

SOUTH AFRICA / JUDGMENT

Chauke v Passenger Rail Agency of South Africa (38743/2015) [2024] ZAGPJHC 621 (9 July 2024)

[2024] ZAGPJHC 621

COURT

South Gauteng High Court, Johannesburg

BEFORE

Kathree-Setiloane

CASE / FILE NUMBER

38743/2015

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IN

THE GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION

JOHANNESBURG

1.

REPORTABLE: NO

2.

OF INTEREST TO OTHER JUDGES: NO

3.

NOT REVISED.

9

July 2024

CASE

NO: 38743/2015

In

the matter between:

LEBOGANG

DESMOND CHAUKE

Plaintiff

and

PASSENGER

RAIL AGENCY OF

SOUTH

AFRICA

Respondent

JUDGMENT

KATHREE-SETILOANE J:

- [1] The plaintiff, Desmond Lebohang Chauke, instituted an action against the Defendant, Passenger Rail Agency of South Africa, for damages arising out of an incident in which he was purportedly pushed out of a moving train at the Vereeniging Railway Station (Vereeniging Station) at approximately 21h30 on 27 June 2014.
- [2] The plaintiff's action came before me on the issue of liability only as this issue was separated from the issue of quantum in terms of Rule 33(4) of the Uniform Rules of Court.
- [3] After the plaintiff closed its case, the defendant brought an application for absolution from the instance. The court dismissed that application and the trial proceeded.
- [4] In brief, the plaintiff's case is that he boarded a train at Vereeniging Station at 21.30 on Friday 27 June 2014. There was a stampede in which he was pushed through the open doors of the train while it was in motion. He fell under the train and sustained severe injuries. As a result, the plaintiff's left leg (above the knee) and left arm was amputated.
- [5] The defendant disputed the version of the plaintiff. Its version was that there was no incident in which the plaintiff was pushed of a train at 21h30 on 27 June 2014, as there was no passenger carrying train operating on that evening which left Vereeniging Station at 21h30 for Germiston.
- [6] The parties have presented two mutually destructive versions. The approach that the court must follow in resolving the dispute has been well established and needs no repetition.[1] The question of onus is of material importance where there are two mutually destructive versions as we have here. Before the onus is discharged, the Court must be satisfied that the version of the party upon whom the onus rests is true, and the other is false. The Court must be placed in a position where it can place full reliance on the version of the party bearing the onus.
- [7] As a provider of rail commuter services to the public,[2] the defendant has a legal duty to implement reasonable measures to ensure the safety of commuters who travel on its trains. As held by the Supreme Court of Appeal inTwala, this obligation would give rise to legal liability where the risk of harm to commuters resulting from falling out of crowded trains running with open doors is imminently foreseeable.[3]

- [8] It is well-established that for the plaintiff to establish that the defendant is liable, it must prove that it was negligent. This onus rests squarely on the plaintiff who is required to prove more than merely 'that harm to others was reasonably foreseeable and that a reasonable person would probably have taken measures to avert the risk of such harm. The plaintiff is required adduce evidence as to the reasonable measures which could have been taken to prevent or minimize the risk'.^[4]
- [9] The plaintiff pleaded that the defendant was negligent in that it 'failed to take any or any reasonable precautions to ensure the safety of commuters, members of the public and the plaintiff, in particular, by failing to: (a) maintain adequate crowd control in and around the station, train and coach;
- (b) ensure that the station, train and coach did not become overcrowded; (c) ensure that the doors of the coach remained closed while the train was in motion; and (d) ensure that passengers were not pushed onto the train by those wishing to board the train and off the train by those wishing to alight and/or exit the train. The defendant denied that it was negligent.
- [10] The plaintiff led the evidence of two witnesses: himself and his father, Mr Simon Pule. The plaintiff's evidence was that his father dropped him off at Vereeniging Station at approximately 20h00 to catch a train to Clarifier. On arrival at the Vereeniging Station, his father instructed him to inquire if there was a train coming to the station that evening. The plaintiff asked a commuter who advised him that a train would be coming in. On being informed of this, the plaintiff's father left the station.
- [11] The plaintiff was in possession of monthly train ticket which was valid from 1 June 2014 to 30 June 2014. After an official had checked his ticket, he went to platform 3 where he waited for the train. He could not say whether the official was a ticket-officer or a security guard. Platform 3 was not crowded when he arrived. While waiting at platform 3, he overheard some people saying that the train was late as it should have arrived at 21h00. The train arrived at 21h30 that evening.
- [12] The plaintiff testified that when the train stopped at platform 3, 'people were screaming, shouting and pushing'. He 'was in the middle of those people (about 100) pushing' and was 'pushed to the door of the train' which was open.' He managed to grab onto a steel pole which was an arm's length from the door of the coach he was pushed into. At this point his left leg was still outside the coach. After managing to pull himself fully into the coach, he was pushed further in by the crowd of people forcing their way into the coach. The train then started to move while the doors were still open. A crowd of people, inside the coach, who were trying to disembark the moving train pushed him out of the coach. There were no security guards on platform 3 when the incident happened and there was no whistle sounded when the train started to move.

