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**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 12/4222**

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
.....	.....
DATE	SIGNATURE

In the matter between:

**OBED MWEZI MFULA**

Plaintiff

and

**PASSENGER RAIL AGENCY OF SOUTH AFRICA  
("PRASA")**

Defendant

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**J U D G M E N T**

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**BHAYAT, AJ**

## INTRODUCTION

[1] The plaintiff instituted these proceedings against the defendant for compensation for damages as a result of injuries he sustained on 10 July 2012 at approximately 19h30 whilst he was a passenger on a train travelling from Germiston to Katlehong.

[2] The injuries were sustained, after the plaintiff was physically attacked by two unknown males, who robbed him of some of his possessions. Whilst fleeing from them to another carriage, his left foot was trapped between the tread plates positioned between carriages. Almost simultaneously, his head had hit the floor which resulted in him having lost consciousness.

[3] The plaintiff does not know how his left hand and left leg became traumatically amputated (non surgical) thereafter.

[4] The plaintiff claimed the following:

- (a) Payment of the sum of R6.210million;
- (b) Interest on the aforesaid sum at the rate of 15.5% per cent per annum from date of issuing of summons to date of payment;
- (c) Cost of suit; and
- (d) Further and/or alternative relief.

[5] The action was defended on the basis that the defendant did not act negligently in any of the respects alleged and, in particular, denied that it failed to provide adequate security for commuters.

## THE PARTIES

[6] The plaintiff is Obed Mwezi Mfula, an adult unemployed [.....], [.....], now aged [.....], who resides at [.....].

[7] The defendant is Passenger Rail Agency of South Africa (“PRASA”), a company duly incorporated with limited liability, a statutory body conducting business from [.....].

#### PLAINTIFF’S CASE

[8] On the morning of 10 July 2012, plaintiff reported to work at Coverland Germiston where he was temporarily placed by labour brokers as a pallet controller. He requested leave to consult with a doctor as he was feeling unwell. Permission was granted and he attended on Dr H Singh in Germiston.

[9] A medical certificate (Exhibit A) was produced. The nature of his illness was described as Arthralgia (joint pain) for which the doctor had dispensed painkillers. He was declared unfit for work from 10 July 2012 to 12 July 2012 due to this illness.

[10] After the visit to the doctor, he proceeded to the Golden Hawk Shopping Centre where he purchased a Kaizer Chiefs soccer jersey. From there he proceeded to the Body Lab Gym to register himself as a member. After registering, he visited a snooker hall to play snooker. He left the snooker hall at approximately 19h00 and proceeded to the taxi rank to transport him to his home in Vosloorus.

[11] No taxis were in attendance and therefore he proceeded to the Germiston Train Station. At the station, he purchased a ticket and boarded the train at Platform 1. Prior to boarding, the ticket was shown to a security guard who also operated as a ticket examiner. Plaintiff stated that he was familiar with this train station.

[12] No one, including himself, was searched before boarding the train. He had an Adidas school bag with him which contained the Kaizer Chief’s jersey, the painkillers, his ID book, the Body Lab Gym receipt and coins totalling R95. His cellphone was in his tracksuit pants.

[13] He entered the carriage, sat down and proceeded to put on his earplugs to listen to music. He noticed approximately nine other commuters in his carriage.

[14] Whilst the train was still stationary at Germiston Station, two unidentified males physically attacked him by punching and kicking him. His cellphone had fallen out. They were trying to rob him. He had retaliated and defended himself by punching back at his attackers. The attack continued after the train departed from Germiston Station and continued for approximately four minutes and ended as the train was approaching President Station. As his attackers were overpowering him, plaintiff fled from them towards the next carriage.

[15] He had opened the door of the carriage leading onto the tread plates anti clockwise. He observed that the safety gummis were missing. Nonetheless he proceeded onto the tread plate as he was desperately trying to escape from his attackers regardless of the potential danger this posed. In between the carriages, his left foot was trapped in a gap between the tread plates. He had fallen down and his head had hit the floor causing him to lose consciousness.

[16] Thereafter the plaintiff is unsure as to how his left arm and left leg were amputated. He could only recall the incident described above eight months later. All his possessions were taken.

[17] The plaintiff observed that there were no security guards on the train, no alarm bells and/or sirens in the carriages. Under cross examination, plaintiff stated that it would be reasonable to have at least two armed or unarmed guards per carriage to protect commuters.

