REPUBLIC OF SOUTH AFRICA

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

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

31/08/2022

DATE SIGNATURE

Case Number: 21/17928

In the matter between:

MOFOKENG KEMMONE ISAAC **PLAINTIFF**

AND

PASSENGER RAIL AGENCY OF SOUTH AFRICA **DEFENDANT**

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:

Introduction

[1] On 21 November 2018 the plaintiff, Mr Kemmone Isaac Mofokeng was injured when he fell from a moving South African Rail Commuter train, which had left Dallas station with the doors of the carriage open. As a result of the accident the plaintiff suffered certain injuries namely; a left distal femur fracture, deep cut on the head, bruises and abrasions on his knee and elbow.

[2] At the commencement of the trial the parties agreed that only the defendant's liability be dealt with and the question of the plaintiff's quantum claim be dealt with later.

[3] I made a ruling in terms of Rule 33(4) that the merits and the quantum be separated and that this court deal with the issue of whether or not the defendant is delictually liable to compensate the plaintiff for whatever damages he may prove to have suffered as a result of the accident.

[4] In the particulars of claim, it is alleged that on 21 November 2018, the plaintiff boarded a train at Dallas station, which was heading to Mpilisweni Station. The coach that he boarded was overcrowded and its doors were open when the train departed from the station. As the train was leaving the station, the plaintiff was ejected out of the moving train through its open doors "due to a fight /commotion among the passengers of the overcrowded coach". He fell on the platform and sustained a fracture on the left femur and other injuries. At the time of the incident, he was in possession of a valid train ticket.

[5] Further allegations, *inter alia,* included that the defendant owed the plaintiff a legal duty alternatively a duty of care to ensure his safety whilst making use of the rail commuter services provided by the defendant, which include, amongst other, taking reasonable steps and implementing reasonable measures to ensure the safety of passengers travelling on trains operated by the defendant.

Common Cause

[6] The common facts in this matter are as follows: The plaintiff was a regular commuter on the defendant's train, travelling from his residence in Katlehong to various destinations. On 21 November 2018 he boarded the train at Dallas station to Katlehong. The plaintiff sustained injuries as the train was departing from the station. After the incident he was taken to Natalspruit Hospital by ambulance where he was admitted.

Issues in dispute

[7] The main issue to be decided upon is the liability of the defendant. The factual dispute is whether the plaintiff was accidentally pushed by other commuters through the open doors of the moving train, or whether he was attempting to illegally board the train by jumping on the link between the coaches, whereafter he lost his balance and was injured. It is also in dispute whether the plaintiff was in possession of a valid ticket for the trip from Dallas station to Katlehong station.

Evidence at Trial

[8] The plaintiff and Mr Bosman testified in the plaintiff's case. The defendant called three witnesses, namely Mr Mokwena, Mr Harvey and Mr Phaswane.

Plaintiff's Evidence

[9] The plaintiff testified that on the day of the incident he was in the company of a co-worker, Mr Bosman, when they both boarded a train at Dallas station, after having completed a gardening job in the area. He and Mr Bosman loaded the lawn mower and gardening tools they had in their possession when and they boarded coach 7/8.

[10] He stated that he was standing in the middle of the coach across the open door when the train pulled away from the station. According to him the train was crowded. As soon as the train started moving, a quarrel broke out between unknown commuters, inside the coach. As a result of the scuffle, he was pushed out of the train, through the open doors.

[11] The plaintiff testified that he managed to hold on to the side handle of the train, one of his legs was hanging outside the coach, between the platform and the moving train. An unknown commuter attempted to assist him; however, he fell from the coach, landing on the platform at Dallas station.

[12] The plaintiff stated that he was in possession of a valid train ticket, which was a monthly ticket for commuters traveling between Mpilisweni and Kempton Park.

[13] During cross examination the plaintiff testified that his girlfriend usually purchases his train ticket at Angus Station.

[14] The plaintiff conceded during questions by counsel on behalf of the defendant that he informed Mr Harvey, the Security Guard, that he was not in possession of a valid train ticket on the day. He further stated that he never informed Mr Harvey that he attempted to board the train by jumping on the link between the coaches, and as a result of losing his balance he fell on the tracks and was injured.

[15] During re-examination the plaintiff explained that he informed the security guard that he was not in possession of a valid train ticket, because he was afraid that if he told the security guard he had a valid train ticket, the security guard would take the ticket from him. He would then have no proof that he was in possession of a valid ticket on the day of the incident.

Evidence of Mr Tshediso Innocent Bosman

[16] Mr Bosman corroborated the evidence of the plaintiff in all material aspects.

