

SOUTH AFRICA / JUDGMENT

Zulu v Passenger Rail Agency of South Africa (33073/2016) [2017] ZAGPPHC 468 (29 June 2017)

[2017] ZAGPPHC 468

COURT

North Gauteng High Court, Pretoria

BEFORE

Thobane

CASE / FILE NUMBER

33073/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 33073/2016

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

DATE:

29/06/2017

PATRICK

XOLANI

ZULU

APPLICANT

AND

PASSENGER

RAIL AGENCY OF SOUTH

AFRICA

RESPONDENT

JUDGMENT

THOBANE AJ,

Introduction

- [1] The plaintiff has instituted an action against the defendant for payment of the sum of R2 million. The plaintiff contends that the defendant is liable for the proven or agreed damages that the plaintiff suffered in that the defendant negligently caused the injuries the plaintiff sustained. The action is defendant by the defendant.
- [2] When the trial commenced the parties advised that it was agreed during the pre-trial conference that it would be convenient if the merits and quantum were severed. It was, in terms of Rule 33 (4) of the Uniform Rules of Court, ruled accordingly.

Plaintiffs case

- [3] Pratrack Xolani Zulu, the plaintiff, testifies as follows;

3.1. On 18 April 2014 at about 04h00 he proceeded to Saulsville Train Station intent on catching the 04h30 train to work. He was in possession of a monthly ticket.

3.2. He met his friend and colleague, Mr. Simelane, in front of the main entrance and they both entered the station. He observed that there were no ticket examiners at the entrance;

3.3. As they walked towards the train he saw only one PRASA security personnel whom he could not tell was male or female as he/

she was far;

3.4. Mr. Simelane entered the train first and at the time the door were open.

3.5. The train was fully packed. Because of this as soon as they entered using the front door, they stood by the door. At that time the train was stationary;

3.6. The train started moving while the doors thereof were being held by other people, to keep them open;

3.7. As the train was moving commuters were running towards it and one of them grabbed him on the shoulder whereupon he fell on the platform;

3.8. He remembers being under the train when it was moving. He crawled from underneath, after it had stopped and collapsed right there and as he put it, he fell right there and does not remember what happened thereafter;

3.9. His next memory was when he was being treated at the hospital after two weeks;

- [3] During cross examination it was put to him that he boarded the train without a ticket. This he disputed. He stated that he was 20cm inside the train when he was grabbed on the shoulder. He was not holding onto any thing but was talking to Mr Simelane. He did not see the person who grabbed him but remembers hearing footsteps coming towards the train prior to being grabbed. The version put to him was that he was never inside the train, but that he tried to board the train in between two coaches.
- [4] Siyabonga Simelane testified that he resides at the Saulsville Hostel. He arrived at Saulsville Station at about 04h25. He met up with the plaintiff at the entrance of the station and they both went inside. On entering they proceeded to platform 1. Most people had boarded the train and he saw one PRASA security guard whom he could not make out was male or female. The train was stationary and the doors thereof were open. The coach was fully packed. He entered the coach first and was followed by the plaintiff. As the train pulled away the plaintiff was grabbed on the shoulder and he fell. The doors of the coach were open because they were being held open by two individuals, one on each side. The train was then stopped while it had only moved about 3 meters or so. He got out of the train, as did most passengers and looked where the plaintiff had fallen. He observed that his body was under the train. He could only see his legs. He then saw him crawling from under the train on his stomach. He went to talk to him momentarily before he left to call an ambulance. He collected the plaintiff's belongings which included his lunch box as well as his phone. In the process he saw the plaintiff's train ticket. When he left, the plaintiff was still being attended by the ambulance personnel having been lifted from the tracks onto the platform.

Defendant's case

- [5] Ms. Pauline Moilwagotlhe testified that she is an employee of a company called R-1 Security Services, which is contracted to the defendant. Her duties, as a security guard, include the escorting of the train driver as well as the train guard. One of her duties also is to keep an eye on the platform and observe commuters before the train departs. On the day of the incident she had escorted the train driver from one end of the train to another. She then stood on the platform to satisfy herself that all passengers were on board. The train started to leave the platform and at that moment a person came running towards the train and tried to hold on to the iron rails situated in between coaches. He however fell and hit his head on the platform and he fell onto the tracks. When she got to platform 2 she found a young man injured at the back of his head and lying on the tracks. She screened to the train guard who in turn communicated with the trained driver. The train driver came over to her and they had a brief conversation. He then asked her to remove the body as he wanted to pull out with the train. Emergency personnel came and lifted the injured person on a stretcher onto platform 2.

