

SOUTH AFRICA / JUDGMENT

Rabothatha v Passenger Rail Agency of South Africa (PRASA) (37116/17) [2018] ZAGPPHC 859 (23 November 2018) [2018] ZAGPPHC 859

COURT

North Gauteng High Court, Pretoria

BEFORE

P.M Mabuse

CASE / FILE NUMBER

37116/17

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) NOT REPORTABLE

(2) NOT OF INTEREST TO OTHER JUDGES

(3) REVISED

CASE NUMBER: 37116/17

DATE: 23 November 2018

MAROPENE BILLLY RABOTHATHA

Plaintiff

V

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Defendant

(PRASA)

JUDGMENT

MABUSE J:

- [1] This is an action by the Plaintiff in which, by combined summons issued by the registrar of this Court on 1 June 2017, he claims from the Defendant payment of money.
- [2] By agreement between the parties followed by an order of this Court the issues relating to the merits and quantum were separated. The parties agreed to deal, at this stage, with the merits of the matter and to postpone the quantum sine die.
- [3] The Plaintiff in this matter, a Mr Maropene Billy Rabothata, is an adult male person who resides at house [...]. The Defendant, Passenger Rail Agency of South Africa, known also by its acronym "PRASA", which acronym I will use right through the entire judgment, is described as a company duly incorporated in terms of the provisions of section 2 of the Legal Succession to the South African Transport Services Act No 9 of 1989 ("the Act") as amended. Its principal place of business is situated at 1040 PRASA House Burnett Street, Hatfield, Pretoria.
- [4] In this matter, the Plaintiff was represented by Adv T Chauke while the Defendant was represented by Adv JG Cilliers (SC). Two witnesses were led on behalf of the Plaintiff. These were the Plaintiff himself and a certain Nkopodi Piet Letsoalo. On the other hand, the Defendant also led evidence of two witnesses, one Rexon Donald Molimi and Shelley Dimakatso Letsheleha.
- [5] The Plaintiffs cause of action arose from an incident that took place at Irene Railway Station on 20 February 2017. On that occasion the Plaintiff had boarded a train at Kalfonteln Railway Station at 05h10. This train was heading to Pretoria and he was travelling to work at Transnet here in Pretoria. The said train stopped at Irene Railway Station. I will interchangeably refer to this train as the first train or train 0605. It then moved away from the platform for a distance of about 500 metres when it stopped again. It then reversed into the platform where it parked. It was stationary for approximately 10 to 15 minutes with its doors closed. After the said period another train arrived at the same railway station and stopped. This train, to which I shall refer to as the second train or interchangeably as train 0603, for purposes of brevity, did not stop at the platform.
- [6] It is only apposite to describe fully the situation at Irene Railway Station. There are four tracks at that particular station. One track is close to platform 1. This is a track for trains that travel from Pretoria to Johannesburg or from North to South. There is the second track next to platform 2. This track is designed for trains travelling from Johannesburg to Pretoria, or from South to North.
- [7] These platforms 1 and 2 are for passengers who get into or off the trains. In between these two tracks which are next to the platforms, as I have indicated earlier, are two more tracks. These tracks are not close to the platforms. By their location it is clear that these two tracks are not meant to be used by people who want to get into or out of the trains. It is so because they do not have platforms. The second train stopped on one of these two tracks very close to, and

parallel with, the first train. These two trains were close to each other.

