

SOUTH AFRICA / JUDGMENT

Letabola v Passenger Rail Agency of South Africa (2152/11) [2014] ZAGPJHC 154 (16 July 2014)

[2014] ZAGPJHC 154

COURT

South Gauteng High Court, Johannesburg

BEFORE

Reyneke AJ

CASE / FILE NUMBER

2152/11

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2152/11

DATE: 16 JULY 2014

In the matter between:

MONGEZI LETABOLA.....PLAINTIFF

And

PASSENGER RAIL AGENCY OF SOUTH AFRICA.....DEFENDANT

J U D G M E N T

REYNEKE AJ

Introduction

[1] The plaintiff sued the defendant for damages sustained when he was injured during an incident that occurred at Tembisa train station. The issues of liability and quantum have been separated in terms of rule 33(4) of the Uniform Rules.

Common cause

- [2] The vicarious liability of the defendant is admitted. The common factors in this matter can be listed as follow: Since November 2010 the plaintiff, a 27 year old man, was a regular commuter on the defendant's early morning train from Lerella to Elandsfontein train stations. In order to be on time for work he had to catch a train between five and six in the morning. On Monday morning, 18 July 2011 he boarded the train to Elandsfontein. The train proceeded to Limendela station where many more commuters boarded. The plaintiff sustained injuries as the train was entering the Tembisa train station. He left the premises and was apprehended in the street by personnel in the employment of the defendant. At that stage he was not in possession of a valid train ticket. He was taken to hospital by an ambulance where he was admitted.

The Issues

- [3] The main issue is about the liability of the defendant. The factual dispute is whether the plaintiff was accidentally pushed by other commuters through the open doors of the moving train, or whether he was illegally standing on a link between two couches and got injured as he was trying to get onto the platform. It is also in dispute whether the plaintiff had a valid train ticket for the trip from Lerella to Elandsfontein.

The plaintiff's version

- [4] In addition to the common cause factors, the plaintiff testified that he bought a weekly train ticket on Sunday, 17 January
2011. The next morning he arrived at Lerella train station and produced his ticket at the gate. Many officers were on duty and the security was tight. The train was fifteen minutes late. He boarded the first coach of the train, which was over crowded. He had to stand together with other passengers as all the seats were occupied. A person known to him by the name of Sanele Mathe, was also in this coach.
- [5] The plaintiff had a bag with him, which contained amongst other goods, his train ticket. He put the bag on a shelf and hold on to a bar with both hands. As the train was departing from the station, the door of the couch did not close. The train stopped at Limendela where there was no platform marshal. When the train continued to Tembisa station the door of the couch was still open and it remained open through the drive.
- [6] As the train was entering Tembisa station many of the commuters were moving towards the open door to disembark. The plaintiff was caught in the motion and he was pushed through the door while the train was still moving. As he was falling he grabbed a handle attached to a bar, only to find that the handle was broken. He got hold of a bar near the door and held on while his left leg was trapped between the platform and the moving train. When the train stopped he managed to gain his balance by holding on to another passenger. No one came to his aid. He was shocked, confused, in pain and bleeding profusely. He ran to the outside of the premises and sat down. The defendant's employees arrived and questioned him. He told them that he was pushed from the train. When the officers requested his ticket, he informed

them that it was inside his bag which was still on the train. He was taken to the hospital. His memory about the happenings after he was injured is impaired. At approximately five that afternoon, he came to his senses and realized that he was in hospital. At some stage he discovered that somebody had brought his bag to the hospital, containing his train ticket.

- [7] LEKUTULA AARON MKWATLA knows the plaintiff from sight. He used the train on an irregular basis since 2006. On the day of the incident he boarded the first couch of the train at Lerella on his way to Johannesburg. He was standing in the couch when he noticed the plaintiff entering the same couch. They did not speak to each other as they were standing approximately 3 meters apart and there were other people between them. The train departed with open doors. At Tembisa he heard the noise of people screaming. He did not see the plaintiff disembarking.
- [8] The train ticket was submitted as Exhibit A. This ticket is a pass from Lerella to Elandsfontein for week 3, bought on 17 January 2010 at 14h57, with expiry date 24 January 2011.

