

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA**



12/4/2016

CASE NUMBER: 21398/2013

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

12.4.2016
DATE

SIGNATURE

In the matter between:

MUTHUPEI PATRICK MUHANELWA

Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

First Defendant

MEMBER OF EXECUTIVE COUNCIL FOR HEALTH,

GAUTENG PROVINCE

Second Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

- [1] The plaintiff's claim against the first defendant is in delict and his claim against the second defendant is based on medical negligence.
- [2] At a pre-trial conference held on 29 October 2015, the parties agreed to a separation of the two claims. The parties further agreed that the claim against the first defendant will proceed to trial and that the claim against the second defendant will be postponed *sine die*.
- [3] The plaintiff and the first defendant also agreed that the issues pertaining to merits and quantum will be separated and that the trial will only proceed in respect of the merits of the plaintiff's claim against the first defendant.

PLEADINGS

- [4] The plaintiff avers that on 8 May 2010 at approximately 20:00, he was a fare paying passenger on a train travelling between Kaalfontein and Leralle stations. During the journey he was robbed of his cell phone and wallet by four of his co-passengers. The doors of the train were open whilst the train was in motion and after being robbed the plaintiff was thrown out of the moving train.
- [5] The aforesaid incident, so the plaintiff avers, was caused by the sole negligence of the first defendant and/or the employees of the first defendant acting within the cause and scope of their employment with the first defendant.
- [6] The grounds of the alleged negligence are set out as follows:

“

5.

The sole cause of the Plaintiff's falling from the train, was the negligence of the First Defendant and or the First Defendant's conductor who was acting in the cause and scope of

his employment with the First Defendant, whose identity is to the Plaintiff unknown, who was negligent in one or more or all of the following respects:

- 5.1 *He/she signalled to the driver of the train that it was safe for the latter to set the train in motion whilst the carriage's doors were open;*
- 5.2 *He/she signalled to the driver of the train that it was safe for the latter to set the train in motion without ensuring that all carriages' doors were closed and/or adequately closed;*
- 5.3 *He/she failed to keep a proper and/or adequate lookout;*
- 5.4 *He/she failed to pay due regard to the safety of passengers on board of the train.*
- 5.5 *He/she failed to prevent the said accident when by the exercise of due and reasonable care, he/she could and should have done so.*
- 5.6 *The First Defendant failed to ensure that there is the presence of the security guard at Kaalfontein station and 1 (one) security guard on each coach.*
- 5.7 *The First Defendant failed to exercise its legal duty to ensure the safety of the passengers on the train more specifically the Plaintiff.*

6.

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

- 6.1 *He/she set the train in motion whilst its carriage doors were opened;*
- 6.2 *He/she failed to close and/or ensure that all carriage doors are closed and/or adequately closed before setting the train in motion and/or opened the doors of the train whilst it was still in motion;*
- 6.3 *He/she set the train in motion without checking that all carriage doors*
- 6.4 *He/she failed to keep a proper and/or adequate lookout;*
- 6.5 *He/she failed to prevent the accident when by the exercise of due and reasonable care, he/she could and should have done so."*

[7] In response to the aforesaid averments, the first defendant pleaded as follows:

"

5.

The Defendant denies that it or its employees were negligent in anyone of the allegations in paragraph 5-5.6 (sic) of the Plaintiff's Particulars of claim, and

pleads that the Plaintiff was never involved in a train accident. In the alternative and only in the event that the Honourable Court finds that the Plaintiff was in fact involved in such a train accident, Defendant further pleads that the accident was caused as a result of the sole negligence of the Plaintiff who was negligent in one or more of the following:-

- 5.1 He stood at the open door of a moving train which posed danger to him at that moment.*
- 5.2 He failed to take any or adequate steps to prevent the accident, when by the exercise of a reasonable care he could, and should have done so.*
- 5.3 He voluntarily got into an overcrowded train where there was no space for anyone to get into the train.*
- 5.4 He got in or tried to alight into a moving train before it came to a standstill, by so doing causing injuries to him.*
- 5.5 He forced the doors of the train to open before the train could stop and the operator opening the door, by so doing posing danger to him and other members of the public.*
- 5.6 He failed to take adequate steps to prevent the accident, when by the exercise of a reasonable care he could and should have done so.*
- 5.7 Alternatively, and only in the event of this Honourable Court finding that the Defendant was negligent, which still denied, the Defendant pleads that such negligence did not contribute to the Plaintiff being pushed out the train.*
- 5.8 Further alternatively and only in the event of this Honourable Court finding that the Defendant was negligent and that such negligence contributed to the Plaintiff being pushed out of the train, which is still denied, then and in the event, the Defendant pleads that the Plaintiff was also guilty of contributory negligence and damages suffered by the Plaintiff should be reduced proportionate to the degree of his own negligence in accordance with the Apportionment of Damages ACT 34 OF 1956."*

