

SOUTH AFRICA / JUDGMENT

Mahlangu v Passenger Rail Agency of South Africa (41271/2015) [2017] ZAGPPHC 547 (29 June 2017)

[2017] ZAGPPHC 547

COURT

North Gauteng High Court, Pretoria

BEFORE

Sathobane

CASE / FILE NUMBER

41271/2015

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Policy**IN****THE****HIGH****COURT OF****SOUTH****AFRICA****GAUTENG****DIVISION, PRETORIA****CASE****NO:**

41271/2015

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

DATE: 29/06/2017
MAHLANGU
IDAH
NOMSA
APPLICANT
AND
PASSENGER
RAIL AGENCY OF SOUTH AFRICA
RESPONDENT

JUDGMENT

THOBANEAJ,

Introduction

- [1] In this action the plaintiff claims damages from the defendant following an incident that occurred on 21 June 2013 within the area of jurisdiction of this court.
- [2] At the commencement of proceedings the parties indicated that they were of the view that it would be convenient for them and for the court if merits and quantum were separated. It was accordingly ruled that the issues be separated in terms of Rule 33 (4) of the Uniform Rules of Court. Quantum was postponed sine die for later adjudication.

Plaintiffs case

- [3] The plaintiff Idah Nomsa Mahlangu testified that on 21 June 2013 she was traveling by train from Nelspuit to Tembisa via the Pretoria Bosman Station on board a Shosholoza train on what is commonly referred to as the "main line". On disembarkation they were informed that the train to Johannesburg was in platform 5. There was further a green light showing that it was the train that was departing. There were many people moving about. She boarded the train while it was stationary, intent on penetrating deeper so as to identify a seat she could sit on. As she entered the coach of the train she had both her hands lifted and holding tightly to her luggage which she

carried on her head.

- [4] Once inside the coach she realized that there were people, other passengers, shoving and pulling and as she put it they were "fighting" for space. She also observed that the train was overcrowded, something she did not see as she was walking toward it. Just as she was attempting to penetrate deeper into the coach, by this time the train was moving, she got pushed out of the train, fell and sustained injuries. As the train was pulling off the platform the doors thereof were open and passengers were still boarding. She did not observe any security guards controlling the movement of people.

- [5] While on the ground she could faintly hear people saying "the person is dead, the person is dead". She realized the presence of people who had gathered around her when she regained consciousness. She does not know who called an ambulance but was eventually taken by ambulance to the hospital. According to her on the day, no statement was taken from her and not security personnel spoke to her. She stated that there was nothing she could have done to avoid falling. She had been traveling with a 2 to 3 years old child on the day.
- [6] During cross examination she was taken to task about the fact that she had testified that she arrived at Pretoria Bosman Station at around 06:00 and that the incident occurred at about 06:15. She was referred to the particulars of claim wherein it was pleaded that the incident occurred around 05:00 and it was pointed out that there was a discrepancy in her testimony. She indicated that she stood to be corrected as she did not have a watch and having grown up in the rural areas, she was accustomed to estimating time using the the crowing of the hen on trees. She stated that she could not dispute any time stipulated in that her stated times were only estimates.
- [7] It came out for the first time during cross examination that on arrival from Nelspruit she proceeded to the ticket office where she purchased a ticket to Tembisa. She thereafter boarded the train. She was not sure if she was the last person to enter the coach as she did not pay attention to that. She agreed to the proposition that the train made provision for both seating and standing passengers and that on the day there were both seated and standing passengers.
- [8] In relation to the child she had been traveling with, she stated that the child was taken by a person from the same village she came from, seeing that she was carrying luggage and they entered the coach first through a different entrance. After she fell, the only exchange she remembers with the security guard was in relation to the ticket and nothing else. She did not recall giving him her physical address. She stated that the address where she stayed was [...] I. P., Tembisa. She disputed that she stayed at address [...] as pleaded in the summons as stated in the statement she purportedly gave to the security guard.
- [9] The version put to her was that the security guard on duty on the day, a Mr Mbonani, would testify that he was on patrol duties and that as he approached the stairs to platform 6 she saw the head of a person and as he went closer to investigate he observed that the person was not moving. The person was a female person who was seated on the stairs. On asking her what happened she proceeded to explain what had happened to her. Particularly that as she was about to board the train to Johannesburg and as she moved up the stairs she was pushed down the stairs by commuters whereupon she fell and hurt her leg. She disputed the version put to her. She further disputed that she gave details about how she fell to the security guard while sitting on the stairs.

