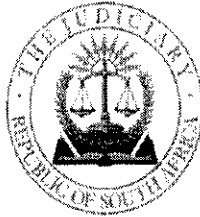


IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: 50819/2011

Date:

17/6/2016

DELETE WHICHEVER IS NOT APPLICABLE

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

17-6-16

DATE

[Signature]

SIGNATURE

In the matter between:

JOYCE MKHABELA

FIRST PLAINTIFF

PRECIOUS TEBOGO NDOU

SECOND PLAINTIFF

PRECIOUS TEBOGO NDOU obo
TSHWARELO HONOUR NDOU

THIRD PLAINTIFF

AND

PRASA

DEFENDANT

JUDGMENT

TOLMAY, J:

- [1] In this matter the plaintiffs instituted action against the defendants after the death of Simon Alfred Mabasa (the deceased) on 10 August 2010 at the Eerste Fabrieke Station.
- [2] The first and second plaintiffs withdrew their claim and only third plaintiff (the plaintiff) proceeded in her capacity as guardian of Tshwarela Honour Ndou, the minor child of the deceased. Her *locus standi* was admitted by the defendants.
- [3] The plaintiff alleged that the death of the deceased was caused by the negligence of the defendant. The plaintiff amended her particulars of claim on 3 occasions. The last amendment alleged that whilst the deceased was trying to board the train, the doors of the train closed, but the passengers kept pushing the deceased forward thereby causing him to fall in between the platform and the train. The train departed and caused serious injuries and ultimately the deceased's death. Previously the plaintiff alleged on the pleadings that the train did not allow sufficient time for the deceased to get off and the doors of the train were not being secured before departing.

[4] At the hearing plaintiff relied on the evidence of Mr Salzhele Alfred Skakane. He testified that he travelled with the deceased on the fateful day from Rissik Street Station to Mamelodi Station. The train stopped at Eerste Fabrieke Station at platform 4 and he and the deceased disembarked from the train and went to platform 3. As there was no train at platform 3 they returned to platform 4. The train was very full and although they initially managed to board the train Mr Shakane was pushed from the train and ended up on the platform. The train started to move with the doors still open and the deceased was pushed from the train and fell on the platform. He then said that the deceased was "pulled from the platform by the wind of the train". The train did not stop at all and proceeded on its journey. He stated that passengers assisted the deceased and they placed him on the platform. According to him there were no platform marshals, no security guard or any employees from the second defendant on the platform when the incident occurred. He contacted the ambulance and the deceased's mother. The deceased died at the hospital.

[5] This evidence contradicts the version of this witness in a statement made by him under oath. In that statement he stated that the train arrived on platform 4 of Eerste Fabrieke Station. The witness and the deceased disembarked and went to platform 1. There was a large crowd of people at platform 1. When they approached the train in order to board the train, the train was full and the doors of the train were already closed. The crowd of people pushed the deceased and the

witness forward and the deceased was pushed from the platform onto the tracks. The train began to move and the witness and the other passengers banged on the doors to try and stop the train. The train however continued on its journey.

- [6] When the witness was asked about the different versions his explanation was that he was under stress when he made the statement and said that the version he gave in Court was what actually happened. There was no indication that he did not convey the facts contained in the statement or that he was not proficient in English and that there was a misunderstanding about his version.
- [7] The mother of the deceased, Ms Joyce Mkhabela, testified that she was informed by a neighbour about the accident and not by Mr Shakane as he testified. She said that the neighbour learned about the accident from a friend of the deceased named ZAZA who called her. No evidence was led that Mr Shakane is known as Zaza. She said that she was never contacted by anyone from the defendants pertaining to the accident.
- [8] The defendant asked for absolution of the instance at the end of plaintiff's case, I refused the application and said that I would give my reasons in my judgment. The reasons are set out hereunder.

- [9] Despite the obvious contradictions in the evidence credibility should usually not be considered at this point of the trial¹. There were allegations that could point to negligence on the part of the second defendant, pertaining to especially crowd control. I also took into consideration that this is a case where plaintiff only needed to prove 1% negligence on the side of defendant and the claim is for the benefit of a minor. In the light of the aforesaid I exercised my discretion to dismiss the application for absolution of the instance.
- [10] The defendant called Mr Dippenaar who is a train driver with 47 years of experience. On the day in question he was functioning as a pilot at Eerste Fabrieke Station. His duties included directing the operations of the train between Eerste Fabrieke Station and Pienaarspoort Station. He wore a reflector jacket and a red armband. Train 9145 arrived at Eerste Fabrieke Station at platform 4. This train was travelling from Pretoria to Pienaarspoort Station. While train 9145 was still at the platform, train 9343 from Mabopane to Eerste Fabrieke arrived at platform 3. As a result of this the platform was crowded. At the appointed departure time train 9145 was set in motion after the signals were given that it was safe for the train to depart. When the train reached an approximate speed of between 15 – 20 kmph the train driver received an emergency stop instruction, which he immediately executed. The train came to a complete stop. Mr Dippenaar exited the driver's cab and proceeded to where he found the deceased who was

¹ Erasmus, Superior Court Practice, vol 2 D1 530-D1 533

lying on the platform. He informed Central Train Control (CTC) of the incident and they called an ambulance, as the track was clear he authorised the train to depart.

