IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

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

27 September 2021

DATE SIGNATURE

Case Number: 13304/17

**NELSON TEGAMU MTHOMBENI** Plaintiff

AND

**PASSENGER RAIL AGENCY OF SOUTH AFRICA** Defendant

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**JUDGMENT**

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**KHWINANA AJ**

Introduction

[1] The Plaintiff instituted an action for damages against the Defendant for personal injuries sustained in a train accident that occurred on the 11th of November 2016, in which the Plaintiff was a commuter/passenger.

[2] The Plaintiff instituted the action under different heads of damages, to wit: General Damages, Future Medical Expenses and Loss of Income (Past and Future).

[3] I have been called upon to decide both the issue of liability and quantum. The parties agree that the issue of quantum will be decided on the papers and the plaintiff relies on medico-legal reports whereas the defendant submitted none.

Merits

[4] The plaintiff is an adult male person identity number […] employed and residing at […] Tembisa Gauteng Province.

[5] The defendant is the public entity established in terms of section 22 of Legal Succession of the South African Transport Services Act no. 9 of 1989 with its principal place of business situated at Prasa House at 1040 Burnett Street Hatfield Pretoria, Gauteng Province.

[6] The Plaintiff testified that he had been waiting since 05h00 in the morning for a train to Kalkfontein. He says he waited for more than two hours and when a train came around 07h00 which was heading to Leralla station he boarded the said train. He says that he knew it was going to come back his direction, He says that due to the delay of the 05h00 train he knew that when it returned it

would be full to capacity and he would not have secured a seat. He says the train came back indeed full and when it passed Limindlela station where he boarded the train.

. [7] He says the train was off to Kalkfontein station where he the plaintiff was to alight. He says he possessed a valid ticket for the trip. The plaintiff says he was pushed through the open doors of a moving train, by people who according to him wanted to disembark, and whilst he was still inside the train. He says he could not have disembarked faster due to the other commuters who were blocking the way or hanging on the doors, hence the commotion of pushing and jostling.

[8] The plaintiff testified that he was injured as a result of the fall. He says that he crawled to the platform and managed to call his cousin/friend who took him to a medical practitioner and ultimately the hospital. Mr Baloyi was called as a witness and he testified that he received a telephone call from the plaintiff who relayed to him that he was injured and requested that he fare him to the hospital for medical attention. He says that he obliged and took the plaintiff for medical attention. His evidence was not rebutted. The plaintiff closed his case.

[9] The defendant called a witness who testified that he was at work on the day in question. He says that if there had been an incident particularly of a person being injured he would have been made aware and he would have seen. He confirmed that the trains are overcrowded due them being delayed. He says he was not aware of the delay by the five o'clock train. The defendant's witness testified that the incident never occurred, since it was not recorded by

the defendant's officials. The defendant did not submit any documentary evidence in relation to his testimony and defendant closed its case.

Legal Principle

[12] It is trite law that the circumstances that the Plaintiff explains to the court should carry the likelihood of having happened on a balance of probabilities.[1] It is trite that if a party wishes to lead evidence to contradict an opposing witness, he should first cross-examine him upon the fact that he intends to prove in contradiction, to give the witness an opportunity for explanation. *"If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct."*[2]

[13] The evidence by the plaintiff has not been rebutted and therefore on a balance of probabilities it is safe to say that the incident occurred as explained by the plaintiff and his witness. The plaintiff took the court into his confidence about the fact that as at the time he boarded the train he did not have a valid ticket to Leralla station. However, I cannot lose sight of the fact that the incident did not occur at the said stage but at the Kalkfontein station where his ticket authorised his trip.

[14] It is an accepted principle of our jurisprudence that the Defendant ("PRASA") has a public duty to provide public rail transport in a safe manner.[3] Negligence will arise when PRASA fails to display or observe the degree of care required by law, of which the standards required are those of a

[1] *Kruger v Coetzee* 1966 (2) SA 428 (A)
[2] *President of the RSA and others v South African Rugby Football Union and Others* (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (1) BCLR 1059 (10 September 1999)
[3] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC)

reasonable man in the position of PRASA. The liability arises if a reasonable man would foresee the likelihood of his conduct injuring another in his person or property and would take reasonable steps to avoid the injury but failed to take such steps. PRASA is aware, as testified by its witness, that during the peak hours of the morning, trains are full to capacity and overloaded, wherein other passengers hang out on the doors and even block the doors from closing. But despite all that, the trains remain overcrowded and do not come on time.

