REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***21st October 2022*** Signature:

CASE NO: 43704/2012

DATE: 21ST OCTOBER 2022

In the matter between:

KOMAKO, LEFA VICTOR Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA Defendant

Coram: Adams J

Heard: 17, 18 and 20 October 2022

Delivered: 21 October 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 14:30 on 21 October 2022.

Summary: Law of Delict – damages – plaintiff falling off train and sustaining bodily injuries – he alleges that he was jostled off the train by fellow passengers in overcrowded coach – defendant avers that plaintiff was 'staff riding' between coaches and fell off – whether negligence on the part of rail agency established

– onus to establish negligence is on the claimant – versions of the parties mutually destructive – evaluation of probabilities.

ORDER

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(1) The plaintiff's claim is dismissed with costs.

JUDGMENT

Adams J:

[1]. On Monday, 23 January 2012, at about 07:30 in the morning, the plaintiff ('Mr Komako'), then 30 years old, was traveling on a train from Merafe station in Soweto on his way to work in Newlands. At Croesus station he fell from the moving train, as a result of which he sustained serious bodily injuries. In this action, Mr Komako claims damages from the defendant ('PRASA'), alleging that its negligence caused his injuries.

[2]. PRASA denies liability. It alleges that the incident in question was caused by Mr Komako's own actions in that he was traveling unlawfully outside the carriage between coaches as against inside of a coach. The case of PRASA is that Mr Komako was 'staff riding', which is a colloquialism denoting the act of riding a train by hanging onto the outside of a coach or riding on the roof or on the space between coaches. PRASA further alleges that Mr Komako was fully aware of the risks involved in travelling outside the passenger carrying carriages, and despite this knowledge, and whilst appreciating the risk, plaintiff had embarked on his journey on the train by travelling between coaches. PRASA's defence accordingly amounts to one of *volenti non fit iniuria*, in addition to being a denial of any negligence on its part.

[3]. At the commencement of the trial, it was indicated to the Court by the parties that, in their view, it would be convenient that the issue of liability and the quantum be separated. Accordingly, and by agreement between the parties,

I ordered that the issue of liability be heard first before other issues and the trial proceeded before me on a separated basis, with the quantum of the plaintiff's claim postponed *sine die*.

[4]. The main issue is whether Mr Komako has established that PRASA was negligent and whether such negligence caused his injuries. Crystallised further, the issue of dispute between the parties relates to whether or not the plaintiff was travelling legally as a fare paying passenger in one of the passenger carrying coaches or whether he was riding the train between the coaches.

[5]. It is Mr Komako's case that he was a passenger in one of PRASA's trains travelling from Merafe station to Newclare station, from where he would have made his way to work in Newlands. The plaintiff testified that the train on which he was travelling as a passenger was overcrowded and the doors remained open during the trip from Merafe station. The reason for this, so he explained, was probably due to the fact that the trains which were supposed to come before the train he boarded, probably did not arrive, which then meant that the latter train had to also cater for the extra passengers and the overflow from the other trains. At Croesus station, where it seemed to him that the train was not going to stop, he was pushed out through the open door by passengers, who became nervous by the fact that the train was not stopping at their destinations.

[6]. The defendant's version, as supported by a security guard, who was on duty on the day of the accident, and who testified that he saw Mr Komako riding between coaches when the train arrived at Croesus station, is that he was traveling not in a coach, but in the space between coaches. This version was furthermore supported by the evidence of a Senior Security Commander, a Ms Mashele, who was summoned to the scene by PRASA's Joint Operations Centre. On her arrival at the scene, she found that Mr Komako lying on the space between the railway tracks and the platform, half under the overhang of the platform. She confirmed – as did PRASA's other witness, the security guard, a Mr Matsobe – that the train involved in the incident was what they described as a 'one stop train', meaning that it was not carrying any passengers and was

not supposed to stop at any of the stations. She expressed the view that the said train was probably en route to the depot for running repairs.

[7]. Ms Mashele's evidence was furthermore that Mr Komako told her that he had been 'staff riding' when he fell of the train. She confirmed that he was in possession of a valid train ticket, which would have entitled him to travel lawfully on a PRASA train from Merafe to Newclare stations.

[8]. From the aforegoing, it is clear that *in casu* I am faced with two mutually destructive versions of the incident in question. The question is which one of these two stories should be accepted. A tendency generally by courts in resolving factual disputes of this nature is to be found in the case of *Stellenbosch Farmers' Winery Group Ltd and Another v Martell and Others*[1], in which the Supreme Court of Appeal (per Nienaber JA) explained how a court should resolve factual disputes. It was held 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 probability or improbability of each party's version on each of the disputed issues.

In light of the 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 a 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 equipoised probabilities prevail.'

