

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 25800/2016

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHERS JUDGES: NO
- (3) REVISED

SIGNATURE

...03 AUGUST 2022

DATE

In the matter between:

MOTAUNG: TSHOMARELO

Plaintiff

And

PASSENGER RAIL AGENCY OF SOUTH AFRICA(PRASA)

Defendant

JUDGEMENT

NDLOKOVANE AJ

INTRODUCTION

[1.] The plaintiff, Mr. Motaung is suing the defendant for compensation for damages to the amount of R1 320 000.00 (one million three hundred and twenty thousand rand), with interest thereon and costs of suit consequent upon the injuries he sustained while he was a ticket bearing passenger in the train of the Defendant on 06 May 2015. His claim is that he was pushed from a moving train as it approached Mabopane Station by other commuters, who first robbed him of his cell phone and watch, as a result of which he sustained multiple injuries on his body. The defendant opposes the claim on the simple basis that it was not liable for whatever injuries the plaintiff might have sustained on that day.

[2.] The parties agreed at the inception of trial that liability is to be determined first with the issue of *quantum*, if any, standing over for later consideration.

EVIDENCE:

Plaintiff's version:

[3]. The plaintiff testimony is succinctly summarised in his heads of arguments as follows:

"The plaintiff testified that he was residing at 3640 Block B, Mabopane in 2015; that in 2015, he was a full- time student registered for the BSc Extended Program at the University of Pretoria ("the University"); that the extended program entails that a student is registered for the first semester and after the conclusion of the semester, such student will decide which discipline to register for; that the Plaintiff intended to pursue studies in the field of Medicine.

The plaintiff further testified that he made use of Metrorail trains to commute in the morning and in the afternoon to the University and back; that in the morning, he would catch a Metrorail train at Soshanguve Train Station and

then alight at Pretoria B Station where he would take a train to Loftus Versveld Train Station; that he would disembark at Loftus Versveld Train Station and catch the University campus bus to Mamelodi campus of the University where the lectures for the BSc Extended Program were held on Tuesdays and Wednesdays, the daily program at Mamelodi campus would end at 17h00 and that he would then catch the University campus bus to the University; that the incident that led to the institution of the action against the defendant fell on a Wednesday; that on the date of the incident, he got into the University campus bus at Mamelodi campus at 17h30.

The plaintiff also testified that the University campus bus took about 45 minutes to arrive at main campus of the University; that he walked to Loftus Versveld where he received the news that trains were not running on schedule and/or that they were delayed; that he got into a train that proceeded to Pretoria B Train Station. That it was further announced that the trains from Pretoria B to Mabopane were running late; that he was still standing in the train.

He testified about the layout of the train coach and the fact that a coach has two segments which are divided by the exit doors; that the train proceeded to Wolmerton Train Station where more people disembarked from the train. Further that at Winternest train station more than half of the commuters in his segment of the coach got off and he managed to take an unoccupied seat in the train; that pursuant to taking a seat in the train, he took out a textbook and studied. He testified that the reason that he took out the textbook to study was that it was during a week where he was writing a semester test and further that it was already after 21h00, and that he would not have time to study at home. He testified that he was seated next to the door that cut into the segment of the coach; that two of the guys that got into the train at Pretoria North Train Station got into the segment where he was seated and that he recognized one of those persons in that such person was wearing a bright sweater which was orange in colour.

The plaintiff further testified that those persons were in a conversation or continued to have a conversation and that the train proceeded to Akasiaboom Train Station; that after Akasiaboom Train Station, the remaining people in the segment of the coach where he was seated were three (3), being the two gentleman who got into the train at Pretoria North Station and himself; that after Kopanong Train station the two gentlemen who were seated diagonal to him, stood up and walked towards him and occupied a seat next to him that he became uncomfortable and that he put his book that he was studying from inside his bag which he carried on his back; that the reason he became uncomfortable was that there were only three people in that segment of a coach and that there were a plethora of seats and that he found it strange that the two-gentleman decided to seat next to him.

The plaintiff testified that the gentleman demanded his watch and his phone and he complied and gave the items to them; that one gentleman who was seated in the other segment of the train proceeded towards them and he overheard the conversation between such gentleman and the two assailants to the effect that the Plaintiff is a student, and they should check if he has a laptop in his bag; that the reason that they discovered that he was a student, is that he was carrying and student card which was hanging from his neck in the ticket holder; that he stood up as he intended to move to the next coach of the train where there was a church service; that one of the three men saw as he was moving and told the others that he was going to report to the other commuters in the nearest coach. He was pulled back from behind by one of the assailants, jerked forward and then pushed out of a moving train.