[15] The Plaintiff is required on trial to prove of that the aforementioned duty was not discharged and fell short of what a reasonable rail provider would have done to ensure commuter safety in the circumstances. It was held in several decisions that where it was found that the Plaintiff was pushed out of open doors of a carriage, whilst the train was in motion, negligence on the part of PRASA is readily found to be established.[4]

[16] Plaintiff's counsel contended that the Plaintiff's evidence remains unchallenged, since none of his evidence was challenged in cross-examination. It was never disputed in cross-examination that the incidents did not occur in the manner that the Plaintiff described or otherwise. The plaintiff contends that the defendant's negligence, has been proven and therefore the defendant should be held liable for 100 % of the Plaintiff's proven damages.

[17] Counsel for the plaintiff further contended that the defendant failed to ensure that trains are on time to avoid overcrowding and failure to close doors when same are overloaded. The plaintiff testified that he was alighting when people

[4] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 35 (CC); *Kruger v Coetzee* 1966 (2) SA 428 (A); *Maruka v Passanger Rail Agency of South Africa* (8905/2014) [2016] ZAGPPHC 213 (15 April 2016)

were hanging on the doors. If the defendant had ensured that the train was not overloaded and the doors were closed when the train started moving. In the premise it is evident that the defendant was negligent and the defendant must compensate the plaintiff for 100 % proven damages.

[18] *The court consequently held that by allowing the train to be overcrowded, the appellant negligently failed to take reasonable steps to prevent harm which was foreseeable and that such negligent omission was the direct cause of the respondent's injuries giving rise to liability for her damages.* Safeguarding the physical well-being of passengers must be a central obligation of PRASA. It reflects the ordinary duty resting on public carriers and is reinforced by the specific constitutional obligation to protect passengers' bodily integrity that rests on PRASA, as an organ of state. The norms and values derived from the Constitution demand that a negligent breach of those duties, even by way of omission, should, absent a suitable non-judicial remedy, attract liability to compensate injured persons in damages.[5]

[19] That PRASA is under a public law duty to protect its commuters cannot be disputed. This much was declared by this Court in *Metrorail*. But here this Court goes a step further to pronounce that the duty concerned, together with constitutional values, have mutated to a private law duty to prevent harm to commuters.[6]

[20] It bears yet another repetition that there is a high demand for the use of trains since they are arguably the most affordable mode of transportation for the

[5] *Passenger Rail Agency of South Africa v Mashongwa* (966/13) [2014] ZASCA 202 (28 November 20214) (Supreme Court of Appeal judgment)

[6] *Shabalala v Metrorail* (062/07) [2007] ZASCA 157; 2008 (3) SA 142 (SCA) (*Shabalala); Transnet Ltd t/a Metrorail and Another v Witter* [2008] ZASCA 95; 2008 (6) SA 549 (SCA) (*Witter*)

poorest members of our society. For this reason, trains are often packed to the point where some passengers have to stand very close to or even lean against the doors. Leaving doors of a moving train open therefore poses a potential danger to passengers on board.

Negligence was formulated as follows[7]:

> *"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."*

[21] PRASA's failure to keep the doors closed while the train was in motion is the kind of conduct that ought to attract liability. This is so not only because of the constitutional rights at stake but also because PRASA has imposed the duty to secure commuters on itself through its operating procedures. More importantly, that preventative step could have been carried out at no extra cost. It is inexcusable that its passenger had to lose his leg owing to its failure to do the ordinary. This dereliction of duty certainly arouses the moral

[7] See *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F where the proper approach for establishing the existence or otherwise, of negligence was formulated by Holmes JA

indignation of society. And this negligent conduct is closely connected to the harm suffered by Mashongwa. It is thus reasonable, fair and just that liability be imputed to PRASA.

