IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number:46493/12

1/2/2017

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

1/2/2017 .....
DATE

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SIGNATURE

In the matter between:

MOKOENA ELSIE MOROANA Plaintiff

And

PASSENGER RAIL OF SOUTH AFRICA Defendant

JUDGMENT

MALUNGANA AJ:

INTRODUCTION

[1] The Plaintiff, Elsie Moroana Mokoena has instituted action for damages against the Defendant, the Passenger Rail Agency of South Africa ("PRASA"), arising out of the injuries which she sustained on 16 July 2012.

[2] It is common cause that the said accident occurred at Bosman station in Pretoria. The damages being claimed by the plaintiff are set out in the summons.

[3] Shortly before the commencement of the trial the parties reached an agreement that the issues will be separated and accordingly the trial would proceed only in respect of the issue of merits. The plaintiff further indicated that she intended to bring about an amendment to her particulars of claim during the course of the trial.

[4] The primary issue in this trial is whether PRASA is delictually liable for the bodily injuries sustained by the plaintiff at Bosman railway station.

PLEADINGS

[5] The plaintiff's pleaded case as set out in its amended particulars of claim is that she sustained injuries solely as a result of PRASA's negligence. Specifically, the plaintiff averred in her particulars as follows:

> *"7. The plaintiff boarded on a train which number is unknown to the plaintiff when the other passengers pushed her out of the train at Bosman station in Pretoria which was still in motion while its doors were open causing the plaintiff to fall of the train.*

8. The sole cause of the falling of the plaintiff in the train was the sole negligence of the Defendant given that the Defendant negligently:

8.1 caused and allowed the condition or state of the train and or the coach and or infrastructure, stations , land and property supporting the operation of the trains and or the coach to pose danger to commuters at large and in particular to the Plaintiff's;

8.2 failed to take and or any reasonable precaution to ensure the safety of commuters in general and the plaintiff in particular, more particular failing to:

..maintain adequate crowd control in and crowd the station, train , and coach ;
..ensure that the doors of the coach remained properly closed while the train is in motion;
..ensure that the commuters in general and plaintiff did not fall from or inside the train"

[6] PRASA defended the action. In its plea to the original particulars of claim PRASA simply admitted the identity of the plaintiff and denied the allegations and put the plaintiff to the proof thereof.

EVIDENCE

[7] The plaintiff, a cleaner at the time of the accident, was the sole witness who testified on how she sustained her injuries. She testified that she is a regular train commuter who lives in Mamelodi. She boarded the train at Mamelodi Garden station on her way to work in Pretoria. The train was full to capacity causing her to stand and balanced herself by grabbing the ropes (belts) provided for for standing passengers in

the coach of the train. She stood between the two doors of the coach, balancing herself with the belts. She could not describe with a degree of exactitude as to how many commuters were in the coach. She further testified that the train travelled with its doors opened throughout her journey. On approaching the train railway station in Pretoria the train reduced its speed and other commuters began to disembark, in the process they pushed her causing her to fall onto the platform. Whilst lying on the platform other commuters trampled over her. She recalled being rescued by two female persons.

[8] During her testimony her legal counsel asked the plaintiff whether she recalled any PRASA official speaking to her immediately after the incident. She replied that she did not speak to any PRASA official. The plaintiff further denied having made a statement to any person immediately after the accident in question.

[9] She further testified that she was in the company of her fiancée whom she described as the father of her children on the date of the accident. He was called to the scene after being alerted of the incident. According to the plaintiff she testified that her fiancée is the one who reported the incident to the security personnel of PRASA.

[10] The plaintiff testified that she has a form 3 (JC) level of education and that she communicated in English, albeit poor, with doctors and hospital employees who attended to her subsequent to the accident and also the medico legal experts. The plaintiff's counsel also asked her whether she intended to bring about the amendment to reflect that the train was not stationery but in "motion" when she was injured. She replied that she intended doing so. I pause to mention that the amendment to her particulars of claim were submitted to the court with no objection from the defendant during the trial.

[11] Under cross examination she was asked to demonstrate the size of the coach in which she was being conveyed. She demonstrated by a show of hands that the size of the coach was about 3-4 metres in breadth. A diagram sketch was then drawn to indicate the position in relation to where she stood in the coach. She further testified

that she found the doors of the coach opened when she boarded the train. It was put to her whether she fell inside the train or in the platform. In this regard she responded that she fell onto the platform and further that she is the only one who fell, no other person fell. Counsel for the defendant further put it to her that he found it strange that she is the only person who fell whilst there were other people behind her who did not fall. She replied that other commuters pushed her from the side.

[12] Counsel for the defendant also questioned the plaintiff about her eleventh hour amendment to her particulars of claim with particular reference to paragraph 7 thereof in which she sought to delete the word stationery and insert the word "motion". She replied that she did not know how that came about.

