniform Rules of Court, the parties sought and obtained an order to deal with

the issue of liability and adjourned the debate on quantum. Consequently, the court *a quo*'s role, and by extension this court's, was circumscribed to the issue of merits.

The parties

- [2] The appellant is Pale Alphios Tsheletshe an adult male who is currently unemployed.
- [3] The respondent is Passenger Rail of South Africa, a state-owned enterprise established in terms of section 22 of the legal succession to the South African Transport Services Act.

The facts

The appellant's version

- [4] The appellant testified that he resided at Lawley and worked at Meadowlands in Soweto. To and from work, he used trains as his preferred mode of transport. On 25 March 2019, his employer dropped him off at Mlamlankuzi station, in Soweto. On this faithful day, the trains were running late, and his train was already over three (3) hours and thirty (30) minutes late, and the train station was bursting at the seams.
- [5] Eventually, the train pulled in at the platform and passengers began disembarking. Even though the train was full, he successfully boarded the fourth coach from the rear. Once inside he tried to make his way to the middle of the coach. He noticed that the exit doors were open. He then heard a whistle, signaling for the train to pull out of the station. Passengers inside the train began pushing, shuffling, jostling and shouting in IsiZulu that they were still disembarking, "Sifuna ukuphuma".

- [6] During the pushing, he lost his grip and that is the last thing he remembers. He regained consciousness after weeks in the hospital. He realised that both his legs had been amputated, and his right arm was also amputated.

The respondent's version

- [7] The Respondent called four witnesses, namely: Mr. Naude, Mr. Nhlapho, Mr. Mofokeng and Ms. Mthembu.
- [8] Mr. Naude, a train driver, testified that he routinely drove the train from the Vereeniging Station to Johannesburg station and back. Both journeys pulled past the Mlamlankunzi station. On the day in question, when he stopped at the edge of the platform in Mlamlankunzi station on his way to Johannesburg, he noticed a person laying on the opposite tracks to Vereeniging.
- [9] He testified that the said person was some 20 meters away from the platform. Using his cell phone, he called the control officer at New Canada, Mr. Van Zyl. He indicated that his train had driven past the train station to Vereeniging at Orlando Station, a Station after if going to Vereeniging, or before Mlamlankunzi if going to Johannesburg.
- [10] Mr. Nhlapho was the security guard on duty on 25 May 2019. His testimony was that he found a person injured by a train on the Vereeniging bound track, near and before the platform. His evidence corroborated that of Naude on the place where the person was found.
- [11] Mr. Mofokeng drove the train on which the appellant was a passenger. He testified that he was on the number 2 mainline from Johannesburg to Vereeniging. At about eight (8) o'clock at night, he approached, stopped and departed from Mlamlankunzi station without an incident, and his metro guard was Ms. Mthembu.
- [12] Ms. Mthembu testified that she had nine years under her belt as a metro guard. She said that her role starts when a train pulls and stops on a platform. On the day of the incident, it was her testimony that she opened the doors of the coaches

after the train had stopped and observed on the platform commuters disembarking and those coming to board the train.

[13] Once the platform was clear of commuters, she blew the whistle alerting the commuters that the train doors were about to be closed, she said. She stated that inside her compartment, she has a grey button which when pressed signals to the train driver to pull off. As the train pulled off the platform, her compartment door remained open for her to continue observing along the platform until the train cleared away from the platform and then she closed it, she testified.

[14] On 25 May 2019, despite being cross-examined at length, she maintained that she had kept a proper look-out and no incident occurred on the platform.

The law

[15] It is trite that Prasa has a legal duty of care to their passengers, as was stated in *Mashongwa v PRASA*¹:

"Public carriers like PRASA have always been regarded as owing a legal duty to their passengers to protect them from suffering physical harm while making use of their transport service. That is true of taxi operators, bus services and the railways, as attested to by numerous cases in our court. That duty arises, in the case of PRASA from the existence of the relationship between carrier and passenger, usually, but not always, based on a contract. It also stems from its public law obligations. This merely strengthens the content in that a breach of those duties is wrongful in the delictual sense and could attract liability for damages."

