REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:

16 November 2022
DATE SIGNATURE

CASE NUMBER: 27304/2019

In the matter between:

RAYMOND ORIEBE ANYASI **PLAINTIFF**

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA **DEFENDANT**

CORAM: **HOLLAND-MUTER AJ:**

Summary: Law of delict-damages-plaintiff allegedly in collision with oncoming train after he lost his grip when clinging onto the side of the passenger carriage-he avers he was struck by oncoming train-defendant avers plaintiff illegally crossed the railway track before the oncoming train when he was struck by the train- whether negligence on the part of rail agency established-onus to establish is on the claimant-versions of the parties mutually destructive-evaluation of probabilities-defence of *volenti non fit injuria.*

JUDGMENT

[1] The plaintiff instituted a claim against the defendant for damages allegedly suffered following an incident that occurred at the Wonderboom Railway Station on 3 October 2018 at approximately 05:45.

TWO DESTRUCTIVE VERSIONS:

[2] The plaintiff alleges that he was pushed out of an overcrowded passenger railway coach whilst clinging onto the edge of the open carriage door. He alleges being pushed from the moving train, falling in front of an oncoming train from the opposite direction and that he sustained serious bodily injuries. The plaintiff claims damages from the defendant ("PRASA"). PRASA denies liability and alleges that the Plaintiff was hit by an oncoming train whilst he was illegally trying to cross the railway line. The court is faced with two mutually destructive versions and accepting the one will lead to the rejection of the other.

SEPARATION OF MERITS AND QUANTUM:

[3] At the beginning of the trial counsel for both parties requested a separation between the quantum and merits issues and that this court only has to adjudicate on the merits issue. Such request was granted in terms of Rule 33(4) of the Uniform Rules of Court and the aspect of quantum was postponed *sine die* subject to the finalization of the merits issue.

[4] The main issue was whether PRASA was negligent and whether such negligence caused his injuries. Both counsel agreed that no issue is taken

whether the plaintiff had a monthly ticket allowing him to use the train service. The issue was whether he was pushed from a moving train by other passengers or whether he was hit by an oncoming express train moving in the opposite direction on another railway in coach.

THE TWO VERSIONS:

[5] The ***plaintiff's version*** was that he arrived at the Wonderboom Station early on that morning before 05:30 (he leaves his home between 05:10-05:15 to catch the train), used the pedestrian bridge to platform 2 where he would board the train traveling from north to south in the direction of the Pretoria Station. He was waiting for the train and there were many other commuters waiting for the train. After the train arrived and came to a stop, the waiting commuters rushed to board the train and he and at least five other commuters could only grip onto the upper opening of the sliding doors and hung onto the outside of the train. The train was overcrowded and only his feet were on the landing board of the carriage at the door. The train began to move and he hung on for all he could. This was normal for many commuters on a daily basis to overcrowd the train resulting in some commuters hanging onto the outside of the moving train. He was clinging onto the side of the carriage at the open door and the train left the station on route to the Pretoria Station. The carriage onto which he was clinging passed the end of the platform and exited the station with him still hanging onto the carriage. He became tired and as a result of the pushing by other commuters in the coach, he lost his grip and fell onto the adjacent railway line only to be hit by an oncoming train from the opposite direction (travelling from south to north on the adjacent railway line). His next recollection was waking up in the Steve Biko Hospital.

[6] ***PRASA's version*****,** as related by the driver of the oncoming train, Hendrik Lambert Bronkhorst **("Bronkhorst"),** is the opposite. He was the driver of train 4401 (the oncoming train) and was traveling from south to north. He is a driver

with four years of experience and explained how he came from the south though the Wonderboompoort on the extreme left rail. There was a speed limit on the line of 30 km/h and he approached the Wonderboom station at that speed. He was driving an express train meaning that the train only stops at certain stations on route, Wonderboom not a stop that morning. He saw the stationary train facing in the opposite direction on platform 2. He was to drive through the station next to platform 1 (on the photo he was on the extreme right line). There was a photo album handed up by consent of both counsel (uploaded onto caselines as Item 022A Bundle G, item 8). He dimmed the train's light to relay his approach to the stationary train next to platform 2 (the train boarded by the plaintiff). When he entered next to platform no 1, he saw a person running across the line from his left to his right as he was travelling. He sounded the train's horn, applied the emergency brakes and flashed the train's bright light. The right front side of the train hit the person as that person's hands were on the edge of the platform attempting to board the platform. The train came to a halt and the injured person was lying between the platform and the passenger carriage fourth from the front of the train. The injured person was attended to by the emergency workers who arrived on the scene. Bronkhorst did not move the train after the collision to enable the medical personal to attend to the plaintiff.