[13] It was put to the plaintiff that the defendant's witness would testify that she, the plaintiff, was personally interviewed by PRASA personnel and she gave them her particulars and an account of how she sustained her injuries. A statement made by a certain Mahlangu, which formed part of the trial bundle, was then read out to the plaintiff which she tearfully confirmed contained her particulars and the circumstances relating to the accident. After the contents were read out she said she did not know the names of the security personnel who took the statement though she confirmed that someone took the statement next to the station's ticket office.

[14] Counsel for the defendant also put it to the plaintiff that in her interaction with everyone including the doctors she told them that she fell from a stationery train and not as per the amended particulars of claim. In her response to the question the plaintiff maintained that she was pushed from a moving train.

[15] In amplification of his questioning, Counsel for the defendant specifically referred the plaintiff to the medico –legal report (page 6 of the report) by the Occupational Therapist, who examined the plaintiff at the instance of her legal representatives, Paul Sekati. Paragraph 4 thereof reads as follows:

*"4. **PRESENT MEDICAL HISTORY***

How the accident happened according to the claimant:

Ms Moroana was a passenger in a train from Mamelodi to Pretoria Central in the morning around 06:00. The train was too full and when it stopped at the Bosman station, some of the other passengers pushed her while getting off the train and she fell to the ground. Some of the passengers did not see her on the floor and tramped on her, causing her severe injuries."

[16] It was then put to the plaintiff that it is odd that all these people claim to have been told the same thing that the train was stationery when she fell and sustained injuries. The plaintiff replied that she was testifying about what happened to her and she did not know where all these people got the information about the stationery train from.

[17] In re-examination by her own counsel she was asked whether she had ever spoken personally to the PRASA officials. She replied as follows: "They spoke to the father of my kids".

[18] The Defendant led evidence by Erick Mahlangu, a former employee of the defendant. He testified that he was in the employ of PRASA since 2010 until 2014. He was employed in the Asset Protection Unit. His role comprised of recording damage to property, vandalism and incidents at the defendant's station and reporting same to Joint Operation Centre ("JOC"). He testified that on the date in question he was assigned to Pretoria Station by his employer. According to him he recorded the incident in which the plaintiff was involved. He was working next to the gates at the access control point, about 30 metres from the platform where the incident occurred. He stated that train number 9106 from Mamelodi usually arrives at the station at around 6:00 in the morning. He observed that amongst the people who disembarked from the train there was a woman who was being aided to walk by fellow commuters. He approached the

injured woman. As procedure he took out his pocket book and recorded the incident as narrated by the plaintiff. Amongst other things, he observed that she had a monthly ticket from Mamelodi Gardens to Pretoria. He testified that the plaintiff told him that when the train in which she was being conveyed stopped she was pushed by other commuters and as a result fell and sustained injuries. After recording the incident he reported same to JOC who then called the ambulance to attend to the plaintiff. Subsequently the ambulance removed the plaintiff to Tshwane Hospital for medical treatment.

[19] Counsel for the defendant questioned him about the contents of the statement which he made and the witness confirmed the authenticity of the statement relating to the incident (page 236 of the trial bundle). He denied that the plaintiff was in the company of a male person as alleged by the plaintiff when he met her and maintained that she was accompanied by two female commuters.

[20] The plaintiff's counsel had an opportunity to cross examine the witness. He asked the witness whether he read the statement to the plaintiff to verify the correctness of the contents with the plaintiff. The witness replied that he did not read back the statement to the plaintiff. The cross examination did not yield any new evidence in addition to what had already been mentioned above.

APPLICABLE LEGAL PRINCIPLES

[21] The case advanced by the plaintiff is premised upon the negligent omissions, namely that it is in breach of a duty of care towards the plaintiff and other passengers in general and that it had failed to take the necessary reasonable measures to prevent the incident.

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

"For the purposes of liability culpa arises if-

(a) A deligens paterfamilias in the position of the defendant-

-would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss;
-would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps."

[23] The reasonableness of the steps taken by PRASA must be evaluated in light of the evidence adduced before this court. It should, however, be pointed out that the defendant is only obliged to provide measures consonant with the proper appreciation of the constitutional and statutory responsibilities it bears as a state organ.

[24] In *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 SCA Nuget JA held at paragraph 21 that:

"When determining whether the law should recognize the existence of a legal duty in any particular circumstances what is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms. Where the conduct of the state , as represented by persons who perform functions on its behalf , is in conflict with its constitutional duty to protect rights in the Bill of Rights , in my view the norm of accountability assume an important role in determining whether a legal duty ought to be recognized in any particular case"(Court's emphasis)".

[25] It is not disputed that the defendant provides a rail commuter service in the public interest and as an organ of state bears the obligation to protect the rights to dignity, life and security of commuters as well as the general public that utilizes facilities under its control.

[26] The central issue, however, is whether the plaintiff has adduced sufficient supporting evidence in this court against which this court would be able to come to her assistance.