[17] He stated that after the plaintiff was pushed from the train, he proceeded to the next station, Wattles, where he disembarked. He testified that when the plaintiff was pushed from the train, he was unable to help the plaintiff. After disembarking at Wattles station, Mr Bosman boarded a train and returned to Dallas station. On his return the plaintiff was not at the station and he was informed that the plaintiff was transported to the hospital by ambulance services.

[18] During cross examination by the defendant the witness did not deviate from his evidence in chief examination.

Defendant's Evidence

Mr Raymond Jabulani Mokwena

[19] Mr Mokwena testified that he was employed by PRASA and was appointed to investigate the incident.

[20] The witness testified regarding the following:

1. Two types of train tickets, namely commuters can buy train tickets at a kiosk window at stations, which tickets when issued are larger in size. Secondly, commuters can

buy train tickets at mobile ticket machines at stations, which tickets will be smaller than those issued at station kiosks.

2. According to his investigations, the train ticket in question in this matter was purchased at Angus Station at a mobile ticket machine.
3. Train tickets are not issued in the name of a commuter, and are not issued to a specific person, therefore he was unable to indicate to whom the ticket in this matter was issued to.
4. Ms Lebotsa was stationed on the train as train guard on the day of the incident. Unfortunately, she is deceased. Prior to her passing he interviewed her regarding the incident, whereafter she made a statement, which statement formed part of his investigation report.
5. The witness referred to the daily train roster of the train and stated that according to information received by him the train was running on time at the time of the incident.
6. He also had insight in the daily occurrence book and entries relevant to the incident were included in his investigation report.

[21] During cross examination by counsel on behalf of the plaintiff, Mr Mokwena stated that train tickets are "not transferable" and therefore if a commuter uses a train ticket bought by another person, the use of the said ticket can be revoked by PRASA. He however, agreed that on face value train tickets are not issued to a specific person, in name.

Mr Jacob Harvey

[22] Mr Harvey testified that he is employed by PRASA Protection Services as a Protective Official. On the day of the incident, at around 13h10, he received a call from the Joint Operational Centre Johannesburg (**"JOC"**) that a person was injured after falling from a train. He was further informed that the injured person was lying on Platform 1 at Dallas Station.

[23] The witness testified that according to the information he received the injured person was attempting to board a moving train.

[24] He then proceeded to Dallas station where he found the plaintiff being attended to by paramedics. Mr Bosman stated that he enquired from the plaintiff as to what had happened. The plaintiff informed him that he attempted to board a moving train when

he slipped and fell. The plaintiff also told him that he was not in possession of a valid train ticket.

[25] Mr Bosman testified that he drafted a report concerning the incident.[1] The witness drafted a second report on request of the attorneys.[2] He also compiled a Liability Report.[3] He conceded that in the Liability Report, he stated that the plaintiff told him that he was in possession of a valid train ticket. The witness explained that he made a human error in omitting the word "not" in possession of a valid train ticket.

[26] During cross examination by the plaintiff, Mr Harvey conceded that during his testimony he relied on the information contained in the reports compiled on the day of the incident.

[27] The witness further stated that the plaintiff told him that he fell underneath the train, and he did not tell him who assisted him to get on the platform after he was injured.

[28] Mr Harvey agreed that the information in his reports regarding injuries sustained by the plaintiff varied. He conceded that the reporting of the incident was not accurate.

Mr Tendai Robert Phaswane

[29] Mr Phaswane testified that on the day of the incident he was employed by Thlakalani Protection Services, a sub-contractor to PRASA. On the day of the incident, he was stationed as a security guard conducting duties in the area of Dallas station. While conducting his duties, he was informed by an unknown truck driver, employed by Spoornet, that an incident occurred at Dallas station where a person was injured.

[30] After receiving the report, he and his colleague Mr Manopi, proceeded to Dallas station. On their arrival they found the plaintiff lying on Platform 1. Mr Phaswane asked the plaintiff what had happened and the plaintiff told him that he attempted to board a moving train by jumping in between the two coaches. The plaintiff further said that he slipped and fell between the train and the platform.

[1] Case Lines 005/8.
[2] Case Lines 005/47.
[3] Case Lines 005/16.

[31] The ambulance services were summonsed. On their arrival they attended to the plaintiff's injuries. Mr Harvey also arrived on the scene.

Evaluation

[32] It is trite that for the plaintiff to succeed in a case that involves negligence, he must prove there was a duty of care owed to him by the defendant, which the defendant has breached and that the breach has caused harm to occur which resulted in damages. Only once the plaintiff has discharged the onus, the defendant will have to rebut the inference of negligence by adducing evidence relating to the measures it took to avert harm.[4]

[33] Therefore, the plaintiff must prove his case on a balance of probabilities and where there are factual disputes, in resolving those factual disputes, the court will apply the technique which was summarised in *Stellenbosch Farmers' Winery Group Limited and Another v Martel & Cie SA and Others*[5]as follows:

> "On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by court in resolving factual disputes of this 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 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 witnesses' 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 extra curial 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's 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."

