IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA 10/5/2016

CASE NO: 54226/2014

(1) REPORTABLE: NO

(2) Of INTEREST TO OTHER JUDGES: NO

(3) DATE DELIVERED: 06 May 2016

(4) SIGNATURE:

In the matter between:

SABELO SIZWE SIBUSISO NGOQI Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA Defendant

JUDGMENT

MAKHUBELE AJ

INTRODUCTION

[1] The Plaintiff, a 26 year old male fell from a stationery train onto or near the tracks of oncoming trains at Mabopane Station, Pretoria,

Gauteng Province. He was subsequently hit by an oncoming train and sustained injuries described in the particulars of claim as "*Fracture of femur and Fracture of right knee*". He instituted a claim for damages against the Passenger Rail Agency of South Africa ("PRASA") alleging that the incident was caused solely by negligence on the part of its employees.

[2] The trial proceeded on the issue of liability only after I granted an order of separation of issues in terms of Rule 33(4) of the Rules of this Court.

[3] The negligence of the Defendant is based on the following alleged omissions;

[3.1] Failing to prevent the incident by exercising reasonable care and attention.

[3.2] being inconsiderate to plaintiff and other commuters;

[3.3] Failing to ensure that all doors of the train are closed before departure; and

[3.4] Allowing the train to depart when it was dangerous and inconveniet to the commuters.

[4] The Plaintiff described the circumstances under which he fell from the train in paragraph 5 of his Amended Particulars of Claim which reads in part as follows;

" The palintiff was standing in front of of an open door in one of the cartridges (sic), *holding onto a steel bar. When the train stopped, passengers and/or commuters from the other cartridge* (sic) *forced their way into the plaintiff's cartridge because the door I their cartridg was not functioning. They forced and/or maneuvered their way into the plaintiff's cartridge in such a manner that the Plaintiff was over-powered and pushed and fell unto the opposite railway lane, resulting in an oncoming train departing the station hitting him on his lower body"*

[4.1] The Defendant's Counsel made a point during cross examination that his oral evidence in this regard differs materially with what he has pleaded in this paragraph. I agree with counsel for the plaintiff that on a proper reading of this paragraph, the plaintiff is not admitting that the doors in his carriage were functional. I do not think that his evidence was different from what is pleaded in this paragraph.

[5] In its Amended Plea[1], the Defendant blamed the Plaintiff for the incident. The Defendant alleged that the incident occurred because he failed to keep a proper lookout, failed to heed warnings inside the train and on stations and positioning himself in a dangerous position and ***"elected to disembark the train on the track side and not on the***

[1] Paragraph 6.2

platform and attempted to cross the adjacent track in front of an oncoming train, which resulted in the Plaintiff being injured" *(highlighted for emphasis).*

[5.1] Though the other defences were not formally abandoned, the Defendant's case on trial was built around the highlighted parts and the alternative pleas arising from it.

[6] In the alternative, one applicable if the other one fail, the Defendant pleaded that;

[6.1] there was no causal connection between the negligence of the employees of the Defendant and the injuries and damages suffered by the Plaintiff;

[6.2] The actions of the Plaintiff indicated in paragraph 6.2.1 to 6.2.4 were negligennt and that such negligence is Contributory negligence as contemplated in the Approtionment of Damages Act, Act 34 of 1956;

[6.3] Plaintiff knew that it was dangrous to disembark the train on the track side and he acted with dolus, which excludes any negligence on the part of the Defendant; and

[6.4] By disembarking on the track side and not on the platform side, with full knowledge and appreciation of the risks, the Plaintiff consented to be subjected to the risk of injury .

COMMON CAUSE ISSUES

[7] On the totality of the evidence pleaded and concessions made by the witnesses during cross examination, the following issues are common cause .

[7.1] The Plaintiff, is a regular commuter who at the time of the incident, had a valid monthly ticket that he used to board the Defendant's trains between his home town, Soshanguve and his place of work at Groenkloof, Pretoria.

