

SOUTH AFRICA / JUDGMENT

Chauke v Passenger Rail Agency of South Africa (8394/13) [2015] ZAGPPHC 1075 (9 December 2015) [2015] ZAGPPHC 1075

COURT

North Gauteng High Court, Pretoria

BEFORE

Motepe

CASE / FILE NUMBER

8394/13

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

REPUBLIC
OF SOUTH AFRICA
OFFICE
OF THE CHIEF JUSTICE
(GAUTENG
DIVISION, PRETORIA)
CASE
NO: 8394/13

DATE: 9/12/2015
NOT
REPORTABLE
NOT
OF INTEREST TO OTHER JUDGES
In

the matter between: ONNICAH
TINNY
CHAUKE
Plaintiff
and
PASSENGER
RAIL AGENCY OF SOUTH
AFRICA
Defendant

JUDGMENT

MOTEPE AJ:

Introduction

and the pleadings

[1] The plaintiff sues the defendant for bodily damages she sustained from falling off a train that was allegedly in motion on 29 December 2012 at or near Kaalfontein train station ("Kaa/fontein") in Gauteng Province. She alleges as follows in paragraphs 5 to 8 of her amended particulars of claim:

" 5.

The sole cause of the plaintiff's falling from the train was the negligence of the conductor, whose identity is to the plaintiff

unknown, who at the time of the accident was employed by the Defendant and was acting in the course and within the scope of his

employment with the Defendant and was negligent in one or more or all of the following respects:

5.1. He/she allowed the train to travel with open doors, specifically the doors of the coach which the Plaintiff was a passenger to.

5.2. He/she signalled to the driver to set the train in motion whilst the doors of the coach which the Plaintiff was a passenger to were still wide open.

5.3 He/she failed to pay due regard to the safety of passengers on board of the train. By allowing the train to travel with open doors.

5.4. He/she failed to prevent the said accident when by the exercise of due and reasonable care, he/she could and should have done so.

6.

Alternatively the sole cause of plaintiffs injuries was the negligence of the driver whose identity is to the Plaintiff unknown, who at the time of the accident was employed by the Defendant and was acting in the course of and within the scope of his employment with the Defendant and was negligent in one or more or all of the following respects:

6.1 He/she set the train in motion at a dangerous and/or inopportune time with the doors open.

6.2 He/she failed to check that it was safe for him/her to set the train motion.

6.3 He/she failed to keep a proper lookout, and/or

6.4. He/she failed to prevent the accident when by the exercise or skill and reasonable care, he/she could and should have done so.

7.

Further alternatively the sole cause of plaintiff's falling from the train was the joint negligent of the conductor and the driver who their identities are to the Plaintiff unknown and were negligent in one or more or all of the respects alleged in paragraph

(5) and (6) respectively.

8.

Further alternatively the sole cause of the plaintiff's falling from the train was the unlawful conduct and negligence of the Defendant which in breach of duty of care which is owed to its passengers specifically the Plaintiff was negligent in one or more of the

following respects:

8.1. By failing to provide personnel to guide, control and/or protect passengers on board and/or alighting and/or boarding the train.

8.2. By failing to put measures in place to ensure that the train was not set in motion whilst the doors are still open.

8.3 By failing to provide security personnel to guard against commuters from blocking the trains' doors to close.

8.4 By failing to put measure in place to warn commuters that the train is full.

8.5 By selling excessive number of train tickets and public provide the least number of trains.

8.2

As a result of the said collision plaintiff sustained serious bodily injuries consisting of the following injuries:

8.2.1 Elbow dislocation

8.2.2 Fractured tibia and fibula

8.2.3 General body pains."

[2] In its amended plea, the defendant dealt with the above allegations as follows:

"

4.

AD PARAGRAPH 4 - 7 THEREOF

The Defendant denies that it or its employees were negligent in anyone of the allegations in paragraph 4 - 7 of the Plaintiffs Particulars of claim, and pleads that the Plaintiff was never involved in a train accident as alleged. The Defendant further pleads that the accident was caused as a result of the sole negligence of the Plaintiff who was negligent in one more of the following:-

1. She stood at the open door of a moving train which posed danger to her at that moment.
2. She failed to take any or adequate steps to prevent the accident, when by the exercise of a reasonable care she could, and should have done so.
3. She voluntarily got into an overcrowded train where there was no space for anyone to get into the train.
4. She got in or alighted from a moving train before it came to a standstill, by so doing causing injuries to her.
5. She forced the doors of the train to open before the train could stop and the operator opening the door. By so doing posing danger to her and other members of the public.
6. She got onto the train whilst it was still in motion.

Alternatively, and only in the event of this Honourable Court finding that the Defendant was negligent, which still denied, the Defendant pleads that such negligence did not contribute to the Plaintiff being pushed out the train.

