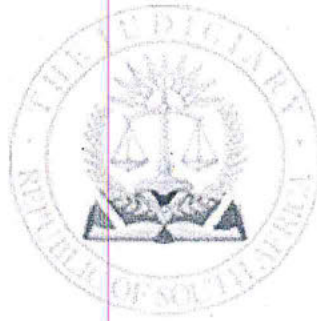




IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

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

DATE: 17 JUNE 2025

SIGNATURE: [REDACTED]

Case No. 49615/2015

In the matter between:

MGIBA, SIPHO JESUS

PLAINTIFF

And

**THE PASSENGER RAIL AGENCY OF SOUTH
AFRICA**

DEFENDANT

Coram: Millar J

Heard on: 16 May & 6 June 2025

Delivered: 17 June 2025 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded

to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 17 June 2025.

JUDGMENT

MILLAR J

- [1] The plaintiff instituted an action for damages against the defendant for injuries suffered by him on the defendant's premises – the Denver train station on 24 February 2015 at approximately 18H00. For the plaintiff the wheels of justice have turned inexplicably slowly but now after 9 years he has had his day in court.
- [2] It is not in issue that the plaintiff found himself on the defendant's premises or that he suffered a traumatic amputation of his right foot while there. What is in issue is how he came to be there and what happened to him. The trial proceeded only for the determination of the issue of liability; the court having ordered a separation of issues¹ upon the joint application of the parties at the commencement of the proceedings.
- [3] This is a case in which the events of the day were testified to by the plaintiff and by two employees of the defendant. Their respective versions of what transpired are diametrically opposed to and mutually destructive of each other.

THE EVIDENCE OF THE PLAINTIFF

¹ The court ordered a separation of issues in terms of rule 33(4) of the Uniform Rules of Court separating the issue of liability from the quantum of damages and postponing the latter *sine die* at the commencement of the proceedings.

- [4] The plaintiff testified that he had finished work on the day in question and had gone to the Denver Station to catch a train home to Tembisa where he lived. He entered the Station through the public entrance and was in possession of a ticket for his journey. He was not in any rush. He decided to catch the train that was going to the Germiston Station even though this was not his destination. While there was a direct train to Tembisa from Denver, he could catch a connecting train there from Germiston.
- [5] He waited for the train to stop and when it had he boarded it. He did so near the middle of the train. When he boarded the train, it was full. It was so full that he was only able to step just inside the doorway of the carriage. There was a press of people in front of him. There were so many people that while he was standing in the centre of the doorway, he was not even able to get a handhold on one of the overhead straps or of any of the bars in the vicinity of the door. He testified that despite this, it was his intention to rely upon the fact that the doors of the train would close before it moved off so that once the doors closed, even though there was a press of people against him and he had no handhold, he would be pushed against the closed doors and would nevertheless still be safe.
- [6] He testified that the train had begun to move off, but the doors had not closed and that shortly after the carriage (in which he was standing) had cleared the platform, the doors had still not closed and he was pushed out of the open doorway by the press of people and fell to the tracks. He found himself injured on the railway tracks having suffered a traumatic amputation below his right knee.
- [7] He testified that other commuters had come to assist him and had lifted him onto the platform. Significantly, he testified that after he had fallen, the train had kept moving and had stopped some distance away from him. He denied that he had tried to board the train while it was moving or that he had done so without being in possession of a valid ticket.

