IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case number: 26582/2016

DELETE WHICHEVER IS NOT APPLICABLE

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

24/5/18 ..... DATE

..... SIGNATURE

In the matter between:

KHETHIWE HLONGWANE **Plaintiff**

and

PASSENDGER RAIL AGENCY OF SOUTH AFRICA **Defendant**

JUDGMENT

WENTZEL, AJ:

INTRODUCTION

1. This is an action for damages against the Passendger Rail Agency, South Africa ("PRASA") arising out of injuries sustained by the plaintiff when alighting from a train at Tooronga Station at approximately 8.30 am on Saturday 20 August 2016. The issue of liability and quantum were separated and only the issue of liability was before me. In this respect, the sole issue was whether the plaintiff lost her footing and twisted her ankle causing it to break whilst alighting from the train, or

whether the train was crowded and she was pushed by other commuters onto the platform through an open door whilst the train was in motion.

2. The plaintiff testified that she had worked the nightshift as a cleaner and had knocked off duty around 7am and had proceeded to Park Station in order to take a train home that morning. She boarded the train no 0609 travelling towards Pretoria, with the intention of alighting at Tooronga Station. The train was not full and she was able to find a seat. She insists that the doors of the train did not close when the train left the station and remained open throughout her journey.

3. Although it was a Saturday morning and was not the end of the month, the plaintiff also insisted that as the train progressed past each station, increasing numbers of commuters boarded the train and that, by the time she reached her destination station, the train had become overcrowded. She avers that when she made her way to the doors in order to alight from the train, commuters on the train began jostling to leave the train, whislt other commuters tried to board the train. She says that before she and the other passengers could disembark, the train jerked forward and was again set in motion, causing those behind her who wanted to disembark, to push her so that they could exit the train, notwithstanding that it was already in motion. Although she tried to push back, she was pushed onto the platform through the open doors, where she fell and twisted her ankle.

4. It would appear from the defendant's evidence, that a passenger drew the attention of one of the security guards on the platform to the fact that there was a young lady who had been injured lying on the platform as a result of which, an ambulance was ultimately called and the plaintiff was taken to hospital. There it was discovered that her ankle was broken requiring a wire to be inserted under anaethetic.

5. The plaintiff averred that had the doors of the train been closed when it moved off from the station, she would not have been pushed out of the train whilst it was in motion and would not have been injured.

6. The defendant led the evidence of a number of witnesses, essentially to establish the same essential facts; that the train was a 12 coach train with 3 motor coaches and 9 ordinary coaches; that the coaches were not overcrowded, that the train's doors were not stuck open, were only opened by the guard at the rear of the train when it had stopped at the station and were closed after all of the passengers had alighted from and boarded the train, after which, the train was set in motion. It was categorically denied that the train had set off from the station with the doors open when passengers were still attempting to leave and board to train. All the witnesses who interviewed the plaintiff insisted that she told them that she had twisted her ankle when disembarking from the train and never once stated that she had been pushed out of the open doors of the train by commuters wishing to leave the train after it had been set in motion. This was corroborated

by the pocket books and occurrence book entries completed by the guard on the station, his supervisor as well as the supervisor employed by PRASA, who had been the one to summon an ambulance.

THE APPLICABLE CASE LAW

7. The Constitutional Court has made it clear that PRASA has a public duty to provide public rail transport in a safe manner (***Rail Commuters Action Group v Transnet Ltd t/a Metrorail*** 2005(2) SA 359 (CC)). 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)).
8. Each case will depend on its own facts but, in ***Mokwena v Passenger Rail Agency of South Africa*** 144465/2010, Stachwell was prepared to adopt a robust approach and accepted that on the basis of evidence tendered in several other matters, where there was evidence 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 to 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.

9. On this basis, 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 (***Loveness Mhlongo v Passenger Rail Agency of South Africa*** (20594/2014) [2016] ZAGPJHC353 (15 December 2016); ***Maruka v Passenger Rail Agency of South Africa*** (8905/2014) [2016] ZAGPPHC213 (15 April2016).

10. However, on the other hand, in **South African Rail Commuter Corporation Ltd v Thwala** (661/2010 [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".*

11. It is thus crucial in determining negligence to ascertain whether the train was moving or not when the plaintiff was injured (***Passenger Rail Agency of South Africa v Baloy***i (69570/2013)[2016] ZAGPPHC785(2 August 2016).