Further alternatively and only in the event of this Honourable Court finding that the Defendant was negligent and that such negligence contributed to the Plaintiff being pushed out of the train, which is still denied, then and in the event, the Defendant pleads that the Plaintiff was also guilty of contributory negligence and damages suffered by the Plaintiff should be reduced proportionate to the degree of her own negligence in accordance with the Apportionment of Damages ACT 34 OF 1956.

5.

AD PARAGRAPH 8 - 8.3 THEREOF

The Defendant bears no knowledge of these allegations and as such these allegations are denied and the Plaintiff is put to the proof thereof." ("Own emphasis")

- [3] Pursuant to an agreement between the parties, merits and quantum were separated. Consequently, the trial proceeded only on the question of liability.

The evidence

- [4] The plaintiff took the stand. She testified that on the day in question she was on her way to work at Isando. She boarded the train at Leralla Station ("Leralla") in company of his nephew whom she identified as Nicholas Patel ("Patel"). According to her testimony, the train arrived around 06h25.

- [5] The train was full to an extent that she and Patel could not find a seat and had to remain standing. She was standing at the corner between the rows of commuter seats and supporting herself on the iron railings in the train, an arms-length away from the door. She was holding the railings with her right hand while she held her bag with her left hand. According to her, the train was so full that you could not even see the shoe you were wearing.
- [6] She testified that the doors of the train were not closed from the time they left Leralla until it reached Kaalfontein. Just before the carriage in which she was in reached the platform, the commuters who were inside the train and who wanted to catch the Pretoria bound train which was now on site started pushing each other. In the process they pushed her, causing her to lose the grip of the railing she was holding and fell through the open doors on the other side of the train, away from the side of the platform.
- [7] As stated above, she testified that the doors on either side of the carriage were open at all material times. There was no security guard or anyone in the carriage who was controlling the passengers. After she fell, she lost consciousness.
- [8] In cross-examination, she was asked about the train number she had boarded. Her evidence was that she did not check the number of the train. It was suggested to her that having used the trains for more than 8 years, she should be knowing the numbers of the trains travelling on that route. She disputed this, testifying that she never checks the numbers on the trains. All that she is interested in is that the train arrives on time and takes her to her destination. She could not dispute that the train number she was in was no.1812.
- [9] It was put to her that the defendant's evidence will be that the train no.1812 arrived at Leralla at 06h38. She disputed this,
- reiterating her evidence that it arrived at 06h25 and only left Leralla at 06h40.
- [10] It was put to her further that having used trains for more than 8 years, she should have realised that it was not safe to board a train when the doors remained open while the train is moving and when the carriage is full. It was put to her that she should have waited for another train instead of boarding this unsafe train. She testified that even though the train was full and the doors could not close, she had no choice but to use it because she could afford to pay for a taxi and that she had a monthly ticket for the train. Having to wait for another train would have meant that she would be late for work. According to her, during December, the defendant reduces the number of trains with the result that she would have waited too long for another train had she let this one go. It was conceded by the defendant in cross-examination of the plaintiff that indeed on the day in question, the defendant was employing a Sunday schedule, confirming the plaintiff's evidence that the defendant does indeed reduce its trains during the December period.
- [11] She was asked whether people were blocking the doors between Leralla and Lemindlela (the station after Leralla but before Kaalfontein).

She answered in the negative, testifying that when the train arrived at Leralla, the doors were already open. She confirmed that after boarding the train she was standing an arm's length away from the door, inside the carriage and that she was holding onto the rails.

