THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 157/08

In the matter between:

GUGU PRECIOUS MTHEMBU **APPELLANT**

v

TRANSNET t/a METRORAIL **RESPONDENT**

Neutral citation: *Mthembu v Transnet t/a Metrorail* (157/2008) [2009] ZASCA 67 (29 May 2009).

Coram: Streicher ADP, Jafta, Mlambo JJA, Hurt et Griesel AJJA
Heard: 19 May 2009
Delivered: 29 May 2009

Summary: Application for special leave to appeal – no reasonable prospects of success in a further appeal.

ORDER

On appeal from: High Court, Johannesburg (Blieden, Claassen, Saldulker JJ sitting as a Court of Appeal).

The following order is made:

'The application for special leave to appeal is refused.'

JUDGMENT

MLAMBO JA (Streicher ADP, Jafta JA, Hurt, Griesel AJJA concurring)

[1] The applicant sued the respondent in the South Gauteng High Court for damages arsing from injuries she sustained in an accident at the Tembisa Station in Gauteng on 25 May 2002. The trial court (Fourie AJ), after ordering in terms of Uniform Rule 33(4) that the issue of liability be determined first and separately as agreed between the parties, found that the applicant's injuries were as a result of the negligence of the respondent's servants acting within the course and scope of their employment by it. The trial court further refused the respondent's application for leave to appeal. This court, however, granted the respondent leave to appeal to the full court. That appeal was successful and that court (Claassen J with Blieden and Saldulker JJ concurring) granted the respondent an order for absolution from the instance with costs.

[2] The applicant lodged an application for special leave to appeal that decision to this court which Cloete JA and Leach AJA referred for oral argument in terms of s 21(3)(c)(ii) of the Supreme Court Act 59 of 1959 and directed that the parties be prepared, if called upon, to address the court on the merits. The approach in such matters is to consider whether there are reasonable prospects of success and whether 'there are special circumstances which merit a further appeal' to this court. *Westinghouse Brake & Equip v Bilger Engineering* 1986 (2) SA 555 (A) at 564H. I propose to consider first whether there are reasonable prospects of success and in doing so I briefly sketch the background of the matter.

[3] The applicant's version of how she came to be injured is that on the morning of 25 May 2002 she went to the Tembisa Station in the company of her common law husband, Sipho Sibiya ('Sibiya') and two of his friends, Jeremiah Msweli ('Msweli') and Themba Khumalo ('Khumalo'), intending to catch a local train to Kempton Park. The applicant knew Msweli and Khumalo very well in view of the fact that they hailed from the same area in KwaZulu-Natal as the applicant and Sibiya. After they had waited for a short while the train arrived at approximately 9 o'clock and stopped.

[4] The platform was full of commuters who were alighting from the train and others boarding. She saw Sibiya rushing towards the train and lost sight of him. She also saw Khumalo and Msweli, who were also ahead of her, board the train. As it was her first time to board such a train she stood aside for commuters to alight and she could at that time see Khumalo and Msweli inside the train. She then moved towards the door of the train and as she put her foot on the step of the train to board, the train suddenly pulled off and she bumped her head against the side of the door and fell onto the platform. She could not recollect what happened after she was hit by the train.

[5] Michael Mthembu (Mthembu), the applicant's brother, testified in support of her case. His version was that he had a telephone discussion with Khumalo sometime after the accident and asked him how the plaintiff came to be injured. Khumalo had informed him that on the day in question they boarded the train at Tembisa Station and only realised after the train had departed that the applicant was not amongst them, which suggested that something was wrong. Khumalo told him that they had to wait for the train to reach the next station before they could alight and rush back to Tembisa Station, where they discovered that the applicant had been injured.