12. This was fully appreciated by the plaintiff's counsel who moved for an amendment to the Particulars of Claim at the commencement of the hearing to include an averment that the plaintiff had been pushed out of a moving train. He accepted that if this could not be established, the plaintiff would be non-suited.

13. In ***Twala's case*** the court found that the train was stationary when the plaintiff was injured and that, in the circumstances, there was no ground for a finding of negligence against the rail corporation. The facts, as relayed by Maya JA were strikingly similar to the present matter:

> *"The background facts are simple and largely undisputed. On her way to work on the fateful morning, the respondent, a regular commuter on the appellant's train service since she took employment in the Village in 1990, boarded her usual train, 9705, at Orlando West, Soweto between 05h00 and 06h00. The train was more crowded than usual because of a civil service strike which brought more passengers. Her regular coach was full to capacity with seated and standing passengers and she was compelled to take adjacent one, also crowded, in which she stood for the duration of her ride. As the train approached her station, disembarking passengers pushed their way to the doors sweeping her along with the tide. She was pushed in that throng and fell on the station platform.*
>
> *The respondent's testimony was that she noticed that the train doors were open only when it pulled in at Village Main Station (contrary to her counsel's summation of her case above that the train doors were open from the previous station) and jostling passengers, who pushed her causing her fall, started disembarking before the train came to a complete standstill. She claimed to have told both Ms Tshidzumba and Mr Maleka that she was pushed from the train whilst it was still moving, albeit slowly. However these officials, who testified for the appellant, were adamant that she reported that the train had already stopped when she was pushed to the platform and fell."*

14. However, that is not necessarily the end of the matter, as it has been found that overcrowding may itself amount to negligence where a plaintiff is pushed out of a train by other passengers, even if it had been stationary(**Phalane v Passenger Rail Agency of South Africa** (71408/2013)[2015]ZAGPPHC804(3 December 2015) and ***Makgopa v Passenger Rail Agency of South Africa***(9830/2015)[2016]ZAGPPHC506(3 June 2016).

15. Unsurpringly, the plaintiff in this matter has also averred that the train was over-crowded, although this was not seriously persisted with in argument . Where, as in this case, the train had been full- in the sense that passengers were required to stand in the isles-but was not over-crowded, this would not amount to negligence. Indeed, in similar circumstances, in ***Twhwala's case***, Maya JA rejected the court *a quo*'s finding of negligence because of overcrowding, notwithstanding that the train had been stationary:

> *"The court below rejected the respondent's evidence that the train was moving when the accident occurred. It found it improbable that 'the general throng of passengers of whom she was one would' exit a moving train and concluded that the train was stationary when the respondent, pushed along by other passengers, disembarked and fell. The court however accepted the respondent's version that the train was overcrowded. On that basis it found that the harm suffered by the respondent – that a frail commuter such as the*

respondent, travelling on a crowded train during peak hours, might be pushed, fall and suffer injury – was foreseeable and that the appellant 'was under an obligation to take steps to prevent' it. The court consequently held that by allowing the train to be overcrowded, the appellant negligently failed to take reasonable steps to prevent harm which was foreseeable and that such negligent omission was the direct cause of the respondent's injuries giving rise to liability for her damages.

Reverting to the facts of the present matter, I respectively agree with the court below that the train must have stopped before the respondent was unceremoniously ejected from her coach.

I may just add that I accept that it is common human behavior for railway commuters, particularly during morning peak periods when most are in a hurry to get to work, to rush to the doors of a coach, when it nears their destination, so as to disembark quickly. This, in fact, is supported by the respondent's evidence that 'if the train is about to stop or to arrive at the station, people push each other….because they want to get off the train'. I find it most unlikely, as did the court below, that the majority of the passengers, no matter how much in a rush they are, would engage in such a dangerous exercise as to exit a moving train as the respondent would have it. What seems more probable is that when the doors of the stationary train opened, the respondent was trapped in the surge of dismounting passengers, shoved in the rush and lost her balance.

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', 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.

