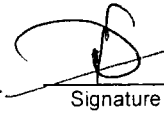




IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION: PRETORIA

15/4/16

CASE NO: 8905/2014

<u>DELETE WHICH IS NOT APPLICABLE</u>	
(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED
<u>01.04.16</u>	
Date	Signature

In the matter between:

PHILLIP MARUKA

PLAINTIFF

And

PASSENGER RAIL AGENCY OF SOUTH AFRICA

DEFENDANT

JUDGMENT

MSIBI AJ

INTRODUCTION

[1] The plaintiff has instituted proceedings against the defendant; (PASSENGER RAIL AGENCY OF SOUTH AFRICA) for damages as a result of injuries he sustained when he fell out of a moving train at Thembisa Train Station.

[2] The defendant is opposing the action; submitting that plaintiff did not fall from a moving train; he was actually hit by a train as he tried to cross the railway line illegally.

[3] The parties had reached an agreement that issues of quantum and merits should be separated, and that the issue of quantum be postponed sine die. Accordingly, in terms of section 33 (4) of the Uniform Rules of Court I have ruled that there be a separation of issues. The present case deals with the merits only.

ISSUES IN DISPUTE BETWEEN THE PARTIES

- [4] (1) whether or not the plaintiff was indeed a passenger of the defendant's train, during the time that he sustained the injuries.
- (2) whether the injuries were sustained as a result of the defendant's negligence.
- (3) whether defendant failed to take reasonable steps to guard against the falling of the plaintiff.

SUMMARY OF EVIDENCE

[5] The only evidence as to the merits of the claim is that of plaintiff. Copies of his medical records from Thembisa Hospital contained in the Index to Personal Documents Bundles were submitted as corroboration of the plaintiff's claim.

[6] On 24 January 2014, Mr Maruka, the plaintiff, was on his way to work when he boarded train number 0152 at Thembisa Train Station. It was between 06:15 and 06:30 am.

- [7] He had been using railway transport since he started working in 2013. He boarded the train as usual. There was a lot of shoving and pulling from within the train. The train pulled off, still with its doors open. Plaintiff was suddenly pushed out as a result of the shoving and pulling. He fell out onto the platform; landing on the right hand side of his body. They were pushed out being three in number. One remained in the train, the other jumped out to safety, while he fell out of the train. He never lost consciousness. As a result of the fall he sustained a fracture of his right arm.
- [8] He got up and went to seek help from a ticket examiner, who called a security guard. The security guard took him to another room. He was together with the male security guard and one female security guard.
- [9] The guards asked for his names and identity document. He produced a passport document. An ambulance was called and he was transported to Thembisa Hospital, where he was admitted for three weeks.

DEFENDANT'S VERSION.

- [10] The defendant challenged the evidence of the plaintiff by calling two witnesses.
- [11] Mr Helani Godfrey Mabasa, testified that he is a security guard for Changing Tides Security Services stationed at Limindlela Station.
- [12] On 24 January 2014 he was on duty at Thembisa Train Station. While at the guard room, the ticket examiner told him about a "liability". They both fetched the man and took him to the guard room. While interviewing him, they asked

him what happened. The person said he got injured while crossing a railway line. He was hit by an oncoming train and fractured his arm in the process. He further stated that the incident occurred while there was a stationary train on platform 1. An ambulance was called that transported plaintiff to hospital. No other train reported similar incidents on this specific day. Mr Mabasa confirmed that he personally wrote a Metro Rail Services Statement concerning this event.

- [13] Mr Langton Masingi employed by PRASA as the investigating officer. He was tasked with the duty of investigating and compiling a report in this matter. He visited the alleged scene of the incident in the company of Mr Mabasa and other officers. Plaintiff was not present. Based on his own observations of the scene and report from Mr Mabasa he compiled a report which also included photographs of the alleged railway line.

BRIEF ANALYSIS OF EVIDENCE

- [14] Mr Maruka testified that he was standing one pace away from the train door. There were two other passengers between him and the door. During cross examination Mr Maruka was asked about the presence of the steel poles at the entrance of the train. He indicated that there were none close to him. It was put to him that he was not in a train. He did not fall from a moving train; he was actually hit by another train while crossing the railway line illegally. To this statement, plaintiff responded that he had a valid train ticket he had no reason to do that. (Copy of his train ticket for that day is included in the index to merit bundles, numbered 2). Plaintiff also added that he is still in possession of the original train ticket.