He was shown a copy of the train ticket by his counsel, and he confirmed that such train ticket together with the two expired tickets that were found in his possession were those that he had in possession on the date of the incident. The copy of the train tickets were handed in as exhibit "A". He confirmed that the train ticket was affixed and closed in the holder of the student card; that he had no wallet in his possession and that the only other items in his bag was a scientific calculator, which he testified that he was going to use to write the test the next day.

He testified in respect of the train ticket, that a friend of his who attended the same church with him was responsible for buying a train ticket for him and furthermore he testified about the difference in respect of the destinations in those train tickets being Rissik Street and Loftus Versveld. He testified that he woke up in hospital and he did not recall what happened subsequent to being pushed from the train and how he was taken to George Mukhari Hospital. A case was opened on 12 May 2015. A copy of such docket was handed in as exhibit "B".

He testified that he was accompanied by his Aunt Tsholofelo Segone/ Ditinti in opening such case at Pretoria North Police Station. He further testified that as at the time when he opened such case docket, he was still hospitalised and that his aunt took him to Pretoria North Police Station to open the case and took him back to hospital; that he "blacked out" and he cannot remember some of the details of the incident and that his aunt was filler in respect of some of the details of the incident that occurred. He testified that the injuries that he sustained included, amongst others, head injuries, injuries to his forehead, laceration on his side and in that he lost seven of his teeth. He testified that the phone that he lost was a Nokia 5210; that he was discharged from hospital on 25 May 2015 and that was the testimony of the Plaintiff.

The plaintiff was cross- examined by Counsel for the defendant. The following aspects stood out during such cross-examination: He was asked about who took him to George Mukhari Hospital and he testified that he did not remember. He was further asked about the fact that he gave the cell number of his aunt to the security officers at Soshanguve Train Station, and his answer was that he does not remember giving his number to the security and what happened to him and further that he was unable to speak. He was asked about his recollection of the events pursuant to being pushed out of the train, and his response was that he does not remember speaking to the security officers. He was asked about sub-paragraph 6.3 of the Particulars of Claim wherein it is alleged that the doors of the moving train were opened by the assailants and that this differed from the testimony in that according to his

testimony the doors of this train were open from the moment that such train left the Pretoria B train station. It was put to him that he only remembers a version that supports his case and he does not remember a version that is contrary to this case. Pursuant to the conclusion of the cross-examination and re-examination, the plaintiff was asked few questions by the Court relating to his academic progress. He testified that he was a first-year student in 2015 and that he is now a university drop out since 2020; that the reason that he dropped out was that he "got stuck" in the first-year courses; that he was academically excluded in 2016, however, some of his lecturers wrote letters to his bursary".

Defendant's version:

[4]. Likewise, the evidence of the defendant's witness was succinctly summarised in the plaintiff's heads of arguments as follows:

"He testified that he received a call from the joint operation centre dispatching him to attend to an injured person at Soshanguve Train Station; that he proceeded to the train station using the tarred road and that on his arrival he spoke to the ticket examiners who directed him to where the security officers were; that he was directed to the end of platform where the security officers and some of the commuters were attending to the injured person (the plaintiff); that the injured person was carrying a school bag and that he was in possession of student card as well as train ticket and that the injured person had visible head injuries; that his clothes were covered with blood which had stains indicating that such blood was not fresh. Furthermore, the injured person was injured on his mouth where blood was still coming out; that he interviewed the injured person and that such person advised him that he woke up next to the railway tracks and he does not remember what happened to him; that the injured person gave him the numbers of his aunt and further that he spoke to the aunt of the plaintiff who told him that she last saw the injured person in the morning of 06 May 2015 when the injured person went to the University; that he summoned an ambulance which took the injured person to the clinic in Block B Soshanguve.

The defendant's witness was cross-examined, and the following aspects stood out: Mr Nema kundani conceded that the plaintiff had a valid train ticket, and that in his statement as well as in the occurrence register the details of such train ticket are fully delineated'. He was asked why the defendant would deny that the plaintiff had a valid train ticket whilst the testimony of its witness contradict such. He testified that he does not know. It was further put to him that there is no version of the defendant which was put to the plaintiff's witness and that the only aspect which comes closer to the defendant's version was that the plaintiff came from the side of Mabopane. The witness did not have an answer. He was furthermore asked about the statements of the two security officers who were on duty being, Ms Catherine Maphoto and Ms Joyce Balaseng Leballo, the first security officers who attended to the plaintiff; that those security officers stated that the plaintiff approached them and that there is no reference to the plaintiff being brought by the commuters to the security officers. His answer was that he does not know the State of mind of the plaintiff as at the time he had an encounter with him. He was asked about the inscription on Case line 7-31, where it is recorded that the plaintiff was "very confused". The witness seems to distance himself from the fact that the plaintiff was very confused. In his testimony in chief, he seems to be saying that the plaintiff was confused but he could not admit that the plaintiff was very confused. The debate ensued with plaintiff's Counsel in respect of the meaning of confused and disorientation. The witness was further asked questions about the placing of security officers in the trains. His answer was the defendant only assigns security officers to trains in the event that complaints are received from commuters. Further that even at night no security officers are placed in the trains. It was put to the defendant's witness that he does not know as a fact that the plaintiff was robbed of his watch and phone and thrown out of the moving train. He admitted that he cannot dispute the fact that the plaintiff was robbed and pushed out of the moving train. The plaintiff's version was put to the witness, and he did not have answers to what was put to him. In particular, it was put to him that the defendant failed to ensure the safety of the Plaintiff on a train on the night on the incident".

