

SOUTH AFRICA / JUDGMENT

Sibisi v Passenger Rail Agency of South Africa (87452/2010) [2017] ZAGPPHC 514 (25 August 2017)

[2017] ZAGPPHC 514

COURT

North Gauteng High Court, Pretoria

BEFORE

Millar

CASE / FILE NUMBER

87452/2010

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INTHE

HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION PRETORIA DIVISION)

Case

No. 87452/2010

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In

the matter between:

MLUNGISI

NAPOLEON

SIBISI PLAINTIFF

and

PASSENGER

RAIL AGENCY OF SOUTH

AFRICA DEFENDANT

JUDGMENT**MILLAR, AJ**

1. This is an action for damages brought by the Plaintiff against the Defendant, the owner and operator of train services in the Gauteng Province.
2. At the commencement of the trial the Plaintiff applied for a separation of issues in terms of Rule 33(4) of the uniform rules for the issue of liability to be determined at this stage and with the determination of the issue of quantum of damages to be postponed sine die. The application was by agreement and I granted the order.
3. It was common cause between the parties that on 15 March 2010 and at approximately 15h00 and at the Longdale Railway Station, an incident occurred as a result of which the plaintiff sustained serious injuries.
4. The parties differed as to what precisely occurred during the incident. The plaintiff was the only witness called to testify in his case. The defendant called 4 witnesses.
5. The Plaintiff is a 26-year-old man whose first language is isiZulu. His evidence was translated into English by an interpreter. He testified that he was 20 years of age when the incident occurred. He had been travelling on a train from town and was homeward bound to the Mzimhlophe station. The train was crowded with commuters and he was forced to stand. He was standing near the door. When the train reached the Longdale station he was forced to make way so as to allow other commuters to disembark.
6. After people had disembarked the train had started to move and as he tried to get back on he was pushed and fell. He said he was trampled on and that other passengers had also fallen. Whilst the train was moving he realized that his trousers, the back of his trouser leg, had been caught on a part of the train and he was then dragged by the train to where the platform ends. He said that he had been dragged a long distance and that he had heard people screaming. He struck his head and the next thing he could recall was being in an ambulance.
7. The doors of the train had been open when this had occurred as there had been people blocking the doors. He stated that none of the other passengers who had fallen had fallen as he had and that he had not seen what had happened to them.
8. He admitted in cross examination that he was aware that the train had a guard who would give the driver the "all clear" but stated that he had not seen the guard on that day. He agreed with the proposition that if the guard had seen what he had described he would have realized it was a dangerous situation. He was unable to offer any explanation as to why the guard would have given the "all clear" in the circumstances.

9. It was put to the plaintiff that the defendant would lead evidence that the incident had not occurred as he had described but that the plaintiff had been injured as a result of being electrocuted and had sustained "burn wounds" while he was on top of the train. The plaintiff denied that he was on top of the train or that his injuries had been sustained through electrocution or that he had sustained any "burn wounds".
10. The plaintiff was shown the medico legal report of a Dr. F Liebenberg, who had examined him for medico legal purposes on behalf of the defendant and denied that the record of his injuries as recounted by him as being correct. The doctor had recorded that he had sustained inter alia burn wounds but he stated that he had told him about abrasions on his stomach.[1] He persisted in his denial that he had suffered any burn wounds despite also being shown the hospital record relating to his admission to Chris Hani Baragwanath Hospital on the day of the incident, which also record burn wounds [2] and also a contemporaneous note made by an employee of the defendant on the day in question.[3]
11. The defendant specifically put to the plaintiff that he had been "train surfing"[4] on the day in question. He denied this and any knowledge of what "train surfing" was and that anyone in the station had seen him on the top of the train.
12. The defendant's first witness was Mr. Bafana Johannes Radebe. Mr. Radebe's first language is also isiZulu and his evidence was also translated into English by an interpreter. He testified that on the day in question, he had been working as a security officer for Vusa- Isizwe, a company contracted by the defendant to provide security services at its premises.
13. He had been standing on the platform bridge, a bridge that straddles the railway tracks allowing commuters to cross safely from one side of the platform to another at the Longdale station.
14. He had been standing on the bridge with a colleague Mr. Malabola, when he had noticed a person lying on his stomach on the top of a train that was entering the station. He could not recall on which specific coach the person was lying but thought it was "somewhere near the middle of the train". He stated that he had then seen the person trying to stand up when he had touched live wires and had then seen the person "burning on top of the train". He had contacted his control to immediately advise them of the incident. By this time the train had come to a standstill and commuters on the platform had seen the person - the plaintiff on top of the train. The platform was busy and someone had climbed on top of the train to help the plaintiff there and had with the help of commuters taken him off the top of the train and put him on the platform. Due to the number of people, neither Mr. Radebe nor Mr. Malabola were able to get close to the plaintiff or to speak to him. The train was stationary at this time and never moved until after the plaintiff had been put onto the platform. Mr. Zitha of the defendant then arrived at the scene.

