IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number:64994/14

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

[redacted]
SIGNATURE

In the matter between:

THABO GIVEN MAFOLE Plaintiff

And

PASSENGER RAIL AGENCY OF SOUTH AFRICA Defendant

JUDGMENT

MALUNGANA AJ:

[1] The Plaintiff, Thabo Given Mafole, instituted proceedings against the Defendant for damages arising out of the bodily injuries which he sustained at the Naledi railway station. The damages which the Plaintiff claims are set out in the summons.

[2] The basis of the plaintiff's claim is that the defendant the Passenger Rail Agency of South Africa ('PRASA') acted negligently in that it failed to operate its train services safely by not ensuring that all the doors of the train were closed whilst conveying commuters. Specifically the plaintiff's claim as pleaded is grounded on the defendant's omission of its legal duty towards the plaintiff or the inaction of its servants in the execution of their duties with the defendant.

[3] The defendant denies that it acted negligently as alleged in the plaintiff's particulars of claim, and pleaded that the plaintiff's exclusive negligence is the sole cause of the incident.

[4] Prior to the commencement of the trial the parties agreed that the question of merits and quantum be separated. The matter therefore only proceeded in respect of liability.

[5] The plaintiff testified that he was a regular commuter on the defendant's train. On 4 February 2014 he boarded the train from Croesus to Naledi on his way from work at about 18:30. Whilst so being conveyed the train doors were opened, and as the train was full to its capacity he stood inside the coach and held on to the belts provided for standing passengers. When the train approached Naledi railway station other commuters started pushing and in the process he was pushed and exited the train through the opened door and fell onto the platform. Whilst lying injured on the platform the security officers came and offered him assistance. An ambulance was subsequently summoned to move him to the hospital for medical treatment.

[6] Cross examination of the plaintiff brought the following to the fore: The plaintiff boarded the defendant's train at about 18:30. He stated that he fell onto platform 4 after

being pushed by other commuters. Counsel for the defendant put it to him that according to the pleadings, in particular his Reply to the Defendant's Further Particulars, the incident in question occurred at platform 3 of the railway station. He disagreed and stated that he never told his attorneys about platform 3, and maintained that according to him it was platform 4.

[7] It was further revealed during cross examination of the plaintiff that the defendant's security personnel discovered him in the early hours of the morning at platform 1 of the railway station, at about 02:45. He again disagreed that it was platform 1, he, however, conceded that the time at which the security found him was as stated by the defendant's witness. He also conceded that he was admitted to hospital at about 04:30.

[8] It was further put to him that the defendant's witness would testify that he, the plaintiff, told her that he was intoxicated and as result fell asleep in the coach of the train and subsequently jumped out of the train using the wrong side of the door. He replied that he would disagree with that version. He further stated that he was dizzy when the paramedics attended to him on the scene.

[9] The defendant led evidence by its security personnel Mervis Khoza. She testified that she was on duty with her colleague Shibyeni on the day in question. They were busy patrolling the area when they discovered the plaintiff next to the parked train. He told them that he became intoxicated and fell asleep. When he woke up he used the wrong door to exit the train coach thereby injuring himself. He smelt of alcohol and apologized for his conduct. She further testified that she found the plaintiff on platform 1 and not platform 4 as testified by the plaintiff. She and Shibyeni checked whether he was injured and subsequently reported the incident to the joint operation unit. An ambulance was summoned to the scene. Bongikosi Mkwanazi from the joint operation unit also came to the scene and recorded the incident in the occurrence book. Her evidence was corroborated by Bongikosi Mkwanazi, who testified that he was told by the security that the plaintiff was intoxicated, fell asleep in the coach and later got up

and jumped out of the train through the wrong door of the train. His report is contained in Exhibit "A" of the Trial bundle.

[10] Having regard to the totality of the evidence, the question which this court has to answer is whether the plaintiff has discharged his onus of proving that the defendant was delictually liable for his damages.

[11] In my view in order for the plaintiff to succeed with his claim, he is required to prove the usual elements of liability applicable in delictual action, namely that there was a breach of duty of care, that there was negligence and that the negligence was causally linked to the harm which he suffered.

[12] Counsel for the plaintiff argued that the defendant should be found to have been negligent for having failed to ensure that the train doors were closed at all times when the train was in motion. In failing to do so the defendant had acted in breach of its duty of care. He referred this court to the Constitutional Court decision in *Irvin Mashongwa v Prasa* (2015) ZACC 36 and *Kruger v Van der Merwe and Another* 1966 (2) SA 266 (A) at 272F. Counsel for the defendant, however, argued that the facts in *Mashongwa* are quite distinguishable from the facts in the present case. To a certain degree I agree with him in that the facts in *Mashongwa* relate to the defendant's failure to provide adequate security personnel and measures to rail commuters. It, however, highlighted once again the need to keep coach doors closed as a security measure when the train is in motion to prevent acts of criminality.