- [8] After the second train had stopped, as I have indicated, the doors of both trains were parallel with each other. The doors of both trains opened whereupon, without much ado, the passengers who were in the first train simply walked out of the first train into the second train. By the passengers who were in the first train reference is made also to elderly people, women and children.
- [9] The Plaintiff testified that when the passengers who were in the first train moved over to the second train, he fell out of the train. As there was no platform or any ladder staircases between the two trains, the passengers from the first train who wanted to move to the second train had to jump from the first train into the second train. At the material time when it was the Plaintiff's time to jump from the first train into the second train, the passenger in the first train surged forward. He had not balanced well. They pushed him. He fell into the space between the two trains. He fell from the height of approximately 1.5 metres. He broke his right hand when he fell. No announcements had been made.
- [10] After falling he became confused. One of the passengers came to assist him. He stood up, walked between the two trains to the platform. There he spoke to the security and gave them his wife's cell numbers.
- [11] The Plaintiff's witness, the said Nkopodi Piet Letsoalo ("Letsoalo"), testified that he was also a passenger in the same first train as the Plaintiff. They were not in the same coach though. He explained to the Court how he knows the Plaintiff; how long he had known the Plaintiff and how the Plaintiff had developed the practice of always calling him after getting into the train. While the Plaintiff got into the train at Kaalfontein Railway Station, next to Tembisa, Letsoalo got into the train at Olifantsfontein Railway Station.
- [12] On 20 February 2017, as usual, he received a telephone call from the Plaintiff who had called him to inform him that he was injured. He himself did not see the Plaintiff's injury. He confirmed the Plaintiff's version about the trains. According to him, the two trains had parked next to each other. The distance between them was about one metre. This distance did not deter the passengers who moved from the first train into the second train. The women, elderly persons and school going children could walk over to the other train. One merely had to walk over and with a little stretch of the leg, as he demonstrated before the Court one step was enough to take a passenger from the first train into the second train.
- [13] The Defendant's first witness was one Rexon Donald Molimi, a security officer employed by R1 Security Company and who on 20 February 2017 and at the material time was stationed at Irene Railway Station. He was standing on top of the bridge over the railway line. According to him he had a clear view of what took place between the two trains in question.
- [14] While he was at the top of the bridge two trains came to stop at the said railway station, one after the other. His description of the railway tracks and the platforms at the Irene Railway Station was not any different from the other witnesses' description. He saw one train arrive

and stop at platform 2. This was train 0605 (the first train). Five minutes thereafter he saw another train come and stop. This second train stopped in the middle tracks where there is no platform. It was train number 0603. He saw passengers alighting from the first train at platform 2 and getting into the second train. Both

trains were heading to Pretoria. The passengers jumped from the first train into the second train. According to him the space between the two trains was approximately 2 metres. He did not know why the passengers jumped from one train into another. One person was injured in the process. He went to assist him to get to platform 2. This man told him that he was late. He told him furthermore that he jumped into the second train because he had thought that the second train would leave the station first.

- [15] He reported the incident of the injured man to JOC which he called the Joint Operation Centre. Two fellow employees came to fetch the injured man when the ambulance they had summonsed failed to arrive. The first train, in other words train 0605, left the station and moved to Pretoria. There was nothing wrong with this train.
- [16] The Defendant's second and last witness was a certain Shelley Dimakatso Letsheleha (Letsheleha"). She is employed by PRASA as a train conductor. This is the work that she has been doing for the past 12 to 13 years. She testified that her work involved closing and opening the train doors at railway stations. She described the control room of a train as follows. The train has two control centres, one on the right and the other one on the left side of the leading coach. These two centres perform the same work but at different times. The control buttons on the left hand side of the train control, inter alia, the closing and opening of the entire doors on the left side of the train while the control centre or buttons on the right hand side of the leading coach perform a similar task, inter alia, on the right.
- [17] The train doors are opened only on the side where there is a platform. This is to make it easier for the passengers to get into or out of the train. The driver of the train also sits in the train on the side on which there is a platform. If the platform is on the left he sits on the left side of the control room. If the platform is on the right he sits on the right side. Her duty as a train conductor is, as soon as a train stops at a station, to open the doors of the train so that passengers on the train can alight from the train and at the same time people on the platform can ride the train; and when everything is clear to blow a whistle to signify that it is safe for the train to move away and thereafter to close the doors. Because of the location of the control buttons in the control centre or room or leading coach of the train it is not possible to open the wrong doors. In other words, it is not possible to open the doors on the right side of the train by pressing the buttons on the left and vice versa.

