

SOUTH AFRICA / JUDGMENT

Masombuka v Passenger Rail Agency of South Africa (24617/2021) [2022] ZAGPPHC 594 (2 August 2022) [2022] ZAGPPHC 594

COURT

North Gauteng High Court, Pretoria

BEFORE

N Janse Van Nieuwenhuizen

CASE / FILE NUMBER

24617/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

REPUBLIC

OF SOUTH AFRICA

Case

Number: 24617/2021

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

YES

2

August 2022

In

the matter between:

KARABO

MASOMBUKA Plaintiff

and

PASSENGER RAIL AGENCY OF

SOUTH AFRICA

Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

[1] The plaintiff instituted a claim for damages he suffered as a result of being thrown from a moving train travelling between Vereeniging and Germiston.

[2] The parties agreed that the merits and quantum of the plaintiff's claim should be separated, and the trial only proceeded on the merits of the plaintiff's claim.

ISSUES IN DISPUTE

[3] The defendant did not dispute the fact that the plaintiff was thrown from a moving train and that the defendant owed a duty of care to members of the public, in that, the defendant had to ensure that:

"3.1 the station in general and in particular all the buildings and the platforms, were safe for the use by the public;

3.2 boarding and dismounting from coaches would proceed without endangering the safety of the public;

3.3 the coaches on the train would be safe for use by members of the public;

3.4 safety regulations would be implemented to ensure safe passage of the train;

3.5 all signals and mechanical operations were in working order and take precautions to ensure that there are no incidents on the train."

[4] The defendant did, however, deny that it breached its obligations supra and more particularly that it failed:

"4.1 to ensure the safety of members of the public on the train;

4.2 to take any adequate precautions to prevent the plaintiff from being injured;

4.3 to employ employees, alternatively, failed to employ an adequate number of employees to guarantee the safety of commuters in general and the plaintiff in particular;

4.4 to employ employees, alternatively, failed to employ an adequate number of employees to prevent commuters and intended commuters from being injured in the manner the plaintiff was injured."

[5] The defendant in the alternative to the aforesaid denial and in the event that the court should find that the defendant was negligent, pleaded that the plaintiff was also negligent, in circumstances where

the train in which the plaintiff was travelling consisted of numerous coaches, all of which had ample space available for passengers and which were safe for use by passengers, in that he:

5.1 failed to remove himself from a coach, the doors of which were open, for the duration of his journey on the train;

5.2 isolated himself from other passengers;

5.3 sat on a bench adjacent to the open doors of the coach.

[6] The plaintiff denied the aforesaid allegations and the issue of contributing negligence is also in dispute.

Evidence

[7] The plaintiff testified that, on 16 October 2019, he bought a single ticket for a trip from Vereeniging to Germison. He boarded the train at Vereeniging station at approximately 8:00 to 8:30, chose a coach

that was empty and took a seat adjacent to the door. The train commenced its journey and although in motion, the doors of the coach

remained open.

[8] The plaintiff was busy on his cell phone when he was approached by an unknown male person. After they greeted, the person produced a knife and told him to hand over everything he had on his person. The plaintiff got up from his seat and pleaded with the person not to rob him. The person responded by saying: “don’t push me to stab you”.

[9] The plaintiff testified that he was in shock and did not respond to the perpetrator’s demand immediately. The perpetrator thereupon removed his wallet, which was in his back pocket. The plaintiff had a bag with him and thought that the perpetrator would also take his bag.

[10] Instead of taking his bag, the perpetrator pushed him out of the moving train. The plaintiff fell on the gravel next to the train track and fractured his leg. He was unable to walk and whilst lying next to the railway a young man that was collecting empty tins along the railway line approached him. The young man assisted the plaintiff by carrying him to a nearby road.

[11] Once next to the road the plaintiff was approached by a number of people and one of the persons, a gentleman that drove a Jetta, phoned for an ambulance. When asked where his belongings were, the plaintiff explained that the robber took his wallet and that he had lost his cell phone when he was thrown from the train.

[12] Someone phoned his number, and his phone could be heard ringing somewhere in the vicinity and was found. The police and an ambulance arrived at the scene and the plaintiff was taken to Boksburg hospital.

- [13] During cross-examination, it was put to the plaintiff that his version differs in material respects from the further particulars provided by his attorney prior to the trial. In the further particulars it was alleged that the plaintiff fell next to the railway tracks close to the platform inside the train station. It was further alleged that the plaintiff was found on the platform after he was assisted by other commuters. The plaintiff could not explain the inconsistency.
- [14] It was put to the plaintiff that it was strange that only his wallet, which was not visible and in his back pocket, was stolen whereas the cell phone and bag, which were visible, were not stolen.
- [15] When asked why he chose to sit alone in a coach, which made him more vulnerable to attack, the plaintiff responded that it was easier to exit the train from a coach in which there were not a lot of other commuters.
- [16] No further evidence was presented in the plaintiff's case and the defendant did not call any witnesses.