[9]. Also in *National Employers' General Insurance Co Ltd v Jager*[2], the court remarked as follows:

'It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only 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 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

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1 *Stellenbosch Farmers' Winery Group Ltd and Another v Martell and Others* 2003 (1) SA 11 (SCA) at para 5;

2 *National Employers' General Insurance Co Ltd v Jager* 1984 (4) SA 437 (ECD) at 440D-441A;

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'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.

This view seems to me to be in general accordance with the views expressed by Coetzee J in *Koster Ko-operatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens (supra) and African Eagle Assurance Co Ltd v Cainer* (supra). I would merely stress however that when in such circumstances one talks about a plaintiff having discharged the onus which rested upon him on a balance of probabilities one really means that the court is satisfied on a balance of probabilities that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a court first to consider the question of credibility of the witnesses as the trial judge did in the present case, and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry. In fact, as l have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities.'

[10]. Lastly, in *Govan v Skidmore*[3], the Court held that, in trying the facts in a matter, one may, by balancing probabilities, select a conclusion which seems to be the more natural or plausible conclusion from amongst several conceivable ones, even though that conclusion may not be the only reasonable one.

[11]. As already indicated, I am here faced with two mutually destructive versions of the incident in question. The version of the plaintiff is irreconcilable with that of the defendant. Accepting the one means of necessity a rejection of the other.

[12]. In deciding where the truth lies, I have to have regard to the probabilities. And in that regard, there are a number of discrepancies in the evidence of

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3 *Govan v Skidmore* 1952 (1) SA 732 (N);

Mr Komako. So, for example, previously inconsistent statements by him were highlighted. His *viva voce* evidence was that the train did not stop at Croesus station, whereas in his particulars claim, it was stated that the incident happened when the train moved off from the said station. Also, in his narration to one of the experts, he stated that he was in fact pushed off the train by another passenger, who had lost his balance. There can be little doubt that these statements by Mr Komako – at different points in time since the incident – are materially contradictory, the one of the other.

[13]. What is more though is that, all things considered, the plaintiff's version seems to me to be an inherently improbable one. His version that he was pushed off the train onto the platform and then inexplicable landed on the space between the platform and the railway tracks, makes very little, if any sense. In my view, this sequence of events is a physical impossibility, especially if regard is had to the common cause fact that there would have been insufficient space between the train and the platform for a person to fall onto the floor beneath the platform. Moreover, his version that he was jostled out of the train onto the platform by other passengers, suggests that his momentum would have propelled him away from the train and not back towards the train. The sum total of the aforegoing is that the plaintiff's version is inherently improbable and for that reason alone, it stands to be rejected.

[14]. There are further inconsistencies and discrepancies in the version of the plaintiff, which, as submitted by Mr Opperman, who appeared on behalf of the defendant, do not explain how Mr Komako was the only passenger in the confusion, who fell off the train. In fact, no other commuters were injured in the incident. And, to add insult to the injury, no one else reported an incident as described by the plaintiff.

[15]. Contrast this with the version of PRASA, which has a ring of truth to it, not to speak of the fact that the two main witnesses corroborate each other in all of the material respects. In any event, to accept the plaintiff's version implies of necessity that the whole story by PRASA's witnesses is a fabrication. No such case was made out or could have been made out on behalf of the plaintiff.

During cross-examination no attempt was made to even begin to suggest a fabrication by these witnesses. Both of them witnesses impressed the Court as honest and forthright in the presentation of their evidence.

[16]. In my view, therefore, when one has regard to the probabilities in their totality, then the plaintiff's version should be rejected as false. I am of the view that, having regard to the evidence as a whole, the incident probably occurred in the manner narrated by the witnesses of PRASA and as pleaded by it. In those circumstances, there is simply no basis on which to draw the conclusion that PRASA was negligent. In my view to impose a duty of care on the said agency in such circumstances would be casting the duty wide and impractical.

[17]. For all of these reasons, the plaintiff's claim falls to be dismissed.

Costs

[18]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. I can think of no reason why I should deviate from this general rule.

[19]. The plaintiff should therefore be ordered to pay the defendant's costs of the action.

Order

[20]. Accordingly, I make the following order: -

(1) The plaintiff's claim is dismissed with costs.

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L R ADAMS
Judge of the High Court of South Africa
Gauteng Division, Johannesburg

HEARD ON:	17th, 18th and 20th October 2022
JUDGMENT DATE:	21st October 2022 – judgment handed down electronically
FOR THE PLAINTIFF:	Ms P T Khoanyane
INSTRUCTED BY:	Matela Sibanyoni & Associates Inc, Mondeor, Johannesburg
FOR THE DEFENDANT:	Advocate Francois F Opperman
INSTRUCTED BY:	Padi Attorneys, Houghton Estate, Johannesburg