- [12] At Lemindlela, more people entered the carriage. She estimated that it may have been approximately 20 people who entered at Lemindlela. They entered at Platform 2, through the doors opposite to the side she was standing. She was then asked why she did not alight at Lemindlela since the train was that full. She repeated that she did not have a taxi fare.
- [13] When the train arrived at the vicinity of Kaalfontein, the platform on which commuters could alight was on the opposite side from where she was standing. It was Platform 2. In other words, she was closer to the doors on which there was no platform to alight. If one got out through those doors, they would have had to jump onto railway lines and only thereafter will they find Platform 3.
- [14] Just as the front part of the train was pulling into the platform, there was an announcement on the loud speakers that the Pretoria bound train had arrived. The people who were rushing for this Pretoria bound train started jostling and pushing. They started jumping out of the moving train. When she was asked if she was not one of those who jumped at Kaalfontein, she rhetorically asked "why would I jump at Kaalfontein when I was going to Isando".
- [15] As people were trying to get off and some getting in, she was then pushed and she fell onto the railway lines. She reiterated that while the other carriages were already on the platform when people started jostling and pushing, her carriage was not yet on the platform. The carriage she was in was approximately 6 paces from the platform. Upon falling, she lost consciousness and only woke up 30 December around 15h30.
- [16] She was asked if she sustained fractures. She answered in the affirmative and further that there is a steel fitted into her body. It was then put to her that the defendant will call two witnesses, Ms Ximbi and Mr Mkatu who will testify that when they attended to the scene, they found the plaintiff further down Platform 3 demonstrating that when she fell, the train had come to a complete standstill on Platform 2. It was put to her that she spoke to Ximbi and Mkatu and informed them that her nephew, Patel jumped off the train as he was getting off at Kaalfontein. She also jumped from the train, following him. She disputed this version and reiterated that she was on her way to work and she could therefore not have alighted at Kaalfontein. When she was told that both Ximbi and Mkatu made statements stating that they spoke to her, she stated that she does not remember speaking to anybody as she was unconscious.
- [17] It was put to the plaintiff that the details that were filled on the form for example her proper identity number demonstrate that the two defendants' witnesses did in fact speak to her. She maintained that she believes that they may have spoken to Patel but not her. She confirmed however that all the details appearing on the statements by the witnesses were correct.

- [18] It was further put to her that Mkatu will testify that as he was exiting the tunnel on the subway, he saw people jumping from the same train across the rail track going onto Platform 3. She confirmed that there were people who were jumping from the train onto the railway tracks.
- [19] It was put to her that Ms Ximbi will testify that she was informed by the plaintiff that she was pushed by unknown commuters while she was blocking the door and she fell down. Therefore, while Ximbi was to testify that the plaintiff was pushed off the train while she was blocking the door, Mkatu was to testify that the plaintiff told her that she jumped from the train following her nephew. This is despite the fact that it was initially put to her that Ximbi will say she jumped following her nephew.
- [20] The next witness to testify was the plaintiff's nephew who gave his names as Mduduzi Selby Patel. He testified that on 29 December 2012, he was in the company of the plaintiff coming from Tembisa where they boarded the train. He was to get off the train at Kaalfontein and catch a City to City bus to Bushbuckridge in Mpumalanga. The train was full with commuters. When it approached Platform 2 at Kaalfontein just when it was about to stop, more people came on board the train. The people coming in pushed the plaintiff and she fell on the rail tracks. The train then went on until it came to a complete stop. He testified that after the plaintiff fell, the train travelled for another 15 meters at a speed of approximately 20 to 30kms per hour until coming to a complete standstill.
- [21] He testified that inside the carriage, he had been standing approximately two arm's length from the plaintiff on the opposite side of the train. He had been leaning on the hanging belts attached to the rails in the train.
- [22] When the plaintiff fell, he witnessed the whole incident. He immediately jumped on the same side that the plaintiff fell. He had on him a back pack and luggage comprising of grocery, including 10kg of rice. He jumped with the back pack and the other commuters who remained in the train passed on his luggage and grocery to him. He then rushed to Platform 3 to place the grocery and luggage at a particular spot. He ran towards the plaintiff and with the help of other commuters, lifted her and put her on to platform
3. He specifically wanted to put her next to his luggage so that he can also keep watch on his luggage so that it is not stolen.
- [23] When he was asked whether the plaintiff was still conscious, he answered that she was dizzy. He confirmed that the plaintiff was going to work in Isando while he was to embark at Kaalfontein and catch a City to City bus to Mpumalanga. When it was put to him that the guards will testify that they found her lying on Platform 3, he confirmed that after she fell on the rail tracks, he, with the assistance of other commuters lifted her and put her on the platform. He confirmed that the defendant's officials later arrived on the scene and he made a statement to them. The official was writing but the statement was never given back to him to read. He also did not sign the statement. He was asked whether his aunt was in a position

to have a sound conversation in the state she was in. He answered in the negative, reiterating that she was too dizzy to have had a sound conversation. He confirmed that the defendant's officials who came to the scene spoke to him and he gave them all the relevant details including those of the plaintiff. When asked whether he gave them the plaintiff's personal details, he confirmed but stated that he did not know her identity number so he could not have given it to them. He only knew her date of birth which he furnished.

[24] When asked whether the plaintiff was carrying her identity document with her, he answered that her identity document and the bank cards were in her handbag. He was then asked if any of the guards searched the handbag to get the details, his answer was "/ would say yes".

[25] In cross-examination, he confirmed that when the plaintiff fell, the carriage in which they were in was just about to enter the platform. It was put to him that his aunt testified that when she was pushed, there were other people who were also pushed. He unequivocally stated that it is not true.

