

SOUTH AFRICA / JUDGMENT

Shimedza v Passenger Rail Agency of South Africa (PRASA) (37125/16) [2017] ZAGPPHC 1145 (10 August 2017) [2017] ZAGPPHC 1145

COURT

North Gauteng High Court, Pretoria

BEFORE

D S Fourie

CASE / FILE NUMBER

37125/16

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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 No: 37125/16

10 August 2017

In the

matter between:

T

SHIMEDZA

Plaintiff

and

PASSENGER

RAIL AGENCY OF SOUTH AFRICA (PRASA)

Defendant

JUDGMENT

D S FOURIE, J:

[1] This is a claim for payment of damages for personal injuries sustained by the plaintiff. The parties have agreed that quantum and merits be separated and an order to that effect has already been granted.

[2] The plaintiff's case in a nutshell is that he was a passenger on a train

operated by the defendant. While he was disembarking from the train at the Winternest Station, the train was set in motion as a result whereof he fell and sustained injuries. The defendant pleaded that the train's doors were closed at all material times. The plaintiff then forced the doors open whilst the train was in motion and attempted to disembark from it. The plaintiff testified without calling any witnesses, whereas the defendant called two witnesses.

THE PLAINTIFF'S EVIDENCE:

[3] The plaintiff testified that on 7 November 2014 at approximately 07h00 pm he had purchased stock for his little street business and was on his way home. It was already dark. He boarded a train at Pretoria A Station at approximately 07h30 pm and was supposed to disembark at the Pretoria North Station. At the Wonderboom Station, just before the Pretoria North Station, when the train stopped, he noticed that the doors of the train did not open. Commuters then had to forcefully open the doors by using their hands. The train then moved on to the next station which is Pretoria North where he was supposed to disembark. He was sitting in one of the middle coaches where there were approximately 15 to 20 people who also wanted to disembark.

[4] The train stopped at the Pretoria North Station but he could not disembark as the doors of the train did not open once again. He then tried to open the doors manually but was unable to do so. The train then moved on to the next station which is Wolmerton. There again the doors did not open and people started to jump from between coaches. He did not do so and remained on the train which was now proceeding to Winternest Station. By now he had moved on to one of the front coaches.

[5] At Winternest Station only he and another commuter were in the coach in question. The train stopped and the doors opened momentarily halfway by itself. There were no people on the platform. As he was in the process of disembarking the train started to move again and he then fell on the ballast stones next to the railway line. He went to the ticket office about 100 metres away where he found two security guards. He reported to them that he had fallen from the train. Later the railway police also arrived. They took a statement from him about what had transpired. He informed them that he had fallen from the train. The statement was not read back to him but he thinks that he signed it. He was in pain and there was blood all over his head. He was later taken to hospital by his brother.

[6] In cross-examination he explained that at the Pretoria North Station

young male commuters were jumping from between coaches whereas the female passengers were running from coach to coach looking for an open door. That is when he moved to the front coach where they were only two people. As the train approached Winternest Station he stood up to get out. The doors opened only about halfway. He took his luggage and was in the process of disembarking when the train started to move again. He was holding onto a metal rail or pole between the doors with his left hand. He was almost outside the train when it started to move. It was a jerky movement which caused him to lose his balance. The doors then closed as the train was now in motion. He was hanging outside the train holding on to the metal rail or pole. He started to lose his grip and then fell sideways onto the ballast stones. It was dark there and about 100 metres from the platform. He sustained injuries to his knee, head and a fracture of his left arm.

[7] When it was put to him that he had forcefully opened the doors and then jumped out, he denied these allegations. He also explained that they were only two people and would not have been able to open the doors. A statement signed by him was also put to him. When confronted with an allegation in the statement that he had disembarked when the train had already left the platform he responded by saying that he had fallen as he was too old to jump from a train. He said he is now 49 years old which means that he was 46 years of age at the time of the incident.

