



IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

DATE 20/4/2012

SIGNATURE 

CASE NO: 2377/11

DATE: ³⁰~~18~~ April 2012

IN THE MATTER BETWEEN

T MALATJIE

PLAINTIFF

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

DEFENDANT

JUDGMENT

LEDWABA, J:

[1] The plaintiff, a 32 year old male who is now on a wheelchair was seriously injured on 30 April 2010 when he was attacked whilst he was a passenger in a train between Mabopane Station and Soshanguve Station, in the district of Gauteng.

[2] He is suing the defendant, for the injuries he sustained. The defendant is defending the action. At the commencement of the trial, as agreed between the plaintiff and the defendant's counsel, I ordered that there should be a separation between the issue of liability and quantum and the trial proceeded on the issue of liability only.

[3] The plaintiff testified and called one witness before closing his case. Two witnesses Mr S C Vermaak and Mr Bronkhorst testified on behalf of the defendant. The plaintiff testified that he boarded a train at Mabopane Station and he had a valid train ticket. He found four men in the carriage he went into. After sitting down, in less than 5 minutes, after the train moved from the station one of the four men approached him and requested a R 2.00 coin from him. When he told him that he did not have money the second man approached him grabbed him with his clothes, pulled and pushed him around. The other two men joined in the attack and he was searched. An amount of R350 (three hundred and fifty rand) was taken from him.

[4] He specifically said he was tossed around next to the wide door of the train and one of the four attackers also slapped him. As the attack continued he lost his consciousness and regained same at Dr George Mukhare Hospital. He further said if the train driver had closed all the train doors he would not be thrown out of the train. During cross examination he said he could not explain how he moved out of the train which was in motion.

[5] He also confirmed that he made two affidavits in respect of the incident of the 30th of April 2010. In paragraph 5 of his first affidavit that he made at the Metro Rail offices he said the following:

"I don't know what happened as they pulled , pushing(sic) me around within the Metro Rail Train (?) , I realised myself in Dr George Mukhare Hospital in Garankuwa."

[6] In the second affidavit that he made to his legal representatives (a copy of the said statement that was not commissioned was handed to the court by agreement and was labeled exhibit C. But the plaintiff's counsel said that exhibit C was properly commissioned and the original thereof was sent to the defendant). Paragraph three of exhibit C reads as follows:

"On the 30th of April 2010 at approximately 13h30 I was a passenger in a Metro Rail Train from Mabopane to Pretoria. Whilst in the train between Mabopane and Soshanguve three male persons approached me and demanded money. I did not comply with their demand and they mugged me and threw me out of a moving train. I was unconscious after the incident."

[7] The plaintiff could not explain, during cross examination why in both statements he did not mention that the doors of the trains when the train was in motion were open, although when he testified he insisted that the train doors were open. He at one stage during cross examination also conceded that he infers that the train doors were open because ultimately he landed outside the train.

[8] The plaintiff denied that the issue of the open train doors was an after-thought and that this aspect was suggested to him by someone. He also specifically denied that he consulted with anybody, including his attorney and counsel, before he testified in court. In my view, his denial is ridiculous because it is clear that he did consult with the Metro Rail Officer and his legal representatives.

[9] He further said he used to commute by a train to seek for employment and has never seen the train doors being open whilst the train is in motion. When it was put to him that the train doors were operating properly and that they were all closed when the train left the Mabopane station he denied same.

[10] The plaintiff's witness other than stating that on 30 April 2010 he went to the scene where the plaintiff was found at a point marked with a 'X' on exhibit 1 he did not say anything material to support the plaintiff's case.

[11] In paragraph 5 – 7 of the plaintiff's particulars of claim the following allegations are made:

“10.1 On or about 30 April 2010, between Mabopane Station and Soshanguve Station, within the jurisdiction of this Honourable Court, Plaintiff was on board a train for which he had a valid ticket, whilst on board the train with the carriage doors opened whilst the train was in motion plaintiff was forced/ejected/pushed out of the carriage by other passengers, as a result of which Plaintiff lost his balance and fell out of the carriage.

10.2 The sole cause of the Plaintiff falling from the train, was the negligence of the conductor, whose identity is to the plaintiff unknown, who was negligent in one or more or all of the following respects:

10.2.1 He/she signaled to the driver of the train that it was safe for the latter to set the train in motion whilst the carriage doors were open;

10.2.2 He/she signaled to the driver of the train that it was safe for the latter to set the train in motion without ensuring that all the carriage doors were closed and/or adequately closed;

10.2.3 He/she failed to keep a proper and adequate lookout;

10.2.4 He/she failed to pay due regard to the safety of passengers on board the train;

10.2.5 *He/she failed to prevent the said accident when by exercise of due and responsible care he/she could and should have done so.*

10.3 *ALTERNATIVELY, the sole cause of the plaintiff's falling from the train was the negligence of the driver of the said train, whose identity is unknown to the plaintiff, who was negligent in one or more or all of the following respects:*