[7.2 On 30 April 2014, the Plaintiff arrived at Pretoria (Bosman) Station at about 17:00. According to the train schedule, his usual train , Number 96, was scheduled to arrive just before 18:00. It did not arrive as scheduled.

[7.3] He then took a train to Attridgeville and ended up at Hercules where he took another one to Marabastad. There he boarded a train to Mabopane. This train was full, but it loaded more commuters along its route[2] until Kopanong station where the first batch of commuters started to disembark.

[7.4] When he boarded the train, he used the doors on its right hand side, where the platform was. Each coach or carriage has four doors, two on each side.

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[2] Hercules, Daspoort, Mountain View, Wolmantin, Winterness and Akasia.

The subsequent passengers before Akasia station also boarded the train on its right handside . The train changed tracks at Kopanong, with the result that the platform now was on the left hand side of the train.

[7.5] The right handside of the train, from which Plaintiff boarded the train had no Platform. It was now parralel to the tracks by the time the train arrived at Mabopane Station.

[7.6] Mabopane Station is the last for the route and it has what is referred to as a "LOOP/ BALOON" where trains make a U-Turn after offloading commuters and travel back to Pretoria. The train that hit the Plaintiff had just made such a U-turn, whilst the one he was travelling in was still off-loading commuters.

[7.7] The train that he was travelling in was offloading commuters at Platform 6.

The distance between Platform 6 and Platform 7 where Plaintiff tried to climb onto before he was hit by the other train is about 1,5 to 2 metres.

[7.8] The height of a platform is about 1,2 metres. The train doors are on the same level with the platform ground.

[7.9] Loose small stones, with a mixture of concrete and more or less the size of an ice cube cover the ground between the two platforms.

[7.10] The Plaintiff fell on his back next to the tracks of the train that was travelling in the opposite direction to the one he fell from. He did not stand up, but crawled towards Platform 7, touched the platform and lifted his body up. His upper body was already on top of the Platform 7 when the train hit his legs.

[7.11] Platform 7 is not a beeline or "shortcut" out of Mabopane Station.

ISSUES THAT ARE IN DISPUTE

[8] Whether there was any negligence on the part of the Defendant, if so;

[9] Whether the Plaintiff contributed to the negligence.

ORAL EVIDENCE

[10] In view of the common cause facts , I will only proceed to summarize the evidence in as far as the disputed issues are concerned.

Plaintiff's case

[11] Ngoqi testified that the doors in the compartment that he was in were and remained opened throughout the journey.

During cross examination, the Defendant's counsel put to him that evidence would be led to prove that the doors were not open. However, no such evidence was led by the time the hearing was concluded.

Ngoqi was also asked to confirm if he was aware that it is possible for the doors to be forced open by passengers. He confirmed that he knew that this was possible.

[12] He testified further that after the platforms were changed, the doors through which passengers had to alight from the train did not open, with the result that the passengers moved to other carriages to disembark.

Initially he disagreed with a suggestion from counsel for the defendant that his carriage became emptier as passengers moved to other carriages to disembark. He indicated that passengers usually give each other a chance to dismbark by going out and then coming back in. He conceded that it did become emptier as more passengers alighted along the route.

[13] He testified further that at Mabopane station he was pushed by the people who wanted to go to the carriage behind the one he was in to disembark from the train.

[14] He confirmed that one other person who was pushed also fell, but he does not know what happened to him. Counsel for the defendant put it to him that there is an eyewitness that saw him and this other person jump from the train. This other person got onto platform 7 before the train came.He demied having seen what became of this person.

He denied having jumped . He knows the risks , and furthermore, he knows Mabopane station very well. The lights are not functional at night and it is difficult to see the train when it comes back from the loop. He would not have taken the risk of jumping. He always buy a monthly train ticket and would not board a train without a ticket.

[15] He denied that he wanted to go to platform 7 as alleged by the Defendant's witness and that this is the reason why he jumped.

[16] He fell on his back, rolled over. He was on his knees, he crawled and used his hands to touch the platform.