[8] He was then referred to certain entries recorded in the occurrence book of the Joint Operation Centre (Exhibit Bundle B, p 20A). According to this entry (which was made at 22:35) a certain Tshidilo reported that a male commuter "alleges that he fell down while alighting from a moving train" at Winternest Station. He agreed that he had fallen down whilst he was alighting, but explained that he was not alighting from a moving train. He was also confronted with another entry (recorded at 00:33) stating that according to P O Jackson that "by the time the train leave the platform the doors opened a little bit and he jumped out while the train was already in motion and fell down on the ballast". He again denied that he had jumped out of a moving train and pointed out that a statement had been taken from him whilst he was "a very ill person". In re-examination he explained that when the doors were slightly open at the Winternest Station, he could see the platform next to the train. That was the case for the plaintiff.

EVIDENCE FOR THE DEFENDANT:

[9] The first witness to testify for the defendant was Mr Jackson, an investigating

officer employed by the defendant. He was mandated to investigate so-called "claim cases" since 2012. He arrived at the Winternest Station after an incident had been reported. When he arrived he found two security officers, the plaintiff and another male person at the station.

[10] He first had a discussion with the security guards. They related to him what the plaintiff had explained to them. According to them the plaintiff was struggling to open the doors and other commuters also tried to open the doors. When

slightly opened, he disembarked from the moving train. He also testified about what the plaintiff had explained to him. At the Winternest Station he opened the doors with the assistance of other people inside the train when the train was already departing. He then jumped out of a moving train and got injured on the ballast stones next to the railway line. He said that according to the plaintiff it was close to 100 metres and that he had to walk back to the platform. He confirmed that a written statement signed by the plaintiff was taken by him (Exhibit Bundle B p 23-25A).

[11] The next witness to testify for the defendant was Ms Tsidino, a security guard who was employed by a private company at the time of the incident. She was on duty on the night in question. It was part of her duties to ensure the safety of commuters at the station. She testified that after this train had departed from the station, she and her colleague left the platform and went to the ticket office. Later the plaintiff arrived there and reported that he was injured. As they did not notice any incident, she asked the plaintiff to explain how it came about that he was injured. According to her the plaintiff explained that the doors of the train did not open at the Pretoria North Station where he was supposed to disembark. At the next station the doors again did not open and the train then proceeded to Winternest Station. There the same thing happened when other commuters then assisted him to forcefully open the doors. When the train had already left the platform he then jumped out of the train. She then relayed the same report to the information centre.

[12] According to her she would have noticed if the plaintiff was holding on to the metal rail or pole whilst the train was still at the station. She would then have indicated to the train guard not to allow the train to move out of the station. That was the last train scheduled for that night. According to her there were other commuters disembarking from this train at Winternest Station and they were doing so "in the usual way".

[13] In cross-examination she explained that the last train scheduled on that route is usually not fully occupied. Commuters usually use the first two coaches from the front. She was then referred to the report of 22:35 in the occurrence book of the Joint Operation Centre. When asked whether that is what she had reported, she replied "yes, that is what we reported". She then added that she could still remember him explaining that he had fallen from a moving train outside the platform, that he had jumped and then fell from a moving train. That concluded the evidence for the defendant.

DISCUSSION:

[14] It was contended on behalf of the plaintiff that I should accept his version and reject the explanation given by the defendant's witnesses. Counsel for the defendant argued that the plaintiff's version as explained in Court, is improbable and should therefore be rejected. He also pointed out that there are two irreconcilable versions of what transpired and suggested that I should grant absolution from the instance.

[15] It is clear that there are material factual disputes between the parties about which version should be accepted. In *SFW Group Ltd & Another v Martell et CIE & Others* 2003 (1) SA 11 (SCA) at p 14 (par 5) Nienaber JA indicated that the technique generally employed by Courts in resolving factual disputes of this nature may conveniently be summarised as follows:

"(a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the Court's finding on the creditability of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as

(i) the witness' candour and demeanour in the witness box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra-curial

statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the Court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. ... But when all factors are equipoised probabilities prevail".

(See also in this regard: *Baring Eiendomme BK v Roux*

[2001] 1 All SA 399 (SCA) at par 7.)

