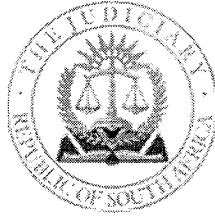
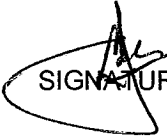


## REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 33843/2016

(1)	REPORTABLE: <del>YES</del> / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
10/05/18 DATE	
 SIGNATURE	

In the matter between

**KHOZA ZETHEMBE****Plaintiff**

And

**PASSENGER RAIL AGENCY OF SOUTH AFRICA  
(PRASA)**

**Defendant**


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**JUDGMENT**


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**CELE AJ****Introduction**

[1] The Plaintiff sues the Defendant for compensation for damages to the tune of R1 520 000.00 with interest thereon and costs of suit consequent upon the injuries he sustained while he was a ticket bearing passenger in the train of Defendant on 14 January 2016. His claim is that he was pushed by other commuters from a moving train as it approached Thembisa Railway Station as a result of which he sustained

multiple injuries on his body. The Defendant opposed the claim on the simple basis that it was not liable for whatever injuries the Plaintiff might have sustained on the day. 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. With counsel of the Defendant agreeing, an amendment of the Plaintiff's particulars of claim was granted after *viva voce* evidence was led.

### **Factual Background**

[2] On 14 January 2016 in the morning Mr Zethembe Khoza, the Plaintiff boarded a train from Thembisa Railway Station but alighted at Isando Railway Station, going to look for some jobs at Isando area. In the afternoon of the same day, he again boarded train number 0533 from Isando heading home in Thembisa. The Train Driver was Mr Johan Moolman and the Train Guard was Mr Dan Silawule. As the train approached the Thembisa Station, it slowed down preparing to stop. Just before the train was brought to a halt, the Plaintiff alighted from the train, fell down and rolled which led to him sustaining some injuries on his body. The security guards at the station attended to the Plaintiff and called for an ambulance. The Plaintiff and another injured commuter were ferried to Thembisa Hospital where the Plaintiff was admitted for medical treatment. He was only discharged after five weeks.

### **Evidence**

#### **Plaintiff's version**

[3] In the morning before boarding the train the Plaintiff purchased a return trip train ticket which he then used when going to Isando. In the afternoon he produced the same ticket to the ticket inspectors. They merely looked at the ticket but did not clip it. He waited at Thembisa Station for about an hour as the trains were scares. When the train finally arrived it was about full. He noticed as it approached that its doors were opened and there were people hanging on some of such doors. He was able to board the train at Isando going home and it left the station still with opened doors. In the train he was a standing passenger and stood some distance, estimated at 1 to 1,5 metres from the doors but as more commuters boarded from other Stations, he was pushed inside the train, close to the seats.

[4] As the train approached Thembisa station he moved towards the doors as did other commuters, preparing to alight. The train slowed down preparing to stop. He was then pushed by other commuters and while the train was still in transit, he fell off it rolled over and sustained multiple injuries. He was hesitant on whether he fell on the rail or on the platform. He insisted later that he fell on the platform. There was a second commuter who was also injured with him. Some people passing by at the scene questioned whether he had a train ticket. At that time a security guard was in attendance and he heard those people asking about the ticket and he then asked the Plaintiff if he had a train ticket. The Plaintiff reached out to his pocket, produced the train ticket and showed it to the security guard who merely looked at it but neither took nor processed it. This incident took place at about 16h30.

[5] It was put to the Plaintiff that as the train approached Isando Station the doors were closed and were only opened once the train had come to a halt. He denied this. It was said that when it took off its door were closed. He denied that. The Train Guard was said to have been responsible for opening and closing train doors when doing so was safe. It was put to him that falling from opened train doors was impossible as its doors were closed, he insisted that the doors were opened and he was pushed by commuters rushing out. He said that as the train had delayed, it was overcrowded. He denied the version that he was in between the couches and fell off from there.

#### **Defendant's version**

[6] As a Train Driver Mr Moolman said that he and the Train Guard checked the train on the yard as routine and confirmed that it was devoid of any defects. That meant that its doors locking device functioned properly. Had there been any defects, he would have called technicians to attend to the train, even if it meant delaying departure time. There was no prescribed form to complete as an indication of the yard inspection done. A prescribed form was used upon completion of the work for that day. Such a form was handed in as exhibit A. That form was meant to be used only if there was any defect noted. There was another form used in the train.

