IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICH IS NOT APPLICABLE
[1] REPORTABLE: ~~YES~~ / NO
[2] OF INTEREST TO OTHER JUDGES:
~~YES~~ / NO
[3] REVISED
DATE 28/11/16 SIGNATURE

CASE NO: 81527/2014

29/11/2016

In the matter between:

M R SIBIYA Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA Defendant

JUDGMENT

J W LOUW, J

[1] The plaintiff instituted a claim for damages against the defendant following severe injuries which he sustained when he was knocked down by a train belonging to the defendant at approximately 05h40 on 2 July 2014 near the Dunswart station. Both the plaintiff's legs were amputated above the knee as a result of the accident. By agreement between the parties, the quantum of the plaintiff's claim was separated from the merits and postponed *sine die.*

[2] The action was instituted on 4 November 2014. In the plaintiff's original particulars of claim it was alleged that whilst the train was in motion, the plaintiff was pushed by other passengers who were jostling for space and that he fell out of the train through open doors. In a reply to a request for further particulars by the defendant, it was stated on behalf of the plaintiff that he boarded the train at the Dunswart station, that his destination was Daveyton and that he was on his way from work to Daveyton. It was further stated that the plaintiff was not pushed on purpose but that the other passengers were jostling for space.

[3] On 10 September 2015, the plaintiff's attorney filed a notice of intention to amend the plaintiff's particulars of claim accompanied by the amended particulars of claim in which the abovementioned version of the accident was jettisoned and replaced with the following version:

"*3. On the 2nd of July 2014 and at approximately 05:40 am at or near between Dunswart train station Gauteng Province, Plaintiff was walking next to the railway line when suddenly a train approached from the front with its headlights off and without hooting to the plaintiff suddenly hit the plaintiff.*

4. This train that hit the plaintiff was not visible at all to the plaintiff as it had its head lights off and it never hooted."

[4] The plaintiff testified that he had been living in Daveyton at the time and was working as a security officer for a firm called Tebutt Security. He had been posted to a train yard which he called Avenue, where trains are cleaned and spray painted, about 2 to 3 weeks before the accident. He was one of about 7 security guards and their duty was to guard cables. He travelled to work by train from Daveyton and alighted at the Dunswart station. From there he walked to the Avenue yard on a footpath alongside the railway line. It is not a long distance. He estimated it to be a 10 minute walk. After completion of his work shift, he would walk back on the same footpath to the Dunswart station where he caught the train back to Daveyton. The footpath was also used by the other employees of Tebutt Security.

[5] On the morning of 2 July 2014, he knocked off work at about 05h40 after a night shift. He walked out the gate of the yard and proceeded on

the footpath towards the platform of the Dunswart station where the footpath ended. His evidence was that as one exits the gate, the footpath is next to the railway line. Thereafter the path moves away from the railway line but turns back to the line as one approaches the station platform. As he walked, the railway line was on his left. The next thing he remembers is waking up being injured. He does not know how he got injured. He did not see the train before it collided with him. It was dusk and he couldn't see far, but if the train had its lights on he would have seen them. He did not see any train with lights and did not hear any train hooting. If he had seen the train, he would have moved out of its way. After the accident, he saw a train which had stopped ahead of where he was lying. A colleague of his approached him with his (the plaintiff's) firearm and other items which the colleague had found where that train was standing. He said people told him that it was that train that had collided with him.

[6] The plaintiff conceded in cross-examination that he knew that trains were dangerous, that one should never cross a railway line unless you were absolutely certain that it was safe to do so and should also not walk so close to a railway line that a train could collide with you. It was put to him that on his own version he had walked so close to the railway line that a train couldn't pass him without colliding with him. His answer was that that was why he didn't know how he got hurt because that was the route they used every day. It was put to him that a train makes a lot of

noise. He agreed, but said that he did not hear it. He agreed that at 05h40 the train lines were already busy with commuters on their way to work.

[7] The plaintiff was asked whether he was sure that the train had come from the front. He said that he had fallen on his back, from which he inferred that the train had come from the front. It was put to him that the train had come from Daveyton towards Dunswart, meaning that the train had come from behind him. The plaintiff said he could not dispute that because when he woke up he was on his back. It was put to him that the train driver would testify that the train was on its way from Daveyton to Dunswart and that the train's lights were on dim because it was approaching a station. The plaintiff said that he could not dispute that but that he did not see lights. He denied that he had crossed the train line in front of the train which collided with him.

[8] The parties prepared a sketch plan which was handed in as Exhibit "A' and which depicts four parallel train lines which respectively run past platforms 1, 2, 3 and 4 of the Dunswart station. Each of the platforms is indicated on the sketch plan and the four lines were referred to in evidence as lines 1, 2, 3, and 4. Lines 1 and 2 are the lines which run from Springs to Johannesburg and back. Lines 3 and 4 are the lines which run from Daveyton to Dunswart to Johannesburg and back. The

line at which the accident occurred was line 4, which is the northern most line and which is the line closest to the Avenue yard.

