IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

28/2/2019

DATE

SIGNATURE

Appeal Case No: A864/2016
Court *a quo* Case No: 37086/2013

In the matter between:

ANNAH NDAKANA Appellant

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA Respondent

JUDGMENT

Haupt, AJ

INTRODUCTION:

[1] The appellant, ANNAH NDAKANA, is appealing the whole of the judgment and order granted by Ranchod J on 27 May 2016. The appeal appeared before us, leave to appeal to the full court of this division having been granted to the appellant on 8 September 2016.

[2] The appeal emanates from a judgment and order granted against the appellant. The appellant instituted action for the payment of damages suffered by her. In her claim against the respondent (PRASA), she alleges that she suffered damages due to bodily injuries she sustained when she fell from one of the respondent's trains on 27 March 2012 at the Saulsville station.

[3] The respondent denied any wrongful conduct on the part of its employees and that the train was again set in motion after it had stopped at the Saulsville station. In summary, the respondent denied liability on the basis that (i) it denied that the incident occurred as described by the appellant; (ii) in the alternative, in the event of the court finding that the incident occurred as described by the appellant, it was caused by the negligence of the appellant and, (iii) it denied any causal link between the injuries sustained as alleged by the appellant and the action of its employees.

[4] The trial court found that the appellant had failed to discharge the onus to proof negligence on the part of the respondent's employees and granted absolution from the instance with costs.

[5] The essense of the appeal before us, is whether the evidence by the appellant and her witnesses, evaluated on a preponderance of probabilities would indicate that she fell from the train as a result of the respondent's negligence, or not.

FACTUAL BACKGROUND:

[6] The relevant factual background facts are largely undisputed and arose in the following circumstances.

[7] On 27 March 2012 the appellant adjourned early from school. She was not a regular train commuter. She decided on 27 March 2012 to take the train back to her home in Saulsville, instead of the bus which would only have arrived later.

[8] She was in possession of a valid train ticket. This was only the second time that she had travelled in a train.

[9] At Pretoria station the intended train was delayed and the appellant was only able to take a later train with number 9051 from Pretoria to Saulsville. The trip from Pretoria station to Saulsville station lasted just more than half an hour. The journey was uneventful. The train doors closed and opened as normal. When the train stopped the doors opened for passengers to disembark.

[10] The train was a 12 coach train, consisting of 9 normal/passenger and 3 motor coaches. The first, middle and last coaches are the motor coaches. The train driver was in the first (front) motor coach and the train guard in the last (back). The appellant was seated in the second last passenger coach.

[11] Saulsville station is the last station at which train number 9051 ends. Saulsville station is a "*turnaround*" station, in that when the train arrives at the station it cannot proceed any further as it is the end of the line and no further journey is possible beyond that station. This entails that when the train arrives at the turnaround station, the train driver and the train guard have to switch places. The train driver will therefore come from the front to the rear coach and the train guard will then go from the rear to the front

coach – this take about 5 minutes. Thereafter the train will then proceed in the opposite direction, back in the direction of Pretoria. Train number 9051 is the train that travels from Pretoria to Saulsville and 9050 is the train that leaves Saulsville to Pretoria. It is the same train, but different tracks.

[12] The incident occurred at about 14h22.

[13] The train driver on duty on the day of the incident was Mr. Prinsloo who has 43 years' experience as a train driver. The train guard on duty that day was Mr. Masimbuko. He has 8 years' experience as a train guard. The train driver and the train guard did not see where, how and when the appellant fell.

[14] I only deal with the evidence as far as it relates to the essence of the appeal before us. In summary, the appellant's evidence is that when the train stopped at Saulsville station, the passengers got up, the sliding doors opened and the passengers disembarked from the train. She began disembarking two to three minutes after the train had stopped, but then the train started to move forward again. At that moment she grabbed hold of the pole/railing next to the door in the train coach in an attempt to maintain her balance. Her body was already outside the train enabling her to notice a person waving a red flag at the back of the train who appeared to stand on the railway tracks. She heard a loud noise that sounded like a siren or hooter. It caused her to lose her grip. She fell between the platform and the train and was dragged by the train until she fell between the gap between the coaches. When the train stopped for the second time she was already under the train lying between the tracks. I do not deal with the evidence of her two corroborating witnesses, for the reasons as more fully dealt with later in this judgment.

