

REPUBLIC OF SOUTH AFRICA



**GAUTENG LOCAL DIVISION
JOHANNESBURG**

CASE NO. 10/46975

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

DATE

SIGNATURE

In the matter between:

NTELENG ALBERT PHOSHOKO

Plaintiff

And

PASSENGER RAIL AGENCY OF SOUTH AFRICA (PRASA)

Defendant

JUDGMENT

OPPERMAN AJ

INTRODUCTION

[1] Mr Phoshoko instituted action against the defendant for damages suffered as a result of personal injuries sustained on 30 October 2010 when he fell from a moving train while its doors were open. The parties had reached an agreement that the issues of quantum and merits be separated in terms of rule 33(4) of the Uniform Rules of Court which was ordered. The court was advised that the only issue in dispute was negligence and the trial was conducted on this basis. At issue

was whether Mr Phoshoko was ejected from the train by some negligence on the part of the defendant, or whether he negligently injured himself by jumping off the moving train, or whether an apportionment of liability should be found in terms of the Apportionment of Damages Act no. 34 of 1956 (as Amended).

PLAINTIFF'S EVIDENCE

[2] Mr Phoshoko testified that on Saturday, the 30th of October 2010, he had boarded a train at Northmead Station, which is situated at Benoni, next to the Lakeside Mall. He explained that he was coming from work and was heading home. Having boarded at Northmead Station, he disembarked at Dunswart Station to board another train. His final destination was Angelo Squatter Camp. The stations following upon Dunswart where the last leg of his fateful journey began are: Boksburg East, Boksburg, East Rand Station and then Angelo.

[3] He explained that the train was full upon entering. There were no seats available to sit but there was standing space. He testified that he stood in the middle of the coach with his back to the door he had used to board the train, facing the opposite door. The distance from either door was about the same (which he estimated to be approximately 2 feet).

[4] Just before the train arrived at Boksburg Station, it started breaking in a jerking manner going forwards and backwards erratically. He explained that he was "way too short" to reach the overhead handles and could also not stabilise himself in any other manner. This action, a foundation of the negligence that plaintiff sought to lay at defendant's door, caused him to fall out of the carriage exiting the same door that he had entered. He landed on the concrete stone bedding next to the railway tracks (between the tracks

and the platform). He managed to move himself from the place where he had landed, to the platform, whereafter he lost consciousness and only regained consciousness at the hospital on the Tuesday (4 days later).

[5] He explained that he had started using the train approximately seven months prior to this incident when he had commenced employment as a general labourer. He was earning approximately R500 per week.

DEFENDANT'S EVIDENCE

[6] The defendant called two witnesses, Mr Themba Mtambo and Mr Senzo Mnyandu.

[7] Mr Mtambo testified that during 2010 he had been employed by Singobile Security Company. On the day in question, being 30 October 2010, he was stationed at platform 2 at East Rand Station. At approximately 15:45, he witnessed a train coming from the direction of Springs heading towards Johannesburg. He saw a man standing on the stairs between two coaches (ie on the outside of the coaches) holding onto iron bars attached to the outside of the coaches. This individual then jumped and fell onto the platform. Mr Mtambo noticed that he had injured his toes in that the foot appeared to have been de-gloved. He approached the man (Mr Phoshoko) and observed that although quiet, he was still breathing. He informed the train driver that a person had been injured and returned to Mr Phoshoko who was still lying on the platform. Mr Phoshoko was crying. Mr Mtambo asked him whether he had any telephone numbers of any relatives that they could contact on his behalf but he said that he could only remember his girlfriend's telephone number. Next to him was a black plastic bag with a lunch box inside. He was wearing one sandal. The other sandal had fallen next to the

railway line. Mr Phoshoko was lying beyond the yellow barrier line and Mr Mtambo requested some bystanders to assist him to move Mr Phoshoko away from the rim of the platform. Mr Mtambo asked him what he had been doing but he didn't answer the question. He cried persistently. Mr Mtambo asked him about his ticket and he admitted that he did not have a ticket. Mr Mtambo stated that because it was a Saturday there were not many people at the station. Another security person was stationed at the end of platform 2 being one Mr Senzo Mnyandu. Mr Mtambo called his controller who contacted an ambulance.