[16] It is therefore not only appropriate but also necessary to say something about the credibility and reliability of the witnesses. An assessment in this regard has to take into account the general context, the witness' memory and the ability to express him- or herself properly. It is a well-known fact that sometimes witnesses do make mistakes and even contradict themselves. One should therefore distinguish between bona fide errors and an intentional untruth. I have had the opportunity to observe the demeanour of all the witnesses and to listen carefully to their evidence. I did not get the impression that any of them intentionally tried to mislead the Court or knowingly told an

untruth.

[17] The plaintiff appeared to be determined and he testified with confidence. Notwithstanding the fact that he testified without the assistance of an interpreter, he was able to express himself properly and he appeared to be an intelligent person. He did not contradict himself in any material respect and gave a logical account of what transpired on the night in question. He impressed me as a good and solid witness.

[18] The witnesses for the defendant did not observe what happened on the night in question.

They testified on what the plaintiff had explained to them. Mr Jackson testified to what he could remember and also confirmed the

statement taken from the plaintiff. He gave his evidence in a satisfactory manner and although he is employed by the defendant, I did not get the impression that he was biased against the plaintiff. He appeared to be self- confident and I have no reason to criticise the manner in which he testified.

[19] Ms Tsidino is a security guard who was on duty on the night in question. Although she had to testify to what transpired almost three years ago there were times when she took a while to answer some critical questions. On the other hand, there was also a time when I gained the impression that she was overstating her evidence. For instance she could still remember very well where she was standing on the platform that particular night when this particular train arrived. Notwithstanding my observations in this regard, I have no reason to reject her evidence or to conclude that her entire evidence is unreliable. This is a matter that should be decided on the evidence and the probabilities.

[20] I shall now consider the evidence. It appears not to be in dispute that the plaintiff was supposed to disembark at the Pretoria North Station. According to him he was unable to do so because the doors of the coach in which he was travelling, did not open. The same thing happened at the Wilmerton Station. He was now travelling to the Winterness Station. The defendant was unable to seriously dispute this evidence. I also have no reason to reject it. The plaintiff was now further away from where he wanted to be and therefore had good reason to disembark at Winterness Station. According to him the doors of the coach in which he was travelling opened only half way which enabled him to take the opportunity to disembark from the train. There appears to be some corroboration for this version. According to the evidence of Ms Tsidino there were commuters disembarking from the train at this occasion in the usual way. It would therefore not have been necessary for the plaintiff to forcefully open the doors as suggested elsewhere.

[21] According to the plaintiff the train was set in motion whilst he was still in the process of disembarking. He lost his balance but as he was still holding on to a metal rail, he was carried away by a moving train. He lost his grip and fell on the ballast stones next to the railway line. There is also some support for this version. It is common cause that the first report about what had transpired, was made to Ms Tsidino. She confirmed in cross-

examination the report of 22:35 in the occurrence book of the Joint Operation Centre was provided by her. The relevant part thereof reads as follows: "S/O Tsidilo ... reported that a male commuter alleges that he fell down while alighting from a moving train number 9471 at Winternest Train Station." It does not contain any reference of doors being opened forcefully or that he jumped out of a moving train. If this is what the plaintiff informed Ms Tsidino, why would he change his version minutes later, and explain how the doors were forcefully opened and that he then jumped from a moving train? Was there not perhaps confusion about where or at what station the doors were forcefully opened? I also keep in mind that self-corroboration (by means of a previous statement) is not possible. However, this previous statement was introduced in cross-examination by the defendant and it may be relevant to indicate that the plaintiffs version in court is not a recent fabrication.

[22] It is true that the plaintiffs evidence in Court differs materially from the version given by the defendant's witnesses (and as contained in the plaintiff's written statement). According to the latter version the

doors were forcefully opened and the plaintiff jumped from a moving train. Ms Tsidino testified that commuters were disembarking from this train at Winternest Station that night "in the usual way". If passengers could disembark "in the usual way", then the obvious question is why would the plaintiff not have used this opportunity to also disembark "in the usual way"? According to his evidence the doors opened momentarily by itself and he was in the process to disembark in the usual way while the train was still stationary. He could not proceed doing so as the train was then set in motion.

