

SOUTH AFRICA / JUDGMENT

Meintjies v Passenger Rail Agency of South Africa (21207/2018) [2023] ZAWCHC 142 (12 June 2023) [2023] ZAWCHC 142

COURT

Western Cape High Court, Cape Town

BEFORE

B P Mantame

CASE / FILE NUMBER

21207/2018

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IN THE HIGH COURT OF
SOUTH AFRICA
(WESTERN CAPE
DIVISION, CAPE TOWN)
Case No: 21207/2018

In the matter between:

STANLEY
FRANS MEINTJIES
Plaintiff
vs
PASSENGER
RAIL AGENCY OF SOUTH AFRICA
Defendant

JUDGMENT

DELIVERED 12 JUNE 2023

MANTAME J

A

INTRODUCTION

- [1] The plaintiff, Stanley Frans Meintjies (“Mr Meintjies”) also known as “Shafiek” instituted a claim for damages against the defendant, Passenger Rail Agency of South Africa (“PRASA”) arising from an alleged train accident on 11 August 2018 between Woodstock and Salt River. The matter served before this Court only on merits.
- [2] At the commencement of the trial, the defendant’s Counsel handed up a notice to amend the plea and an amended plea. The plaintiff did not object to this belated amendment of the plea, but reserved his rights should this amendment become an issue at a later stage.
- [3] In its brief opening address, the plaintiff stated that it will prove that the incident happened on 11 August 2018. The plaintiff will lead two (2) witnesses in proving its case, i.e. the plaintiff and Mr Faiek Fortune (“Mr Fortune”). The plaintiff’s case was that he boarded a Metrorail train from Woodstock to Observatory. Inside the train, he was robbed and attacked by four (4) individuals. These individuals searched him and took his belongings and ejected him out of the train while the train was in motion. At the time of the incident the doors of the train were open and there was no security guard present.
- [4] Mr Fortune will give evidence that he boarded the same train as the plaintiff. He saw people inside the train being robbed and he saw an individual being flung off the train; the individual turned out to be the plaintiff. This Court has to determine whether the defendant was negligent by failing to deploy security guards on its trains; whether the doors that were left open while the train was in motion placed the commuters in danger.

B EVIDENCE LED

- [5] The plaintiff, Mr Meintjies, testified that he currently resides with his sister at No. 4[...] E[...] K[...] Road Manenberg. On 11 August 2018 when the incident occurred he was homeless. He earned his living by doing gardening for people in Woodstock, Observatory, Salt River and Rondebosch.
- .
- [6] On the day in question, he travelled by train from Woodstock to Observatory for a job at around 10:00 in the morning. He remained standing inside the train. After the doors were closed, he observed a gentleman approaching him and demanded money and his cell phone. He indicated that he does not have much money. The individual grabbed his bag and

a fight ensued. The other individual stabbed him with a screwdriver and he let go off the bag which had his train ticket in his wallet. Another individual asked him if he wanted to 'fly', and they attempted to throw him off the train and he resisted and grabbed a pole in between the doors. He was ultimately kicked out of the moving train.

- [7] After he was kicked out of the train, he could not remember what happened next. He regained consciousness in hospital. He sustained serious injuries which left him paralysed. He remained in Groote Schuur Hospital for five (5) months and spent another three (3) months at the rehabilitation centre. The plaintiff accepted that he used drugs at the time, but on the day of the incident he used no substance.
- [8] During cross-examination he confirmed that he used heroine and that it is a dangerous drug. It made him drunk and caused him to be limited in his perception. He further confirmed that even though it was a Saturday morning when the incident occurred, the train was not full and had plenty of spaces to sit but he remained standing close to the door. His reason for doing so was that the trip was short. He was asked to confirm during his testimony-in-chief whether the doors were closed when he got inside the train. His response was that he could not remember if the doors were closed. However, he now recalled that he was approached by four (4) individuals whom he found on the train already seated. He did not suspect that these individuals would rob him and no one came to his assistance.
- [9] Furthermore, during cross-examination he stated that when he was robbed, he told the robbers that the money in the bag was for work and that is when they asked if he wanted to 'fly'. Besides him holding on to the pole on the verge of the doors, he was kicked twice or three times out of the train. When he was asked who opened the doors after they were closed, his response was that someone might have opened the doors at that time.
- [10] It was put to him that nothing was said about his robbery in his pleadings. He could not address this question but indicated that he was robbed. He was confronted with a statement he made to the police on 16 October 2018 where he said he was thrown out of the train. He said being kicked out or thrown out of the train is the same thing. Also, it was put to him that in his statement he indicated that the doors were open after he boarded the train and not closed, and further there is no mention of two (2) doors in the statement. He attributed the omissions to his confusion since he was still hospitalised. However, he could not say how it was possible for him to be confused after two (2) months of his hospitalisation. He categorically denied that he was under the influence of heroine when the incident occurred.
- [11] On further cross-examination, it was suggested that his version is not true as the hospital records stated that he was 'allegedly hit by a train'[1]. The plaintiff denied that he was hit by a train. He was further referred to the hospital records which stated that 'he was involved in train accident around 10:00 unclear if hit by train or fell after train passed near him'[2]. Furthermore, the plaintiff was referred to hospital records where it was summarised that he was involved in 'train accident: 18/08/18'[3]; he was referred to the hospital records where it was stated '41 year old male known heroine addict #allegedly hit by a train ...'[4]; he was

further referred to a triage comment which was made at 12:05 on 11 August 2018 which stated that '41 year old male patient was brought by ambulance from scene presenting with a history of falling near railway lines when train pass him sustained head injury laceration to Head also drug abuser....'[5]; he was referred further to the hospital records where it was stated that he was 'alert' and the initial entry of Dr Tsang at 11:29 on 11 August 2018 stated that 'male patient brought by ambulance on hard board from the scene presenting with history of falling down when train passes him ...'[6]; he was referred further to hospital records review notes by a physician which were completed at 14:03 on 11 August 2018 and stated

that '41 year old male. Known substance abuser – heroine and last used this morning. Brought in by EMS from scene, pt was walking along the train tracks (likely intoxicated with heroine at the time), the wind of the moving train then knocked the pt and he fell and hit his head (same level). The pt was not hit by a train ...'[7]. In response, the plaintiff stated that the hospital used its own words.