[18] The defendant omitted to place armed or unarmed security guards in each carriage, that as a result of inadequate security measures, he was

forced to flee from his attackers which resulted in his severe injuries for which he holds the defendant liable.

#### DEFENDANT'S CASE

The defendant called four witnesses:

##### First witness – Milfred Chemere

[19] He commenced employment with Metrorail in 2002. At the time of the incident, he was the Planning and Logistics Manager and, to date, he occupies the same position.

[20] Pre-trip inspections are done on a daily basis by the train driver and a train guard. The train driver is given a journal which contains the schedule of his trips for his shift. Upon receipt of same, the driver assisted by a train guard does a pre-trip inspection of the train set. This covers an inspection regarding mechanical and maintenance issues.

[21] In the event that an inspection reveals faults, the train driver completes a Form T403 which the manager or his staff receives. This information is captured on the Facility Maintenance Management System. Should any faults be noted requiring maintenance or repairs, the train is immediately withdrawn from service and shunted. He pointed out that refurbishment is distinct from maintenance issues.

[22] He did not receive any report concerning any maintenance issues relating to the incident described by the plaintiff, namely the absence of gummis or a gap between the steel tread plates regarding any train on the day.

[23] As a logistics manager, the witness oversees maintenance/repairs and refurbishments of the train sets. He takes decisions to withdraw trains from operational service when he receives a Form T403.

[24] He randomly inspects trains. Technical supervisors and planners are employed to attend to maintenance. The technical supervisors oversee artisans. His division also employs quality assurers who check train sets in outlying depots for faults.

[25] All operational carriages are refurbished every ten years. During 2001, a decision was taken to install standardised doors in all carriages as there were no doors previously and to replace the aluminium gummis between the carriages with one metre high rubber gummis.

[26] The aluminium gummis were replaced as these were frequently vandalised and stolen. The gummis are mounted onto the carriages. There are no reported incidences of the gummis being stolen. The entire gummi unit is replaced if a tear appears in the rubber. At the point where the gummis rotate against each other, to and fro, a person cannot push his fist through.

[27] All carriages are connected by steel couplings, above which are vestibule buffers. Above the vestibule buffers are tread plates. These buffers are connected by springs which pushes from each end of the carriage and from side to side to provide stability when the train takes a bend.

[28] The spring-loaded vestibule buffers causes continuous compression which keeps the tread plates together continuously, thus preventing any gaps.

[29] The train photos utilised for the purposes of the trial (as appears in plaintiff's Bundle D) depict photos of trains undergoing maintenance and repairs at the maintenance depot and is not a photo of the train boarded by the plaintiff.

Second witness: Frans Samson Khoza

[30] He is employed by Metrorail as a peace officer. During July 2012, he was stationed at Kaalfontein when he was called and told that someone had been hit by a train at Platform 3 Germiston.

[31] He arrived at the scene at 22h30 and found the plaintiff lying injured on the railway line. His left arm and left leg were amputated and lying approximately 5 metres from the plaintiff. The plaintiff could not speak. A bag was found at the scene. On his arrival, the ambulance service was already there. He did not witness the incident.

[32] He compiled a report from the information he gathered from the security guards. The train involved was Train 7866 which had returned from Kwesine Station (a turning point) to Germiston. The train was stationed at Platform 3.

[33] He was unsure as to whether or not the plaintiff was conscious. Security guards and peace officers are not allowed to touch or search any victim as per Metrorail's employment policy. Only medics and police are allowed to do so.

[34] The plaintiff was identified from a document which was removed from his bag lying nearby.

[35] Commuters have access to Platforms 1, 2 and 3 from the same point of entry. There are ten platforms at Germiston as reflected in Exhibit B. Exhibit B is a diagram drawn by the witness of Platforms 1, 2, 3 and 4 to assist counsel and the court.

[36] He had completed a Railway Occurrence Report (aka liability report) on 10 July 2012 (Annexure A2 – pg 27 of plaintiff's Bundle C).

Third witness: Tobekile Nthandi

[37] During July 2012, he was employed by Changing Tides Security Company ("Changing Tides") as a site supervisor. Changing Tides are contracted by Metrorail.

[38] A security officer had reported an accident to him. He attended the scene and found the plaintiff lying injured on the railway track at Platform 3 Germiston Station. He reported that the plaintiff had a deep cut on his head, his left arm was cut off at the elbow and left leg was cut off above the left knee.

