

SOUTH AFRICA / JUDGMENT

Mthethwa v Passenger Rail Agency of South Africa (PRASA) (2020/33363)

[2023] ZAGPJHC 135 (14 February 2023)

[2023] ZAGPJHC 135

COURT

South Gauteng High Court, Johannesburg

BEFORE

Moorcroft

CASE / FILE NUMBER

2020/33363

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IN

THE HIGH COURT OF SOUTH AFRICA,

GAUTENG

DIVISION, JOHANNESBURG

CASE

NO: 2020/33363

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: YES

DATE:

14 February 2023

In

the matter between:

MTHETHWA,

SPHAMANDLA

LYMON Plaintiff

and

PASSENGER

RAIL AGENCY OF SOUTH AFRICA (PRASA) Defendant

JUDGMENT

MOORCROFT AJ:

Summary

Negligence – defendant permitted train to travel with open doors of both sides and to keep the doors open on both sides when the train was stationary – plaintiff pushed out of door on the far side of platform – Permitting a train to operate with open doors prima facie negligent - defendant bore onus of rebuttal but chose not to lead evidence – Defendant liable in delict for plaintiff's damages arising from his injuries

Order

[1] In this matter I make the following order:

1. The defendant is liable for 100% of the agreed or proven damages suffered by the plaintiff as a result of having fallen from a train at Lindela Station on 12 September 2019;
2. The defendant is ordered to pay the plaintiff's agreed or taxed costs to date;
3. The trial on quantum is postponed sine die.

[2] The reasons for the order follow below.

Introduction

[3] The plaintiff claims delictual damages from the defendant arising out of an incident at Lindela Station on 12 September 2019 when he fell out of a stationary passenger train operated by the defendant.

[4] It was ordered at a case management meeting that the issues of merits and quantum be separated in terms of Rule 33(4) and the matter proceeded before me on merits only.

[5] The plaintiff was the only witness who testified to the events surrounding the incident. The plaintiff's brother and the defendant's supervisor, both of whom arrived on the scene some time after the incident, also testified; as did the plaintiff's

attorney on the contents of a letter[1] dated 9 July 2020 where she had written that the incident occurred when the plaintiff was 'boarding' the train. She

testified that this was an error caused by the questionable practice of 'cutting and pasting' when the letter was written.

The amendment

- [6] The plaintiff's case as pleaded was that he was 'pushed or dislodged' when there was a fire in the back of the carriage. He lost his balance and fell out of the open door of the carriage onto a cement platform.[2] He also alleged in the particulars of claim that he was 'boarding' the train.[3]
- [7] The amendment[4] involved the substitution of 'the railway tracks' for the reference to 'a cement platform.' The defendant objected to the amendment on the basis that the reference to 'a cement platform' meant that it was the plaintiff's case that he fell from the train onto the station platform, but this was of course not the only interpretation of the phrase 'a cement platform' as it could also mean a cement platform of any description near the railway tracks, other than the station platform.
- [8] It was not all clear from the particulars of claim whether the plaintiff fell onto the station platform, or onto some or other cement platform on the other side of the train.
- [9] The application to amend was of course late and Mr Kromhout explained that the discrepancy between the evidence and the facts only came to light during consultations a few days before trial. The application

was served on Sunday, the 6th of February 2023 and the defendant was justified in opposing it.

- [10] After hearing argument I granted the amendment and ordered the plaintiff to pay the costs of the amendment. I concluded that the question of negligence was not impacted by whether the plaintiff fell on a cement platform (which may or may not on the pleadings be the station platform) or on a railway track.

The plaintiff's evidence[5]

- [11] It was common cause that there are two railway lines at Lindela station, the one for the train coming from Germiston station towards Pilot station and the other for the train going in the opposite direction, from Pilot to Germiston. There are two platforms serving the two railway lines, situated on the outside of the lines.
- [12] It was also common cause that the plaintiff was the holder of a valid train ticket.[6]
- [13] On the day of the incident the plaintiff (coming from his place of employment at the end of a working day in Boksburg and via the train station at Angelo) changed trains at Germiston and boarded the train to Pilot, his destination. He was in the second carriage behind the locomotive. The train was crowded and many passengers were standing.
- [14] The doors on both sides of the carriage were open and there were passengers standing in the doorways, preventing the doors from closing when the train departed Germiston. The plaintiff was standing between two opposing doors and approximately on the centre line.

