

SOUTH AFRICA / JUDGMENT

Maduna v Passenger Rail Agency of South Africa (16358/2015) [2017] ZAGPJHC 143 (7 June 2017) [2017] ZAGPJHC 143

COURT

South Gauteng High Court, Johannesburg

BEFORE

Van der Linde

CASE / FILE NUMBER

16358/2015

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 16358/2015

Not reportable

Not of interest to

other judges

Revised.

7 June 2017

In

the matter between:

Maduna,
Happy
Luvuyo Plaintiff
and
Passenger
Rail Agency of South
Africa Defendant

JUDGMENT

Van der Linde, J:

Introduction

- [1] This case is about a 24 years old young man who lost his left forearm when he landed underneath the wheels of a moving train at Vereeniging station slightly more than two years ago on 23 January 2015. He sues the defendant for the loss and damages resulting from that event and its consequences. The parties have agreed that the question of quantum be separated and deferred for later determination. This implicates paragraphs 9 to 12 inclusive of the particulars of claim, and the concomitant pleas to those.
- [2] The issues pleaded in paragraphs 9 to 12 inclusive of the particulars of claim, and responded to in the appropriate paragraphs of the plea, are then hereby separated from all other issues that arise on the pleadings between the parties, and those separated issues are deferred for later determination.

The plaintiff's case

The plaintiff's evidence

- [3] The facts, as with many of these types of cases, are simply stated but not as easily resolved. The plaintiff's case is that on the fateful Friday afternoon he and his friend Leonard Duba, were on their way to their respective homes, his in Orange Farm, and Mr Duba's in Kliptown. They arrived at the station just after 13h00, bought their tickets, and then went to the mall to see if there were any good specials. It was payday, and they were expecting sms notifications that their salaries had been paid into their bank accounts.
- [4] In the event the money did not come, and they went back to the station, arriving there shortly after 17h00. The train they had intended boarding was then already stationary at platform two. They dawdled for a while on the platform, said the plaintiff (Mr Duba did not support this part), and then boarded the train. Mr Duba was ahead of him, and moved into the coach once he was inside.
- [5] The plaintiff, who boarded the train after Mr Duba had done so, was left in the entrance to the coach, some 15 cm away from the train doors, and holding on to a vertical pole that was attached to the seat with his right hand. Next a whistle was blown. Some time passed and the train then pulled off.

- [6] At that time some people were running from the platform towards the train. With the doors behind the plaintiff still open, a person came from behind, into the train, and grabbed the plaintiff's left shoulder. The plaintiff was pulled off balance and fell backwards off the train, slipping through the space between the platform and the coach, and landing underneath the wheels.
- [7] The train, then already in motion, cut off his left forearm virtually completely, necessitating its subsequent amputation. The train was halted immediately, and the plaintiff dragged off the rails to the side where he then lay next to the fence. He was severely shocked but did not lose consciousness. After a while the train pulled off again, continuing on its journey. The ambulance arrived later, and took the plaintiff to hospital.

Mr Duba's evidence

- [8] His friend, Mr Duba, was not to be seen on the scene after the events, and when he was called to testify, he said that he had stayed on the train and had gone home. His explanation for this potentially strange conduct was to the effect that he was upset by and could not face up to the severity of the injuries that his co-commuter had suffered.
- [9] His evidence differed in some respects from that of the plaintiff. As pointed out, according to him the two of them, after they had descended from the overhead passenger walkway, immediately proceeded to the train, and did not first hang around on the platform. They entered the coach at the area where the passenger walkway descended.

[10] He was ahead of the plaintiff and in fact lost sight of him in these circumstances: he had entered the train first, and then turned to his right, making his way into the coach. Once in the train, a short period of some 5 to 6 minutes lapsed before the train pulled off.

[11] At some stage he turned around to look at where the plaintiff was, and saw him standing into the coach at the entrance area, some 1,5 m into the coach, holding on to a vertical pole. He turned back, and next heard the commotion when the accident occurred. He was not asked about and did not corroborate the plaintiff version about the train doors being open as the train pulled off.