15. Mr. Radebe had made a statement on the day in question[5] and was cross examined at some length on the statement. The cross examination did not elicit what I regard to be any material contradictions between the evidence given in court and what was recorded in the statement.
16. The defendant's second witness was Mr. Moses Vinas Zitha. Mr. Zitha's first language is also isiZulu and his evidence was also translated into English by an interpreter. He testified that he was a Section Security Commander for the defendant and on the day in question, he had been on duty in his car in the vicinity of the Croesus railway station. He had received a call from control about an incident at the Langdale station and had gone there immediately. He testified that he had been in his car when he received the call and it had taken him a minute and a half to get there. He put the distance he travelled at about one kilometer.
17. When he arrived on the scene there were a lot of people on the platform and the train was stationary. He had been informed by

control that someone had been electrocuted on the top of the train and when he arrived there he saw someone lying on the top of the train.
18. He then described how he had thereafter seen the same person standing up and walking and being electrocuted. He then saw a commuter

climbing on top of the train and he shouted for him to get off. The person subsequently with the help of commuters brought the injured person to the platform. The person who had climbed on top of the train was a certain Mr. Bheki Tshabalala who was arrested for what he had done and subsequently released with a warning.
19. He prepared a report of the incident and confirmed that he had observed burn wounds on the plaintiff as he lay on the platform.[6] He too was adamant that the train did not move until the plaintiff had been safely brought down onto the platform.
20. Mr Zitha was cross-examined at some length on why he had testified that he had seen the Plaintiff being electrocuted but had not recorded this in the statement that he had made on the day. He was adamant that he had witnessed the plaintiff being electrocuted and readily conceded that he had omitted to record this in his statement.
21. The third witness called by the defendant was Mr Anthony Magani, a train driver whose first language is isiZulu and his evidence was also translated into English by an interpreter. He was the driver of the train in question. His evidence was that he had pulled into Longdale Station and passengers had disembarked and embarked.
22. He had received a signal from the train guard to proceed but noticed school girls outside the train shouting to him to stop. He put the emergency brakes of the train on and then stepped out of the train. He saw a person on the top of the locomotive which he drove. He described it as "the motor coach." He said he saw someone climb between the motor coach and the adjacent carriage and shouted to the person that they would help pull him out. The person

then stood up and staggered one way and then another and grabbed onto the "pantograph" which caused him to be electrocuted. He said there was fire and black smoke and the person then fell down and did not move again. He did not see the person who had been standing between the coaches again until he saw him being arrested.

23. The paramedics arrived and his recollection is that they were the ones who helped to remove the plaintiff from the roof of the train.
24. He was adamant that on the day in question the plaintiff had not been dragged by the train but had been electrocuted while on the roof of the train. His evidence was not disturbed in cross examination.
25. The fourth witness called by the defendant was Mr David Mubo, the now retired train guard whose first language is isiPedi and his evidence was also translated into English by an interpreter. His evidence was that on the day in question, he had given the signal to the train driver, Mr Magani, for the train to proceed. He was stationed at the back of the train 12 carriages away from the motor coach. When the train did not move, he looked out and could see that something was happening. He left the train and went towards the driver to find out why the train had not departed. There were many people on the platform and he described the situation at "chaotic" with some people screaming.
26. He described what he saw as a "movie". He saw a young man lying on the roof of the motor coach and as he was walking in that direction, the young man stood up, walked one way and then back again. He said that he saw him grab the pantograph and be electrocuted. He stated that after this had happened they had to wait for the paramedics and security and that the driver of the train had had to call Operations to let them know what had happened. The train only left between 40 and 45 minutes later after the plaintiff had been removed by the paramedics. His evidence was similarly not disturbed in cross-examination.
27. The crux of this case is whether or not the plaintiff was injured when he was dragged by the train as alleged by him or whether he was injured as a result of electrocution because he was on the roof of the train. It is only after this issue has been resolved, and then only if in favour of the plaintiff, that the issue of negligence would have to be determined.
28. The two versions presented to the Court are mutually destructive. The incident could only have occurred in one or other of the ways as testified to by the plaintiff alternatively the defendant's witnesses.
29. The approach to be adopted in cases such as the present one is set out in *Seshoka v Road Accident Fund* where the court held:

" [9] The correct approach to be adopted when dealing with mutually destructive versions was succinctly set out in the case of *National Employers General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440E-G, where Eksteen AJP said

"... Where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If, however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."

