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

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED. 2/8/2016

In the matter between ~ **Case No.: 2013/69570**

2/8/2016

PASSENGER RAIL AGENCY OF SOUTH AFRICA SOC LIMITED **APPLICANT**

And

PHAPANO PATRICK BALOYI **RESPONDENT**

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

TSATSAWANE AJ

1 INTRODUCTION

1.1 This is an application for leave to appeal against my judgment granted against the applicant in June 2016 pursuant to action proceedings between the parties.

1.2 In the action proceedings, the respondent claims damages against the applicant arising from injuries sustained as a result of the respondent having been pushed out of a moving train operated by the defendant.

2 THE TRIAL

2.1 At the trial, it was common cause that the applicant owed the public, including the respondent, a duty of care to ensure, amongst others, that its trains were safe for use by members of the public; that safety regulations and pre-cautions would be implemented to ensure the safety of members of the public using the applicant's trains; that the coaches of the trains would be safe for use by members of the public.

2.2 In paragraph 2 of the judgment, I found that the applicant is under a public duty to protect its commuters and that such duty "*together with constitutional values, have mutated to a private law duty to prevent harm to commuters*[1]". The applicant does not suggest that this finding (based on the cases cited in the footnote) is wrong or that there are reasonable prospects of another Court finding differently on this issue.

2.3 By agreement between the parties and in terms of Rule 33(4), I was invited to determine the following three issues ~

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[1] See Mashongwa v Passenger Rail Agency of South Africa 2016 (3) SA 528 (CC) and Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC).

2.3.1 whether the train was in motion when the respondent was pushed out of it;

2.3.2 whether the applicant was negligent; and

2.3.3 whether the injuries sustained by the respondent were consistent with the manner in which the incident occurred.

2.4 The applicant did not place in dispute the fact that the respondent was pushed out of its train. The applicant disputed that the train was in motion when the respondent was pushed out of it. The respondent led evidence to the effect that the train started moving out of the station whilst the door that he used to enter the train was open. The applicant did not lead any evidence to contradict this evidence.

2.5 I found in favour of the respondent in respect of the issues which I was invited to determine. In particular and based on evidence which the applicant did not contradict, I made, amongst others, the following findings against the applicant ~

2.5.1 the respondent was pushed out of the defendant's moving train and sustained injuries as a result thereof;

2.5.2 the applicant was negligent in that it failed to observe the basic safety-critical practice of keeping the relevant door closed whilst the train was in motion;

2.5.3 the defendant should have foreseen that leaving the relevant door open whilst the train was in motion posed a danger to the respondent and that it failed to take reasonable steps to prevent the respondent from not only being pushed out of the door but also falling out of the door.

3 THE APPLICATION FOR LEAVE TO APPEAL

3.1 The applicant has filed an application for leave to appeal against my judgment on the following two grounds ~

"*2. The learned Judge erred in finding that it does not matter who pushed the plaintiff for the purposes of establishing negligence in this action.*

3. The learned Judge erred in finding that the issue of negligence against the Defendant was proven by the Plaintiff."

3.2 The applicant correctly abandoned the first ground of appeal, i.e. that I erred in dismissing its application for absolution from the instance.

3.3 At the hearing of the application for leave to appeal, Mr. Gwala, who appeared on behalf of the applicant, contended that I ought to have included in the issues submitted to me for determination, a fourth issue, i.e. the question whether the applicant was vicariously liable to the respondent. This, so the argument went, is a law issue which I should have raised due to

the fact that the parties were mistaken about what, in law, was in fact in issue between them.

3.4 In developing his argument, Mr. Gwala contended that the applicant was not vicariously liable to the respondent and that the applicant was not negligent due to the fact that it was not established as to who actually pushed the respondent out of the moving train and without this having been established, it was wrong to conclude that the applicant was negligent.

3.5 According to Mr. Gwala, the applicant could only be negligent if the person responsible for the negligent act was one of its employees and that the evidence did not establish this. On this basis, Mr. Gwala submitted that there are prospects of another Court coming to a different conclusion. Mr. Gwala's contention in this regard would have been correct if the respondent's case was based on vicarious liability – it was not.

3.6 In support of his contentions, Mr. Gwala referred me to Quartermark Investments (Pty) Ltd v Mkhwanazi And Another 2014 (3) SA 96 (SCA) and Cusa v Tao Ying Metal Industries And Others 2009 (2) SA 204 (CC) in support of the contention that I should have added the question of vicarious liability as one of the issues that I had to determine in terms of Rule 33(4) – in addition to what the parties agreed were the issues to be determined. This, according to Mr. Gwala, I had to do due to the fact that this is a law point and a Court is obliged to raise a law point if the parties are wrong in their approach to the matter. I disagree.