[12] The plaintiff was further referred to the ambulance report which stated that he was fully conscious and in full senses (Glasgow Coma Scale -GCS 15) when he was taken to hospital.[8] This proposition was vehemently denied by the plaintiff. However, he confirmed that he knew Mr Fortune, his own witness, from Woodstock.

However, he did not see him on the day of the incident. It was put to the plaintiff that the entries on the hospital records are consistent with the version of the defence witness. The defence witness will testify that he was advised by his fellow homeless people that the plaintiff was hit by a train. His response was that he was not hit by a train.

[13] Mr Fortune testified that he resides at No 9[...] H[...] Street Kalksteenfontein. He is employed by Eindoman Projects as a construction worker since 2015. Prior to the incident that happened on 11 August 2018, he did not know the plaintiff, but he has seen him at the building site where he works with a lady pushing a trolley and collecting scrap metals.

[14] On 11 August 2018 he went to work as usual but their foreman sent him home as their tools were stolen when they arrived at work. He then went to Woodstock station where he normally catches a train going home. He was at the station between 08:00 – 09:00 when the train via Netreg station to Mitchell's Plain arrived.

[15] When the train arrived, he noted that quite a few doors were open. There were no security guards outside and inside the train. He decided to occupy the second carriage. He looked in the first carriage and observed a gentleman putting his hands up. He immediately ascertained that two (2) gentleman robbed people by searching them in their pockets. At that time the train was already in motion. The passengers in the second carriage immediately ran to the third carriage after witnessing this incident. He decided not to get out of the train as he did not want to wait another hour before another train arrives.

- [16] When he arrived at the third carriage, and while the train maneuvered the bend, he decided to peep through the door to gain sight of what was happening in the first carriage. He observed a man being flung out of the train. Nobody came to the assistance of the person who was flung out and he did not know the person either. He immediately approached the train guard to ask if he saw the person who was flung out of the train. The guard told him it is impossible for the train to reverse. However, he will call the office and report the incident.
- [17] Mr Fortune then decided to alight at the next station at platform 6 and go back to Woodstock station. He waited for the train for about 10 – 15 minutes and boarded the next train at platform 3. When he arrived at Woodstock station he alighted and walked about 2 - 4 minutes to the scene of the incident. He met the paramedics and two (2) security guards who were attending to the gentleman that was flung out of the train. There were other two or three bystanders at the scene. While he was there, the plaintiff's female friend whom he has seen pushing trolleys with, arrived at the scene and started shouting at him. At the time, he was busy interacting with the security guards. What made him upset was that they did not take any notes about what he said nor take his cell phone number. At that stage, the plaintiff was shouting that he cannot feel his legs and that he is going to die.
- [18] After this incident, a lady friend of the plaintiff visited him at work and informed him that an investigator from Adendorf Attorneys would like to speak to him. A week later, the investigator arrived at his workplace and requested that they should attend at their offices. This is how he ended up as a witness in this matter.
- [19] During cross-examination, Mr Fortune said he did not know the name of the plaintiff's female friend and he did not know who flung the plaintiff out of the train. Mr Fortune could not comment on the fact that the hospital records indicated that he was hit by the train when that was pointed out to him. He could not comment on the suggestion that the plaintiff was trying to cross the railway tracks when he was hit by the train or blown away by the train. Further, he did not know who called the ambulance to take the plaintiff to hospital.
- [20] The plaintiff closed its case.
- [21] The defendant called Mr Thobela Mbiko ("Mr Mbiko"). Mr Mbiko testified that he resides in Khayelitsha. He has been in the employ of Chippa Protection Services as a Security Guard for the past nine (9) years.
- [22] On 11 August 2018 he was on duty with his co-workers doing patrol duties for PRASA from 06:00 am – 18:00 pm. He was on foot patrol with Mr Xhantibe and a third person he could not recall from Woodstock to Salt River. It was of utmost importance that they provide this service as PRASA has an incessant problem with its overhead and ground cables that are constantly vandalised. They focussed on inspecting the points and track boards and ascertain if the cables are still intact. When undertaking this duty, they walk on the service road. Also they inspect the railway tracks in order to ensure that there are no people illegally

crossing them.

- [23] Whilst doing their patrol duties between Woodstock and Salt River and close to the foot bridge (Tanzania Bridge) at about 09:50, they decided to look back in the direction from which they approached. They saw three (3) people standing on the left side under the bridge. Since no persons were allowed inside the railway tracks, they decided to go back and investigate as there were no people when they passed the area. Most importantly, the place where these people were standing is the hotspot where most cables are removed.
- [24] On their arrival at this spot, they noticed that there was a male person lying on the ground. The three (3) people who were standing advised them that the person was hit by a train. The person was injured on his head and lying face down. At this juncture, Counsel for the plaintiff objected to this evidence being presented as it was hearsay. The witness was temporarily excused and Counsel for the defendant made an application for the admission of hearsay evidence.