[15] In summary, respondent's evidence as corroborated by both the train driver and the train guard is that the train did not move a second time

after it had stopped as Saulsville station on account of the fact that the entry speed of the train was very low (15km/h), there is a 12 coach mark on the platform, namely a yellow board with black letters clearly visible to the train driver and that is where the train stopped, Saulsville is a turnaround station and therefore the train could not move forward again and the platform length at Saulsville is so long that even if the train were to stop short of its assigned position, it would nevertheless still be fully in the platform and a repositioning of the train (i.e to move forward again) would be unnecessary.

[16] Both the train driver and train guard testified extensively pertaining to their respective duties and procedures before the train leaves and when it arrives at its destination. This includes the train doors that open by way of a hydraulic system that is clearly audible, the bell communication system between them, the procedure that is followed at Saulsville as a last station when the train driver and train guard exchange coaches and when flags, in particular red flags, are used. Their evidence was that a red flag will never be used in case of an emergency stop. A red flag will only be used by the train driver and/or train guard when the train has broken down, or the power is off or there is construction on the railway line. The train driver specifically testified that, in the event of an emergency stop, the train guard would pull the brake in his *"drive cab"*. Every motor coach has a *"drive cab"*. On the day of the incident, after the train had stopped and the doors opened, a security guard came to the train guard and informed him that a person has fallen. This happened immediately after the train had stopped. The train guard saw a person lying between the gap which is between the platform and the train.

[17] The train driver testified that when he got out of his motor coach, he saw a group of people standing at the end of the train and he was informed that a person had fallen. He saw a person (the appellant) who was sitting under the platform. Both the train guard and driver were adamant that the train, on the day of the incident, stopped only once and that it did not

move forward again, save for when the train driver received the necessary authority to move the train half a coach length forward in order to expose the appellant so that the paramedics could reach her. The appellant was adamant that the train had moved a second time.

PROCEEDINGS BEFORE THE TRIAL COURT:

[18] By agreement between the parties the trial only proceeded in respect of merits. At the commencement of the trial the respondent abandoned its alternative defences, based on contributory negligence as set out in sub-paragraphs 4.2.5, 4.2.8, 4.2.11 and 4.2.13 of its plea.

[19] The crux of the issue before the trial court was whether, after the train had stopped at Saulsville station, the train driver caused it to move forward again without prior warning and whilst the doors were open, causing the appellant who was in the process of disembarking the train, to lose her balance and fall down.

[20] When the matter came before Ranchod J, an order was granted, by agreement, in terms of Rule 33(4) separating the merits and quantum and postponing the determination of the quantum *sine die*.

[21] The only issue the trial court had to determine was whether the train moved for a second time after it had stopped at the Saulsville station.

[22] It was common cause that the onus of proof rested on the appellant.

[23] Three witnesses testified in support of the appellant's case, being the appellant and two fellow passengers (Mr. Masilwana and Mr. Lehabe). Mr. Masilwana sat in the same coach in which the appellant was travelling, but more to the back of the coach. Mr. Lehabe was a passenger in the coach in front of the coach in which the appellant was sitting.

[24] The train driver, Mr. Prinsloo and the train guard, Mr. Masimbuko on duty of the day of the incident, testified for the respondent.

[25] In summary, the appellant's case was that the train driver and/or or train guard were negligent by allowing the doors of the train coach to be opened at an inopportune moment and/or setting the train in motion, alternatively allowing the train to move without prior warning and whilst the doors of the train was still open. Furthermore it was argued that if it is accepted that the appellant was a passenger inside the train when arriving at Saulsville station, the question is how she came to fall when exiting and how did she end up under the last coach if the train had been stationary throughout?

[26] The appellant argued there was no evidence whatsoever tendered on behalf of the respondent to give an explanation on how she ended up under the last coach if the train had been stationary throughout, having regard to where she exited. The appellant's case is that on the probabilities the only explanation for her falling and eventually ending up under the last coach of the train, is that the train moved when she exited it.