The defendant's version

- [9] CONSTANCE VUKEYA testified in Shangaan that she is a protection official, working as a platform marshal in the defendant's service since February
2007. She explained that all the doors of a train open or close at once by the push of a button situated in the last coach. The whistle blower closes the doors and blows the whistle after the platform marshal has raised the white flag. Only thereafter the train will depart. People standing in the way may cause the doors not to close. There are noticeboards in the station and on the train, warning people not to lean against the doors, not to stand between the coaches and not to board while a train is in motion.
- [10] On the day in question she reported at her head office situated in Kaalfontein and departed to Tembisa station. She noticed the train entering the station as she was standing on the platform. She was approximately five meters away from the train in a position from where she could observe all twelve coaches passing her. While the train was still in motion she noticed a person standing on the link between coaches 2 and 3, holding on to two iron bars. In between the coaches are passages which are enclosed by rubber structures. A person can jump over the rubber structures on to the link between the coaches. She described the link as a selection of pipes between the coaches. This person was trying to get on to the platform but his left leg struck the side of the platform. At that stage her view was obscured by people on the platform. She raised a red flag to signal that there was an accident. At that stage the doors of the couches were opened. Guards assisted her. They went to the point where the person had struck his leg and she noticed blood and a piece of flesh sticking to the platform. The injured person was nowhere to be found. She raised the white flag, all the doors closed and the train departed. She followed the blood trail to the outside of the station and apprehended the plaintiff who was sitting in the street. The plaintiff phoned his mother and explained in Zulu, in which she is not fluent, that the train "had thrown him away" or "had

poured him out”. She completed a liability report by inserting information as provided by the plaintiff.

- [11] ADELAIDE MALEASENYA is in the service of Afriguard Security Company, rendering security services to the defendant. She arrived at Tembisa station at six. She was in the guard room when Vukiye reported the incident. They found a shoe on the rail way. On apprehending the plaintiff he explained in Sepedi that his ticket was at his house and that he had run out of the station as he was afraid that he would be arrested. He complained that he was feeling dizzy. She could see that he was in pain.
- [12] ALPHEUS MAJA is also a security officer, since 2003. He was at the upper level near the guard room when Vukiye reported the incident. Blood stains were found on the platform across the third or fourth couch in relation to the stationary train. One of them picked up the shoe, which was eventually loaded into the ambulance. The plaintiff was wearing only one shoe. He confirmed the evidence of Maleaseny in regards to the conversation with the plaintiff.

Evaluation

- [13] Mr Mkwatla, who testified on behalf of the plaintiff, made a good impression. He did not contradict himself. He only knows the plaintiff from sight and has no reason to advance the plaintiff’s case. He corroborated the plaintiff’s version, although he had not seen how the injury was sustained. He did not add on in this respect as he could have done if his version was concocted. I accept his evidence.
- [14] The plaintiff was argumentative with a tendency to pose his own questions, but once instructed to answer the questions, he did so. He gave a coherent version and never contradicted himself or his witness. As to how he sustained the injuries, he stands as a single witness. However, apart from Mkwatla who corroborates the evidence that the doors were open and that the plaintiff was indeed inside the first couch, there are various probabilities and other aspects in support of the plaintiff’s version, to wit:
- (a) The train ticket, exhibit A, reflects that it was bought the previous day, that it was valid for the route that the plaintiff had to take to get to work; and that it was valid on the day of the incident.
 - (b) The date on the ticket excludes the possibility that it was bought afterwards in an attempt to strengthen the plaintiff’s version. This possibility was in any event not canvassed by defendant’s counsel.
 - (c) The undisputed evidence by plaintiff is that the security that morning was tight at Lerella train station, limiting the possibility that the plaintiff could enter without a ticket.
 - (d) The plaintiff testified that there are no conductors on the train in the morning. This evidence was not challenged. There was no fear for arrest, thus there was no reason why the plaintiff should hide his presence even if he did not have his ticket with him.