C. APPLICATION FOR ADMISSION OF HEARSAY EVIDENCE

- [25] Counsel for the defendant made an application to the Court to admit the hearsay evidence of Mr Mbiko. The Court was requested to exercise its discretion and admit the hearsay evidence as governed by Section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 (“the LEAA”). The Court was implored to receive the evidence from Mr Mbiko of what was told to him by the people at the scene of the incident. It was submitted that it was in the interest of justice that this evidence should be admitted. The discretionary power of the Court was said to have been dealt with in *Hewan v Kourie and Another*[9], where it was stated:

‘Section 3 (1) (c) requires the Court, in the exercise of its discretion, to have regard to the collective and interrelated effect of all the considerations set out in paras (i)-(iv) and also to “any other factor which should in the opinion of the court be taken into account” para (vii). When doing that, the reliability of the evidence will no doubt play an important role: para (iv) requires the Court to have regard to the probative value of the evidence. It stands to reason that the less reliable the evidence, the less its probative value will be. However, probative value or reliability are not static, well defined concepts. There are numerous degrees of reliability. The Legislature recognised this in requiring the Court to have regard to all the factors mentioned in s 3 (1) (c). A proper application of the provisions of s 3 (1) (c) will result in the Court having proper regard to the reciprocal influences that the various factors have on each other in determining the interests of justice in every case. Thus the Court, having regard to the nature of the proceedings, the purpose for which the evidence is tendered, the reason why the hearsay evidence is tendered and the prejudice to the other party, might be inclined to admit evidence which is by its nature less reliable where the evidence is tendered in motion proceedings, but, in order to prove a central issue in a criminal

case, the Court would in turn probably require a high degree of reliability or a substantial probative value before exercising its discretion in favour of admitting evidence. Section 3 (1) (c) introduces into the rule against hearsay a flexibility which should not be negated by also introducing, in addition to the requirements of the section, reliability as an overriding requirement. The difficulties encountered by the Court in applying the exceptions to the common-law rule against hearsay underline the dangers in categorising and labelling exceptions to the hearsay rule.'

In Hewan (supra), Counsel for the defendant argued, the court accepted evidence from the wife on what was communicated to her by her deceased husband

about the money that would be received by her should her husband die.

[26] It was submitted that the homeless people who made the statements to Mr Mbiko cannot be traced as they refused to give their details to him. According to these unknown people, the plaintiff attempted to cross over to the other side of the tracks. It is therefore common cause that the plaintiff was found lying on the left side of the tracks by the ambulance personnel. In this instance, the interest of justice requires that this Court accepts the evidence finally. Mr Mbiko was at the scene shortly after the occurrence of the incident. What is contained in the medical records is consistent with what was said at the scene to Mr Mbiko. The ambulance personnel and the hospital personnel gathered all the information from the plaintiff

himself who was in his full senses when he was taken to hospital. It was further submitted that even if the hearsay evidence of what was said to Mr Mbiko and the information in the medical and hospital records could be excluded, the plaintiff failed to discharge the onus in proving negligence on the part of the defendant.

[27] It was therefore submitted that the Court should take into account the probative value of what the hearsay evidence entails. There is enough evidence on record to corroborate what the witness said and therefore the evidence should be admitted.

[28] In opposing this application, Counsel for the plaintiff submitted that the evidence to be tendered by Mr Mbiko is central to the dispute and should not be accepted. This Court was referred to The South African Law of Evidence by DT Zeffertt & AP Peizes[10] where it was stated:

'Since the person upon whose credibility the probative value of the evidence depends is. In the case of hearsay evidence, not subjected to the curial devices designated to identify, assess and eliminate those aspects of the evidence that render it potentially unreliable, it is important for a court to (a) understand what the potential dangers are; (b) consider the extent to which those dangers actually arise in the case before it; and (c) identify factors that tend to reduce or even eliminate those dangers. Only then will a court be in a position to determine the extent of the prejudice caused to an adversary by the denial to that party of the benefit of those devices (which amount, in a criminal case, to a constitutional right).

The dangers to which a court must be alert are (a) insincerity on the part of the absent declarant or actor; (b) erroneous memory; (c) defective perception; and (d) inadequate narrative capacity.'

In effect, it was stated that the plaintiff would be prejudiced in the sense that it cannot test the allegations by Mr Mbiko since they are hearsay in nature.

[29] Further, the plaintiff argued that in *S v Ramavhale*[11]Schultz JA stated that the court should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even a significant part in proceedings, unless there are compelling justifications for doing so. In this matter, no compelling reasons exist for accepting this hearsay evidence. In fact, what the homeless people saw, is in any event contradicted by the other hearsay evidence that the defendant attempts to tender, namely the medical notes. Section 3 of the LEAA gives the court a discretion to admit hearsay evidence if it is in the interest of justice to do so. In this instance, the plaintiff lacks the opportunity to test the hearsay evidence through cross-examination and the reliability of the evidence tendered is extremely doubtful. In essence, it was argued that procedural fairness should dictate that this hearsay evidence should not be allowed in view of the direct evidence that has been provided by the plaintiff and his witnesses.