Defendant's case

- [10] David Mbonani testified that he was a security guard in the employ of defendant doing patrolling duties for over 10 years. What he remembered about the incident is that on the day he was patrolling on platform 4 and proceeded to enter the subway that linked platforms 5 and 6. While climbing the stairs he saw a train on platform 6 and observed that people were alighting therefrom. He did not see the train arrive though. He only heard that it was headed to Johannesburg. He continued to patrol and passed the first subway. At the last subway he saw a person sitting on the stairs. On asking her why she was seated there she stated that people who had alighted from the train pushed her and as a result she fell and could not reach the train. He then notified "JOC" that there was a problem on platform 5 and 6. An ambulance was then called. The ambulance crew on arrival moved her and placed her next to the ticket sales office. They thereafter loaded her on a stretcher and took her away. He did not have any interaction with her thereafter.
- [11] The version of the plaintiff namely, that she was pushed off a train, was put to him and he could neither admit nor deny it. He conceded that if that were the incident then he did not see it. He stated that he found her on the stairs, while the Johannesburg bound train was still there at 06:13.
- [12] During cross examination it was put to him that the plaintiff was Shangaan speaking. He asserted however that they spoke Zulu on the day of the incident. He stated that he spoke only Zulu and did not know Shangaan, the language spoken by the plaintiff. He stated further that he encountered the plaintiff at exactly 06:13 and that of this he was certain because he looked at the time on his cellphone. He was confronted with his statement on page 131 of the paginated papers in terms of which he saw the train stationary at 06:18. He then remembered that he had confused the time with the time on the ticket that the plaintiff showed him, which showed that it was purchased at 06:13. He further could not deny the plaintiff's version about how he came to board the coach.
- [13] It was put to him that there were three versions before court on the part of the defendant namely, page 91 of the papers in terms of which the plaintiff was pushed by commuters while ascending stairs heading to platform 5 and 6, page 129 in terms of which a female commuter alleged that she was pushed on the stairs on platform 5 and 6 after alighting a Shosholozha train and lastly page 131 in terms of which he saw a train stationary on platform 6 and in that process a female commuter was ascending up the stairs heading to platform 5 and 6 and was pushed by other commuters ascending or descending the stairs, fell and commuters walked all over her.
- [14] The information given to him he wrote on a piece of paper. In relation to the version of the plaintiff he could not dispute that when he found the plaintiff it was after she had already been pushed off the train.

Evaluation

[15] In argument both parties submitted that the court should employ the technique set out in *Stellenbosch Farmers Winery Group and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA). The technique is oft quoted 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's 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's 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."

[15] I am not entirely with the parties when they submit that there are two mutually destructive versions which require the deployment of the aforementioned technique. A closer look at the facts of this matter point to the fact that there is in fact one version before court. The version of the plaintiff which is challenged by the defendant on the basis of what the defendant contends was conveyed by the plaintiff. I shall return to what is contended by the defendant shortly.

[16] The plaintiffs pleaded case is that the defendant owed a duty of care towards the plaintiff to ensure that;

16.1. the station was safe for use by the plaintiff;

16.2. the boarding and alighting of the coaches of the train would proceed without endangering the safety of the public;

16.3. the coaches of the train would be safe for use by the plaintiff;

16.4. safety regulations and precautions would be implemented to ensure safe passage of passengers on the train and at the station.

The duty of care alleged by the plaintiff is admitted by the defendant. What the defendant contends is that it did not breach the alleged duty of care.

[17] The plaintiff lists a number of contentions in the particulars of claim in terms of which it is submitted that the defendant's breach amounted to negligence. These I summarize as follows;

17.1. that the defendant failed to ensure the safety of the plaintiff;

17.2. that the defendant failed to take steps to avoid the incident;

17.3. that the defendant failed to take steps to prevent plaintiff being pushed off the train;

17.4. that the defendant failed to employ adequate employees to guarantee the safety and security of commuters;

17.5. that the defendant allowed overcrowding;

17.6. that the defendant failed to ensure that the coach was safe for boarding alighting passengers when the train pulled off the platform.

[18] The test for negligence is trite and was laid down by Holmes JA in

Kruger v Coetzee 1966 (2) SA 428 {A} at 430E-F as follows:

"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."

[19] In Mashongwa v Passenger Rail Agency of South Africa 2016 (3) SA 528 (CC) at page 36 para [20] Mogoeng CJ states as follows:

"Public carriers like PRASA have always been regarded as owing a legal duty to their passenger to protect them from suffering physical harm while making use of their transport services. That is true of taxi operators, bus services and the railways, as attested to by numerous cases in our courts. That duty arises, in the case of PRASA from the existence of the relationship between carriers and passengers, usually, but not always based on a contract. It also stems from its public

law obligation. This merely strengthens the contention that a breach of those duties is wrongful in the delictual sense and could attract liability for damages."