[39] The plaintiff was lying behind Train 7866 which was stationary. He witnessed the ambulance arrive and the medics searching the bag found near the plaintiff. The medic found his ID document from which he was identified.

[40] On average, two security guards are posted at each platform. The duties of the security officers are to prevent crime and to assist people who are injured.

[41] He did not see the accident and found the plaintiff unconscious. The amputated limbs were approximately 5 metres away.

[42] Generally he receives reports of pick pocketing but not of theft and robbery. He did not receive any crime reports on the day.

[43] The security guards do not patrol the inside of the carriages. He did not receive any crime report concerning the route between President and Germiston Stations.

[44] He confirmed the contents of his report of the accident and affidavit dated 10 July 2012 respectively which appears from page 30 to 39 of plaintiff's Bundle C.

Fourth witness: Lutendo Godfrey Ramaremela

[45] In July 2012, he was employed as a train guard by Metrorail. Currently he is employed by Metrorail as train driver. He worked along various routes leaving from Germiston Station, which included Kwesine. He was on duty on

the same route taken by the plaintiff from Germiston to President and finally to Kwesine stations.

[46] He stated there are three motor carriages on a train set. He occupies the rear one from which he observes the platform and the opening and closing of the exit doors to the carriages. Once all the passengers are on board, he closes the doors and signals to the driver that it is clear and safe to depart.

[47] As a train guard, he was stationed inside a cabin (cab) in the train. He was required to be on board whilst the train was in motion. He is alerted about problems inside the carriages by screams from victims who require assistance as well as when commuters lodge a complaint with him at his cab at the next station. If there was a problem, his duty was to stop the train and investigate.

[48] He receives a daily journal which contains his duties for the day. The witness confirmed the contents of the daily journal for 10 July 2012 as appears on page 41 of plaintiff's Bundle C, which he received from his Section Manager.

[49] He had prepared several trains, including Train 7866. He had checked that the doors, couplings, brake blocks, gummis, lights and tread plates between the carriages were in working order.

[50] On his way to commence the preparation on Train 7866 for the following day's trips, he walked along the railway line and did not see the plaintiff. He moved the train a short distance as per his instructions as it was parked in the wrong place for the morning trip. He then prepared the train. He found no faults on Train 7866 or any gaps between the tread plates nor did he find any evidence of blood or missing gummis.

[51] After preparation he saw the plaintiff lying injured on the railway line in between the position from where he had moved the train to its final parking place. He has no idea as to what occurred that led to the plaintiff being injured

and being found on the railway line through which he passed through when moving the train earlier.

[52] The preparation of several trains commenced at approximately 20h10 and was completed by 22h00. He could not recall how long it took to prepare Train 7866.

#### ABSOLUTION FROM THE INSTANCE

[53] The defendant brought an Application for Absolution from the Instance at the end of the Plaintiff's case.

[54] The test that was applied was ' . . . whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should nor ought to) find for the plaintiff' as stated in *Gascoyne v Paul and Hunter 1917 TPD 170 at 173*. This test was referred to and applied in many other subsequent cases and remains unchanged.

[55] The application was refused and costs were reserved.

#### SEPARATION OF ISSUES

[56] The parties had agreed at their second pre-trial meeting that the matter should proceed on liability and the aspect of quantum be postponed sine die with the leave of the court.

[57] Leave of the court to separate the issues was sought in terms of Rule 33(4) of the Uniform Rules. The application was granted and the matter proceeded on merits only. The issue of quantum was postponed sine die.

#### ISSUES IN DISPUTE

[58] Was the plaintiff a passenger on a train?

[59] Was the plaintiff attacked on the train?

[60] Was the plaintiff trapped between the tread plates?

[61] Did the defendant cause the plaintiff's injuries as a result of its negligence in not providing adequate security for commuters?

#### ANALYSIS OF PLAINTIFF'S EVIDENCE

[62] The plaintiff had testified that he was only able to recall the incident approximately eight months later. However, prior to the expiry of the eight months (March 2013), the plaintiff had instructed his attorneys to prepare a Summons and Particulars of Claim which was signed on 07 November 2012 and issued on 09 November 2012. This indicates that he was able to recollect the events much sooner. This shows willingness to state a version of events which to the knowledge of the plaintiff may not be true.