[30] In reply, Counsel for the defendant submitted that the plaintiff's argument is misplaced. The parties, at pre-trial stage agreed that notice should be given if one party would object to certain evidence / or to a certain witness being called. The plaintiff should have read the pre-trial minute conjunctively and not disjunctively. The plaintiff cannot blame the defendant for being unable to call certain witnesses for them to be cross-examined. In that matter, there was no agreement by the parties at pre-trial stage save for the specific terms regarding the actual conduct of the trial. In any event, it was submitted that in *S v Ndlovu and Another*, [12] Goldstone JA stated where Section 3 (1) of the LEAA is invoked, the court would be called upon to exercise a judicial discretion as to whether such evidence should have been admitted in the interest of justice.

[31] After hearing submissions from the parties, the Court ruled that the evidence of Mr Mbiko be provisionally admitted. Whether the Court would finally admit this evidence would be evident in the course of this judgment.

[32] Mr Mbiko was recalled to the witness stand. Mr Mbiko testified that at the scene, the three (3) unknown men advised him that the gentlemen who was lying face down next to the tracks was hit by a train. However, they could not identify the train. Immediately, he called the Control Room in Cape Town to report the incident. As a result, an ambulance was dispatched to the scene. These unknown men refused to give their details to Mr Mbiko since at the time, they illegally placed themselves inside the railway tracks and where they were not supposed to be. To him, these people appeared like they lived under the Tanzania Bridge (where the community of homeless people lived). After these men relayed the information, they left the scene immediately. It was his testimony that he did not see a lady at the scene that was referred to by Mr Fortune, nor Mr Fortune himself.

[33] Mr Mbiko confirmed during cross-examination that he did not witness the incident when it happened, but he observed that Mr Meintjies was injured on his side. He was confident that all three (3) men told him that the plaintiff was hit by a train.

[34] The defendant closed its case.

D.

ISSUES

[35] This Court is called upon to decide (i) whether or not the plaintiff was a passenger on the defendant's train at the time the incident occurred, and that he sustained injuries; (ii) whether the plaintiff's sustained injuries as a result of the defendant's negligence and / or the plaintiff's sole negligence; (iii) whether the defendant failed to take reasonable steps to guard against the attack on, and the ejection of the plaintiff through the open carriage doors of a moving train.

E. SUBMISSIONS ON MERITS

[36] The plaintiff submitted that he was attacked by unknown assailants and thrown out from a moving train through the open doors of the carriage. As a result of this incident, he sustained injuries which left him paralysed. The plaintiff's injuries were caused by the negligence of the defendant and or/ its employees who failed to ensure the safety of the passengers on the train, including the plaintiff, by deploying security guards at the stations and / or on the trains; the defendant or its employees allowed the train to commence moving from Woodstock station while the doors of the carriage in which the plaintiff was travelling were open; the defendant or its employees failed to avoid the incident when by the exercise of reasonable care and diligence they could and should have done so.

[37] On 26 March 2019, the defendant delivered a plea to the aforesaid allegations and admitted that it operated trains travelling between Woodstock and Salt River train stations on 11 August 2018. It denied having any knowledge of the incident. On 2 May 2023, the defendant handed in an amended plea in which it admitted that it had knowledge of the incident, but denied that the incident occurred as alleged. The defendant alleged that the incident was caused by the sole negligence of the plaintiff.

[38] Notably, the plaintiff had no recollection of what transpired immediately after the incident nor how he ended up in hospital. He did not have any recollection of speaking with anyone at the hospital as he was unconscious, save for his sister. He, however denied the use of any substances on the date of the incident. He constantly denied that he told any medical practitioner that he had been hit by a train. He persisted with his evidence that he was attacked and thrown out of the moving train carriage. It was therefore submitted that if the whole of the plaintiff's testimony is considered, his version remained the same. The plaintiff, it was said, was a credible witness. No other direct evidence or other testimony of any other witness raises any doubt about the accuracy and truthfulness of the plaintiff's

testimony.

- [39] The defence refuted this submission and characterised the plaintiff as a bad witness. It was stated that despite the plaintiff being in a wheelchair, his candour and demeanour in the witness box was one of uncertainty. He contradicted himself on the doors of the train. He was not certain whether the doors were opened or closed when the train left Woodstock station; in his particulars of claim at paragraph 3 he contended that he was attacked by unknown assailants and thrown from the train through the open doors of the carriage and when he gave evidence, it appears that he was not thrown out of the train but kicked on his stomach and his leg, which caused his hand to slip from the handle resulting in his fall; in his particulars of claim at paragraph 4.2, he stated that the train commenced moving from Woodstock station while the carriage doors in which the plaintiff was travelling were open. This contradicts his version that the doors closed when the train started to move.
- [40] The defence observed that the plaintiff's condition prior the incident is paramount. In his evidence he repeated that he was a heroine user and he last used it a day prior to the incident. When he was confronted with the doctors note that he last used heroine on the morning of the incident, his response was that it was their own notes. In essence, that points to the mendacity of the plaintiff as a witness. The information that he gave to the medical personnel on how the incident occurred proves that his mental capacity was seriously impacted by heroine. He admitted that heroine makes a person drunk. However, he elected not to respond to the other allegations.
- [41] In fact, it was stated the plaintiff was contradicted by his own witness on the mechanism of injury. According to the plaintiff, he was kicked out of the train, whereas Mr Fortune stated that he was flung out of the train. In *Santam Bpk v Biddulph*[13], the court held that the test for a witness's credibility is not whether the witness is truthful or indeed reliable in all that he/she said, but whether on a balance of probabilities, the essential features of his testimony are true.
- [42] Equally, Counsel for the plaintiff submitted that Mr Fortune witnessed the plaintiff being thrown out of the open carriage doors of the train in which he was travelling. He persisted with this version despite being confronted with the medical notes and the allegations contained therein about the plaintiff being hit by a train. It was argued that Mr Fortune provided direct evidence and was consistent in his testimony on how the incident occurred. There could be some uncertainties regarding the time periods, but were not seriously brought into doubt. This Court should therefore accept his evidence as correct.
- [43] The defence denied that to be so. It contended that Mr Fortune was an untruthful witness. When he gave evidence he appeared to be uncertain and at times sarcastic. In fact, it was said there were unbelievable noticeable features in his testimony. For instance, on noticing the robbery in the first carriage, one would have expected that his attention would be drawn to that robbery, instead he sticks his head out and notices the plaintiff being flung out; the timeframe within which he travelled as testified is inconsistent with the objective evidence

