

SOUTH AFRICA / JUDGMENT

Zihori J v Passenger Rail Agency of South Africa (35192/18) [2021] ZAGPPHC 582 (8 September 2021) [2021] ZAGPPHC 582

COURT

North Gauteng High Court, Pretoria

BEFORE

N P Mngqibisa-Thusi

CASE / FILE NUMBER

35192/18

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

No.: 35192/18

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED.

08/09/2021

In

the matter between:

JUSTICE

ZIHORI

Plaintiff

and

PASSENGER

RAIL AGENCY OF SOUTH AFRICA

Defendant

JUDGMENT

MNGQIBISA-THUSI J

- [1] The plaintiff has instituted a claim for damages against the defendant, the Passenger Rail Agency of South Africa, arising from injuries sustained when he allegedly fell from a moving train operated by the defendant. The incident occurred on 11 July 2017.
- [2] The parties have agreed on a separation of merits and quantum and that the issue of quantum be postponed sine die.
- [3] The plaintiff alleges that he fell from a moving train as a result of the negligence of the defendant's employees failing to maintain its train and to ensure the safety of its passengers. It is the plaintiff's contention that he fell from a moving train travelling from the Mabopane train station to Kopanong station, before it reached the platform. As a result of the fall, he sustained fractures of the left tibia and fibula, and femur.
- [4] In its plea the defendant has denied any negligence on its part. In the alternative, the defendant has pleaded contributory negligence on the part of the plaintiff. Further in the alternative, the defendant has pleaded the defence of *volenti non fit injuria*.
- [5] It is the defendant's contention that the plaintiff was on board a non-passenger carrying train and sustained his injuries when he jumped out of a moving train when he realised that the train was not stopping at any of the stations it passed.
- [6] The dispute between the parties are the circumstances under which the plaintiff fell off a moving train and sustaining injuries. In the event that the court accepts the plaintiff's version as to circumstances under which he sustained his injuries, the next issue to be determined is whether there was negligence on the part of the defendant. In the event that the plaintiff's version as to how he sustained his injuries is rejected, the defendant is entitled to absolution from the instance, alternatively, the dismissal of the plaintiff's claim.
- [7] The defendant is responsible for the provision of commuter rail services in the country. Further, the Constitutional Court has confirmed that the defendant has a public duty to provide public rail transport in a safe manner[1].
- [8] In brief the plaintiff's evidence is as follows. On 11 July 2017 he was a passenger with a valid train ticket on a train travelling from Mabopane to Pretoria Station. Before the train reached the platform at the Kopanong station, some passengers from the back coaches of the train came through the coach he was in and as a result of the pressure from these passengers, he was pushed through an open train door and he fell off the train before it reached the platform. He alleges that he fell on top of a concrete slab that lay alongside the railway tracks. Plaintiff further testified that the train had no doors, windows or harnesses to hold on. According to the plaintiff, he does not remember what happened after he fell in that he woke up in hospital on 13 July

2017. He was confused and the nurses had explained what happened to him and gave him his belongings.
- [9] With reference to his further particulars where it is stated that he boarded the train between 15h00 and 15h30, the plaintiff testified that he must have lost time but does remember that the incident did not occur in the evening but during the day. He further testified that he arrived at the Mabopane station around 13h00. He further testified that even though he boarded the train about 13h20 or 13h30, the train only left Mabopane station between 15h00 and 15h30. Mabopane station is the last station and there were a lot of people disembarking and embarking on the train.
- [10] The plaintiff further testified that when he fell from the train, there were a number of people, including passengers on the train he was in, who saw him fall from the train but does not know if those people are the ones who called the ambulance as he alleges that after falling he became unconscious.
- [11] Under cross examination the plaintiff denied jumping off the train. He further denied that the incident occurred at the platform. According to the plaintiff the train took 40 minutes to travel between Mabopane and Kopanong stations. He denied speaking to Mr Edwin Jabulani Nkoane (a PRASA official) at the scene and telling him how he fell from the train. He further testified that the train stopped at each station it passed.
- [12] The plaintiff called Ms Alvina Matau Seshabela, a crew member at the Emergency Medical Services (EMS) who attended to the plaintiff at the scene and completed a patient report form. She testified as follows. On the day in question the EMS received a call at around 19h05 about an incident which was reported on platform 2, Kopanong Station. She and a colleague, Mr Molekwa, arrived at the scene at around 20h32 where they found the plaintiff lying on the ground next to the railway line. They also found some security officers. According to Ms Seshabela the report made to the EMS was that the incident happened at platform 2. However, when they arrived at platform 2, Kopanong station they did not find the plaintiff. They struggled to reach patient and they did not find patient at platform 2 and they were redirected as the location he was at was not easy to reach. They went back to the ambulance and left the station. They found the patient lying next to the railway line but a distance from the entrance. According to Ms Seshabela the distance between the platform and place where they found the plaintiff was about 100m.
- [13] Under cross examination Ms Seshabela testified that on arrival at the scene she had a discussion with the plaintiff who told her that he fell from a moving train. She confirmed that when she found the plaintiff, she was fully conscious without any medical history. Furthermore, Seshabela conceded that, taking into account the nature and severity of the plaintiff's injuries and the concomitant bleeding, it would be fatal if the plaintiff did not get medical assistance within a few hours after the incident.
- [14] After the testimony of Ms Seshabela, the plaintiff closed his case.