[63] Plaintiff's version does not correspond in all material respects with an affidavit he had deposed on 26 October 2012 (page 2, Bundle C). He states under oath that he was travelling on a train from Germiston to Katlehong when he was attacked by two males who wanted to take his cellphone. After he refused, one of them hit him over the head with an object. He thereafter ran towards another carriage when he was trapped between the carriages. It was at this spot where he was injured and lost his left foot and left hand.

[64] Plaintiff testified that he was certain that he had boarded the train on Platform 1 which goes through President and other stations before reaching Kwesine, the turnaround station. He retracted this when he was confronted that the train to Kwesine leaves from Platform 3.

[65] Plaintiff stated that the attack commenced whilst the train was stationary at Germiston Station and continued to the point when the train was approaching President Station, which is en route to Kwesine. However, he could not offer any explanation as to how he was found lying on the tracks at

Platform 3 Germiston Station together with his bag and with his amputated limbs found lying close by.

[66] In addition, plaintiff testified that his ID document was stolen by his attackers but the third defendant witness testified that a medic had found the ID document in his bag from which he was identified. The second defendant witness also testified that the plaintiff was identified from a document retrieved from his bag.

[67] The plaintiff's version that all his possessions, including ID book, cannot be accepted as true as his ID document was found in his bag close to his injured body by the medic which was seen by the defendant's third witness.

[68] The incident happened just after 19h30 but the plaintiff was only found around 22h30 with traumatic amputations and still alive. Plaintiff has not accounted for his whereabouts for the three hours between 19h30 and 22h30. The only plausible inference is that the assault and trapping did not occur as described around 19h30. This is difficult to comprehend.

[69] The injuries sustained by the plaintiff is not consistent with injuries he would have sustained had his leg been trapped up to the ankle between the tread plates.

[70] The hospital records discovered by the plaintiff contain no notes by the medical staff of any wounds or injuries consistent with the assault described by the plaintiff (pages 3 to 8 of plaintiff's Bundle C).

[71] Under cross examination, the plaintiff denied that he had consumed any alcohol whilst playing snooker for a few hours that afternoon. The Chris Hani Baragwanath Hospital record indicates that he was intoxicated upon admission (page 5 of plaintiff's Bundle C).

[72] Had the attack and the trapping of the leg occurred as described by the plaintiff, other commuters would have, in all probability, alerted the train guard and any other security personnel on the platform.

[73] The train driver and the guards did not report any gummis missing or of having received a report of a criminal incident.

[74] In his original and amended Particulars of Claim, plaintiff states in para 9.3 and 9.4 ' . . . that prior to the collision he was employed as a carpenter'. Reference is made to a collision incident and not that as described by the plaintiff in his evidence in chief. This is in conflict with his evidence that he was severely assaulted and trapped at the ankle between carriages.

#### ANALYSIS OF DEFENDANT'S EVIDENCE

The overall analysis of the four witnesses called by the defendant revealed the following:

[75] No train ticket was found on plaintiff's person or in his bag.

[76] None of them witnessed how the plaintiff sustained these injuries.

[77] They were all employed either directly or indirectly by Metrorail in different capacities.

[78] Systems were in place for reporting any incident, accident or criminal activity on the platform or in the carriages, any maintenance/repairs or refurbishment.

[79] No report was received of any criminal attack on the plaintiff nor was any report received relating to faulty tread plates or missing gummis. An inspection of Train 7866 in order to prepare it for the trips for the next morning did not reveal any missing gummis or faulty tread plates.

[80] No traces of blood were found to corroborate plaintiff's version of the trapping incident and the subsequent fall leading to his unconsciousness.

[81] The three photographs contained in plaintiff's Bundle D are pictures of a train being repaired in the maintenance depot of Metrorail. It has not been established that it was the train travelled on by the plaintiff. The photographer was not called to testify.

[82] Two train guards are stationed on each platform. There are no train guards positioned inside the carriages to prevent or combat crime with the exception of a train guard positioned in a cabin at the rear end of the train. This train guard does not patrol the carriages neither are there any security cameras.

#### DISPUTE OF FACT

[83] 'In *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others 2003 (1) SA 11 (SCA) at para 5*, the Supreme court of Appeal explained how a court should resolve factual disputes and ascertain, as far as possible, where the truth lies between conflicting factual assertions:

"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 disputed issues. In light of the 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. The hard case, which will doubtless be a rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors equiposed probabilities prevail.'<sup>1</sup>

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<sup>1</sup> Bellengere, Palmer, Theophilopoulos, Whitcher, Roberts, Melville, Picarra, Illsley, Nkutha, Naude, van der Merwe and Reddy 2013:168.