- [13] The plaintiff could not remember what happened after he was pushed out of the train. He woke up at Sebokeng Hospital and only realised two weeks' later that his arm and leg had been amputated.
- [14] The testimony of the plaintiff's father did not contribute to resolving the dispute between the parties, as he was not a witness to the incident and had no knowledge of it. He did, however, confirm that he dropped the plaintiff off at Vereeniging Station at about 19h50 to catch a train to Kliprivier.
- [15] The defendant led the evidence of four witnesses. The first was Mr Gerhardus Jacobus Van Wyk (Mr Van Wyk). He was employed as a train driver by the defendant at the time of the incident. Mr Van Wyk drove train 9075 which was the last train that travelled from Vereeniging Station to Johannesburg Station on the evening of the plaintiff's fall. He lived in Vereeniging not Braamfontein. The train was scheduled to leave Vereeniging enroute to Johannesburg at 17.35 and arrive at Johannesburg Station at 19.27. The train was, however, delayed. As a result, it only left Vereeniging Station at 18.30 and arrived in Johannesburg at 20h44.
- [16] Mr Van Wyk testified on how the driver and the train guard swap coaches when a train departs a train station or shunts to a siding. On arrival at Johannesburg station he walked to the motor coach on the western side of the train. The train guard in turn walked from the western side to the eastern side. They did this change-over because the train was now going to travel from Johannesburg to Vereeniging where it was to be staged or stabled. The train number changed to 9086. He said that this was not the last train to arrive at Vereeniging Station as trains from Braamfontein would have arrived at that station after the arrival of his train.
- [17] Mr Van Wyk arrived at Vereeniging Station in train 9086 at 22h40 on Friday, 27 June 2014. As the train was approaching the bridge near platform 3, he saw in the headlight a person lying on the ground between the rail and the platform. Although the person's leg was severed from his body, he appeared to be alive. Mr Van Wyk stopped the train about a meter away from the injured person. He disembarked; reported the incident to Centralised Train Control (CTC); and requested an ambulance to take the injured person to the hospital. On his way to the CTC he met two security guards who were patrolling the station. He informed them of what he saw and they then took a look. He thereafter shunted the train to the siding - the place where the trains were stabled or parked.
- [18] According to the evidence of Mr Van Wyk there was a wall between platform 1 and 3. In cross examination, Mr Van Wyk confirmed that after he departed Vereeniging Station at 18.30 on the evening of 27 June 2014, at least two other trains would have travelled from Braamfontein Station to Vereeniging Station. He could not say what the train numbers were or what time they would have departed Braamfontein Station. He could not say exactly which of the three lines the trains would have travelled on, nor the platforms they would have arrived at because he was travelling in the opposite direction to Johannesburg. He,

however, made it clear that they could have used any of the three lines or platforms.