[22] The plaintiff has succeeded to prove the defendant's negligence in that the defendant failed to ensure that the train is not overcrowded and that doors remain closed when the train is moving.

Injuries

[23] The Plaintiff have filed five (5) experts' reports which the parties have agreed that same be admitted into evidence, The experts' reports referred to above are the following: Dr Kumbirai – Orthopaedic Surgeon; Dr Mkhabele and Indunah – Radiologist; Poppy Khunou – Occupational Therapist; Christelle Botha – Industrial Psychologist; Actuaries – Munro Acturies:

[24] In accordance with the aforementioned reports and their prognosis, as well as the Particulars of Claim and hospital records, the Plaintiff suffered and/or sustained the following injuries: According to the Orthopaedic Surgeon, the Plaintiff sustained a fracture of the left tibial plateau, from which he received the following treatment: * A clinical and radiological examination * Open reduction plus internal fixation in the left tibial plateau with plate and screws in situ, and was rehabilitated and mobilized through crushes. Following the incident, the Plaintiff was admitted to Tembisa Hospital, and remained therein from 16 November 2016 to 24 December 2017.

[25] The Plaintiff's current complaints and/or sequelae in consequence of the injuries sustained are: A painful left knee, this is exacerbated by prolonged

standing, walking, lifting of heavy weights and cold weather. He is unable to walk fast due to the said pain. After the incident, the Plaintiff was able to return to his pre-morbid job, though he could not perform to the maximum as he was able to pre-morbidly.

[26] It is opined by the Orthopaedic that the Plaintiff would require to undergo further surgery to remove the implants to prevent them from acting as a focus for sepsis should the Plaintiff become immune compromised. Considering his age, there is a 10 % chance that the left knee may worsen to warrant a total left knee replacement in the future.

[27] Following the Occupational Therapist's assessment, it was established that the Plaintiff could after the incident cope with tasks that require light physical strength, that he may be suited for light type of tasks. The Plaintiff would benefit from future medical interventions. The plaintiff has claimed an amount of R100 000.00 for future medical expenses. It is evident that the plaintiff will require medical attention and it is therefore fair and reasonable that the sum of R100 000.00 be awarded accordingly.

General damages

[28] It is trite that the award for general damages is solely in the discretion of the court, and which discretion will be exercised judicially in considering what is a fair and adequate compensation to the injured. The aforesaid discretion may be exercised with the guidance of previous awards made in comparable cases. It was held in the past that the determination of General Damages has never been an easy task as there is neither mathematical nor scientific

formula, or formulation to compute the monetary value on pain & suffering, loss of amenities of life and disability.[8]

[29] Counsel for the defendant submits that R400 000,00 is fair and reasonable for general damages. The plaintiff has sustained injuries that resulted into pain and suffering and having considered the plethora of cases referred to I am satisfied that the sum of R400 000.00 is fair and reasonable.

Loss of earnings/ earning capacity

[30] Mr Masipa referred me to a plethora of cases that dealt with the general approach in assessing damages for loss of earnings.[9] He repeated what was stated by Nicholas JA[10] as follows: *"Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. One is for the judge to make a round estimate of an amount which seems to him to be fair and reasonable."*

[31] He further referred to an unreported case[11], where Prinsloo J held that: *"where career and income details are available, the actuarial calculation approach is more appropriate and a court must primarily be guided by the*

[8] *AA Mutual Insurance Association Ltd v Maqula* 1978 (1) SA 805 (A) and *Ronal Accident Fund v Guedes* 2006 (5) SA 583 (SCA) at para 8
[9] *Goldie v City Council of Johannesburg* 1948 (2) SA 913 (W) and *Southern Insurance Association v Bailie* 1984 (1) SA 98 (A) at 112E-114F
[10] *Southern Insurance Association v Bailie supra*
[11] *Mashaba v Road Accident Fund* 2006 JOL 16926 (T) (unreported) and *O v Road Accident Fund* (20976/2014) [2018] ZAGPJHC 419 (31 May 2018) (unreported)