THE EVIDENCE OF THE DEFENDANT

- [8] The first witness who testified for the defendant was Mr. Magoso. On 24 February 2015, he had been working as a train guard for approximately 8 years. His evidence was that he had been in the last carriage of the train. It was his duty to ensure that the platform was clear and that the doors of the train were closed before the signal was given to the train driver for the train to move. He did this by looking down the length of the platform from the last carriage (where he was) to the engine which was at the front of the train. The train occupied the entire platform.
- [9] He explained that for the platform to be clear, it meant that no person was to be standing inside the yellow line on the platform adjacent to its edge and the train. He furthermore explained that commuters often moved around the platform and even on occasion ran along the platform next to the train but that this was not regarded as presenting any danger unless and until the yellow line was crossed.
- [10] He testified that on the day in question, the train had come to a standstill. When the platform was clear and the doors were closed, he had given the driver the signal for the train to move off. The train had begun moving off slowly when unexpectedly, to his left, he had seen the plaintiff running next to the train outside the yellow line – he was approximately 4.5 to 5.5 meters away when he first saw him. While this was not a common occurrence, he had seen it before. The train had started moving off slowly and so the plaintiff was able to keep pace with the carriage he was in and overtake him. It was at this point, that the plaintiff veered to his right and jumped onto the door of the train.
- [11] He went on to say that there is a thin metal lip above the door of the train and a narrow step at the bottom of the doorway even when the doors are closed. The plaintiff tried to grab the lip and step onto the step but slipped and fell. The whole incident occurred in a matter of seconds and so while he was watching the plaintiff jump and attempt to hold onto and step onto the door, he had alerted the driver to stop the train.

- [12] The train came to a standstill with the carriage he was in still next to the platform. He jumped out of the train onto the platform and then down onto the tracks and with the help of commuters who were on the platform, he had lifted the plaintiff up onto the platform. He also retrieved his amputated limb and put it next to the plaintiff.
- [13] Once the plaintiff had been put onto the platform, Mr. Magoso spoke to him and asked him what had happened. He said that the plaintiff had told him that he had been pushed from the train and that he had told him that he was lying because he had seen what he had done.
- [14] Once help had been summoned and paramedics were on the scene, since there was no obstruction of the train, he reboarded the train and it continued its journey.
- [15] The second witness to testify for the defendant was Mr. Baloyi. On 24 February 2015, he was a security officer for the defendant. He had started his shift at 18h00 and would be on duty until 06h00 the following day. He was based at another station and had received a call at approximately 18h20 about an incident at the Denver station. It had then taken him approximately 20 minutes after the incident had occurred to get the scene.
- [16] He found paramedics attending to the plaintiff. The plaintiff was conscious. While the paramedics were attending to him, he asked the plaintiff for his particulars and recorded these contemporaneously in a report. He also asked the plaintiff what had happened, and the plaintiff had told him that he had attempted to board the moving train but had slipped and fallen. He asked the plaintiff if he had had a ticket, but the plaintiff told him he did not.

MUTUALLY DESTRUCTIVE VERSIONS – THE LAW

- [17] In *National Employers' General Insurance Co Ltd v De Jagers*,² the test to be applied in cases such as the present was enunciated as follows:

"It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless 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 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 balance in the sense that they do not favour the plaintiff's case any more than they do the defendant's, 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."

- [18] The two versions before the court are mutually destructive of each other. None of the elements of either version are consonant with or corroborative of any of the elements of the other. This case is the proverbial "all or nothing" for the plaintiff. Either the plaintiff's version is established on a balance of probabilities (that version being more probable than that proffered on behalf of the defendant), or not.
- [19] In the case of both versions, there is a single witness who gave direct evidence in support thereof. Mr. Magoso, notwithstanding his evidence, testified that the plaintiff had informed him on the scene that he had been "pushed out of the train".

² 1984 (4) SA 437 (E) at 440D-G. See also *Stellenbosch Farmers' Winery Group Ltd & Another v Martell et Cie & Others* 2003 (1) SA 11 (SCA).

Against this, is the evidence of Mr. Baloyi that the plaintiff himself had told him, that "he had attempted to board a moving train." There is no evidence before the court to indicate that Mr. Magoso and Mr. Baloyi ever saw or spoke to each other on the day.