[26] When it was put to him that the defendant's witnesses will testify that they found the plaintiff between mast poles EA23/295 and EA23/338 which are towards the middle of the platform, he did not dispute this. It was then put to him that the defendant's witnesses will testify that the position where they found the plaintiff is further up the platform, closer to the end of the platform. They will say that it was not at the beginning of the platform. He was then asked how is it possible that the plaintiff, having fallen 15 paces before the platform was carried further up the platform. He answered that the main reason was the luggage and grocery. He had to put her next to his luggage and grocery so that he could keep watch of both her and his luggage and grocery.

[27] When the statement of Mkatu was read to him, he disputed its contents particularly the fact that he jumped off the train and the plaintiff followed him.

[28] He was asked whether it is his testimony that the defendant's witnesses opened the plaintiff's handbag to retrieve her identity

document. He answered he just assumed that that is how they got hold of her indemnity number.

[29] He confirmed in cross-examination that the doors of the train remained open from Leralla up until Kaalfontein and that the train was full. He boarded the train around 06h20. When it was put to him that one of the defendant's witnesses will testify that the train arrived at 06h38, he stated that he cannot dispute that because he is assuming that the train arrived around 06h20. He however disputed that one of the defendant's witnesses, Mr Monzhelele was to testify that the train was not full. According to him, the train was full.

- [30] At the end of Patel's evidence, the plaintiff closed its case. The first witness to be called on behalf of the defendant was Ndivhuho Justice Munzhelele who is employed by the defendant as a train guard. His duties include assisting the train driver by opening and closing the doors of the train and giving the right of way to the driver. He confirms that he was on duty on 29 December 2012, having reported for work at 05h19.
- [31] He was stationed in a train with no.1807 from Elandsfontein Station to Leralla. On its arrival at Leralla, it changed its number to 1812. The driver was one SP Mkhize. I pause to mention that the driver was not called as a witness.
- [32] He was asked in evidence in chief whether the doors of the train were working when he assumed his duties. His answer was that they were working because the guard from whom he took over never made a report to him that the doors were not working. He testified that the train arrived at Leralla at 06h40 and departed at 06h55. According to him it takes approximately 12 minutes to Kaalfontein. He disputed the plaintiff's evidence that the train arrived at Leralla at 06h25.
- [33] He testified further that at that time of the year, the factories were closed so the train never gets full. He therefore disputed the plaintiff's evidence the train was full. He confirmed however that the trains were travelling on a Sunday schedule at an hourly interval.
- [34] He testified that the train arrived at Kaalfontein incident free. He has no knowledge of the alleged incident by the plaintiff. He disputed the evidence by the plaintiff and Patel that the train arrived with its doors open.
- [35] He testified that whenever he assumes as a guard, he checks the doors if they close and open properly. He then checks if the commuters have alighted after which he closes the doors and blows the whistle for the driver to depart. He does this with his head protruding from the side of the train on the side of the platform. He does not check the opposite side of the train as commuters are not expected to be on that side.
- [36] When asked whether he would see what happens on the other side of the platform, his answer was "No", the reason being that he will be concentrating on the side of the platform. He only heard of the plaintiff's incident approximately three months after it occurred, during the investigations by the defendant.
- [37] In cross-examination it was put to him that the only reason he says the doors were functioning properly was that he did not receive any report that they were dysfunctional. He answered "Yes" and that at no stage was it brought to his attention that the doors were not functioning properly. If the doors were dysfunctional, there would have been a report from the guard from whom he is taking over. After he completed his duties, he also made an oral report to the next guard that the doors were functioning properly.

- [38] When it was put to him that he did not personally inspect the doors to see if they are functioning or not, he testified for the first time that he personally walked on foot checking that the doors of the train were functioning before it switched to no.1812. When asked why did he not mention this in his evidence in chief, he testified that it is because he was never asked the question.
- [39] He was then asked to explain how he checks the doors. His testimony was that there is button that he presses that opens and closes the doors. Each side of the train has got a separate button for the doors. He testified that it was possible to "bridge" the doors. This is when a person will stand by the doors blocking them from closing. Once the person moves, the doors will automatically close.
- [40] He was then asked whether he presses this button while inside or outside the train and his testimony was that he would be inside the train. If the door does not close despite him having pressed the button to close, it will make a particular sound notifying him that it is not closed. He was asked if he is able to see the doors whether they are open or closed inside the train pressing the button and his answer was "No", but that he is able to see the commuters alighting. He testified further that he only checks the side of the platform for the doors and not the other side. Ifind this strange because it only takes a button to check both sides whether the doors are working or not. Also, suddenly in this answer he is not mentioning walking on foot inspecting the train.
- [41] The next witness to be called on behalf of the defendant was Nosekete Edith Ximbi. On the day in question, she was stationed at Kaalfontein by a private security firm she was working for, namely Changing Tides, presumably contracted by the defendant.
- [42] On 29 December 2012, while she was escorting ticket officers, she was called by train commuters informing her that a person has been injured at Platform 3 and 4. She rushed to the scene and found her sittid on a chair.
- [43] She asked the plaintiff what the problem was. The plaintiff told her she was pushed out of the train. She asked the plaintiff whether she was embarking or alighting. The plaintiff told her she wanted to get off but was pushed and fell. She asked the plaintiff about the ticket and her answer was that she did not have one.
- [44] She was asked whether the plaintiff was alone or with other people and she answered that the plaintiff was with somebody but that she was only concentrating on the plaintiff. The plaintiff told her she fell on the yellow line and from that she assumed that the plaintiff fell on the platform.