[23] Essentially the plaintiff bears the onus to prove on a balance of probabilities that there is a casual nexus between the defendant's negligent behavior and her resultant injuries. Grappling with the intractable question of causation the Constitutional Court seized the opportunity in *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC) paras 40-41 and enunciated the correct legal approach to causation as follows:

> 'Although different theories have developed on causation, the one frequently employed in determining causation is *conditio sine qua non* theory or 'but –for test. This test is not without problems, especially when determining whether a specific omission caused a certain consequence. According to this test the enquiry to determine causal link, put in its simplest formulation, is whether 'one fact follows from another'. The test "may involve the metal elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and posing of the question as to whether upon such a hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss;[otherwise] it would not have ensued . If the wrongful act is shown in this way not to be a *causa sine non* of the loss suffered, then no legal liability can arise."

[24] In *International Shipping Co (Pty) v Bentley* 1990 (1) SA 680, the test to be applied for determining causation was further described by Corbet CJ as "a flexible one in which factors such as reasonable foreseeability, directness, the absence of a *novus actus interveniens,* legal policy, reasonability, fairness and justice all play a part". In *Lee*

(supra), the Constitutional Court in its salutary warning stated in para 73 thereof as follows:

> 'Our law has always recognized that the but –for test should not be applied inflexibly. A court ultimately has to make a finding as to whether causation was established on the balance of probabilities on the facts of each specific case.

[25] Turning now to the facts of this case. The following salient facts cannot be disputed; that the plaintiff was at the railway station on the ill fated day and that she fell onto the railway platform and sustained certain bodily injuries.

[26] However, what is not clear is how the plaintiff fell and ended up on the railway platform as there is a paucity of evidence. There is material evidence from the trial bundle which is in sharp contrast with the testimony in chief of the plaintiff. The plaintiff testified in her evidence in chief that she did not give account of what had happened to the officials of the defendant. When pressed under cross examination she said that her fiancée is the one who gave the defendant's security personnel information about how she was injured. What is strange about this information is that she said that the alleged fiancée was notified by other commuters that she was injured and later came to the scene. There is no evidence adduced to corroborate this part of her version. This does not accord with common sense that her fiancée suddenly appears on the scene and gives account of what had happened to the defendant's employees. Which calls for a sensible retrospective analysis of what would have occurred, based on the totality of evidence before this court than metaphysics.

[27] In cross examination the statement made by the defendant's former employee, Erick Mahlangu, was read out to the plaintiff. According to the statement, which was made shortly after the incident, the plaintiff informed Mahlangu that she fell onto the platform after the train had stopped at the railway station. The relevant extract from the handwritten statement which appear from page 237 of the trial bundle reads as follows:

"The *injured commuter informed me that the train .., the train number 9106 at 06h00 stopped on platform one, as she was getting off she was pushed by other commuter, fell onto the station platform and sustained injuries mentioned above."*

[28] Cross examination also brought to the fore that the hospital records also contained the same information. It was put to her that the Occupational Therapist's Report which was compiled at the instance of her attorneys also states that she fell when the train was stationery. Counsel for the defendant further put it to her that her previous pleadings albeit amended during the trial also state that she fell from a stationery train, which contradicts her current version.

[29] That being the totality of the evidence I pause to state that it is clear from the adduced evidence that the probabilities do not favour the plaintiff.

[30] The approach adopted by the court in *Lee* never sought to replace the existing approach to factual causation. It adopted the approach to causation premised on the flexibility that has always been recognized in the traditional approach. It is particularly apt where the harm that has ensued is closely connected to an omission of a defendant that carries the duty to prevent harm. Regard being had to all the facts, the question is whether harm would nevertheless have ensued, even if the omission had not occurred.

[31] Counsel for the defendant referred this court to *South African Rail Commuter Corporation Limited v Almmah Philisiwe Thwala* 661/2010 ZASCA 170 in which the court held in para 18:

".....It seems to me that once the court accepted that the train was stationery when the respondent disembarked and the accident occurred, that should have been the end of the respondent's case. This, clearly, was the result contemplated by the parties themselves when they defined the issue; that only a finding that the train was in motion when the respondent was pushed and fell would give rise to liability."

[32] Based on the available facts, common sense and simple logic dictates to me that the train was stationery when the plaintiff fell onto the platform after having been pushed by impatient fellow commuters. Whilst dealing with the same problem the court held in *Minister of Finance & Others v Gore No* 2007 (1) SA 111 (SCA) that:

'Application of the 'but-for' test is not based on mathematics, pure science or philosophy. It is matter of common sense, based on the practical way in which the ordinary person 's mind against the background of everyday life experience.'

[33] In his closing argument, counsel for the defendant argued that the reports regarding the manner in which the plaintiff sustained her injuries were contemporaneous to the time of the accident and urged this court to reject her eleventh hour change of version as contained in the amended pleadings. The probabilities in favour of the defendant are that the plaintiff did not fall from a moving train, as the medical records and other material evidence show that the train was stationery when the plaintiff sustained injuries.

[34] In my view, the plaintiff's evidence falls short of satisfying the standard of proof required.

[35] I accordingly make the following order:

[35.1] The plaintiff's claim is dismissed with costs

P H MALUNGANA
Acting Judge of the High Court
Of South Africa
Gauteng Division, Pretoria

Appearances

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