The defendant's case

The train guard's evidence

[12] A very different version emerged from the defendant's two witnesses. The first of these was Ms Phonyokoani, who was the train guard on duty on the day of the accident. She had been with the defendant for some fourteen years and had been in the position of a train guard for some four years. In that capacity she occupied the last coach, or cabin, attached at the back of the train.

[13]She explained that, in relation to when the time came for a train to pull away from a station, her duties required of her to start by observing the commuters on the platform seeking to board the train; then to sound the whistle indicating that the train would soon pull off; thereafter to close the electrically operated doors by pushing the appropriate button in her cabin; and thereafter to sound the bell, indicating to the driver that s/he could pull off (“ride away”). The requirement that she observe applied throughout these stages, she said.

[14]On the day in question, that is precisely what she did. However, when the train had already pulled off, with its doors closed, a young man came running across the platform intending to embark the train. Since the doors were already closed he aimed for the area between two coaches, about three to four coaches away from her, tried to hold on but slipped and fell beneath the train. Exh B page 11 is a depiction of the area between two coaches, reflecting a hand rail and foot plates in that area.

[15]Ms Phonyokoani immediately sounded the bell thrice to signal an emergency stop, and the train stopped. She went to the injured

person, who was already being attended to by the security guard on duty on platform two at that time. She asked the security guard to establish whether the plaintiff had a ticket, and if so to retrieve it from him. He did this, and gave her the ticket. She thereafter

reported the events telephonically and, having confirmed that the ambulance had been summoned, she was instructed by her superiors to convey to the driver of the train to continue on his journey. This she did, and she left the scene, resuming her duties on the train.

[16]She was led on a written statement she had made some months later about the incident. In the statement she said that the injured person had tried to board a moving train. The evidence went in without objection as being self-corroboration. She said too that, as the statement conveys, she went to the injured person after the event and obtained his particulars.

[17]In cross-examination it was put to her that the part of her statement that said that she had obtained the plaintiff’s particulars, was contradictory to her evidence that she did not speak to the plaintiff after the incident. She explained that the statement was prepared by another person, although she did read it over, and signed it, signifying her agreement to it. But she explained that obtaining the plaintiff’s particulars was a reference to her securing the plaintiff’s ticket through the intercession of the security guard.

The protection officer

[18]The defendant’s second witness was Mr Mnisi. He was a protection officer employed by the defendant at the time. He received a call about the accident and was instructed to attend the scene. He arrived there nearly two hours later, and found the plaintiff and the security guard on platform two. He asked the plaintiff whether he could speak to him about what had happened, and on receiving an affirmative reply, asked him what had happened.

[19]The plaintiff responded that he had attempted to board a moving train, but fell, and landed underneath the train, injuring his left forearm. Mr Mnisi thereafter recorded this version in the liability report that he was obliged to and did complete that day.

[20]In cross-examination he was asked why he had not made mention of the ambulance assistants who were also there. He conceded that he had not mentioned them. It was put to him that these assistants would not have agreed to let him interview the plaintiff, given the latter's severe injury. He responded that in fact they permitted him to speak to the plaintiff.

[21]The occurrence book was put to him, in which it was recorded that the security guard had reported that the plaintiff had attempted to board a moving train, and had fallen; and thus got injured. It was put to him that in fact he, the witness, had obtained his version of what the plaintiff told him from that security guard.

[22]His response was that he did discuss the matter with the security guard, and that the security guard merely confirmed what the plaintiff had in any event told him; namely that he had attempted to board a moving train, but fell underneath the train.

[23]What the security guard, who was not called, had told Mr Mnisi was of course hearsay evidence. But that conversation was elicited in cross-examination, and so it went in.

Discussion

[24] Where, as here, versions collide, the three aspects of credibility, reliability and probability must all be examined together. The Supreme Court of Appeal in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others*, 2003 (1) SA 11 (SCA), authoritatively summarised the legal position as follows:

"[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the

event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its

assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.”[1]

[25] These three constituent parts of the exercise are indicated merely to underscore the breadth of the field to be covered, but they are interwoven. The focal point of the exercise remains to find the truth of what had happened. Where however there are two mutually destructive versions, the question arises as to how to approach the matter.