- [19] Ms. Fulufhelo Lynette Manugu (Ms Manugu) also testified on behalf of the defendant. According to her testimony, on 27 June 2014 she worked as a metro guard on train numbers 0747 and 0752 which travelled on the Germiston Vereeniging line. A draft daily journal for these two trains dated 27 June 2014 was presented to her during her evidence in chief. She confirmed that it was her daily journal for 27 June 2014. She testified with reference to this daily journal that train 0747 left Germiston at 18h10 and arrived in Vereeniging at 19h32. She explained what would generally occur when train 0747 arrived at Vereeniging Station. On arrival at Vereeniging Station, that train would do a turnaround in the direction of Germiston. The actual train would not turn around, but the train driver and train guard would change coaches. In doing so, the train guard would disembark the first coach of the train on the Vereeniging side of the station and walk to the last coach on the Germiston side of the station. The driver and the guard did this change-over in preparation for the train to travel in the opposite direction back to Germiston. This usually took about 5 minutes.
- [20] Before the train travelled in the direction of Germiston, its number changed. On arrival at Vereeniging Station, train 0747 would change to 0752. After the changeover, Ms Manugu would be in the last coach of the train and the train driver would be in the first coach or the motor coach on the Germiston side of Vereeniging Station.
- [21] Ms Manugu explained the procedure she would follow before the train would leave for Germiston Station. Before a train departed the station, she would put her head out of the window of the coach to check if there were commuters standing on the yellow line of the platform. If the platform was clear, she would blow the whistle to alert the commuters that the train was about to leave. She

would thereafter close the doors of the train and signal the driver by pressing a button, which made the sound of a bell. This sound signaled to the driver that it was safe and clear for the train to leave the station. As a train moved out of the station, she would continue to observe the platform from the coach window (with head outside the window) until the last coach had left the platform. She said that if she observed something that indicated that it was dangerous for the train or a commuter on the platform, she would alert the train driver to stop the train. She did this by pressing an emergency bell. The train driver would respond by immediately stopping the train.

- [22] On the night in question, she did not observe anything that would compromise the safety of any passenger. Train 0752 was the last train to travel from Vereeniging Station to Germiston Station. It left Vereeniging Station at 19h40. At that time of the evening, there would generally be only about 10 passengers on the entire train. On a Friday, peak hour is 3 pm.
- [23] On the question of whether there was a stampede at 21h30 on Friday, 27 June 2014, she said that there could not have been a stampede as there was no train at that time. Any train that arrived at Vereeniging Station after the 19h40 would not go back to Germiston but would be staged or stabled at Vereeniging Station. There were no passengers on a train that goes to

the siding to be stabled or staged. This is because they would be informed by the train guard on duty that it was “an all-change train”, meaning that the train was to be staged or stabled. On being informed of this, passengers would disembark the train.

[24] Mr Frederick Makonya Mbatha (Mr Mbatha) also testified for the defendant. On 27 June 2014 when plaintiff was purportedly pushed off a train, Mr Mbatha was employed by the defendant as a metro train guard. He worked on the trains that ran between Vereeniging Station and Germiston Station.

[25] Relying on his daily journal for 27 June 2014 which he had personally signed-off, he testified that he was on train 0950 that left Vereeniging Station at 19h06 for Germiston Station on the night in question. Mr Mbatha was adamant that the trains at that time were on time on the Vereeniging Germiston line, and there was no incident that caused any delay prior to 19h06 on that evening.

[26] He testified that there was no stampede at Vereeniging Station on the evening of 27 June 2014. According to his testimony, peak time for commuters at Vereeniging Station, on any Friday of the month, was between 14h00 and 17h00. After 17h00 the number of commuters decreased and from about 19h00 to 20h00 there would only be about 15 to 20 commuters (or less) at that station.

[27] With reference to the evidence of Mr Van Wyk that the train 9086 which travelled to Johannesburg was 55 minutes late that evening, he was adamant that that delay did not influence the Germiston Line, and that the trains on which he was on duty were on time.