- (e) At the time when the plaintiff boarded the train, there was still room enough, as many more commuters boarded at Lamella and at Tembisa. Vukiye confirmed the train was not full on arrival at Tembisa. Thus there was no reason for the plaintiff to stand on the link.
- (f) The fact that the blood and piece of flesh on the platform was not directly across the door of the first couch of the stationary train, but closer to the link between the second and third couches, ties in with the plaintiff's evidence, taking account that the train was still moving when his leg struck the platform.
- (g) Mr Mjali testified that the plaintiff reported that he was pushed from the train.
- [15] A puzzling question is how and by whom the bag containing the ticket was retrieved. The probabilities that the bag was found and delivered to the owner at the hospital that very same day are very limited in my view.
- [16] Evidence was tendered that the plaintiff talked to his mother over the phone and that a woman later that morning presented a monthly ticket to the defendant's witnesses. The defendant suggested that the plaintiff's mother brought the ticket to Tembisa station after the event and that this evidence supported the defendant's contention that the plaintiff had no ticket. Strangely so, this ticket was not retrieved and the woman's particulars or the information on the ticket was not recorded. This woman did not even identify herself or associate with the plaintiff. This evidence does not support an inference that it was as a result of the phone call to the plaintiff's mother that Exhibit A, which he had forgotten at his home that morning was brought to the station or to the hospital. However, as it was never contended that the matter of a valid train ticket may have a bearing on the liability of the defendant, nothing turns on this point.
- [17] The defendant argued that the plaintiff's evidence that he had a ticket is not in line with the information on the liability report, which was obtained from the plaintiff. I do not deem the above mentioned as a contradiction. It is common cause that the plaintiff was not in possession of a train ticket when he was apprehended. Thus the information in the report regarding the train ticket is correct.
- [18] It was argued that the plaintiff was conscious and fully aware of his surroundings when he had talked to the officials. This argument was based on the contents of the liability report and a hospital record. It was submitted that the plaintiff's evidence that he had run away because he was confused, is contradicted by the information in the liability report. The plaintiff's leg was injured, he was shocked, in pain, bleeding profusely, admitted in hospital and operated that evening. Under those circumstances it is likely that he cannot remember exactly what had happened when he was apprehended by the officials.
- [19] The admissibility of the contents of the hospital reports, describing the state of consciousness of the plaintiff, came under attack, as the author of the reports did not testify. In the light of my finding in the paragraph above, I do not deem it necessary to deal with the admissibility of the hospital record.

- [20] Much was made about the fact that the plaintiff had left the train station instead of asking for help. In addition Maliasenya testified that the plaintiff explained he had forgotten his ticket at home and thus was afraid of being arrested. This explanation is in dispute. The conversation was in Sepedi, while Maliasenya is Shangaan speaking and the plaintiff is a Zulu. Except for the possibility of miscommunication, the plaintiff was in shock and seriously injured just minutes earlier. I do not find anything sinister in the plaintiff's reaction. Nothing turns on this point.
- [21] Counsel for the plaintiff contended that Vukiye was not on the scene and that all of her evidence is concocted. This contention is based on the dates on her statements. She testified that she had written her statement in her own handwriting and she handed it to Tlake Shadung and Coetzee at her head office at Kaalfontein on the same day. Shadung, the investigator, administered the oath on the same day. The date of 26 April 2012 was not entered in her presence. It is highly unlikely that she would submit a liability report if she was not on duty at Tembisa on this day. I accept that Me Vukiye was on the scene.
- [22] The inference that only the plaintiff and no other person got injured that morning is sustained by all the evidence. There is not a possibility that Vukiye witnessed another person standing on the link.
- [23] Vukiye is a single witness on the position of the first coach's door and the way the plaintiff got injured. She was standing on the platform, five meters away from a train consisting of twelve coaches. She testified that the doors of all the coaches were closed when the train arrived at Tembisa. It is unlikely that she was able to observe the whole length of the train with from that position. Her further evidence that she could observe every coach as the train was passing by is more likely. As the train entered the station her attention was drawn by the person who eventually got injured and she raised the red flag. Yet all the doors were opened, despite the fact that she had not raised the white flag to indicate that it was safe to open the doors. Thereafter her view was obscured by many people on the platform. In view of the above, there is doubt that Vukiye was in a position where she could clearly observe the door of the first coach as the train was arriving.
- [24] Although she was not a satisfactory witness on every aspect, her evidence that the plaintiff was standing on the link, still stands. However, it is highly unlikely that the plaintiff, on his way to Elandsfontein, would disembark at Tembisa which was not his final destination. The mere fact that the incident happened at Tembisa, supports the probability that the plaintiff was indeed pushed out of the train.
- [25] In regard to the above, also see the probabilities in favour of the plaintiff, as mentioned in paragraph 14, above.
- [26] Me Maleasenya did not make a good impression. The court had to prompt her to answer questions while she was under cross-examination, as there was no reaction coming forth. She was just silently standing in the witness dock even when simple questions were posed.