EVIDENCE

- [8] The plaintiff testified that, on the day in question, he boarded a train at Irene station. At Kaalfontein station he disembarked and got onto another train. When he got into the coach, he noticed two passengers standing at the door facing each other. Their position at the door prevented the doors from closing. He took a seat. On the seat opposite him there were four passengers.
- [9] The plaintiff took his Blackberry cell phone out of his pocket whereupon one of the four passengers sitting opposite him stood up and approached him. The person spoke Zulu and requested the plaintiff to hand over his cell phone. The plaintiff refused and returned his cell phone to his pocket.
- [10] The next moment the other three passengers also stood up and started searching through his pockets. They took his cell phone, his purse with some R 200 in and his train ticket.
- [11] In the meantime the train had started moving and after the plaintiff was robbed of his belongings, he was thrown from the train. The train had already left the station and he fell on the ground next to the train.
- [12] The plaintiff injured his right shoulder and arm and was eventually admitted to hospital. He spent a month in hospital recovering from his injuries. When he returned to work, he was informed by his employer that he can no longer, due to the injuries, do his work properly and he was dismissed. He thereafter returned to his home in Makhado. Upon his return to Makhado he still had to undergo physiotherapy.
- [13] The plaintiff was referred to notes made by the hospital staff in Makhado, which notes are dated 20 July 2010, some two months after the incident. From the notes it appear that the plaintiff informed the hospital staff that his injuries emanate from an accident that occurred on 8 May 2010 and that he was initially treated at Thembisa hospital .
- [14] The plaintiff testified that he endeavoured to obtain his hospital records from Thembisa hospital, but was unsuccessful.

- [15] The plaintiff in conclusion testified that there was no security guard in the coach he was traveling in and that the doors remained open until he was thrown from the train.
- [16] During cross-examination it was put to the plaintiff that the train driver and a security guard will testify that the train doors did work and only opened once the train came to a standstill. In response, the plaintiff testified that he saw some coaches with open doors when the train entered the station at Kaalfontein. The plaintiff agreed that should the train operate properly, the doors will remain closed whilst the train is in motion, but added that some passengers prevented the doors from closing by standing in front of the sensors. He confirmed that it was the position when he entered the train at Kaalfontein.
- [17] The plaintiff admitted that he did not report the incident to the police or the defendant. He could not give a satisfactory explanation for his failure to do so.
- [18] The plaintiff was cross-examined at length in respect of the differences between the averments contained in the initial particulars of claim and the amended particulars of claim. Initially it was not alleged that the plaintiff was robbed and that he was thrown from the train. The initial averments read as follows:

"Whilst on board the train with the carriage's door opened whilst the train was in – motion, Plaintiff was forced/ejected/dislodged/pushed out of the carriage by other passengers, as a result of which Plaintiff lost his balance and fell out of the carriage."

- [19] The plaintiff testified that he only told his attorney after some time about the robbery, because he was "confused". He strenuously denied that he ever told his attorney that he merely lost his balance and fell from the coach. There were, furthermore, discrepancies in respect of the time it took before the plaintiff was thrown from the train. The plaintiff estimated approximately seven minutes, whereas it was put to him that the next station is only four minutes from Kaalfontein station. The plaintiff answered that it was an estimation and that he did not have a watch.

- [20] The plaintiff could not explain why the hospital notes did not indicate that he was in a train accident. He testified that he did inform the hospital staff of the manner in which the accident occurred.
- [21] It was put to the plaintiff that the defendant investigated the incident after summons was received, but could not find any confirmation of the plaintiff's version and that Thembisa hospital did not have any record of the plaintiff's admission or treatment.
- [22] It was stated that an employee of the defendant, Ms Mashao will testify that she was in the last coach and that she did not see the plaintiff anywhere near the train. The plaintiff responded that he was thrown into long grass.
- [23] It was put to the Plaintiff that Ms Mashao will always make sure that the doors are closed before she signals the driver that it is safe to depart. Ms Mashao is aware that some commuters block the doors, but she will reprimand them and make sure the doors are closed. The plaintiff testified that he has never seen this happen and added that even if the doors are closed, some passengers will force the doors open whilst the train is in motion. It was put to the plaintiff that Ms Mashao cannot do anything whilst the train is in motion because her duties are on the platform.
- [24] During re-examination the plaintiff testified that he was not aware that he had to report the incident to the police or the defendant.
- [25] On a question form the court, the plaintiff indicated that his educational level is grade seven.
- [26] The plaintiff closed its case and the first witness to testify on behalf of the defendant was Mr Shadung. He is employed by the defendant as an investigator. He confirmed that he could not find any record of the incident in the official records of the defendant, nor could he find any record of the plaintiff's admission at Thembisa hospital.