[15] On behalf of the defendant, Mr Edwin Jabulani Nkoane, Head of Security at PRASA whose main duties include the protection of assets of PRASA, patrolling and attending scenes where incidents have occurred. Nkoane testified as follows. On the day in question he reported for duty at 18h00. He was informed of the incident around 19h00. As he was around the area where the incident occurred, he went to the scene and found the plaintiff and two securities. He heard someone screaming at the platform but could not see who it was. He found the plaintiff lying on the platform and conscious. On speaking to the plaintiff he told him his name and country of origin. He further testified that the plaintiff told him that he boarded the train at Mabopane station and it did not stop at

Soshanguve. When he realised that it was not going to stop at Kopanong, he opened the doors while the train was in motion and decided to jump off the train. Nkoane further testified that he waited with the plaintiff for the ambulance to arrive and assisted

the EMS team to carry the plaintiff to the ambulance.

[16] Nkoane further testified that the last train travelling to Wolmerton and taking passengers, leaves Mabopane station at 19h15, and thereafter all other trains do not take passengers.

[17] Under cross examination Nkoane denied that the plaintiff fell before the platform and reiterated that the plaintiff was found on platform 2. Nkoane could not, however, tell what the inside condition of the train was as the plaintiff had alleged that the train he boarded had no doors, windows or overhead straps.

[18] The next witness to testify on behalf of the defendant was Mr Sibusiso Kekana, a sectional manager at PRASA, whose function is, amongst others, to monitor the movement of trains. Kekana testified that at around 19h05 he received a call from Centralised Train Control. Kekana testified that when he arrived at the scene he found two security officers and heard someone screaming at the platform, even though he could not see him. On investigation he found the plaintiff lying on platform 2 at Kopanong station. He testified Nkoane found him at the scene. According to Kekana, the plaintiff was conscious. He spoke to the plaintiff who told him his name and told him that he boarded a train at Mabopane train station. When he realised that the train was not going to stop at Kopanong

station, he opened the train doors and jumped off the train.

[19] Kekana testified that when the ambulance arrived at the scene, he helped in carrying the plaintiff to the ambulance which was parked in parking B which is situated outside the station.

[20] Under cross-examination, from the train driver's journal, Kekana identified the train the plaintiff could have been on as train number 9952. Kekana surmised that train number 9952 is the likely train the plaintiff boarded and fell from if one takes into account the time the EMS received the information about the occurrence of the incident in this matter. Further that his assumption that it might be the train number 9952, is based on the fact that that train does not stop at any of the stations it passes. Kekana also confirmed the evidence of

Nkoane as to where the plaintiff was found. According to Kekana trains leaving Mabopane station before 19h00 towards Wolmerton are usually empty and take approximately 6 minutes from Mabopane to Kopanong station. This is in

contrast with the plaintiff's evidence that the trip is about 40 minutes. Kekana was of the opinion that, taking into account the nature of injuries the plaintiff sustained, he would not have been able to move from the north to the southern side of the platform or get on the platform.

[21] It is common cause that:

21.1 on the day in question the plaintiff was on board a train;

21.2 he sustained his injuries as a result of falling off the train;

21.3 he was attended to by paramedics and was eventually taken to the hospital for treatment.

[22] The onus rests on the plaintiff to prove on a balance of probabilities that he sustained his injuries in the manner he alleges.

[23] As indicated above the material dispute between the parties is whether the plaintiff got off the train on his own volition while the train was in motion or whether the plaintiff was pushed by other commuters from a moving train.

[24] The court is confronted with two mutually destructive versions as to how the plaintiff sustained his injuries.

[25] In *National Employers' General Insurance Co Ltd v Jagers*[2] the court stated:

"... that in any civil case, as in any criminal case, the onus can ordinarily be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rest 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 probabilities favour the plaintiff, 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 more than they do the defendant's, 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."