[8] Mr Senzo Mnyandu testified that on 30 October 2010 he was an employee of Sibongile Security Company and that on that day, he was stationed at East Rand Station. He was on duty with his co-employee, Mr Themba Mtambo. He explained that East Rand Station has four platforms and that he and Mr Mtambo were stationed at platform 2. Mr Mnyandu explained that he did not see the incident and that he had only seen Mr Phoshoko after the injury and whilst he was lying on the platform. This was so because he was positioned towards the end of the platform next to the gate where the ticket examiner was stationed, whereas Mr Mthambo was performing his duties at the other end of the platform ie the side that the train had entered the station. Mr Mthambo had called him. He then noticed that Mr Phoshoko was lying on the platform and that he had an injured foot. He observed that the skin on his toes was missing. He recalled that he and Mr Mtambo had spoken to Mr Phoshoko. Mr Phoshoko did not respond initially but did so later. He was asked where he resided and had explained that he stayed in Angelo. He was asked about the telephone numbers of relatives but could only remember the telephone number of his girlfriend. They had

asked him how old he was and he had explained that he was 21 years of age. He noticed that one sandal was on his foot and the other sandal was lying inside the railway track. He was asked about a ticket and he had explained that he did not have a ticket.

THE AMENDMENTS

[9] The original particulars of claim signed on 17 November 2010 (two and a half weeks after the incident) recorded that the incident had occurred at the Boksburg Station. During April 2012 this fact was amended to record that the incident had occurred at East Rand Station.

[10] During the cross-examination of Mr Phoshoko, plaintiff's counsel moved for an amendment to paragraphs 3 and 3.1 of the particulars of claim to read:

"On and(sic) about the 30th of October 2010 at Boksburg station, in the vicinity of Johannesburg, within the area of jurisdiction of this Honourable Court, the Plaintiff:

3.1 Was in possession of a valid weekly ticket allowing him to travel on trains from Northmead to Angelo and return."

[11] The amendment was opposed by the defendant, contending that it would be prejudiced if the amendment were granted in that it had brought witnesses to court to testify that the incident in issue had occurred at East Rand Station. Mr Phoshoko did not seek to redefine the issues which fell for determination by this Court. Negligence being the only issue which was in dispute and all other issues being common cause, the dispute relating to the location of the station where the incident had occurred, had a bearing on, primarily, credibility. The amendment was granted. The defendant did not

seek a postponement nor did it request that the matter stand down to deal with the changed facts.

EVALUATION OF THE EVIDENCE

[12] The Court is faced with two mutually destructive versions. Mr Phoshoko contends that he was ejected from the inside of the coach whereas the defendant's evidence is to the effect that Mr Phoshoko was standing on the stairs between the carriages (on the outside of the carriages) holding onto the iron bars on either side of the carriages. When the train got to the station he jumped, inflicting the de-gloving of his foot by his own conduct.

[13] This Court is to approach these versions by applying the principles enunciated in the decision of *Stellenbosch Farmers Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 at 14I-15D where Nienaber JA 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 probabilities. As to (a), the court's 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 demeanour 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, (v) the probability or improbability of 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. The hard case, which will doubtless be the 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 are equipoised probabilities prevail."

[14] Mr Phoshoko was cross-examined on the content of the trial bundle.

The truth of the content of the documents was not admitted. In the absence of the author/s of the document/s having been called to testify in respect of the truth of the content thereof, the content remains hearsay evidence and thus inadmissible and it will be disregarded save where the content was admitted during cross examination or other safe-guards can be found in the objective evidence.

Mr Phoshoko – Tendency to exaggerate

[15] Mr Phoshoko did not make a favourable impression as a witness. He was prone to exaggeration. So, for example, he stated that he had lost consciousness on the Saturday and only regained consciousness on the Tuesday. The hospital registration form reflects that he was admitted at 17:32 and his residential address is recorded as 1482 8th Street, Boksburg. He testified that that was his mother's residential address where she is employed as a domestic worker. The undisputed evidence is that he was admitted to the hospital without any relatives being present. The only source of the particulars relating to the residential address could have been Mr Phoshoko. The significance of this is, as the defendant's counsel correctly pointed out, that he was conscious when admitted to the hospital. Mr

Phoshoko attempted to explain this away by stating that that which was written down on the registration form, was only recorded after he had regained consciousness. This does, however, not explain how his signature appeared on the consent to operation form (he admitted that it was his signature), nor does it explain why the person who completed the progress report at 21:45 on 30 October 2010 had recorded "patient verbalised that he was pushed out a moving train". Mr Phoshoko was the only source of information for the address of his mother's employer (which save for one digit is, according to Mr Phoshoko, the correct address) and for the version recorded in the progress report. It is unfortunate that Mr Phoshoko deemed it necessary to exaggerate the extent of his injuries by stating that he had lost consciousness for 4 days. He was seriously injured already. There was no need to exaggerate. His willingness to do so does, unfortunately, affects his credibility. He persisted with contending that he was unconscious until the Tuesday post the incident despite overwhelming evidence to the contrary. This included documentary records and, of course, the two witnesses called on behalf of the defendant who both testified that they had spoken with Mr Phoshoko. Neither of these witnesses had any incentive to recount a false version of events, but more about them later.