- [27] She testified that her affidavit was submitted on the day of the incident and that she was thirty years of age at that stage. The affidavit shows that it was commissioned on 28 March 2012; that is some two years after the incident, and her age is stated as thirty-two. It is more probable that the affidavit was made and commissioned in March 2012.
- [28] The essence of Maleasenya's evidence on 27 May 2014 is about the plaintiff's explanation when he was apprehended outside the station on 18 January
2010. This explanation is not contained in her affidavit which was made more than two years after the event. The above by necessity casts a shadow over the credibility of her evidence.
- [29] Mr Maja can be described as eccentric. He cautioned the interpreter more than once not to hurry him, as he wanted time to think before answering. He also requested the interpreter not to interrupt him by interpreting his evidence, even while he was giving quite lengthy explanations. He corroborated the plaintiff's version that he was pushed from the train, but under cross examination he contradicted himself on this crucial aspect.
- [30] There are two conflicting versions before me. However, in the light of all the above, I am satisfied that the plaintiff had proven on a preponderance of probabilities that he was pushed from the inside of the first couch through the open door of the moving train, as it was entering Tembisa station, resulting his leg to be caught between the moving train and the platform.
- [31] The plaintiff based his case on the negligence of the conductor, the driver of the train, and/or on the joint negligence of the conductor and the driver and the negligence of the defendant. The classic Roman –Dutch law test for the determination of negligence to be applied was formulated in *Kruger v Coetzee*¹. Negligence will be established 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.
- ... Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case.'
- [32] The plaintiff bears the onus to adduce evidence that will give rise to an inference of negligence². Furthermore, the plaintiff has to prove that harm was reasonably foreseeable under the circumstances and the plaintiff must adduce

evidence as to the reasonable measures which could have been taken to minimise the risk of harm.³ Only once the plaintiff satisfied this onus, the defendant will have to rebut the inference of negligence by adducing evidence

relating to the measures it took to avert harm.⁴

[33] Paragraph 4 of the particulars of claim states:

“The sole cause of the Plaintiff’s falling from the train was the unlawful conduct and negligence of the conductor, whose identity is to the Plaintiff unknown, who was acting in the course of and within the scope of his employment with the Defendant and who was negligent in one or more respects:

4.1 He failed to keep a proper lookout;

4.2 He signalled to the driver that it was safe to set the train in motion with its doors open,

4.3 He failed to pay due regard to the safety of passengers on board the train,

4.4 He failed to prevent the said accident when, by the exercise of due and reasonable care, he could and have done so,

4.5 He failed to close the doors timeously or at all,

4.6 He failed to pay due regard to the safety of passengers alighting from the said train specifically the plaintiff,

4.7 He failed to seek assistance from the Defendant in providing adequate support/personal to guide, supervise, control and or protect

passengers on board and or alighting the train.”

[34] The unchallenged evidence by the plaintiff was that there was no conductor on the train and that there are never conductors on the train in the morning. The plaintiff did not tender evidence to describe the general duties of a conductor. Neither of the witnesses for the defendant are conductors. This results in the court not knowing whether the duties of care mentioned in paragraphs 4.1 – 4.7 of the particulars of claim, resorts under the duties or job description of a conductor. I cannot take judicial notice of the general duties of a conductor, and I do not even have that personal knowledge.

[35] The Oxford Concise Dictionary, 10th edition, described “conductor”, amongst other descriptions, as a person who collects fares on a bus. In Northern America the word is used for a guard on a train. Kritzinger, Schoonees, Cronjé, Eksteen, Major Dictionary English-Afrikaans, contains a description of “conductor” that is not remotely applicable to this situation. In my view the word “conductor” is not used in a universal sense, where certain duties to be performed on trains are automatically connected to the word “conductor”.

[36] It is an established principle of our law that negligent conduct giving rise to loss is not actionable, unless it is also wrongful. A negligent omission will be regarded as wrongful and therefore actionable only when the legal convictions of the community impose a legal duty, as opposed to a mere moral duty, to avoid harm to others through positive action. 5

[37] In the absence of evidence it is impossible to test the duties of a conductor against the allegations contained in the particulars of claim. My conclusion is that the plaintiff failed to show that the absence of a conductor result in a wrongful omission.