10.3.1 *He/she set the train in motion whilst the carriage doors were open;*

10.3.2 *He/she failed to close and/ or ensure that all the carriage doors were closed and/or adequately closed before setting the train in motion;*

10.3.3 *He/she set the train in motion without ensuring that all the carriage doors were closed and/or adequately closed;*

10.3.4 *He/she failed to keep a proper and adequate lookout;*

10.3.5 *He/she failed to prevent the accident when by the exercise of due and reasonable care, he/she could and should have done so."*

[12] In the plaintiff's reply to the defendant's request for further particulars dated 5 January 2012 in paragraph 4 the response is the following:

" The plaintiff was intentionally pushed out of the carriage and he resisted but eventually lost his balance and fell out of the carriage."

[13] The defendant's first witness Mr Vermaak who worked for Transnet between 1993 – 2007 testified that the train doors operate mechanically with air-pressure to open and close. The mechanism is controlled by the train guard.

[14] Importantly, in my view, he said when the doors have been closed a strong person can manage to open them, furthermore to prevent harm to commuters when a door which is about to close gets into contact with part of the body of a person it would not squeeze same but the door would re-open. Also in case of emergency the door is made in such a manner that it can be forced to open.

[15] Mr Bronkhorst testified that on 30 April 2010 he was the guard responsible for commuter safety and was responsible to close the train doors and to signal the train driver to move when it was safe to do so. He was also responsible to open the doors when the train stopped at a station.

[16] He said on the day of the incident when he took over from the guard who knocked off, the train doors were functioning properly. He further explained that any of the doors when a door malfunctions, it is manually locked and notice's put on the said door and a written report is made regarding the said malfunctioning.

[17] He further said when the train stopped at Soshanguve Station he was informed that a passenger fell from the train and he checked the doors to check if they were still in order and there was no fault with the doors.

[18] During cross examination he was asked why in his report on page 14 of exhibit B did he only say "*...I didn't witness the said incident at Mabopane / Soshanguve Station on the 30th of April 2010*" and not mention that the doors were closed and were in a good working order. His response was then he was asked if he witnessed the incident and was not asked about the doors.

[19] On the evidence presented I should now determine if the defendant is delictually liable for the damage suffered by the plaintiff. That is, was there any negligence or omission on the part of the defendant? The onus is on the plaintiff. The plaintiff must adduce sufficient evidence to prove negligence or an omission.

[20] *In casu* the plaintiff alleged the doors were open. Mr Bronkhorst said when the train left Mabopane Station all the doors were closed. On proper and careful analysis of the evidence, I think Mr Bronkhorst's version that the doors were closed when the train left the station is more probable and accepted because:

19.1 Mr Bronkhorst was a credible witness, his evidence was straight forward and he responded clearly and logically to the questions put to him.

19.2 On the contrary the plaintiff's evidence in court differed with the contents of the two affidavits he made in that when he testified in court he added that the doors were open.

19.3 In the two affidavits he said he was attacked by three men but in court he mentioned that he was attacked by four men.

19.4 The plaintiff said the doors on both sides of the train were open and Mr Bronkhorst clearly testified that on the day in question only doors on the one side were open.

[21] It is clear that the plaintiff was unexpectedly attacked just after the train left the station, in my view, he did not have ample opportunity to observe whether the doors were opened whilst the train was in motion.

[22] It should also be kept in mind that Mr Vermaak said the train doors for the safety of the passengers can be opened even after being closed by the guard. There is a possibility that the doors could have been opened by the four thugs after the train left the station.

[23] The plaintiff's counsel referred me to *Transnet Ltd v Witter* (517/2007) [2008] ZASCA 95 (517/2007) (16 September 2008) when it was held that a train

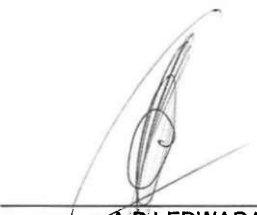
leaving a station with open doors constitutes negligence. On the facts of this case the principle in the Witter case is not applicable.

[24] Having regard to the evidence that the doors may be forced to open and the fact that it is clear that the plaintiff was attacked by three or four thugs, it would be unreasonable to impute liability on the defendant.

[25] Realistic and sensible judicial approach to the facts and circumstances of this case forces me to conclude that the plaintiff failed, on the balance of probabilities to prove any negligence on the part of the defendant.

[26] I therefore make the following order:

The plaintiff's case is dismissed with costs.


A P LEDWABA
JUDGE OF THE HIGH COURT

HEARD ON: 17 April 2012

FOR THE PLAINTIFF: Adv K K Kekana

INSTRUCTED BY: Ntabeni Attorneys, Pretoria

FOR THE DEFENDANT: Adv J G Cilliers SC

INSTRUCTED BY: Stone Attorneys, Pretoria