REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: A5051/2010

DATE:09/11/2011

REPORTABLE

In the matter between:

SOUTH AFIRCAN RAIL COMMUTER CORPORATION LIMITED — **Applicant**

and

SINDISWA SOMLOTHA — **Respondent**

JUDGMENT

MOKGOATLHENG J

(1) The respondent a 32 year old female security guard sued the appellant for damages arising out of an incident in which she was injured at the New Era Station, on 24 October 2007. The trial proceeded only on the issue of liability, after the parties obtained a consent order separating the issues of

liability and quantum in terms of ***Rule 33 (4) of the Uniform Rules***. At the conclusion of the trial, the court-a-quo found that the appellant's negligence contributed to the injuries sustained by the respondent and consequently was liable for 50% of her proven damages. The appeal is with the court-a-quo's leave.

THE FACTUAL MATRIX

(2) The background facts are uncomplicated and largely undisputed. The respondent is a regular commuter on the appellant's train service. On that fateful afternoon she was on her way to work when she boarded the train at Park Station. When the train approached New Era Station, she stood up, traversed the passage and moved towards the coach door. It was difficult for her to make her way towards the door because the coach was full. There was pushing and jostling in the coach passage. She had not reached the coach door when the train stopped. Some commuters managed to disembark from the train. The train started moving with the coach doors open. The pushing was continuing, people were screaming trying to get the train to stop. Because of the noise in the coach, she did not hear any whistle blowing or any warning indicating that the train was going to pull off. She does not know how she got out of the train, but when she came to, she was lying on the platform. She does not how she ended up there.

(3) Ntuli testified on behalf of the appellant that he is employed as a security guard. He and his colleague Sindane performed security duties at the New Era Station in the middle of the specific platform. The train arrived on time at the station and stopped. Commuters disembarked from the train. Commuters on the station boarded the train. A whistle was blown. The coach doors were closed. The train pulled off. Just as the train was pulling off, he saw a male person and a female

person struggling with the coach door. Eventually these two persons managed to open the coach door. The male person jumped off first, thereafter a lady jumped out as well, but unfortunately she collided with a pole and was injured.

THE APPELLANT'S ALLEGED NEGLIGENCE

(4) The negligence attributed to the appellant is that "*it allowed the train to be set in motion without ensuring that the doors of the train and coach in which the respondent was travelling were closed before the train was set in motion,……the appellant allowed the coach of the train in which the respondent was travelling to be overcrowded and which resulted in the respondent being pushed out of the train,…….. and appellant allowed the train to move with open doors and failed to take any alternative, adequate steps to prevent the train from moving with open doors".*

(5) The test by which delictual liability is determined is trite. It encapsulates, depending upon the particular exigencies of each case, the question whether;

(a) a reasonable person in the appellant's position would foresee the reasonable possibility of its servants conduct causing harm resulting in patrimonial loss to another;

(b) would take reasonable steps to avert the risk of such harm; and

(c) the appellant failed to take such steps.

(6) It is trite that not every act or omission which causes harm is actionable in delict. In order for liability for patrimonial loss to arise, the negligent act or omission must be wrongful. It follows that it is the reasonableness or otherwise of imposing liability for such a negligent act or omission determines whether such negligence or omission can be regarded as wrongful.

(7) The onus to prove negligence reposed on the respondent and objectively requires more than merely proving that the risk of harm to her was reasonably foreseeable and that a reasonable person would have taken measures to prevent the risk of such harm. The respondent must adduce cogent credible evidence regarding the reasonable measures which could have been taken by the appellant to prevent or minimise the risk of such harm.

(8) It is settled that the appellant carries a positive obligation to implement reasonable measures to ensure the safety of rail commuters who travel on its trains. Failure to implement such obligation must give rise to delictual liability where, as was pleaded here, the risk of harm to commuters resulting from falling out of crowded trains running with open doors is eminently foreseeable.

(9) The question which remains for determination is whether on the evidence that the respondent fell and sustained injury as a result of her disembarkation from a moving train with its doors open, she discharged the onus resting upon her, of proving on a balance of probabilities that the appellant was negligent, bearing in mind that whether or not such conduct

constitutes negligence ultimately depends upon a realistic and sensible judicial approach to all the relevant facts and circumstances. See ***Transnet Limited t/a Metro Rail and the South African Rail Commuter Corporation Limited v David Witter 2008 (6) SA 549 SCA, 2009 (1) ALL SA 164.***

(10) The court-a-quo correctly identified that *"The essential and narrow question is whether the sliding doors of the coach were properly closed before the train was set in motion*". Further the court-a-quo correctly opined that the appellant has been held to be negligent where it sets in motion a train whilst the sliding doors of the coaches are not properly closed. It followed that there would be no negligence on the part of the appellant at all if the sliding doors were closed when the train was set in motion and the doors were forcibly opened, as contended for by the appellants witness Ntuli.