JUDGMENT OF THE TRIAL COURT:

[27] In its judgment the trial court made the following findings:

[27.1] The appellant testified in chief and under cross-examination that she boarded the train at Pretoria at about 14h30 and that the journey took just over 30 minutes. Therefore the train arrived at Saulsville at about 15h00. This is inconsistent with the time of the incident at about 14h22, which was not in dispute.

[27.2] It seems improbable that it would take the appellant two to three minutes to get off the train at Saulsville in the absence of a

reasonable explanation given her testimony that she sat near to the exit door.

[27.3] Her testimony that she saw a person with a red flag standing on the railway track and it seemed that he was attempting to stop the train, seems improbable in that the person (presumably the train guard who had a red flag in his possession) would be standing on the tracks to stop the train moving forward where he is at the rear coach and the driver in the front coach.

[27.4] Her testimony was that when the train began moving forward again she let go of the pole she was holding onto while disembarking and she fell down. If her version is to be accepted, it begs the question why she did not keep holding on for then she probably would not have fallen down.

[27.5] The appellant's demeanour in the witness stand cannot be criticized. She was calm and gave her evidence in a "*fairly forthright manner*". She was adamant that the train moved forward whilst she was getting off.

[27.6] The appellant's two corroborating witnesses (Masilwane and Lehabe) were not reliable. Mr. Masilwane was not an impressive witness. He speculated and had no first-hand knowledge. Mr Lehabe's recollection of events further appears not to be reliable.

[27.7] The train guard, Mr. Masimbuko made a good impression as a witness. There was no contradiction in his evidence and he was calm and gave considered answers under a lengthy cross-examination. This finding refers to the train guard's evidence relating to the explanation of his duties when a train arrives at the station.

[27.8] The train driver, Mr. Prinsloo made overall a good impression as a witness and his evidence is reliable. This refers to the train driver's testimony regarding that on the day in question he had stopped the train, then got off to go to the back of the train as he was going to drive back to Pretoria. He did not move the train forward again after stopping except when the appellant had to be reached by the paramedics and then he only moved the train with the permission of the Central Train Control (CTC).

MERITS OF THE APPEAL:

[28] Before us, it was argued on behalf of the appellant that despite the inconsistencies and contradictions between the evidence of the appellant and her two corroborating witnesses (Masilwane and Lehabe), this does not taint the appellant's case in a fatal sense. It was contended that there was sufficient *prima facie* evidence to discharge the onus of proof and the only contradictory factual evidence on behalf of the respondent was a bare denial by the train driver and train guard that the train had moved again.

[29] Although the appellant agrees that the respondent has no burden of proof, it was argued that there is an obligation on the respondent to rebut the evidence of the appellant. It was further contended that the respondent's witnesses could not explain how the appellant would land under the last coach of the train after having exited the third coach without the train having moved.

[30] The primary thrust of the appeal against the judgment was that the trial court ignored the inherent probabilities. It was contended that her version on the probabilities was the only explanation for her falling from the train and eventually ending up under the last coach of the train, i.e that the train moved when she exited it and that there is no other inference to be drawn.

[31] The trial court was faced with two mutually destructive versions as to whether the train had moved forward again whilst the appellant was disembarking after having come to a stop. The technique to be applied in resolving factual disputes was confirmed by the Supreme Court of Appeal in **SFW Group Ltd and another v Martell *et ci* and others** 2003 (1) SA 11 (SCA) at 14, paragraph (5). To resolve factual disputes of this nature the court must make findings on (i) the credibility of the various factual witnesses; (ii) their reliability; and (iii) the probabilities.

[32] The trial court in applying the abovementioned technique found that the appellant did not discharge the onus to proof negligence on the part of the respondent's employees. I agree with the finding of the trial court.

[33] In the present matter the onus rested on the appellant to proof negligence on the balance of probabilities on the part of the respondent's employees, in this instance the train driver or the train guard or both of them, as they were the only persons who could have caused the train to move again after it had stopped.

