

SOUTH AFRICA / JUDGMENT

## Ngwane v PRASA (35036/2016) [2019] ZAGPJHC 245 (27 May 2019) [2019] ZAGPJHC 245

COURT

South Gauteng High Court, Johannesburg

BEFORE

Ngomane

CASE / FILE NUMBER

35036/2016

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### Source record

IN

THE HIGH COURT OF SOUTH AFRICA,

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 35036/2016

In

the matter between:

NGWANE

LINDOKUHLE SENZO

Plaintiff

and

PRASA

Defendant

### JUDGMENT

NGOMANE AJ:

### INTRODUCTION

- [1] This is an action for damages arising out of a train accident that occurred on 3 March 2015 at Residensia station. The plaintiff sues the defendant for negligence for injuries sustained at the time he attempted to board a train owned and operated by the defendant, who conducts rail transportation as its core business.

[2] The defendant, however, denied liability and pleaded contributory negligence in terms of the Apportionment of Damages Act, 34 of 1956 in the event I find that there was indeed such an accident at its terminal at the aforesaid station.

[3] At the outset, the parties have agreed to separate the issue of liability from quantum in terms of the Rule 33(4) and the trial

proceeded only on the question of negligence between the parties.

## BACKGROUND

[4] The plaintiff, a student, boarded a full train from Houtkop on his way home to Orange Farm. He testified that he was coming from school and he went to the train station with his friend, Lehlohonolo Letsware. He testified that he had a valid return ticket for the journey and recalled that the Defendant blew a whistle before the train took off and an announcement was made that the train will leave that particular station.

[5] He testified that he boarded the Vereeniging route when he took the train from Houtkop. The train travelled and passed Kwaggastroom

station with its doors open, travelled with open doors at Eating side station until the train arrived at Residentia station, still with its open doors. He testified that the time was around 14h30 to 15h00 in the afternoon.

[6] The plaintiff stated that at the time when the train arrived at platform 1, Residencia station, and they disembarked from that

platform 1. He testified that there was train standing stationary at platform 2. He heard an announcement about changing or swapping

trains on the speakers and that the train he initially boarded, was going back. He referred to the term “all change” that was announced that they had to change trains and he moved to the train standing at platform 2. During cross-examination, it was suggested to him that it was in fact platform 6 and 5 respectively, where the train arrived and he accepted the correction as indicated by counsel for defendant and accepted that he was mistaken.

[7] His testimony was to the effect that after realising that the train at platform 4 was stationary, he ran after the train that was commencing and on the verge of leaving platform 6. He was the last person to get inside the train. At the time when he pushed into the coach, he did not notice if there were any other persons behind him. He then lost balance after both his feet were on the train; fell on the ground and not on the tracks. He used the term “conflict” as a result of the confusion created by the “all change” at platform 5, which caused him and other commuters to return to platform 6.

- [8] Of particular interest is that the plaintiff testified that on their return to platform 6, the train had started to move and was in motion. He was challenged during cross –examination that he took a chance on a moving train and his response was that he disagreed with that proposition made by counsel for defendant.
- [9] Accordingly, he finally testified that the reason why he did not wait for the following train was that it was getting late and that working people have already knocked off from work.
- [10] Immediately after the plaintiff closed its case, the defendant applied for an absolution from the instance. The application was heard on 17 May 2019 where oral arguments were adduced by both counsel. I then ordered counsel to file written Heads of argument on 20 May 2019 when the court resumed. After the deliberations of the aforesaid application, I refused to grant the defendant

absolution from the instance with costs and my reasons were read out ex tempore in the record and the matter proceeded for trial.