THE OTHER WITNESSES:

[7] The plaintiff called three other witnesses while the defendant called one other witness.

WITNESSES ON BEHALF OF THE PLAINTIFF:

PRETTY ROTHE MOSIA: ("MOSIA"):

[8] Mosia is employed as a Basic Ambulance Assistant by the Tshwane Fire Department. She was accompanied by a colleague and they arrived on the scene

at 06:30, some 15 minutes after receiving a call out. She remembered that the injured person's clothes were partly tangled around the axel and wheel of the coach but she cannot remember where the injured person was lying in relation to the train. She was more concerned about the Code 038 received indicating that a person either jumped or fell from a train. Not being an eye witness of the incident, her evidence does not advance the version of the plaintiff at all. She was a very hesitant and uncertain witness and her recollection of what she observed is very poor. It did not do the plaintiff any favour calling her as what she testified were mostly hearsay evidence (the patient report) and a poor recollection.

KGABO FRANCINAH MASIA: ("MASIA"):

[9] Masia is also employed by the Tshwane Emergency Services as a Superintendent in the Medical Operational Division. Her evidence was merely to explain the Code 038 (signifying that someone jumped or fell from a train). She did not attend to the scene and her evidence does not advance the version of the plaintiff in any way. Her evidence does not assist the plaintiff at all.

REFILWE PHABINA KGOKANE: ("KGOGANE"):

[10] Kgokane is employed by the Tshwane Emergency Services as a Life Support Officer. She is the author of the Patient Report Form in Bundle E on information received from various people on the scene. She used the Code 038 because that was the information she received from the call-out indicating that a person fell from a train. She did not eye witness this and no eye witnesses were called to confirm such. It therefore remains hearsay as to how the plaintiff was injured. She assisted to attend to the plaintiff as he was still lying next to the rail line next to the platform. Her version as to how the plaintiff was casavaced from the station differs from what Malan on behalf of the defendant testified. She was unsure about her recollection on certain aspects and relied on the completed patient report form. She does not know about a hole in the perimeter wall next to the station but remembered that the plaintiff was taken via the pedestrian over bridge to the waiting ambulance. This was also contrary to what Malan later

testified. She said that when she arrived, the train was some distance away from the point of impact, also different to what Malan and Bronkhorst testified. The rest of her evidence does not take the matter any further.

WITNESS ON BEHALF OF THE DEFENDANT:

BERNEDEA MALAN: ("MALAN"):

[11] Malan is likewise employed by the Tshwane Emergency Services in the ambulance section. She arrived at the scene in the ambulance and attended to the injured plaintiff where he was lying underneath the train next to the rail line and platform. The train was at first made safe by switching off the electric current on the line. The plaintiff was removed from under the train by moving him underneath the train on a spinal board and she was adamant that the plaintiff could not be removed between the edge of the platform and the stationary train as the opening was to narrow. After stabilizing the plaintiff, he was removed through the hole in the perimeter wall close where he was found because the ambulance was waiting on the other side of the wall; much closer as to should the plaintiff be carried over the bridge. The train was still stationary at the scene where the plaintiff was found. According to her none of the plaintiff's clothes were tangled onto the axel of the carriage.

EVALUATION:

[12] From the aforegoing, it is clear that the court is faced with two mutually destructive versions of the incident. The question is which one of the versions should be accepted. It is trite that courts, when faced with two mutually destructive versions, resolve factual disputes as was held in ***Stellenbosch Farmers' Winery Group Ltd and Another v Martell and Others 2003 (1)SA (SCA) 1 at [5]*** *"To come to a conclusion on the disputed issues a court must make findings on: (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probability or improbability of each party's version on each of the*

disputes issues. In light of the assessment of (a), (b) & (c) the court will, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be a rare one, occurs when a court's credibility findings compel it in one direction and its observations and evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors equipoised probabilities prevail".

[13] In ***National Employers' General Insurance Co Ltd v Jager 1984 (4) SA 437 (ECD) at 440D-441A***a similar approach was echoed "*in that the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. Where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable and the other version is therefore false or mistaken and falls to be rejected. In deciding whether the evidence is true or not, the court will weigh up and test the plaintiff's allegations against the probabilities. When considering the probabilities of both versions and if the balance of probabilities favours the plaintiff 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 anymore that they favour the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied his version is true and that of the defendant is false".*

[14] A similar approach was followed in **Komako v PRASA, Case No 43704/2012 (unreported) in the Johannesburg High Court on 21 October 2022.**

[15] In **Dreyer v AXZS Industries 2006 (5) SA 548 SCA** the court reiterated the approaches in the ***Stellenbosch*** and ***Jagers*** cases. The court referred to the probabilities inherent in the respective conflicting versions and that the maxim that the party who bears the onus must satisfy the court on a balance of

probabilities that his version, taken into account the probabilities of the two destructive versions, is true and should be accepted.

