

SOUTH AFRICA / JUDGMENT

Masango v Passenger Rail Agency of South Africa (32319/2013) [2020] ZAGPPHC 3 (10 January 2020)

[2020] ZAGPPHC 3

COURT

North Gauteng High Court, Pretoria

BEFORE

Raulinga

CASE / FILE NUMBER

32319/2013

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

CASE

NO: 32319/2013

10/1/2020

In

the matter between:

NOBUHLE

BONANI MASANGO

Plaintiff

And

PASSENGER

RAIL AGENCY OF SOUTH

AFRICA

Defendant

JUDGMENT

RAULINGA J,

- [1] The plaintiff instituted an action against the defendant claiming damages for bodily injuries sustained while she was a passenger on a suburban passenger train operated by Metrorail on 5 April 2013.
- [2] She alleges that the aforesaid incident was caused by the negligence of the employees and/or agents of the defendant, acting whilst in the course of their employment with it, in one or more of the following respects in which such employees and/or agents failed to:
- 2.1 Put in place and/or implement appropriate measures to ensure that the doors of the railway carriages on the train were properly secure whilst the said train was in motion.
- 2.2 Put in place and/or implement appropriate measures to ensure that the carriages carrying passengers were not overcrowded with passengers.
- [3] The defendant puts the issues of liability in dispute and puts the plaintiff to the proof thereof. It is disputed by the defendant that the incident occurred at all and that the plaintiff's version is improbable.
- [4] At the commencement of the trial the parties agreed that merits and quantum be separated in terms of Rule 33(4) of the Rules of Court. The Court will therefore only consider the merits.
- [5] The plaintiff testified that on 5 April 2013 at 16h50 she boarded the train at Ikwezi Station on her way to work in Johannesburg. She was in possession of a valid monthly ticket that she had produced to the examiner before boarding the train. She was in carriage number 5 that she regularly used on her way to work because there are always preachers who preach to a Christian congregation therein.
- [6] The said carriage was overcrowded and as a result she had to hold onto a pole or rod descending from the roof to the floor of the carriage. She was standing about half a meter from the door. The train normally travels with its doors open. Passengers were leaning against each other because the train was overcrowded. As the train was negotiating a curve, she fell off and landed on ballasts. She then stood up and walked up the platform from where she climbed up the stairs. She then boarded a taxi to work. While in the taxi she noticed that she was bleeding. On arrival at work she was taken to Medi-Clinic for medical treatment. She sustained injuries on her left foot, particularly her left ankle. She was later put off from work for two weeks.
- [7] On 18 April 2013 the plaintiff reported the incident to a Mr Shongwe at Ikwezi Station. She never saw Mr Shongwe again until she saw him in court on 18 May 2015.

- [8] In support of the case for the plaintiff, Mr Mandlangapheli Makhoba was called to testify. He has been a regular passenger of train number 9335 since 1997. On 5 April 2013 he boarded the train at Inhlazane station in Parktown. He knew the plaintiff as a regular passenger of the said train at Ikwezi at 06h50. Just before the train could negotiate a curve he heard people screaming that somebody had fallen off the train. He would later learn that it was the plaintiff who fell off the train. He confirmed that he had earlier seen the plaintiff board the train and that he did not see her get off the train at Park Station. He did not witness the plaintiff fall off the train. However, he knows the plaintiff because she always uses carriage where he normally preaches to the passengers. On the said day the train was overcrowded and he could not move around as he was preaching. The train doors were open when the train pulled off. The plaintiff was standing next to open doors. He was informed by a certain lady that the plaintiff got injured.
- [9] At the close of the plaintiff's case, counsel for the defendant launched an application for absolution from the instance contending that the plaintiff did not present prima facie evidence touching on liability as appears in paragraphs 7.1 and 7.2 of the particulars of claim.
- [10] This Court granted absolution from the instance which was challenged by the plaintiff by way of appeal to the Full Bench of the Local Division. The Appeal Court dismissed the order for absolution from the instance and referred the matter back to this Court to proceed further.
- [11] On 2 October 2019, the matter was placed on the roll for further hearing. On the said date the defendant proceeded to call its witnesses.
- [12] Ms Vanya, the train driver, confirmed that the speed of the train when rounding the curve is 40km per hour and that it normally rounds the curve in a smooth manner without jerking. She further testified that the travel time from Ikwezi to Dube is approximately 6 minutes.
- [13] Mr Shongwe testified that he is employed as a security guard at Ikwezi station. His duties entail inter alia patrols and attending to incidents that occurred at the station. No report was made to him by the plaintiff on the day of the alleged incident by the plaintiff to have been taken by him. He has never made a statement or filed a report of an incident that he has not observed or attended to. He had on occasions witnessed trains leave the station with doors still open.
- [14] Mr Hlalele testified that he is employed as a security guard at Ikwezi station. His duties entail inter alia patrols and attending to incidents that occurred at the station. Walking in the section by people is not permitted and would amount to a reportable incident. He would be able to observe people walking in the section. On the day in the question he did not observe a person walking in the section. No report was made to him of an incident that occurred on that particular day. No report was made to him after the alleged incident had occurred. He has never made a statement or filed a report in respect of an incident that he had not observed or attended to.