[15] The version that plaintiff gave in court is the same version that he gave to the hospital personnel upon his admission in Thembisa hospital. He denied the version of the defendant that he reported to Mr Mabasa, that he was hit by a train while crossing a railway line. He further stated that he would not do such, knowing that it is unlawful to do so.

[16] It is clear to this Court that Mr Maruka had been a commuter since 2013. It was not disputed that he was on his way to work on that morning. He testified that a lady security officer took down his statement. On the other hand Mr Mabasa insists that he is the one that recorded the statement.

[17] In his heads of argument, Counsel for the plaintiff submitted that Mabasa was energetic and confident in his evidence in chief but under cross-examination his demeanor had changed. Mr Mabasa conceded to the following under cross examination.

- (a) that it is illegal to cross a railway line and that offenders are to be arrested.
- (b) that he had a duty as a security guard to arrest anyone who commits this offence.
- (c) that he was supposed to have arrested Mr Maruka for crossing a railway line illegally. He further gave an explanation that he did not to arrest him due to his injuries.
- (d) that he did not examine the extent of his injuries.
- (e) that Mr Maruka, gave them his full names and passport when requested to do so.
- (f) that he however referred to him as "the unknown injured commuter" in

his statement, despite the fact that he already had established his identity.

(g) that he made several mistakes in his statement concerning this incident.

(h) that he did not take the plaintiff to the scene of the incident, for him to point it out; considering the fact that he was able to walk.

[18] Counsel put it to him that he is clearly trying to protect himself or someone due to the nature of his evidence and the contradiction contained therein.

[19] Mr Masingi's evidence is to the effect that he investigated the matter and compiled a report thereafter. He also conceded during cross examination that he based his final report on the information and report that he obtained from Mr Mabasa, which was full of mistakes.

[20] In his heads of argument Counsel submitted that the plaintiff's version is a true account of the events that led to his injury at Thembisa Train Station on 24 January 2014.

[21] Defendant's Counsel submitted in her heads of argument that plaintiff was not injured in one of their trains. His injuries were proved and they are not disputed, however they were not sustained, as a result of the defendant's negligence. Should the court find that he fell from the moving train defendant further disputed the allegation that its employees failed to take reasonable steps to guard against the falling of the plaintiff.

[22] Counsel further submitted that there is nothing brought by the plaintiff before this court which can provide a foundation for a claim of liability against the defendant. It is the defendant's contention that legal causation has not been established by the plaintiff, in that he did not prove a nexus between the injuries that he sustained and the duty that was owed to him by the defendant. This duty was left to the court to speculate or hypothesize.

[23] Counsel for the defendant referred this court to the case of **IRVINE MASHONGWA V PRASA (CC T 03/15)** held that PRASA has a Constitutional duty to safeguard the physical wellbeing of its commuters or passengers. The court's attention was drawn to the fact that PRASA's duty is in relation to its passengers only. This submission is in the light of the defendant's version that plaintiff did not fall from any of their trains. Since he was not in any of their trains, there was no duty owed to him.

[24] Plaintiff gave evidence that was clear, straight forward and not exaggerated. Even during cross examination he was not evasive, he did not struggle to answer questions. The same cannot be said about Mr Mabasa, the security guard. The discrepancies that I highlighted in my evaluation of his evidence leave much to be desired. His incident report is incorrect in more than one instance. The court cannot take his evidence to be probable, after taking into consideration all the discrepancies in his evidence. There was no evidence led by the defendant to the effect that doors were closed when the train departed from Thembisa Train Station. The time that this train disembarked from the station has been disclosed by the plaintiff. The train driver and conductor are unknown to the plaintiff but known to the defendant. Neither of the two was called to testify to the effect that the train doors were closed.

Accordingly I am satisfied that plaintiff has established that he was a lawful passenger on train 0152 leaving Thembisa Train Station on 24 January 2014 around 6:20 am and he was ejected from this moving train by the pushing and jostling for space from fellow commuters while the doors were open.

WERE INJURIES SUSTAINED AS A RESULT OF DEFENDANT'S NEGLIGENCE?