[17] It was suggested to him that he should have remained between the two platforms because there is enough space for a person to do so whilst two trains pass . He testified that he did not consider that as a safe option. His thinking was that because his body has already landed on the tracks, he thought that the safer route would be to climb onto the nearest platform.

It was also suggested that it would have been safer for him to go back to the train that he fell from. His response was that it would have been difficult to climb on the train as there was no platform. The doors are high.

[18] On why he did not sustain injuries on his back, the plaintiff explained that the concrete on the tracks is not slab, but loose stones.

Defendant's case

[19] The first witness was **Mr. Mathys Croukamp**. He testified that he was employed by PRASA as a train driver at the relevant time. He arrived at Mabopane station at about 07:30 in the evening. He made a u-turn at the loop after all passengers had disembarked. He was heading back to the depot, at Wolmerton.

[20] Before he made the u-turn, he had stopped at platform 6 where his passengers disembarked. After he left, another train came and stopped at platform 6. As he made the u-turn , he saw a male person jump out of the train and he was foollowed by another one. He blew a hooter and applied emergency brakes. They kep on moving to get onto platform 7. One of them made it, but one was hit by his train . His upper body was on the platform and he was struggling to lift his feet.

[21] Trains take long to stop because the entire carriage fleet must come to a stand still. He stopped about 90-100 metres away after applying emergency brakes. He called Train Emergency control from inside his train with his cellphone and requested medical assistance for the person that had been struck by his train. He climbed out and walked back. He found this person lying on the platform on the yellow line. He was lying on his stomach with armed crossed . He kept on saying that he could not feel his legs. He told him that help was coming. A lady security guard came running from the back of platform 7. He told her what had happened. He had 33 years service experience as a train driver at the time. He no longer works for PRASA. He has seen people take chances like the plaintiff did before.

[22] He denied that the people who jumped from the train fell down. According to him they were moving towards platform 7.

[23] The lighting at the station was good. His train headlight was also on , but not bright because he was passing another train.

He confirmed that he drafted the sketch plan that depicts the layout of the Mabopane station.

[24] He confirmed that it is possible to force open train doors from inside. The train guard at the back of the train controls the doors by pushing a button to open and close them. The doors use air pressure. If a door malfunctions, it could be a mechanical problem, but one can still

open them by applying force. Usually commuters notify the guard that the door has malfunctioned. The guard would then put a sign to warn passengers not to use it.

[25] **Cross examination** elicited the follwing responses;

[26] He saw the people jump as he was parallel to the third or fourth coach of the other train.. He was about 40 metres away from them. He was travelling at about 40 kilometers per hour.

[27] He denied that there was anything that obstructed his view and prevented him from clearly seeing the two male persons jump from the other train and walk towards platform 7. His train has a big screen.

[28] He cannot dispute the Plaintiff's evidence that there was commotion in the train he was traveling in because he was not there.

[29] He demonstrated how people jump out of trains . This entails putting hands on the platform. He saw the plaintiff jump. He denied a suggestion that it is possible that when he first saw the plaintiff , he had already risen up after falling. He reiterated that he was the first person to arrive where the plaintiff was lying .

[30] The second witness was **Margaret Dimakatso Chauke.** She testified that she was employed as a security guard by a private company

called Enlightened Security and on the day in question she was posted at Mabopane Station.

[31] She did not see how the plaintiff was hit by the train because she was at platform 6 checking the passengers that were disembarking from a train. The incident occurred at platform 7. She went there after the incident and found him in a lying position. She was alerted to the incident by siren honking. She met with the the train driver and he was talking on the phone. He told her what had happened.

[32] The train doors had no problem.

[33] She spoke to the plaintiff who told her that he was hit by a train after he jumped the tracks and that the reason he jumped was because he wanted to take a shortcut as the other side was full with people.

[33] She was checking passengers who were alighting from a train at platform 6. She confirmed that she asked the plaintiff if he had a train ticket. She established that he had.

[34] She was **cross examined** by counsel for the plaintiff and the following responses were elicited;

[35] She recorded the incident in her pocket boook, but it has since been collected by her employer as it was full.