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[4] South African Rail Commuter Corporation Ltd v Thwala [ZASCA] 170 at paragraph 18.
[5] 2002 (1) SA 11 (SCA).

[34] The central issue in this case is whether the defendant, through its employees, is to blame for the incident which caused the plaintiff injuries.

[35] In *Kruger v Coetzee*[6] the Supreme Court of Appeal stated the following;

a) "a *diligens paterfamilias* in the position of the defendant-
   (i) Would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
   (ii) Would take reasonable steps to guard against such occurrence; and
b) The defendant failed to take such steps.

[36] In *Le Roux and Others v Dey*[7] the Constitutional Court stated the following:

"In the more recent past our courts have come to recognise, however, that in the context of the law of delict: (a) the criterion of wrongfulness ultimately depends on a judicial determination of whether – assuming all the other elements of delictual liability to present – it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and (b) that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.

[37] In *Country Trading CC v MEC Department of Infrastructure Development*[8] the Constitutional Court said:

"Wrongfulness is an element of delictual liability. It functions to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether 'the social, economic and other costs are just too high to justify the use of the law of delict for the resolution of the particular issue'. Wrongfulness typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirable and overly burdensome to impose liability."

[6] 1966 (2) SA (A) 433.
[7] [2011] (3) ZACC SA 274 (CC) at paragraph 122.
[8] [2014] ZACC 28, 2015 (1) SA 1 (CC).

[38] The plaintiff and Mr Bosman made a good impression during their testimony in court. Their evidence corroborated each other where expected. They both provided the court with a coherent version namely, that on the day of the incident they boarded the train at Dallas station with a lawn mower and garden tools. Shortly after the train started moving the plaintiff was pushed from the train by commuters fighting inside the coach.

[39] It is evident that the incident occured as the train was leaving the station and the doors were still open. The plaintiff's version is not only corroborated by Mr Bosman, but also by external facts. The plaintiff stated that he grabbed onto the side of the train when he was pushed, his leg was hanging outside the train between the train and the platform. After letting go of the train, he fell and landed on the platform. This version is more probable when looking at the evidence that the plaintiff was lying on his back on Platform 1.

[40] The witnesses called in the defence case confirmed that the plaintiff was found lying on the platform. Mr Phaswane testified there were no other people present when he arrived on the scene. According to the hospital record[9] the plaintiff sustained a left femur fracture, a break of thigh bone just above the knee. Undoubtedly, the plaintiff would have been in extreme pain, and therefore, unable to walk, unassisted from the tracks to the platform. The version that the defence placed before court, in that the plaintiff informed Mr Harvey and Phaswane that he fell on the tracks is improbable due to the fact that the plaintiff was most probably unable to move.

[41] The plaintiff testified that he was in possession of a valid train ticket.[10] He provide undisputed evidence that his girlfriend bought the ticket on his behalf at Angus station. There is no evidence place before the court to contradict the version by the plaintiff. The plaintiff was an honest witness, he conceded that he informed the security guard that he was not in possession of a valid train ticket. The explanation by the plaintiff for not telling the truth is satisfactory. He stated that he was afraid that the ticket would be taken from him and he would be unable to prove he was in possession of a valid train ticket. None of the witnesses called in the defence case testified that they searched the plaintiff

[9] Case Lines 005/5.
[10] Case Lines 005/2.

in order to confirm that he was not in possession of a valid train ticket. Therefore, there is no evidence before me to reject the explanation by the plaintiff. I accept the evidence that the plaintiff was in possession of a valid train ticket on the day of the incident.

[42] The defendant's case is that the plaintiff attempted to board a moving train and thereby placed himself in danger of sustaining an injury. In other words, by attempting to board a moving train the plaintiff voluntarily assumed the risk of sustaining an injury or causing harm to himself.

[43] The defence did not call any eye witnesses pertaining to the incident. The defence relied on the evidence of Mr Mokwena, Mr Harvey and Mr Phaswane, all of whom arrived at the scene after the plaintiff was injured.

[44] I have to evaluate their evidence with caution, because all the witnesses called by the defence are employees of PRASA and as such are not independent witnesses. I have to consider that their versions may be subjectively influenced due to their employment relationship with the defendant.

[45] According to the information contained in the investigation report compiled by Mr Mokwena[11] the following version was provided to him by the plaintiff as to how the accident occurred;

"According to the injured person confirmed that he was trying to embark on a moving train, he slipped and fell underneath the train, however when I arrived, I found the injured on the platform and the injured did not disclose who or how he was removed from the tracks.
The injured also informed me that he was traveling with a relief train ticket..." [emphasis]

[46] When considering the above, I am of the view that if a person fell and ended up underneath a moving train, as Mr Mokwena would like the court to believe, chances are that the person would have been fatally injured. Furthermore, according to the information referred to above the plaintiff told Mr Mokwena that he was in possession of a relief ticket and not that he had no valid ticket.