#### THE DEFENDANTS CASE

- [11] The defendant called its first witness, Mr Buhlebezwe Tshomela (Tshomela), who is the train driver who took over from another train driver at Braamfontein and on route to Vereeniging on 3 March 2015.
- [12] He testified about the procedure of how he will direct the train to align to the platform so that passengers can disembark on the platform.
- [13] Tshomela testified about the fact that there was a Metro guard seated at the rear of the train who will observe the yellow line and how the metro guard will conduct the procedure to release the open button so that the passengers or the commuters will disembark from the train. He further testified about the procedure where the metro guard blew a whistle that the doors are about to be closed. The metro guard will notify him after blowing a one (1) bell signal that the train can depart or leave the platform as it is safe to do so. Further, a whistle will be blown for him to make an emergency stop in the event of an accident. All the above procedure, according to him, were followed at Residentia station.
- [14] Tshomela testified that he knows nothing about the incident of the 3rd of March 2015 because that was his train and he recalls that at no stage was he flagged or told to make an emergency stop. It was only on either Wednesday or Thursday last week, i.e. 15 – 16 May 2019, that he was for the first time advised of the accident by the defendant`s attorneys and for him to avail himself for the trial. Put differently, Tshomela knows nothing about the accident of plaintiff falling off a moving train. That concluded the evidence of Mr Tshomela.
- [15] The defendant called its second witness, Mr Khumbulekile Kenneth Mnyaka, (Mnyaka), who is a section security commander of the

Defendant. Mnyaka testified that he has been employed for the past five (5) years by the defendants and visits fifteen (15) stations per shift. He oversees the issue of security in all the 15 stations as a security officer commander and received a call from the joint operation centre. He testified to the effect that he was called to the scene and he went to do his own investigation and found the plaintiff at their offices inside the stations. He interviewed the plaintiff and also interviewed two (2) commuters who are unidentified as they refused to disclose their names to Mnyaka. He interviewed them and plaintiff separately and compiled a report regarding the events of the 3rd of March 2015. His testimony was that the plaintiff told him that there was an “all change” and plaintiff together with the other commuters jumped out of train 9055 to embark the train that was stationery at platform 5. After realising that the train was stationery, they noticed the train they disembarked that it was now departing; they rushed back to the moving train that had started to move from platform 6.

[16] Mnyaka testified to the effect that the commuters at the platforms saw the plaintiff trying to board the moving train and he was referred to his report which read as follow:[1]

It is alleged by the injured person (and unknown commuters) that when train 9055 arrived at platform 6, Residencia station, they thought it was all change and all commuters jumped out of the train 9049 that was standing faulty on platform 5. The train 9055 started to move and they all ran back to the train.

Other commuters managed to board the moving train but he missed a step and fell between the platform and the train and got injured.”

[17] The defendant called Ms Esther Ramekoa (Ramekoa). She was the third witness for the defendant and employed for six (6) at Houtheuwel,

Vaal area Customer services in the Vaal area. She emphasised that she was not working at that particular area at the time the accident occurred.

[18] Ramekoa was advised about the accident by the attorneys for the defendant .On analysing her evidence, she conceded in cross-examination that it is important for the commuters to know when trains arrived or are delayed at their stations.

[19] When asked by her counsel about number of platforms at Residencia, she was doubtful and could not confine herself to indicate whether it was five (5) or six (6) platforms at Residencia. She replied that there are four (4) or five (5) platforms and taking into account that this accident fell in her area.

[20] In respect of contentious issue on whether announcements are made on the speakers at Residencia, she testified that no announcements were made and her predecessor made a note that a loud hailer should be used instead to notify commuters on train delays or any other changes affecting the running of the defendant`s trains.

- [21] Ramekoa evidence was less impressive and she was called like Tshomela by the defendant's attorneys to testify about any announcements made at Residentia station on the 3 March 2015. That concluded her evidence and she reiterated that she was not in the area at that particular year.
- [22] The defendant closed its case accordingly without calling the metro guard who was with Tshomela at the time of the accident. No explanation of his absence was tendered.
- [23] The evidence placed before me supports the version of plaintiff more particular, the defence witness, Mnyaka, who corroborated the plaintiff regarding the "all change" to the extent that he confirmed that Residentia has 6 platforms and in such stations "all change" does occur. He said so based on his position of being a security station commander ("SSC"), overseeing fifteen (15) stations in Gauteng.
- [24] Turning to the evidence of Tshomela, who distanced himself from the accident and denied that there was any accident whatsoever on the day in question, is disturbing. The plaintiff pleaded that after the fall, the train continued with its journey and never stopped.
- [25] Mnyaka filed a report about the incident and it was noted that a tick was made on exactly where in the station the incident took place and it is recorded that the occurrence happened on the platform where Tshomela's train was driven. I make a finding that the train driven by Tshomela, with the metro guard failed to close the doors thereby inviting the plaintiff to attempt to board a moving train under the circumstances. I find that the defendant was negligent as the result of plaintiff falling from the moving train at the platform and sustaining injuries. Further, the defendant also caused panic to the commuters and plaintiff by having a train on the opposite platform thereby creating the impression of the "all change" scenario. Mnyaka confirms that after his investigation he found the faulty train and the driver was inside the train in contrast to the version of Tshomela, who denied that there was faulty train on platform 5.
- [26] Tshomela even denied the existence of the other train standing stationary and parallel to platform 6 where he arrived. I found him to be less satisfactory as a witness and unreliable by even denying the obvious facts of an injured plaintiff as described by Mnyaka, who found him at the station when the train left without being flagged for emergency stop.