[36] She confirmed that she made a statement about the incident . In the statement she did not indicate why plaintiff chose to jump. She did

not read the statement back to the plaintiff. She denied that what she wrote is not what he told her.

[37] Platform 7 is not a shortcut or shortest way out of the station.

[38] It is an offence to to disembark from a train through a wrong door. She made a statement about this and if plaintiff was not injured, he would have been arrested.

[39] The defendant closed its case.

ANALYSIS OF EVIDENCE

[40] The defendant did not lead any evidence with regard to the issue of whether the doors were open or not. The security guard that was called to testify , Ms Chauke, is not employed by PRASA. She testified that the doors were functioning. Having heard the evidence of Croucamp that the train guard is the one who controls the train doors, I do not think that one can attach any probative value to the evidence of Ms Chauke. Her duties, according to her is to check that passengers do not cross the railway line, answer their questions, and check tickets.

[41] A train guard, or any other person who knows something about functioning of train doors on the other hand would have told the court about the actual state of affairs with regard to the functioning of the doors of the specific train on the day in question. Ms Chauke, in

response to a question to clarify why she stated that the train doors were functioning, indicated that when a train leaves the station, she watches it and see that the doors are closed.

She did not observe the doors of this particular train. Furthermore, it is not her job. She could not explain how it is possible for her, even if it was her job, to see that all doors are closed when she remain standing on the platform whilst the train saunters away.

[42] I do not understand why she was called to testify. Having heard her testimony and considered the statement she made, it would appear that she is the one that came with the version that the plaintiff jumped from the train. She destroyed that defence herself by conceding that platform 7 was not a shortcut or the shortest way out of the station.

[43] Croucamp on the other hand appeared to me to be an over-enthuastic witness. He has seen it all, and to him train commute s often jump off trains. It may be so, but the question is, did plaintiff jump off the train on the day in question?. He did not see what was happening in the train.

[44] This defence of contributory negligence or self-assumption of risk appear to have been premised on the evidence of Ms Chauke as I have indicated above. Now, the plaintiff had a monthly train ticket, and there is no apparennt reason why he would have wanted to go to platform 7

becasuse , as Ms Chauke conceded, it was not a shortcut out of the station.

[45] On the other hand, I find the version of the Plaintiff to be more probable. He was consistent and in my view truthful.

LEGAL PRINCIPLES

[46] I agree with counsel for the both parties that the versions presented before me as to how the plaintiff found himself on the tracks of an oncoming train are totally irreconcilable and thus mutually destructive. Under the circumstances, two issues arise for consideration:

[46.1] which of the two irreconcilable versions is most probable.

[46.2] whether the defendant has any duty of care towards the plaintiff as a train commuter as alleged in the Particulars of his Claim, and if so, whether it has discharged it.

[47] With regard to the first issue, the approach is stated in the matter of ***Stellenbosch Farmers Winery Group & Another v Martell & Others*** [3] . The court summarized the technique generally employed to resolve factual disputes in order to come to a conclusion. The court is

[3] 2003(1) SCA 11 at

required to make findings on (a) the credibility of the various factual witnesses;(b) their reliability; and (c) the probabilities.

[48] On the question of onus, the Supreme Court of Appeal, per Mhlanta JA had this to say in the matter of the **City of Johannesburg metropolitan Council v Patric Ngobeni**[4] had this to say:

> *"[50] It is trite that a party who asserts has a duty to discharge the onus of proof. In African Eagle Life Assurance Co Ltd v Cainer,[11] Coetzee J applied the principle set out in National Employers' General Insurance Association v Gany* ***1931 AD 187*** *as follows:*
>
> > *'Where there are two stories mutually destructive, before the onus is discharged the Court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false. It is not enough to say that the story told by Clarke is not satisfactory in every respect, it must be clear to the Court of first instance that the version of the litigant upon whom the onus rests is the true version . . . .'*
>
> *[51] The approach to be adopted when dealing with the question of onus and the probabilities was outlined by Eksteen JP in National Employers' General v Jagers,[12] as follows:*
>
> > *'It seems to me, with respect, that in any civil case, as in any*

