

SOUTH AFRICA / JUDGMENT

Mkhize v Passenger Rail Agency of South Africa (11417/20) [2023] ZAGPPHC 1883 (3 November 2023)

[2023] ZAGPPHC 1883

COURT

North Gauteng High Court, Pretoria

BEFORE

de Vos

CASE / FILE NUMBER

11417/20

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE

NO: 11417/20

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

Date:

3 November 2023

In

the matter between:

NS

MKHIZE

Plaintiff

and

PASSENGER

RAIL AGENCY OF SOUTH

AFRICA

Defendant

JUDGMENT

DE VOS AJ

- [1] Ms Mkhize claims delictual damages for harm she suffered after being pushed out of the open door of a moving train. The parties agreed to separate quantum and merits. At the commencement of the trial, they requested this Court to order the separation of these issues. The Court granted the separation of quantum and liability, and the Court, therefore, only has to decide the liability issue.
- [2] The issue of liability turns on the element of negligence. The negligence, as pleaded, is that the defendant (“PRASA”) operated a train with its doors open. The sole controversy in this case is whether Ms Mkhize has shown that PRASA acted negligently.
- [3] Ms Mkhize’s case is that she was pushed out of the open doors of a moving train. She testified that on Sunday, 27 August 2017, she was on her way to work as a sorter at a reclaiming company. To get to work, she travelled from Zwelethu station to Rossburgh station. As the train approached Rossburgh station, there was another train waiting on the other side of the platform. Ms Mkhize was in the second row of commuters from the door waiting to alight. Her fellow commuters were anxious to catch the train waiting at the platform. Ms Mkhize was not catching the waiting train and did not share their anxiety. The other commuters pushed past Ms Mkhize “from behind” through the open door in a rush to catch the other train. Ms Mkhize’s evidence was that the other commuters pushed her whilst “the train was still in motion”. Ms Mkhize, being pushed from behind, fell onto the platform.
- [4] As a result of the fall, Ms Mkhize lost consciousness. She regained consciousness in the ticket office as an official from PRASA was wiping blood from her face. The bleeding came from her forehead. This injury bore a scar, which Ms Mkhize still carries and pointed out to the Court. She does not know how she got to the ticket office from the platform but was subsequently told she had been taken to the ticket office by private security guards. From the ticket office, she was rushed to hospital, where she underwent surgery on her upper arm.
- [5] PRASA submitted that there were mutually destructive versions before the Court as a result of differences in Ms Mkhize’s version regarding the nature and extent to which the doors were open. PRASA refers to Ms Mkhize’s pleaded case that the doors “unexpectedly opened” when the train approached the platform and contrasted this to Ms Mkhize’s evidence at trial: the doors were open constantly from Zwelethu to Rossburgh station and were then forced open more by

other passengers rushing to catch the next train.

[6] PRASA contends that these are mutually destructive versions which the Court must resolve through the accepted test in *Stellenbosch Farmers' Winery Group Ltd v Martell ET CIE*.^[1] The test in *Stellenbosch* requires the Court to make findings on (a) the credibility of the various factual witnesses, (b) their reliability; and (c) the

probabilities. PRASA invites the Court to have regard to the credibility and reliability of the witnesses. Evidence that is reliable should be weighed against the evidence that is found to be false and, in the process, measured against the probabilities.

[7] The *Stellenbosch* test usually finds application where the Court is confronted with two different versions from different persons. Essentially where the evidence amounts to one person's word against another's. In these situations, logic dictates that where there are conflicting

versions or mutually destructive stories, both cannot be true. Only one can be true. Consequently, the other must be false.^[2] The *Stellenbosch* test provides the resolution when the Court is faced with two mutually destructive versions.

[8] PRASA's case hinges on the characterisation of the case as one involving two conflicting versions. I am, however, not persuaded that there are conflicting versions before the Court, either on the pleadings or on the evidence presented to Court.

[9] Both parties have pleaded that Ms Mkhize fell out of a moving train whilst the door was open. The plaintiff pleads that the doors of the coach were open as it was approaching the platform and that unknown persons pushed Ms Mkhize from the train. PRASA pleaded that Ms Mkhize "stood at the open door of a moving train".^[3] On the papers, it is common cause that the doors of the train were open whilst it was in motion.

[10] The relevant issue is whether the train doors were open whilst it was in motion. PRASA's pleaded case concedes that the doors were open whilst the train was in motion. PRASA's pleaded case is congruent with Ms Mkhize's pleaded case. On the pleadings, there is only one version before the Court: the doors were open whilst the train was in motion.