[28] Mr Malahlela, an employee of Royal Security was on duty at Vereeniging Station from 18.00 on 27 June 2014. He patrolled platforms 1, 2 and 3. Platform 1 was separated from platform 3 by a wall, so when he was patrolling platform 1, he could not see what was happening on platform 3. He, however, remained adamant that there was no crowd or stampede on platform 3 on the evening of 27 June

2014. He said although at the time of the incident he was patrolling platform 1 and not platform 3, and could not see what was happening there, he would have heard the screams and shouts from commuters who were caught in the stampede. He was also certain

that if plaintiff was indeed pushed off the train, someone in the crowd disembarking the train or those on the platform would have

informed him of the incident. He, however, only became aware that plaintiff was injured and underneath the platform when Mr Van Wyk alerted him to this.

[29] Mr Malahlele testified that last train left Vereeniging Station at 19h40 that evening and after that there were no crowds at Vereeniging Station. If there were people on the platform they would be asked to leave.

Analysis

- [30] The case that the defendant had to meet was that its employees who were on duty on the train that left Vereeniging Station for Germiston Station at 21h30 on 27 June 2014, were negligent in allowing the train to move whilst passengers were boarding and disembarking the train. Central to the case which the defendant had to meet was the question of whether there was a passenger train that left Vereeniging Station at 09h30 on 27 June
2014. This issue goes to the root of the plaintiff's case against the defendant. If the plaintiff is unable to persuade the court of this, its claim must fail.
- [31] As alluded to, Ms. Manugu testified that the last train that left Vereeniging Station for Germiston on Friday, 27 June 2014 was train 0752 and she was the security guard on the train. It, however, emerged in cross examination, Ms Manugu had no independent recollection of the exact times that the trains on which worked, on 27 June 2014, departed or arrived at the stations on the Vereeniging Germiston line left. She was dependent for these times on her signed final daily roster for that day. However, what was presented to her by the defendant's counsel during her testimony in the trail, was an unsigned draft of her daily journal for that day. This draft was amended by a functionary at 11h30 on the day. Ms Manugu seemed to only realize during cross examination that this was a draft and not the final version which she signed on 27 June 2014. She was certain that she had signed the final version of her daily journal but did not explain why it was not before court. In view of her concession that without the signed final version of her daily journal she could not say what the exact times of the trains were, I cannot accept Ms Manugu's testimony that train 0752 was the last train that left Vereeniging Station on Friday, 27 June 2014. Nor can I accept her evidence that that train could not have been more than 10 to 15 minutes late in arriving at that station. I also do not accept her evidence that she observed the platform from that train before it left.
- [32] Ms. Manugu accepted in cross examination that she could not dispute that the that the plaintiff boarded a train at 21h30 at Vereeniging Station and that the doors remained open while the train was in motion leaving the station. Mr Mbatha, the train guard on duty on trains 0750 and 0753 that travelled on the Germiston Vereeniging line on 27 June 2014, also conceded in cross examination that between 20h00 and 21h57 on 27 June 2014, he was not at Vereeniging Station, and that he was not a witness to what may have happened at the station during that time.
- [33] Although neither Mr Mbatha not Mrs Manugu could dispute that the plaintiff may have fallen off a train at approximately 09h30, Mr Malahlele who was on duty at Vereeniging Station that evening was adamant that this could have not happened because there was no train that left Vereeniging Station at 21h30 on Friday, 27 June 2014. He said that the last train that left Vereeniging Station that evening was at 19h40, and that after that time no other trains had left the station to go to either Johannesburg or Germiston. According to Mr Mbatha's testimony, the only trains that would have arrived at Vereeniging Station after

19h40 would have been those that were to be stabled or staged in the siding.

