

**OFFICE OF THE CHIEF JUSTICE
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION: PRETORIA**

CASE NO: 59370//2011

15 June 2016

Not reportable

Not of interest to other judges

Revised.

In the matter between:

LEHLOHONOLO VICTOR KHUDUGA

PLAINTIFF

And

PASSENGER RAIL AGENCY OF SOUTH AFRICA

DEFENDANT

JUDGMENT

VUKEYA AJ

[1] The plaintiff instituted an action for damages against the defendant suffered as a result of personal injuries he sustained while he was a passenger in a train during 2011. His leg was amputated when he was pushed out of a moving train at Kalfontein station.

[2] The parties agreed in terms of Rule 33(4) of the Uniform Rules of Court that the issues of quantum and merits be heard separately and therefore the case at hand deals only with the merits.

[3] Mr Lehlohonolo Victor Khuduga, the plaintiff, told the court that he, on 10/07/2011,

was a passenger in a train from Kempton Park to Thembisa. He was standing in the third coach of the train holding on to a steel bar inside the train and holding his groceries in the other hand. The doors of the train were not properly closed when it left Kempton Park station.

[4] The train was full and the people were standing holding on to the steel rails while some were close to the door. There were no empty seats. He saw Metro rail security officials at Kempton Park before embarking but none of them said anything about the doors which were not properly closed when the train moved.

[5] When it reached Kalfontein station, the people started pushing each other to get in and some out of the moving train. Before the train could stop and while it was still in motion, he was pushed out of the train and he lost his footing and fell between the platform and the train. The train came to a standstill and the people nearby helped him and placed him on the platform. He lost consciousness at some point though he could not recall at what stage this happened. He could not even recall how he got to the hospital. He was injured on his leg and it was amputated.

[6] He explained that when he was pushed out of the train he lost his grip on the steel rail, lost his footing and fell. He never saw any Metro officials after he fell and did not recall providing his personal details to any officials at the scene. A gentleman he believed was from PRASA spoke to him at the hospital and he later learned that the person was a Lawyer.

[7] He had a monthly ticket to travel from Oakmore to Knights though he was going to Thembisa. When shown Page 17 of Exhibit "A", the Plaintiff denied that he was in possession of that ticket and also denied that he was supposed to be travelling from Olifant to Tembisa as indicated in ticket 29642786130870.

[8] He also denied the version that he was staff riding or that he came through the subway between platform 3 and 4 after the conductor had signaled for the train to depart and attempted to embark between the coaches causing him to fall. When it was put to him that he did so as an attempt to commit suicide he denied this and said he has minor children to take care of.

[9] The plaintiff could not exactly demonstrate how he fell as he could only remember being pushed, losing his footing and falling. It was put to him that his body was larger than the distance between the platform and the train and therefore it was impossible for him to have fallen in the manner he attempted to demonstrate. The plaintiff could neither confirm nor dispute this averment but said that he landed underneath the train and was moved to the platform by other commuters.

[10] The Plaintiff's case was closed.

[11] Dirk Johannes Albertus Leslie was the train driver on the day in question. He approached the platform at Kalfontein and stopped at the normal place to allow passengers to disembark and embark from the train. Shortly after departing he received an emergency signal to stop. He stopped the train, looked behind and saw people four coaches behind him. It took about 30-40 meters to stop the train as it was not moving fast.

[12] He went to inspect what was happening. When he arrived at the platform the Plaintiff was lying there. He then reported that someone had been injured under the train and that some passengers may have removed him and placed him on the platform.

[13] The witness confirmed that he made both reports as they appear on pages 29, 34 & 35 of Exhibit A that the plaintiff was staff riding, but said that he did not know that for sure, he only heard from some commuters.

[14] Ephraim Lesebana Mothiba, the Metro train guard, said that on 10/07/2011 he was on duty to provide safety to passengers. He explained that he sits at the back of the coach, opens the window, and takes out his head to observe the platform for passengers. When the train becomes stationery he uses a button to open the doors. When satisfied that the movement of passengers has stopped he blows the whistle to alert commuters that the doors are about to close. If there is no movement of commuters he then closes the doors and gives the driver a notification by pressing the ride-away button which signals the driver to leave the platform. He then observes the

movement of the train until the last coach leaves the platform.

[15] The incident involving the plaintiff happened in Kalfontein on platform 4. He did all he was supposed to do as safety precautions before the incident happened. The train got to a standstill on platform 4 and he opened the doors. Some commuters got in some got out. When it was safe and there were no passengers going in and out of the train, he blew the whistle to warn commuters that the doors were about to be closed. He closed the doors and gave the driver the ride-away signal. The platform only had people who had disembarked from the train when he gave the driver the signal to move.