[45] She confirmed that the train number was 1812. She spent about 30 minutes with the plaintiff before Mr Mkatu arrived. She was referred to her statement appearing at pages 33 and 34 of the merits bundle and she confirmed the correctness of its contents. This is surprising because earlier in her evidence, she testified that the plaintiff told her that she was about to alight from the train when she was pushed by other commuters. However, in her statement at page 33 of the merits bundle at paragraph 3, she states as follows:

"She alleged that she was being pushed by the unknown group of commuters while she blocked the train doors".

[46] She testified that the position where the plaintiff was found was between the two mast poles referred to above. According to her, these mast poles are in the middle of the platform. What was however put to the plaintiff in cross-examination is that the mast poles were towards the end of the platform.

[47] In cross-examination, she was asked if she could dispute that the plaintiff was picked up from the rail tracks and carried to the platform where she found her. She conceded that she could not dispute that because she did not see the incident.

[48] She was then referred to the liability report she filled appearing at pages 26 to 32 of the merits bundle. She was specifically referred to page 31 under paragraph 10 where she ticked the box "lying down" instead of the boxes "standing" and "sitting". When asked why she did not cross "sitting" instead of "lying down", she answered that she had no comment. It ought to be recalled that she had testified that the plaintiff had been sitting on a chair when she found her. Her report therefore contradicted her evidence in this regard.

[49] She was then asked why, on the same page on the question whether the plaintiff disembarked from the moving train she ticked "No". She experienced obvious discomfort and was unable to answer the question. After a while, she inexplicably answered that she was just

writing. She however insisted that the plaintiff did tell her that she was trying to disembark but could not answer why then she ticked that the plaintiff was not disembarking from a moving train.

[50] In re-examination she was asked whether she was there when Mkatu was speaking to the plaintiff. She answered that when the Mkatu came, she immediately left. This is different to what she testified in the evidence in chief. She was asked whether she saw any person travelling with the plaintiff. She answered "yes" but she did not see him, she only heard him talking to her partner, Mr Mkatu. Now suddenly in re-examination she testified that when she arrived at the scene she was alone and when Mkatu arrived, she left.

- [51] Mr David Mkatu was the next witness to take the stand on behalf of the defendant. He is employed by the defendant as a "shift member". This according to him is a person who oversees the activities at the premises of the defendant inter alia guarding cables and ensuring that employees and commuters are safe. He confirms that on 29 December 2012 he was on duty at Kaalfontein. He remembers the incident involving the plaintiff.
- [52] He testified that as he was entering the subway into the station, he saw a train travelling towards the Johannesburg side. He then heard commuters scream at Platform 3 and 4. He went there and found the plaintiff sitting, crying. There were many people around her but there was a gentleman with a light complexion who told him that the plaintiff was his sister. He then told the plaintiff that he worked for the defendant and that the plaintiff must explain to him what happened.
- [53] He testified that the plaintiff told him that when the train arrived at Platform 2 from Tembisa, she and her brother decided to open the door of the compartment of the side of the rail track. Other commuters jumped out. Her brother jumped out and as he was trying to help his sister to jump, the people pushed her causing her to fall and getting injured in the process. She told him she fell on the rail tracks. The people lifted her and put her on the platform.
- [54] He testified that the plaintiff was conscious at all times. He disputed that she was ever unconscious when he was speaking to her. He insisted that the person who was giving him the information was the plaintiff, with Mr Patel (whom he identified as the brother) just supplementing her. When it was put to him Mr Patel testified that the plaintiff was in a dizzy state, he testified that he did not know about that. He denied that the personal details of the plaintiff were given to him by Patel. When asked whether he could have searched the plaintiff's handbag to obtain her identity number, he answered that only the police have powers to search and not PRASA officials like him.
- [55] It was put to him that the plaintiff's and Mr Patel's evidence was that when she fell from the train, the train was not stationary. He denied this, saying that when he heard people screaming, the train was already stationary. He immediately went to the scene and when he arrived where the plaintiff was, the train had started moving out of the platform. The subway from which he was emerging when he heard this screaming is at the begging of the platform whereas the mast poles are in the middle of the platform, far from the subway. He testified that from the time the train reached Kaalfontein and left it did not even take a minute. At the time when he heard the people scream, when entering the subway, the train was already stationary and when he reached the plaintiff, the train was already moving. This means it took him not more than a minute from the time he heard the screams to reach the plaintiff. He did not see anybody being carried from the rail tracks onto Platform 3.
- [56] He was referred to the liability report he made, appearing at pages 13 to 19 of the merits bundle. He was specifically referred to page 18 under paragraph 10 where he filled in that the plaintiff was "lying down" instead of "standing" or "sitting". He confirmed as he had filled