*actuarial approach, which deals with loss of income or earnings before applying the robust approach, which normally caters for loss of earning capacity. This would help the court to ensure that the compensation assessed and awarded to the Plaintiff is as close as possible to the actual facts relied upon."*

[32] Counsel also referred to the matter where Moosa AJ held that: *"The actuarial approach seeks to determine the loss of earing as realistically as possible to what may be the Plaintiff's actual losses. This approach comprises of:*

*a) providing a factual basis upon which the loss of earning is to be calculated, and only then;*

*b) by applying appropriate contingency deductions".*

[33] Counsel for the plaintiff in his summary of the facts says the Plaintiff filed the report of the Industrial psychologist which contained the factual basis on which the actuarial calculations were derived from. The following circumstances should be taken into account in determining the Plaintiff's loss of earnings, and the appropriate application of contingencies:

33.1 The Plaintiff is 59 years of age this year; His highest educational qualification is Grade 12, and therefore has no formal vocational skill qualification; He returned to work after the incident, and was employed until retrenched in 2019; He could safely meet light work load; He present pain in his left leg, and same is exacerbated by prolonged standing and walking; He cannot walk fast, and has lost his amenities of life; His physical capacity, rate of work and work qualification profile

could not competently meet the physical requirements of the work that requires whole body range of motion, agility and stamina.

33.2 As a result, his future work choices have been compromised, and his employability significantly negatively impacted on; At his age, he would struggle to re-enter the open labour market due to his low level of education and reduced residual physical strength; His occupational freedom had been severely restricted, and is expected to experience prolonged periods of unemployment, now that he is retrenched, though same was voluntarily.

[34] However, Counsel for the plaintiff contended that the plaintiff cannot be considered completely unemployable; He is considered vulnerable in the open market and will likely only be able to be paid minimally as an unskilled labourer in taking into account the aforementioned circumstances, therefore the amount calculated by the Actuary be awarded as and accepted as fair and equitable.

[35] Koch in the Quantum Yearbook said: *"General contingencies cover a wide range of considerations which may vary from case to case and may include: taxation, early death, saved travel costs, loss of employment, promotion prospects, divorce, etc. There are no fixed rules as regard to general contingencies."* Contingencies are the hazards that normally beset the lives and circumstances of ordinary people. The Plaintiff *in casu* is 59 years old, which put him in the bracket of middle aged to old male person, of which a contingency deduction of 10 % post-morbid may be allowed. In computing the

number of years until retirement, the Plaintiff was still left with about 2 years to sixty and 7 years to 65 which is the normal age of retirement.

[36] Counsel for the defendant contended that loss of earnings be dismissed as no loss of earnings has been suffered. Defence submit that there is no evidence of loss of earnings for the following reasons:

36.1.1 The actuarial calculations have been computed on the wrong basis.

36.1.2 Following the plaintiff's retrenchment, unrelated to the injuries sustained in the accident, his legal representatives have failed update and attain revised expert opinions. Effectively, the expert evidence as it stands before this court is of absolutely no probative value in quantifying the plaintiff's patrimonial loss.

36.2 Therefore, the plaintiff has failed to prove his heads of damages for past loss of income and future loss of earnings. And for the court to make any finding on loss of earnings would be tantamount to impressible speculation and conjecture.

Conclusion

[37] The plaintiff during his testimony told how his name was not appearing on the list of those that were being retrenched however he requested to be included. He further said that the employer had agreed to keep him in his employment

however he was no longer required to walk around the plant but was stationed in one spot which assisted him to conduct his duties as a site-supervisor.

[38] What is evident is that due to the injuries sustained and the sequelae had affected him in the open market, he was no longer competitive to his peers and the employer considered that he was now able to do light duties and the thus the changes of his employment. The actuarial report took into account contingencies pre and post morbid without considering benefits as is the case currently. This makes it difficult for me to consider the report without the evidence alluded to supra. The report did not speak to the retrenchment package that has been taken by the plaintiff. I am inclined to agree with the defendant that loss of earnings report ought to have been revisited taking into account the retrenchment package received. It is imperative to remember that the amount awarded for loss of earning is to put the plaintiff in a position he would have been in had it not been for the accident.