[6] She testified further that she is not permitted to search commuter luggage. She asked two persons who were next to the injured person crying to bring his bags. On searching the bag what was found was the lunch box, a wallet with bank cards inside. There was no ticket. They then used torches

to search near the tracks as it was still dark and still the ticket could not be found.

[7] She was asked during cross examination about the training she received. She stated that she was not so clear on the rules and obligations as she only received minimal training. On observing an incident she reports to her controller, a Ms Mahlangu, who in turn reports to "JOC". She was referred to a statement signed by her and she confirmed that whereas she signed before one Mxwele he never gave a statement to him and never reported to him. She stated that she was made to sign a black statement twice and that she never was taken before a commissioner of oaths as the statement seems to suggest. She was referred to the fact that according to the statement she did not witness the incident and readily conceded that her version is not supported by the statement purportedly made by her. It was put to her that the personal items of the plaintiff which included the ticket were removed by Mr Simelane. She stated that she could not dispute this version. She could not dispute that the coach was full and people were standing closely next to each other, that the door was kept open by two individuals, that the train pulled out while the doors were open and that when the train pulled out the Plaintiff was 20cm inside the coach by the door.

[8] Ms. Makunga Veronica testified that she was in the employ of the defendant as a guard. One of her duties is to see and observe if commuters are safe prior to the departure of the train. She also checks if the doors of the train are closed or open prior to departure of the train. Every second year they have to undergo a refresher course in respect of her duties. On the day of the incident she was on duty. They arrived on a train from Bosman Station and as soon as they arrived she switched the train number from 9001 to 9000 because train number 9001 does not carry passengers. On arrival at Saulsville she switches off her lights and was escorted to the back of the train by a security guard called Mabasa. The train was departing at 04h30 and at that time she looked right and observed that there were no passengers, she got off the train and stood on the platform which was also clear of commuters, blew her whistle, got back on the train, pressed a bell to signal to the driver to depart, kept her head stuck out to observe outside and there and then, while the train was in motion, she saw a person running towards it from Customer Service. She then pressed her stop button three times to stop the train.

[9] At a distance he observed the guard who was escorting the train driver waving his hands up and down signaling to her to stop. After the train had stopped she then got off and went to the security guard who had stopped her who there and then informed her that there is a person who was trying to board the train in between coaches. The driver, who had gotten off the train also came to her to ask her what had happened and she explained what she saw. They later departed for

Pretoria Bosman Station and on arrival thereat, she reported the matter to her seniors. She stated that although she could not see from her coach if all the doors were closed, the pressure monitoring instrument, in her coach, showed that the doors were closed. She stated that most trains have stickers warning passengers not to board the train while it is in motion and also that modern trains have a continuing message informing passengers throughout their journey that they should not board or alight from a moving train.

[10] In cross examination she stated that in her mind the person that arrived late and was running towards the train is the same person that got injured although she did not see the injured person to avoid trauma. She was further referred to the fact that in the report she wrote after the incident she indicated that the person that got injured was "standing" between coaches. She conceded that what she saw was a person running towards the train but did not see him fall between the coaches. The version contained in the statement she made, to the effect that the person who got injured was standing in between coaches is in fact what she was told by the security guard on duty on the day. She stated that although she did give a statement and that although it purports to be under oath, she never gave a statement under oath. Various proposition were put to her which were in line with the plaintiffs case. While she noted them she also did not dispute them.

Evaluation

[11] There are two diametrically opposed versions before court. This calls for the principles set out in Stellenbosch Farmers Winery Group and Another v Martell et Cie and Others 2003 (1) SA 11 (SCA) where Nienaber JA set out the principles as follows;

"[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. 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.”
- [12] The plaintiff relies on various grounds of negligence in the particulars of claim. Each of the counsels argue that the court should find in their favour and reject the other's version. There three critical areas which I discern to be holding sway, which I continue deal with below.