3.7 In this case, the respondent did not rely on vicarious liability. The respondent relied on the applicant's breach of its duty of care. The applicant did not contest the relevant allegations at the trial. In order to rely on vicarious liability, the applicant would have had to allege and prove the relevant elements of that liability. The respondent chose not to rely on vicarious liability and deliberately relied on a breach of a legal duty, which he was in law entitled to do. For this, the respondent was entitled to allege and prove what is contained in his particulars of claim and he did so.

3.8 The cases to which I was referred do not support the applicant's contentions. The cases dealt with something different from what was before me. In *Cusa v Tao Ying Metal Industries And Others*, Ngcobo J (as he then was) said the following in relation to the raising of law points ~

> "*[67] Subject to what is stated in the following paragraph, the role of the reviewing court is limited to deciding issues that are raised in the review proceedings. It may not, on its own, raise issues which were not raised by the party who seeks to review an arbitral award. There is much to be said for the submission by the workers that it is not for the reviewing court to tell a litigant what it should complain about. In particular, the LRA specifies the ground upon which arbitral awards may be reviewed. A party who seeks to review an arbitral award is bound by the grounds contained in the review application. A litigant may not, on appeal, raise a new ground of review. To permit a party to do so may very well undermine the objective*

of the LRA to have labour disputes resolved as speedily as possible.

[68] *These principles are, however, subject to one qualification. Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, mero motu, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality. Accordingly, the Supreme Court of Appeal was entitled mero motu to raise the issue of the commissioner's jurisdiction and to require argument thereon. However, as will be shown below, on a proper analysis of the record, the arbitration proceedings, in fact, did not reach the stage where the question of jurisdiction came into play.*"

3.9 The above clearly does not apply in this case. Ngcobo J was concerned with a case where at issue was the raising of a law point on appeal – not the raising of a whole new cause of action by the Court itself (at the trial), which cause of action would have required the parties to lead factual evidence which they did not come to Court to lead – and which cause of action the respondent as plaintiff did not rely upon in the particulars of claim. In this case, it did not appear from the pleadings that the respondent wanted to rely on or had to rely on vicarious liability nor was the applicant

itself called upon to defend a case based on vicarious liability. Even if the respondent may have had to rely on vicarious liability, the Court could not have amended the respondent's particulars of claim to introduce a new claim based on vicarious liability. It is not clear from Mr. Gwala's contentions as to how the pleadings would have had to be dealt with if the Court itself raised the issue of vicarious liability.

3.10 In *Quatermark*, the Supreme Court of Appeal relied on Ngcobo J's *dictum* quoted above. It said the following ~

> "*[20]* ... *The essential function of an appeal court is to determine whether the court below came to a correct conclusion. For this reason the raising of a new point of law on appeal is not precluded, provided the point is covered by the pleadings and its consideration on appeal involves no unfairness to the party against whom it is directed* ...
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> *[21]* ... *Lewis JA, in the recent judgment of Nedbank Ltd v Mendelow NO and Another confirmed that the court could raise matters mero motu 'where the facts to which those principles apply are squarely raised in the papers before the court (and that were before the high court)' and that 'a court should not allow the continuation of a wrong because the legal representatives of the parties did not appreciate the correct legal principles.*"

3.11 In the light of the fact that the respondent did not rely on vicarious liability, the suggestion that the court ought to have raised it on its own is clearly wrong in law.

3.12 The applicant has not attempted to show that my reliance on the decisions of the Constitutional Court and the Supreme Court of Appeal referred to in the judgment was wrong or that my application of the principles laid in such cases was wrong. Without such an attempt having been made, there are no reasonable prospect of success on appeal.

3.13 In addition, no attempt has been made to demonstrate why it matters as to who pushed the respondent out of a moving train in circumstances where the applicant was found to be negligent in that "*it failed to observe the basic safety-critical practice of keeping the relevant door closed whilst the train was in motion*" and when the respondent's evidence to the effect that the applicant's train moved from the station whilst the relevant door was open was not contradicted.

3.14 In the light of the above, I am of the view that ~

3.14.1 the appeal would not have a reasonable prospect of success; and

3.14.2 there is no other compelling reason why an appeal should be heard.

3.15 In the circumstances, the application for leave to appeal is dismissed with costs.

KENNEDY TSATSAWANE

Acting Judge of the Gauteng Division of the High Court of South Africa

For the applicant:	Adv. N. Gwala
	Instructed by Ledwaba Mazwai Inc., Pretoria
For the respondent:	Adv. Granova
	Instructed by Mohalutsi Attorneys, Pretoria