

SOUTH AFRICA / JUDGMENT

Makgopa v Passenger Rail of South Africa (9830/2015) [2016] ZAGPPHC 506 (3 June 2016)

[2016] ZAGPPHC 506

COURT

North Gauteng High Court, Pretoria

BEFORE

SL Magardie

CASE / FILE NUMBER

9830/2015

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IN

THE HIGH COURT OF SOUTH
AFRICA

(GAUTENG
HIGH COURT,
PRETORIA)

Case

no: 9830/2015

DATE:

3 JUNE 2016

In

the matter between:

SHADRACK

NKOSANA MAKGOPA

Plaintiff

and

PASSENGER

RAIL AGENCY OF SOUTH AFRICA

Defendant

JUDGMENT**MAGARDIE AJ**

1. In this case the Plaintiff instituted action against the Defendant for damages suffered in the total amount of R6 000 000.00 founded on alleged negligence on the part of the Defendant. The Plaintiff was a passenger in a Metrorail train operated by the Defendant.
2. The parties agreed that the issues pertaining to quantum and merits should be separated in terms of Rule 33(4) of the Uniform Rules of Court. The trial before me was for the determination of the merits, to determine the delictual liability of the Defendant in the manner alleged by the Plaintiff.
3. It must be stated forthwith that, although the Defendant served the Plaintiff with an amended Plea, the Defendant was no longer pursuing such amendment.

THE PLAINTIFF'S AVERMENTS

4. The Plaintiff was a passenger in a Metrorail train operated by the Defendant, having boarded same at the Mamelodi Gardens Station. The Plaintiff's Particulars of Claim were, inter alia, as follows:

4.1 On 12 December 2014, the Plaintiff boarded a train from Mamelodi to Gezina in Pretoria;

4.2 The Plaintiff was in possession of a valid train ticket; 4.3 Whilst on the train, the Plaintiff was pushed by one of the commuters and fell on the railway lines at the Eerste Fabrieke Station;

4.4 The Defendant had a duty of care towards the Plaintiff to ensure the safety of the Plaintiff;

4.5 The Defendant breached its duty of care towards the Plaintiff in that:

4.5.1 the Defendant failed to ensure the safety of members of the public, especially the Plaintiff;

4.5.2 the Defendant failed to take any reasonable or adequate steps to avoid injury to the Plaintiff under the circumstances; and

4.5.3 the Defendant failed to employ employees, alternatively, failed to employ an adequate number of employees to guarantee the safety of passengers in general and that of the Plaintiff.

4.6 As a result of the foregoing, the Plaintiff sustained traumatic brain injuries as well as the amputation of his leg. SUMMARY OF THE EVIDENCE

5. The Plaintiff was the only witness to testify to prove the averments made in the Particulars of Claim. On 12 December 2014, at

approximately 5 a.m., the Plaintiff boarded train nr 91 at the Mamelodi Gardens Station going to work in Gezina.