## ANALYSIS

### OF THE LEGAL PRINCIPLES INVOLVED

The test for negligence was formulated in *Kruger v Coetzee*[2] as follows:

*"for the purposes of liability culpa arises if-*

- (a) a diligens paterfamilias in the position of the defendant-

(i) Would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss;and

(ii) Would take reasonable steps to guard against such occurrence ; and

(b) the defendant failed to take such steps”

[27] In casu, the defendant failed to call the metro guard who was responsible for releasing the button for the sliding doors on the platform side so that they can be opened manually.

Tshomela testified that the metro guard keeps an eye on the yellow line on the platform

to check if there are no passengers embarking and will blow his whistle to notify him that it is safe to go. Tshomela never mention

the name of the metro guard who was with him and whether he in fact blew his whistle to warn him to stop the train due to plaintiff

having fallen from the platform.

[28] It is common cause that no such evidence was tendered by the Defendant on whether the metro guard complied with the general

operating instructions on the opening or closing of the coach doors of the train conducted by Tshomela on the aforesaid date. It is only the say so of Tshomela that the procedure of the metro guard was followed at Residentia station. Such evidence was not tendered by the defendants and this supported my earlier decision to refuse absolution from the instance eventually. The Defendant failed, in my view, to tender this crucial evidence of the closing of doors, to prevent the plaintiff from boarding a moving train.

[29] Therefore the defendant failed to keep coach doors closed at the time of the arrival of the train at Residentia. In *Choma Michael v PRASA*, the court found that the train guard, who was on duty during the incident, was a crucial witness who was not called to testify about closure of the doors on the train. The court found that on the probabilities, the doors of the train were not closed when the train departed the station.

[30] Section 1(1) (a) of the Apportionment of Damages Act provides[3] :

*“where any person suffers damage which is caused partly by his own fault and partly by fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.”*

[31] The provisions of section 1 of the Act clearly relate only to cases where the plaintiff has suffered harm partly as a consequence of his or her own fault and partly as a consequence of the fault of the defendant.

[32] The defendant witness, Mnyaka confirmed that Residentia station is “all change” station due to the number of six (6) platforms it has and he admitted same based on his position as security commander overseeing 15 stations in his area in Gauteng.

Due to Mnyaka conceding to the number of platforms in the station, the evidence of the plaintiff was corroborated that it is indeed “all change” station. Further, the report compiled immediately after the incident by Mnyaka, after he interviewed the commuters that they thought it was “all change” and the commuters jumped out to train 9049 that was standing faulty on platform 5.

[33] The Defendant closed its case without calling the metro guard who was with Tshomela at the time of the accident and no explanation was furnished on his absence. Counsel for the Defendant submitted that the plaintiff must not overburden it.

[34] In the absence of the evidence of the metro guard to the contrary that the doors were closed when he blew the whistle for Tshomela, to safely pulled off, I accept the evidence of plaintiff that the door was opened and Mnyaka corroborated the plaintiff that witnesses

reported to him that he attempted to board a moving train and he missed the step and fell on the platform. The Defendant argued that I must make an adverse inference about the failure of the plaintiff to call his friend who boarded the train despite him testifying that he does not know if the friend saw him falling. Nothing really turns on this aspect as the evidence shows that he jumped out of the other train and attempted to board a moving train as observed by the commuters.