The question which remains for determination is whether on the evidence that the respondent fell and sustained injury as a result of being pushed from a stationary train by impatient fellow commuters – a happenstance over which the appellant was not shown to have control – 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 conduct constitutes negligence ultimately depends upon a realistic and sensible judicial approach to all the relevant facts and circumstances.

As indicated above, the premise of the respondent's case was that she fell and sustained injury as a result of being pushed by an excessive crowd 'from

inside' a moving train. Quite apart from the finding that the evidence does not establish the reasonable precautionary measures that the appellant could have taken to prevent passengers knocking one another down when disembarking from stationary trains, the respondent's single, insurmountable hurdle is her failure to establish that the train was in motion when she was ejected from it. It seems to me that once the court accepted that the train was stationary when the respondent disembarked and the accident occurred, that should have been the end of the respondent's case. This, clearly, was the result contemplated by the parties themselves when they defined the issue; that only a finding that the train was in motion when the respondent was pushed and fell would give rise to liability. The court below thus erred in this regard and the appeal must succeed."

THE EVIDENCE

16. Bearing the above case law in mind, it is necessary to examine the evidence. The plaintiff was the only witness called on her behalf. She testified through an interpreter. She was not a forthwright witness and consistently failed to engage either with counsel or the court, tending to look away when spoken to and speaking in an incredibily soft voice. The Court was left wondering whether this was because she was not confident about her evidence, or whether she was simply an incredibly shy and unsure witness.

17. The Court's scetism was somewhat fuelled by the fact that the plaintiff made all the requsite averments set out in the case law to establish negligence; that the train was over-crowded, that the doors were not closed at any stage during her journey, and that she had been pushed out of train by jostling commuters while the train was still in motion. I was also left wondering why the guard at the station had been so adamant that the plaintiff was travelling with other commuters and was later joined by her family and why this had been denied by the plaintiff. I felt that I could not discount that this may have been to avoid an adverse inference being drawn by her failure to call these persons to corroborate her version.

18. My scepticism was not reserved soley for the plaintiff. Unsuprisingly,the guard stationed at the back of the train, Mr Kganyago ("*Kganyago*"),whose duty it was to ensure that passengers embark and disembark under safe conditions, insisted that he had done his job diligently and properly and had made sure that the doors of the train were closed after the passengers had alighted from and boarded the train before he signalled to the driver, sitting in the front of the train, that it was safe for the train to leave the station.

19. He stated that there was a button in the coach which, when pushed, closed all the doors of the carriages.However, prior to closing the doors of the train, he sounds his whistle. This lets commuters know that the the doors are about to be closed, whereafter, the train would be departing from the station. He insisted that he would not sound his whistle to indicate the train would be departing if there were any passengers standing between the yellow line on the platform and the

train. He explained that this is a mandatory procedure which he is required to follow at each and every station.

20. He denied that he would ever allow the train to be set in motion whilst commuters were still embarking and disembarking from the train, or when the doors of the train were still open. To avoid this,it was part of his duty to stick his head out of the last coach and ensure that all the doors are closed before leaving the station.

21. He stated that the station bent towards the right and he thus, had a full view of all of the coaches, including the last one occupied by the plaintiff, before he signalled to the driver that it was safe to leave the station. However, he did concede in cross-examination that had the train stopped at platform 3 and not platform 4, the track would have curved the other way and his vision would of the carriages would have been obscured.

22. Be this as it may, he insisited that he keeps the platform in view when the train departs and if there was someone who had fallen from the train between it and the yellow line, he would push the emergency bell to tell the driver to immediately stop the train so that he could attend to the commuter. Where a person, like the plaintiff, fell on the other side of the yellow line, that would be responsibility of the metro-guards stationed at the station.

23. He also stated that the train had been travelling at an off-peak time on a Saturday morning when there are very few commuters and thus, the train would not have been over-crowded. He conceded, however, that the train may have been full, with passengers not able to sit holding onto the poles in the isles, but insisted it was not over-crowded.

24. He also testified that the buffer plates between the motor coaches prevents there being any jerking movements when the train leaves the station. But I would have thought that this required expert evidence.

