



**IN THE HIGH COURT OF SOUTH-AFRICA
GAUTENG DIVISION, JOHANNESBURG**

**APPEAL CASE NO: A5016/2022
COURT A QUO CASE NO: 46614/2018**

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

DATE 25.01.2023,


SIGNATURE

**PASSENGER RAIL AGENCY
OF SOUTH AFRICA (PRASA)**

APPELLANT

AND

MPHO LIFFON SELEKE

RESPONDENT

JUDGMENT

STRIJDOM AJ

1. This appeal concerns a decision by Wright J of the Gauteng Division of the High Court of South Africa, Johannesburg on 27 August 2021¹ holding the appellant

¹ Caselines 003 – p 1919 to 199

liable to the respondent for 50% of the respondent's proven damages and to pay the respondent's costs of suit relating to liability. In this judgement I will refer to the appellant as the defendant and the respondent as the plaintiff.

2. The trial Court granted the defendant leave to appeal the judgment to the full Court of this division on 28 September 2021.²
3. Condonation was granted by this court for the late filing of the record by the Defendant and reinstatement of the lapsed appeal.
4. The grounds of the Defendant's appeal can be summarized as follows:
 - 4.1. The Court a quo erred in deciding the matter on the strength of the Defendant's version in attributing contributory negligence to the appellant and in apportioning the damages 50% in line with the Apportionment of Damages Act 34 of 1956, in circumstances where:
 - 4.2. The Plaintiff bears the onus to prove each element of delictual liability against the Defendant.
 - 4.3. The Defendant and the Plaintiff have mutually destructive versions within the meaning of *STELLENBOSCH FARMERS WINERIES GROUP E ANOTHER V MARTELL ET CIE & OTHERS* 2003 (1) SA 11 (SCA).
 - 4.4. The Plaintiff's version was that he was injured as a result of being pushed from inside of a train, whilst the train was moving with open doors.
 - 4.5. The Defendant's version was that the Plaintiff was injured whilst he was attempting to board a moving train.
 - 4.6. The Plaintiff's version was correctly rejected by the court.

² Caselines: 003 – p 206 to 209

4.7. The Plaintiff did not plead, nor lead any evidence on any other alternative version other than the version correctly rejected by the court.'

5. The plaintiff sued the defendant in the High Court, Johannesburg for payment of R850 000 as damages arising out of the accident involving a train operated by the defendant. The court a quo (Wright J) was asked to determine the issue of liability separately from the other issues. It held that both parties were equally negligent and that such negligence had contributed to the injuries sustained by the plaintiff. Consequently, it reduced damages to which the plaintiff was entitled by half and ordered the defendant to pay costs of the trial.
6. The facts found by the trial court were the following. The plaintiff testified that on 16 November 2018 at about 5:30 pm, he arrived at Mayfair station. The platform was full and the train was delayed. When the train arrived, it was full. He had to push his way onto the train. Once on the train, he stayed at the door. Some passengers got off at Mayfair. The train departed Mayfair, very full and with its doors open. The doors remained open all the way from Mayfair to Midway. The plaintiff stated that at first, after boarding the train he was close to the door but at some stage he moved further into the train. The train stopped at Midway. Some people pushed to get in. Others were pushing outwards at the same time. By that time, the train had begun its departure and was travelling fast. He was pushed and fell out onto the platform, sustaining his injuries.
7. It was conceded by the parties that the court a quo correctly rejected the plaintiff's version and accepted the version of the defendant.
8. Mr Kgoadi testified for the defendant. He works for a contractor to Prasa. He works under a Mr Nkwinika. Mr Kgoadi was working nightshift from 6 pm to 6 am. From his position close to the relevant platform, he saw a stationary train. Commuters in the train were singing. Four men on the platform were dancing and singing. A guard's whistle blew, indicating that the train was about to depart. As the train started moving, three of the four men on the platform

jumped on to the moving train as it gathered speed. Commuters held the doors open. A person on the train attempted to help the fourth man as the latter attempted to board the moving train. The train hit the fourth man as he bumped against the side of the train. He fell down at the end of the platform, as the platform slopes down to the ground.

9. Mr Kgoadi phoned his superior, Mr Nkwinika. He arrived after about five minutes. They went to the man lying on the ground. The man was asked for his ticket. He did not produce a ticket. An ambulance then arrived.
10. Mr Kgoadi further testified that the coach which the man had tried to enter was full, but not overcrowded. He saw the severed fingers of the injured man in the middle of the space between the two parallel tracks. The train did not stop after the accident.
11. Mr Nkwinika testified that he is a security shift commander working for Prasa. He did not witness the incident. He was phoned by Mr Kgoadi on the day of the incident. He arrived at the scene and asked the injured man (the plaintiff) for his ticket. He could not produce one. He saw the severed fingers of the plaintiff were lying between the two tracks. He confirmed that the plaintiff was found at the end of the platform as it sloped to the ground.
12. The trial court found that Prasa allowed the train to proceed on and did not even stop after the accident. Prasa allowed the train to proceed before the plaintiff attempted to board it when Prasa could and should have stopped the train before the plaintiff's attempt. Prasa was thus negligent and is liable to the plaintiff for his damages. The trial court concluded that even if commuters on the train held the door open to prevent its closing, at a minimum there should have been a warning from the train guard to the driver that the driver should immediately stop.
13. The trial court found that the plaintiff was negligent in attempting to board a moving train, gathering speed as it was and after three people before him had

boarded the moving train. The trial court found that the it is probable that the plaintiff was not in possession of a valid train ticket for the trip in question³.