of the ambulance record. It would therefore be improbable to have been at the scene as he claims; Mr Fortune claimed that he did not know the plaintiff, yet he goes to the extremes in investigating the person who was flung out of the train - he reported the incident to the train guard at Salt River Station, he decided to travel back to Woodstock station and to the scene of the incident, if he would have gone to this extent, surely there would have been a record of the plaintiff's injury, including his report to the police; the plaintiff testified that he was on a train from Woodstock to Observatory. In contrast, Mr Fortune was on a train from Woodstock to Mitchell's Plain. These are two different train lines. The mendacity of the plaintiff and his witness points to the fact that their evidence is unreliable and dishonest.

- [44] It was argued that the plaintiff's version is impeachable. With regard to the ambulance report, which reflected the incident as reported at 09:51, at that time the incident had already occurred, and at that time Mr Fortune was already travelling to Salt River Station. Further, this report stated that the paramedics departed the scene of the incident at approximately 10:38, being almost 50 minutes after the incident had been reported. Then, there was more than sufficient time for Mr Fortune to travel to Salt River station and back to the scene of the incident and to interact with the plaintiff, the bystanders and the paramedics. His evidence was said to have remained the same. This Court should find that he was a truthful and credible witness.
- [45] With regard to the defence witness, Mr Mbiko, Counsel for the plaintiff argued that he had no knowledge of how the incident occurred. He merely found the plaintiff lying next to the railway lines. The unknown bystanders reported to him that he attempted to cross the railway line when he was struck by a train. He did not make any further investigations from the unknown bystanders. Ms Lombard, his colleague at the scene, took notes and also interacted with paramedics. Mr Mbiko's testimony contained numerous unexplained and inconsistent statements which undermined his recollection of the incident. As a result, his credibility and reliability as a witness should be put to question.
- [46] The defence pointed out that nothing is questionable about Mr Mbiko's testimony. In fact, his evidence was not seriously challenged. He was at the scene immediately after the incident for the right reasons. This Court was requested to find that the plaintiff was not on the train on 11 August 2018; he was part of the group of homeless people who attempted to cross the railway line; based on his condition of being under the influence of heroine, he collided with the train and that is how he sustained the injuries.
- [47] Counsel for the defendant pointed out that the plaintiff testified that the doors were closed when the train started to move. The four
- (4) assailants approached him while standing with his back to the opposite open doors. These alleged assailants proceeded to ask him for money and cell phone. He told them he did not have much money, but a R13.00. They grabbed his bag, the scuffle broke out and he ended up being thrown out of the moving train. He did not know at what stage the doors were opened. After he was kicked out he became unconscious and only regained consciousness in

hospital. Upon clarity being sought by the Court, he stated that after he boarded the train, he stood by the opposite door which was open. He used his friend's ticket to board the train. He did not show the ticket to anyone as it was in his wallet. The assailants took off with his bag which

contained his wallet, R13.00, a broken cell phone and half a loaf of bread. It was submitted that the plaintiff's version is less than convincing. The Court was therefore asked to dismiss the plaintiff's claim with costs.

F RELIANCE ON MEDICAL NOTES

[48] Counsel for the plaintiff submitted that, insofar as defendant wishes to rely on the contents of the medical notes, in support of its defence that the plaintiff was not a passenger on one of the trains. In their pre-trial minute it was expressly stated that the parties had agreed that the discovered documents are what they purport to be but that the correctness of the contents thereof was not admitted. At no time during the proceedings did the defendant apply in terms of the Law of Evidence Amendment Act 45 of 1988, for the medical notes to be admitted as evidence.

[49] In *Rautini v Passenger Rail Agency of South Africa*, [14] it was stated that:

'[11] The contents of the hospital records and medical notes constituted hearsay evidence, and it is trite that hearsay evidence is prima facie inadmissible. The discovery thereof by the appellant in terms of the rules of court does not make them admissible as evidence against the appellant, unless the documents could be admitted under one or other of the common law exceptions to the hearsay rule.'

And

'[12] In the circumstances, the full court's finding that material differences existed between the appellant's version and the medical records regarding where he fell from the train, the cause of his fall and his first lucid recollection after the fall, was erroneous. The full court's reliance on hearsay evidence in that regard amounts to a material misdirection that vitiates its ultimate finding on the outcome of the appeal that was before it.'

[50] Counsel for the plaintiff stated that reliance on the medical notes by the defence is misplaced. In any event, those medical notes contradict themselves in certain instances and for that reason, they would not provide any assistance to the court in determining the

issues.