6. The Plaintiff had to change from train nr 91 to train nr 93 at the Eerste Fabrieke Station. Train nr 91 was full of commuters and a lot of the commuters disembarked at the Eerste Fabrieke Station to get on to train nr 93. As people flocked towards train nr 93 and the situation became chaotic, the Plaintiff had a change of heart and decided to return to train nr 91. The Plaintiff then again boarded train nr 91 in a very full coach.
7. The Plaintiff further explained that when inside train number 91, he held onto the handrail, standing in one corner next to the door of the coach. He further testified that the doors of the coach were open and could not close as a result of the fact that the train was too full.
8. The Plaintiff recalled that commuters were pushing and fighting to secure a better spot to position themselves in the full train. After leaving the Eerste Fabrieke Station, the train proceeded towards the Denneboom Station. It was at that juncture that the Plaintiff was pushed out of the moving train by one of the commuters. As he fell outside the train, the Plaintiff landed on his back.
9. The Plaintiff was unconscious after the incident and only came to his senses when he was in hospital. He testified that he sustained injuries to his head, his left knee was severed and he had lacerations on his back.
10. As at the date of the incident, the Plaintiff testified that he had been using the train as a mode of transport for seven years. On the date of the incident, the Plaintiff was in possession of a valid train ticket which he kept inside a school bag which he carried over his shoulders. The train ticket was valid from 01 December 2014 until 31 December 2014, entitling him to use the train for the entire month of December 2014.
11. During cross-examination, counsel for the Defendant pointed out that, as the Plaintiff was on his way to Gezina, the Plaintiff had to get onto train number 93 as train number 91 did not go to Gezina but to Pretoria; further that the incident occurred after the Eerste Fabrieke Station, on the way to Denneboom Station. However, the Plaintiff was adamant that at Eerste Fabrieke Station, he was in train number 91. He maintained that he disembarked from train number 91 and wanted to board train number 93 but had a change of heart as a lot of commuters were running towards train number 93 and that the trains were running late on that day. He then went back to train number 91.
12. The Plaintiff explained that train number 93 came from Gezina and that it would make a U-turn at the Eerste Fabrieke Station, at which station it would wait for a few minutes. Further, that some of the commuters on train number 91 would go to train number
93. When put to him that there was sufficient time to change trains, the Plaintiff disagreed, stating that the situation on the day was chaotic, people were rushing to different platforms and confusion prevailed as the trains were running late on that day.

13. When the Defendant's counsel confronted the Plaintiff with an undated handwritten statement, the Plaintiff explained that he wrote the statement a week following his release from hospital. He was still confused following the injuries he had sustained and that he reduced what he could remember in writing. The Plaintiff maintained that the incident occurred between the Eerste Fabrieke and Denneboom Stations.
14. The Plaintiff was also taxed with inconsistencies in the letter of demand dated 28 January 2015, as well as inconsistencies in the medico-legal reports by Dr Okoli, Dr Kumbirai and Dr Mojaelo in relation to how the incident transpired.
15. I must pause here to highlight that, the report of Dr Okoli on page 71 at paragraph 3 states that the Plaintiff was "holding onto the pole, by the door of the train. He was literally hanging by the door which was not closed ..." (own emphasis). When incessantly taxed by counsel for the Defendant whether he was outside the door, the Plaintiff persisted that he was standing inside the door, where he was pushed from behind, whilst facing the direction in which the train was travelling. The Plaintiff persisted that he knew exactly what happened on the day of the incident, except for what transpired after he was pushed from the train.
16. When the Defendant's version was put to him, the Plaintiff outright denied same and specifically stated that he could never have walked next to the tracks of a train whilst having a valid train ticket in his possession.
17. When it was put to the Plaintiff that he took a risk by standing at the open door of a full train, the Plaintiff persisted that he was standing inside the door and that he could not be blamed for what transpired when he got pushed afterwards. The forgoing was the evidence of the Plaintiff.
18. The evidence of the Defendant was based on the evidence of two witnesses, namely the train driver, Ms Qondela and the pilotsman, Mr Nemasisi. Although a security guard by the name of Ms Thandeka Shongwe was mentioned during the evidence of Ms Qondela, she was not called to testify for the Defendant.
19. Ms Qondela testified that she is employed at Metrorail as a train driver since 2008 and that she worked on the specific train line for a period of seven years. She was previously employed as a security guard. She explained that the duties of a train guard were to open the doors of the train for commuters to disembark and alight and to communicate with the train driver.
20. Ms Qondela testified that she was on duty on 12 December 2014, and was the train driver of train number 91. She began her duties at 04h10 in the morning. Her duty was, inter alia, to drive the train to Pretoria Station twice. She had to take the first train to the Pienaarspoort Station from Pretoria Station at 04.40 a.m. She then had to return to Pretoria Station. She was assisted in the cabin by Mr Nemasisi, She explained that the pilotsman controls the route and communicates with the control office.