- [15] Mrs Mulaudzi testified that she was on duty on the particular day and no incident was reported to her.
- [16] The plaintiff submits that there is uncontested evidence that the train pulled off from the station whilst the doors to the carriage were open and that she fell off the train out the open door whilst the train was in motion. This she contends is confirmed by the evidence of Mr Shongwe, the defendant's witness, who testified that he had seen the train leave the station on occasions with doors still open.
- [17] Further, that the defendant has imposed the duty on itself to secure commuters through its operating procedures. Consequently, its negligent conduct is closely connected to the harm suffered by the plaintiff and therefore liability should be imputed to the defendant.
- [18] Concerning the evidence of Mr Shongwe that he neither met with the plaintiff nor took a statement from her on 18 March 2018, the plaintiff argues that on 18 May 2015, she identified Mr Shongwe in Court as the person that she had met on 18 April 2013 and made a statement to him. Further, that her evidence was not disputed by the defendant in cross-examination.
- [19] The defendant however, submits that the Court is faced with mutually destructive versions by the parties. The plaintiff alleges that she fell off a moving train through the open doors of the train resulting in injuries. The defendant on the other hand alleges that the incident did not occur at all or did not occur as alleged by the plaintiff.
- [20] On a proper evaluation of the evidence in this matter, it can only be fair to decide the issues on probabilities.
- [21] When faced with mutually destructive versions, the approach of the Court is whether the matter may be resolved on the probabilities. This involves considering the credibility of the witnesses, their reliability and, finally, determining on the probabilities whether the party with the onus has succeeded in discharging it.[1]
- [22] In the dictum of Wessels JA case of National Employees' Mutual General Insurance Association v Gany[2], the Court espoused the following approach:

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. It is not enough to say that the story told by Clarke is not satisfactory in every respect, it must be clear to the Court of first instance that the version of the litigant upon whom the onus rests is the true version '

- [23] In assessing two conflicting versions, only one of which can be correct, the onus is on the plaintiff to prove on a preponderance of probabilities that his/ her version is the truth. This onus is discharged if the plaintiff can show by credible evidence that her version is the more probable and acceptable version. The credibility of the witnesses and the probability or improbability of what they say should not be regarded as separate enquiries to be considered in piecemeal. They are part of a single investigation into the acceptability or

otherwise of a plaintiff's version, an investigation where questions of demeanour and impression are measured against the context of witness evidence, where the importance of any discrepancies or contradictions are assessed and where a particular story is tested against facts which cannot be disputed and against the inherent probabilities, so that at the end of the day one can say with conviction that one version is more probable and should be accepted, and that therefore the other

version is false and may be rejected with safety.[3]

[24] One can therefore analyse the evidence of the plaintiff focusing on discrepancies and probabilities.

[25] The plaintiff alleges that she injured her left ankle. The medical report compiled on the day of the incident indicate that it was the right ankle that was injured. The plaintiff alleges that there was also a cut on her left foot. The medical report makes no mention of a cut to the left foot. In my view there are glaring discrepancies on the injuries sustained.