[16] The court *a quo* dismissed the plaintiff's claim after finding that the evidence of the appellant was reliable. Dealing with a trial court's findings, the court in *Pistorius v S*² held:

¹ 2016 (3) SA 528 (CC) at para 20

² 2014 ZASCA 47; 2014 (2) 314 (SCA) 1 APRIL 2014

"It is a time-honoured principle that once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong. *R v Dhlumayo & another* 1948 (2) SA 677 (A) at 706; *Kebana v S* 2010 (1) All SA 310 (SCA) para 12. It can hardly be disputed that the magistrate had advantages which we, as an appeal court, do not have of having seen, observed and heard the witnesses testifying in his presence in court. As the saying goes, he was steeped in the atmosphere of the trial. Absent any positive finding that he was wrong, *this court* is not at liberty to interfere with his finding."

Issues

- [17] To my mind, this matter pivots around two issues. First, it is about where the appellant was found, some 20 metres before the platform of Mlamlankunzi station, on the rail tracks going to Vereeniging. Second, it is about the findings of the trial court that the version of the appellant was reliable.

The first issue

- [18] As a matter of common sense and simple logic, if the appellant boarded the train at the platform in Mlamlankunzi station, and, subsequently, got pushed out of the moving train, because the doors were not closed, his body would have been found, in all probabilities, on the rail tracks opposite the platform, not 20 metres before the platform. Alternatively, if the train dragged him along, his body would have been found after the platform, not before the platform. It defies logic and common sense that the appellant's body was found 20 metres before the platform. Above all else law must accord with common sense otherwise it is nonsense.
- [19] What I find disquieting, in this matter, is that what was pleaded differs materially from the *viva voce* evidence of the plaintiff. It was pleaded that: "In the course of this jostling by such persons, the Plaintiff was dislodged from his standing

position and forcibly ejected from the moving train through the open door of the coach, causing the Plaintiff to fall into the gap between the train and the platform ("the incident")."³

[20] In his evidence in chief, the appellant does not mention being ejected from a moving train nor does he mention falling into the gap between the train and the platform. His version is that he simply lost consciousness inside the train and does not remember what happened next. What is more concerning is that the hospital record dated 28/3/19 notes: "train accident, fell late evening btw 2 carriages." When confronted with this record, counsel for the appellant submitted that it was not evidence and that this court should not take note of it.

[21] What is worse is that the appellant proffered no version to counter this dilemma, save to ask the court to draw an inference. It need hardly be stated that an inference must be mounted on two principles. First, the inference sought to be drawn must be consistent with all the proven facts. Second, the appellant is not required to show that the inference sought to be drawn is the only reasonable inference, but merely that it seems to be the more plausible from amongst several conceivable ones.⁴

[22] The appellant falls far too short of this test. The proven facts are not consistent with the inference the appellant seeks to draw. Therefore, we do not get to the second leg of the test, otherwise, the whole exercise would be a conjecture or speculation.

The second issue

[23] The second predicament in this case is that the court *a quo* held that it could not fault the quality of the appellant's evidence, and he appeared to be a trustworthy and reliable witness. It bears mentioning that the appellant's evidence is confined to what happened before the accident. As already stated, he cannot relate how the accident happened. If his evidence of what happened before the accident is

³ Particulars of claim para 4.3

⁴ AA Onderlinge Assurance v De Beer 1982 (2) SA 603(A) 620F-G

accepted, it means that he was not on the train before it pulled into Mlamlankunzi station, *ipso facto*, he could not have fallen before the platform of Mlamlankunzi station.