[10] The Supreme Court of Appeal, in the case of Stellenbosch Farmers Winery Group Ltd and Another v Martell Et Cie and Others 2003

(1) SA 11 (SCA) at 14/- 15 E, approved this approach saying:

"The technique generally employed by courts in resolving factual disputes of this nature may be conveniently summarised as follows. To come to a

conclusion

on the disputed issues the court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.

.. . 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 ..."

[11] The principle is therefore established that when there are mutually destructive versions before the court, the plaintiff's onus of proof can only be discharged if he establishes his case on a preponderance of probabilities. The principle is also established that the requirement that a court has to be satisfied that the plaintiff's version is true and that of the defendant false in order for the plaintiff to succeed in discharging his onus of proof, is only applicable in cases where there are no probabilities one way or the other. See African Eagle Life Assurance Co Ltd v Gainer 1980

(2) SA 324 (W)."[7]

30. I am unable to make any credibility findings against any of the witnesses who testified in the trial. All gave their evidence through an interpreter and gave their evidence in a forthright manner. The incident in question occurred more than 7 years ago. Two of the defendant's witnesses no longer work[8] for the defendant. None of the defendant's witnesses knew each other or the plaintiff before the incident and except for Mr. Magani and Mr. Budo who

worked on the same train they never saw each other again except for Mr Magani who testified that he had once seen Mr. Zitha at the Naledi Station. The determination of this case in my view is on which of the versions before the court is more probable.

31. Besides the testimony of the plaintiff, there is no evidence to support his version.

32. Counsel for the plaintiff submitted that the evidence of the defendant's witnesses was contrived and that they had deliberately

made up the evidence they presented. This was, so the submission went because of the similarities of the evidence in certain respects. All the defendant's witnesses testified that they had seen the plaintiff on the roof of the train on the day in question.

33. Their respective recollections as to the specific sequence of events and what they had personally seen differed. These differences were not in my view material. Besides the viva voce evidence of its witnesses, the defendant also tendered documentary evidence in the form of reports and statements created on the same day[9] and within a few hours of the incident, all of which confirmed and corroborated the viva voce evidence[10]. It was not put to any of the defendant's witnesses that they had conspired to create a version on the day "the temporal coincidence" between the incident at the station and the recording by Mr Zitha of his observation of burn wounds in his report

militates against a finding that the plaintiff's version is the more probable in question and I find on a conspectus of all the evidence led that it is highly improbable that they did so.¹¹

34. When weighed against the evidence of the defendant it seems probable and I find that the plaintiff was indeed on the roof of the train and electrocuted. Accordingly, it is not necessary for me to decide whether there was any negligence on the part of the defendant.

35. In the circumstances, I make the following order:

35.1 The plaintiff's claim is dismissed with costs.

A MILLAR

ACTING JUDGE OF THE HIGH COURT

HEARD ON: 23 24 AUGUST 2017

JUDGMENT

DELIVERED ON: 25 AUGUST 2017

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[1]Exhibit "A" - page 52 paragraph 3

[2]Exhibit "B" - page 2

[3] Exhibit "A" - page 21

[4]Train surfing (also known as train hopping or train hitching) is a type of parkour that is the act of hitching a ride on the outside of a moving train. tram or another rail transport. https://en.wikipedia.org/wiki/Train_surfing

[5]Exhibit "A" pages 10 - 11

[6]Exhibit "A" page 21

[7] Seshoka v Road Accident Fund (25868/10)[2011] ZAGPJHC 122 - paragraphs 9 11 quoted in full.

[8] Mr. Radebe and Mr. Mudo

[9] Exhibit "A" - see especially the Fault Report at page 21 and the Injury report drawn by Mr. Zitha at page 21

[10] see Burger v Union National South British Insurance Company 1975 (4) SA 72 (W) at 74 A

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