[16] I have indicated that there are two mutually destructive versions of the accident in question. Accepting the one means the rejection of the other. In deciding where the truth lies, there are a number of discrepancies in evidence of the plaintiff to consider. The most improbable aspect is that on his version the train already left the station (the carriage onto which he was clinging) when he lost his grip and as a result of the other pushing and struggling to stay on the train, he fell direct into the path of the oncoming train from the opposite direction. If this is true, he must have, taken into account the clear photos, fallen from the train some distance beyond the end of the platform when he was struck by the oncoming train. It is further common cause as testified by his own witnesses that he was found between platform 1 and the stationary train some distance into the station. Although no distances were given, it can be accepted that on the plaintiff's version the train must have dragged him along for at least 200 meters after the collision. This is simply not possible. The train would have extensively mauled him and he would not have survived the dragging and mauling. From the photos it is clear that the two railway lines in question only come close to one another some distance outside the station, approximate 100 to 150 meters outside the station. See the photos in this regard.

[17] The version of Bronkhorst (the driver of the oncoming train) is far more probable and ties in with the factual position where the plaintiff was found after the collision some 100 meters into the station. This was confirmed by all the other witnesses where the plaintiff was found after the collision.

[18] There are other discrepancies between the versions of the parties with regard to removal of the plaintiff after retrieving him from beneath the stationary train and how he was taken to the waiting ambulance, the position of the train driven by Bronkhorst (still stationary or some distance away). Malan's version that the plaintiff was removed trough the opening in the perimeter wall

to the waiting ambulance is more probable that he was carried over the tracks via the pedestrian bridge. The existence of a hole in the wall is not denied and the location where the plaintiff was found in in the proximity of the hole. This is in line with what Bronkhorst testified. The version on behalf of the defendant is by far the most probable version.

PRASA'S DEFENCE OF *VOLENTI NON FIT INIURIA:*

[19] The *locus classicus* on this issue is **Santam Insurance Co (Ltd) v Vorster 1973 (3) SA 764 A at 781 B-F.** It was held that *"…If it be shown that, in addition to knowledge and appreciation of the danger, the claimant foresaw the risk of injury to himself, that will ordinarily suffice to establish the 'consent' required to render him volens"* and *"the court must perforce first to an objective assessment of the relevant facts on order to determine what, in the premises, may fairly be said to have been the inherent risks of the particular hazardous activity under consideration".*

[20] A similar dictum is found in the unreported case of **Moepa v Transnet Limited and Other, case number 2475/2005 delivered on 12 July 2007 in the then TPD.** The gist of the judgment is that where a plaintiff concedes that he has been commuting for quite some time, he was not a newcomer to trains, he ought to be aware of the inherent dangers and serious risks of injury when someone tries to board a moving train.

[21] The plaintiff conceded that there are frequent crossings of the tracks by passengers and that clinging onto the side of the carriage occurred daily although it was inherently dangerous. He however denied that he crossed the track that morning. The speculation as to why the Code 038 was used takes the matter no further. Masia merely completed the passenger accident form on hearsay as to the code and was not present when the accident happened. All in

all I am satisfied that the version by the witnesses on behalf of the defendant is more probable that that of the plaintiff.

[22] I am satisfied that the version of the plaintiff does not pass the test. He tried to cross the track to board the waiting stationary train on platform two. He did not make it and was struck by the oncoming train. On this version the court has to apply the ***maxim*** of *volenti non fit injuria* based on the concessions made by the plaintiff. He was at all times aware of the extreme risks involved in crossing rail tracks under the prevailing circumstances and clinging onto the side of a carriage. The version of the defendant is accepted. I am further satisfied that there was no negligence on the part of Bronkhorst and there is no reason to reject the defendant's version.

COSTS:

[23] The general rule in matters of costs is that the successful party should be awarded his costs, and that there will not be departed from this rule without exceptional circumstances. The purpose of a cost order is to allow the successful party to recover from the losing side expenses incurred in the litigation. See **Herbstein & Van Winsen**, **The Civil Practice of the Supreme Court of South Africa 4th Ed p 701.** A court will normally not deviate from this rule unless exceptional circumstances exist. I am of the view that there are no such circumstances to deviate from the general rule.

ORDER:

[24] Accordingly, I make the following order:

The plaintiff's claim is dismissed with costs, the costs to be on a party and party scale.

J HOLLAND-MUTER AJ

ACTING JUDGE OF THE PRETORIA HIGH COURT.

Matter heard on: 24 October 2022

Judgment delivered on: 16 November 2022

(Judgment handed down electronically by circulation to the parties' representatives by email and uploaded to CaseLines and by release to SAFLII)

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