



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 853/2020

In the matter between:

MASIBULELE RAUTINI

APPELLANT

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

RESPONDENT

Neutral citation: *Rautini v Passenger Rail Agency of South Africa* (Case no. 853/2020) [2021] ZASCA 158 (8 November 2021)

Coram: MBHA, CARELSE and MOTHLE JJA and PHATSHOANE and MOLEFE AJJA

Heard: 9 September 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website

and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 8 November 2021.

Summary: Law of evidence – admissibility – whether discovered documents were correctly admitted into evidence without proof of the contents – whether the full court drew correct inferences from evidence tendered – whether the appellant was a credible witness and whether the full court was correct in rejecting his version of events – appeal upheld with costs.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Desai, Mabindla-Boqwana and Savage JJ sitting as a court of appeal):

- 1 The appeal is upheld with costs including those of two counsel where so employed.
 - 2 The order of the full court is set aside and replaced with the following order:
'The appeal is dismissed with costs.'
-

JUDGMENT

Molefe AJA (Mbha, Carelse and Mothle JJA and Phatshoane AJA concurring):

[1] This appeal is against the judgment and order of the full court of the Western Cape Division of the High Court, Cape Town (the full court), sitting as a court of appeal, handed down on 8 July 2020. The appeal is with special leave from this Court.

[2] The appellant claimed damages against the respondent for injuries sustained during an incident on 19 November 2011. At the time of the incident, the appellant was a

passenger in a train operated by the respondent. The incident occurred on a railway line between the Du Toit and Lynedoch train stations in Cape Town.

[3] At the commencement of the trial, the merits and quantum were separated in terms of Uniform Court Rule 33(4). The trial court, per McCurdie AJ, gave judgment in the appellant's favour on the merits and found the respondent liable for all proven or agreed damages suffered by the appellant. This Court granted leave to appeal to the full court, which upheld the appeal and dismissed the appellant's claim. The appellant then turned to this Court to appeal the full court's decision.

[4] The appellant was a single witness and the only witness to give evidence on how the incident occurred. He was a gardener at Spier Wine Estate. On the morning of 19 November 2011, he boarded the train at Du Toit station and was on his way to work. He testified that he usually disembarked the train at Lynedoch station and would walk back to Spier Wine Estate. It is common cause that Spier station is used for private Spier events as scheduled trains never stopped there. The appellant's evidence is that the doors of the train were open when the train left Du Toit station and remained open throughout the journey.

[5] Just before Lynedoch station, a gang of three men appeared and threatened the passengers with a knife and a gun, demanding their cell phones. In a scuffle with one of them, the appellant was thrown out of the moving train. The appellant does not remember where he fell. Other evidence indicates that he was later found on the platform at Spier station. He was seriously injured and was taken to Stellenbosch hospital in an ambulance. He regained consciousness at the Paarl General Hospital.

[6] The respondent called witnesses whose testimony did not shed any light on how the incident concerned occurred. Importantly, as regards the cause of the appellant falling out of the train, the respondent failed to lead the evidence of the Metrorail security guard at Lynedoch station who reported the incident. The evidence of this witness might have been able to give an account on how and where the appellant fell from the train.

[7] The full court rejected the appellant's version about how the incident occurred and found that his version was inconsistent with the version contained in discovered documents, in particular the medical and the ambulance reports. According to the ambulance report, the incident occurred at 'Spier station Lynedoch station'. It also states that a '[m]ale patient fell from the moving train.' The medical report however, recorded that according to an ambulance officer he was thrown out of train or jumped. Despite the clear disparity between these two documents, the full court found that the appellant's version ought to be rejected on the basis that the contents of the discovered documents, more particularly the notes contained in the medical records discovered by the appellant, were credible, acceptable and accordingly admissible.

Admissibility of hearsay evidence

[8] This appeal raises the important issue regarding the admissibility of the contents of discovered documents, without the author having to testify about the correctness of the contents thereof. Counsel for the appellant argued that the medical records could not be relied on as they constituted hearsay evidence.¹ The full court however attached considerable weight to them on the basis that the appellant, who in fact discovered them, never disputed their veracity. It then concluded that the appellant in fact supported the respondent's version of events.

[9] Section 3(1) of the Law of Evidence Amendment Act 45 of 1988 (the Law of Evidence Amendment Act) reads as follows:

'(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

¹ According to s 3(4) of the Law of Evidence Amendment Act 45 of 1988 hearsay evidence 'means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence'.

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to –

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interest of justice.’

[10] The record indicates that the appellant’s counsel in his opening address at the trial expressly stated that the discovered documents are what they purport to be, but that the correctness of the contents was not admitted. This was confirmed by the respondent’s counsel in this Court. In his heads of argument, the respondent’s counsel confirmed that the documents were expressly admitted as evidence, although the content would remain hearsay evidence in the sense that the authors would not have to be called. Furthermore, to call the authors as witnesses was ‘unnecessary in view of the agreement between the parties and would have been a waste of the court’s time’.

[11] The contents of the hospital records and medical notes constituted hearsay evidence, and it is trite that hearsay evidence is prima facie inadmissible.² The discovery thereof by the appellant in terms of the rules of court does not make them admissible as evidence against the appellant, unless the documents could be admitted under one or other of the common law exceptions to the hearsay rule.

[12] It is common cause that the respondent’s counsel made no application for any of the hearsay evidence to be admitted in terms of s 3 of the Law of Evidence Amendment

² See *Zungu NO v Minister of Safety and Security* 2003 (4) SA 87 (D) at 90D.

Act. In the circumstances, the full court's finding that material differences existed between the appellant's version and the medical records regarding where he fell from the train, the cause of his fall and his first lucid recollection after the fall, was erroneous. The full court's reliance on hearsay evidence in that regard amounts to a material misdirection that vitiates its ultimate finding on the outcome of the appeal that was before it.