his form that the plaintiff was injured in a stationary train that was not overcrowded and that the plaintiff suffered the injury due to her own negligence. In cross-examination he confirmed that he did not see the incident but only got there after it had happened. He confirmed that Ms Ximbi went to the scene first. When he arrived at the scene, Ms Ximbi was already there.

- [57] He was referred to page 13 of his report in which he indicated that the time of occurrence as 07h05 yet he had indicated that he attended to the scene at 07h10. It was then put to him that if the incident happened at 07h05 and he only arrived five minutes later, the train would have left already when he arrived because he indicated that the train takes hardly a minute. He insisted however that as he emerged out of the subway, the train was already at Platform 2.
- [58] He was then referred to page 15, paragraph 5 and asked where it reads "statement taken", what was he indicating. He indicated that this meant the statement was taken and attached. Paragraph 5 contained the personal details of Mr Patel. He confirmed when asked that the statement he was referring to in that form was that of Mr Patel. This, showing that he actually took the statement from Patel and not the plaintiff as he had testified.
- [59] He was then referred to the investigation report by one RJ Mokwena, an employee of the defendant who conducted the investigation and this report, appearing at pages 4 to 10 of the merits bundle. At paragraph 9 of this report, describes the injuries as "head injury and loss of consciousness". Under the heading "Circumstance of incident" it states the following "Third party was robbed, assaulted and pushed out of the train that was in motion while its doors were open". When he was asked why did he mark "possible overcrowding" at page 18 of his liability report, he answered that it was because he did not know how many people were on the train. When it was then put to him that the train was overcrowded, he answered that what he knows is that during that time of the year, in December there are not many people because the factories are closed. When it was put to him that even Ximbi filled in at page 31 that the train was overcrowded, he was quick to respond that Ximbi did not tick "overcrowding" but that she filled in "possible overcrowding". When it was pointed out to him that he is reading the wrong part of the page, he then agreed that Ximbi did tick "overcrowding" .
- [60] When it was again put to him that the reason why he did not tick that he took the statement from the plaintiff was because she did not take one from her as she was unconscious or dizzy, he answered that if she was unconscious or dizzy then there should have been visible bruises on her body, implying that the plaintiff was not injured. He was then referred to page 12 of his incident report where he himself filled that the plaintiff "sustained severe injuries as follows; A fractured, swollen right arm A fractured, swollen right leg" . He admitted that this was indeed what he recorded.

- [61] He was then referred to page 1 of the "PERSONAL DOCUMENTS BUNDLES" being a form from the Tembisa Hospital where it is marked "trauma". He was then asked as to when did he make the statement at pages 11 and 12 of the merits bundle. He testified that he does not recall. According to him, at the scene of the incident, he only made rough notes and reports immediately to Joint Office Centre who would then call an ambulance to assist the injured. It is only when he has time that he will make a proper statement. He however disputed that he made the statement at a later date and backdated it. He confirms however that they never make people sign the statements.
- [62] In re-examination, it was put to him that many details appearing at page 10 of the Investigation Report by Mokwena are wrong for example the identity number, the address and head injuries. It also says that the person was robbed, assaulted and pushed out of the train when there was no evidence that the plaintiff was robbed and assaulted.
- [63] Mr Mkatu confirmed however that Mr RJ Mokwena is an employee of the defendant who conducts investigations. According to him, Mr Mokwena was not present at the scene and he only signed his report on 24 February 2013.
- [64] He was then referred to page 1 of the form from the Tembisa Hospital where next to "mental state", it was written "conscious". He was further referred to page 15 of the merits bundle being his liability report where he had ticked that the plaintiff was able to communicate. He confirmed that the plaintiff was indeed able to communicate and that he spoke to her.
- [65] At the end of his re-examination, I asked the exact role of Mr RJ Mokwena. He confirmed that Mr Mokwena is his colleague who is also employed by the defendant at Protection Services and conducts investigations and prepares reports on incidents.