- [27] He could locate the relevant train from the records kept by the defendant. He established that a certain Mr Kruger was the train driver and that Ms Mashao was the security guard on the train. During the train journey they sit at opposite ends of the train.
- [28] He indicated that the plaintiff's version is possible. He testified that it is possible to open the doors of the train whilst the train is in motion and ascribed such behaviour to "*bad elements*" on the train.
- [29] Mr Shadung was of the view that, having regard to the number of trains in operation, it was not possible to post a security guard in each coach.
- [30] During cross-examination he stated that he did not know of any steps that have been taken by the defendant to prevent the doors from being opened whilst the train is in motion.
- [31] Ms Mashao testified next. Ms Mashao confirmed the version put to the plaintiff in respect of her duties and added that she does not have any duties between train stations. She agreed that it will be of assistance if security guards are placed inside coaches.

EVALUATION

- [32] The plaintiff never deviated from his version of events. He was thoroughly cross-examined by Mr Mataboge, counsel on behalf of the defendant and gave detailed explanations in respect of his movements prior to and after the incident. The plaintiff did find it difficult to answer questions pertaining to steps he did not take, for example reporting the matter to the police or the defendant.
- [33] He, furthermore, could not explain why the version initially averred in the particulars of claim differed from the later version that supports his evidence. I do not deem his inability to explain these issues satisfactory, as an indication of untruthfulness.

- [34] The plaintiff is neither well educated nor sophisticated. He was employed as a labourer at the time and his level of education is grade 7. One should take these factors into account when evaluating his evidence.
- [35] The defendant argued that the lack of documentary proof together with the plaintiff's failure to report the incident suggests that he fabricated the incident.
- [36] The only documentary evidence pertaining to the incident is to be found in the hospital records kept at Memorial Hospital in Mhakado. The notes confirm the date of the incident. It is not uncommon for records to get lost in Government institutions and I do not believe that the lack of hospital records at Thembisa hospital should count against the plaintiff.
- [37] Having regard to the probability of his version, both witnesses who testified on behalf of the defendant conceded that the plaintiff's version is probable.
- [38] The evidence of Mr Shadung, furthermore, confirms the plaintiff's version in respect of the train schedules and train stations. Both Mr Shadung and Ms Mashao confirmed that the doors of the train are sometimes kept open by "*bad elements*".
- [39] In the premises, I accept the plaintiff's version of events.

LIABILITY

- [40] The question whether the plaintiff succeeded in establishing that the defendant's conduct was wrongful and negligent and that such negligence caused the damages suffered by the plaintiff, remains to be answered.
- [41] The Constitutional Court in the recent judgment of *Mashongwa v PRASA* [2015] ZACC 36 examined the defendant's responsibilities towards commuters in circumstances similar to the facts under consideration. The question arose whether the defendant ought to be held liable in delict for damages suffered as a result of a breach of the defendant's public law duty to provide safety and security measures for commuters.

- [42] In respect of wrongfulness, The Court reached the following conclusion at para [27]:

“When account is taken of all these factors, including the absence of effective relief for individual commuters who are victims of violence on PRASA’s trains, one is driven to the conclusion that the breach of public duty by PRASA must be transposed into a private law breach in delict. Consequently, the breach would amount to wrongfulness.” (footnote omitted)

- [43] In respect of the failure to post security guards on trains as a ground for negligence, the Court, however concluded at para [43]:

“Absent information on all, if any, security measures explored or those put in place in certain areas and why security-related resources were deployed in the manner in which they were, it is impossible to contextualise the decisions taken and assess the reasonableness of the conduct complained of. We cannot conclude that negligence has been established.”

- [44] No evidence was led by the plaintiff in the respect of the security measures in place at the time of the incident and similarly, I am not in a position to assess the reasonableness thereof. This ground for negligence must as a result fail.

- [45] The further ground for negligence, to wit the doors of the train were open whilst the train was in motion, was also considered by the Constitutional Court.

- [46] Emphasising the inherent foreseeable danger of leaving doors open whilst a train is in motion, the Constitutional Court came to the following finding in para [62]:

“Open doors evidently facilitated the ease with which Mr Mashongwa was thrown out of the train. Landing out of a moving train as a result of an accidental fall at the risk of limb or life is not materially different from so landing as a result of some criminal activity. Negligence has thus been established.”

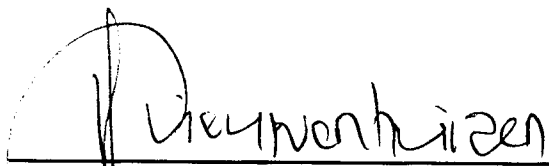
[47] The Constitutional Court examined both the issue of factual causation and legal causation and found that leaving the doors of a train open whilst the train is in motion, which enables criminals to throw a commuter out of the train and which in turn results in the commuter sustaining injuries, establishes both factual and legal causation.

[48] In the result, the plaintiff did succeed in proving on a balance of probabilities all the elements necessary to hold the defendant liable for the damages he suffered and an order in his favour must follow.

ORDER

In the premises, I make the following order:

1. The defendant is liable for the plaintiff's proven or agreed damages.
2. The defendant is ordered to pay the costs of suit.



JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Appearances : Advocate S.O Ravele
Instructed by : S.O Ravele Attorneys

Appearances : Advocate L M Mataboge
Instructed by : Makhubela Attorneys