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[4] supra

criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfied the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

[52] In the present case the plaintiff, during the trial, abandoned his

main ground and pursued his claim on the basis that Ledwaba negligently discharged the firearm. It follows that the plaintiff bore the onus of proof and had to prove that Ledwaba had been negligent. Accordingly, the defendant no longer had a duty to prove the defence of justification as it could not raise such a defence against a claim of negligence. In the result, the plaintiff had to prove the element of negligence on Ledwaba's part in order to succeed. Regarding the question of onus, Spilg J remarked:

> *'I am satisfied that after subjecting the evidence in this manner the truth is readily discernible. Moreover I am satisfied that irrespective of who was required to discharge the onus, the result will be the same.'*

[53] I do not agree with the trial judge when regard is had to the facts. It is difficult to comprehend how the judge could make this statement unless he had pre-judged the issues. He adopted an approach that is flawed and which cannot be applied when faced with two mutually destructive versions. It was imperative for Spilg J to have been alive to the issue relating to the onus and to make a determination in that regard. Had the trial judge adopted a proper approach and applied the principles set out in the Jagers case, the result would have been different. I will hereafter show how the trial judge erred in his approach."

[49] I have no doubt in my mind, as I have already stated above, that the version of the plaintiff is more probable.

[50] The enquiry is not complete though because even if he was pushed, the next question is whether this and the resultant harm was foreseeable, and if so, whether there is anything that the Defendant could have done to prevent the harm, which should also be foreseable.

[51] The defendant concentrated on proving that the Plaintiff jumped and forgot to place facts before me with regard to the issue of negligence.

[52] It is the defendant that should have led evidence with regard to measures that it took to ensure that train passengers are safe.

The test for negligence is as formulated in the matter of Kruger v Coetzee [5] . Jolmes JA formulated it as follws in paragraph 430E

"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.

[53] It is a basic fundamental requirement for the safe operation of a passenger train that it should not depart with a door open. The defendant should in my view have placed evidence before me with regard to standard operating procedures and how they were complied with on the day in question.

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[5] 1966(2) SA 428 (A)

In the matter of Transnet Ltd t/a Metrorail and Another v Witter 2008 (6) SA 549 (SCA), this was indicated as evidence that would satisfy the first two requirements in paragraph (a) of the test for liability as formulated by Holmes JA in the matter of Kruger v Coetzee.

[54] The defendant bore the onus to place such evidence as I have already stated above. In the absence of such evidence, I am bound to find in favour of the plaintiff that the the fact that he would be pushed off the train and that he would suffer injuries as a result thereof was foreseable.

Furthermore, the defendant failed to take steps to prevent it.

[55] The duty to care, and to protect commuters was denied by the Defendant in its plea[6], but suprising enough no evidence was tendered in this regard.

CONCLUSION AND ORDER

[55] Under the circumstances, I make the following order;

[55.1] The defendant is liable to compensate the plaintiff to the full extent of his proven damages and costs of the trial on merits ;

[55.2] The determination of the quantum of the claim is postponed sine die.

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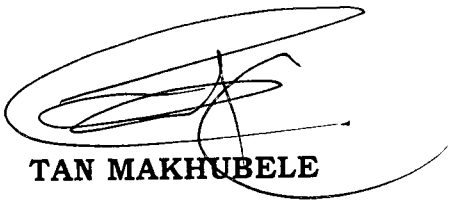
[6] paragraph 3 of the Defendant's Plea .



TAN MAKHUBELE

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

PLAINTIFF :	ADVOCATE NR RALIKHUVHANA
INSTRUCTED BY:	MIKE MABUNDA INCORPORATED
	ARCADIA, PRETORIA
DEFENDANT	JG CILLIERS SC
INSTRUCTED BY	STONE ATTORNEYS
	MONUMENT PARK, PRETORIA