- [20] Both the plaintiff and Mr. Magoso testified through an interpreter. Mr. Baloyi, although English is not his first language, chose to testify in English. In my view, the performance of all the witnesses who testified, was unremarkable and nothing in the way that they testified or as to the content of their evidence is sufficient for me to make any credibility finding. Since the performance in the witness box is an entirely neutral factor in this case, it falls to be decided on the versions.
- [21] The plaintiff testified that he had a train ticket on the day in question. Against this, Mr. Baloyi testified that he had asked the plaintiff whether he had a ticket or not and the plaintiff had said no. While the issue of a ticket may in some cases be of relevance, in the present case, it was to my mind, something of a red herring. This is because, it was not placed in issue that the defendant bears the responsibility of ensuring that the doors of its trains are closed before the trains begin to move to ensure the safety of the persons who are inside the train. This duty does not extend only to those who have tickets.³
- [22] The plaintiff was consistent in his version to this court and his first recount to Mr. Magoso of being pushed out of the train, but it remains unexplained why a person who had worked the whole day and was not in any particular rush, would get into a train, so full that there was nowhere for him to grab on any handhold and that he had to rely on the doors to be closed for him to be safe.
- [23] It was argued for the plaintiff that the prevailing duty was on the defendant to ensure that the train did not move off before the doors were closed. This cannot

³ *Farmer v Robinson Gold Mining Company Ltd* 1917 AD 501 at 522 ". . . it is not that the act of trespass deprives the wrongdoer of all right to protection. This cannot be so, because if an owner is in fact aware of the presence of a trespasser, he is bound to observe a certain degree of care. The reason why an owner as a general rule is not obliged to be careful in the case of a trespasser is that he cannot be reasonably expected to anticipate his presence."

be disputed. However, it was not explained why (when the train began to move off and it was said that the door had not closed) that the plaintiff did not step out of the train, while on his version it was still adjacent to the platform, and he could have done so safely. Indeed, it was his duty to do so on his own version.⁴

[24] Against the version of the plaintiff is that for the defendant. Neither of the defendant's witnesses saw or spoke to each on the day in question. It is thus inexplicable, that Mr. Baloyi could have recorded that the plaintiff told him he had attempted to jump onto a moving train, a version corroborative of that of Mr. Magoso, unless the plaintiff had indeed done so. What he saw and heard was recorded in a report and that report was made on the same day. Of course, why the plaintiff would tell Mr. Magoso one version and Mr. Baloyi another, is also inexplicable.

[25] If I take the view that the circumstances under which both versions by the plaintiff were recounted to Mr. Magoso and Mr. Baloyi while he was lying on the platform with his severed leg next to him, and so little or no reliance can, to my mind, be placed on what he said while lying there, then the only evidence to be weighed is that of the plaintiff and Mr. Magoso. Even so, the probabilities do not favour one version.⁵

[26] On consideration of the evidence as a whole⁶, I am unable to find that the version of the plaintiff as to the occurrence is more probable than that of Mr. Magoso. Both versions are on the common cause facts plausible. I am not satisfied that the plaintiff has discharged the onus upon him and for that reason his claim is to be dismissed.

[27] The costs will follow the result.

⁴ See *Kruger v Coetzee* 1966 (2) SA 428 (A). See especially *Passenger Rail Agency of South Africa v Seleke* 2023 JDR 0245 (GJ).

⁵ Even on the plaintiff's own version, he was negligent in embarking and thereafter remaining on the train when it started to move. He could and should have safely disembarked when the doors did not immediately close, and the train began to move.

⁶ *S v Van Der Meyden* 1999 (2) SA 79 (W); *S v Van Aswegen* 2001 (2) SACR 97 (SCA).

[28] In the circumstances, and for the reasons set out above, I make the following order:

[27.1] The plaintiff's claim is dismissed.

[27.2] The plaintiff is ordered to pay the defendant's costs on the scale B.



A MILLAR

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

HEARD ON:

16 MAY & 6 JUNE 2025

JUDGMENT DELIVERED ON:

17 JUNE 2025

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