[11] Case Lines 005.

[47] Furthermore, the improbability with the testimony of the defence witnesses is that they did not only contradict themselves regarding the information contained in their reports, but they also contradicted each other on various aspects. These include the time of the incident, when they arrived on the accident scene, the disclosures of the plaintiff as to how he was injured and lastly the injuries that the plaintiff sustained. Their versions as to exactly what the plaintiff told them are contradictory to wit;

1. how he boarded the train, jumping through a door or jumping on the link between the coaches, and
2. he fell from the train, did he hit the wall of the platform, or did he end up underneath the train.

[48] These contradictions in the evidence of the defence witnesses are material and go to the root of their credibility. In a nutshell, the evidence of the defence witnesses is unreliable because of the contradictions. The improbabilities in their evidence are clear when considering that if the plaintiff fell and landed underneath the train of the tracks, he would have been fatally injured. Mr Phaswane testified the plaintiff was lying on the platform on his arrival and there were no other people present. The question has to be raised; how did the plaintiff move from the tracks to the platform.

[49] As stated, the defence did not present any eye witness testimony as to what transpired on the day. Evident from the fact is that I have to find that there were no security guard/s stationed at Dallas station of the day of the incident. The train guard, Ms Lebotsa was not present in the coach which the plaintiff boarded. If she was present, she would have signalled the train driver to stop the train after the incident, which was not done, the train proceeded on its route without delay.

[50] It is telling that security and train guards are employed by the defendant specifically to observe what is happening on its platforms, stations and inside the train coaches. They are there to protect the defendant's customers and passengers from harm or injury. In the matter before me no evidence was proffered by the defence as to what steps it has taken in order to protect commuters, and more specifically the plaintiff on the day of the incident. On this basis alone the defendant was negligent.

[51] I therefore conclude that the defendant owed the plaintiff a duty of care and has breached that duty which breach has caused harm to the plaintiff as a result whereof the plaintiff has suffered damages.

[52] The uncontroverted evidence by the plaintiff which is corroborated by his co-worker, Mr Bosman, is that the train doors were open as from the time they boarded the train at Dallas station and even at the time the train started moving to the next station. The plaintiff and Mr Bosman maintained that the plaintiff was pushed from the train due to a commotion inside the coach. It is undisputed that at that time the doors of the coach were still open and as such were not closed prior to the train started moving.

[53] In *Mashongwa v Prasa*[12] the Constitutional Court said:

> "It bears yet another repetition that there is a high demand for the use of trains since they are the arguably the most affordable mode of transportation for the poorest members of our society. For this reason, trains are often packed to the point where some passengers have to stand very close to or even lean against doors. Leaving doors of the moving train open therefore poses a potential danger to passengers on board."

[54] The Court continued to state the following:[13]

> "Doors exit not merely to facilitate entry and exit of passenger, but also to secure those inside from danger. PRASA appreciated the importance of keeping the doors of a moving train closed as a necessary safety and security feature. This is borne out by a provision in its operating procedures requiring that doors be closed whenever the train is in motion. Leaving them open is thus an obvious and well known potential danger to passengers."

[55] The testimony of the plaintiff is clear and unambiguous that he boarded the train at Dallas station and as the train started moving the doors of the coach were not closed as a result he was pushed from the train. There is no merit in the contention by the defendant as to why the plaintiff was not seated after the train start moving.

[56] Based on the facts which I have found to be proved the defendant's conduct was wrongful in not providing security guards on the station, who could have assisted and prevented

[12] [2015] ZACC 36; 2016 (2) BCLR 204 (CC); 2016 (3) SA 528 (CC) at paragraph [46].
[13] See paragraph [48].

the train from proceeding out of the station with the doors open. Furthermore, the defendant's failure to provide guards or sufficient marshals inside the train was a neglect of the defendant's duty to provide protection and security for its passengers, including the plaintiff.

[57] In the circumstances, I make the following order:

1. The plaintiff is entitled to recover from the defendant 100% of his proven damages;
2. In terms of Rule 33 (4) of the Uniform Rules of Court the issue of quantum of damages is postponed *sine die.*
3. The defendant is ordered to pay the cost incurred by the plaintiff.

CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *Case Lines* and by release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 31 August 2022.

DATE OF HEARING:	**10 – 11 August 2022**
DATE JUDGMENT DELIVERED:	**31 August 2022**

APPEARANCES:

Attorney for the Plaintiff:	Med Attorneys
Counsel for the Plaintiff:	Mr M Fisher
Attorney for the Defendant:	Ngeno and Mteto Inc
Counsel for the Defendant:	Mr N K Msindo