[51] The defence argued that the distinguishing fact between Rautini (*supra*) and this matter is that the appellant's Counsel expressly stated that the discovered documents were what they purported to be, but that the correctness of the contents was not admitted. The respondent's Counsel confirmed that the contents would remain hearsay evidence but argued that calling the authors as witnesses was unnecessary, given the parties' agreement, it would have wasted the court's time.

[52] In this matter, the defence stressed that the parties held a pre-trial conference on 12 May 2021. In paragraphs 9.2 – 9.4 of the pre-trial minutes, the parties agreed:

‘9.2 Documents and copies of documents and extracts from documents or copies of documents will, without further proof, serve as evidence of what they purport to be without requiring formal proof in the normal course of events;

9.3 The foregoing arrangement is subject to the following:

9.3.1 Neither party admits the correctness of the contents of any document as a result of the aforementioned pragmatic arrangement;

9.3.2 Any party has the right on at least 7 (seven) days' notice prior to the trial date, to require that any specific document or extract from any specific document be proven formally.

9.4 The defendant agrees.'

[53] Given the fact that the purpose of the pre-trial conference is to curtail issues at trial, the defence submitted that the plaintiff cannot renege from the agreement. In *Filta-Matrix (Pty) Ltd v Freudenberg & Others*[15], Harms JA stated that:

‘To allow a party, without special circumstances, to resile from an agreement deliberately reached at a pre-trial conference would be to negate the object of Rule 37, which is to limit issues and to curtail the scope of the litigation (cf *Price NO v Allied-JBS Society* 1980

(3) SA 874 (A) at 882D-H). If a party elects to limit the ambit of its case, the election is usually binding (AJ Shepherd (EDMS) Bpk v Santam Versekerings Maatskappy Bpk 1985 (1) SA 399 (A) at 415 B-D; *Chemfos Ltd v Plaasfosfaat (Pty) Ltd* 1985 (3) SA 106 (A) at 114l – 115B). No reason exists why the principle should not apply in this case.’

[54] The parties in this matter, it was submitted, paragraph 9.2 allows the defendant to accept the documents as what they purport to be without formal proof in the normal course of events to serve as evidence. Be that as it may, paragraphs 9.3.1 and 9.3.2 should be read conjunctively and not disjunctively. In this instance, it was incumbent upon the plaintiff to serve a notice at least seven (7) days before the trial date, requiring that a specific document or extract relied upon be proved formally. Thus, in the absence of such notice, paragraph 9.2 is applicable. If the defendant was required to call each and every doctor and nurse that made entries in those medical records to testify, the trial would have run into several days.

Clearly it would have defeated the objectives of the Rule 37 conference. In fact, some entries are consistent with the evidence of the plaintiff. Equally, the plaintiffs' counsel acquiesced in the admission of the contents of the hospital and medical notes by cross-examining the defendants witness on them. The plaintiff cannot make an about turn at this stage. This Court was asked to accept the documents as contained in Exhibit A as evidence.

DISCUSSION

Medical records

[55] At the commencement of the trial, a trial bundle was handed up by agreement between the parties and was marked as Exhibit A. Subsequent thereto, further documents were handed up and admitted as exhibits, i.e. Exhibit B, C and D without any objection. These documents were utilized throughout the trial to examine and cross-examine witnesses who testified. To the extent that the Court's determination of the issues is central to these documents, the plaintiff's Counsel raised an objection to the use of the medical and hospital records that are contained in Exhibit A for the first time at the close of trial and during argument. The plaintiff's objection was that these records are hearsay in nature. No witnesses were called to prove what is contained thereon. They therefore remain hearsay in nature.

[56] The production of these documents at trial emanates from a request by the defendant at discovery stage that the plaintiff makes available any medical records, hospital records, x-ray photographs or other documentary information relevant to the assessment of plaintiff's claims in terms of Rule 36 (4) of the Uniform Rules of Court on 4 December 2018. On 21 November 2019 the plaintiff responded to this request and furnished a copy of the plaintiff's identity document, ambulance report and hospital records from Groote Schuur Hospital. These documents were contained in Exhibit A. No expert reports were filed pursuant thereto.

[57] In their pre-trial minute dated 12 May 2021, the plaintiff made the following suggestion in terms of Rule 37 (6) (k) of the Uniform Rules of Court:

'9.1 The plaintiff will prepare bundles of documents for purposes of trial:

9.2 Documents and copies of documents and extracts from documents or copies of documents will, without further proof, serve as evidence of what they purport to be without requiring formal proof in the normal course of events;

9.3 The foregoing arrangement is subject to the following:

9.3.1 Neither party admits the correctness of the contents of any document as a result of the aforementioned pragmatic arrangement;

9.3.2 Any party has the right, on at least 7 (seven) days' notice prior to the trial date, to require that any specific document or extract from any specific document be proven formally.

9.4 The defendant agrees.'

[58] The plaintiff sought to rely on Rautini (supra) in its attempt to reject the use of medical and hospital records in these proceedings. In that matter, the medical records were simply discovered without an agreement with regard to its utilization during trial. In this instance, the parties agreed specifically in their pre – trial conference that these medical reports and or/ documents, copies of documents and extracts from documents or copies of documents will, without further proof, serve as evidence of what they purport to be without requiring formal proof in the normal course of events. However, if one party does not admit the correctness of the contents, it has the right, on at least 7 (seven) days’ notice prior to the trial date, to require that any specific document or extract from any specific document be proven formally. Absence such notice, they will serve as evidence without requiring any formal proof. (Emphasis added).