21. Ms Qondela went further to mention that her train left from Mamelodi Gardens Station to Eerste Fabrieke Station. En route to Eerste Fabrieke Station and outside the station, she noticed a person walking very close to the railway line, on the left side, in the direction the train was moving. She noticed that person where the railway line made a curve. At the time when she noticed the person, she reduced the speed of the train by using the gearlever. She then hooted a number of times at the pedestrian but he

came even closer towards the train. She then used the emergency brakes; the train did not stop immediately and collided with the

pedestrian. The train came to a standstill a distance away from the Eerste Fabrieke Station.

22. Ms Qondela remained in the cabin and requested the pilotsman to check on the pedestrian. Upon his return, the pilotsman reported that the pedestrian's leg was severed but that he was still alive.
23. Ms Qondela then informed the control office why the train became stationary. She remained in the train for a while before she took the train back to Pretoria Station where she was released from duty. Ms Qondela was not in a position to give a clear indication of the distance between where the train stopped and the Eerste Fabrieke Station. Counsel for the Defendant estimated the distance at approximately 100 meters.
24. Ms Qondela testified further that she communicated with the train guard who sat at the rear end of the train, in the cabin, a certain Ms Thandeka Shongwe, who called her to enquire why the train came to a standstill.
25. During cross-examination of Ms Qondela, she stated that she knew that the duties of a train guard were to safeguard commuters and to secure that the doors of the train were closed before the train took off. She conceded that it would be negligent on the part of a train guard not to ensure that doors were closed. She knew that it was a criminal offence for persons to walk next to the railway line and that security guards would arrest such persons if found walking there. She

pointed out that security guards were based on the platforms and not in open areas where people would be crossing the railway lines. She also pointed out that, if guards were found to be in open areas, it would be to arrest people stealing cables at night. She agreed that guards would be there to guard the copper cables.

26. Ms Qondela, stated that she didn't see the pedestrian that was hit by her train and as such, she could not identify him. She mentioned that she hit a male pedestrian and that the pedestrian's surname was given to her by her manager. She also did not see the injuries sustained by the Plaintiff but was told of the injuries. She explained further that she was aware that there was incident registers in which one would record all incidents while on duty. When asked if such a recording was made, she answered that a statement was made to her line manager. She was not aware of any other incidents on that day.

27. When presented with the train ticket, the witness said she could not comment on its validity. She could not deny that the Plaintiff was a passenger on train number
91. The witness was not certain of the exact time of the incident stating only that it was before 6.00 a.m. The witness could not comment on why a person with a valid train ticket would walk on the railway line instead of using the train. She conceded that a normal person would have reacted when hearing a hooter. When confronted with the Plea filed on behalf of the Defendant, the witness conceded that her version was not reflected in the Plea.
28. Mr Nemasisi was the second witness for the Defendant. He testified that he was employed by the Defendant as a pilotsman at the Wolmerton depot and that he was on duty on 12 December 2014, as a pilotsman. According to Mr Nemasisi, the duties of a pilotsman were to control the trains where there are single lanes. On the day of the incident, the witness was working on the lanes between the Eerste Fabrieke and Pienaarspoort Stations.
29. Mr Nemasisi went further to state that he saw a pedestrian walking on the left side of the railway line as they were approaching a curve. The train was on its way from Mamelodi Gardens towards the Eerste Fabrieke Station. The incident occurred a distance away from the Eerste Fabrieke Station and before the train could reach the Eerste Fabrieke Station. The train driver hooted continuously but the pedestrian crossed the railway line from the left side to the right side. It was then that the train hit the pedestrian. Once the train came to a standstill, a distance before the platform, he went to check on the person and found the person on the left side of the train, next to the wheels of the train and approximately 3 to 4 coaches from the front of the train. He found that the person's leg was severed and muscles were hanging from the leg. He finished his duty 5 minutes after the incident.
30. During cross-examination of Mr Nemasisi, he stated that he saw the Plaintiff on the day of the incident, who was at that stage unconscious, but he did not know him by name. Mr Nemasisi went further to state that he was in the employ of the Defendant since 08 February 2012. He also stated that he did not know what the duties of a security guard were and was also not sure if there were guards employed to specifically guard against commuters crossing railway lines. He testified that, when he executed his duties, he normally saw guards around "those" areas but was not sure if they were there to guard people crossing the railway lines. He agreed that it was a criminal offence to cross the railway lines but was not certain if a person who crossed the railway line must be criminally charged. He had seen security guards conducting stop-and-search operations and arrested people for not having valid train tickets but he has not seen security guards arresting people who crossed the railway lines.
31. Returning to the incident, Mr Nemasisi confirmed that he saw the Plaintiff's severed leg. He disputed the injuries to the head on the basis that there was no visible blood. He couldn't comment on the lacerations on the back. The witness assumed that the incident occurred on the left side of the train as, so he claimed, he could see clear from where he was seated in