25. However, what a guard in Kganyago's position is required to do to ensure passenger safety and whether Kganyago did follow these procedures on the day in question, is another matter entirely. It was appararent that Kganyago had no independent recollection of the day in question and his testimony was no more than what he avers he normally does when performing his duties. He, did, however, insist that had the plaintiff fallen out of the train while it was in motion, he would have instructed the driver to immediately stop the train and he did not do so on that day. He did not see the plaintiff fall from the train or lying on the platform and thus, did not record any incidences in his pocket book. From this he deduced that no-one had fallen from a moving train that day as had this occurred, he would have recorded it.

26. He argued that as the plaintiff says she was lying on the other side of the emergency lane after she had fallen, she could not have fallen from the train, unless she was "*flying*".

27. However, under cross-examination Kganyago conceded that commuters do often jam the doors so that they cannot close and do forcefully open the doors when the train is in motion. He said he was powerless to stop this practice as he was intimidated and frightened by the hoodlams on the train who he said were aggressive. He conceded that this occurs on a daily basis. This is done, amongst other reasons, to avoid ticket inspectors verifying if commuters have valid tickets to board to train. It would thus, not have been improbable for this to have occurred on the day in question.

28. The evidence of the guards on duty at the station and the officials called after it was discovered that a passenger had been injured was essentially led to establish that the plaintiff did not report to any of the persons who attended to her, that she had been pushed out of a moving train. Their record books and reports contain important corroborating evidence.

29. Mr Ngobesi ("*Ngobesi*"), the guard on duty on the platform, stated he recalled the incident. He stated that the plaintiff was not travelling alone and was with two other female passengers. He also stated that after a while, a member of the plaintiff's family attended at the scene. This was denied by the plaintiff. He accepted that from the gate where he was stationed, he could not see the back of the train, which is where the plaintiff states that she was seated and the doors were open. He clearly did not witness her fall and was told by another commuter that she was injured. He reported that the plaintiff said that when she disembarked, she tripped herself and twisted her ankle. He said she never said the train was over-crowded or that she had been pushed out of the train onto the platform whilst it was in motion.

30. This, it was argued, was corroborated by the entries he made in his pocket book, in the occurrence book and the statement he prepared of the incident (Exhibit B pp 8, 18 and 20 respectively). However, although it is correct that the plaintiff's version was not recorded, neither was his version of what he stated had been told by him as to the circumstances under which the plaintiff had fallen.There was no mention that she had said she had twisted her ankle while disembarking and the only salient facts recorded were the date and time of the accident, the details of the person injured, the direction of the train and that she was in possession of a valid ticket (a requirement for liability). This evidence was in itself, therefore, inconclusive.

31. Ngobesi stated, however, that he reported the incident to his supervisor, Mr Ntuli ("*Ntuli*"), who arrived about an hour later and also spoke to the plaintiff, although

he could not hear what was said between them. Hereafter, he stated that Ntuli called the metromember, who is a PRASA employee, tasked with dealing with all incidents occurring on the trains, Mr Nkosi (" *Nkosi*"), who also spoke to the plaintiff and called the ambulance, by this stage, several hours after the plaintiff had first been injured. Both of these persons testified and also denied that the plaintiff had told them that she had been pushed from an over-crowded train whilst it was in motion.

32. Ntulini, testified that he attended at the scene and spoke to the plaintiff. He is required to complete a liability form if there is an incident and a statement which he did (Exhibit B pp 11 and 17). He stated he first records what is stated in rough and thereafter, writes this neatly in the statement. There it was recorded that the plaintiff became injured while disembarking from a stationary train. He said he first got this information from the guard at the gate and thereafter, from the plaintiff herself. Although recorded in the wrong place of the liability report (ie where he was supposed to record the injuries) he recorded that " *she fell down while she was coming from the stationary train*" (p17). I do not think it matters that he did not record that this is what was told to him by the plaintiff and this is an inference readily drawn from the statement. The fact this was first recorded on rough paper before noted down properly in the report, which he thereafter threw away, also does not cause me to doubt the veracity of that which was recorded.