[35] Mnyaka spent almost three (3) hours investigating how the plaintiff got injured immediately when he received a call from the joint operation centre. He interviewed the plaintiff and two (2) unknown commuters who refused to give their details but saw the plaintiff running towards the moving train. His evidence was reliable and I find him to be a credible witness in contrast to Tshomela.

[36] I was referred to different authorities by both counsels where the issue of the open doors was ventilated in *Transnet Ltd t/a Metrorail & Another v Witter*. In this case the plaintiff boarded a train that had moved from a platform and it had its doors opened. The same facts appears that the respondent was attempting to board the train but he fell and the train and his left foot was severed as he attempted to board the train and the Court made a determination that the damages for plaintiff should be reduced by 50% cent because he had also been negligent in attempting to board a moving train.

[37] In *Choma v PRASA*[4], the plaintiff ran after a moving train where the doors were opened and the train was immediately stopped and the plaintiff was retrieved underneath the train. The court drew an inference from the failure of the defendant to call the “crucial witness” to confirm if the doors were closed. The court found both parties to be equally to be blamed for the accident.

- [38] The failure to take reasonable steps to prevent foreseeable harm to another will result in liability only if the failure is wrongful. It is the reasonableness or otherwise of imposing liability for such a negligent failure that will determine whether it is to be regarded as wrongful. I accordingly find, on the probabilities, that the doors of the train were not closed when the train departed the station, and the evidence of the train driver that there was no accident on his train, is improbable and false. Tshomela together with his metro guard failed to close the doors and prompted the plaintiff to chase on a moving train which he had earlier disembarked. On the totality of the evidence, the plaintiff conceded that he fell at the door of the train as he was the last one to embark a train that was in motion. The evidence showed that the plaintiff was adamant to board the train and not wait for the following train in the station. It was late and all the working people had already knocked off.
- [39] I therefore find that the defendant contributed to the plaintiff's loss in him having to chase back the very same train he had disembarked due to the confusion with faulty train in platform 5 where the "all change" occurs and returning to the very said platform 6 where the train had commenced to move with its doors open. From the afore-going, had they not seen the faulty train at platform 5, irrespective of whether an announcement was made or not, the plaintiff would not have disembarked from train 9055 conducted by the defendant. The plaintiff alighted due to Residensia station being known as a terminal where the "all change" by trains occurs. Mnyaka conceded to that fact and he was a credible and reliable witness as opposed to Tshomela.
- [40] The Defendant should have foreseen such conduct materialising and should have averted harm by directing the plaintiff not to disembark at an "all change" platform, which they failed to do and resulting in him now having to run back to platform 6, after the train had started to move from the platform. At least Tshomela and the metro guard owed him that duty to close the coach doors so that he does not run after a moving train with open doors. In *Transnet Ltd t/a Metro rail v Tshabalala* (2006) 2 All SA 583(SCA), at paragraph 9, the court held: a reasonable man in the position of the defendant would not have allowed the train to operate with the doors of the coaches open as he would have foreseen that to leave the doors of the railway coaches open would constitute an invitation to prospective passengers to board the train while moving and that it would be dangerous for them to do so. Similarly, a reasonable man in the position of a prospective passenger would have foreseen the danger of boarding a train after it had started to move and would have refrained from doing so.
- [41] Both the plaintiff and defendant were therefore negligent.
- [42] In the result, I grant the following order for the plaintiff against the defendant:
1. the plaintiff is entitled to recover 50% of his proven damages from the defendant;
  2. the defendant is ordered to pay the plaintiff's costs of action;
  3. the issue of quantum is postpone sine die.

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H NGOMANE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

COUNSEL FOR THE PLAINTIFF: Mr M Ramaili

INSTRUCTED BY: B Mzamo Attorneys

COUNSEL FOR THE DEFENDENT: Mr N Bangisi

INSTRUCTED BY: Jerry Nkeli Attorneys

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DATE OF JUDGMENT: 27 May 2019

[1] Supplementary index to pleadings & notices, page 98

[2] 1966 (2) SA 428 (A) dictum at 430E-G

[3] Act 34 of 1956

[4] Case no:16436/2011, 22 October 2012,para 14

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