[59] In Natal Joint Municipal Pension Fund v Endumeni Municipality,[16] Wallis JA stated:

‘[T]he present state of the law can be expressed as follows:

Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument or contract, having regard to the context provided by reading the particular provision or provisions in light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production ... The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document ... The “inevitable point of departure is the language of the provision itself,” read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’ (Citations omitted)

[60] The parties agreed to the admission of discovered documents as part of evidence at pre-trial stage in order to curtail the proceedings. This approach was understandable as the issues in this matter were quite simple and that only three

(3) witnesses were called during trial. If the plaintiff had an axe to grind with his own documents that he discovered, the objective interpretation of that agreement is that he should have called the medical personnel to testify in court and prove such evidence formally. In the absence of his insistence that the medical and hospital records be proved, he cannot go against what was agreed upon at the pre - trial stage and contend that they are hearsay evidence. Failure on his part to give notice seven (7) days before the trial commenced to the effect that he required those records to be proved, means that he accepted that they constitute as evidence and therefore there was no need for them to be proved. Our Courts have repeatedly stated that the privity and sanctity of the contract entails that contractual obligations must always be honoured when the parties have entered into the contractual agreement freely

and voluntarily. It is not open for another party to raise a technical point after the fact. The parties should observe and perform in terms of their agreement, and should only be allowed to deviate therefrom only if it can be demonstrated that the agreement is tainted. Such was not the case in this matter. In any event, I agree with the defendant that by cross-examining witnesses on those medical records, the plaintiff acquiesced to the contents that they are what they purport to be, nothing more and nothing less. Undeniably, Rautini (*supra*) is distinguishable from these proceedings. In the circumstances, the hospital and medical records will be admitted as part of evidence in this matter.

Merits

[61] The first issue for determination in this trial is whether the plaintiff was a passenger on the defendant's train when the incident occurred, and that he sustained injuries. The plaintiff testified that he boarded a train from Woodstock to Observatory to look for 'loose garden jobs'. In his examination-in-chief, the plaintiff stated that the doors of the train were closed after he boarded the train, however, when he was confronted with this version during cross-examination, his response was that he could not remember whether the doors were closed. Further, he stated that he was approached by gentlemen in his examination-in-chief. During cross-examination he said he was approached by four (4) individuals. Also despite the pleadings

stating that he was thrown out of the train, his testimony was that he was kicked out of the train. In my view, these are two different

scenarios. The process of throwing out involves manhandling or use of hands, whereas the process of kicking out involves the use of one's feet.

[62] The allegation about the plaintiff being thrown out of the moving train was made for the first time in his particulars of claim for damages; and the version that he was kicked out of a moving train was mentioned during his testimony in Court for the first time. Mr Fortune on the other hand, saw a person being flung out of a train. The plaintiff testified that he held on to a pole, resisting his assailants from kicking him out of the train. Mr Fortune testified that there is no pole at the verge of the door. For him to be able to see the plaintiff being dislodged out of the moving train, he peeped through the door and held both his hands on the bars that are situated on both sides of the train. These versions are at odds with each other.

[63] Furthermore, the medical records are riddled with inconsistencies in respect of the mechanism of his injury. Not a single report suggest that he was thrown or kicked out of a moving train. As pointed out above, during the testimony of witnesses, the ambulance report (pre-hospital patient report) stated that he was a train casualty. When he was first attended at the scene all his vitals were good. He was alert and fully conscious. His Glasgow Coma Scale(GCS) was 15; the triage notes at 12:05 on 11 August 2018 stated '41 year old male

patient was brought by ambulance from scene presenting with a history of falling near railway lines when train pass him sustained head injury laceration to Head also drug abuser...'[17]; the physician at 14:03 on 11 August 2018 stated that '41 year old male. Known substance abuser – heroine and last used this morning. Brought in by EMS from scene, pt was walking along the train tracks (likely intoxicated with heroine at the time), the wind of the moving train then knocked the pt and he fell and hit his head (same level). The patient was not hit by a train..'[18]; notes on 12 August 2018 stated that 'he was involved in train accident... unclear if hit by a train'[19]; notes by Dr Sothman on 13 August 2018 stated that 'he was allegedly hit by a train'[20]; physiotherapy record on 30 August 2018 stated that 'pt well...complaining of drug withdrawal.'[21]

[64] The plaintiff handed up a Metrorail report (CMOCC Daily report)[22] that was compiled on the date of the incident. According to this report, it was reported to the PRASA officials by the unknown

coloured vagrant that the plaintiff was struck by an unknown train while illegally crossing the railway tracks. This report was

corroborated by Mr Mbiko's version who reported the incident at the Control room and was with the official who compiled this report. To some extent, this report and Mr Mbiko's version is supported by the entries that are contained in the medical and hospital report.

[65] The plaintiff denies that he used drugs on the morning of this incident, whereas the hospital records on the day of his admission reflects that he is a known substance abuser and he used drugs that morning. This information should have been gathered from the plaintiff as both the ambulance report and hospital records clearly showed that he was conscious when he arrived in hospital. That is backed up by the vitals that were recorded at the scene and in hospital. However, in his testimony, the plaintiff wants this Court to believe that he was unconscious when he arrived in hospital.

[66] The information on hospital and medical reports, although inconsistent, was furnished by the plaintiff to the medical personnel as no one else from the scene accompanied him to hospital other than the paramedics who transported him to hospital. It does not assist the plaintiff to simply state that those were their own words. The medical personnel could not have sucked this information out of their thumbs. The inference that could be drawn by this Court is purely that the plaintiff was still intoxicated when he gave the inconsistent information and did not appreciate what could have actually happened to him. This is borne out by the fact that after two weeks of his hospitalisation, he complained of drug withdrawal to the physiotherapist. Strangely, there were no further inconsistencies that were recorded in the hospital notes thereafter.