Discussion

- [17] In assessing the evidence of the plaintiff, I take into account that the plaintiff was an impressive witness that gave his testimony in a straightforward manner. The plaintiff did not contradict himself during cross-examination and I have no hesitation in accepting the version he gave under oath in court.
- [18] The question then arises, to what extent the further particulars provided by the plaintiff's attorney, which particulars differ in material respects from the plaintiff's evidence in court, affects the reliability of the plaintiff as a witness.
- [19] The plaintiff could not explain why the particulars provided by his attorney differed substantially from his version. The difference in the two versions, although speculative, points to one of two scenarios: the plaintiff has substantially changed his version to such an extent that the court should find him an unreliable witness or the plaintiff's attorney provided the incorrect particulars.
- [20] The plaintiff stated under oath that the version, given by his attorney in the further particulars, is not correct. Having regard to the demeanour of the plaintiff in the witness stand and the fact that he did not contradict himself during evidence, I am prepared to accept the plaintiff's evidence in this regard.
- [21] In the premises, the matter will be adjudicated on the version provided by the plaintiff in court.

- [22] The facts in casu are similar to the facts considered by the Constitutional Court in *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC) (“Mashongwa”). Mashongwa was also robbed and thrown from a train of which the doors remained open whilst the train was in motion.
- [23] In respect of the defendant’s duty to post security guards on a train, the court held that the reasonableness of such steps should be considered on the available evidence. The reason for the factual enquiry was explained by the court at para [35] and [36]

“[35] Consistent with the different levels of crime on trains countrywide, there should be a differentiation in the deployment of the limited resources at the command of Prasa for security. The resources allocated to Johannesburg or Cape Town may, for example, have to be significantly different in nature or greater in comparison with those set aside for a city like Kimberley. And this differential treatment extends to the kind of safety and security measures deemed appropriate for areas whose trains are affected more by violent crime than others. That security guards are deployed to trains in one area would thus not necessarily mean that trains in all other areas have to be provided with the same security detail. Security measures must be crime-level and area-specific. A one-size-fits-all approach would be rather too robotic and insensitive to the priorities that compete for the meagre resources that all state- subsidised institutions have to contend with.

- [36] Some lines or trains probably require more security attention than others. It would thus not necessarily be negligent of the transport utility to have not deployed security guards to a particular route at a time a commuter was attacked, if that route were known to be in a low-risk or low-crime area. To determine the reasonableness of the measures taken by Prasa, in conformity with the value of accountability, reasons for the position taken must be provided.”

- [24] The plaintiff did not present any evidence in respect of the factors playing a role in determining whether the absence of a security guard in the coach in which the plaintiff was travelling was negligent. Evidence to form a factual basis for a finding that the defendant was negligent in not posting a guard/s in on the train in which Mashongwa

was travelling was also absent, and the court held as follows at para [43]:

“[43] Absent information on all, if any, security measures explored or those put in place in certain areas and why the security-related

resources were deployed in the manner in which they were, it is impossible to contextualise the decisions taken and assess the

reasonableness 43 of the conduct complained of. We cannot conclude that negligence has been established.”

- [25] The same finding applies in casu.

- [26] In respect of the coach doors that were left open whilst the train was in motion, the Constitutional Court held as follows at par [52]:

“[52] It must be emphasised that harm was reasonably foreseeable and Prasa had an actionable legal duty to keep the doors closed while the train was in motion. Not only has it expressly imposed this duty on itself, its importance was also alluded to in Metrorail. 51 It is also commonsensical that keeping the doors of a moving train closed is an essential safety procedure. Mr Mashongwa would probably

not have sustained the injuries that culminated in the amputation of his leg, had Prasa ensured that the doors of the coach in which he was were closed while the train was in motion. It was thus negligent of Prasa not to observe a basic safety-critical practice of keeping the coach doors closed while the train was in motion, and therefore reasonable to impose liability for damages on it, if other elements were proved.”

[27] In the result, the plaintiff has established that the defendant was negligent in leaving the coach doors open whilst the train was in motion.

[28] In respect of the factual causation it is more probable that the plaintiff would not have been thrown from the train if the coach doors were closed.

[29] The legal causation between the injuries the plaintiff suffered as a result from being thrown from a moving train with open doors, were considered in Mashongwa, supra at para [69]:

“[69] 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 steps 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.”

[30] The defendant is thus liable for the damages suffered by the plaintiff.

[31] In the final instances, the question of contributory negligence should be considered. Although contributory negligence was pleaded by the defendant, Ms Marx, counsel on behalf of the defendant, did not pursue the issue during cross-examination. It is in any event, not the place where the plaintiff was seated that caused him from being thrown from the train, but the physical act of the robber.

[32] In the result, the defendant has failed to establish on a balance of probabilities that the plaintiff was negligent in sitting close to the open door and that such negligence contributed to his injuries.

ORDER

The following order is issued:

1. The defendant is liable for the plaintiff's proven or agreed damages.

2. The defendant is ordered to pay the costs of suit.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES:

7 and 8 June 2022

DATE DELIVERED PER COVID19 DIRECTIVES:

2.8.2022

APPEARANCES

For the Plaintiff: Advocate

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Mashapa

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Advocate Adv Marx

Instructed by:

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