

**REPUBLIC OF SOUTH AFRICA**



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

**CASE NO: 27470/2021**

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
	22 April 2024
	.....
.....	DATE

In the matter between:

**DAVID SIBULAWA**

Plaintiff

and

**PASSENGER RAIL AGENCY OF SOUTH AFRICA**

Defendant

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**JUDGMENT**

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**Mazibuko AJ**

Introduction

1 The plaintiff instituted an action against the defendant, the Passenger Rail Agency of South Africa ("PRASA"), in which he claimed damages for injuries

he sustained in a train incident on 2 December 2019 at Grasmere train station, Johannesburg.

2. The defendant provides rail commuter services within South Africa.
3. The plaintiff alleges that he bought a train ticket and boarded the train. The train was overcrowded. During the duration of his journey, the train carriage doors remained open whilst the train was in motion. At Grasmere train station, the jostling of other commuters resulted in the plaintiff being pushed out of the moving train before the train could stop. He fell and got injured.
4. According to the plaintiff, the defendant breached its legal duty. Alternatively, the defendant owed a duty of care to members of the public. Paragraph 6 of his particulars of claim read:

*"6.1 The defendant failed to ensure the safety of members of the public on the train and, in particular, that of the plaintiff as a commuter.*

*6.2. The defendant failed to take any or adequate steps to avoid the circumstances in which the plaintiff was injured. Went by the exercise of reasonable care. They could or should have done so.*

*6.3. The defendant failed to take adequate precautions to prevent the plaintiff from being injured in the opposite circumstances. The defendant failed to employ employees or, alternatively, failed to employ an adequate number of employees to guarantee the safety of commuters in general and the plaintiff in particular. On the commuter train in which the plaintiff was travelling as a commuter.*

*6.4. The defendant failed to employ employees, alternatively failed to employ an adequate number of employees to prevent commuters and intended commuters from being injured in the manner the plaintiff was injured."*

5. At the commencement of the trial, and by agreement between the parties, the court granted an order separating the issues in terms of rule 33(4)<sup>1</sup> of the Uniform Rules of Court on the basis that the issues relating to liability would first be determined and the remaining issues would stand over for later determination.

#### Issue

6. The issue for determination was whether PRASA is delictually liable to compensate the plaintiff. Which is whether a reasonable person in the position of the defendant would foresee the reasonable possibility of his or her conduct causing harm to another, resulting in patrimonial loss; (b) would take reasonable steps to prevent the risk of such harm; and it failed to reasonable steps to prevent the foreseeable harm.

#### Evidence

##### Plaintiff's case

7. In support of its case, the plaintiff testified and called one witness, Mr Kananelo Rankhoana. The plaintiff testified that he boarded a train at Park Station to disembark at Grasmere train station. When it reached Lenasia train station, it stopped, and all commuters were instructed to disembark and get onto another train because of what was referred to as an *all-change*.
8. They got into another train as instructed. The train became overcrowded because of an all change, and all seats were occupied. Some passengers, including the plaintiff, were standing next to the door. Other passengers stood balancing against each side of the door as the doors were not closed. The train doors were not functional.

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<sup>1</sup> Uniform Rules of Court, Act 59 of 1959.

9. When the train approached the Grasmere train station platform, passengers moved closer to the doors and started pushing each other from behind so they could get ready to disembark. In the process, the plaintiff, who was standing next to the doors, was pushed from behind and fell out of the train, which was still in motion with open doors, and he sustained injuries.
10. Under cross-examination, he was asked whether he knew the capacity of the coach he was in and the number of passengers that capacity was exceeded to conclude that the train or coach was overcrowded. He answered that he did not know. He testified that the train remained full, though commuters were embarking and disembarking in the three stations between Lenasia and Grasmere.
11. Further, he stated that though he had no technical skill to conclude that the train doors were not functioning, under normal circumstances, the doors would attempt to close, and commuters would force them open, and that did not happen on the date in question.
12. He was referred to a referral note from Lenasia Clinic to Chris Hani Baragwanath hospital (hereinafter referred to as "Bara") under clinic history and examination, where it reads: *Male p pushed off train when disembarking*. He later clarified that he had not completed the document (the referral letter), but the nurse had. He did not know what they wrote as he would tell them, and they would be writing.