[25] The plaintiff alleged in his particulars of claim that the defendant was negligent due to the following:

“(5) The sole cause of the plaintiff's falling from the train was the negligence of the conductor, whose identity is to the plaintiff unknown, who at the time of the accident was employed by the Defendant and was acting in the course of and within the scope of his employment with the defendant and was negligent in one or more or all of the following respects:

(5.1) He/she failed to keep a proper lookout

(5.2) He/she failed to close the doors timeously or at all

(5.3) He/she allowed the train to travel with open doors

(5.4) He/she signaled to the driver that it was safe to set the train in motion whilst its doors were wide open

(5.5) He/she signaled to the driver to set the train in motion whilst passenger were still embarking and/ or disembarking from a train

(5.6) He/she failed to pay due regard to the safety of passengers on board of the train

(5.7) He/she failed to seek assistance from the defendant to provide adequate equipment and personnel to control and/ or protect passengers on board and/or alighting and/or boarding the train.

(5.8) He/she failed to present the accident when, by the exercise of still

and reasonable care, he could and should have done so.

- (6) *Alternatively the sole cause of Plaintiff's injuries was the negligence of the driver whose identity is to the Plaintiff unknown, who at the time of the accident was employed by the Defendant and was acting in the course of and within the scope of his employment with the defendant and was negligent in one or more or all of the following respects:*

(6.1) He/she set the train in motion at a dangerous and/or inopportune time with the doors open

(6.2) He/she failed to check that it was safe for him/her to set the train in motion

(6.3) He/she set the train in motion without checking that all the doors were closed.

(6.4) He/she set the train in motion whilst passengers were still alighting from and/ or boarding into the train.

(6.5) He/she failed to keep a proper lookout, and/or;

(6.6) He/she failed to prevent the accident when by the exercise of skill and reasonable care, he/she could and should have done so.

- (7) *Further alternatively the sole cause of plaintiff's falling from the train was the joint negligent of the conductor and the driver who their identities are to the plaintiff unknown and were negligent in one or more or all of the respects alleged in paragraph (1) and (2) above respectively.*

- (8) *Further alternatively the sole cause of plaintiff's falling from the train was the unlawful conduct and negligence of the defendant which in breach of duty of care which it owed to its passengers specifically the plaintiff was negligent in one or more of the following respects:*

(8.1) By failing to provide personnel to guide, control and /or protect

passenger on board and/or alighting and/or boarding the train

(8.2) By failing to put measures in place to ensure that the train was not set in motion whilst the doors are still open.

As a result of the said omission plaintiff sustained serious bodily injuries consisting of the following injuries:

(a) Right fractured arm.

(b) General body pains”

NEGLIGENCE

[26] The test for negligence was laid down in **KRUGER VS COETZEE (2) SA 428**

A as follows. *“For the purposes of liability culpa arises if- (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.”

[27] In the matter before me defendants never conceded to possibility of harm nor that they would or should have taken steps to guard against such harm. Their defense is based on denial that plaintiff fell from a train. Their version is that plaintiff exposed himself to danger by crossing a railway line illegally.

[28] In **IRVINE VAN SAM MASHONGWA AND PASSENGER RAIL AGENCY OF SOUTH AFRICA 2015 ZACC page 36 at para [20] MOGOENG CJ** states as follows: *‘Public carriers like PRASA have always been regarded as owing a legal duty to their passenger to protect them from suffering physical harm while making use of their transport services. That is true of taxi operators, bus*

services and the railways, as attested to by numerous cases in our courts. That duty arises, in the case of PRASA from the existence of the relationship between carriers and passengers, usually, but not always based on a contract. It also stems from its public law obligation. This merely strengthens the contention that a breach of those duties is wrongful in the delictual sense and could attract liability for damages”

[29] In this matter plaintiff in his particulars of claim indicated that the conductor and or driver of the train omitted to close the doors of the train before it could disembark from Thembisa Train Station.

[30] In applying the approach which was formulated in *Kruger v Coetzee* the court will ask itself the following questions.

- Would a reasonable person in PRASA's position have reasonably foreseen harm befalling Mr Maruka as a result of the train disembarking with open doors?
- If so, would she have taken reasonable steps to prevent harm to Mr Maruka?
- If she would, did PRASA take reasonable steps to avert the foreseeable harm that ultimately occurred?