- [15] The train stopped at Lindela station, which is not far from Pilot station. The platform was on the left side of the train, the 'near-side' or 'platform side' and the second railway line was on the right side, the 'far-side' of the train. The plaintiff was still standing between two doors and at the centre of the carriage.
- [16] The train jerked, forwards and backwards twice but did not depart. Then there was some kind of explosion, a 'loud bang' at the back of the carriage. Passengers panicked and jostled, and in the melee the plaintiff was pushed out of the carriage on the far side. He fell onto the rails and was injured. There was no train on the tracks for the train bound for Germiston when he fell.
- [17] The train bound for Pilot that the plaintiff should have been on departed without him. Some time later he was moved by bystanders to the platform on the other side, the side where trains bound for Germiston would stop. This is where his brother and the supervisor of the defendant who attended at the incident, encountered him later. An ambulance fetched him and took him to the hospital in Vosloorust.
- [18] I do not find it necessary to deal at length with the evidence of the plaintiff's brother and the defendant's supervisor who arrived on the scene a considerable time after the incident took place. The supervisor conceded that during his time working on the railway stations he dealt with a great many incidents and accidents, and his memory as to what exactly was said and by whom, might not be accurate four years later under circumstances where he had no reason to remember this specific incident in any detail.
- [19] What is common cause is that the defendant's supervisor was shown a copy of the plaintiff's ticket and wrote down his personal particulars.

Wrongfulness

- [20] 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 are wrongful for purposes of public law remedies and for the purposes of determining delictual liability.[7]
- [21] Operating a train under conditions where the doors remain open even though the train is travelling at speed and when there is no platform onto which to step out is per se dangerous and wrongful.[8]

The question of negligence

- [22] The test for negligence has often been stated and was formulated as follows in *Kruger v Coetzee*: [9]

For the purposes of liability culpa [10] arises if –

- (a) a diligens paterfamilias [11] 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

[23] 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 Germiston station and then at Lindela station. While the train was stationary one would expect the doors to be open 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 far side, there was an appreciable drop from the floor of the carriage to ground level. Passengers are not expected to embark or disembark on the far side.

[24] 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 passenger 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.

[25] When reading the case law I must be careful to differentiate between statements of law and the analysis of factual evidence in those

cases. I am bound by precedent but may not have regard to factual evidence[12] and findings of fact in other cases.

[26] The undisputed evidence in this matter is that the doors were open on both sides of the carriage when the train travelled between Germiston and Lindela, and when it was stationary at Lindela. A crowded railway carriage travelling at normal speeds pose an obvious danger to passengers and injury or death is foreseeable in the event of a passenger falling out or being pushed out. The reasonable man (and the reasonable operator of a rail service) will foresee the possibility of harm under these circumstances.

[27] The Constitutional Court declared in 2004 that Transnet Ltd (first respondent) and the present defendant (second respondent) "have an obligation to ensure that reasonable measures are taken to provide for the security of rail commuters whilst they are making use of rail transport services provided and ensured by, respectively, the first and second respondents." [13]

[28] When the train is stationary at a designated stop next to a station platform one would expect the near side doors to be open at some stage so that passengers may embark and disembark. The reason for the existence of a railway platform is for the platform to be flush with the doors and 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 stationary or in motion.

- [29] 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. The undisputed evidence was that the adjacent railway lines were about two meters apart; a carriage is wider than the tracks and two trains passing would be in close proximity. The danger of falling onto, or under the wheels of another train is therefore real, and utterly foreseeable. The reasonable man would guard against it.
- [30] There is considerable authority to the effect that a railway operator has a duty to see to it that the doors of a train are closed at relevant times.[14] A failure to comply with the duty can be interpreted as an omissio (the failure to see to it that the doors are properly closed) or a commissio (permitting the train to depart a station and to travel with doors open).
- [31] The onus[15] to prove[16] his case remains throughout on the plaintiff. The defendant's liability is not absolute-[17] the liability of a railway operator is not strict liability, and a prima facie case presented by the plaintiff can be rebutted.
- [32] The defendant's duties must be exercised in a reasonable manner. Absolute perfection in a perfect World is not required.
- [33] The undisputed evidence in this matter casts an onus of rebuttal[18] or evidentiary burden onto the defendant. The prima facie case made out by the plaintiff can conceivably be rebutted by the defendant by leading evidence to show that it took all reasonable

steps to ensure that the doors were closed before the train departed a station and that the doors on the far side were always closed. [19] The defendant however elected to lead no evidence.