Mr Kananelo Rankhoana

13. Mr Kananelo Rankhoana (hereinafter referred to as "Mr Rankhoana") testified that he boarded the same train as the plaintiff from Lenasia train station, travelling to Grasmere train station. He was standing not far from the plaintiff.

The train was overcrowded with passengers. There were no empty seats. The train remained full throughout his journey until he disembarked.

14. When the train approached Grasmere train station, passengers came close to the doors, preparing to disembark, and the plaintiff, who was next to the doors, was pushed in the process and fell out of the train, which was still in motion with its doors open. He then rushed to assist the plaintiff, who was lying down with a broken leg. Later, together with another passenger, he took the plaintiff to a nearby taxi rank so he could be transported to the clinic.
15. The plaintiff closed its case.

#### Defendant's case

16. The defendant brought an application seeking to be absolved from the instance.

#### Absolution from the instance

17. The question is whether the court could find for the plaintiff on the evidence adduced.
18. The test for absolution, to be applied by a trial court at the end of a plaintiff's case, is whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might find for the plaintiff.<sup>2</sup> 'This implies that the plaintiff has to make out a *prima facie* case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence, no court could find for the plaintiff.'<sup>3</sup>

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<sup>2</sup> Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G-H.

<sup>3</sup> Gordon Lloyd Page & Associates v Rivera and Another 2001 (1) SA 88 (SCA) para 2.

19. In order to consider whether absolution from the instance should be granted, the court must take into account the facts that are common cause between the parties, the averments in the particulars of claim that were admitted and denied in the plea. It also has to consider the evidence of the plaintiff and his witness, their responses whilst under cross-examination and propositions put during cross-examination as to what the defendant's version might be when called upon to testify, not expressly admitted by the plaintiff. Propositions put during cross-examination are not evidence and have no probative value. See *Osman Tyres and Spares CC & another v ADT Security (Pty) Ltd.*<sup>4</sup>
  
20. A court must not evaluate the plaintiff's evidence at the absolution stage but must accept the evidence as true.<sup>5</sup> Nor should a court weigh up different possible inferences. It must rather determine whether any one inference, from a range of possible reasonable inferences, might favour the plaintiff. See *Gandy v Makhanya.*<sup>6</sup>
  
21. Issues of negligence are questions of fact best determined after all the evidence has been heard, including that of the defendant, should it choose to provide same. This is precisely the position in this matter.
  
22. The defendant, in its plea, contended that the plaintiff did not observe one or either of the following whilst he boarded its train, in that he (a) failed to heed to the precautionary measure displayed on the defendant's premises for safe commuting, (b) disembarked the train while still in motion, (c) stood by the door, and by so doing blocking the train from closing, posing a danger to himself and fellow passengers, (d) disregarded lawful instructions by defendants' official for safe commuting and/or (e) he was late for his journey

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<sup>4</sup> [2020] ZASCA 33 [3 April 2020], paragraph 22.

<sup>5</sup> *Atlantic Continental Assurance Co of SA v Vermaak* 1973 (2) SA 525 (E) at 527C-E.

<sup>6</sup> 1974 (4) SA 853 (N) at 856B-C; *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 39.

and opportunistically boarded the train that was already in motion, posing danger for himself."

23. The plaintiff should not lightly be deprived of his remedy without the court first hearing what the defendant has to say.<sup>7</sup> The defendant may be required to ventilate its case to substantiate its contentions. The propositions put forth during cross-examination are not evidence and have no probative value. A court should grant absolution where it believes it is in the interest of justice. With the facts and evidence placed before me, such an occasion has not arisen. Consequently, the application for absolution from the instance stands to fail.

24. In the premises, the following order is made:

Order:

1. The defendant's application for absolution from the instance is refused with costs.

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N. Mazibuko

Acting Judge of the Gauteng Division, Pretoria

*This judgment was handed down electronically by circulation to the parties' representatives by email.*

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<sup>7</sup> Supreme Service Station (1969) (Pty) Ltd v Fox and Goodridge (Pty) Ltd 1971 (4) SA 90 (RA) at 93.

*Representation:*

Counsel for the Plaintiff: Mr NC Rangelulu  
Attorneys for the Plaintiff: Mashapa Attorneys

Counsel for the Defendant: Mr L Mgwetyana  
Attorneys for the Defendant: Ngeno & Mteto INC

Heard: 11 March 2024  
Date of Judgment: 22 April 2024