[20] The plaintiff is the only person who testified about the incident. The witness of the defendant, Mr Mbonani, on his version, testified about what he was allegedly told by the plaintiff. The version of the plaintiff was rigorously tested during lengthy cross examination. The plaintiff was clear about what happened on the day. She had a valid ticket. She had boarded the train and was trying to penetrate deeper into the train when was pushed out. The doors of the train were open at the time. Her testimony that the train pulled away while the doors were open was not controverted. When Mbonani testified in chief the version of the plaintiff was put him. The exchange between Mr. Opperman and him was like this;

Mr. Opperman: I told you the plaintiffs version. Did she tell you she was pushed from a moving train?

Mr. Mbonani: No.

Mr. Opperman: Would you agree with the version that she was pushed?

Mr. Mbonani: I can neither deny nor agree because I did not see .

[21] The cross examination of Mr. Mbonani if anything shows that the defendant is relying in the main on what Mr Mbonani testified he was told by the plaintiff. When one considers the fact that even that which is alleged to have been conveyed to him by the plaintiff is recorded differently, the dangers of relying on such evidence are propelled to the fore. Countless times in cross examination he stated that he could not dispute the version of the plaintiff as

.he did not witness the incident that forms the basis of this suit. When regard is had to the parties pleaded cases and the concession by Mr Mbonani in court, the conclusion is inescapable that there is in fact one version before court. The following could not be disputed by Mr Mbonani;

21.1. that the train was overcrowded;

21.2. that the people inside the train were pushing and "fighting" for space;

21.3. that the plaintiff boarded the train;

21.4. that when the train started moving the doors thereof were open;

21.5. that the plaintiff was pushed by other commuters and fell on the platform;

21.6. that the plaintiff sustained injuries as a result;

Moreover, when a postulation was put to him that when he encountered the plaintiff on the stairs it was after she had been pushed, he stated that he could neither admit nor dispute such a postulation.

[22] Mr Opperman submits in argument that the plaintiff's pleaded case differs from the evidence tendered and that from this the court should conclude that the evidence of the plaintiff was a recent fabrication. In particular the fact that the plaintiff's pleaded case was to the effect that the incident occurred around 5h00 was irreconcilable with the time that appears on the ticket 6h13 and further irreconcilable with her testimony to the effect that the incident occurred around 6h15. These timelines emanate from different sources.

22.1. "around 05h00" appears in the plea;

22.2. "approximately 05h00" appears in the reply to request for further particulars;

22.3. 06h13 appears on the ticket;

22.4. "approximately 06h15" was testified to in court as the time of the incident. (Underlining my emphasis.)

Mr Opperman contends that it is "illogical and disingenuous" to retort that the times were only an estimate. Ms. Schreuder for the plaintiff stated that it was clear that the plaintiff was an unsophisticated person who grew up in the rural areas. Her explanation that she did not have a watch and that in any event she grew up estimating morning time through the crowing of the hens. The summation by Mr. Opperman that the pleaded case was "totally different" from the evidence tendered in court is in my view without substance for the following reasons. Firstly, in the particulars of claim it is pleaded that the plaintiff "around" 05h00 was already on board. It is clear that the use of "around" with reference to time denotes an estimation. So does the use of "approximately". The two words are synonyms which denote "not perfectly accurate or correct. The plaintiff gave an explanation of why there would be a discrepancy on time. She stated under repetitive cross examination that the times were an estimate given how she personally estimated time. I have no reason to disbelieve her and do not share the view that the above time lines, which, save for the time on the ticket, are clearly estimates, are fabricated.

[23] Countless cases have dealt with the duty of the defendant towards the commuting public. In these proceedings the defendant admits that it owed the duty of care to the plaintiff. The defendant however does not advance any reason, in the pleadings and in court testimony, why the plaintiff's contention that the defendant on the day of the incident failed in its duty, should be rejected. In argument it was submitted that it would be highly unlikely that passengers would alight from a moving train whose doors were open. In making the submission Mr. Opperman relied on the case of *Moepya v Transnet Limited* and Another case number 2475/05. Reliance on this case is in my view misplaced. The version of the plaintiff is that when she boarded the train it was stationary. This was not disputed. The plaintiff's own testimony is that she did not pay much attention whether there were people still boarding the train. It is not the plaintiff's case that she boarded the train while it was in motion. The defendant does not contend this was the case.

Conclusion

[24] From the above I make the following findings;

24.1. the plaintiff board a ticket to Tembisa;

24.2. the plaintiff boarded the stationary train;

24.3. the train was overloaded;

24.4. the train started to pull off while the doors thereof were still open;

24.5. there were no adequate security measures in place to control the movement of passengers;

24.6. the plaintiff was pushed out of the train and fell on the platform;

24.7. the plaintiff sustained injuries as a result of the fall.

[25] I therefore make the following order;

1. the defendant is liable for 100% of the plaintiff's proven or agreed damages;
2. the defendant to pay the costs.

SATHOBANE

ACTING JUDGE OF THE HIGH COURT

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