[11] I then consider if there were different versions presented to the Court in the evidence led at trial. PRASA has not presented any evidence that the doors were closed or that the train was not in motion. PRASA led one witness, Ms Ngcobo, who works in the ticket office at Rosburgh station. Ms Ngcobo has been working at the station for 22 years. Ms Ngcobo did not witness the event and testified largely about her knowledge of the business of the train on a Sunday and the events as relayed to her by security guards. She also testified that she prepared a statement at the time – based on what was relayed to her on the day. Ms Ngcobo conceded that she did not witness the incident, and her only knowledge of it is in terms of what was relayed to her. However, when asked what Ms Mkhize had done wrong, Ms Ngcobo said that Ms Mkhize "came out of the train whilst the train was in motion". Albeit hearsay, this evidence is compatible with Ms Mkhize's evidence and does not provide a destructive version.

- [12] PRASA invites the Court to elevate the discrepancies in Ms Mkhize's versions to mutually destructive versions. I find that the discrepancies do not give rise to different versions before the Court. The Court has one version with minor discrepancies. The version is that the doors were open whilst the train was in motion. This version remained consistent. This is the factual basis on which the negligence finding hinges – whether they were completely open throughout or mostly open throughout and nudged open further closer to the station - does not alter the material fact that the doors were open. The core of the evidence, however, consistently, was that the doors were open whilst the train was moving.
- [13] I cannot accept PRASA's invitation to apply the test in Stellenbosch. PRASA's incorrect characterisation of the case becomes clear when one considers the unsuitability of the Stellenbosch test in this case. As set out above, the Stellenbosch test resolves a dispute by requiring the findings on (a) the credibility of the various factual witnesses, (b) their reliability; and (c) the probabilities. However, there is only one factual witness in this case: Ms Mkhize. I can, therefore, not make a credible finding about the witnesses in order to determine which evidence weighs more. The same applies to the issue of reliability. There is only the evidence of Ms Mkhize, and I cannot test the reliability of her evidence against the reliability of another witness who has contradicted her. Lastly, there is no need to consider the probabilities – as there is only one version before the Court – that Ms Mkhize fell through an open door of a moving train.
- [14] The Court does not disregard the discrepancies in Ms Mkhize's evidence. The Court has considered the differences in Ms Mkhize's evidence regarding the extent to which the doors were open. The differences stand, regardless of whether Ms Mkhize's evidence is contradicted by another witness. In essence, Ms Mkhize is not freed from her onus just because her evidence is uncontested. In *Denissora v Heyns Helicopters*[4] the Court held – "It does not, however, follow that because evidence is uncontested, therefore, it is true. The evidence may be so impossible in the light of all other evidence that it cannot be accepted".
- [15] The fact that evidence stands uncontradicted does not relieve Ms Mkhize from the obligation to discharge the onus resting on them.[5] However, in these circumstances, PRASA does not dispute that Ms Mkhize fell from the train. PRASA also admits that the train was in motion with its doors open. The Court has objective evidence in the form of the injuries sustained and the report filed at the time of the incident which confirms Ms Mkhize was injured.
- [16] Counsel for the plaintiff invited the Court to consider the passage of time between the incident six years ago and today. Human memory is fallible, and some discrepancy is not abnormal nor indicative of deceit. Vitally, the differences between the versions were minor and Ms Mkhize remained constant on the only relevant issue – that she was pushed through open doors of a moving train. There is thus an explanation for the minor discrepancies. Based on the totality of evidence, the Court is therefore satisfied that Ms Mkhize's evidence is, in material respects, true.

[17] I therefore decline PRASA's invitation to elevate the minor discrepancies in Ms Mkhize's evidence to mutually destructive versions which requires the application of the Stellenbosch test. Having resolved the factual issue between the parties, the Court must apply the law. The legal principles that apply when a person falls from an open door of a moving train is settled, consistent and clear. A body of jurisprudence has been built on the issue, and the parties agreed on the applicable principles.

[18] The authoritative position appears in the Constitutional Court's judgment in Mashongwa:[6]

"No additional resources were required for PRASA to do the obvious. And that mundane task was simply to comply with its own general operating instructions and ensure that the doors of all coaches, including the coach occupied by Mr Mashongwa, were closed. It is something so easy to accomplish and yet so necessary that any attempt to provide an "acceptable" excuse for not doing it would inevitably be met with resistance and likely rejection."

[19] The Constitutional Court found that PRASA's failure to ensure the train doors were closed gave rise to negligence due to the risk involved and PRASA's duties to commuters.