the cabin. When specifically referred to the medical reports from Steve Biko Academic Hospital, the witness said he couldn't tell if the document he was referred to was indeed a report from Steve Biko Hospital. When directed to the hospital's stamp on the report, the witness condescendingly said that henceforth, he would be aware of the stamp. He was further referred to the train ticket and stated that he didn't know whether the ticket was valid. However, he conceded that a valid ticket holder would use the train rather than to walk on the railway lines. He disputed that the Plaintiff boarded the train at Mamelodi Gardens Station and maintained that the Plaintiff crossed the railway line.

32. Mr Nemasisi said that the driver started hooting when the person was approximately 10 meters away and moving from the left to the right of the railway line. He stated further that he was in possession of a work cellphone, which would alert him of all incidents, even after he was released from his duties on the day of the incident.
33. The above was the evidence for the Defendant. As was the case with Ms Qondela, Mr Nemasisi's version was not part of the Defendant's Plea, raising questions as to where and when it came to light.

ANALYSIS

OF THE ISSUES AND THE LAW

34. The version that the Defendant posited against the Plaintiff's claim during the trial brings me to the purpose of pleadings. I mentioned elsewhere herein above that the Defendant's Plea was one of bare denial. Although at some stage the Defendant filed a notice to amend and a premature amendment, the amendment was not taken further, resulting in the Defendant reverting to the original Plea of bare denial. The Defendant's conduct meant that the Plaintiff came into the trial without the knowledge of what case he had to meet. No factual averments were given against the Plaintiff's Particulars of Claim.
35. The version that the Plaintiff's injuries were brought about as a result of him unlawfully crossing the railway lines in the face of an oncoming train was raised during the trial. Although a series of questions were posed to the Plaintiff during cross-examination to support such version, it is curious as to why, if the Defendant had such a solid version, it was not pleaded as such in the first place.
36. In *Nieuwoudt v Joubert*[1] it was held that the purpose of pleadings is to define issues so as to enable each party to know the case he has to meet. Once the Defendant filed its plea in the manner that it did herein, such plea had to be understood to be the basis of the Defendant's case and thereby giving the Plaintiff a clear position of the Defendant's defence.
37. As a result of the forgoing, the evidence of the Defendant's witnesses was not in accordance with its Plea, begging the question as to what informed the Plea in the first place. The probabilities are strongly against the version of the Defendant as presented by its two witnesses, especially when considered against the backdrop of its Plea.