[13] It is settled in our law that the defendant has a duty to protect its commuters and that cannot be disputed. What this court should concern itself with is whether based on the evidence adduced the defendant has breached that duty. It is therefore necessary to deal with the issue of negligence on the part of the defendant.

[14] The test for establishing whether the defendant was negligent is set out in *Kruger v Coetzee* (2) SA 428 at 430E – F where the court held that:

"For the purposes of liability culpa arises if-

(a) A *diligens paterfamilias* in the position of the defendant –

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

(b) the defendant failed to take such steps.

[15] This court should, however, point out that Counsel for the plaintiff in advancing the plaintiff's case lost sight of the fact that before one indulgences in that kind of enquiry the plaintiff had to cross the hurdle of causality. In essence any liability which may otherwise be attributed to the defendant under the circumstances should be judged having regard to the general principles governing the law of delict, otherwise we end up with negligence in vacuum.

[16] In this regard the test for determining legal causation in the law of delict was described by Corbett CJ in *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 as involving two distinct enquiries, namely factual causation which is designed to determine whether a postulated cause can be identified as *causa sine qua non* of the loss in question. The other is a remote one involving juridical problem in the solution of which considerations of public policy may play a part.

[17] Turning now to the present case, the inconsistency in relation to the platform at which the plaintiff fell and later discovered by the security personnel of the defendant as well as the time during which he was discovered cast sufficient doubt in the court's mind regarding the truthfulness of his version. His reply to further particulars states that the incident occurred on platform 3. He testified that the incident occurred at platform 4; the defendant's witnesses who testified without contradiction said they found him at

platform 1 next to where the train parked on the wrong side of the platform. On this score the probabilities do not favour the plaintiff.

[18] Counsel for the defendant had argued that the contemporaneous documents and reports created after the accident cannot be ignored. He further stated in his argument that it is highly improbable that the plaintiff would exit the train through the open door passing through a number of people, regard being had to where he was standing in the coach, as he testified. In support of his submission he referred me to the decision in *South African Rail Commuter Corporation Limited v Almmah Philisiwe Thwala* 2011 ZASCA 170 (CC).The relevant paragraphs of this case read as follows:

> *"11.....the onus to prove negligence rests on the plaintiff and requires more than merely proving that harm to others was reasonably foreseeable and that a reasonable person would have taken measures to avert the risk of such harm. The plaintiff must adduce evidence as to the reasonable measures which could have been take to prevent or minimize the risk of harm.*
>
> *15. But I have difficulty with the factual finding made by the court below that the train , in particular , the respondent's coach , was 'overcrowded ', from which inference of negligence was drawn . The sum of the respondent's evidence on this aspect was merely that the train was 'very full '...even up to the door'. She neither pleaded nor established in evidence that the appellant had a duty to regulate the numbers of its rail passengers nor what reasonable measures it ought to have implemented in that regard to ensure passenger safety that it omitted to take. She led no evidence, for example, on the passenger capacity of the coach when the train reached her station etc. One cannot assume simply from the fact there were standing passengers that the coach carried an impermissible number as appellant 's policy and applicable safety standards might well legitimately have allowed that practice.*

18. As indicated above , the premise of the respondent's case was that she fell and sustained injury as a result of being pushed by excessive crowd 'from inside ' a moving train . Quite apart from the finding that the evidence does not establish that she was pushed and fell because the coach was overcrowded an her failure to establish the reasonable precautionary measures that the appellant could have taken to prevent passengers knocking one another down when disembarking from the stationary trains, the respondent's single, insurmountable hurdle is her failure to establish that the train was in motion when she was ejected from it. It seems that once the court accepted that the train was stationary when she the respondent disembarked and the accident occurred, that should have been the end of the respondent's case. "

[19] Upon careful evaluation thereof, the evidence adduced by the plaintiff falls short of the requirements and standard of proof stated in *Thwala*'s case. This court finds that the evidence establishes that there is no causal nexus between the defendant's alleged negligent behavior and the damages suffered by the plaintiff. Accordingly, plaintiff failed to adduce sufficient evidence to prove causation.

[20] In the result, the plaintiff's action is dismissed with costs.

[redacted]

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

Appearances

FOR THE PLAINTIFF: ADV.Z S RASEKGALA
INSTRUCTED BY : MAKWARELA ATTORNEYS
TEL: 012 326 1603
FAX: 012 326 1604
REF: MAK 0124/CIV

FOR THE DEFENDANT : MR. B L SHABANGU
INSTRUCTED BY : LEDWABA MAZAWAI ATTORNEYS
TEL : 012 346 7314
FAX : 012 346 7313
Mr. B Shabangu/LIT.93/2014/BLS