[39] The plaintiff also denied having been selling Tupperware which enabled him to receive additional income. This income was taken into account by the actuary in preparing the report, again failure to take the said income into account when the report was being prepared is misleading to this court. The loss of earnings claim is based on information furnished which informs the expert to make his/her calculations whilst most of it becomes speculative as nothing in the future is certain. It is therefore imperative that whilst there is

speculation however all the facts alluded to are taken into account to ensure that the court comes to an informed decision.

[40] In the premise I come to the conclusion that the claim for loss of earnings be dismissed.

Costs

[40] Counsel for the defendant argues that costs be that of the day the matter was heard and the other days wherein a Judge could not be secured should not be costs against the unsuccessful party. I agree with the defendant that costs that are awarded are for the day that the trial was conducted on party and party scale. Counsel is entitled to actual work done.

[41] The plaintiff has filed a draft order for my consideration. I have considered same and have amended it accordingly.

[42] The draft order marked “X” is made an order of Court.

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**E.N.B. KHWINANA**

**ACTING JUDGE OF GAUTENG DIVISION, PRETORIA**

Counsel for Plaintiff: Adv Masipa

Attorney for Plaintiff: Linda Nkuna Attorneys

Counsel for Defendant: Adv Mabuza

Attorney for Defendant: Ledwaba Mazwai

Date of Hearing: 03 June 2021

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 13304/17

BEFORE the Honourable MADAM JUSTICE KHWINANA AJ

On this the 27 Day of September 2021

In the matter between:

NELSON TEGAMU MTHOMBENI PLAINTIFF

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA (PRASA) DEFENDANT

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DRAFT ORDER

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AFTER HAVING HEARD COUNSEL FOR THE PARTIES, the following order is made:

1. That the Defendant be and is hereby held liable for 100 % of the Plaintiff's damages arising from a train incident that occurred on the 11th of November 2016.

2. That the Defendant is ordered to pay the Plaintiff's delictual damages in the amount of (R500 000.00 (FIVE HUNDRED THOUSAND RANDS)

   Being :

R 400 000.00 for General Damages and

R 100 000.00 for Future Medical Expenses

which amount shall be paid within 30 days from the date of this order to the Plaintiff's Attorneys, LINDA NKUNA ATTORNEYS, direct transfer into their trust account, the details of which are as follows:

LINDA NKUNA ATTORNEYS TRUST ACCOUNT

Bank: FIRST NATIONAL BANK

Branch code: 250665

Account no: […] Branch;

PRETORIA CENTRAL TYPE: CURRENT ACCOUNT

REF: PRASA/LN/004

3. That the Defendant shall not be liable for prescribed interest on the aforesaid payment if timeously made;

4. The Defendant is ordered to pay Plaintiff's taxed or agreed costs on a High Court scale as between party and party and which costs shall include, but not be limited to:

4.1 The costs of consultations with the Plaintiff and Counsel, and preparations;

4.2 The costs of obtaining the reports, addendum reports of the following experts:

4.2.1 DR P T Kumbirai (Orthopaedic Surgeon);

4.2.2 DRS MKHABELE AND INDUNAH (Radiologists)

4.2.3 POPPY KHUNOU (Occupational Therapist);

4.2.4 CHRISTELLE BOTHA (Industrial Psychologist);

4.2.5 MUNRO ACTUARIES (Actuary);

4.2.6 The costs of Counsel for trial,

5. In the event that costs are not agreed, the Plaintiff agrees as follows:

5.1 The Plaintiff shall serve the notice of taxation on the Defendant's attorney of record, and;

5.2 The Plaintiff shall allow the Defendant 14 (FOURTEEN) court days to make payment of the taxed costs.

**BY COURT**

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**REGISTRAR**

Counsel for the Plaintiff

Adv. Relleng Masipa

Tel: 079 261 0063

Counsel for the Defendant

Adv. Vincent Mabuza

Tel: 072 950 2307