[84] There is disagreement between the litigants regarding:

- (a) Whether plaintiff was a passenger on a train;
- (b) Whether the incident of trapping and loss of consciousness occurred;
- (c) Failure to provide adequate security on board the train in not placing armed or unarmed security guards in each carriage;
- (d) Failure to provide adequate safety measures in failing to provide gummis between the carriages and ensuring that there were no gaps between the tread plates.

#### PARTICULARS OF CLAIM

[85] The plaintiff states in his Particulars of Claim that the incident of assault and trapping between the carriages which resulted in his severe bodily injuries was caused solely by the negligence of the defendant, who was negligent in one or more of the following ways:

- “6.1 The defendant failed by its conduct and/or omission of the staff on duty to provide security;
- 6.2 The Defendant failed to provide adequate security for commuters on conveyance thereby breaching its legal duty;
- 6.3 Defendant failed to ensure that there was sufficient supervision to ensure the safety of commuters on board;
- 6.4 The Defendant failed to ensure that the doors of the carriages were properly secured;
- 6.5 The Defendant failed to post security guards at the point of entry to search for dangerous weapons;
- 6.6 The Defendant failed to install metal detectors to search for dangerous weapons.”

[86] The evidence in chief of the plaintiff is inconsistent with his pleadings. The grounds of negligence relied on by the plaintiff in the trial is that the defendant failed to provide armed or unarmed guards in each carriage; the gummis were missing and that the tread plates were not compressed thus leaving gaps. This was not particularised in the pleadings. The viva voce evidence was not consistent with the above particulars.

[87] In addition, the plaintiff pleaded in para 9.3 and 9.4 which deals with estimated past and future loss of earnings that “prior to the collision plaintiff was employed as a carpenter”. His evidence in chief was that he was employed as a pallet controller and that his injuries resulted from the attack and the subsequent trapping of his ankle and not as a result of a collision with a train.

[88] To worsen matters, the plaintiff pleaded in para 5 that his severe bodily injuries were as a result of being severely assaulted and being trapped between the carriages. This is a glaring contradiction in plaintiff’s pleadings.

[89] The bodily injuries described in para 7 of plaintiff’s Particulars of Claim is inconsistent with the nature of the injuries as described by the plaintiff in his evidence in chief. The injuries do not correspond to an assault and the trapping of the ankle.

## SECURITY MEASURES

[90] It is common cause between the parties that the defendant bears certain obligations in terms of subsecs 15 (1) and 23(1) of Legal Succession to the South African Transport Services Act 9 of 1989 (“the SATS Act”) and the South African Constitution to ensure that reasonable security measures are in place for security of rail commuters when providing rail commuter services under the SATS Act.

[91] The defendant is an organ of State performing public functions and providing public service and is held accountable to protect the commuter's constitutional right to right to life, freedom and security of person, including the right to be free from all forms of violence from either public or private sources as held in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 CC*.

[92] The plaintiff testified that the defendant's failure to place two security guards (armed or unarmed) in each carriage, is unreasonable and a breach of its legal duty. Further, that failure to provide security doors in each carriage is also a failure of its legal duty.

[93] In *Tshabalala v Metrorail 2008 (3) SA 142 (SCA)* it was held that:

- (a) failure by the respondent to take reasonable steps to provide for commuters safety would render it liable in delict;
- (b) failure by the respondent to ensure that there was a security guard in each and every coach, did not give rise to an inference of negligence.

[94] Given the Tshabalala decision, the plaintiff's argument that the defendant has breached its legal duty in not providing guards in each railway coach as being unreasonable, is not tenable.

## ONUS

[95] The Tshabalala case establishes the following:

- (a) the onus is on the plaintiff to establish whether reasonable protective steps were taken by the defendant and that had reasonable steps been taken, the attack would not have had occurred;

- (b) that a negligent omission, unless wrongful, does not give rise to a delictual liability;
- (c) the failure to take reasonable steps to prevent foreseeable harm to another will result in liability only if the failure is wrongful;
- (d) it is the reasonableness or otherwise of imposing liability for such a negligent failure that will determine whether it is to be regarded as wrongful.

[96] In the circumstances of this case, the plaintiff has not made out that the measures adopted by the defendant were unreasonable. The defendant provided evidence that Changing Tides was contracted by it to prevent and combat crime and had deployed two security guards on each platform and a train guard on each train. Against the background of the binding decision of the Tshabalala case, these measures appear to be reasonable.