[16] The train was already in motion when he noticed the plaintiff emerging from the side of platform 3 and running towards platform 4. The train had already gained speed when the man emerged from the right hand side running towards the train. He then gave the driver an emergency bell signal to stop as he had noticed the man was about to put his life in danger. Before the train could stop the plaintiff had already reached the train.

[17] The plaintiff attempted to embark in between the coaches. He used the hand- rails used by technicians to separate and unhook the trains. When he held on to the handrails the train was in motion, he was pulled by the train, lost his footing and fell underneath the train. The train came to a standstill. He then phoned the driver of the train and informed him that a person tried to climb in between the coaches. The driver then called the operating unit to conduct an investigation and to call an ambulance. He then went to the scene and found the plaintiff on the platform. He had already been removed from underneath the train to the platform by other commuters.

[18] This witness told the court that the ticket found in possession of the plaintiff did not permit him to go to Thembisa and therefore he was in the train illegally. He however conceded that if a person had a ticket to commute from Knights to Oakmore and was found in Kalfontein then that person would not be an illegal commuter.

[19] He did not complete a Railway Occurrences Report or a Liability Report because he was on leave when statements were obtained.

[20] Zaneen Diye Tshuma the commander, who co-ordinates with service providers in the security line for security services, went to the scene as soon as the incident was reported to him. He found the plaintiff who identified himself as Khuduga. He interviewed him while he was conscious and obtained his names, addresses and details of his train ticket.

[21] Though he is not the author of the information contained in pages 8 and 9 of Exhibit A, he is the one who provided it. He however said that the person who received the information from him may have made a mistake with plaintiff's names and date of birth as those were incorrect. He said when he interviewed the plaintiff his leg had been amputated, he was bleeding profusely but he was in his sound and sober senses.

[22] That is, in a nutshell, the evidence upon which the case must be decided. The onus is on the plaintiff to prove his claim on a balance of probabilities.

[23] The two versions before court are mutually destructive and therefore the court employs the guidelines as set out in Stellenbosch Farmers' Winerv Group and Another v Martel et Cie and Others 2003 (1) SA (11) SCA where the following was said:

"... to come to a conclusion on the disputed issues a court must make findings on (a) probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of that 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 demeanor 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 facts or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the caliber and cogency of his performance compared to that of other witnesses testifying about the same incident or the same 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."

[24] It is common cause that the plaintiff sustained serious injuries as a result of which his leg was amputated and that this happened at a train station at Kalfontein. What is in dispute is whether this happened as a result of the Defendant's negligence as alleged in the Plaintiff's particulars of claim.

[25] The Plaintiff alleges in his particulars of claim that the sole cause of him falling from the train was the negligence of the train conductor in that, amongst other factors:

- a) He opened the doors of the train which was full of passengers before it came to a stand-still at the platform;
- b) The Plaintiff was pushed out of a moving train through the open doors by passengers who were pushing each other for space;
- c) The defendant failed to pay due regard to the safety of the passengers;
- d) The defendant failed to prevent the accident when by exercise of due and reasonable care he could have done so;
- e) The doors were never closed when the train took off.

[26] The question the court has to answer is whether the circumstances leading to the demise of the plaintiff were foreseeable and whether the defendant had acted negligently in not foreseeing the possibility of harm and taking reasonable steps to prevent it. The reasonable man test is therefore applicable in this matter.

[27] The court must determine if there was a duty on the defendant towards the plaintiff and the nature of the duty. In *Ngubane v South African Transport Services* 1991 (1) SA 756 AD Kumleben JA held as follows:

"As regards the requirements, it is acknowledged that reasonable steps are not necessarily those which would ensure that foreseeable harm of any kind does not in any circumstances eventuate. The contributor (Prof J C van der Walt) in Joubert (ed) The Law of South Africa vol 8 sv "Delict" para 43 at 78 comments in this regard that: "Once it is established that a reasonable man would have foreseen the possibility of harm the question arises whether he would have taken the measures to prevent the

occurrence of the foreseeable harm. The answer depends on the circumstances of the case. There are however, four basic considerations in each case which influence the reaction of the reasonable man in a situation posing a foreseeable risk of harm to others: (a) the degree or extent of the risk created by the actor's conduct; (b) the gravity of the possible consequences if the risk of harm materializes; (c) the utility of the actor's conduct; and (d) the burden of eliminating the risk of harm".

[28] The Plaintiff being a single witness with regards to the incident, made a good impression when giving evidence. He gave a clear and coherent version of the incident without giving any impression that his evidence may have either been fabricated or exaggerated. Even when subjected to severe cross examination he stuck to his version and did not falter. He conceded when it was necessary and never contradicted himself or the version in his particulars of claim.