[34] Onus of proof is a matter of substantive law.[1] The appellant therefore has to proof all the elements of her case.[2] If the train moved again after it had stopped, it follows that the respondent was negligent. If the train did not move again, there is no negligence on the part of the respondent. She alleged, and therefore had to proof, that the driver of the train and/or train guard was negligent in one or more of the following respects:

(i) That he caused the train to suddenly pull off without ensuring that it was safe to do so;

(ii) failed to exercise proper or adequate control over the train;

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1 Zeffert, Paizes, St.Q Skeen, The South African Law of Evidence (Butterworths) at 45

2 **Pillay v Krishna** 1946 AD 946 at 951-952

(iii) failed to keep a proper lookout; and

(iv) failed to prevent the incident when he was, with the exercise of reasonable care, in the position to do so.

[35] It is settled law that whilst the evidentiary burden may shift between parties dependent on the measure of proof furnished by the one party or the other, the onus never shifts from the party on whom it originally rested.[3]

[36] The evidence of the appellant on how the incident took place was not corroborated by her factual witnesses. I do not agree with the appellant's argument that although the evidence of Masilwane and Lehabe was not satisfactory in all respects, their evidence remain untainted that the train moved again. A court cannot decide a case in light of inferences which arise only from selected facts considered in isolation, nor follow an approach resulting in a cherry picking of evidence and a piecemeal process of reasoning when weighing up the evidence as a whole of a witness.[4]

[37] The evidence of the corroborating witnesses taken as a whole is irreconcilable with the appellant's evidence on how the incident occurred. To illustrate, Masilwane testified that when the train moved again, the train doors closed trapping the appellant's leg. Mr Lehabe was sitting in a different coach and he did not see the appellant falling from the train. He disembarked the train in under a minute, whereas it took the appellant, who was sitting close to the door, two to three minutes. Furthermore, he was already on his way to the station exit when the incident occurred. In my view their evidence taken as a whole, has no evidentiary value due to

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3 **South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd** 1977 (3) SA 534 (A) at 548

4 **R v Sacco** 1958(2) SA 349 (N) at 353; Schwikkard, Van der Merwe, Principles of Evidence (2nd edition) (Juta) at 495-496

the inherent inconsistencies and contradictions. I agree with the finding of the trial court that their evidence is neither credible nor reliable.

[38] As the onus was on the appellant it was not for the respondent to explain what happened on the day of the incident or give alternatives to what might have happened. I do not agree with the appellant's contention that there was a mere bare denial by the respondent regarding the second movement of the train. Only two persons could have caused the train to move, i.e the train driver or the train guard signalling the driver to continue. The respondent did not merely, in my view, give a bare denial if regard is had to the evidence of the train driver and the train guard regarding the procedure and protocol that was followed on the particular day and more specifically that Saulsville is a turnaround station and the processes that are followed when there is an emergency stop and the three bell system signalling to commuters that they can disembark.

[39] In my view the version of the train driver and train guard is more probable and show to the inherent improbability of the appellant's evidence of a red flag that was waived which she saw whilst still clutching to the pole or that she heard a sound similar to a siren when she fell. Having regard to the evidence of the train driver and train guard taken as a whole, it is clear that a red flag is not used in a situation of an emergency stop as argued on the version of the appellant.

[40] Both the train driver and the train guard were consistent and steadfast in their evidence which corroborated each other pertaining to the evidence to what had happened prior to arriving at the Saulsville station and that they parked at the designated 12 coach mark. When considering their testimony as a whole, why the train did not move a second time, the respondent has provided, in my view sufficient evidence to neutralise a *prima facie* case – that is if it is accepted that the appellant had made out such a case. The entry speed of the train was very low when it approached the station (15km/h), the train stopped at the yellow board

with black letters clearly visible to the train driver marked "*12 coach mark*" platform, Saulsville station is a turnaround station and therefore the end of the route and the length of the platform at Saulsville is so long that even if a train were to stop short of its assigned position, it would nevertheless still be fully in the platform and a re-positioning of the train would be unnecessary.

[41] No evidence was placed before the trial court on behalf of the appellant that the train had to be re-positioned as it was not properly on the platform. The evidence before the trial court was that it was an uneventful journey and when the train stopped, the doors opened and the passengers started disembarking. Therefore on the probabilities there was no reason to move the train deeper into the platform as the evidence taken as a whole show that when the train stopped, it was parked in such a manner that the passengers could disembark without difficulty.