#### FACTUAL CAUSATION

[97] It was stated in *Carmichele v Minister of Safety and Security and Another 2003 (2) SA 656 CC* that:

‘As previously pointed out by this court, in law of delict causation involves two distinct inquiries. The first is a factual one and relates to the question whether the Respondent’s wrongful act was the cause of the Appellant’s loss. This has been referred to as “factual causation”.

In determination of the factual inquiry, the usual test that is applied is the *conditio sine qua non* test, which is also known as the “but for test” which is postulated as follows “whether the wrongful conduct of the Respondent is a necessary condition such that, but for such conduct, the incident would not have happened“.’

[98] Even if proved that the assault and trapping occurred, the plaintiff has not established that the security measures taken by the defendant of meeting

its legal obligations were unreasonable neither has the plaintiff satisfied the court that the assault was not the cause of the damages.

## PROBALITIES

It must be decided whether on *all* the evidence, the plaintiff's version is *more probable* than the defendant's.

[99] 'The Supreme Court of Appeal in *Santam Bpk v Biddulph 2004 (5) SA 586 (SCA) at 589 para 5* held that, as a general rule, it is undesirable to rely on a credibility finding as a sole basis for assessing the probative value of evidence. Of course, there are occasions when on the face of the record of a witness's evidence, the witness's testimony is so riddled with patent inconsistencies and contradictions that their credibility and the unreliability of that testimony is glaringly obvious. Ordinarily though, findings of credibility cannot be judged in isolation, but should be considered in light of the proved facts and the probabilities of the matter under consideration.

As stated in *Mabona and Another v Minister of Law and Order and Others 1988 (2) SA 654 (SE) at 662*, the credibility of witnesses and the probability or improbability of what they say are part of a single investigation into the acceptability or otherwise of a version. In this single investigation, questions of impression are measured against the content of a witness's evidence, the importance of any discrepancies or contradictions are assessed and a particular story is tested against facts which cannot be disputed and against the inherent probabilities.

In the case of *Network Field Marketing (Pty) Ltd v Mngezana NO and Others (2011) 32 ILJ 1705 (LC) at para 17* referring to *Santam Bpk v Biddulph 2004 (5) SA 586 (SCA) at 589 para 5*, the Court found that an analysis of the conflicting evidence using a balance of probabilities, rather than resorting to credibility finds, would have produced a more accurate factual finding.

In *Minister of Safety and Security and Others v Craig and Others NNO 2011 (1) SACR 469 CA*, the Supreme Court of Appeal held that although courses of appeal are slow to disturb findings of credibility, they generally have liberty to do so where a finding of fact does not primarily depend on the personal impression made

by a witness's demeanour, but rather on inferences and other proved facts and on probabilities. The Supreme Court of Appeal found that the witness's version, which the trial court had preferred, was contrived and inconsistent with the overall probabilities of the case.<sup>2</sup>

[100] From the aforementioned analysis of the totality of all the evidence, the plaintiff's version is inconsistent and highly improbable.

## FINDINGS

[101] As a result of the unsatisfactory nature of the plaintiff's evidence which has not been corroborated in any material respect and the fact that his evidence is that of a single witness, it has to be treated with caution.

[102] In the result, the following order is made:

The plaintiff's case is dismissed with costs, including the costs reserved by this court on 05 February 2014.




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**A Y BHAYAT**

**ACTING JUDGE OF THE SOUTH GAUTENG HIGH COURT**

***COUNSEL FOR THE PLAINTIFF***

***ADV V P NGUTSHANE***

***PLAINTIFF'S ATTORNEYS***

***SEPAMLA ATTORNEYS***

***COUNSEL FOR THE DEFENDANT***

***ADV M SMIT***

***DEFENDANT'S ATTORNEYS***

***CLIFFE DEKKER HOFMEYER INC***

***DATE OF HEARING***

***03 – 05 FEBRUARY 2014***

***DATE OF JUDGMENT***

***12 – FEBRUARY 2014***

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<sup>2</sup> *ibid* 169-170.

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1. Bellengere A, Palmer R, Theophilopoulos C, Witcher B, Roberts L, Melville N, Picarra E, Illsley T, Nkutha M, Naude B, van der Merwe A and Reddy S. 2013. *The Law of Evidence in South Africa*. Cape Town: Oxford University Press Southern Africa.