[26] The plaintiff alleges that she was injured when she fell through the open doors of a moving train. The train was rounding a curve at a speed of 40km per hour when she fell off from a height of approximately 1.5 meters onto the ballast stones. I must immediately mention that the Full Bench Court has already pronounced on this aspect and I must say no more. However, there is a discrepancy between the plaintiff's evidence and that of her witness Mr Makhoba. His evidence is that just before the train could negotiate a curve he heard people screaming that somebody had fallen off the train, whereas she testified that the train was rounding a curve at a speed of 40km per hour when she fell off the train. In my view this is a contradiction between her evidence and that of Mr Makhoba.

[27] The plaintiff offered at least four versions during her testimony as how she was ejected from the train.

27.1 The train jerked unexpectedly when rounding the curve;

27.2 She was pushed by other passengers who were getting ready to disembark at the next station;

27.3 A scuffle broke out amongst passengers as a result of which she was ejected;

27.4 The version that she mentioned to the doctor who examined her and completed a medical report, was that she was pushed off a train whilst attempting to alight, landing on the platform and injured her left ankle.

[28] She further testified that after sustaining the injuries, she walked back to the platform, a distance of approximately 400 meters, lifted herself up the platform, walked another 150 meters on the platform, climbed up two flights of stairs, walked past security officers and ticket examiners without reporting the incident to any of them, walked into a taxi and went to her place of work.

- [29] In an answer to a pre-trial question the plaintiff stated that she was travelling in train number 9335. It would later transpire that the train she alleges she was ejected from could not have been number 9335. The time of arrival and the time of incident did not correlate.
- [30] Mr Makhoba testified that he did not witness how, when or where the plaintiff fell, or to the negligence of the defendant. I agree with the defendant that Makhoba's evidence was of little value.
- [31] There is no need to rehash the defendant's evidence. It is my considered view that the defendant managed to rebut the plaintiff's version in all respects. The only version that I am prepared to accept as tendered by the plaintiff is that the doors of the train remained open while it was in motion. It is for that reason that I part ways with Mr Hlalele for the defendant who testified that he has never seen a train with its doors open while in motion. Otherwise I find the evidence of the defendant credible. There are no substantial inconsistencies in the version of the defendant.
- [32] I now deal with the evidence of the plaintiff pertaining to credibility¹ discrepancies, probabilities and improbabilities.
- [33] The plaintiff was inconsistent in as far as the injuries sustained are concerned. It is not clear whether it was the left ankle or right ankle that was injured. The report makes no mention of her left foot. She testified that she was injured when she fell through the open doors when the train was rounding a curve, whereas Mr Makhoba said it was before the train reached the curve. One is not certain as to which version is true of the four versions mentioned in paragraph 27 above. It is also unusual that a person who was injured could have gone past the ticket examiner, and the security guards without reporting the incident to any of them. One is therefore convinced that her story that she came back to Ikwezi station to report the incident to Mr Shongwe on 18 April 2015 was an afterthought in order to close the gaps in her original version.

It is therefore more probable that Mr Shongwe never met her on 18 April 2013, nor did he take any statement from her on that day. Her version in this regard must be rejected. Lastly she is not certain of the number of the train she boarded on that day.

- [34] In the circumstances, the plaintiff failed to discharge her onus, she did not tender credible evidence that her version is more probable and acceptable. Considering the evidence as a whole, I find that the evidence of the defendant is more probable than that of the plaintiff.

- [35] In the result the following order is made:

35.1 The plaintiff's claim is dismissed with costs.

TJ RAULINGA

JUDGE OF THE GAUTENG HIGH

COURT DIVISION

Heard on: 18-21 May 2015; 10 September 2015; and 2 -4 October 2019

Delivered: ... January 2020

APPEARANCES

For the Applicant/ Defendant:

Adv. M Witz

Instructed by:

Bove Attorneys

For the Respondent/ Plaintiff:

Adv. E Raubenheimer

Instructed by:

Cliff Dekker Hofmeyer Inc.

[1] Stellenbosch Farmers Winery Group and Another v Martell et Cie and others 2003 (1) SA (SCA) para 5

[2] 1931 AD 187

[3] Mabona and another v Minister of Law and Order and others 1988

(2) SA 654

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Prepared on 11 October 2026 · Esheria