[31] In *Minister of Safety and Security v van Duivenboden* 2002(6) SA 431 SCA Nugent JA held at paragraph 21: “Where *the conduct of the State as represented by the persons who perform functions on its behalf, is in conflict constitutional with its duty to protect rights in the Bill of rights, in my view, the norm of accountability must necessarily assume an important role in determining whether a legal duty ought to be recognized in any particular case.*”

And p446 and 447:

“However, where the State's failure occurs in circumstances that offer no effective remedy other than action for damages, the norm of accountability will in my view, ordinarily demand the recognition of a legal duty unless there are other considerations affecting the public interest that outweigh that norm”.

No evidence was led by the defendant to rebut the version of the plaintiff that the doors of the train were open while it was in motion. I will deal with the matter on the basis that the coach doors were left open.

[32] In Mashongwa case at paragraph [46] and [48] Mogoeng AJ further held as follows. *“It bears yet another repetition that there is a high demand for the use of train since they are arguably the most affordable mode of transportation for the poorest members of society, for this reason, trains are often packed to the point where some passengers have to stand very close or even lean against doors. Leaving doors of a moving train open therefore poses a potential danger to passengers on board.”*

“Doors exist not merely to facilitate entry and exit of passengers, 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.”

[33] In **SOUTH AFRICAN RAIL COMMUTER CORPORATION LIMITED and AMMAH PHILISIWE THWALA 2011 ZASCA 170** the plaintiff had sustained injuries after she was pushed out of a train. The question was whether the train was stationary or in motion. Plaintiff's claim was dismissed due to the

fact that she fell while the train was stationery. Had the court made a finding that the train was in motion she would have succeeded in her action, on the basis of negligence. It was held that negligence cannot be proved where the doors of the train were open while the train was stationery.

[34] It is my finding that a heavier burden is placed on a defendant where greater risk exists. In this matter the risk or harm was to plaintiff's life and limb. A reasonable person or organ of state would have reasonably foreseen that Mr Maruka or any commuter would fall as a result of a train disembarking with open doors. It is also expected that PRASA should have taken reasonable steps to prevent that harm from taking place.

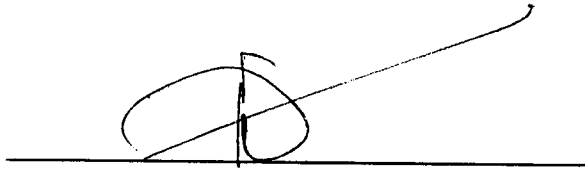
[35] There are simple and reasonable steps in making sure that the doors are always closed when the train is in motion. In this matter PRASA did not take reasonable and necessary steps to avert the foreseeable harm. As a result of this omission Mr Maruka was pushed out of the moving train and fell. Had the doors of the coach in the train that Mr Maruka was travelling in been closed, it is more probable that he would not have been pushed out of the moving train. Plaintiff would not have sustained the injuries and the fracture to his arm.

[36] It is my finding that defendant failed to ensure that doors of the coach remained closed while the train was in motion. I do find that defendant failed to ensure that commuters in general and plaintiff in particular did not fall from the moving train, as claimed in the plaintiff's particulars of claim.

[37] I find that defendant was negligent, and such negligence was the sole cause of the plaintiff's injuries.

ORDER

1. The defendant is liable for 100% of plaintiff's proven or agreed damages.
2. Defendant to pay plaintiff's costs in respect of the dispute on merits of the case.
3. The question of quantum is postponed sine die.

A handwritten signature in black ink, consisting of a large, stylized 'S' and 'M' intertwined, with a long horizontal stroke extending to the right.

MSIBI S M

**ACTING JUDGE OF THE HIGH COURT OF
SOUTH AFRICA GAUTENG DIVISION PRETORIA**

HEARD ON: 17 MARCH 2016

DELIVERED ON:

COUNSEL FOR PLAINTIFF: ADV T C MAPHELELA

ATTORNEYS FOR PLAINTIFF: M A SELOTA ATTORNEYS

COUNSEL FOR DEFENDANT: ADV M T MANKGE

ATTORNEYS FOR DEFENDENT: JERRY NKELI AND ASSOCIATE INC