- [18] Although the doors of the train are designed to be opened by the buttons situated in the control section of the train nothing prevents the doors from being opened forcefully. Accordingly, it is possible for the passengers to open the doors of the train by force. When this happens, the control panel of the train will not show that the doors or anyone of them is open nor will it show that an attempt is made to force the doors open.
- [19] It has never happened that a train should stop at a railway station, proceed for a distance of about 500 metres out of the platforms, stop and reverse into the platform.
- [20] The following facts are common cause between the parties:
- 20.1 that on 20 February 2017 in the morning the Plaintiff was a fare paying passenger in the first train or train number 0605;
- 20.2 that the said train, from the point of view where the Plaintiff boarded it, was traveling from Kaalfontein to Pretoria;
- 20.3 that the said train stopped at a platform at Irene Railway Station;
- 20.4 that while it was still stationary at the said railway station, another train, the second train or train number 0603, arrived at the same railway station but stopped on the railway tracks that had no platforms;
- 20.5 that tile doors of the two trains were opened;
- 20.6 that some passengers in the first train or train number 0605 either walked over to, or jumped into, the second train or train number 0603;
- 20.7 that there had been no announcement that these passengers should move from the first train to the second train;
- 20.8 that the Plaintiff was among the passengers who walked over to, or jumped into, the second train or train 0603;
- 20.9 that he fell between the two trains when he attempted to move from the first train or train 0605 to the second train or train 0603.
- [21] Mr Chauke argued that the Plaintiff has made out a good case for the relief that he seeks and that his claim should therefore succeed. He argued, inter alia, that the Defendant had a duty to make sure that the passengers are safe. He submitted that the driver or conductor was, in some respects, negligent. He found support for his submission in the unreported case of *Limakatso Mamotsekane Susannah Mpshe v Passenger Rail Agency of South Africa (PRASA)* Case Number 13/5939 by Andrews AJ of the Gauteng Local Division. He relied, in particular, on paragraph 38 of the said judgment in which the said Court had the following to say:

"38. Most of the passengers would disembark by climbing off the train and walking to other destinations along the train tracks. On 22 November it was foreseeable that the passengers would disembark by pulling the doors of the train open after it had been stationary for any length of time. These duties were to focus on getting the train back in working order and she did not consider communicating with the passengers to be one of its duties. "

[22] On the other hand, Mr Cilliers, applied for the dismissal, with costs, of the Plaintiff's claim on the ground that the Plaintiff has failed to prove that the conduct of the train conductor or driver was wrongful; that the Plaintiff has failed to prove that the train driver or conductor was negligent and finally, that there was no basis, on the

facts, for a finding that the Defendant was negligent. Finally, he submitted that on the basis of the principles of *volenti non fit injuria*, supported by some authority, especially of *Santam Insurance Co Ltd v Vorster* 1973(4) SA 764 (AD), the Plaintiffs claim should be dismissed.

[23] In order to succeed with his claim against the Defendant, the onus rests on the Plaintiff to allege and prove that the Defendant has committed a delict. So far as it relates to the duty of the Plaintiff to allege and prove see *Pillay v Krishna and Another* 1946 SA (AD) 946, 951, which deals with the fundamental rules governing the incidents of

onus in our law. The Plaintiff must prove that the Defendant has breached a duty imposed by law on it.

[24] The Plaintiff seeks to hold the Defendant liable for the damages he sustained from the injuries he sustained when he fell from a stationary train purely on the conduct of the train conductor or train driver. It is alleged by the Plaintiff in the particulars of claim that the train conductor was negligent. The respects in which the conductor was alleged to have been negligent were set out as follows; that he failed to:

24.1 keep a proper lookout;

24.2 check that it was safe to signal to the train driver to stop;

24.3 signal to the driver to stop at the platform;

24.4 pay due regard to the safety of the commuters on board of the train;

24.5 pay assistance from the Defendant to provide adequate equipment and personnel to control and/or to protect commuters on board and/or disembarking and/or boarding the train;

24.6 prevent the accident when by the exercise of reasonable care she could or should have done so.

[25] While the duty of the Plaintiff is to allege the facts on which his claim is based, or the facts on which he seeks the relief, once such a matter reaches the trial stage his further duty is to adduce evidence in substantiation of the facts set out in the particulars of claim. It serves no purpose to plead one thing and when the witnesses testify they do so differently. When an allegation is made in the pleadings that allegation must, at the trial, be supported by

credible evidence. Evidence is the most important information required to prove the facts set out in the particulars of claim.

[26] The evidence tendered by the Plaintiff and his witness does not prove the facts set out in the particulars of claim, as constituting negligence on the part of the train conductor. In brief the facts set out in the particulars of claim are not sufficiently supported by the evidence tendered. Therefore, the Plaintiff has failed to discharge the onus of proving that the train conductor was negligent in any of the respects set out in the pleadings.