- [34] Mr Mbatha's evidence on this issue was corroborated by Mr Malahlele, who testified that train 0753 was the last train on the Vereeniging Germiston line to arrive at Vereeniging Station, on 27 June 2014, where it was stabled or staged for the night. Neither Mr Malahlele's evidence nor Mr Mbatha's evidence was refuted by the plaintiff.
- [35] With reference to the evidence of Mr Van Wyk (the train driver who found the plaintiff between the rails and platform 3) that his train departed Vereeniging Station for Johannesburg 55 minutes late, Mr Mbatha was adamant that did not influence the Germiston Vereeniging line. In this regard, he said that he bore 'no knowledge of what could have happened on the Johannesburg line where Mr Van Wyk was working but on our line, Vereeniging to Germiston, [the trains] were always on time'.
- [36] Importantly in this respect, Ms. Manugu testified that the train which Mr Van Wyk said was 55 minutes late on 14 June 2014, travelled from Vereeniging to Johannesburg and not Vereeniging to Germiston. She explained that the trains that travelled from Vereeniging to Johannesburg used a different line/platform from the one that Mr Van Wyk referred to in his evidence. Thus, any delay of a train travelling to Johannesburg that evening would not influence the trains travelling to Germiston. I have no reason to reject the evidence of Ms. Manugu on this aspect as it was based on her experience and was not reliant on her signed final daily journal for 27 June 2014.
- [37] When it was put to Mr Mbatha that Ms. Manugu testified that there could have been a delay of 10 to 15 minutes on the trains on which she worked on 27 June 2014, Mr Mbatha responded by saying that although those trains may have been delayed, there were no delays on the trains which he had worked on that day. He said that he was sure about this because if there were delays, it would have been captured in his daily journal which he had signed off on.
- [38] A related issue which the plaintiff bears the onus to prove is that platform 3 was crowded at 21h30 on 27 June 2014, and that there was a stampede by commuters to get into the train. This resulted in him being pushed into the train by the crowd of approximately 100 commuters who were rushing to board the train, and pushed out by the crowd inside the train who were trying to disembark, when the train started to move. He said that the commuters who were trying to board the train 'screamed, shouted and pushed each other to board the train. The plaintiff furthermore testified that there were no security guards on platform 3 when the stampede occurred.
- [39] The plaintiff's testimony was consistent with that of Mr Malahlele, who testified that he was patrolling platform 1 at about 21h30 on 27 June 2014. As indicated, Mr Malahlele was on duty at Vereeniging Station on that evening. He was, however, resolute in his testimony that platform 3 was not overcrowded at 21h30 on 27 June 2014, and nor was there a stampede on the platform.

- [40] He insisted that none of the three platforms were overcrowded with commuters at 21h30 that evening because after the last train left the station, they chased people away. According to him the last train left Vereeniging Station for Germiston at 19h40, thus after this the station could not have been crowded with commuters. That the last train left Vereeniging Station for Germiston at 19h40 is in line with the time noted in the draft copy of Ms Manugu's draft daily journal. His evidence on this aspect was also not challenged in cross examination.
- [41] Mr Malahlele's evidence that the platform was not crowded after 19h40 is also consistent with that of Mr Mbatha who testified that peak hour at Vereeniging Station on a Friday was between 14h00 and 17h00 and that after that there were less commuters on the station. He also said that 'between 14h00 and 20h00 there would be fewer passengers; between 15 or 20 or even less'. Ms Manugu likewise testified that peak hour on a Friday at Vereeniging was 3 pm, and that in her experience 'more especially if it is a Friday or a payday... the activity at the station is very minimal and less, because a lot of people would have got paid earlier and knocked off early'. There is no basis to reject the evidence of Ms. Manugu on this aspect, as she was
- testifying from experience. Thus, on the objective facts, it is improbable that there would have been a crowd of people on platform 3 at 21h30 on platform 3, Vereeniging Station.
- [42] Although Mr Malahlele accepted that he could not see what was happening on platform 3 at 21h30 on 27 June 2014 as he was patrolling platform 1 at that time, he was, however, adamant that if there was a stampede at platform 3 as testified by the plaintiff, he would have heard the screams of the commuters who were attempting to board or disembark a train.
- [43] In the same vein, he testified that had the plaintiff fallen off the train, he would have heard the screams of commuters, and they would have reported the incident to him. Mr Malahlele's version on this aspect must be assessed on the probabilities. On the probabilities, had there been a stampede on platform 3 at approximately 21h30 on 27 June 2014, Mr Malahlele who was on the other side of the wall that divided platform 1 from platform 3, would have heard the screams of the commuters who were caught up in the stampede to board and disembark the train. He would have likewise heard their screams had the plaintiff fallen off the train.
- [44] It is also probable that one of the many commuters who disembarked the train just before or after the plaintiff was pushed off, would have reported the incident to Mr Malahlele or the CTC or called ambulance to take him to hospital.