SUBMISSIONS

[5] The plaintiff submits that the defendant relied on the evidence of Mr. Lufuno Henry Nematikundani, the Protection Official at PRASA stationed at Mabopane. According to the plaintiff, Nematikundani was an argumentative witness, who disassociated himself with recorded state of mind of the plaintiff on the date of the incident i.e., that he was very confused. He failed to accept and concede that the plaintiff was very confused, and this fact was recorded in the defendant's own occurrence register. The plaintiff's submission was that this went to the credibility of the defendant's witness. Secondly, the defendant's witness did not shed any light on how the incident concerned occurred or rebut the evidence of the plaintiff in that regard. Therefore, the plaintiff's evidence with regards to the robbery and being thrown out of the moving train stands unchallenged, so the plaintiff's submissions goes.

THE APPLICABLE CASE LAW

[6.] The Constitutional Court in the case of ***Rail Commuters Action Group v Transnet Ltd t/a Metrorail***, stated that PRASA has a public duty to provide public rail transport in a safe manner¹. The plaintiff bears the onus of proving that in the present case, that duty was not discharged and fell short of what the reasonable rail provider would have done to ensure commuter safety in the circumstances (***Kruger v Coetzee*** 1966(2) SA 428(A)).

[7.] Each case will depend on its own facts but, in ***Mokwena v South African Rail Commuter Corporation Limited and Another***² Satchwell J was prepared to adopt a robust approach and accepted that on the basis of evidence tendered in several other matters, that where there was evidence which established that a plaintiff was injured when pushed out of a moving train when the doors were not closed, this *ipso facto* meant that the railway authority was negligent, it being accepted that there was a duty of care to ensure that the doors were not opened when the train was in motion, which duty was readily discharged by putting reasonable controls in place.

¹ 2005(2) SA 359 (CC).

² (14465/2010) [2012] ZAGPJHC 133 (14 June 2012)

[8.] On this basis, in the case of ***Loveness Mhlongo v Passenger Rail Agency of South Africa*** where it was found that the plaintiff was pushed out of the open doors of a carriage whilst the train was in motion, negligence was readily found to have been established ³.

[9.] However, on the other hand, in ***South African Rail Commuter Corporation Ltd v Thwala*** (661/2011 ZASCA 170) Maya JA made it clear that:

“It seems to me that once the Court accepted that the train was stationary when the Respondent disembarked and the accident occurred, that should be the end of the respondent’s case...that only a finding that the train was in motion when the respondent was pushed and fell would give rise to liability”.

EVALUATION

[10.] Through its evidence the plaintiff alleged that the defendant and/or its employee(s) were negligent, *inter alia*, as follows:

- (a) They failed to keep a proper lookout.
- (b) They signaled to the driver that it was safe to set the train in motion with its doors open.
- (c) They failed to pay due regard to the safety of passengers on board the train.
- (d) They failed to prevent the said accident when, by exercise of reasonable care he could and should have done so.

[11.] The defendant denies that it or its employees were negligent in anyone of the allegations in paragraph 7 of the plaintiff’s particulars of claim, the defendant further

³ 20594/2014) [2016] ZAGPJHC353 (15 December 2016)

pleads that the accident was caused because of the sole negligence of the plaintiff who was negligent in one or more of the following:

- “(a) He stood at the open door of a moving train which posed danger to himself at that moment.*
- (b) He failed to take any or adequate steps to prevent the accident, when by the exercise of a reasonable care he could, and should have done so.*
- (c) He voluntary got into an overcrowded train where there was no space for anyone to get into the train.*
- (d) He forced the doors of the train to open before the train could stop and the operator opening the door, by so doing posing danger to himself and other members of the public.”*

[12.] The claim of the plaintiff is premised on the alleged negligence of the employees of the defendant. The test by which delictual liability is determined has become trite. It involves, depending upon the circumstances of each case, the questions whether:

- (a) a reasonable person in the defendant's position would foresee the reasonable possibility of his or her conduct causing harm resulting in patrimonial loss to another.
- (b) would take reasonable steps to avert the risk of such harm; and
- (c) the defendant failed to take such steps.