The ticket

- [13] The defendant's pleaded case is that the plaintiff did not possess a valid train ticket on the day. It is submitted that this is consistent with the testimony of Ms. Moilwagotlhe whose testimony was to the effect that the personal belongings of the plaintiff were searched but that no ticket was found. Mr. Simelane testified that he found the ticket together with the lunch bag of the plaintiff. Ms. Mankge, for the defendant, is asking that I draw a negative inference because the original ticket was never discovered despite a notice to do so and that the discovered copy was of poor quality. Further that the date thereon was not clearly visible. The plaintiff contradicted himself, the argument continued, when he stated that he bought the ticket "month end" whereas the date on the ticket appears to be 1st April and therefore would have been bought "beginning of the month". To draw an inference as Ms Mankge has asked the court to do would be oversimplification of the matter. The evidence of Mr. Simelane was to the effect that he collected the train ticket after the incident together with the plaintiff's personal belongings and boarded the train. He stated that he later took all those belongings to the landlord of the plaintiff. It was not disputed that when the plaintiff and Mr. Simelane entered the Saulsville train station there were no ticket examiners at the entrance. The evidence of the defendant's witness is that there are usually no ticket examiners at that time of the morning although they are meant to be there. She stated that they arrive a few minutes later on weekends. This speaks to the lack of adequate measures to control the movement of commuters and to ensure that only those who possess valid train tickets are allowed onto trains.
- [14] The version of the plaintiff was that it was possible that he could have bought the ticket on 1 April as depicted on it. He stated that he used the ticket to travel from 1 April to 30 April. I do not find it improbable that Mr Simelane collected the plaintiff's belongings which included the train ticket where the plaintiff had fallen, got back on the train and left with it. The version of Mr Simelane about how he retrieved plaintiff's personal belongings was not disputed. In particular when Ms Moilwakgotlhe was cross examined it was put to her that the ticket and lunchbox was retrieved by Simelane, she replied that there were two people after the incident one of whom was short. It was possible, she conceded, that one of them could have taken the train ticket on the day. She stated however that the person who searched the plaintiff's bag found only his wallet and lunchbox. The version of Ms Moilwakgotlhe was not canvassed with Mr. Simelane to enable him to refute it. On the

probabilities, it is my finding that the plaintiff did have a valid ticket.

The open doors

- [15] The plaintiff and Mr Simelane corroborated one another about how they walked towards the train which was stationary and its doors open and how they boarded it. They further corroborated each other about how they stood once inside the train. In short they were inside the coach next to the door and behind them were two people who forcibly kept the door open, on plaintiff's version. The defendant's version to the effect that the doors of the train were closed when the train departed from the platform was not put to the plaintiff for him to comment on. It was only when the assistant train driver Ms Makunga testified that the version of the defendant was made known. According to her, she made sure that the doors were closed from her coach and observed the pressure gauge according to which the doors were closed. In answer to one of the clarifying questions by the court she indicated that it was possible the doors could have been open because she could not see all of them. She stated that when closing the doors she listens to the banging sound they make.
- [16] Ms Mankge argues that it is improbable that the plaintiff and Mr. Simelane could have entered the train and stand 15 to 20cm to the edge of the train with the doors thereof open. She contends there would not have been sufficient space. Both plaintiff and defendant demonstrated how they stood inside the train. They corroborated one another in that regard. I accept their evidence. In failing to ensure that all the doors of the train were closed when it departed from the station, the defendant was negligent.
- [17] There is ample case law dealing with open doors of the train while it is in motion. In the unreported case of *Maruka v Passenger Rail Agency of South Africa* (8905/2014) [2016] ZAGPPHC 213 (15 April 2016), the court found that the defendant did not rebut the plaintiff's contention that the train departed with its doors open. In the above case the plaintiff's claim was that he was pushed out of a moving train because of the shoving and pulling inside the train. As a result three passengers were pushed out of the train. He fell on the platform and was injured. The version of PRASA was that he was not even a passenger on the train. He however produced a ticket. The defendant has a duty when it comes to a train departing or moving train with its doors open. In *Mashongwa v PRASA* 2016 (3) SA 528 (CC), the duty of PRASA was much more better refined. The following dicta demonstrate the essence of such a duty;