[9] The driver of the train in question, Mr Sibanyoni, testified that he had been employed by the defendant as a train driver since 1999. On 2 July 2014 he was en route from Daveyton to Johannesburg via Dunswart. When he approached Dunswart station, his train was switched from line 3 to line 4 via a change-over track between the two lines because there was another train standing at platform 3. He estimated the distance from where the change-over track joins line 4 to the point of impact to be 300 m. The distance from the point of impact to where platform 4 started he estimated to be approximately 50 m. It was dark and the train's lights were on dim. His attention was focused on the people standing on the platform. He did not look to the side of the train. The next thing he saw was a person in the middle of the train line, moving from left to right. He was 2 to 3 meters from the person when he first saw him. The speed of the train at that stage was approximately 40 kph. He applied all the train's brakes but it was too late. He pressed the hooter at the moment that the train struck the person. The train came to a standstill when more than half of the front of the train was opposite platform 4. It was not possible to bring the train to a standstill in a shorter distance. When the train came to a standstill, he got out and walked back with security officers to the place where the incident had occurred. They found the plaintiff at the scene. The plaintiff was found approximately 30 cm

outside the tracks on the right hand side of the tracks in the direction in which Sibiya was travelling, i.e. on the side where the footpath was.

[10] Mr Sibanyoni further testified that trains have a headlight which can be switched to bright or dim. At the time of the incident the light was on dim because drivers are required to dim the train's headlight when it approaches a platform or when it crosses another train. If the train's light was not working he would have noticed it as he would thenhave had to drive it in the dark from Daveyton to Dunswart. At the point where the incident occurred there were no outside lights and it was dark. Before the incident, he had on occasions noticed people crossing the train line at the beginning of the platform, but not at the place where the incident occurred. He said in cross-examination that he would then make such people aware of the approaching train, which I understood to mean that he would sound the train's hooter.

[11] Mr Sibanyoni testified in cross-examination that from the point where he changed lines he could see platforms 2, 3 and 4 where there were lights burning. He could see people on platform 3 and the people on platform 4 who were waiting for his train. From where he joined line 4, he did not see anyone moving in the open space before the platforms. Exhibit "A" shows that the tracks of line 4 run in a straight line from where he joined line 4 up to platform 4. His focus was on the platform where people were moving around. The open space was dark. If it was

light he would have seen a person in front of him. He was asked if he would have been able to see a person 50 m ahead. He said that he could have seen such a person in front of the train, but not on the side of the train. If the plaintiff had been 50 m away, he would have seen him but he did not see him before he was 3 m away. He looked in front of him, not on the side. When people cross the line in front of him he can see them and will warn them, but not if they cross from the dark. He testified that he could see approximately 100 m ahead of him when the train's headlight was dimmed. He said that the ray of the light reaches a distance of 1 to 2 m on each side of the tracks. He does look at the sides of the tracks in front of him but not directly at the side of the train. For a distance of 100 m before the collision he did not see any person on the side of the tracks in front of him. He was asked to explain how he did not see the plaintiff before he entered the tracks. His answer was that if he had noticed the plaintiff he would have blown the hooter, but he couldn't tell why he didn't notice him as it was like a person who was committing suicide.

[12] It was put to Mr Sibanyoni that if he had kept a proper lookout, he would have seen the plaintiff approaching line 4. His answer was that if the plaintiff had entered the line when he (Sibanyoni) was far away, he would have alerted him, but that the plaintiff just came from the side of the train and that he noticed him when he was in front of the train between the two tracks moving from left to right. He was asked if the

plaintiff had just been dropped there from somewhere. His answer was that the plaintiff just landed in front of his train and that he did not know where he had come from.

[13] The only other witness called by the defendant was Mr Melusi Mpofu who has been employed by Metrorail since 2012. At the time of the incident, his position was that of chief electrical fitter specializing in train sets. He went to the scene of the incident on the evening of 2 July 2014 and tested the train's hooter and head light. He found no defects, both being in proper working order. He submitted a report in which his findings were confirmed. He said in cross-examination that a driver is not permitted to depart before all critical items are working. He explained that there are drivers who check all train sets at night. If something is found wrong, technicians such as himself are called out to do the necessary repairs. When the driver who has to drive a train in the morning arrives, he is given a form on which faults which had been reported by the other driver have been booked. The driver who has to drive the train then checks if such faults have been fixed.

[14] The version of the plaintiff and that of Mr. Sibanyoni are mutually destructive. In *Stellenbosch Farmers' Winery Group Ltd and Another v martell et Cie and Others*[1] Nienaber JA said the following at par. [5]:

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[1] 2003 (1) SA 11 (SCA)

"The technique generally employed by courts 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 the 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 witness' 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 extracurial 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' 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."