[13] In any event, of all the reports relied upon by the respondent, only one report mentioned the word 'jumped.' The remainder of the reports mentioned the word 'fell'.

Failure to cross-examine the appellant

[14] The facts of this case fall squarely within those in *President of the Republic of South Africa vs South African Rugby Football Union (SARFU)*, where the Constitutional Court held as follows:

'The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule, it is essential when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. 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. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts.'³

[15] The reason for this rule is clear. As was stated in *S v Boesak*⁴ the rule, which is part of the practice of our courts, is followed to ensure that trials are conducted fairly, and a witness is afforded the opportunity to answer challenges to his or her evidence and is not ambushed. The appellant in *casu* gave his version of events under oath. The

³ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1; 1999 (10) BCLR 1059 para 61.

⁴ *S v Boesak* 2001 (1) BCLR 36 (CC); 2001 (1) SA 912 (CC) para 26.

respondent adduced no direct evidence to contradict the appellant's version. The trial court accepted the appellant's evidence and his version of events.

[16] The only witness called by the respondent concerning the contents of the hospital notes was Dr Herman Visagie, a family physician employed at Stellenbosch Hospital. He conceded that he could not recall the appellant or whether he in fact spoke to him after his admission at the hospital. He also could not say whether the appellant had provided him with information regarding the nature of the incident.

[17] The full court considered as relevant the fact that an incident as serious as that of robbery and attempted murder on a train was not reported to the police or the respondent, and that it only came to light a year later when the appellant lodged a claim with the respondent. The full court then drew the inference that the appellant's version of events was a recent fabrication.

[18] It is important to note that the appellant was never cross-examined on what he had told the medical personnel at the Stellenbosch, Tygerberg and Paarl hospitals, the ambulance personnel, PRASA and the Stellenbosch Justice Centre regarding the cause of the fall. Neither was he cross-examined about when he had first related to anyone that assailants had pushed him from the train. If the respondent had wanted to suggest that the appellant's version, that he was pushed from the train, was a recent fabrication, it should have explored this aspect with the appellant. In the absence of cross-examination of the appellant on this aspect, the full court committed a material misdirection when it found that his version only became known a year later. There was simply no evidence to support such a finding.

[19] The appellant's evidence was that he was late for work that morning and that the train did not stop at Spier station. The full court then found that the inference sought to be drawn by the [respondent] was that the [appellant] was late for work and probably jumped out of the moving train at the Spier station which was why the records indicated that the incident occurred at that station. However, the appellant was never afforded the

opportunity to respond to the respondents' hypothesis that because he was late for work, therefore he jumped out of a moving train at Spier station.

[20] The respondent submitted that when the appellant went into the witness box, he knew exactly what evidence was already placed before the court, and that he had every opportunity 'to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.' This argument has no merit. Prior notice was not given to the appellant that the respondent intended to use the documentary evidence to impeach his credibility.

[21] The first difficulty facing the respondent is that it never pleaded the issues raised above. It is also significant that it did not plead that the appellant had deliberately jumped from the train at Spier station. This Court in *Minister of Safety and Security v Slabbert* held as follows:

'A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.'⁵

[22] The second difficulty facing the respondent is that during cross-examination, it never put to the appellant that he had deliberately jumped from the train because he was late for work. Instead, it was put to the appellant that the Stellenbosch hospital records showed that, he was 'thrown out, fell or jumped' from the train. The appellant remained adamant that armed robbers threw him out of the train. In any event, the ambivalence of this notation supports either version.

[23] The Constitutional Court in *SARFU* emphasised the importance of expressly and adequately putting a version to the other party in cross-examination as follows:

⁵ *Minister of Safety and Security v Slabbert* [2009] ZASCA 163; [2010] 2 All SA 474 (SCA) para 11.

'The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence *is* to be challenged but also *how* it is to be challenged.'⁶

It must be emphasised that the failure to put a version even where it should not have been put, does not necessarily warrant an inference that the witness's version is a recent fabrication. This would be unfair to the witness and may lead to an incorrect finding. The full court relied heavily on inferences drawn from inadmissible hearsay evidence and evidence that was not substantiated or proven.

[24] The general rule regarding the drawing of inferences is clear. A court may only draw inferences that are consistent with all the proven facts, and where one or more inferences are possible, it must satisfy itself that the inference sought to be drawn is the most probable inference.⁷

[25] It is common cause between the parties that the carriage doors were open throughout the journey since it was an established fact that the appellant fell from the train through the open doors of the carriage. In *Mashongwa v PRASA*, the Constitutional Court held that this constituted negligence on the part of PRASA, and that PRASA's failure to keep the doors closed while the train was in motion, attracted liability.⁸ In essence, the appellant would not have suffered injuries in the manner he did if the carriage doors were closed while the train was in motion.

[26] In the result, I make the following order:

- 1 The appeal is upheld with costs including those of two counsel where so employed.
- 2 The order of the full court is set aside and replaced with the following order:
'The appeal is dismissed with costs'.

⁶ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) para 63.

⁷ *AA Onderlinge Assuransie-Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A).

⁸ *Mashongwa vs PRASA* [2015] ZACC 36; 2016 (2) BCLR 204 (CC); 2016 (3) SA 528 (CC) para 69.

D S MOLEFE
ACTING JUDGE OF APPEAL

APPEARANCES

For appellant:

J H Roux SC and A J du Toit

Instructed by:

DSC Attorneys, Cape Town

Rosendorff Reitz Barry, Bloemfontein

For respondent:

T D Potgieter SC

Instructed by:

Werkmans Attorneys, Cape Town

Lovious Block Inc, Bloemfontein.