



THE HIGH COURT OF SOUTH AFRICA, SOUTH GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE NO: 16/4158

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

17/04/2020

DATE

SIGNATURE

In the matter between:

MHLANGA EDDIE

PLAINTIFF

AND

PASSENGER RAIL AGENCY

DEFENDENT

JUDGMENT.

Molahlehi J

Introduction

[1] The claim for damages by the plaintiff, Mr Mhlanga, in this matter arose from the accident that occurred on 10 August 2016 at New Canada railway station. He claims damages as a result of the injuries suffered consequent the accident.

[2] It was pointed out by Counsel at the commencement of the hearing that an order was issued during the case management conference, separating liability from quantum of damages. Thus the only issue for determination in the present proceedings concerns the issue of liability of the defendant.

[3] It is common cause that the plaintiff suffered bodily injuries on the day in question. He embarked on the train at Orlando railway station with his intended destination being Johannesburg.

The plaintiff's case

[4] The plaintiff was the first witness to testify about what happened on the day of the incident. He boarded the train at around 7:20 at Orlando railway station. The train arrived thirty minutes late and was overcrowded.

[5] He travelled on the train with his cousin Mr Gift Simango. On arrival at the station, the train doors were open and remained like that until the train arrived at the new Canada railway station.

[6] The train was overloaded, and thus he had to stand, with nothing to balance himself on. He was standing a meter away from the open door.

[7] He testified further that the next station after Orlando was Mlamlankumzi and because of train was full, no passengers embarked on the train at that station. The next station was New Canada.

[8] As the train was approaching the platform at New Canada, the passengers started jostling and pushing towards the opened door in preparation of alighting from the train. In the process of jostling and pushing by other passengers, the plaintiff was ejected out of the moving train. He fell and sustained injuries on his feet and back.

[9] Before falling out of the train there were seven people between him and the door, who were balancing themselves with the steel poles inside the train.

[10] The plaintiff testified during cross-examination that he fell backwards and on his back. He was asked how it came about that he ended up injuring his feet if he fell in the manner he described. He stated that it was because the people who alighted the train at that moment were pushing. He disputed the version put to him that he was seen hanging outside the driver's cabin. He further insisted that no person boarded the train at Mlamlankunzi.

[11] The second witness to testify in support of the case of the plaintiff was his relative, Mr Gifts Simango. He testified that he together with his cousin, (the plaintiff) and other cousins boarded the train from Orlando on the way to Johannesburg in the morning. The train was overloaded, and its doors were open as it travelled towards Johannesburg. He did not find a seat to sit on, and thus he stood, holding onto the belts that hang inside the train ceiling. He had his monthly ticket and was in the second coach from that of the driver's cabin.

[12] According to him, information was passed by passengers who were at the door that a stop-and-check would be conducted at the New Canada station. It was for this reason that people started jostling and pushing to get out of the train. The plaintiff was in that process ejected out of the train. He fell out of the train just where the platform begins. The official of the defendant approached him immediately after the accident.

[13] During cross-examination, the witness stated that they, together with the plaintiff, arrived at Orlando station at about 6:30 and boarded the train to Johannesburg. His version concerning what happened at Mlamlankunzi is that the train stopped and few people alighted and because it was overloaded few were able to board the train.

[14] Concerning what happened as they approached and arrived at the New Canada station, he testified that about five meters before entering the platform the train reduced its speed and at that point, people started jumping out of the train. The plaintiff was the only person who was ejected out of the train on that the day. He refuted the assertion that the plaintiff was hanging out of the driver's cabin. He also confirmed the version that there were people between the door and where the plaintiff was standing.

[15] During cross-examination, he insisted that the incident occurred on 9 August and not 10 August 20216.

The defendant's case

[16] The only witness who testified on behalf of the defendant was Mr Tembe, the senior protection officer of the defendant. He testified that on 10 August 2016 he

reported for duty at New Canada railway station and was deployed to conduct a stop-and-check of passengers who were on the train without valid tickets.