14. Counsel for the defendant submitted that the grounds of negligence relied on by the trial court for its finding have not been pleaded by the plaintiff and the plaintiff has not led any of the evidence on which the (trial court has made the findings of negligence against the defendant.)
15. It was also submitted on behalf of the defendant that the cause of the incident were the actions of the plaintiff, either through voluntary assumption of risk (*volenti non fit iniuria*) alternatively that the incident occurred as a result of the sole negligence of the plaintiff. ⁴
16. Counsel for defendant submitted that the trial court erred in not finding that the plaintiff failed to overcome the burden of proof because his version was rejected.
17. It was argued on behalf of the plaintiff that all the 'pieces' of evidence led at the trial must be considered and placed on a canvas and '... When one assembles all the pieces of the mosaic, one may discern a picture'. ⁵ It does not matter which party adduced the proven facts.
18. It was further submitted by counsel for the plaintiff that the defendant was negligent because it failed to:
 - 18.1. Ensure that the Plaintiff was safely on board the train before it departed;
 - 18.2. Ensure that preventative measures were in place to prevent the Plaintiff from running alongside the train in an attempt to board it whilst it was moving; and

³ Caselines: 003 – p 198 to 199

⁴ Caselines: Amended Pleas: 030 – p1 to 5

⁵ S v Ngubane 2021 (2) SACR 158 (GJ) at [19]

- 18.3. Ensure that the train doors were closed so as to prevent people from running alongside the train.
19. Counsel for the plaintiff argued that Prasa has been mandated by the Constitutional Court 'to ensure that reasonable measures are in place to provide for the safety of rail commuters'.⁶
20. The central issue in this appeal is whether the trial court could find that the defendant was negligent based on the evidence adduced by the defendant's witnesses.
21. I disagree with the contention of the Plaintiff that the court a quo could not rely on the evidence tendered by the defendant to find that the plaintiff had overcome the onus placed on him.
22. A court does not base its conclusion on only part of the evidence. 'What must be borne in mind, however, is that the conclusion which is reached must account for all evidence'.⁷
23. In my view the trial court erred in drawing inferences of negligence on the side of the defendant without properly establishing objective facts.
24. The drawing of an inference requires properly established objective facts.
25. In *CASWELL v POWELL DUFFRYN ASSOCIATED COLLIERS LTD*⁸ the court distinguished between inference and conjecture or speculation:
- 'Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases, the other facts can be

⁶ *Mashongwa v Passenger Rail Agency of South-Africa* 2016 (3) SA 528 (CC), at para [18]; see also *Rail Commuters Action Group V Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) at [83].

⁷ *S v Van der Meyden* 1999 (2) SA 79 (W) and *S v Van Aswegen* 2001 (2) SACR (SCA).

⁸ [1939] 3 ALL ER 722 (HL) 733 E-F

inferred with as much practical certainty as if they had been actually observed. In other cases, the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.'

26. 'The inference sought to be drawn must be consistent with all the proved facts. If it is not the inference cannot be drawn.'⁹
27. The trial court held that 'Prasa allowed the train to proceed before the plaintiff attempted to board if when Prasa could and should have stopped the train before the plaintiff's attempt.'¹⁰
28. There is no objective evidence on record why the defendant could or could not stop the train. There is also no objective evidence why the defendant should have stopped the train before the plaintiff's attempt. The only objective evidence is that the whistle of the guard sounded before the train was set in motion and that commuters blocked the relevant door from closing whilst the train was in motion. There is no evidence that the doors were not closed before the relevant door was kept open by the commuters.
29. No facts or evidence about the speed, length or braking ability of the train, or whether the guard or the train driver was aware of the plaintiff's attempt to board the train. There is also no evidence whether the train driver or guard was aware that the relevant door was kept open by the commuters.
30. It was submitted by the defendant that the incident occurred as a result of the sole negligence of the plaintiff. I must agree with this submission. A reasonable man, in the position of a prospective passenger, would have foreseen the danger of boarding a train after it had started to move and would have refrained from doing so.

⁹ R v Blom 1939 AD 188 at 202-3

¹⁰ Caselines: 003 p 198 to 199

31. The plaintiff could not have attempted to board the train in the manner described in evidence if the doors were not held open by commuters.
32. I conclude that the facts in this matter do not support the inference which the trial court sought to draw that the defendant was negligent or that its negligence contributed to the injuries sustained by the plaintiff.
33. It is trite that the defendant has a Constitutional duty to ensure that reasonable measures are in place to provide for the safety of rail commuters. However, in this matter no evidence exists to indicate that the defendant did not discharge its Constitutional duty. There was also no onus on the defendant to do so.
34. In the result the following order is made:
1. Condonation is granted for the late filing of the appeal record and reinstatement of the lapsed appeal.
 2. The appeal is upheld with costs and the order of the trial court is replaced with the following order:
 1. The action is dismissed with costs.



Strijdom AJ
Acting Judge of the High Court
of South Africa Gauteng Division
Johannesburg

I agree



Makume J

Judge of the High Court of South Africa

Gauteng Division

Johannesburg

I agree and it is so ordered



Mudau J

Judge of the High Court of South Africa

Gauteng Division

Johannesburg

Heard on: 19 October 2022

Judgement on:

Appearances:

For the Appellant:

Adv SM Tisani

Instructed by:

Norton Rose Fulbright

For the Respondent:

Adv R Shepstone

Instructed by:

Mngqibisa Attorneys