[20] These findings have been applied consistently. In Maduna v Passenger Rail Agency of South Africa, the Court held –

"Open train doors and injuries resulting from them have often received judicial attention. Unsurprisingly the cases all say that a rail operator who leaves train doors open while the train is in motion, acts negligently."[7]

[21] PRASA, operating a moving train with open doors is, in terms of our settled jurisprudence, a negligent act. The risk of serious injury to an intending commuter resulting from starting a train while persons are in the act of boarding the train is self-evident.[8] PRASA was negligent in allowing the train to start moving with its doors open.[9]

[22] In Mthombeni v Passenger Rail Agency of South Africa[10] the Court held –

"It bears yet another repetition that there is a high demand for the use of train since they are arguably the most affordable mode of transportation for the poorest members of society, for this reason, trains are often packed to the point where some passengers have to stand very close or even lean against doors. Leaving the doors of a moving train open, therefore, poses a potential danger to passengers on board.⁸

"Doors exist not merely to facilitate entry and exit of passengers, but also to secure those inside from danger. PRASA appreciated the importance of keeping the doors of a moving train closed as a necessary safety and security feature. This is borne out by a provision in its operating procedures requiring that doors be closed whenever the train is in motion. Leaving them open is thus an obvious and well known potential danger to passengers".⁸

- [23] In *Baloyi v Passenger Rail Agency of South Africa*[11] it was repeated that “it was a basic fundamental requirement” for the safe operation of a passenger train in any country that “a train should not depart with a door open”. The prohibition of trains travelling with open doors keeping the doors of the train closed whilst in motion is an “essential safety procedure”.[12] Travelling with open train doors is a negligent act.[13]
- [24] The Supreme Court of Appeal in *Transnet Ltd t/a Metro Rail and Another v Witter*[14] has categorically stated that “a train leaving with open doors constitutes negligence”. In *Maruka v Passenger Rail Agency of South Africa*[15] the plaintiff was ejected from a moving train by the pushing and jostling for space from fellow commuters while the doors were open. The Court held that there is a “heavier burden” placed on PRASA “where greater risk exists”.
- [25] The law is clear: PRASA operating a train with its doors open whilst in motion is a negligent act giving rise to a liability to pay compensatory damages.[16] In this case, the pleaded facts were common cause, and the uncontroverted evidence before the Court was that Ms Mkhize was pushed through an open door of a moving train.
- [26] Having decided on the issue of liability, the only outstanding issue is that of costs. I see no reason to deviate from the normal rule that costs should follow the result. There has been no request for punitive costs.

Order

[27] As a result, the following order is granted:

- a) The defendant is liable for 100% of the plaintiff's proven or agreed damages.
- b) The defendant is ordered to pay the plaintiff's costs on a party and party scale, including the costs of counsel.

I de Vos

Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the plaintiff: J van der Merwe Instructed by: Gert Nel Inc Counsel for the defendant: WB Ridgard Instructed by: Makhubela Attorneys Date of the hearing: 24 October 2023 Date of judgment: 3 November 2023

[1] 2003

(1) SA 11 (SCA)

[2] S v Janse van Rensburg 2009

- (2) SACR 216 (C) at para 8
- [3] Plea para 5.1
- [4] 2003
- (4) All SA 74 (C)
- [5] Minister of Justice v Saarnetso 1963 3 SA 530 (A) at 534 H
- [6] Mashongwa v PRASA (CCT03/15) [2015] ZACC 36; 2016 (2) BCLR 204 (CC); 2016 (3) SA 528 (CC)
- [7] 2017 JDR 1039 (GJ) par [28]
- [8] Ngubane v SA Transport Services [1990] ZASCA 147; 1991
- (1) SA 576 (A) at 777D
- [9] Transnet Ltd t/a Metrorail v Witter [2008] ZASCA 95; 2008
- (6) SA 549 (SCA) par [1] at 552 and par [5]-[11] at 555
- [10] (13304/17) [2021] ZAGPPHC 614 (27 September 2021)
- [11] 2018 JDR 2044 (GJ) para 20
- [12] Id at para 26
- [13] Id at para 27
- [14] (517/2007) 2008 ZASCA 95 (16 September 2008)
- [15] 2016 JDR 0720 (GP) at 34
- [16] In *Rodgers v Passenger Rail Agency of South Africa* 2018 JDR 0347 (GP) at para 14 it was held that “PRASA has an obligation to protect its passenger's bodily integrity and failure to do so attracts liability to compensate for damages suffered as a result thereof.”

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