[26] In *Stellenbosch Farmer's Winery Group Ltd and Another v Martell ET CIE and Others*[3], in confirming the approach in *Jagers* (above) the court stated that:

"[5] ... The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the

probabilities. As to (a), the court's finding on the credibility 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's 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 extracurial 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's 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. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail"[4].

[27] The plaintiff's version is that he had boarded a train at Mabopane station en route to Pretoria, around 15h00. He alleges that as the train approached the Kopanong station, there was a commotion inside the train and he was pushed out of the train as other passengers were pushing to prepare to disembark as soon as the train stopped. He further alleges that on falling he lost consciousness and woke up in hospital.

[28] On the other hand it is the defendant's contention that the plaintiff fell from the train when he jumped out while it was in motion when he realised that it was not going to stop at Kopanong station. Further that the plaintiff could not have been on the train he alleges he was on when one takes into account the time the emergency services were contacted about his plight. It is

the defendant's contention that it is likely, taking into account the time at which the plaintiff was found that the plaintiff

was on a non-passenger carrying train which does not stop on any of the station it passes on its way to the train bays in Wolmerton.

[29] The plaintiff was not an impressive witness particularly when one takes into account that when confronted with the inconsistencies found in his evidence in court and the information in further particulars he provided with regard to the time he boarded the train at Kopanong station and his alleged unconsciousness after the fall. Ms Seshabela, the plaintiff's witness testified that when she and her colleague reached the plaintiff where he

was lying, he was fully conscious and had a conversation with him. Ms Seshabela's evidence on this aspect is confirmed by the evidence of the defendant's two witnesses, Mr Nkoane and Mr Kekana who also testified that they found the plaintiff conscious and able to speak.

[30] Furthermore, taking into account that according to Ms Seshabela's evidence the EMS only received a call at 19:05 and that the EMS officers arrived at the scene around 20h32, and taking into account the plaintiff's version that he boarded the train in Mabopane around 14h00, it is improbable that the plaintiff would have survived or endured the injuries he sustained until the time the ambulance arrived. I find the plaintiff's evidence in this regard not plausible and am of the view that the defendant's version as to the train the plaintiff was on when he sustained his injuries was a later train which had no passengers who could have pushed the plaintiff out of the moving train. The plaintiff's version with regard to how he sustained his injuries is, under the circumstances highly improbable and ought to be rejected. It is probable that the plaintiff did board a non-passenger carrying train and when it was not stopping where he intended alighting, he choose to jump out of the train whilst it was in motion and injured himself.

[31] On the issue of whether the defendant could have been negligent in making it possible for the plaintiff to board a non-passenger carrying train, the plaintiff has not shown how the defendant could have prevented him from boarding this train. Further, by the mere fact that the plaintiff managed to board this particular train points to negligence on the part of the defendant in that it

should have foreseen people boarding its non-passenger carrying train and did not put sufficient security to prevent such an eventuality,

the fact that I have found that the plaintiff voluntarily jumped out of a moving train when he realised it was not going to stop at his intended destination, negates any wrongfulness on the part of the defendant. I am of the view that under these circumstances the defendant could not be said to have been negligent. I therefore come to the conclusion that the defendant's special plea of *volenti non fit injuria* ought to be upheld.

[32] In conclusion I am satisfied that the plaintiff has not, on a balance of probabilities, proven that the defendant is liable for the damage the plaintiff suffered as a result of the injuries sustained when he fell of the moving train.

[33] In the result the following order is made:

'The plaintiff's claim for damages against the defendant is dismissed with costs.'

N P MNGQIBISA-THUSI

Judge of the High Court

Date of hearing: 18 February 2021

Date of Judgment: 08 September 2021

Appearances

For plaintiff: Adv R Baloyi (instructed by Mahumani Incorporated)

For Defendant: Adv J G Cilliers SC (instructed by Stone Attorneys)

- [1] Rail Commuters Action Group v Transnet Ltd t/a Metrorail [2004] ZACC 20; 2005
- (2) SA 359 (CC) at para [84].
- [2] 1984(4) SA 437 (E) at 440D –G.
- [3] 2003
- (1) SA 11 (SCA).
- [4] In National Employers Mutual General Insurance Association v Gany 1931 AD 187 at 199 the court stated that: "Where there are two stories mutually destructive, before the onus is discharged, the Court must be

satisfied that the story of the litigant upon whom the onus rests is true and the other false. It is not enough to say that the story told by Clark is not satisfactory in every respect. It must be clear to the Court of first instance that the version of the litigant upon whom the onus rests is the true version and that in this case absolute reliance can be placed upon the story as told by A. Gany. ..."

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