38. At the end of the trial the court was confronted with two diametrically opposed versions, which were mutually destructive. When confronted with two mutually destructive versions, the court has to implement the principles enunciated in *Stellenbosch Farmers' Winery Group and Another v Martell et Cie and Others*[2] where Nienaber JA held 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. "
39. Ms Qondela's story that her train hit a pedestrian along the railway line and that the train came to a standstill shortly thereafter, but she did not get off the train to examine the person who was struck by the train, is not only outrageous, but unnatural. That explanation defies any logical reaction of a human person finding himself/herself in a similar situation.
40. A further agonising aspect of the testimonies of the Defendant's witnesses is that, if the posited version were anything to go by, there was no iota of information pertaining to what became of the injured person who was unconscious on the ground with a severed leg. Was he taken to hospital? If so, who took him to which hospital? Where are the records of the incident?
41. The claim of privilege on the incident register was something bizarre. Surely the incident register was pivotal to the claims made by the Defendant. It defies logic that the Defendant, who claims that the Plaintiff was a victim of a train accident occasioned by the Plaintiff's unlawful crossing of the railway lines in the face of an oncoming train, fails to discover the incident register that was so central to its case. If privilege of the incident register is claimed, it is unfathomable how such claim of privilege advances the Defendant's case. Regard must be had to the fact that the story that a pedestrian was run over by a train originates from the Defendant. With this said, Ms Qondela did not testify that the incident

involving her train was recorded in the incident register, apart from her informing the supervisor. It is for this reason that the bizarre claim of privilege should be understood.

42. Analysis of the evidence of the witnesses for the Defendant shows that a chunk of Ms Qondela's testimony was based on hearsay apparently obtained from the pilotsman and her manager. Such relates to the identity of the Plaintiff and the nature of the injuries he sustained. Ms Qondela never got out of the train to ascertain the identity of the Plaintiff and to investigate what transpired. She persisted that she did not see the Plaintiff on the day of the incident and only recalled that it was a male person. I also find her evidence that the Plaintiff moved closer to the train when she hooted, highly improbable. Further, although Ms Qondela explained the duties of a security guard, such was of no assistance to the Defendant's case insofar as those security guards were based at the platform and not where members of the public crossed the railway lines. She proceeded to mention that such guards were based at the platforms and not where people crossed the railway lines. She also stated that it was also part of the security

officer's duties to arrest persons responsible for cable theft. In any event, Ms Qondela's evidence is irrelevant in toto insofar as she could not identify the Plaintiff as the person who was run over by a train. Against this backdrop, I am not certain why her evidence was presented in the first place.

43. The second witness, Mr Nemasisi's attitude was condescending and he evaded simple questions. Whilst conceding that it was a criminal offence to cross the railway lines, he stated that he was not certain if such offenders were ever charged with criminal offences. Mr Nemasisi stated further that he was aware that the duty of a security guard was to protect commuters, but that he was not sure if there were guards who were actually employed to guard against people crossing the railway lines. He also testified that, when he executed his duties, he would notice security guards in open areas, but was not aware if they were guarding people

who crossed the railway lines. When confronted with the Plaintiff's medical report, which clearly showed it came from the Steve Biko Hospital, he was not willing to concede that such was the case.

44. The evidence of the Plaintiff was cogent, distinct and uncontroverted. To the extent that the Defendant presented evidence to discount the Plaintiff's claim, the Defendant's witnesses were as if they were testifying about a different incident that had nothing to do with the Plaintiff. The Plaintiff's evidence clearly showed that the Plaintiff was taken to Steve Biko Hospital for treatment. The Plaintiff also presented the hospital records with the hospital stamp to buttress his version.
45. Insofar as the issue of crossing the railway line in the face of the oncoming train is concerned, nothing to corroborate such a version with intrinsic evidence in the form of an incident report was presented before me. I find that the Plaintiff's evidence was well presented, clear and not unembellished. Whatever minor discrepancies from the Plaintiff's

evidence, such do not detract from the fact that his evidence was clear and unembellished. The cross-examination of the Plaintiff did not discredit his version. The Plaintiff maintained his version throughout, namely that, whilst he was standing inside the train, which was moving with an open door, one of the commuters pushed him resulting in him falling outside the moving train, after which his leg was severed.

46. The question this court has to answer is whether the harm to the Plaintiff in these particular circumstances was foreseeable and whether the Defendant had acted negligently in not foreseeing the harm and acting to prevent it. The test is what a reasonable person would have done under these circumstances.