[27] It is also sought to hold the Defendant liable for the damages suffered by the Plaintiff on the account of the alleged negligent conduct of the driver of the train. As with regards to the train conductor, the respects in which it is alleged that the driver of the train was negligent was set out in the particulars of claim.

[28] The Defendant is alleged to have been negligent in some respects. In particular it is alleged that the conduct and negligence of the Defendant, in breach of its duty of care led, to the Plaintiff falling from the train, and resulted in him suffering damages. According to the Plaintiff, the Plaintiff would not have fallen from the stationary train if the Defendant had not failed to:

28.1 provide competent personnel to guide, control and/or protect commuters as boarding the train and/or disembarking from the train. There was no evidence led in support of this allegation;

28.2 put measures in place to ensure that the train doors on the railway tracks are never opened and at the station platforms; and

28.3 put measures in place to ensure that the train are never stopped on railway tracks between the platforms whilst commuters are on board.

[29] The Plaintiff's evidence is that 10 to 15 minutes after the first train or his train or train number 0605 had arrived and stopped at the Irene Railway Station, the second train or train number 0603 arrived and stopped in the railway tracks where there was no platform. In my view, the first train was not wrong to stop at the platform. A platform is the only legal place from which people can ride a train or disembark from a train. It is not known why the second train stopped at a point where there was no platform. No announcement had been made that the purpose of doing so was to enable the passengers who were in the first train to jump or move over to the second train. What is of paramount importance is the evidence of the Plaintiff that before the arrival of the second train or train 0603 the doors of the first train were closed while the passengers sat in the coaches.

[30] After the arrival of the second train the doors of both trains were opened. It is not known who opened the doors. It could not have been the train conductor of the first train because firstly, there was no platform there. Letsheleha testified that a train conductor would only open the doors of a train on the side of the train where there is a platform. This evidence was not disputed. Secondly, she testified furthermore that on the date of the incident she

was the conductor of the first train. She did not open the doors of the first train where there was no platform. The evidence was not disputed. The Plaintiff himself told the Court that (he doors of the first train were always closed until the arrival of the second train, the Defendant accepted his evidence and never contested it. Letsheleha told the Court furthermore that it is possible for the passengers to forcefully open the train doors without the train conductor knowing about it or becoming aware of it. This evidence was not contested. There is no direct evidence that the passengers opened the train doors. In the circumstances of this case the doors could only have been opened by either the conductor or the passengers. The conclusion is inevitable in my view, that It was some passenger' in the first train that opened the doors of the first train.

- [31] The Plaintiff told the Court that without any announcement being made, the passengers in the first train either walked over to, or jumped into, the second train whose doors were, for unknown reasons, open. He told the Court that when he saw the doors of the second train open he thought that they were allowed to walk over to the second train. When the passengers in the first train moved over to, or jumped into, the second train he followed them. When it was his turn to jump,

passengers who were behind and around him surged forward, he lost his balance and fell into the space between the two trains and broke his right arm.

- [32] On a question by Mr Cilliers, the Plaintiff admitted that his conduct of moving from one train to another in the circumstances of this case was unlawful; secondly that it was risky; and thirdly, that it constituted a criminal offence. He admitted that he appreciated the danger of exchanging trains in the manner in which he tried to do on that fateful day but notwithstanding such appreciation, decided to take the risk. The reason he gave for doing so was that, as the first train was late, he would be late for work. In other words he found himself in a catch 22 situation or between a rock and a hard place. He was going to jump Into the second train because he had thought that the second train would be the first to pull off from the station.
- [33] In the circumstances there was very little that the Defendant's employees could do to prevent the doors of the train from opening. When the doors opened the train conductor had no way of knowing it. Even if she had become aware of it there was very little that she could do to prevent the crowd of passengers from changing trains in the way in which they did.
- [34] The Defendant's first witness testified that he saw passengers jumping from the first train to the second train. He knew it was unlawful for passengers to behave in that manner but because there were many of them he was unable to prevent them from doing so. He told the Court that if it was a manageable number of passengers he would have prevented them from jumping from the first train to the second train.