[29] During cross examination the plaintiff was confronted about the information he provided to PRASA officials after the incident. It was alleged that he was in his right state of mind when he gave out the information to the officials and therefore he was not being truthful when he told the court that he never spoke to any officials at the scene and that he never gave them his ticket.

[30] When looking at the manner in which the information was obtained from the Plaintiff, the question arises as to whether such information was obtained properly or whether such information can be allowed to affect the credibility of the plaintiff and the reliability of his evidence.

[31] The plaintiff had just fallen from a moving train; his leg amputated and was bleeding profusely when he was interviewed and his ticket allegedly obtained from him. It cannot be said that he was in a good state of mind and that he was in his sound senses when he gave out the information. It cannot therefore be expected of him to recall some of the things he said, whether they made sense or not. In fact, it is questionable why the defendant opted to interview the plaintiff while he was in a state of vulnerability and then use the information obtained against him in the trial.

[32] I am of the view that the discrepancies in the evidence of the plaintiff, caused by the information received from him while he was in that state cannot be viewed in a serious light. Such discrepancies do not affect the credibility of the plaintiff and the reliability of his evidence and they are therefore found to be immaterial.

[33] The good qualities observed in the evidence of the plaintiff are lacking in the evidence of the defendant. Mr Leslie, the train driver, did not see what actually happened and how the plaintiff got injured. He was referred to Page 34 Exhibit "A", and Page 29 in Paragraph 4; wherein it was alleged that he had made a report that "there was a person underneath the train". He conceded that he made such a report but stated that some people may have moved the person to the platform. What is of importance to note is the fact that what Mr Leslie actually reported was untrue as he did not see the plaintiff under the train but the person was already on the platform when he saw him.

[34] He further stated when cross examined that it was not possible that he may have been pushed if he fell underneath the train. He said when he stopped the train, he saw something wrong at the platform and when he went to the platform the plaintiff was lying there but says some people may have moved him to the platform. If this is something he did not see, why then did he report that the person was underneath the train if he had seen him on the platform unless his intention is to deliberately mislead the court into believing that the plaintiff was responsible for his own demise.

[35] Mr Mothiba, the train guard, alleges that he saw how the incident happened. He states that when he saw that the plaintiff was about to put his life in danger, he gave the driver an emergency bell to stop the train after he had given him a ride away signal. The evidence of the plaintiff that he had groceries in his other hand was not disputed by the defendant. It makes it improbable therefore that the plaintiff would attempt to hold on to the handrails on the couches while the train is in motion and this makes the version of the plaintiff more probable.

[36] This witness also mentioned that when he went to the scene he found the plaintiff on the platform. According to him the plaintiff had been removed by the commuters from underneath the train to the platform. He was referred to page 36 of Exhibit "A" wherein he stated that he gave the driver a signal after the person had fallen, he said that his

recordings were not done in sequence and denied that he was not being truthful.

[37] The witness was confronted about the contents of Pages 19 and 20 of Exhibit 'A' in which it was reported that the plaintiff was disembarking from a moving train and he said that the people who drafted the report did not see the incident while he saw it.

[38] This witness was the responsible person who was supposed to prepare a Railway Occurrence Report or a Liability Report but said that when the incident was investigated he was on leave and could not compile such a report. The incident occurred in July 2011 and the witness said he did not know why the report had not been compiled up to the date of trial in February 2016.

[39] I am of the view that if this witness was truthful and honest about what actually happened on the day in question; a full report concerning the incident would have been prepared as soon as the incident occurred. If Mr Mothiba does not know why the report has not been prepared, it suggests that he is not being truthful to the court and is concealing the true state of affairs as it occurred on 10/07/2011 thus making the version of the plaintiff more probable.

[40] This witness's evidence contradicted that of Mr Leslie who told the court that he received only one signal to stop the train. According to Mr Mathiba there were two signals, first when he noticed the plaintiff running towards the moving train and then when he got injured.

[41] The above contradiction is found to be material as it relates to the bone of contention between the parties in this matter. It addresses the defence of the defendant as it shows that if there was indeed one signal for the train to stop, then it cannot be true that the train guard saw the plaintiff a few meters away from the train while attempting to stuff ride.

[42] Mr. Tsuma, the co-coordinator between PRASA and security companies employed by the defendant, did not see this incident but interviewed the plaintiff at the scene. His evidence that the plaintiff was in his sound mind when interviewed leaves much to be desired. After confirming that the plaintiff had just been amputated of his leg, bleeding

profusely and in excruciating pain he maintained that the plaintiff was in his sound senses. Though he conceded that some of the particulars in the report were incorrect, he still maintained his observation of the plaintiff during the interview.