External contradictions

[16] Eighteen days after the incident, action was instituted by Mr Phoshoko against the defendant. At that point he had instructed his attorneys of record that the incident had occurred at the Boksburg Station. During 2012, an amendment was effected to the pleadings to reflect that the

incident had occurred at the East Rand Station. An amendment during 2013 confirmed this feature and amended certain other aspects of the claim.

[17] The parties came to trial on the basis that the incident had occurred at the East Rand Station. During Mr Phoshoko's evidence-in-chief, he changed the place where the incident had occurred to the Boksburg station. A sympathetic analysis of these facts might lead to the conclusion that Mr Phoshoko is (or was) simply mistaken and/or confused about the place where the incident had occurred. During cross-examination, he blamed his attorneys of record for having made a mistake. No evidence has been placed before this Court as to how this mistake might have arisen. In the absence of evidence explaining how the attorneys of record for the plaintiff might have gotten the place where the incident had occurred so very wrong, this Court is compelled to conclude that Mr Phoshoko changed the place where the incident had occurred in order to get around the damning evidence of the two independent witnesses called by the defendant. I find it highly improbable that the attorneys for the plaintiff would have gotten something so fundamental so completely wrong.

[18] Another material aspect of Mr Phoshoko's evidence which changed from the time action was instituted until he testified in this Court, was that he had initially, and in the particulars formulated 18 days after the incident, stated that he had been pushed out of the moving train by other passengers. During his evidence-in-chief, he disavowed this notion. When confronted with this change in version, Mr Phoshoko stated that someone could have pushed him.

[19] The reasons advanced by Mr Phoshoko in his evidence in chief for falling out of the train were primarily the jerking movement of the train, the

speed at which it was travelling and the fact that the doors were open. This was the foundation of his allegation of negligence against the defendant and it had clearly been modified from the version that he had been pushed from the train. This *volte face* unfortunately casts further doubt on his credibility.

[20] It does appear as though Mr Phoshoko had boarded the train without a ticket. It is a factor that goes to whether he was inside or outside the carriage shortly before his fall. Without a ticket he would have been concerned about detection by the defendant's officers. Not only could he not produce the ticket at the time of the incident, but his evidence as to the nature of the ticket that he allegedly had at the time, also changed during the course of this litigation: The particulars of claim served 18 days after the incident recorded that he had a ticket which would allow him to travel from Boksburg, returning to Boksburg. This version changed during 2013 when the particulars were amended to record that at the time of the incident he had a ticket which allowed him to travel from Angelo station to Dunswart station. The version, which was finally advanced, was that Mr Phoshoko had a ticket entitling him to travel from Northmead to Angelo station and back to Northmead.

Internal Contradiction

[21] During Mr Phoshoko's evidence-in-chief he testified that he had not held onto the overhead handles as he is "way too short". During cross-examination, the parties agreed that Mr Phoshoko is approximately 1,65 metres tall. When it was put to him during cross-examination that a person of his height could easily reach those belts, Mr Phoshoko admitted that he could reach them but then advanced a different speculative alternative being

that it depended on whether or not those belts were present in that particular train. He agreed that if there were belts, he would have been able to hold onto them.

Improbability of plaintiff's version

[22] Mr Phoshoko's description of how he had fallen out of the carriage seems improbable. He testified that he was about two feet away from the door he had used to board the train and that after getting to the centre of the train, he was surrounded by other commuters. He had entered the train facing the opposite door and had remained in this position even when the train was entering the Boksburg Station. He explained that the train had started jerking and he was unable to maintain his balance. He was at pains to explain that the train was full and that he was surrounded by commuters.

[23] One wonders why Mr Phoshoko was propelled from the centre of the train, past all the other commuters, out of the door but that not one of his fellow commuters, and those closer to the door, had fallen out of the train. I find this version improbable. One would have expected those who were closer to the open doors to have fallen out.

Defendant's Witnesses

[24] The defendant's witnesses gave evidence which was not only credible but also reliable. Mr Mtambo was not an employee of the defendant at the time. He was employed by an independent security company. He, at the time of testifying, owed such security company no allegiance and advised this Court that he was employed elsewhere. Mr Mnyandu too was employed by the same security company as Mr Mtambo although at the time

of testifying, Mr Mnyandu too was employed by a different, also independent, security company. No reasons were advanced why these witnesses would have come to court to perjure themselves and to have fabricated a set of facts which would exculpate the defendant. Notably, it was not put to either of them that they were lying and had concocted this entire set of facts to favour the defendant.