[42] The appellant contends that the probabilities favour her version in that when the train moved again she fell and she was dragged along by the train and the train kept on moving until the gap between the coaches reached the appellant when she fell down from the platform, landing on her version, underneath the train between the wheels of the last coach. The appellant further contends that the only inference to be drawn is that the appellant would not have landed under the last coach, if the train did not move a second time whilst she was exiting the third last coach.

[43] The evidence before the trial court was that the space between the train and the platform was very limited (8-10 cm). The appellant argued that the only logical explanation of how she ended up under the last coach of the train, was to accept her version that when she exited the third last coach the train moved again. The authorities indicate that inferences must be carefully distinguished from conjecture and speculation and that

no inferences can be drawn unless there are objective facts from which to infer other facts which it is sought to establish.[5]

[44] The court is not entitled to speculate on the possible existence of other facts, it must stay within the four corners of the proved facts.[6] It was not for the trial court to speculate on how the appellant landed underneath the last train coach. She must proof her case. She provided no factual or expert evidence or even photographs regarding the length of the coach, where the door was situated from which she exited the coach, the spaces between the coaches or whether the train was at the platform or not, to support the inference the appellant wishes the court to make having regard to the probabilities. If there are no positive facts from which the inference can be made, the method of inference fails and what is left is mere speculation and conjecture.[7]

[45] The respondent's witnesses did not see how the incident occurred and therefore they could not speculate on how the appellant fell and came to land under the train. Their testimony is directly related to whether or not they were negligent as alleged by the appellant. In applying the technique laid down in **SFW Group** *supra*, the version of the appellant, in my view, is improbable. If the appellant's evidence is to be accepted that the train moved again and she tried to hold on, lost her grip, was trapped between the platform and the train, was dragged along and eventually fell between the coaches and ended up under the train inside the railway tracks between the wheels of the train, it is improbable that the appellant would not have been run over by the train, alternatively fatally injured given her testimony that the train kept on moving.

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5 **Casswell v Powell Duffryn Associated Collaries Ltd** 1939 (3) All ER 722 at 733; **S v Essack** 1974 (1) SA 1 (A) at 6; Principles of Evidence *supra* at 496

6 Principles of Evidence *supra* at 496 and the reference to authorities in footnotes 14 and 15

7 **De Wet v President Versekeringsmaatskappy Bpk** 1978 (3) SA 495 (C) at 500

[46] The train driver and train guard both testified that it was not possible for the train to have moved forward in order to expose the appellant if she was lying under the train on/or between the tracks or wheels. They are prohibited from moving the train when a person is lying under a train on the tracks as the train is low and when the train moves it would either seriously injure or kill the person lying under the train. In my view the probabilities favour the version on behalf of the respondent in that the appellant was underneath the platform and not underneath the train.

[47] In my view the version of the appellant contains various inherent improbabilities. In contrast to the appellant's evidence and the contradictory evidence of her collaborating witnesses, the evidence by the train driver and train guard was, without contradictions or inherent improbabilities. I agree with the findings of the trial court in this regard. In my view on a closer examination of the evidence and having regard to the test regarding the reliability of the evidence, the credibility of the witnesses and the probabilities, the appellant failed to discharge the onus of proof.

[48] Counsel on behalf of the respondent indicated that in the event of the appeal being dismissed, the respondent shall not seek to enforce any costs order granted.

ORDER:

[49] The following order is made:

1. The appeal is dismissed;

2. Each party to pay it's own costs.

L C HAUPT (AJ)
Acting Judge of the High Court

I agree and it is so ordered.

R G TOLMAY
Judge of the High Court

I agree and it is so ordered.

D NAIR
Acting Judge of the High Court

I agree and it is so ordered.

HEARD ON:	7 November 2018
DATE OF JUDGMENT:	___ February 2019
APPELLANTS' COUNSEL:	Adv N F de Jager
RESPONDENT'S COUNSEL:	Adv S M Tisani
APPELLANTS' ATTORNEY:	Gert Nel Inc.
RESPONDENTS' ATTORNEYS:	Diale Mogashoa Attorneys