[24] On the other hand, Ms. Mthembu, a metro guard at PRASA, testified that no incident happened on the platform, on that day. It is worth noting that of all the coaches pulled by the train hers was the last coach to clear off the platform. Therefore, she had the full view of the entire platform; even so, she would not have seen a person who had fallen into the gap between the train and the platform. Contrary to the appellant's counsel's submission that the place where the appellant was found is a neutral fact, this court is of the view that it is critical.

[25] Examining this very point, the court *a quo* hit the nail on the head when it held:

"The problem, however, remains the place where the plaintiff was found. If the plaintiff was found at a distance from the platform in the direction of the train was travelling, one could still draw the inference that the plaintiff was dragged for some distance after he fell underneath the train."⁵

[26] It is not without significance that the court *a quo* held: "The plaintiff's evidence is, however, irreconcilable with the evidence of Mr. Naude and Mr. Nhlapho."⁶ This finding is of paramount importance since it comes hot on the heels of the factual finding, namely:

"In this respect, the uncontested evidence of Mr. Naude and Mr. Ndlovu (Nhlapho) that the plaintiff was found some 20 meters before the platform dispels any notion that the plaintiff fell on the platform in the manner described by him."⁷

[27] In short, the trial court found that Naude was corroborated by Nhlapho. At the risk of being repetitive, I must mention the following:

⁵ Para 22 of the judgment

⁶ Para 23 of the judgment.

⁷ Judgment para 20

"It is a well-known principle of our law that the factual findings of a trial court are presumed to be correct unless a misdirection on the part of the trial judge can be pointed to in order to justify interference with those findings on appeal."⁸

[28] The trial court had a distinctive advantage which certainly is worth its weight in gold. It had the advantage of observing the witnesses when giving evidence in chief and under cross-examination. *Festina lente* is the word that comes to mind when approaching the factual findings of the trial court. So, this court is faced with two diametrically opposed views of how the accident happened. What the court *a quo* could not do was to accept both versions.

[29] Acknowledging the dilemma faced by the court, the appellant's counsel submitted that there were two irreconcilable versions and referred to the matter of *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*.⁹ Indeed, *Stellenbosch's* case elucidates what a court's approach should be when confronted with two irreconcilable versions. Having mentioned that a court must make findings on "(a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities"¹⁰, the court, in *Stellenbosch*, held: "That hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another."¹¹ In such a case, or where all factors are equipoised probabilities prevail.

[30] When dealing with mutually destructive versions, the correct approach to be adopted is succinctly set out in *National Employers General Insurance Co Ltd v Jagers*,¹² where Eksteen AJP said:

"... Where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is

⁸ Roux v Hattingh 2012(6) SA 428 para 434 A

⁹ 2003(1) SA 11(SCA)

¹⁰ supra page 14 para 5 J

¹¹ Supra page 15 para 5 D

¹² 1984 (4) SA 437 (E) at 440E - G [also reported at [1984] 4 All SA 622 (E) - Ed]

therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."

[31] In *casu*, the court *a quo* misdirected itself in dismissing the matter, because the probabilities are evenly balanced for, they do not favour the appellant any more than they do the respondent, in my view. Since the burden of proof lies on the plaintiff, and the trial court could not satisfactorily decide on which side the truth lies, the appropriate judgment should have been absolution from the instance.

[32] Costs

The applicant has obtained a limited form of success. Therefore, I am of the view that each party should pay its costs. In the result, I propose the following order:

[33] Order

1. The appeal is dismissed.
2. The court *a quo*'s order of dismissal is set aside and substituted with an order for absolution from the instance.
3. There is no order as to costs.



M. P. MOTHHA
JUDGE OF THE HIGH COURT
PRETORIA

I concur



M. M. D. LENYAI
JUDGE OF THE HIGH COURT
PRETORIA

I concur



M. J. TEFFO
JUDGE OF THE HIGH COURT
PRETORIA

DATE OF HEARING: 21 January 2025

DATE OF JUDGMENT: 18 March 2025

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