[23] The explanation that he jumped from a moving train should be considered in the context of all the undisputed facts. The incident happened at approximately 19h30 (or even later) when it was already dark. He fell on the ballast stones next to the railway line approximately 100 metres from the platform. The front part of the train (including the coach in which the plaintiff was travelling) had obviously by then already left the station. The plaintiff was at that stage already a middle-aged man of 46 years and was carrying two bags of stock for his business. What are the probabilities that he would have jumped from a moving train

under these circumstances? There is, in my view, only one answer: it is highly improbable. Taking a leap into darkness with two bags of stock from a moving train where there is no platform will not only cause serious injuries, but may also be fatal. This is the conduct one would expect of a drunk or mad man.

[24] On the other hand, the plaintiff has given a logical account of how he was injured. He did not contradict himself in any material respect and his version is not inherently improbable. I therefore have to conclude that the other version as alleged by the defendant's witnesses (and contained in the plaintiff's written statement) is so improbable that it cannot be

accepted. The plaintiff's version as explained in Court is the more probable one and I therefore accept his evidence in this regard.

NEGLIGENCE:

[25] I shall now consider the question of negligence. It involves a twofold enquiry. First, was the harm reasonably foreseeable? Second, would the diligens paterfamilias have taken reasonable steps to guard against such occurrence and did the employees of the defendant fail to take those steps? The answer to the first question is obvious. A person who is disembarking from a stationary train may be injured or even killed if that train is suddenly set in motion. The second leg of the enquiry relates to the reasonableness or otherwise of the defendant's

conduct. Generally speaking, the answer to the enquiry depends upon a consideration of all the relevant circumstances and involves a valued judgment which is to be made by balancing various competing considerations, including such factors as the degree or extent of the risk created by the conduct of the person concerned, the gravity of the possible consequences and the burden of eliminaitng the risk of harm (as per Scott JA in *Cape Metropolitan Council v Graham* 2001

(1) SA 1197 (SCA) at 1203, par 7).

[26] It has been pleaded in the particulars of claim that the train driver was negligent by setting the train in motion at a dangerous or inopportune time. With regard to the train guard it has been pleaded that he/she failed to warn passengers about the imminent departure of the train. It was also the evidence of the plaintiff that the train was set in motion whilst he was still in the process of disembarking. This clearly indicates that either the train guard was not performing her duties properly or the train driver failed to take into account the fact that passengers were still in the process of disembarking. Taking into account the gravity of the possible consequences, there is no doubt that this conduct amounts to negligence.

CAUSATION:

[27] The next question to be considered is whether this negligence caused the injuries sustained by the plaintiff. As far as causation is concerned, the following dictum in *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700E-G is apposite:

"It has been previously pointed out by this Court, in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as 'factual causation'. The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a cause sine qua non of the Joss in question ... On the other hand, demonstration that the wrongful act was a causa sine qua non of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote."

[28] As far as the first enquiry is concerned (the factual one) the plaintiff testified that as he was in the process of disembarking, the train was set in motion which caused him to lose his balance. He held onto a metal rail but lost his grip as a result whereof he fell on the ballast stones. If the sine qua non test is applied, it clearly demonstrates that the sudden movement of the train caused the plaintiff to lose his balance and ultimately to fall down. This factual cause is also not too remote. This negligent act of setting the train in motion at an inopportune moment is linked sufficiently closely or directly to what ultimately happened to the plaintiff.

[29] The last question to be considered is whether there is any contributory negligence on the plaintiff's side? It is clear that the plaintiff found himself suddenly in a state of emergency when the train started to move

forward. He lost his balance but held onto a metal rail probably in an attempt not to fall. He testified that this incident happened very quickly. It would be wrong for me to now follow an armchair approach and to criticise him for not taking alternative steps at an earlier stage. During argument counsel for the defendant was also unable to argue that the plaintiff was contributory negligent. I therefore conclude that the defendant is 100% liable to compensate the plaintiff for the injuries sustained.

ORDER:

In the result I make the following order:

(1) It is declared that the defendant is 100% liable to compensate the plaintiff for his proven or agreed damages sustained on 7 November

2014;

(2) The defendant is ordered to pay the plaintiff's party and party costs to date hereof.

D S FOURIE

JUDGE OF THE HIGH COURT

PRETORIA

Date: 10 August 2017

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