

SOUTH AFRICA / JUDGMENT

Mbolambi v Passenger Rail Agency of South Africa (10219/12) [2015] ZAGPPHC 865 (20 November 2015) [2015] ZAGPPHC 865

COURT

North Gauteng High Court, Pretoria

BEFORE

NP Mngqibisa-Thusi

CASE / FILE NUMBER

10219/12

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

REPUBLIC OF SOUTH AFRICA

IN

THE GAUTENG DIVISION OF THE HIGH COURT OF SOUTH
AFRICA,

PRETORIA

20/11/2015

Case

no: 10219/12

In

the matter between:

NTSAPHOKAZI

F MBOLAMBI obo

MAKHOSANDILE

R

SITHOLE Plaintiff

and

PASSENGER

RAIL AGENCY OF SOUTH

AFRICA Defendant

JUDGMENT

MNGQIBISA-THUSI J:

[1] The plaintiff, Ntsaphokazi F Mbolambi ("Ms Mbolambi") is claiming damages for loss of support on her behalf and in a representative capacity on behalf of her minor son, Khanyisile Sunshine Mbolambi ("Khanyisile Mbolambi"). The claims arise as a result of the death of Makhosandile Richard Sithole ("the deceased") who succumbed to injuries he sustained on 19 January 2012 when he allegedly fell off a train owned and operated by the defendant, the Passenger Rail Agency of South Africa ("the Rail Agency").

[2] At the start of the hearing, the parties agreed on a separation of

.

issues of liability and quantum.[1] The issue for the determination of quantum was postponement sine die.

[3] The defendant provides rail transport to the public.

[4] In its particulars of claim the plaintiff alleges that the incident was caused by the negligence of the defendant's employee, the train conductor, in that:

4.1. He open (sic) the doors of the train which was full of the passengers before it came to a stop at the platform.

4.2. The plaintiff was pushed out of a moving train through the open doors by the passengers who were pushing each other for space.

4.3. The conductor failed to close the doors timeously.

4.4. He failed to pay due regard to the safety of passengers alighting from the said train specifically the Plaintiff.

4.5. He failed to prevent the said accident when by the exercise of due and reasonable care, he could and should have done so.

4.6. The doors were never closed when the train was taking off."

[5] The defendant has denied liability for the loss suffered by the plaintiff. It is the defendant's contention that the deceased

sustained his injuries through his own fault by hanging outside a moving train. The defendant further pleaded that, in the event that it is found that the defendant was negligent, the defendant pleads that the plaintiff contributed to the loss he suffered.

[6] The following facts are common cause. The deceased was Khanyisile Mbolambi's biological father. On 19 January 2012, the deceased fell off a moving train shortly after it left the Kaalfontein train station. As a result of the fall, the deceased sustained bodily

injuries from which he died at the

Hospital on____.

[7] From the pre-trial minute it appears that the issue of whether the deceased was Ms Mbolambi's husband is still in dispute for

determination once liability has been determined.

[8] The issue to be determined is whether the Rail Agency through its employees was negligent.

[9] The parties agreed that Ms Mbolambi bears the onus of proving negligence on the part of the Rail Agency.

[10] The test for determining negligence involves the questions whether

(a) a reasonable person in the defendant's position would foresee the reasonable possibility of his or her conduct causing harm resulting in patrimonial loss to another; (b) would take reasonable steps to avert the risk of such harm; and (c) the defendant failed to take such reasonable steps.[2]

[11] Ms Mbolambi's evidence related to the fact on the relevant morning (19 January 2012), the deceased left home to board a train at Tembisa on his way to Kempton Park where he was going to finalise a loan agreement.