33. Nkosi was the shift member employed by Metrorail Protection Services. When there is an incident involving the trains, he is contacted so that he can report on the incident to his employer. He spoke to the plaintiff and obtained her details. He records the incident in an occurrence book and prepares a report for the Joint Operational Centre in Johannesburg. In the extract from OB book recording incident (p 5 at p 7), he recorded that "*the injured person alleged that she was disembarking a train at Tooronga Station and she lost footing and feel down then left ankle was swollen and Bruises on the left leg*"(sic). He stated that the plaintiff told him that while she was disembarking, she missed her step and twisted her ankle. He accepted the plaintiff did not expressly state that the train was stationary, but this was an assumption he drew from the fact that the plaintiff stated that she got injured while disembarking and you don't disembark from a moving train. She did not say the train was moving, or that the train was overcrowded and she had been pushed by other commuters. She reported that she was in considerable pain and required an ambulance, which he called.

34. In an effort to negate the effect of this evidence, the plaintiff insisited that she only spoke to the security guard at the station and did not speak to his supervisor or to any Metrorail Employee. It was suggested by counsel that the version of events was reported to Ntulini and Nkosi by the security guard on duty and that he did not get this information from the plaintiff. This, however, does not detract from the fact that Ngobesi, who seemed to have the most accurate recall of the incident, denied that the plaintiff ever asserted that she had been pushed out of a moving train.

35. In these circumstances, the recordal in the hospital records, which formed part of the bundle, apparently by the doctor attending to the plaintiff that the plaintiff had stated that she had been pushed out of a moving train, became crucial corroborating evidence. The defendant's counsel sought to exclude this evidence on the basis that it was hearsay and, moreover, was inadmissible as a prior consistent statement.

36. It is true that these records were not traversed in evidence by the plaintiff, nor was the doctor who made the note called as a witness and would thus constitute hearsay evidence. However, in terms of the Pre-Trial Minute signed by the parties, it was recorded that the documents in the bundle were agreed to be what they purported to be and thus, although not truth of their content, constituted a record that indicated that the plaintiff had informed the doctor attending to her that this is how she had become injured, although this might not necessarily have been true. It was thus, evidence of a prior consistent statement, which the defendant's counsel conceded was only inadmissible in criminal proceedings.

37. Although it was also recorded in the pre-trial minute that each party retained the right to object to the use of a specific document, in which case it would have to be proved, and the defendant's counsel did object to the use of the hospital records,this was on the basis that the statement in them was hearsay, not on the grounds that they were not what they purported to be, namely the hospital records of the plaintiff. I thus felt entitled to have regard to these records.

38. The question thus, arose what reliance should be placed on this corroborating evidence. In evaluating the weight to be attached to this evidence I am mindful that attorneys specialising in these and motor-vehicle accident cases are often termed "*ambulance chasers*" and secure mandates from clients at the emergency rooms of several hospitals. I can thus, not entirely exclude the possibility that the plaintiff's attorney, or his representatives, could have been at the emergency room and counselled the plaintiff as to what should be said in order to establish a claim for damages. By the time they appear in court, these plaintiff's are well versed in the essential averments that need to be made to establish negligence.

39. However, as this is a serious inference which I am unable to draw unless canvassed in cross-examination with the plaintiff to establish when she first briefed her attorney, and whether this was before or after she had been seen by a doctor at the hospital, this statement in the hospital records remains probative evidence which precludes my dismissal of the plaintiff's action. But because this should properly have been canvassed by the plaintiff in evidence, at which stage it could have been properly challenged in cross-exmination, I am reluctant to find that this evidence is sufficient to discharge the onus on the plaintiff to establish negligence in the light of the weight of the evidence to the contrary.

40. In these circumstances, I feel that I have no alternative but to grant absolution from the instance. This is the appropriate order where the Court cannot accept

the plaintiff's evidence as providing a more probable version of events than that of the defendant's witnesses (**National Employers General Insurance v Jagers** 1984 (4) SA 437 (E) at 440D-H).

41. As I do not believe that either party was successful, I believe that it is appropriate that each party bear their own costs.

42. In the circumstances I make an Order as follows:

42.1. granting absolution from the instance;
42.2. directing that each party bear their own costs.

SM Wentzel

SM WENTZEL, AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION
JOHANNESBURG

Attorney with right of appearance for the plaintiff: Bulelani Mzamo of B Mzamo Inc.
Counsel for the defendant:Sazi M. Tisani instructed by Cliffe Dekker Hofmeyr Inc.
Date of hearing: 9 February 2018; Date of argument: 22 February 2018
Date of Judgment: 29/5/2018