[13.] The evidential onus to prove negligence rests on the plaintiff and it requires more than merely proving that harm to others was reasonably foreseeable and that a reasonable person would probably have taken measures to avert the risk of such harm. The plaintiff must adduce evidence as to the reasonable measures which could have been taken to prevent or minimize the risk of harm.

[14.] Briefly, the evidence of the parties appears to be mutually destructive as it cannot co-exist. A closer examination of it reveals otherwise. The version of the plaintiff is constituted of direct evidence of what he says he experienced on the day

in question. That of the defendant is circumstantial, in that its witnesses did not witness the alleged incident. They seek to surmise from how they usually executed their duties and then dispute the version of the Plaintiff. Mr. Nematikundani correctly conceded that he did not witness the incident as he was the Protection officer who was called on the scene after the fact. His evidence was that when he saw the plaintiff lying near the platform the train had already left the platform. However, he conceded the train ticket he found on the plaintiff.

[15.] Commenting in general on how the plaintiff testified, the plaintiff's evidence was straightforward in respect of the way he alleged the incident happened. The two contradictions he then referred to are essentially of no consequence as it was the defendant's version that the plaintiff was lying on the platform and not on the rail. The issue of the exact time when this incidence took place was never indicated to be decisive and material to the disputed facts. After all, this incidence relates to events of some four years ago with the notorious aspect of memory failure as time passes on.

[16.] Effectively therefore, the version of the plaintiff is not gainsaid by any other version except by speculation of what could have happened based on the routine which employees of the defendant usually followed.

[17.] I find that the plaintiff was a credible and reliable witness whose version is favored by the probabilities of this matter. I also accept the evidence under oath of the plaintiff on how the incident occurred or what led to the incident occurring. I find that the doors of the coach the plaintiff was in were not working as they should have been, with the coach being overcrowded to the point causing commotion and resulting in him being pushed out through an open door, even though, the act of pushing out the plaintiff took place when the couch has become less overcrowded, the doors remained not working. In as much as he boarded an already full train, he had no choice as he had already spent an hour waiting for this train. It is not as though he had a choice of trains to pick from. He had paid for this trip and had no

money on the day in question to use an alternative mode of transportation like other commuters.

[18.] The defendant has been proved to have been negligent, *inter alia*, in that its employee(s):

- (a) failed to keep a proper lookout.
- (b) signaled to the driver that it was safe to set the train in motion with its doors open.
- (c) failed to pay due regard to the safety of passengers on board the train; and
- (d) failed to prevent the said accident when, by exercise of reasonable care they could and should have done so.

[19.] As the defendant provides public transport by trains, it carries the responsibility of ensuring that such service is rendered in an efficient, caring, and safe environment. The service is to be rendered timeously to create certainty to the commuters who can then plan for their journeys properly. The defendant must be able to meet the demand of its customers, the commuters, to quell any overcrowding in trains. With technological advancement, it should be possible to gauge the number of commuters boarding each train and to control the same.

[20.] A comparative approach is that of lifts used in high buildings, which can detect an overload of persons which in turn triggers the alarm with the result that lift doors do not then close until the weight issue is resolved on the spot. There appears to be a number of instances of commuters falling from moving trains and sustaining injuries as evinced by cases referred to by parties in this matter. It should technically be possible to detect an opening door of a coach while the train is in transit through an alarm system that would inform the train driver and the train guard. Security personnel should then attend to that incident on the spot, with the train brought to a halt. A moving train with open doors poses a risk to loss of life or serious injuries to commuters who might be thrown out of it, for whatever reason. Human dignity and a right to life as enshrined in our Constitution would then be given a proper meaning, if


safety measures are put in place by the defendant, as a public transport services provider.

FINDINGS:

[22] The defendant is found to have been 100% liable for the Plaintiff's proved and or agreed damages.

Order

- [1] The Defendant is ordered to pay the Plaintiff's costs, including those relating to the merits of the claim.
- [2] The question of *quantum* is postponed *sine die*.



**NDLOKOVANE N
ACTING JUDGE OF THE HIGH COURT**

Delivered: this judgment was prepared and authored by the judge whose name is reflected and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of his matter on Caselines. The date for handing down is deemed to be 03 August 2022

APPEARANCES

FOR THE PLAINTIFF: ADV. B.T Moeletsi

FOR THE DEFENDANT: ADV Rangululu

HEARD ON: 06 June 2022

DATE OF JUDGMENT: 03 August 2022