[12] Ms Mbolambi called Ms Xoliswa Mhlana's (Ms Mhlana) as a witness. Ms Mhlana's evidence is that she boarded the same train with the deceased at Tembisa train station. The deceased offered her a seat inside in the coach, as the train was full. When the train stopped at Kaalfontein station, there was a commotion made by certain youth inside the train who came from another coach with the intention of disembarking before the train could depart in order to board another train, which was going to Pretoria. As the train slowly started leaving the platform, she heard someone shouting that someone had fallen underneath the train. The train stopped whilst still on the platform. Ms Mhlana and other passengers disembarked to investigate what was happening. On alighting from the train, Ms Mhlana saw a young man rolling on the platform, injured, with his pants torn. She further saw another person, whom he later identified as the young man who had offered her his seat, lying beneath the train. Ms Mhlana testified the deceased was cut into two with his left arm amputated. She testified that when the train started moving at Kaalfontein, as was the case in Tembisa, the doors of the train were open and there were no security guards on the platform.

- [13] During cross-examination, Ms Mhlana conceded that she did not see how the deceased landed beneath the train. Ms Mhlana was presented with a photo from the photo album taken by the police of the accident scene. The particular photo shown to Ms Mhlana depicted half of the deceased's body lying between the platform and the rails and the other between the train rails. Ms Mhlana explained that she could only see the lower torso of the deceased as the upper part of the body was beneath the train. She was able to identify the deceased by the blue trousers he was wearing. On being confronted about a statement she made to the police, Ms Mhlana insisted that she had informed the person taking the statement that there were young people who came running through the coach they were in. The young people were trying to alight from the train as it began to move. Further that she only learnt after the incident that the young people were trying to catch another train, which was going to Pretoria. Ms Mhlana denied that the deceased alighted from the train at Kaalfontein and tried to embark onto the train she was in as it started to move as alleged by the defendant. She was adamant that the deceased, whilst still inside the train, was pushed out by passengers who were trying to disembark as the train started to move out of the platform.
- [14] The Rail Agency called Mr Refion Kango Mahoka ("Mr Mahoka") as a witness. Mr Mahoka testified that he is employed as a train guard by the Rail Agency. On the day in question, he was the relevant guard on the train involved. He testified that one of his functions as a train guard is to check that commuters alighting and embarking on the train have safely done so before giving the train driver the signal that it was safe for the train to start moving. On the day in question and after satisfying himself that it was safe for the train to depart, he climbed onto the guard's coach, which is at the rear end of the train and gave the signal to the driver to depart. As the train gained momentum, he saw a man running from a train, which was on Platform 1, and coming from Pretoria, running towards his train and trying to climb between two coaches of the train. He then gave the train driver a three-bell signal, signifying that an emergency situation had arisen. The train came to a standstill after a short while. Because he was scared and frightened, he went to the front of the train where the driver's coach was. On investigation, they found
- the deceased body, cut into two and lying on the train rails, about 150m from where the train stopped. Mr Mahoka had no knowledge of another reported incident at Kaalfontein which occurred on the same morning.
- [15] During cross-examination, Mr Mahoka testified that before the train left Elandsfontein, he and the driver of the train, a certain Mr Msiza, had inspected the doors of the train and found them in perfect working condition. He further testified that when the train stopped, the deceased body was lying about 150m from the train.
- [16] The next witness called by the Rail Agency was Mr Zanini Diye Tshuma ("Mr Tshuma"), a section security commander at the Kaalfontein. Mr Tshuma's evidence is that he went to the accident scene after the incident was reported to him because as one of his functions, he has to secure the area around the accident scene until the investigators and photographer arrive.

On arrival he cordoned off the accident area. According to Mr Tshuma, the deceased's body was lying approximately about 100m from the train. Mr Tshuma also confirmed that there was a prior accident at the station but that it did not involve the train relevant to this matter.