[6] The respondent's version, on the other hand, came predominantly from Khumalo and Emma Phasha (Phasha), one of the security guards who were on duty at Tembisa Station that morning. Khumalo's version was that the four of them had waited at the Tembisa Station for quite some time and when the train entered the station, and before it could come to a stop, the applicant stumbled in a bizarre fashion towards the train and bumped into it with her head. None of them had yet boarded the train as it had not stopped. Thereafter, one of them rushed up the stairs to call the station security guards to come and assist. Khumalo disputed the appellant's version that he, Msweli and Sipho had managed to board the train. Phasha testified that she and her colleague, Ledwaba, were stationed on an overhead bridge over platform 1 and the railway lines when she suddenly heard screaming just before 09h50. The screaming came from the platform below and within two minutes or so of hearing the screaming a young man had approached her and her colleague and advised them that someone had been injured on the platform below.

[7] She and Ledwaba then went down to the platform and found the applicant lying on the platform bleeding profusely from a wound on her head. The young man who had summoned them from the overhead bridge was also there with two others who said they were travelling with the applicant. One of these young men related to her and Ledwaba how the accident occurred and she recorded this in

the occurrence book. She is the one who summoned an ambulance to ferry the applicant to hospital. She transcribed the entry she had made in the occurrence book into her pocket book. The occurrence book and pocket book were handed in as exhibits during the trial. The note she made in the occurrence book reads:

'Saturday 25 May 2002
ACCIDENT REPORT
09h50 At time 09h50 at Tembisa Station Gugu Mthembu date of birth 1980, address 548 Endulwini sec Tembisa that lady hit a train with her head before the train stop. That happened at platform 1 . . . Found injury at the left head (deep cut) and bruises on the left leg. She hold weekly ticket from Limdlela – Elandsfontein ticket no: 19842108736024. Train no: 1832. Taken her to Tembisa Hospital.
Ambulance Arrive: 10h08
Driver: Samson Baloyi
Reg no. BXV 651 GP
Departure: 10h25.'

[8] As is apparent from the aforegoing the applicant's version of how the accident occurred and that of the respondent's witnesses differed materially and were clearly mutually destructive. A useful reminder on how courts should approach such matters is found in *SFW Group Ltd & another v Martell et CIE & others* 2003 (1) SA 11 (SCA) at 14I-15E.

[9] The trial court in accepting the applicant's version found that she was an honest, straight forward and credible witness who did not endeavour to embellish her evidence in order to strengthen her case. For this reason the trial court reasoned that it had no reason to disbelieve her and concluded that her version accorded substantially with the objective facts. The trial court was critical of Khumalo branding him as an incredible and unreliable witness whose version was as absurd as it was improbable. The trial court was especially critical of Khumalo's version that the appellant had simply stumbled towards the approaching train as if she was intoxicated and struck her head against it. In this

regard the trial court reasoned that the respondent had tendered no evidence to indicate why the applicant, who had behaved in a perfectly normal and sane manner up to that time, could all of a sudden have behaved in the manner described and demonstrated by Khumalo, stumbling past her three companions and running head first into a moving train.

[10] It becomes immediately apparent that in accepting the appellant's version and rejecting Khumalo's the trial court completely ignored Phasha's version. Perusal of the trial court's judgment reveals that nowhere does that court consider Phasha's version when analysing the evidence. This was correctly found to be a misdirection by the full court which reasoned:

'1. Nowhere was the vital importance of the evidence of Phasha discussed. On appeal it was conceded that the evidence of Phasha was of vital importance to the defendant to establish that Khumalo, Sipho and Msweli were in fact on the platform immediately after the incident and after the train had left the station. On the plaintiff's version, on the other hand, the three young men boarded the train and only discovered that plaintiff had remained behind after the train had left. Phasha's evidence in regard to her contemporaneous recordal of the events on the platform immediately after the incident confirms the version of the defendant that the three young men were on the platform enabling her to obtain the details of the plaintiff and how her injuries occurred. On the plaintiff's version there would have been no eye witnesses to the incident to supply Phasha and Ledwaba with any particulars regarding the incident. It was therefore important for the court to deal with this evidence. Its failure to do so fell foul of the duty of a court to traverse in judgment **all** relevant evidence.'