[7] Mr Moolman said that he relied on communications received from the Train Guard as to when to pull off from the station. The Guard had a bell to ring for a safe take off. He conceded that it happened often that commuters would block train doors from closing resulting in trains travelling with open doors. As a Train Driver he was in front and was unable to see events of 14 January 2016.

[8] Mr Silawule said that as a Train Guard he was responsible for the safe opening and closing of train doors. Once satisfied that alighting commuters were safely on the platform and boarding ones were safely inside the train, he pressed a button to close train doors and he blew a whistle three times to indicate to all that the train was about to take off. He then rang a bell to tell the Train Driver that it was safe to move the train off. He would then have satisfied himself that all train doors were closed before the take off. If he picked up any problems with train doors he would report that and the train had to be halted until the problem was resolved.

[9] He denied that on the day in question the train approached and left Isando Station with opened doors. When the train approached Thembisa Station its doors were closed. It was therefore impossible for the Plaintiff to have been pushed through opened train doors as none were opened. He was of the view that the Plaintiff must have been between the couches just before he fell from the train, if he was ever in the train. As the train came into Thembisa Station he saw the Plaintiff lying down on the train platform surrounded by people. He saw this after the train had stopped. He then opened train doors, alighted and went to the scene. He later returned to the train to continue with his duties. All of that took about 5 to 6 minutes and the train took off again.

[10] When asked by Court he said that while in transit he was unable to see if all train doors were closed. He could only see once the train had stopped and once he had alighted from it. He also conceded that some passengers do block train door from closing.

## **Submissions**

[11] Mr Ralikhuvhana, appearing for the Plaintiff, argued for the acceptance of his client's version, contending that the Plaintiff discharged the onus upon him by testifying well and exhibiting a demeanour throughout the trial which was of an honest person. He said that the Plaintiff discharged his burden of establishing on a balance of probabilities, that the alleged incident in which he was injured would not have occurred but for the negligence of the Defendant. Further, he submitted that the Plaintiff placed some evidence before court that gives rise to an inference of negligence on the part of the Defendant, showing that such negligence was causally connected to the alleged harm suffered.

[12] He averred that the evidence of the two witnesses of the Defendant, ignoring the numerous contradictions and inconsistencies in their evidence highlighted during the course of their cross-examination, contributed little of value to the case. Their evidence was apparently presented to corroborate and or support Defendant's version that train doors were always closed, nothing more. Defendant having alleged so fails to tell court as to where Plaintiff was or fell from. All they presented was speculations without basis. Their evidence could do no more than confirm that the Plaintiff was injured in the manner in which he had alleged. Mr Ralikhuvhana asked for a finding in favour of the Plaintiff and that the Defendant was liable 100% for the Plaintiff's proven and or agreed damages with costs.

[13] Mr Thumbathi, appearing for the Defendant submitted correctly that there are two mutually destructive versions in this matter calling upon court to make a just and sensible decision upon these two contradictory versions. He said that the Plaintiff's evidence was straightforward in respect of the manner in which he alleged the incident happened but he struggled to explain where on the platform he fell and he failed to adequately recall the time at which the incident happened. Further, there was no corroboration of the Plaintiff's version despite him testifying that he was aware and had knowledge of other commuters who could positively testify that the doors were open on the date in question.

[14] He argued that probabilities lay in favour of the Defendant in the following respects:

- The train guard maintains that prior to departure at every station he ensured that the train doors were closed.
- There was the possibility that the train doors might have been forced open by commuters while the train was in motion.

It was more probable that the train doors were forced open while the train was in motion than it would be to state that the doors were open at all times more so in light of the evidence of the Mr Moolman and that of Mr Silawule whose evidence collaborated each other in all material terms. That notwithstanding, the Plaintiff's claim should still not succeed as this would still not be in line with the Plaintiff's testimony, namely, if the doors were forced open he would have seen it as he was close to the door and that further he would have testified to this effect but he did not. Mr Thumbathi asked for the dismissal of the claim of the Plaintiff with costs.