[26] In *National Employers' Mutual General Insurance Association v Gany* 1931 AD 187 at 199 the following was said:

“Where there are two stories mutually destructive, before the onus is discharged, the Court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false.”

[27] This approach was clarified in *African Eagle Life Assurance Co Ltd v Cainer* 1980 (2) SA 234 (W) at 237 - 8, where Coetzee, J (as he then was) clarified this approach, making it plain that where there are probabilities, one way or the other, they decide the case: “Where there are probabilities, inherent or otherwise, there is no room for this approach.”

[28] Open train doors and injuries resulting from them have often received judicial attention.[2] Unsurprisingly the cases all say that a rail operator who leaves train doors open while the train is in motion, acts negligently. The Chief Justice put it succinctly in *Mashonga*:

“[18] The vulnerability of rail commuters and the precarious situation in which they often find themselves ought, by now, to be self-evident. It is 10 years since Metrorail in effect highlighted the need to keep coach doors closed to secure rail commuters and the significance of failing to provide safety and security measures for them when a train is in motion.[20] Even then it was not a new problem as there were reported decisions in other courts that dealt with it.[21] This underpins the utmost importance of PRASA's duty “to ensure that reasonable measures are in place to provide for the safety of rail commuters”.[22]”

[29] But were the train doors open in this case? Without this being the case, the plaintiff's version must fall to the ground. What are the inherent probabilities of train doors being open while a train is in motion?

[30] Against them being open, is that fact that it is such a dangerous circumstance that the commuters inside the train would likely raise an immediate hue and cry.[3] No-one suggested, and it would have been for the plaintiff to have done so, that that occurred here.

[31] One then weighs the credibility of the three witnesses into the consideration of this issue. The plaintiff gave straightforward

evidence about them being open, and it cannot be said that the plaintiff was a poor witness. His evidence seemed largely coherent,

and not internally incoherent or contradictory. True, his version of the events, if fabricated, needed to be no more than an uncomplicated

one, but still.

[32]The plaintiff was, to some extent, corroborated by his friend Mr Duba. He did say that he saw the plaintiff in the coach, and that would support the plaintiff's description of the events.

Although Mr Duba also gave his evidence in an uncomplicated, straightforward way, there are three features that militate against the unqualified acceptance of his evidence. The first is that he is the plaintiff's friend, and might for that reason be inclined to give evidence that supports the plaintiff's case.

[33]The second is that there does appear to have been some physical distance between Mr Duba and the plaintiff. The former was ahead of the latter when the coach was boarded. The former moved deeper into the coach once he had entered it, in a sense leaving the plaintiff behind.

[34]But there was some disinterest in connecting with the plaintiff on board the train. Having observed where the plaintiff was standing, he did not again take notice of him. They were, of course, also not ultimately going to disembark at the same station, and it is quite possible that their intention was to have parted ways at that stage already.

[35]But, and this is the third point, simply moving off home when his friend lay critically injured is strange conduct, unless he wished to disassociate himself from the plaintiff. And he might have wanted to do that if the plaintiff's disaster was self-inflicted.

[36]Against the evidence for the plaintiff stands the evidence of Ms Phonyokoani. Apart from pushing the button to close the doors, she testified also that she could and actually did observe that the doors were consequently in fact closed. This was subject to her own qualification that her ability to observe whether doors were open or closed, applied only to the first six or seven coaches from her position; beyond that, she would not be able to see.

[37]Her evidence was also that the person who had come running across the platform had tried to jump onto the coupling between the third and fourth coaches away from her. Since those coaches were involved, she must have been able to see, on her version, whether the doors were open or closed. And she said they were closed.

[38]There is nothing inherently improbable about her evidence. At one stage it was put to her in cross-examination that it was a case of mistaken identity; that another person had tried to board the moving train and had pulled the plaintiff off. She was however definitive and assertive about not mistaking someone else for the plaintiff. It was put to her that this third person was actually trying to embark the train between two coaches; but that version was of course very different from the plaintiff's version.