[17] He conducted the process of checking by standing on a vantage point which is a bridge under which the train would pass on its way to Johannesburg. While standing there, he observed a person next to the driver's door outside the train. The person was trying to jump from where he was, as the train was entering the platform. It was too late for him to jump and accordingly, he landed under the train and the platform.

[18] Having observed the incident, he went around to a security officers and instructed him to contact other officials to go to the scene. He further testified that he never saw any other person jumping out of the train on that day.

[19] During cross-examination, Mr Tembe conceded that the train was overcrowded and that people were hanging at the door of the train.

[20] He insisted that he saw only one person at the door of the driver and that only one person was involved in that accident on that day.

Legal principles.

[21] As stated in *South African Rail Commuter Corporation Ltd v Thwala*,¹ the test for determining the legal liability in a case involving an allegation of negligence entails conducting a factual inquiry into 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.

[22] In *Thwala* the Court, after restating the above test held that not every act or omission which causes harm is actionable. The Court further found that for liability for patrimonial loss to arise, the negligent act must be harmful.

[23] It is trite that the plaintiff being the party alleging negligence has the burden of proof. The plaintiff has to discharge the burden by adducing evidence as to the reasonable measures which could have been taken to prevent or minimize the risk of harm.

[24] In *Moshongwa v PRASA*,² the Constitutional Court held that PRASA has by being a public carrier a duty to protect its passengers from suffering physical injury while using trains.

[25] As concerning the issue of causation, the Constitutional Court in the *Minister of Correctional Services*,³ held that the element of liability gives rise to two distinct inquiries. The first inquiry, the Court held, is a factual inquiry into whether the harm complained of was due to the negligent act or omission on the part of the defendant.

¹ *South African Rail Commuter Corporation Ltd v Thwala*(661/2010) [2011] ZASCA 170 (29 SEPTEMBER 2011) at paragraph [11].

² (2015) ZACC 36 at paragraph 20.

³ 2013 (2) BCLR 129 (CC).

There is no need to conduct further inquiry if the answer to this question is in the negative. If the answer is in the affirmative, the second inquiry, which concerns legal causation requires an investigation into how close or remote is the harm to the negligent act or omission.

[26] The case of the plaintiff in the present matter is based on the alleged failure by the defendant to take reasonable steps to prevent the injuries he suffered. His contention is that had the doors of the train been closed he would not have suffered any harm. In other words, the consequent injuries and the damages he suffered follow from the negligent failure by the defendant to close the door of the train.

[27] The defendant disputed the plaintiff's claim and contended that he was not forced out of the moving train, but instead, he involved himself in an act in which he voluntarily assumed the risk of injury. It contended that it should not be liable for the resultant damages suffered by the plaintiff when he voluntarily assumed the risk of the danger of falling off the train.

[28] It is clear from the above discussion that there is a factual dispute concerning the cause of the accident.

[29] In resolving factual disputes, the Court is enjoined to find where the truth lies between the two mutually destructive versions. In this respect the Court is required to investigate: (a) the credibility of the various factual witnesses, (b) the reliability and (c) the probability or improbability of each party's version on each of the disputed issues. In search of where the truth lies between the two mutually destructive versions, the Court will be persuaded by whether the balance in favour of the truth tilts in favour of the party that has the burden of proof. While these factors need not be considered in isolation of

each other, the courts are generally slow to resort to the credibility factor because of its inherent challenges.⁴ To succeed in discharging its onus the party that bears the onus has to produce credible evidence to support his or her case.⁵

[30] In the present case, it was argued on behalf of the plaintiff that he had discharged the onus of proving on the balance of probabilities that the defendant was negligent in allowing the train to travel with its doors open. It was further argued that the plaintiff and his witness were reliable witnesses and thus the probabilities favour that version.

Evaluation

[31] In my view, the version of the plaintiff is highly improbable, and precisely because it in certain respects is contradicted by his witness. Although the train was overcrowded, he did not have to push himself inside the train and stand about a meter away from the door. He estimated that there were about seven other people between him and the train door.