[45] On the plaintiff's version evidence, if there were at least 100 commuters on the platform who were rushing to get onto the train, then there must have been an equal number of commuters who were attempting to disembark the train when it started to move. On the probabilities, some of these commuters would have fallen onto the platform and sustained injuries while disembarking the moving train. Yet on the plaintiff's version none of the commuters who attempted to disembark when the train started to move

sustained injuries in the tragic incident. What's more, on his version, not a single commuter who managed to disembark the train that evening, witnessed the incident or reported it to the CTC or the security guards on duty. In my view, it is objectively impossible that not one of the commuters, who were trying to board the train and those who pushed him out in the process of attempting to disembark, were injured in the incident or reported the incident to the authorities.

[46] As I see it, there would have been a sizeable number of commuters who would have witnessed the tragic incident on the plaintiff's version, yet not one of them deemed it appropriate to report the incident or get immediate assistance for the plaintiff. This in my view is an objective impossibility.

[47] In my view, it was also objectively impossible for a stampede to have occurred by virtue of the turn-around or change-over of the driver and the train guard that occurred at Vereeniging Station. Significantly, in this regard, the plaintiff did not dispute that the trains did a turn around when they arrived at Vereeniging Station and before they left for Germiston Station. On the undisputed evidence, the train was approximately 300 meters long and the change-over took between 5 and 8 minutes. In the light of time it took to complete the turnaround, it is highly improbable if not impossible that a stampede as described by the plaintiff would have occurred.

[48] On consideration of the objective and undisputed facts, the plaintiff has failed to prove on a balance of probabilities that the defendant is liable for the alleged damages suffered because of an incident that occurred on 27 June 2014 at approximately 21h30. The plaintiff's claim must accordingly fail.

[49] In the result, I make the following order:

1. The plaintiff's claim is dismissed with costs, including those of two counsel where such were employed.

F KATHREE-SETILOANE J

Counsel for the plaintiff: Mr Ram/Ms Granova

Instructed by: Molepo Attorneys

Counsel for the respondent: Mr Cilliers with Mr Opperman

Instructed by: Majavu Inc

Date of hearing: 24 to 28 February 2020; 28-29 November 2022; 11 December 2023

Heads of argument received: 31 July 2023

Argument heard: 11 December 2023

Completed Transcript: 2 July 2024

Date of Judgment: 9 July 2024

This judgment has regrettably been delayed as I had had fractured my right hand on 3 December 2023, been diagnosed with cancer on 28 January 2024 and had to undergo two surgeries and cancer treatment in February and March

2024. At the end of March 2024 while still under cancer treatment, my husband was diagnosed with pancreatic cancer and passed away on 1 May

2024. In June 2024, I discovered that the record was incomplete as it did not include the cross-examination of Mr Malahlele. I requested the record, and it was provided to me on 2 July 2024.

(Handed down electronically by email to the parties' legal representative and by being uploaded to CaseLines).

[1] Stellenbosch Farmer's Winery Group Limited and Another v Martell et cie and Others 2003

(1) SA 11 (A).

[2] Legal Succession to the South African Transport Services Act 9 of 1989

[3] SA Rail Commuter Corporation Limited v Twala [2011] ZASCA 170 at para 12 (Twala).

[4] Twala at para 11.

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