### **Evaluation**

[15] Through its evidence the Plaintiff alleged that the Defendant and or its employee(s) were negligent, *inter alia*, as follows;

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

[16] In brief, the Defendant disputed liability by contending that Plaintiff was the sole cause of any injuries that he might have sustained in that the Plaintiff was negligent in one or more of the following respects:

1. Plaintiff failed to keep a proper lookout;
2. Plaintiff failed to avoid the occurrence or incident when, with the exercise of reasonable skill and care, the plaintiff could and should have done so;

3. He knowingly and voluntarily exposed herself to risk of being injured;
4. He attempted to disembark from the train at a moment when it was unsafe and inopportune to do so;
5. He opened or attempted to open the outer door of the couch while the train was in motion;
6. He walked slowly under the circumstances;
7. He negligently disembarked onto the wrong side or portion of the platform;
8. He failed to negotiate his steps in such a way that a reasonable and prudent would have done;
9. He entered into an already full train.

[17] 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 particular 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<sup>1</sup>.

[18] 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 minimise the risk of harm<sup>2</sup>.

[19] At a glance, 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

<sup>1</sup> Kruger v Coetzee 1966 (2) SA 428 (A) at 430E-F; Mkhathshwa v Minister of Defence 2000 (1) SA 1104 (SCA) paras 19-22; Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd 2000 (1) SA 827 (SCA) para 22.

<sup>2</sup> Shabalala v Metrorail 2008 (3) SA 142 (SCA) para 11.

in question. That of the Defendant is circumstantial, in that both witnesses did not witness the alleged incident. They seek to surmise from how they usually executed their duties in then dispute the version of the Plaintiff. Mr Moolman correctly conceded that he did not witness the incident as he was the Train Driver occupying the front of the train. Mr Silawule conceded as well, that he did not witness how it came about that the Plaintiff was lying on the train platform surrounded by some people. His evidence was that when he saw the Plaintiff lying on the platform the train doors were still closed.

[20] Commenting in general on how the Plaintiff testified, Mr Thumbathi very correctly conceded that: 'the Plaintiff's evidence was straightforward in respect of the manner in which 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 relate to events of some two years ago with the notorious aspect of memory failure as time passes on<sup>3</sup>.

[21] 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. There is then the identified concession by counsel of the Defendant that the Plaintiff's evidence was straightforward in respect of the manner in which he alleged the incidence happened.

[22] I find that the Plaintiff was a credible and reliable witness whose version is favoured 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 couch being overcrowded to the point causing commotion and resulting in him being pushed out through an open door. In as much as he boarded an already full train, he had no choice as he had already spent an hour waiting for

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<sup>33</sup> See *S v Nyembe* 1982 (1) SA 835 (A) at 842.



this train. It is not as though he had a choice of trains to pick up from. He had paid for this trip.

[23] The Defendant has been proved to have been negligent, inter alia, in that its employee(s):

1. failed to keep a proper lookout;
2. signaled to the driver that it was safe to set the train in motion with its doors open;
3. failed to pay due regard to the safety of passengers on board the train;
4. failed to prevent the said accident when, by exercise of reasonable care he could and should have done so.

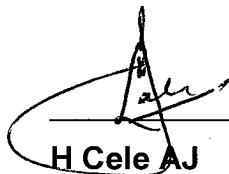
[24] As the defendant provides public transport by trains, it carries the responsibility of ensuring that such service is rendered in an efficient, caring and safe environment. The service is to be rendered timeously so as to create certainty to the commuters who can then plan for their journeys properly. The Defendant must be able to meet the demand of its customers, the commuters, so as 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. A comparative approach is that of lifts used in high buildings, which are able to 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 imposes 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 safely measures are put in place by the Defendant, as a public transport services provider.

**Findings:**

[25] The Defendant is found to have been 100% liable to 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 for three (3) days for trial being 8 to 10 May 2018.
- [2] The question of quantum is postponed sine die.

  
H Cele AJ

**Acting Judge Gauteng Division of the High Court**

Heard: 08 May 2018

Delivered: 10 May 2018

**Appearances**

For the Plaintiff	Adv. R N Ralikhuvhana
For the Defendant	Adv. D. Thumbathi