(11) It is trite that where there are two mutually destructive versions the respondent can only succeed if she satisfies the court on a preponderance of probabilities that her version is true and accurate and therefore acceptable. In deciding whether such evidence is true or not the court will weigh up and test the respondent's allegations against the general probabilities. The estimate of the credibility of the witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the respondent, then the court will accept her version as being probably true. If, however, the probabilities are evenly balanced in the sense that they do not favour the respondent's case any more than they do the appellant's, the respondent can only succeed if the court nevertheless believes her and is satisfied that her evidence is true and that Ntuli's version is false. ***National Employers' General Insurance Co Ltd v Jagers 1984 (4) SA 437 (ECD) at 440E – 441H***.

(12) Regarding the credibility of witnesses in factual disputes it is instructive to have regard to the ratio, in ***Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others 2003 (1) SA 11 (SCA) at 141 – 15D*** where it was held:

"The technique generally employed by courts in resolving factual disputes of this [irreconcilable] 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 courts 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' candour and demeanor 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;

(vi) the probability or improbability and 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' 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."

(13) Mr Ferreira's argument on behalf of the appellant, is that the respondent has failed to discharge the onus resting on her because there is a *lacuna* in her evidence in that she cannot explain to the court how she disembarked from the coach and landed on the platform. Counsel's argument misconceives the objective reality that it is common cause that the train was set in motion with the specific coach doors open, consequently, the appellant's servant was negligent in setting the train in motion with the coach doors open. Its conduct is ineluctably the contributory cause to the respondent falling off the train and onto the platform.

(14) I cannot find fault with the court-a-quo's reasoning and findings in its evaluation of Ntuli's evidence. I repeat the court-a-quo's dealing with such evidence verbatim for purposes of emphasis:

"During cross examination his attention was drawn firstly to two statements that he had made as well as other documents conyained in the bundle. His attention was drawn, firstly, to exhibit "B" a statement that he made at the time of the incident. In that

statement no mention is made of there being any forcible opening of the doors by passengers as he contended in his evidence. All that he stated was that the Plaintiff disembarked from the moving train. The following day Ntuli was required to submit a more comprehensive statement under oath to Metro Rail Protection Services; this document is exhibit "C". Here (to) no mention is made of the alleged forcible opening of the doors, he merely mentions that whilst patrolling on the 24 October 2007 he came across a woman who was embarking (sic) from a moving train. When confronted with these two statements Ntuli was unable to satisfactorily explain the omission. He sought to explain that he was told by Metro Rail what to put into the statement, a highly improbable and improper suggestion.

In my view if Ntuli had indeed witnessed persons forcibly opening the sliding doors and exiting the train as he described in evidence he would have mentioned this in the statements exhibits "B" and "C". These are not mere omissions which are irrelevant and which can be overlooked, they are material omissions.

Ntuli's attention was also drawn to a statement made by an official named More, exhibit "D". The official concerned made a written statement… under which Ntuli's signature appears. Here to (sic) it is merely stated that the injured person was disembarking from the moving train and no mention is made of the forcible opening of doors….

Another material aspect which in my view impacts on the integrity of Mr Ntuli is his omission in the statement to refer to the fact that at the time of the incident he was accompanied by another security guard one Sindane, who witnessed what, had occurred. In exhibit "B" he was specifically required to indicate whether there were other witnesses to the occurrence… He deliberately omitted to refer to Sindane's presence in the statement. When asked to

explain this he gave contradictory versions. He first said that he inserted the words not applicable (N/A) at the appropriate place where there is a reference to other witnesses, because Sindane was shocked and was in no position to give a statement. He later testified that according to Metro Rail training that he had received it was not necessary for him to refer to a witness who was a colleague of his or who worked with him, but rather to other witnesses.