[11] Furthermore, the full court stated that:

'(16) I am of the view that the record clearly shows Phasha to have been a credible and trustworthy witness. Had the court *a quo* evaluated her evidence, it would have come to this conclusion. In so doing, it would not have found in the plaintiff's favour,

since Phasha's evidence corroborates the evidence of Khumalo that he gave a report to the security officers to the effect that the plaintiff had collided with the train prior to it coming to a standstill.

(17) The court *a quo* also failed to take into account that plaintiff's pleaded version of how she had fallen between the platform and the tracks is wholly inconsistent with her evidence as well as the evidence of the defendant's witnesses. This fact affects the credibility of the plaintiff.'

[12] Regarding the trial court's finding that there was no dispute that the applicant's three companions had boarded the train, the full court found that the trial court had erred in that regard as the respondent had disputed the applicant's allegation that her three companions had boarded the train. The full court found that this misdirection by the trial court indicated a lack of understanding of one of the crucial issues that was at stake during the trial. This was also a correct finding by the full court.

[13] Regarding the trial court's criticism of the version tendered by Khumalo, as to why the applicant had suddenly stumbled towards the moving train, on the basis that the respondent had failed to produce evidence showing that the applicant would have suddenly behaved in that manner, the full court reasoned thus:

'There was no *onus* upon the defendant to tender any evidence to indicate why the plaintiff acted as Khumalo had alleged. The *onus* is upon the plaintiff to prove on a balance of probabilities that her version is the correct one. It seems, however, from the statement quoted above that the court required the defendant to give some explanation why plaintiff acted as alleged by Khumalo. In this regard, the court misdirected itself as to a proper evaluation of the probabilities and *onus* of proof.'

Whilst Khumalo's description and demonstration of how the applicant stumbled into a moving train may appear bizarre, the fact is Khumalo was an eyewitness and his version is corroborated by Phasha's contemporaneous note of that

version, taken from one of the applicant's companions on the platform shortly after the accident occurred.

[14] Furthermore, regarding the trial court's finding that there was some suggestion on record that Khumalo had been persuaded to give evidence to controvert the plaintiff's version, the full court found that the trial court had also misdirected itself in that regard. The full court reasoned:

'The evidence discloses no such suggestion at all. In my view this is an important misdirection on the part of the court *a quo's* evaluation of the evidence. It seems as if its conclusion that Khumalo was not a credible or reliable witness, resulted directly from a misdirected appreciation of the onus of proof and a wrong understanding of what the evidence disclosed as to why Khumalo testified contrary to the plaintiff's version. If those were the only reasons for the court holding Khumalo not to be a credible and an unreliable witness, then such conclusion is unjustified, both in law and in fact.'

[15] The full court concluded that for these reasons it was of the view that the trial court's judgment contained substantial misdirections, which caused it to come to a wrong conclusion on the facts as well as on the law. The full court found that the trial court should in fact have accepted the evidence of Phasha as proof that a description of how the collision occurred was reported immediately after the incident by one of the applicant's companions.

[16] In my view, the full court was fully justified in concluding that the trial court had committed the misdirections it identified. The trial court clearly failed to evaluate the evidence in line with the approach referred to earlier in *SFW Group & another v Martell et CIE & others* (supra). On the other hand, the full court dealt with the matter comprehensively and properly and consequently there is very little that one can add to its reasons.

[17] Based on the aforegoing, I am of the view that there are no prospects of success whatsoever in a further appeal. The probabilities are very strongly in

favour of the respondent's version. This being my conclusion, there is no warrant to consider whether there are any special circumstances that would warrant a further appeal to this court. The respondent did not insist on the costs of the application.

[18] The application for special leave to appeal is refused.

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JUDGE OF APPEAL

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