[38] Paragraph 5 of the particulars of claim deals with the allegations against the driver of the train and reads:

“Alternatively, the sole cause of Plaintiff’s injuries was the unlawful (sic) of the unknown driver who was acting in the course of and within the scope of his employment with the Defendant and who was negligent in one or more of the following respects:

5.1 He set the train in motion at a dangerous and/or inopportune time with the doors open,

5.2 He failed himself to check that it was safe for him to set the train in motion,

5.3 He set the train in motion without checking that all the doors were closed,

5.4 He set the train in motion whilst passengers were in fact alighting (sic) the train,

5.5 He failed to keep a proper lookout,

5.6 He failed to prevent the accident when, by the exercise of due and reasonable care, he could and should have done so.”

[39] Paragraph 6 of the particulars of claim deals with the negligence of the driver and the defendant and reads:

“6.1 Further alternatively the sole cause of Plaintiff’s falling from the train was the joint negligence of the conductor and the driver, identity of both of whom is to the Plaintiff unknown, who were negligent in one or more of the respects alleged in paragraphs 4 and 5 respectively above.

6.2 Further alternatively, the sole cause of the Plaintiff falling from the train was the unlawful conduct and negligent (sic) of the Defendant which, in breach of duty of care which it owed to its passengers, was negligent in one or more of the following respects:

6.2.1 By failing to guide, supervise, control and or protect passengers on board and or alighting the train, and/or

6.2.2 By failing to put measures in place that would guide, supervise, control and/or protect passengers on board and/or alighting the train, and/or

6.2.3 By failing to provide personnel and/or conductor/s to guide supervise, control and/or protect passengers on board and/or alighting the train, and/or

6.2.4 By failing to put measures in place to ensure that the train was not set in motion with the doors open.

6.3 Further alternatively, the sole cause of the Plaintiff's falling from the train was the unlawful conduct and joint negligence of the train conductor, its driver and the Defendant who was negligent in one or more of the respects specified in paragraphs (4),

(5) and (6.2) above."

[40] The driver of the train did not testify. No reason for his absence was tendered. The defendant failed to rebut the evidence tendered by the plaintiff.

The plaintiff had shown on a preponderance of probabilities that the doors were open or at least opened before the train came to a standstill, resulting in the plaintiff being pushed from the moving train.

[41] A diligens paterfamilias in the position of the defendant would have taken measurements to ensure that all the doors of all the coaches were closed on departure from each station and that it would only be opened at a safe and opportune moment, when the train had come to a complete standstill. In this regards, personnel of the defendant should have supervised, controlled and protected the passengers on board and or disembarking from the train. By doing so, the inopportune opening of the doors and the disembarking of the passengers could have been controlled. On this morning there were not adequate measures in place. The driver of the train failed to prevent the accident when, by the exercise of due and reasonable care, he could and should have done so.

[42] Lastly, the matter of overcrowding was canvassed. I do not know the number of commuters allowed on the train and whether these numbers were exceeded. The safety standards are unknown. I cannot make an inference that because there were standing passengers; the coach was overcrowded, carrying an impermissible number of passengers, not in accordance to the defendant's policy or safety standards. Overcrowding is in any event not alleged as a ground for negligence.

[43] In the light of the above, I am satisfied that the plaintiff sustained his injuries as a result of the negligent conduct by the driver of the train and the negligent omission by the defendant to take positive steps to avoid harm.

[44] In the result, the following order is made:

- (a) On the issue of the merits, I find in the favour of the plaintiff.
- (b) Costs to follow the cause.

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Counsel for the Plaintiff: Adv N. Ralikhuvana

Instructed by: Matlala Attorneys

Counsel for the Defendant: Adv M. Kgomongwe

Instructed by: Kekana Hlatshwayo Radebe Inc.

Date of Hearing: 26 – 29 May 2014

Date of Judgment: 16 July 2014

1 1966

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

2Shabalala v Metrorail 2008 (3) SA 142 (SCA) para 11, South African Rail Commuter Corporation Ltd v Thwala, (661/2010)[ZASCA 170 (29 September 2011) para 18.

3Shabalala para 7.

4Thwala para 16.

5Minister of Police v Ewels 1975 (3) SA 590 (A).

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