- [67] The plaintiff sought to rely on the medical report of Drs Smit and Masuku[23] on 15 August 2018 and the occupational therapy's report on 17 August 2018, that the plaintiff was non-verbal and unable to communicate in hospital since he was incubated for ventilator support. As is apparent from the records, this procedure was done after it was discovered that he had injured his spine. The notes from 11 to 14 August 2018 suggest that the plaintiff was in his senses.
- [68] Quite notably, Mr Fortune testified that he arrived between 08:00 – 09:00 at Woodstock station and took a train to Mitchell's Plain. The plaintiff testified that he boarded a train from Woodstock to Observatory. The incident in question happened at 09:50, some fifty minutes after Mr Fortune had departed with his train to Mitchell's Plain. Even though it was put to him that the plaintiff boarded a train to Observatory, he tried to wiggle his way and justify this by stating that one can alight along the way in the Mitchell's Plain train route and walk to Observatory. Unfortunately, that was not the evidence of the plaintiff. The evidence before the Court was that the plaintiff and Mr Fortune took two (2) different trains which serviced different routes. That is borne out by the contradictions in their evidence on the times their trains departed and the layout of the interior of the trains.
- [69] In addition, Mr Fortune testified that he interacted with the paramedics, the security guards and the plaintiff's female friend who started shouting at the plaintiff after he got back to the scene. He witnessed the plaintiff shouting that he cannot feel his legs, that he was going to die. Taking into account the time that was recorded by the paramedics in the ambulance report and the time it took for Mr Fortune to get back to the scene, it is highly impossible that he would have arrived while the plaintiff and the paramedics were still at the scene. In any event, Mr Mbiko could not remember seeing Mr Fortune at the scene despite the fact that he was one of the security guards who were present. Mr Fortune's exaggerated curiosity on the plaintiff alleged accident whom he did not know at the time, whereas there was an alleged robbery which took place inside the train coincidentally is mindboggling. More implausible is his alleged return to the scene, when he initially testified that he proceeded with the train despite the fact that he witnessed robbery taking place and could not get off and wait for another train that would come in the next hour. More to the Court's disbelief, the robbers somehow proceeded with a robbery of a homeless person who in his own words had nothing of value in his bag and ultimately got kicked/ thrown/ejected /flung out of a moving train. Despite the ambulance and hospital records that proved the plaintiff to be alert and conscious shortly after the incident, however his testimony that he was in complete amnesia after the incident is more worrisome to say the least.
- [70] Having evaluated the evidence presented by the witnesses, the only conclusion is that the plaintiff was not a passenger in any of the defendants trains (whether in the Observatory route or in the Mitchells Plain route). Since he was immediately found next to the railway tracks shortly after the incident, the version that he attempted to cross the railway line illegally when he sustained the injuries is plausible. That is borne out by Mr Mbiko's evidence that he found the plaintiff with other homeless people who communicated to him

as such. As I have stated earlier on, this version is supported to a large extent by the medical notes. In the interest of justice, I am convinced that Mr Mbiko's hearsay evidence should be finally admitted.

[71] In such circumstances, no negligence could be attributed to the defendant. For the Court to find in favour of the plaintiff, it is trite that the he proves his case on a balance of probabilities, which in this instance he failed. At any rate, it is my view that the credibility of the plaintiff and his witness is seriously questionable. The essential features of the plaintiff and his witness testimonies are not true. It therefore stands to be rejected in its totality.

[72] In the result, I make the following order:

The plaintiff's case is dismissed on merits.

WESTERN CAPE HIGH COURT

In the High Court of South Africa

(Western Cape Division, Cape Town)

Coram: B P MANTAME, J

Judgment

by: B P MANTAME, J FOR PLAINTIFF: ADV L J SMIT 072 276 3223 johansmit@capebar.co.za

Instructed by: Adendorff Attorneys Inc 0860 122 529 FOR DEFENDANT: ADV S O'BRIEN 083 372 9306 obrien@capebar.co.za Instructed by: AMMM Inc Attorneys 010 541 1630 Date

(s) of Hearing: 05/29/23

Judgment

Delivered on: 06/12/23

[1] Exhibit A at page 189

[2] Exhibit A at page 196

[3] Exhibit A at page 219

[4] Exhibit A at page 516

[5] Exhibit A at page 589

[6] Exhibit A at page 592

[7] Exhibit A at page 631

[8] Exhibit A at page 5-6

[9] 1993

(3) SA 233 TPD at page 239 B - G

[10] Lexus Nexus 2nd Edition p401

[11] 1996

(1) SACR 639 (A) at 640 c

[12] 1993

(2) SACR 69 (A)

[13] 2004 (5) SA 586 (SCA)

[14] 2021 JDR 2717 (SCA) at para 11 and 12

[15]

[1997] ZASCA 110; 1998 (1) SA 606 (SCA) at page 614 B-D; see also MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga & Another 2010

(4) SA 122 (SCA) at para 6

[16] [2012] ZASCA 13; 2012 (4) SA 593 at para 18

[17] Exhibit A at page 589

[18] Exhibit A at page 631

[19] Exhibit A at page 196

[20] Exhibit at page 189

[21] Exhibit A at page 526

[22] Exhibit C at page 6

[23] Exhibit A at page 187

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