Analysis

of the evidence

- [66] From the above, I find that the plaintiff's evidence that she was on her way to work at Isando and that she could not have alighted at Kaalfontein is probable. This is indeed corroborated by Patel. She was a frank witness and did not attempt to embellish her evidence.
- [67] While she did deny that either Mkatu or Ximbi spoke to her, she conceded that the details they recorded in their reports were her details. Her testimony was that they probably got her details from Patel. Patel however testified that he did not know the plaintiffs identity number and therefore could not have given it to either Ximbi or Mkatu. He testified that it is possible that they obtained her identity document from her bag.
- [68] This discrepancy might be explained by the plaintiffs evidence that after she fell, she was unconscious until the following day. Patel's evidence is that after the plaintiff fell, she was dizzy and could not have engaged in any meaningful conversation. Bearing in mind the nature of the injuries sustained by the plaintiff and the indication from the records of Tembisa Hospital that she experienced trauma, it is probable that she may have given some

of her details to either Mkatu or Ximbi in her "dizzy" state. This however does not in any way demonstrate that she or Patel were untruthful. It in fact shows that their evidence was not rehearsed.

[69] Her evidence that the train was full must be accepted. The defendant's witness who could give direct evidence on this issue, Mr Monzhelele only testified that during that time of the year, the factories are closed so the trains never gets full. He however

himself testified that the numbers of the trains are reduced during this period. I find that because of this reduction of the numbers of the trains, it is probable that some of them do get full. This is further corroborated by the fact that the defendant's own witness, Ximbi filled in her report at page 31 of the merits bundle that the train was overcrowded. This is further corroborated by the defendant's plea in which it is alleged that the plaintiff voluntarily "got into an overcrowded train where there was no space for anyone to get into the train". I find therefore that the train was indeed overcrowded as testified by the plaintiff.

[70] On the question as to whether the doors of the train were open while it was in motion as testified by the plaintiff and Patel, the evidence of Monzhelele on behalf of the defendant is unhelpful. While he testified that the doors were closed, he conceded that he did not witness the plaintiff's incident and that he only heard about it three months after it allegedly occurred. He would not have noticed if the doors on the side of the plaintiff were open because when the train is about to depart, he checks the doors by protruding from the side of the train, on the side of the platform. He does not check the opposite side of the train as commuters are not expected to be on that side. It is common cause that the plaintiff was on the other side.

[71] When asked whether the doors of the train were functioning properly, he said they were. However, the only reason he proffered for saying so initially was that when he took over from the previous guard, he did not receive the report that the doors were malfunctioning. He later modified his evidence in cross-examination testifying that before the train switched from no.1807 to 1812, he personally walked on foot checking that the doors of the train were functioning. However, when asked how he checks the doors, he now testified that he uses the buttons to check if the buttons are functioning properly. His shaky evidence must be contrasted with that of both the plaintiff and Patel who were unwavering in their testimony that the doors were indeed open.

[72] It ought to be remembered once more that the defendant, in its plea also stated that the plaintiff "stood at the open door of a moving train which posed danger to her at that moment". Consequently, it cannot be seriously disputed that the doors were indeed open while the train was in motion.

[73] On the question as to whether the plaintiff did fall on the rail tracks and was carried to Platform 3, the only witness for the defendant who attempted to seriously dispute this was Mr Mkatu. While it is common cause that he was not inside the train and could therefore not have seen whether the plaintiff was indeed pushed or not, he testified that while entering

the subway into the station, he saw the train travelling towards Johannesburg entering the platform. He heard commuters screaming at Platform 3 and 4. He immediately went there and found the plaintiff sitting at Platform 3 crying. His testimony was that from the time the train entered the station and until it left, it was less than one minute. This was clearly an attempt to show that there was not enough time for the plaintiff to have fallen and Patel rushing to drop his groceries and luggage first, rushing back and picking the plaintiff with the help of other commuters and moving her to Platform 3 where she was found by Mkatu.