FINDING ON DISPUTED ISSUES

[25] I find Mr Phoshoko not to be either credible or reliable. The probabilities are also strongly against the version advanced by Mr Phoshoko. I accordingly find that the incident occurred in the manner described by the defendant's witnesses.

ALTERNATIVE BASIS FOR LIABILITY

[26] As a separate argument, Counsel for Mr Phoshoko contended that the defendant ought to have put measures in place to deal with overcrowding. Reliance was placed on the decision of *South African Rail Commuter Corporation Ltd v Thwala* (661/2010) [2011] ZASCA 170 (29 September 2011). In this judgment Maya JA held at paras [15] and [16] as follows:

"[15] But I have a difficulty with the factual finding made by the court below that the train and, in particular, the respondent's coach, was 'overcrowded', from which the inference of negligence was drawn. The sum of the respondent's evidence on this aspect was merely that the train was 'very full ... even up to the door'. She neither pleaded nor established in evidence that the appellant had a duty to regulate the numbers of its rail passengers nor what reasonable measures it ought to have implemented in that regard to ensure passenger safety that it omitted to take. She led no evidence, for example, on the passenger capacity of the coach; if that number was exceeded, how many passengers remained in the coach when the train reached her station etc. One cannot assume simply from the fact that there were

standing passengers that the coach carried an impermissible number as the appellant's policy and applicable safety standards might well legitimately have allowed that practice.

[16] I say this aware that the appellant's policies and legal obligations in the conduct of its rail service are, of course, peculiarly within its knowledge. So too is the nature and extent of the relevant precautionary measures it must take to ensure rail commuter safety. However, the fact remains that it did not have to prove that it could not reasonably have prevented the respondent's fall. The record shows no indication that the respondent attempted to ascertain this kind of evidence by, for example, employing the mechanisms provided by the rules of court such as seeking discovery, requesting particulars for trial etc. The nature of the respondent's onus was such as to oblige her to adduce evidence that gave rise to an inference of negligence. Only then would the appellant have had to rebut that inference by adducing evidence relating to the measures it took to avert harm. But the onus of proving that such measures were inadequate and unreasonable in the circumstances would nevertheless remain on the respondent."

[27] Mr Phoshoko did not testify that the train was overcrowded. He simply stated that it was full so that there was no place to be seated but there was place to stand. The *Thwala* (supra) decision accordingly has no application. But even on the aspect of the extent of occupancy of the train, I find the version of Mr Phoshoko improbable. In this regard, Mr Mthambo's evidence was in direct contrast to that proffered by Mr Phoshoko. Mr Mthambo testified that it was a Saturday afternoon and consequently there were not many people, either on the station or in the train. I thus find that the factual foundation for reliance on the *Thwala* matter is absent.

[28] The plaintiff's counsel further contended that because the defendant is aware that trains become too full to the point that commuters board outside moving trains, the defendant had a duty to guard against the conduct testified to by its own witnesses. As the defendant's counsel correctly pointed out, the evidence was that the train had arrived at the East Rand Station with Mr Phoshoko positioned in between the coaches, holding onto

the bars on each side of the coach. It is not the defendant's case that Mr Phoshoko had boarded the train in such position. Moreover, it is the defendant's case that Mr Phoshoko had conducted himself in this manner by virtue of the fact that he was not possessed of a ticket entitling him to commute between those destinations. He did not resort to this conduct because the train was overcrowded. It was rather that he wanted to avoid detection.

CONCLUSION

[29] For the reasons advanced herein, I conclude that Mr Phoshoko has failed to discharge the onus which he bears, and has also failed to lay the factual foundation for a finding in his favour even if it were based on the defendant's version of events.

[30] Mr Mokotedi, who appeared on behalf of the defendant, requested that the action be dismissed with costs. I enquired from Mr Mokotedi what order I should make in respect of costs, assuming I were to find in his favour bearing in mind that the plaintiff is a man of straw. Mr Mokotedi advised that the costs order would in all probability not be executed. Normally a mere inability to pay costs on the part of an unsuccessful litigant would not lead to a finding excusing such litigant from paying the other side's costs. I cannot see any reason for deviating from this rule and none was advanced, but trust that Mr Mokotedi's advices to his client in regard to the execution of the costs order will be followed.

ORDER

[31] In the result I grant the following order: The separated issue of liability is determined against the plaintiff. Accordingly, plaintiff's action is dismissed with costs.

I OPPERMAN
Acting Judge of the High Court

Heard: 23 September 2014
Judgment delivered: 15 February 2015

Appearances:
For Plaintiff: Adv R Ralikhuvhana
Attorneys Denga Incorporated
For Defendant: Adv K M Mokotedi
Attorneys Norton Rose South Africa