[32] He initially stated that as far as he could recall, no one was pushed out of the train on that day. When questioned further about this issue in cross-examination, he said that he could not recall how many people were between him and the door. He could not see whether any passenger blocked the door from closing. The plaintiff

⁴ Stellenbosch Farmers' Winery Group Ltd and Another v Martell and Others, 2003 (1) SA 11 (SCA) at paragraph [5].

⁵ National Employers' General Insurance v Jager 1984 (4) SA 437 (ECD) at 440 – D.

conceded in general terms that it is dangerous to hang outside the train once it is in motion.

[33] The second witness of the plaintiff was the most unsatisfactory witness in that he contradicted the plaintiff in some respects. It appears from his version that the jostling and pushing in the coach was due to passengers who wanted to jump out of the moving train to avoid ticket inspectors.

[34] He testified that the plaintiff was the only person that fell out of the train. This is so despite there being many other people who were jumping out of the moving train. It was also, according to him, only the plaintiff who lost his balance while the others balanced on each other.

[35] It is quite clear that to a considerable extent, the story told by the plaintiff's witness was a fabrication. This is amongst others evidenced by the fact that he during cross-examination he volunteered information which was never solicited from him in cross-examination. He testified in this respect that other people who were outside the driver's cabin accused the plaintiff as one of those who were outside the driver's cabin. There was nothing suggesting the need to divulge this information, which to some extent supported the version that there was at least someone hanging outside the driver's cabin.

[36] He contradicted the plaintiff about the times estimated by the plaintiff and the date of the occurrence. He insisted that the accident occurred on 9 August 2016. This is despite it being indicated to him that the record reflected otherwise. He could not tell how come his brother missed noticing that some people boarded the train at Mlamlankunzi railway station. The version of the plaintiff was that there were no

passengers that went on board the train at Mlamlankunzi station because the train was full.

[37] The only witness of the defendant was Mr Tembe. His testimony, although being that of a single witness, was clear, consistent and satisfactory to the extent that this Court was persuaded to accept it as truthful. He gave a full account of what happened at the critical moment before the accident.

[38] As indicated earlier, he observed the incident from his vantage point standing on the bridge under which the train would pass. He saw the plaintiff hanging outside the driver's cabin and also as he was trying to pull himself up as the train was approaching the platform.

[39] Mr Tembe was cross-examined at length as to why he did not stop the train when he saw the plaintiff hanging outside the driver's cabin. His explanation which I find fair and reasonable is that he is not responsible for train operations, and in any case, the train was entering the station, and it was about thirty meters away from the platform at the time he saw it.

[40] The argument that calling Mr Tembe as a witness was an afterthought because he was not identified as such in the appellant's occurrence book is unsustainable. The occurrence book indicates otherwise. The record reflects that the entry into the occurrence book was done by Mr Mavume, who recorded that the incident was reported by Mr Tembe, who also witnessed the incident.

[41] The proposition by the plaintiff's Counsel that the person that Mr Tembe saw hanging on the train may be a different person who by the time he reported the incident to the security may have stood up and run away is unsustainable considering the

plaintiff's version. The fact that one of the witnesses who stated that he preferred to remain anonymous and was unwilling to testify does not detract from the reliability, the consistency and the truthfulness of the single witness testimony of Mr Temebe.

[42] In light of the above, I find that the plaintiff has failed to adduce sufficient evidence to show that the injury he suffered was as a result of the negligence of the defendant.

Order

[43] In the premises, the plaintiff's claim is dismissed with costs.



E Molahlehi

Judge of the High Court,
Johannesburg

The representation:

For the Plaintiff: Adv O Morapedi instructed by B Mzamo Incorporated

For the Defendant: Adv FF Opperman instructed by Cliffe Derker Hofmeyr Inc

Date heard: 13 February 2020

Delivered: 17 April 2020.