"[44] Mr Mashongwa testified that the doors of the coach, out of which he was thrown, were left open from Walker Street to Rissik Street stations. To rebut this evidence, Ms Beauty Mothotsi, a former security guard who was on the Rissik station platform at the time of the incident, testified on behalf of PRASA. She said that the coach doors had been closed, but were forced open by the attackers at the time when they threw Mr Mashongwa out of the train. PRASA's technician, Mr Godfrey Raphadu, told the High Court that he had checked the doors 10 days prior to and 17 days after the incident. On both occasions they were fully

functional. Because the High Court rejected PRASA's versions and made a finding favourable to Mr Mashongwa, PRASA has urged us to revisit those findings.

[45] It is undesirable for this Court to second-guess the well-reasoned factual findings of the trial court. Only under certain circumstances may an appellate court interfere with the factual findings of a trial court. What constitutes those circumstances are a demonstrable and material misdirection and a finding that is clearly wrong.⁴⁴ Otherwise trial courts are best placed to make such findings.⁴⁵ The discussion will thus proceed on the basis that the coach doors were left open from the time Mr Mashongwa boarded the train until he was thrown out of it."

[18] The Constitutional Court dealt with the duty of PRASA towards its passengers in so far as the doors are concerned. The thrust of the judgment is that in failing to ensure that the doors were closed, PRASA failed in its duty.

Adequacy of security guards

[19] The deployment of adequate security personnel is also an issue that was adequately traversed in *Mashongwa v PRASA* supra. Ms. Mankge argued that the defendant took all reasonable steps to ensure the safety of passengers by employing more than one security guard on the day, and that the plaintiff's version that the defendant failed to take reasonable steps should be rejected. It is common cause that on the day there were two security guards on duty. Their primary duty seems to have been to escort the train driver and his assistant to the opposing ends of the train. As they do so, evidence shows that they would have at some point crossed paths. It is a given that their primary duty at the time is the safety of the train driver and the assistant. The entrance of the station was not manned. This is not disputed. In fact on the evidence of the defendant the staff responsible for manning the entrance and checking tickets would have reported for duty at 5h00, some 30 minutes after the train would have departed. Such measures are clearly inadequate.

[26] There are numerous troubling aspects of the version of the defendant. Those in my view, make the version of the defendant inherently unreliable. These aspects are accentuated when the mosaic of the evidence is looked at. They are the following;

26.1. The fact that witnesses were made to sign blank statements.

This means that it was possible for the defendant to formulate a version, having seen inculpatory evidence that was in existence at the time;

26.2. The fact that the witnesses were not taken to a commissioner of

oaths for purposes of administering the oath. In fact evidence suggests that the person who took the statements also administered the oath. What this means is that the said person took a blank statement to a witness to get it signed. The witness would sign it while blank and hand it back. He would then complete the statement and color it with his own facts and commission it. This is the case of fraud.

26.3. The fact that according to one of the versions the incident occurred on platform 1 and that the plaintiff was then "rolled" to platform 2;

26.4. The fact that Mabasa is listed as the person who witnessed and reported the incident. The testimony of Ms. Moilwagotlhe was to the effect that she reported the incident to her supervisor a Ms. Mahlangu who then would have reported to JOC. The tendered evidence shows that it is Mabasa who reported the case to JOC. Mabasa was not called to testify. Nowhere does it appear that Mahlangu reported the incident;

26.5. The fact that the version to the effect that the plaintiff tried to hold onto or grab the iron rails while the train was in motion, was not put to him, to enable him to comment on it;

26.6. The fact that the version to the effect that Ms. Moilwagotlhe saw an individual run was not in "her" written statement;

26.7. The fact that she saw an individual trying to board the train was not in "her" written statement;

26.8. The fact that Ms. Moilwagotlhe saw the plaintiff standing between coaches was not put to the plaintiff to enable him to comment thereon;

[27] I am therefore of the view, in light of what is stated above, that the plaintiff has discharged, successfully, the onus resting on him on a balance of probabilities. I further see no reason why costs can't follow the result.

[28] I therefore make the following order;

1. the defendant is liable for 100% of the plaintiff's proven or agreed damages;
2. the defendant to pay the costs.

SA THOBANE

ACTING JUDGE OF THE HIGH COURT

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