[15] As far as the credibility of the plaintiff is concerned, he was cross-examined and criticised on why he did not tell his attorney immediately when the attorney was told the version of the incident, as first pleaded, by the persons who operated as touts and had taken the plaintiff to the attorney after the plaintiff's discharge from hospital, that it was not the truth. His explanation was that that the persons told him that they had already given the attorney the story, that he wasn't given time to speak and that he was dependent on these people to thereafter take him home. He didn't know the attorney and these people told him this was how they worked and he couldn't argue with them. He did afterwards phone the attorney and told him what the true version was, whereafter the particulars of claim were amended. His explanation of why it took him so long to phone the attorney and inform him of the truth was very unconvincing. What was originally pleaded on his behalf was contradicted by his evidence in court, but what counts in his favour is the fact that he did eventually give his attorney the true version and did not persist with the original false version. It should also be remembered that his highest educational level is Standard 5 and that the people he was dealing with were the inventors of the false version.[2] I found him to be a satisfactory witness in court. There was nothing improbable in the version to which he testified. As far as the reliability of his evidence is concerned, he

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[2] It was stated in the written heads of argument filed on behalf of the plaintiff that practitioners at times do furnish documents without having taken full and clear instructions of the client. If this statement is intended to convey that there are practitioners who plead facts and furnish further particulars on behalf of a client which turn out to be false, it is, of course, a very serious matter which must require disciplinary action against such practitioners.

conceded that his evidence that the train had collided with him from the front was an inference which he drew from the fact that he had landed on his back after the collision. He never saw the train before the collision. There can be no doubt that, on his version, the train collided with him from the back and not from the front.

[16] As far as the credibility of the train driver, Mr Sibanyoni, is concerned, I have difficulty in accepting the probability of his version. I find it improbable that the plaintiff could have come from nowhere as was testified by Mr Sibanyoni, that the plaintiff would have attempted to cross the railway line right front of the train when it was 2 or 3 meters away from him in an apparent attempt to commit suicide, and that Mr Sibanyoni was only able to see the plaintiff for the first time when he was 2 or 3 meters away from him. Further, on Mr Sibanyoni's evidence, the plaintiff was attempting to cross the line from his (Mr Sibanyoni's) left to his right so that the injuries to the plaintiff's body would have been on the right side of his body. The plaintiff, however, testified that, apart from his severed legs, he had injuries on the left back back of his head down to his neck and shoulders and to his left arm. Those injuries accord with the probability that the plaintiff was struck from the back while walking along the railway line, and not while attempting to cross it. As mentioned earlier, railway line 4 would have been to his left when walking on the footpath in the direction of platform 4 of the Dunswart train station. A further improbability of Mr Sibanyoni's version is that if the plaintiff was

footpath in the direction of platform 4 of the Dunswart train station. A further improbability of Mr Sibanyoni's version is that if the plaintiff was on his way from the Avenue yard to platform 4, he had no reason to cross line 4. The Avenue yard and platform 4 are on the same side of railway line 4.

[17] In my view, the probabilities are that the plaintiff was struck from the back by the train while he was walking on the footpath alongside line 4. This conclusion then raises the question of whose negligence was the cause of the accident. The plaintiff was himself clearly negligent for walking so close to a railway line with the knowledge of it being a busy line. He clearly failed to keep a proper lookout for passing trains, whether from the front or the back. But the train driver was also negligent by not timeously seeing the plaintiff walking close to the line or, if he did see him timeously, by not sounding the train's hooter to warn the plaintiff of the approaching train.

[18] It was submitted by counsel on behalf of the defendant that the plaintiff voluntarily accepted the risk of being injured by walking so close to a busy train line. The onus rests on a defendant to establish a defence of *volenti non fit iniuria*. The defendant must allege and prove that the plaintiff had knowledge of the risk, that he appreciated the ambit of the risk and that he consented to the risk.[3] Consent may be express or

[3] *Santam Insurance Co Ltd v Vorster* 1973 (4) SA 764 (A) 779A-E

implied. Although consent may be implied from a plaintiff's knowledge and appreciation, they are not tantamount to consent. Whether consent can be implied requires a subjective inquiry relating to the plaintiff. In the circumstances in which I have found to be the probable way in which the accident happened, including the fact that the footpath was regularly used not only by the plaintiff but also by other employees and there being no evidence of anyone else previously being injured in the same way, it cannot, in my view, be inferred that the plaintiff subjectively consented to the risk of being injured by a train. The defendant has therefore failed to discharge the onus of proving consent by the plaintiff to the risk of being injured. The position would have been different if the accident had occurred in the manner testified to by Mr Sibanyoni.

[19] An apportionment in respect of the plaintiff's claim for damages therefore has to be made. In my view, a fair apportionment will be to assess the plaintiff's negligence at 60% and that of Mr Sibanyoni at 40%.

[20] The order which I make is the following:

[a] It is ordered that the defendant is liable for payment of 40% of the damage which the plaintiff is able to prove or which may be agreed he has suffered as a result of the accident which occurred on 2 July 2014.

[b] The defendant is ordered to pay the plaintiff's costs of the action.

Counsel for plaintiff: Adv. N S Petla

Instructed by: Mashamaite Attorneys, Kempton Park

Counsel for defendant: Adv. J G Cilliers SC

Instructed by: Stone Attorneys, Pretoria