[43] During the interview a ticket number was obtained from the plaintiff which the defendant alleges was found in the plaintiff's possession. The plaintiff has denied that he had such a ticket but insisted he had one allowing him to travel from Knights to Oakmore. The fact that the plaintiff was interviewed while he was in that state did not make a good impression to the court and therefore the evidence of this witness is rejected as it is found to be unreliable.

[44] The court accepts the evidence of the plaintiff as being true and rejects that of the defendant.

[45] After finding that there was harm caused to the plaintiff the next thing to deal with in this particular matter is whether the harm was foreseeable and whether the defendant could have foreseen the harm and prevented its occurrence.

[46] The court should first find if there was a legal duty on the defendant to act in order to prevent harm and whether the defendant acted reasonably to prevent harm. In determining the existence of a legal duty to act Nugent JA stated as follows in the case of *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 SCA:

"When determining whether the law should recognize the existence of a legal duty in any particular circumstances what is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms. Where the conduct of the state, as represented by the persons who perform functions on its behalf, is in conflict with its constitutional 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".

[47] After the existence of a legal duty has been established, the court has to determine whether the plaintiff has proven that the defendant has breached such a legal duty to act in order to prevent harm. In making this determination, the court must find if there

was negligence on the part of the defendant.

[48] The test to be applied is whether a reasonable person in the defendant's position would have foreseen the possibility of harm being caused against the plaintiff if the train doors are opened before the train comes to a total standstill. If so, has the defendant taken reasonable steps to prevent harm to the plaintiff?

[49] The plaintiff's claim for damages is based on the defendant's failure to keep the doors closed until the train came to a standstill thereby causing him to be thrown out of the moving train and getting injured. He contends that the train was full and had the doors remained closed until the train had stopped he would not have been thrown out and harm would not have been caused on him.

[50] The court has accepted the version of the plaintiff and has rejected that of the defendant that the train guard Mr Mothiba followed all procedures to ensure the safety of all the commuters on the day in question. PRASA must ensure the safety of the commuters by ensuring that their train guards abide by the rules to close and open doors when it is safe to do so.

[51] PRASA being an organ of the state, the standard of reasonableness is viewed in the light of what is contained in the Constitution of SA which clearly requires the protection of rights entrenched in the Bill Of Rights. The court must therefore evaluate the steps taken by the defendant to prevent harm from occurring in the light of the evidence before it.

[52] The plaintiff testified that the train he was travelling in was full; he stood in it and held on to the hand rail inside while he had his groceries in the other hand. When it came to the station at Kalfontein the people started pushing each other outside, as the doors were open while the train was still moving, he was pushed out, lost his footing and fell. He was injured by the moving train and his leg was amputated.

[53] Keeping the doors of a moving train closed is an essential safety procedure. And had the doors been properly closed and opened when the train came to a total halt, the plaintiff would not have sustained any injuries that culminated in the amputation of his

leg. The court finds therefore that the defendant was indeed negligent on the day in question as he had failed to observe a basic safety practice of keeping the doors closed while the train was in motion.

[54] I am of the view that negligence has been established.

[55] After having established the element of wrongfulness and that of negligence, the court has to establish one more element before it can find that the plaintiff has proven his claim on a balance of probabilities. That is factual causation. The question therefore is whether there was a causal link between the defendant's negligence and the plaintiff's injuries.

[56] This means the court must determine whether the harm that ensued is closely connected to an omission of the defendant who carried the duty to prevent the harm. The test is whether the harm would nevertheless have ensued even if the omission had not occurred. It is probable that had the doors been closed and only opened when the train came to a total halt, the plaintiff would not have been pushed out and injured himself.

[57] The fact that the plaintiff was pushed out of the defendant's moving train whose doors were left open reinforces the legal connection between the defendant's failure to take preventative measures and the amputation of the plaintiff's leg.

[58] Therefore the court finds that the defendant's conduct attracts liability because the defendant has a legal duty to secure commuters through its operating procedures.

[59] I therefore find that the defendant was negligent in not ensuring the safety of its commuters on the day in question by making sure that the doors were closed at all times while the train was in motion and opening them when it came to a total stand still.

[60] The following order is made:

- a) The defendant is liable for 100% of the plaintiff's proven damages;
 - b) The defendant is liable for the plaintiff's costs relating to the merits of the action;
- and

c) The question of quantum is postponed sine die.

VUKEYA L D

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

HEARD ON:

DELIVERED ON:

COUNSEL FOR PLAINTIFF: ADV

ATTORNEYS FOR PLAINTIFF:

COUNSEL FOR DEFENDANT: ADV

ATTORNEYS FOR DEFENDANT: