

SOUTH AFRICA / JUDGMENT

Mavhungu v Passenger Rail Agency of South Africa (83450/14) [2023] ZAGPPHC 1928 (20 November 2023) [2023] ZAGPPHC 1928

COURT

North Gauteng High Court, Pretoria

BEFORE

Botsi-Thulare

CASE / FILE NUMBER

83450/14

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

Case

No: 83450/14

REPORTABLE: NO

OF

INTEREST TO OTHER JUDGES:NO

REVISED:

NO

Date:

20 November 2023

In

the matter between:

FHATUWAMNI

MAVHUNGU

Plaintiff

And

PASSENGER

RAIL AGENCY OF SOUTH AFRICA

Defendant

Delivered: This judgement

was prepared and authored by the Judge whose name is reflected and is

handed down electronically by circulation

to the Parties /their legal

representatives by email and by uploading it to the electronic file

of this matter on Case Lines. The

date for hand-down is deemed to be

20 November 2023

JUDGMENT

BOTSI-THULARE AJ

Introduction

- [1] This is a personal injury claim brought by Fhatuwani Mavhungu (plaintiff), an adult male in his legal capacity, against Passenger Rail Agency of South Africa (PRASA) (defendant), a South African State-Owned Enterprise responsible for passenger rail services in the Republic. The claim arises from the damages incurred when the plaintiff sustained injuries in an incident at Mears Station, Pretoria. The matter was initially scheduled for trial on 24 April 2023; however, it underwent multiple postponements, and at one juncture, it was removed from the trial roll. Subsequently, on 21 August 2023, it was reinstated on the roll and successfully concluded.
- [2] The merits and quantum in this matter were separated and I am called to proceed on merits only.

Background

Facts

- [3] On 22 April 2014 at approximately 06h30, on Metrorail train no 9110, the plaintiff was passenger holding a valid ticket for the journey, travelling from Koedoesport to Bosman station. The journey would take the plaintiff through Devenish Station and Mears to Saulsville Station. On the day of the incident, the train came to a standstill for approximately 30 minutes between Devenish and Mears station. Whilst the train was in motion, the doors of the coach the plaintiff was a passenger in were open, that was when the plaintiff was allegedly pushed by passengers on the train and got injured. As a result, the plaintiff is claiming for personal injuries, alleging that the defendant's negligence caused his injuries.

Plaintiff's evidence

- [4] It is the plaintiff's version that he was passenger travelling from work to home, on Metrorail train 9110 with a valid ticket. He was travelling from Koedoesport station to Saulsville station Gauteng, Pretoria. He is a security guard who was working nightshift. The plaintiff testified that the train he was travelling in was overcrowded from Koedoesport onwards, the train was also behind schedule. As it made its usual stops it became more overcrowded as the other passengers alighted to this particular coach and there were no security personnel on sight to prevent overcrowding while the plaintiff's coach kept being more overcrowded along the journey. It is the plaintiff's version that he was standing in the middle of the coach holding onto to a plastic strap intended for the use of standing passengers to keep their balance. The carriage was full, and the plaintiff suspected that the full carriage was the reason the train doors were not closing, both sides of the train were open.
- [5] The plaintiff further testified that between Devenish station and Mears Station, the train came to a standstill for a period of approximately 30 minutes. The passengers started disembarking through open doors and started walking next to the train in the direction of Mears. During this event there were no security personnel or employees of the defendant trying to stop the commuters from disembarking the train at the point where the train came to a stop, no communication was conveyed to any commuters for the unscheduled stop between two stations. There was a sound described by the plaintiff as a hooter where the train started moving again, the doors on both sides of the train were still open. The plaintiff testified that he never heard a sound made by the doors to indicate that they were closing, thereby implying that the doors remained open. The commuters started attempting to board the train after it started moving again through open doors. The commuters started embarking on the right side of the coach, some commuters were assisting others by pulling them up into the train by their arms. Whist these events were taking place, the train was in motion, the doors on both sides of the coach in which the plaintiff was a passenger were open. Just before the train entered Mears station, the commuters on the coach that the plaintiff was traveling were disembarking by moving and pushing towards the left side of the train, where the left side of the of the doors were open and where they would have to disembark. The pushing and shoving towards the left side caused the plaintiff to lose his grip of the plastic belt he was holding onto, and he was being pushed towards the open door of the left side of the coach. Eventually he was pushed out of the carriage through the open doors causing him to fall on the platform on the platform where he sustained injuries to his head and

right leg.

- [6] The other source of evidence in this trial was an animated detailed description the plaintiff gave in his demonstration as to how he was pushed and shoved to the point of losing his grip on the plastic belt. He remembers speaking to a female enquiring about his ticket and personal details, he had no reason to disembark the train at Mears station when his intended destination was Bosman station and then to Saulsville station, and that the plaintiff would never walk from Mears station to Bosman station, it would be far for him.
- [7] During cross examination, the plaintiff confirmed the issue of the train being overcrowded as well as doors being open while the train was in motion and confirmed that other commuters started pushing and shoving as the train was about to enter Mears station.
- [8] The investigator's testimony regarding the incident, and the alleged version provided to her and the interview with the plaintiff was not clearly put before the plaintiff under cross examination.
- [9] The plaintiff admitted that he spoke to one of the defendant's employees and was asked whether he had a ticket for the journey, he further provided a name, address and telephone number on her request. The plaintiff could not remember any further conversation he had with the defendant's employee.
- [10] The evidence that the plaintiff attempted to board the train by hanging between coaches and lifting his legs just before they reached the platform at Mears station to try and get onto the platform, as testified by the investigator, was never put to the plaintiff under cross examination.

Defendant' defence on the pleadings

- [11] The defendant is denying the plaintiff's averments and pleads specifically that at all material times, the plaintiff placed himself in danger. The plaintiff was hanging outside the train doors. Therefore, the plaintiff failed to avoid the incident. The defendant further pleads that in fact the train halted and once it started moving, the commuters who have alighted from the train including the plaintiff attempted to board the train again hanging onto the side, this resulted in the plaintiff being hit by the station platform. The defendant pleads that in providing rail services, it implemented reasonable and required safety regulations. The defendant pleads contributory negligence.
- [12] However, the defendant admits a duty of care to commuters, but denies it had a duty to the plaintiff. The defendant admitted liability in the matter of a deceased person who died in the incident that occurred the same day as the occurrence of the plaintiff's incident.
- [13] Before I proceed, I will pause to give a definition of the word 'gainsay' as provided in the defendant's papers, and 'gangway' in the context of the evidence before the court. Gainsay in dictionary meaning refers to denying or contradicting a fact or statement, and 'gangway' refers to a raised platform or walkway providing a passage. The court in *Chabot v Master and Owners, S-S. "Umgeni*,^[1] held that the shipping companies owe a duty to the public to have safe gangways and they cannot escape liability if a passenger or visitor does not

exercise the utmost care. The court further continued to find that the appellant was negligent since he had knowledge that the gangway was dangerous, however with this knowledge he proceeded to use the gangway. With that being said, the defendant's witnesses as I read the papers, they testified that the passengers embarked the train using gainsay which is not allowed, I therefore believe that the proper terms to be used is gangway.

Defendant's evidence

Mr Kganyago

- [14] The defendant's version through Mr Kganyago who was on duty on the day of the incident, testified that he was a Metro-Rail guard for the train in which the plaintiff was a passenger, and as his duty to ensure that doors are fully closed before the train moves, in the morning before the train was used it was examined and that all doors were working in order (closing and opening). He also indicated that before the train moves (while it is still standing) he can see all doors and observed that they were closed before sending a signal to the train operator that it is safe to proceed. Between Koedoespoort and Mears there are five stations, namely, Haartebees, Rissik, Loftus, Walker and Devenish. All stations from Koedoesport to Mears used the left-hand side platform, the procedure to ensure that the doors were closed at all the above-mentioned stations including Silverton station, which is a station just before Koedoesport was performed.
- [15] He further testified that the signal was closed between Devenish and Mears station for approximately 30 minutes. Whilst the train was stationary, he did not open the doors. Some passengers alighted from the train and started walking towards Mears station. The passengers alighted between the coaches using gangway. He testified that passengers are not allowed to embark and disembark through gangway. The gangway is corridor that links the coaches. After the signal opened, they communicated with the operator using the signals and the train proceeded to move towards Mears. When the train moved from Mears, he became aware about the two passengers that fell and send a please call message to the operator who then called, and he informed her about the incident.
- [16] He refuted the plaintiff's version that the doors were open, that the train was late, and it was overcrowded. However, he conceded that he did not know which coach the plaintiff was, and he could not tell if that particular coach was overcrowded. However, he explained that due to his experience most passengers disembark at Koedoesport and accordingly it is not possible that the train was overcrowded.
- [17] Also refuted that the train only stops for few seconds hence the people were pushing to get out before the train stops. He explained that he is the person who opens and closes the doors and only closes the doors and signals the operator to move only after it is safe. There is no time limit at the station.

- [18] During cross-examination he testified that it is not possible to force open the doors. They can only be open when the train is turned off and the train was never turned off between Devenish and Mears. He further confirmed that he kept observing whilst the train was moving, and he could not see anyone hanging outside the train. Furthermore, there was a curve where he saw all the doors on the left and they were closed.

Ms Nkosi

- [19] The defendant's version was further supported by Ms Nkosi, the train operator, who testified that she was a train operator in the train that the plaintiff got injured. It travelled from Mamelodi to Pretoria station. She confirmed that it was the metro guard's duty to ensure that the doors were closed. The signal was closed between Devenish and Mears and passengers got off the train and started walking towards Mears station. When the signal opened, she hooted to disperse the people who disembarked and were walking next to the tracks. She also confirmed that the passengers disembarked whilst using the gangway when the train was stationary between Devenish and Mears.
- [20] She further conceded that she could not see anyone hanging as she was focused ahead. During cross examination she confirmed that passengers use gangway in between the coaches. She further testified the people hanging in between the coaches will not be visible to her or the metro guard. She further confirmed that it is impossible for a person to keep the doors open as they work with pressure. Lastly, when the train moves it starts slow and picks up the speed to the maximum of 30 km/h.

Ms Ndhlovu (now Mahlangu)

- [21] Testified that at the time of the incident she was a protection officer. There were technical problems that led to train to be stopped between Devenish and Mears. She received the call from JOC that the tracks were down between Koedoespoort and Pretoria station. She then accompanied the technician to signal point on the other end of Mears platform towards Bosman.
- [22] She then received another call from JOC informing her about injured people at Mears. She walked from the signal point to the incident it took her about 4 minutes because she had to walk on the other side of the platform to avoid the irritated people who were walking towards Bosman.
- [23] When she got to the plaintiff, she asked his name and his ticket. At the time he was with another person referred to as his supervisor and that person showed her the train ticket.

- [24] She then asked the plaintiff what happened and was informed by the plaintiff that he alighted from the train whilst it was stationary between Devenish and Mears because he was in a hurry to catch another train at Pretoria station to Saulsville station. Whilst walking between Devenish and Mears, the train started moving and he decided to ride the train by holding on the handle between the coaches. It would have been faster and quicker for them to catch another train and Pretoria station.
- [25] During the cross examination she stated that it is illegal for people to surf the train and hang outside between the couches. She was then asked why the plaintiff was not fined at the scene and her response was that she used humanity as the plaintiff was injured and her concern was to get him medical assistance. She refuted the plaintiff's version about people pulling each other between Devenish and Mears as the train is elevated and the doors would have been closed.
- [26] She further confirmed that people hanging in between coaches would not be seen by the operator and the guard.

Ms Mphaka

- [27] She testified she received a call from JOC that two people were hit by train at Mears. When she arrived at Mears she met Ms Ndhlovu and she handed over the scene to her and explained what had happened. She explained to her that two people fell from the train and they were not hit by train.
- [28] She then saw the deceased and the plaintiff. She approached the plaintiff and asked what happened. The plaintiff told her that he was hanging from the train that had stopped between Devenish and Mears. He alighted from the train because he did not know when it was going to move. He then heard the bell and the train started moving but it was moving slow.
- [29] He then decided to ride the train by hanging between the coaches and when he tried to disembark, he hit the platform wall and fell. Could not take a written statement from him, because he was injured and decided not to take the statement at that time.
- [30] During cross examination the witness demonstrated that the height of the train is high, and as for a person almost her height, it would not have been impossible for the passengers to pull people outside the coach, taking into account that the train was in motion.

Inspection in loco

- [31] The inspection in loco[2] assists the courts in achieving the following purposes, namely: to follow the oral evidence including observing real evidence which is additional to the oral evidence. At the inspection in loco, the parties agreed that the platform where the incident occurred would be referred to as the Unisa side platform, the opposite side would be referred to as the trackside or ticket station platform. The parties agreed that the plaintiff was found on the Unisa side platform after the incident occurred and towards the beginning

of the platform. The beginning of the platform would refer to the side of the platform from which a train would enter the station.

Issues

for determination

[32] 32.1 The issues to be determined here by this court are the two conflicting versions of the plaintiff and the defendant.

32.2 More specifically whether the defendant admits that the plaintiff fell from a moving train which travelled with open doors?

32.3. Whether the defendants admit that the Metrorail General Operating Instructions require that all train doors must be closed prior to departure?

32.4 Ultimately, this court must determine whether the defendant was negligent?

Law applicable to facts

(i) Conflicting versions

[33] From the given versions, it is clear that in casu, the court is left with two mutually conflicting versions which cannot co-exist, and the court has to determine which one of these versions should be accepted. A tendency generally accepted by courts in resolving factual disputes of this nature is found in Stellenbosch-Farmers' Winery -Group Ltd and Another v Martell and Others[3] which held the following:

"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 equipoised, probabilities prevail."[4]

[34] Further, the court in National Employers' General Insurance Co Ltd v Jager[5], the court remarked as follows:

"It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other

version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If, however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true, and that the defendant's version is false.

This view seems to me to be in general accordance with the views expressed by Coetzee J in *Koster Ko-operatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens* (supra) and *African Eagle Assurance Co Ltd v Cainer* (supra). I would merely stress however that when in such circumstances one talks about a plaintiff having discharged the onus which rested upon him on a balance of probabilities one really means that the court is satisfied on a balance of probabilities that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a court first to consider the question of credibility

of the witnesses as the trial judge did in the present case, and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative

credibility apart from the probabilities.”[6]

[35] Lastly, in *Govan v Skidmore*[7], the Court held that, in trying the facts in a matter, one may, by balancing probabilities, select a conclusion which seems to be the more natural or plausible conclusion from amongst several conceivable ones, even though that conclusion may not be the only reasonable one.

[36] Based on the above, the court will now turn to consider whether the plaintiff has adduced evidence on a balance of probabilities, having due regard to the credibility and reliability of the witnesses, that the defendant was negligent and that his averment or version of the plaintiff testimony is true and accurate, and therefore acceptable, and that the version of the defendant falls to be rejected. To avoid liability, the defendant must produce evidence to disprove the inference of negligence on his part, failing which he/she risks the possibility of being found liable for damages suffered by the plaintiff.

Evaluation of evidence and submissions

- [37] To resolve a civil dispute such as the one before this Court, one needs to turn to the probabilities of the competing versions, coupled with the evidence presented before this Court by both parties. It's either the plaintiff was pushed out of the train through open doors or the plaintiff, in terms of what the defendant was pleading, was hanging on the side of the train.
- [38] During the evidence given the plaintiff was the single witness regarding the events that occurred on the day in question. However, being a single witness does not put the plaintiff in a disadvantaged position. His evidence still needs to be considered holistically to arrive at an objective conclusion. The single witnesses' evidence should not merely be disregarded or discounted on the basis that the witness has an interest or is bias in the proceedings, However, the evidence should be assessed as a whole and with caution taking into account all the relevant considerations. The Court, in in *S v Saulus and Others*,^[8] correctly found that:
- "There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness. The trial judge will weigh his evidence, will consider its merits and demerits and having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told . . ."* [9]
- [39] Regarding the plaintiff's testimony in so far as it relates to the incident, the train was overcrowded, especially in the coach that he was traveling in, and kept being overcrowded along the stations, while the doors were open. The plaintiff testifies that on the same day a person died due to the overcrowding in the train and the defendant has accepted liability of such.
- [40] During cross examination, the plaintiff remembers one of the defendant's employees who came to ask him about his ticket and the plaintiff provided more information about his address and name. The plaintiff cannot be criticized for failure to recall every detail of what happened on that day, given the circumstances at the time of the incident he was from nightshift work, probably looking forward to getting home and to rest. He would not have gotten off Mears station when his intended destination was Bosman station and then to Saulsville station, and. would never walk from Mears station to Bosman as it would be too far.
- [41] Regarding the sustained injuries which arise from the alleged shoving and pushing from the left side of the train, which caused the plaintiff to lose the grip on the plastic belt he was holding, therefore falling on the pavement next to the platform and sustaining injuries as a result. I believe that this happened as a result of the overcrowding of the coach the plaintiff was on, and the pushing and shoving, otherwise he would not have lost his grip if he had not possibly been pushed by an enormous number of commuters. The plaintiff would not have fallen on the platform if the doors of the train were closed.

- [42] On the other hand, the defendant's pleading is that the plaintiff was hanging outside the train doors, and the testimony through Mr Kganyago, the security guard who was on duty, proves otherwise, as he confirms that he did not see anyone hanging outside the train. The other two witnesses confirmed it is illegal for people to surf the train and hang outside like between the coaches, and that people hanging in between coaches would not be seen by the operator and the guard. The court cannot expect the security personnel to have knowledge of which coach the passengers are travelling at all times, however, their duty is to ensure that doors are closed at all times when the train is in motion and that the train is not overcrowded. The security guard was not sure about the overcrowding or whether the doors were closed or not, also whether the plaintiff was indeed hanging outside or not.
- [43] The plaintiff was a good and credible witness who relayed the incident of the March 2021 in a clear and uncomplicated fashion. He answered questions put to him in a direct manner, and in my view was steadfast under cross examination. I find that his explanation as to why he boarded the overcrowded train to be reasonable and logical. He already bought the ticket and he needed to board it to get home. This is a plausible explanation.
- [44] The plaintiff was consistent in his explanation regarding passengers alighting and new commuters boarding the train at the various stations along the way. There is nothing unusual in the explanation that he stood at the door and gave way to people boarding the train. I am of the view that he did not attempt to exaggerate his evidence, nor did he conjure up a version that he saw people pushing and desperately wanting to be out due to the accident that just happened and rushing to get home. In short, I agree with the submission that the plaintiff was a credible, honest witness, who remained consistent under cross examination.
- (ii) The question of negligence
- [45] The railway system is a primary mode of transport for many, and users are entitled to a railway system that is safe, well - managed and efficient within the constraints imposed by economic realities. The breach of public law obligations is wrongful for purposes of public law remedies and for the purposes of determining delictual liability.
- [46] Operating a train under conditions where the doors remained open even though the train was travelling when there is no platform onto which to step out is per se dangerous and wrongful.
- [47] The classic test for negligence is set out in *Kruger v Coetzee*, [10] which may be summarised as follows, would a reasonable person in the position of the defendant foresee the reasonable possibility of its conduct injuring the plaintiff and causing him patrimonial loss. For the purposes of liability culpa arises if: [11]
- (a) a diligens paterfamilias in the position of the defendant-

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps.

[48] The plaintiff's case for the negligence of the defendant and its employees and agents was based solely on the fact that the doors were kept open on both sides of the carriage from Mears station and then at Devenish station. While the train was stationery one would expect the doors to be at the platform side, but there was no explanation for the open doors on the far side. It was common cause that on the platform side, the floor of the carriage was at the approximate height of the platform whereas on the other side, there is an appreciable drop from the floor of the carriage to ground level. Passengers are not expected to embark or disembark on the far side.

[49] Neither the plaintiff nor the defendant dealt with the number of guards and conductors (if any) on the train or with the policies, the procedures and practices of the defendant in operating an urban passengers rail network, the measure of control that the personnel had over the doors, the extent to which personnel could interfere when passengers impermissibly kept the doors open, and the mechanical or electronic systems used to manipulate the doors.

(iii) Contributory negligence

[50] In *Johnson, Daniel James v Road Accident Fund*[12] the court held that in order to avoid liability, the defendant must produce evidence to disprove the inference of negligence on his part, failing which he/she risks the possibility of being found to be liable for damages suffered by the plaintiff. Where the defendant had in the alternative pleaded contributory negligence and an apportionment, the defendant would have to adduce evidence to establish negligence on the part of the plaintiff on a balance of probabilities.

[51] There is no evidence of contributory negligence, it was suggested in the pleadings that the plaintiff was hanging outside the train doors, while the testimony says that he was inside the train. The plaintiff's undisputed evidence was that he was on his way home and intended to disembark at Mears/ Devenish Station. He had no reason to leave the train or get off at said station because his destination was far, he could not walk there. He has been using the train since 2006, so he knows these issues. There were no security personnel on sight, and the train usually stops at various stations. The coach in which the plaintiff was travelling became overcrowded as more passengers alighted to pick particular coach while he was standing in a middle of the coach holding on to a plastic belt for balance. As the train got more overcrowded the plaintiff suspected that the doors did not close as he did not hear the sound they make when they close. This court takes note of the demonstration the plaintiff made to show how he was pushed and shoved out of the train. There was also no evidence that his behaviour differed from that of the other passengers.

[52] Section 1(1)(a) of the Apportionment of Damages Act 1(1)(a) gives a discretion to the trial court to reduce a plaintiff's claim for damages suffered on a just and equitable basis and to apportion the degree of liability. Where apportionment is to be determined, the court is obliged to consider the evidence as a whole in its assessment of the degrees of negligence of the parties. In this instance in order to prove contributory negligence, it was necessary to show that there was a causal connection between the incident and the conduct of the plaintiff, this being a deviation from the standard of the diligence paterfamilias. In this instance there is no evidence of contributory negligence.

(iv) Wrongfulness and the defendant's duty to commuters

[53] Wrongfulness is an essential element in delict.[13] The Constitutional Court held in this regard that the element of wrongfulness acts 'as a brake on liability' and that

conduct is not to be regarded as wrongful if public or legal policy considerations determine that it would be 'undesirable and overly burdensome to impose liability'.[14] In *Le Roux and Others v Dey*,[15] the Constitutional Court confirmed that the criterion of wrongfulness depends on a judicial determination as to whether it would be reasonable to impose liability on the defendants, which reasonableness has nothing to do with the reasonableness of the defendant's conduct or omissions. Therefore, even if it were to be found that there was negligence herein, the mere fact of such negligence may not make the omission wrongful. In order to prevent the 'chilling effect' that delictual liability in such cases may have on the functioning of public servants, such proportionality exercise must be duly carried out and the requirements of foreseeability and the proximity of harm to the action or omission complained of, should be judicially evaluated.[16]

[54] In case of Organs of state, the Constitutional Court in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*,[17] recognised that rail commuters in their thousands use the rail system daily and once they board a train, find themselves in a vulnerable

position and even targeted by criminals on board the same train. The Constitutional court held that Metrorail owed a positive duty to ensure that reasonable measures were in place to cater for the safety and security of rail commuters. Significantly, the Constitutional

Court was clear that it mattered not who implemented these measures as long as they were in place.

[55] The defendant as an Organ of State established in terms of section 2 of the Legal Succession to the South African Transport Services Act provides rail commuters with its services, it has a duty and obligation to protect the commuters' bodily integrity. In *Mashongwa v PRASA*[18] the court held that:

“As its mandate the defendant’s duty to safeguard the physical wellbeing of passengers must be central obligation. It reflects the ordinary duty resting on public carriers and is reinforced by the specific constitutional obligation to protect passenger’s bodily integrity, as an organ state. The norms and values derived from the Constitution demand that a negligent breach of those duties, even by way of omission, should, absent a suitable non judicial, attract liability to compensate injured persons in damages. (own emphasis)

When account is taken of these factors, including the absence of effective relief for individual commuters who are the victims of violence on Prasa’s trains, one is driven to the conclusion that the breach of public duty by Prasa must be transposed into a private law breach in delict. Consequently, the breach would amount to wrongfulness.[19]

[56] From the above paragraphs in the Mashongwa judgement, read with its predecessor, the Rail Commuters Action Group judgement, it is thus apparent that the defendant has a public duty to protect rail commuters, but this does not mean that it has a legal duty for purposes of delict. For that legal duty to arise, the defendant is required to take reasonable steps to provide for the safety of commuters and any failure to take such steps may render it liable in delict. This leads to the next question, which is whether the defendant was negligent in relation to the plaintiff.

[57] In Mashongwa, when considering the negligence of Prasa in the circumstances of the commuter who was pushed from a moving train while its doors were open, the Constitutional court specified that the test involves the reasonable organ of State test which recognizes that an Organ of State is in a different position to that of an individual. The question thus, is whether a defendant had reasonably foreseen the harm befalling the plaintiff as a result of the train doors being open while the train was in motion.

[58] The reasonable man will foresee the possibility of injury or death if a person fell out or were pushed out the door on the far side and fell onto the ground, and this would be the case irrespective of whether the train was in motion or not. There can be no doubt that leaving the train doors open is a danger to commuters who board that train, as he/she could slip, be pushed, lose their balance, fall from the train, and sustain injury.

[59] The facts of this case echo those in Centane,[20] Metrorail and a host of other similar matters in relation to the daily reality of overcrowded trains operated by the defendant.

Commuters pushing against each other in order to align at the stations, a fact which the plaintiff testified about, seems to be a normal occurrence and part of the daily train journey for many South African commuters. While this matter does not involve a scenario where the plaintiff was pushed from the train, the evidence, which follows the pleading, is that the plaintiff fell through the open door of the train while it was in motion.

[60] In my view, all that was required of the defendant was to comply with its own operating instructions. Yet, the defendant failed to do so and operated its train from Mears and Devonshire stations with its carriage doors open, put another way, the defendant’s

employees being the security guards, omitted to close the train doors, and such conduct is not acceptable. In allowing the train doors to be and remain open while the train was in motion. The defendant failed in its legal duty towards the plaintiff as a commuter. The resultant finding is that the defendant failed to ensure that the safety precaution (closing the train doors) was complied with and such failure amounts to negligence on its part. A reasonable Organ of State in the defendant's position, which owes a public duty to commuters, would have ensured that the train doors were kept closed to prevent the plaintiff's fall or slip from the train onto the railway tracks or platform. Thus, the reasonable possibility of the plaintiff, a commuter, falling from the packing, moving train whilst the doors were open, was foreseeable.

[61] When the train is stationery at a designate stop next to a station platform one would expect the rear side doors to be open at some stage so that passengers may embark or disembark. The reason for the existence of a railway platform is for the platform to be flush with the doors and the floor of the railway carriage so passengers can step from one to the other in safety. On the far side there is a considerable drop between the floor of the carriage and ground level. There is no reason for the doors on the far side to be open at any time whether the train is stationery or in motion. The defendant failed to take reasonable care.

(v) Causation

[62] In approaching the element of causation, the court in *Maphela v Prasa*[21] on similar facts as the ones before the court asked if there is a causal connection between the defendant's negligent conduct and the plaintiff's injuries. In this regard, the court enquired whether the harm would nonetheless have ensued even if the omission (the failure to close the train doors while it was in motion) has not occurred. A casual nexus must exist between the defendants conduct and the damage or harm suffered by the plaintiff.

[63] In Applying the *conditio sine qua non* test and causation by omission, I have to ask what would probably have happened had the defendant ensured that the train doors were closed on the journey which the plaintiff took.

[64] The defendant's conduct in failing to close the doors and in circumstances where it takes upon itself the duty to provide safe passage to the plaintiff and other commuters, led me to conclude that its negligent omission is closely connected to the harm suffered by the plaintiff as a result of the incident. Accordingly, the defendant is liable to the plaintiff for the harm he suffered.

[65] I emphasize that it remained the defendant's duty and operational obligations to ensure that the train's doors were closed when it left a station and when it was in motion. The defendant bears the onus in respect of proving that the plaintiff was negligent, and that the negligence was casually connected to the damages which he suffered.

[66] Furthermore, the defendant bears the onus of proving that the plaintiff had knowledge of the risk associated with standing at the open door of train while it was in motion, that he appreciated the extent of such risk and that he consented to the risk. In this regard, the defendant led no evidence which would cause me to consider that the above essential elements of the defence were proved. Thus, the onus attached to a defence of *volenti non fit iniuria* was not discharged and the submission by the defendant's counsel was unsubstantiated. In view of all the above conclusions, I find that the defendant is solely liable for the harm suffered by the plaintiff, and that the plaintiff therefore succeeds with his claim on the merits.

Reasons

for the decision

- [67] I therefore further find that, in the evidence given by the defendant, none of the witnesses has seen the plaintiff hanging on the outside of the train doors or riding between the doors as the defendant pleads. Arguably they confirmed that it is not allowed to ride through gangway, and it is impossible to see a passenger in that instance.
- [68] Given the circumstances of the plaintiff, I find him to be a responsible person with a stable employment, who would not put himself and his life at risk by surfing on the train between coaches or hanging outside of the train doors as the defendant's evidence suggests.
- [69] The plausible reason why none of the witnesses has seen him hanging outside the doors was because he was not riding the train from outside, but inside holding onto the plastic handle until he was pushed and fell on the platform due to the pushing, shoving by passengers overcrowding in his coach.

Conclusion

- [70] The plaintiff made out a *prima facie* case and the defendants failed to lead evidence to discharge the evidentiary burden. The defendant is liable for the damages suffered by the plaintiff.

Order

[71]

1. The plaintiff's claim on the merits is upheld.
2. The defendant is 100% liable for the plaintiff's proven damages
3. The defendant is ordered to pay the plaintiff's costs on an attorney and client scale as taxed or agreed and including the costs of senior counsel.
4. The trial on quantum is postponed *sine die*.

MD BOTSI-THULARE AJ

ACTING JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES: Plaintiff's Counsel: Adv Pieter Venter Instructed by Spruyt Incorporated
Attorneys Defendant's Counsel: Adv M Vimbi Instructed by: Jerry Nkeli & Associates DATE OF
HEARING: 14 April 2023 DATE OF RESERVED JUDGMENT: 21 August 2023 DATE OF JUDGMENT:
20 November 2023

[1] (1914) 35 NPD 140.

[2] R v Mokoena 1932 OPD 79 at 80.

[3] 2003

(1) SA 11 (SCA) at para 5.

[4] Id para 5.

[5] 1984

(4) SA 437 (ECD).

[6] Id at para 440D-441A.

[7] 1952

(1) SA 732 (N).

[8] 1981

(3) SA 172 (A).

[9] Id para 180 E -G.

[10] 1966

(2) SA 428 (A) at para 491.

[11] Ibid

[12] Case Number 13020/2014 GHC paragraph 17, confirming Solomon and Another v Musset and Bright Ltd 1926 AD 427 and 435.

[13] Stedall and Another v Aspelting and Another [2017] ZASCA 172; 2018 (2) SA 75 (SCA) para 11.

[14] Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng 2015

(1) SA 1 (CC).

[15] Le Roux and Others v Dey [2011] ZACC 4; 2011 (3) SA 274 (CC) para 122

[16] Carmichele v Minister of Safety and Security

[2001] ZACC 22; 2001

[4] SA 938 (CC) para 49.

[17] [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at para 82.

[18] [2015] ZACC 36; 2016 (2) BCLR 204 (CC); 2016 (3) SA 528 (CC)

[19] Ibid para 26 and 27.

[20] Centane v Prasa Western Cape High Court, case number 5672/2019, judgment delivered on 3 March 2023.

[21] Maphela v Passenger Rail Agency of South Africa (834/021)

[2023] ZAWCHC 137 at para 58.

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