- [17] Plaintiff's counsel submitted that the evidence of Ms Mhlana as to how the accident happened should be accepted. Counsel submitted that the employees of the Rail Agency, in particular, the train guard and the train driver, were negligent in failing to make sure that when the train left Kaalfontein, its doors were closed. Further, counsel submitted that when the train guard gave the train driver the signal to move, he had not made sure that passengers alighting and those boarding the train had done so safely. Counsel questioned why Mr Mahoka could not have known about an earlier accident which occurred in the same area. In this regard, plaintiff's counsel relied on a statement made by a certain Mr Ximbi, discovered by the Rail Agency. In this statement, Mr Ximbi alluded to the fact that the incident relating to the deceased was a second incident on that morning at the Kaalfontein station. Counsel submitted that the fact that Mr Mahoko was not aware of the earlier incident was indicative of negligence on his part.
- [18] In terms of the pre-trial minute, the parties were in agreement that the truth of the content of the documents in the trial bundle was not admitted. In the absence of the author of the documents having been called as a witness in respect of the truth of the content thereof, the content remains hearsay evidence and therefore inadmissible. Neither party called Mr Ximbi as a witness. However, nothing turns on this fact as both Ms Mhlana and Mr Tshuma testified about the earlier accident.
- [19] On behalf of the Rail Agency, counsel pointed out that the court was faced with two mutually destructive versions as to how the accident occurred. Counsel submitted that in such situation the court should apply the principles laid down in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd*. Counsel argued that none of the plaintiff's witnesses had witnessed the accident. Counsel argued that the defendant's version as to how the accident happened was more probable.
- [20] The plaintiff's version is that the deceased was pushed out of the moving train by commuters who wanted to get off the train as it was moving out of the platform but could not do so as the train had stopped for a very short time at Kaalfontein. On the other hand the Rail Agency's version is that the deceased was not on the train involved when it reached Kaalfontein station. Further that the deceased tried to board the train when it was already in motion, slipped and fell between the platform and the train. The version is that the deceased sustained his injuries whilst trying to board the train when it was already in motion.
- [1] The versions of the plaintiff and the defendant as to how the deceased landed under the train are mutually destructive. In the

Stellenbosch Farmers' Winery (supra), the court stated that:

"[5] ... The technique generally employed by the 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 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 with his own extra curial 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 the 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 the latter. But when all factors are equipoised probabilities prevail.[3]"

[21] The witnesses called by the plaintiff were impressive. Even though Ms Mhlana did not witness how the deceased fell under the train, she was adamant that the deceased was in the train with her, a fact disputed by the defendant. She was spontaneous and there were no inconsistencies or contradictions in her evidence. The defendant's witnesses were not bad witnesses. However, on probabilities, Ms Mhlana's evidence that the train doors were open when the train was in motion is more probable. Mr Mahoko, could not with certainty

assert that all the doors of the train were closed when the train started moving, particularly as the train was full and there were passengers disembarking from the train as it started moving. Furthermore, Ms Mhlana's evidence that the deceased was in the train and fell from inside the train, probably after being pushed out by commuters who were getting off the train as it started moving. Mr Mahoko's evidence that he saw the deceased trying to board the train between the coaches is improbable if one takes into account that he was at the rear end of the train and cannot with certainty say that the person he saw trying to board the train was the deceased.

[22] On probabilities, I am satisfied that the accident in which the deceased perished occurred in the manner in which Ms Mhlana

testified. It is improbable that a person could have tried to board a train between the coaches if one takes into consideration that the doors of the train were not closed when the train was leaving the platform.

[23] In the result, this court finds that the plaintiff proved, on a balance of probabilities, that the Railway Agency failed to discharge its obligations towards train commuters by failing to make sure that the doors of its train were closed when the train left Kaalfontein station, resulting in the deceased being injured after being pushed by other commuters.

[24] Accordingly, the following order is made:

1. That the Rail Agency is liable to pay the plaintiff's proven damages.
2. That the Rail Agency is ordered to pay the costs to date of this order.

NP Mngqibisa-Thusi

Judge of the High Court

Appearances:

For the Plaintiff: Adv Maphellela

Instructed by: MA Selota Attorneys

For the Defendant: Adv Celliers SC

Instructed by: Stone Attorneys

- [1] The agreement to separate the issues is in terms of Rule 33(4) of the Rules of Court.
- [2] Kruger v Coetzee 1966 (2) SA 429 (A).
- [3] See also Govan v Skidmore 1952 (1) SA 732 (N) where the court stated at 734 C-D that: " . .. in finding facts and making inferences. in a civil case. it seems to me that one may. as Wigmore conveys in his work on Evidence (3rd ed.. para. 32). by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2015/865.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/mbolambi-v-passenger-unknown-topic-agpphc-2015>

Prepared on 13 October 2026 · Esheria