His evidence in this regard cannot be accepted. Given the very significant omission to which I have referred, particularly concerning the forcible opening of the doors. The only inference to be drawn is that all that Ntuli witnessed in fact, was the Plaintiff disembarking from the train whilst it was in motion and that he did not at the time see persons male and female struggling with the door or attempting to open the door or opening the door as contended for in his evidence in chief…

It was put to the Plaintiff that Ntuli would testify that after the train was set in motion there was a wrestling with doors, a man then jumped off and was followed by a woman the Plaintiff. It was not put by counsel for the Defendant to the Plaintiff that she caused the door of the coach to open or assisted another person to open the coach, as is alleged in the pleadings, the Defendant's plea and in Ntuli's evidence in chief…

The fact that the Plaintiff exited or disembarked from the train shortly after it was set in motion through the sliding doors of the coach is a clear indication, on the probabilities, that the door was open and remained open when the train was set in motion.

In the circumstances, having regard to the probabilities, the evidence and the credibility findings which I have made, I find that the Defendant was indeed negligent, the negligence being that it allowed the train to be set in motion without ensuring that the doors

of the train and coach in which the Plaintiff was travelling were closed…"

(14) The plaintiff testified consistently that the doors were open from Germiston Station to where the train arrived at the New Era Station and remained open when the train was set in motion. She then says that she does not recall what happened thereafter. The only substantial criticism levelled against the respondent is that she did not respond adequately to the appellant's version when put by counsel. Apart from that aspect there is no reason why the respondent's version that the doors were open should be rejected."

(15) A court of appeal is generally reluctant to disturb findings of fact which depend on credibility. It is trite that it will do so where such findings are plainly wrong ***Santam Bpk v Biddulph 2004 (5) SA 486 (SCA) at 589E-G.*** Having regard to the judgment of the Court-a-quo and the reasoning followed by it in coming to its findings there are no grounds upon which it can cogently be argued that its finding are wrong ***R v Dhlumayo and Another 1948 (2) SA 677 (A) at 705 – 706; Protea Assurance Co Ltd v Casey 1970 (2) SA 643 (A) at 648D-E; Munster Estate (Pty) Ltd v Killarney Hills (Pty) Ltd 1979 (1) SA 621 (A) at 623F-624A.***

(16) In addition, an aspect which seemed to have escaped the court-a-quo as well as counsel, is the content of *paragraph 2* in the report made by Ntuli Exhibit "B". *Paragraph 2* deals with the particulars of the person completing the report who happens to be Ntuli himself. The question is asked whether he was a "*witness to the occurrence*". The answer to this question is indicated by a cross with a "*No*". Ntuli did not therefore regard himself as capable of being a witness to the occurrence, yet he testified as if he witnessed the whole event. This

inconsistency is, in my view, very material to the veracity of his evidence. In my view, the court's credibility finding of Ntuli as an unsatisfactory witness cannot be upset nor the finding that the probabilities were in favour of the respondent's version.

(17) The court-a-quo correctly, made the finding that the evidence does not establish that the respondent was pushed and fell because the coach was overcrowded, and correctly came to the conclusion that the respondent's version that she walked off the train while the doors were open without having forced them open, is more probable.

(18) The court-a-quo also correctly made a credibility finding against Ntuli that the latter's version that the doors were closed when the train moved off and that the doors were forced open by another gentleman and the plaintiff was to be rejected as improbable. The court-a-quo correctly disbelieved the evidence of Ntuli since his version was only mentioned for the first time at the trial. In an affidavit previously made to his superiors as well as in the accident form filled in by him, no mention was made of the fact that the doors were forced open.

(19) The court-a-quo correctly applied the applicable legal principles to the facts and I cannot find any fault with the court-a-quo's analysis, evaluations, findings of fact and its conclusions regarding the credibility of the evidence of the appellant's witness Ntuli.

(20) In my view causative negligence was established. Mr Ferreira conceded that he cannot credibly assail the court-a-quo's application of its judicial discretion regarding the apportionment of contributory negligence. Consequently, it is not

necessary to deal with this aspect as an issue in this appeal, save to state that the court-a-quo exercised its judicial discretion properly and did not misdirect itself in its assessment of contributory negligence.

(21) I therefore make the following order:

The appeal is dismissed with costs.

Dated and signed at Johannesburg on the 9th November 2011.

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D.R. MOKGOATLHENG

JUDGE OF THE HIGH COURT

I, agree

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W.L. WEPENER

JUDGE OF THE HIGH COURT

I, agree, and it is so ordered

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C.J. CLAASSEN

JUDGE OF THE HIGH COURT