[39]As a witness, she was generally observant and accurate, certain of her observations, and alive to the responsibilities of her job. She made concessions where these were due, such as the train departing late. It is of course possible that Ms Phonyokoani's so-called lateral view from the rear to the front of the train, not a side view, meant that she could err in not being able to distinguish between a person leaping in between two coaches and a person leaping into open doors. But this issue was not canvassed with her, and if it had been, she might have had a persuasive explanation.

[40]The many cases dealing with plaintiffs injured on trains are, as is to be expected, decisions on the facts of each of those cases. In *Malatjie v Passenger Rail Agency of South Africa*[4] *Ledwaba J* (as he then was) accepted the evidence of the train guard that he had ensured that the doors were closed when the train left the station, disbelieved the plaintiff, and dismissed the plaintiff's case.

[41]But in *Mokwena v South African Rail Commuter Corporation Ltd and Another*[5] *Satchwell, J* observed the following at an inspection in loco:

"[22] We observed passenger trains arrive, stop and depart. We saw trains depart the station where the doors had not closed on the platform side – a number of times where it seemed that passengers were holding the doors open and at least twice where there was no one in the vicinity of the doors. On one occasion the door was closing but very slowly as the train was moving off. On another occasion the door did not commence closing at all while the train was moving out the station. We also observed that doors on the opposite side of the carriage to the platform side were open – both while the train was stationery and moving off."

[42]It would appear that sometimes, even when the train guard closes train doors, passengers are able to keep them open, as happened in *Lukhele*.

Conclusion

[43]If the opposing viva voce evidence of these witnesses cannot be unfangled, all one is left with is the rather thin inherent

probability that if the doors were in fact open, there would have been a hue and cry, which there was not; and perhaps the hearsay

evidence of the security guard. Although this hearsay statement went in, its weight is a different issue, and since it was not tested in cross-examination, I would prefer to put little store by it. The probabilities accordingly cannot, as I see it, resolve this case.

[44]That leaves one with the crucial consideration that it is not possible, in my view, to make a credibility finding against Ms Phonyokoani. So long as her version cannot be rejected as being false, and so long as the inherent probabilities do not knock it down either, as I have found in this case, the plaintiff cannot succeed. In the result I make the following order:

The defendant is absolved from the instance, with costs.

WHG van der Linde

Judge, High Court

Johannesburg

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Dates of trial: 29, 30 May 2017

Date of judgment: 7 June, 2017

[1] The judgment in *Selamolele v Makhado*, 1988 (2) SA 372 (V) by Van der Spuy, AJ is a handy collection of the authorities as of that date.

[2] *Transnet Ltd. t/a Metrorail and Another v Witter* (517/2007) [2008] ZASCA 95; 2008 (6) SA 549 (SCA) ; [2009] 1 All SA 164 (SCA) (16 September 2008); *Transnet Ltd t/a Metro Rail v Tshabalala* (151/05)

[2006] ZASCA 24; [2006] SCA 25 (RSA); [2006] 2 All SA 583 (SCA) (22 March 2006); *Mashongwa v PRASA* (CCT03/15) [2015] ZACC 36; 2016 (2) BCLR 204 (CC); 2016 (3) SA 528 (CC) (26 November 2015); *Khupa v South African Transport Services*, 1990 (2) SA 627 (W); *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* (CCT 56/03)

[2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) (26 November 2004) at [84], [102] and [106]; *Lukhele v Metrorail* (A5041/2007) [2008] ZAGPHC 332 (24 October 2008).

[3] As happened in *Ngubane v South African Transport Services* (92/89)

[1990] ZASCA 148; 1991 (1) SA 756 (AD); [1991] 4 All SA 22 (AD) (28 November 1990) at [5].

[4] (2377/11) [2012] ZAGPPHC 60 (20 April 2012).

[5] (14465/2010) [2012] ZAGPJHC 133 (14 June 2012).

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