- [74] It was however shown to him during cross-examination that in his own report, he indicated that he arrived at the scene at 07h10 when the accident happened at 07h05. He could not explain this but still insisted that it took him less than one minute from the time the train entered the station to him attending to the plaintiff. His evidence on this regard is improbable and ought to be rejected. I find that the plaintiff did fall on the rail tracks and was carried to Platform 3.
- [75] I find further on the probabilities that the plaintiff was pushed from a moving train by other commuters. There was no reason for her to alight at Kaalfontein. I consequently reject Mkatu's report that the plaintiff and/or Patel told him that she jumped onto the railway lines, following Patel in an attempt to get easy access to exit from the station. This report is contradicted by Ximbi's report who wrote that the plaintiff alleged that "she was being pushed by the unknown group of commuters while she blocked the train doors". I consequently reject the defendant's version that the plaintiff was attempting to jump onto the railway line.
- [76] In any event, in a report prepared by the defendant's own employee, Mr Mokwena, he recorded at page 9 that the third party, obvious reference to the plaintiff, "was pushed out of a stationary train by other commuters who were using the opposite doors to disembark and she sustained injuries". He also states in a different portion of his report that the plaintiff "was robbed, assaulted and pushed out of the train that was in motion while its doors were open". While this report does contain some inaccuracies in relation to the incident, it clearly records in favour of the plaintiff that she was pushed by other commuters and that the doors of the train were open while it was in motion. Mr Mkatu testified that Mr Mokwena is indeed an employee of the defendant who conducts investigations of accidents such as these. Despite his report forming part of the merits bundle, the defendant inexplicably did not call him as witness. In my view, given the nature of the evidence and the contents of the report, a negative inference should be drawn against the defendant for failing to call Mr Mokwena as a witness.¹ No reasons were advanced as to why he was not called as a witness.

The law

- [77] The test for negligence was formulated in *Kruger v Coetzee*². It was held in that case that for "the purposes of liability, culpa arises if-
- (a) a diligens paterfamilias in the position of the defendant-

- (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
 - (ii) would take reasonable steps to guard against such occurrence; and
- (b) the defendant failed to take such steps"

[78] In the premises, I find that the defendant ought to have foreseen that allowing an overcrowded train to move with its doors open might lead to a commuter falling and getting injured. Furthermore, the plaintiff falling off the train (after being pushed) and sustaining injuries was due to the failure of the defendant to take steps to guard against this. The evidence of Monzhelele that he only checked the side of the platform is telling. It was in this regard held in *Transnet Ltd t/a Metro Rail v Tshabalala 3* that:

"A reasonable man in the position of the defendant would not have allowed the train to operate with the doors of the coaches open as he would have foreseen that to leave the doors of the railway coaches open would constitute an invitation to prospective passengers to board the train while moving that it would be dangerous for them to do so" .

[79] It was also found in *Transnet Ltd t/a Metro Rail and Another v Witter*⁴, that a train leaving with open doors constitutes negligence. It was emphasised in that case that the duties of the train guard is to ensure that all train doors were closed before he gave the signal to the train driver to proceed.

[80] In *Lukhele v Metro Rail*⁵, the Full Bench of the then Witwatersrand Local Division found that even if the doors of the train might not be malfunctioning, it remains the duty of the defendant (Metro Rail in that case) to ensure that the train does not depart from the station with open doors. In *Lukhele*, while the respondent was found to have been negligent, the appellant was also found to have been contributory negligent because she attempted to board a moving train despite the warning by the security guard at the platform that "the train was going to injure her".

[81] In casu, the plaintiff was pushed by other commuters while she was already standing inside the train securing herself on the rails inside the train. She did not attempt to board a moving train. In my view, it will be unfair to hold it against her that she boarded the

train that was already full and remained inside despite more people coming in. She testified that she had a ticket for the train and could not afford to miss it because she did not have money to go catch a taxi to work. In any event, there is no suggestion that when she boarded the train, she was aware that the doors of the train were not going to be closed once it departed. I can find no conduct in her part which indicate contributory negligence.

[82] On the other hand, the evidence of the train guard is that he only checked the doors on the side of the platform because he was not expecting commuters to be on the other side. This simply means that he did not exercise necessary care to check if the doors from both sides of the train were properly closed and that they were not opened by the commuters while the

train was in motion. Having considered the relevant facts of this case as set out above, I find that the defendant was negligent and that there was no contributory negligence from the plaintiff.

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

1. The plaintiff is entitled to recover from the defendant 100% of her proven damages.
2. The defendant is ordered to pay the plaintiff's costs of the action.

JA Motepe

Acting Judge of the High Court

Counsel for the plaintiff: Adv OM Moeti

Attorneys for the plaintiff: Makhubela Attorneys

Counsel for the defendant: Adv GE Nameng

Attorneys for the defendant: MA Selota Attorneys

c/o Sekonya Attorneys

1 See *Elgin Fireclays Limited v Webb* 1947 (4) SA 744 (A) at 749-750; *SOS Kinderdorf International v Effie Lentini Architects* 1993

(2) SA 481 (Nm) at 4891-J

2 1966 (2) SA 428 (A) at 430E-G

3

[2006] 2 ALL SA 583 (SCA) at para 9

4 2008 (6) SA 549 (SCA)

5 (A5041/2007) [2008] ZAGPHC 332 (24 October 2008)

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2015/1075.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/chaue-v-passenger-unknown-topic-agpphc-2015>

Prepared on 11 October 2026 · Esheria