47. It is trite that a Plaintiff bears the onus of proving its claim and that onus is discharged on a balance of probabilities. [3] In determining whether a Plaintiff has discharged the onus to prove a claim, a court is required to consider the oral evidence together with any other documentary evidence as well as surrounding circumstances and probabilities of a case. Many a time a court may be confronted with mutually destructive versions and only one version must be accepted above the other. If the court cannot find that one version should be accepted above the other, the conclusion would be that a Plaintiff has failed to prove its claim on a balance of probabilities.

48. In *Mashongwa v Passenger Rail Agency of South Africa* [4] it was held that:

"Public carriers like PRASA have always been regarded as owing a legal duty to their passengers 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 carrier and passenger, usually, but not always, based on a contract. It also stems from its public law obligations. This merely strengthens the contention that a breach of those duties is wrongful in the delictual sense and could attract liability for damages."

Further, that: "That the incident happened inside PRASA's moving train whose doors were left open reinforces the legal connection between PRASA's failure to take preventative measures and the amputation of Mr Mashongwa's leg. PRASA's failure to keep the doors closed while the train was in motion is the kind of conduct that ought to attract liability. This is so not only because of the constitutional rights at stake but also because PRASA has imposed the duty to secure commuters on itself through its operating procedures. More importantly, that preventative step could have been carried out at no extra cost. It is inexcusable that its passenger had to lose his leg owing to its failure to do the ordinary. This dereliction of duty certainly arouses the moral indignation of society. And this negligent conduct is closely connected to the harm suffered by Mr Mashongwa. It is thus reasonable, fair and just that liability be imputed to PRASA."

49. No plausible reason was advanced as to why the Plaintiff, who was in possession of a valid train ticket, would walk along the railway lines. Also, I find it highly improbable that a normal person would have moved toward the train whilst being warned of oncoming danger. The Defendant's witnesses' account of the incident was fraught with inherent improbabilities. I have to accept the evidence of the Plaintiff that he was pushed from a moving train, by a commuter, whilst the doors of the train were open.
50. All things considered, as well as the probabilities and circumstances, I have no doubt in rejecting the evidence of the Defendant's witnesses. I am satisfied with the evidence of the Plaintiff that he was pushed out of a moving train resulting in the amputation of his leg. The amputation of the Plaintiff's leg was a painful and severe act to a person of the Plaintiff and brought indignation to him as a person who was born with all limbs.
51. There was no evidence before me to controvert the Plaintiff's version that the doors of the coach, occupied by the Plaintiff, were open when the train was in motion. The Defendant should have foreseen that leaving the doors of the coach open could endanger the safety and lives of the commuters. As it happened, the Plaintiff was pushed by one of the commuters resulting in him falling out of the train. The end resulting of the Plaintiff falling out of the open doors of the full coach was the severing of the Plaintiff's leg. The Defendant owed the Plaintiff and the other commuters a duty of care to ensure their safety whilst travelling in its trains. To this end, I find that the Plaintiff has succeeded in proving negligence on the part of the Defendant.

CONCLUSION

52. In the result I find that there was a duty of care that the Defendant owed to the persons, including the Plaintiff, who utilized its trains and that the Defendant should have ensured that all the doors of the coaches were closed. Further, that the Defendant was negligent by not ensuring that the doors were closed whilst the train was in motion.
53. In the result I make the following order:
- 53.1 The Defendant is liable for 100% of the Plaintiff's proven or agreed damages.
- 53.2 The Defendant to pay the Plaintiff's costs.
- 53.3 The issue of quantum is postponed sine die.

SL MAGARDIE

ACTING JUDGE OF THE HIGH COURT

[1] 1988 (3) SA 84 (SE) [2] 2003 (1) SA (11) SCA

[1] 1988 (3) SA 84 (SE)

[2] 2003 (1) SA (11) SCA

[3] Santam Bpk v Potgieter 1997 (3) SA 415 (0)

[4] 2016 (2) BCLR 204 (CC).

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