[11] Mr Mashiana testified that he was a platform marshal in the employ of second defendant on the day in question. His duties were inter alia to ensure that it was safe for the train to depart. He would raise a red flag to indicate to the train guard if it was not safe for the train to depart. He would ensure that all passengers had embarked and disembarked and that there were no passengers between the yellow line that runs along the length of the platform and the end of the platform. He would wait for the doors of the train to be closed before raising a white flag to indicate that it was safe for the train to depart. He wore a reflector jacket and worked with 2 other marshals. One was stationed at the head of the train, one in the middle and one at the back of the train.

[12] He confirmed that on the day in question train 9145 arrived at platform 4 and passengers embarked and disembarked safely. While this train was at platform 4 another train arrived at platform 3. He ensured that the passengers embarked and disembarked safely and all people were clear of the yellow line. He waited for the train doors to be closed and when they were safe he raised the white flag to indicate that it was safe for the train to leave.

- [13] As the train was pulling away with closed doors he saw a male person coming from the direction of train 9335. He ran towards train 9145 and attempted to board the train between coaches. This person slipped and fell between the coaches and onto the tracks. He raised a red flag to bring the train to an emergency stop, which was immediately done. He went to the scene and found a man lying on the tracks behind the motor coach. Passengers removed him from the tracks and placed him on the platform. He communicated with the man who was seriously injured and obtained his details. He reported the incident, and an ambulance was dispatched.
- [14] Mr Mashiana made a statement on 10 August 2010. In that statement he said that the incident occurred at platform 3 and not platform 4 and involved train number 9343 and not train 9145 as he testified. In that statement he refers to "commuters" who attempted to board the train and not to a single male as was done in his evidence. This statement furthermore avers that an African male fell between the train set and the platform, not between train coaches as he testified.
- [15] It is trite that the *onus* to prove negligence rests wholly on the plaintiff. It is also trite that the defendant is under a public law duty to provide safe public rail transport². In this instance, as this claim is a claim for loss of support, the plaintiff is only required to prove 1% negligence on the part of the defendant.

² Rail Commuters Action Group v Transnet Ltd T/a Metrorail 2005(2) SA 359 (CC); Mashangwa v Passenger Rail Agency of South Africa 2015 JDR 2582 (CC)

- [16] The plaintiff had a single witness who testified about the incident. Mr Skakane's evidence in court was in contradiction with the contents of his statement as well as the pleadings. As he was the only witness called by the plaintiff one must accept that the version contained in at least the latest amendment of the pleadings must also have been obtained from him. The plaintiff's case is thus based on 3 different versions. This raises serious questions about the credibility of Mr Skakane. The explanation for the difference in the evidence and the statement is not convincing. Mr Skakane, under these circumstances, can't be regarded as a credible witness.
- [17] Mr Skakane's evidence also contains further improbabilities. His evidence was that the train did not stop at all after the incident is improbable in the light of the evidence of Mr Dippenaar and Mr Mashiana. The allegation that the deceased was suck beneath the train by the wind is also improbable in the light of the fact that the train was just departing and could not have picked up enough speed to have caused such a strong wind. Mr Dippenaar's evidence was that the train was moving between 15 – 20 kmph, and on Mr Shakane's own version the train had just started moving when the incident occurred.
- [18] Although Mr Mashiana's evidence contradicted his statement in certain aspects I am of the view that these contradictions are not significant, in any event the plaintiff carries the *onus* and not the defendant.

[19] It is impossible to find in favour of the plaintiff in the light of all these contradictions and improbabilities. Consequently the plaintiff did not succeed in proving negligence on the part of the second defendant. Therefore the claim must be dismissed.

[20] Defendant indicated that irrespective of the outcome they will not seek a costs order against the plaintiff.

[21] I make the following order:

21.1 The plaintiff's claim is dismissed; and

21.2 Each party to pay its own costs.


R G TOLMAY
JUDGE OF THE HIGH COURT

DATE OF HEARING: 23 MAY 2016

DATE OF JUDGMENT: 17 JUNE 2016

ATTORNEYS FOR APPLICANT: SPRUYT INCORPORATED

ADVOCATE FOR APPLICANT: ADV R G EGAN

ATTORNEYS FOR RESPONDENT: DIALE MOGASHOA ATTORNEYS

ADVOCATE FOR RESPONDENT: ADV S M TISANI