[35] In its plea the Defendant had pleaded that the Plaintiff attempted to jump from a stationary train into an adjacent train. In paragraph 5 of its plea the Defendant pleaded furthermore that the Plaintiff elected to jump from a stationary train into an adjacent train which was extremely dangerous to do and which caused him to fall between the two trains. In paragraph 5.3 the Defendant pleaded that whilst attempting to jump from one train to the other, the Plaintiff knew that it was dangerous and he acted with *dolus* in doing so, The Defendant then pleaded that in such circumstances it could not be held liable for the Injuries sustained by the Plaintiff In his attempt to jump from one train to the other. The Defendant's plea accords with tile evidence of the Plaintiff.

[36] I agree with Mr Cilliers that on the basis of the principle of *volenti non fit injuria*, the Defendant cannot, in law, be held responsible for the damages suffered by the Plaintiff. A person who participates willingly in an activity involving a risk of harm to him cannot complain that a delict has been committed against him. Voluntary assumption of risk is a ground of justification. The standard requirements are "knowledge, appreciation and consent". See in this regard *Santam Insurance Co Ltd v Vorster supra* at page 779 A-B where the Court had the following to say:

"That the onus of establishing this defence rests on the appellant, is common cause. Nor is it disputed that the essential elements of the defence were correctly stated in Innes CJ's well-known summary of "knowledge, appreciation and consent" (*Vide Waring and Gilour v Sherborne 1904 TS 340, 344*). "

The foregoing paragraph makes it clear that it is the duty of the party that pleads *volenti non fit injuria* or voluntary assumption of risk that must establish it. Secondly, the said principle may be pleaded as a defence. The element of consent in the current case takes the form of assumption of a risk.

[37] The ease of *Santam Insurance Co Ltd v Vorster supra* was followed in this Division by Mynhardt J, in his unreported case of *L.L. Moepya v Transnet Ltd and SA Rail Commuter Corporation*, Case number 2474/05, which was handed down on 12 July 2007 in which the learned Judge quoted with approval the following passage at 781 8-F where the Chief Justice had the following to say:

"/ am accordingly of the opinion that if it be shown that, in addition to knowledge and appreciation of the danger, the claimant foresaw the risk of injury to himself, that will ordinarily suffice to establish the "consent" required to render him volents

- provided always that the particular risk which culminated in his injuries falls within the ambit of the thus foreseen risk. "

More importantly it was again followed by the Full Court of this Division consisting of Msimeki, Tolmay and Rabie JJ in their unreported case of *Mfanafathi Lucas Shongwe v Passenger Rail Agency of South Africa* case number A512/2010 which was handed down on 15 June 2012.

[38] In paragraph 22 of the said judgment the Full Court was satisfied that the principle of *volenti non fit injuria* was established if the following requirements were satisfied:

"22. A consideration of evidence as a whole reveals that:

- (1) The plaintiff consented to the risk of injury and to the Injury.
- (2) He was capable of volition.
- (3) He had full knowledge of the nature and the extent of the(possible) prejudice.
- (4) He realised and appreciated fully what the nature and extent of the harm will be.
- (5) He subjectively consented to the prejudicial act.
- (6) The doors of the train were closed.
- (7) The plaintiff could not have targeted the door when he attempted to board the train but the area between the coaches."

[39] The facts in the case on which counsel for the Plaintiff relies are different from the facts on this case. What is common between the two cases is that it was the passengers who opened the doors of tile train. What is materially different from this case is that in that case the Plaintiff was pushed out of the coach after she had been dislodged from where she was standing and holding onto a steel bar about 1.2 metres from the train door. She did not, on her own, walk to tile open train door.

[40] In casu I am satisfied that, on the conspectus of all the evidence, the Plaintiff has failed to prove:

40.1 that the conduct of the train driver or the train conductor was unlawful;

40.1 that the train conductor or driver was negligent;

40.3 any facts on the basis of which this Court may infer negligence on the part of the Defendant or its employees.

If anything, the Defendant has successfully established that the requirements of the principle *volenti non fit injuria*.

[41] In the premises the Plaintiff's claim may not succeed.

The Plaintiff's claim is accordingly dismissed with costs.

P.M MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Plaintiff: Adv. T Chauke

Instructed by:

Masila Ramollo Attorneys

c/o Nkhesani Malika Attorneys

Counsel for the Defendant: Adv. JG Cilliers (SC)

Instructed by:

Stone Attorneys

Date Heard:

21-22 November 2018

Date of Judgment:

23 November 2018

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