Causation

- [34] Had the far side door been closed the plaintiff would not have fallen out of the train. The open door (left open wrongfully and negligently) was a *conditio sine qua non* for the fall and the injuries suffered by the plaintiff. [20]

Contributory negligence

- [35] There is no evidence of contributory negligence. It was suggested in cross examination that the plaintiff had jumped from the train, but the defendant's witness who gave evidence to the effect that he had been told this by the plaintiff had to concede that his memory may be faulty.

[36] The plaintiff's undisputed evidence was that he was on his way home and intended to disembark at Pilot station. There would be no reason for him to disembark at the Lindela station. There was also no evidence that his behaviour differed from that of the other passengers when the explosion occurred in the back of the carriage and that he jumped out because of fear or that he over-reacted.

Conclusion

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

[38] I therefore make the order as set out above.

J MOORCROFT

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting 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 CaseLines. The date of the judgment is deemed to be 14 FEBRUARY 2023.

COUNSEL FOR THE PLAINTIFF: E KROMHOUT

INSTRUCTED BY: MNGUNI

ATTORNEYS INC

COUNSEL FOR DEFENDANT: L MATSIELA

INSTRUCTED BY: PADI

INC

DATE OF THE TRIAL: 7

& 8 FEBRUARY 2023

DATE OF ORDER: 14

FEBRUARY 2023

DATE OF JUDGMENT: 14

FEBRUARY 2023

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- [1] CaseLines 027-37.
- [2] Particulars of claim, paras 6, 8.12, 8.13, and 8.15.
- [3] Particulars of claim, par. 8.12.
- [4] CaseLines 032-1.
- [5] The plaintiff testified through a Zulu/English interpreter, Mr. Mthombeni.
- [6] CaseLines 027-4.
- [7] See *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) par. 79 et seq, and *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC) paras 16 to 21.
- [8] See *Mashongwa v Passenger Rail Agency of South Africa* par. 23. Mogoeng CJ said: “An omission will be regarded as wrongful when it ‘evokes moral indignation and the legal convictions of the community require that the omission be regarded as wrongful.’”
- [9] *Kruger v Coetzee* 1966 (2) SA 428 (A) 430E-F.
- [10] I.e., negligence.
- [11] The reasonable man, travelling on the proverbial bus to Putney.
- [12] For instance, in *Transnet Ltd t/a Metrorail and Another v Witter* 2008 (6) SA 549 (SCA) 555 the Supreme Court of Appeal evaluated the written operating instructions of the appellant and heard evidence by experts. Such a document and such evidence could very well be very relevant to the present matter but neither the plaintiff nor the defendant elected to present such evidence. In *Mazibuko v Passenger Rail Agency of South Africa*, 2011/40493, South Gauteng High Court, 7 December 2012, reference was made to the Metrorail General Operating Instructions.
- [13] *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC).
- [14] *Shabalala v Metrorail* 2008 (3) SA 142 (SCA) par. 8, *Transnet Ltd t/a Metrorail and Another v Witter*
- [2008] ZASCA 95; 2008 (6) SA 549 (SCA) *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC) paras 9, 18, 44 to 62, *Motloun v Passenger Rail Agency of South Africa* (PRASA) 2022 JDR 0398,
- [2022] ZAGPJHC 50 paras 11 to 15, *Mmatli v SA Rail Commuter Corporation*, 2009/51438, South Gauteng High Court, 30 January 2012, *Mazibuko v Passenger Rail Agency of South Africa*, 2011/40493, South Gauteng High Court, 7 December 2012, paras 31 to

36. In the latter case negligence stemmed from the General Operating Instructions (not relevant from the present) or from the failure of the rail operator to give proper instructions and imposing obligations on staff. Weiner J said in par. 33 that “no train should be in motion unless all the doors are properly closed” and in par. 34 that to “avoid liability, the defendant would have to take such reasonable steps necessary under the circumstances to prevent people in the position of the plaintiff from being harmed whilst travelling on a moving train.”
- [15] ‘Bewyslas’ or ‘burden of proof.’
- [16] Pillay v Krishna 1946 AD 946 at 952.
- [17] See Shabalala v Metrorail 2008 (3) SA 142 (SCA) paras 11 and 12.
- [18] ‘Weerleggingslas.’ See South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A) 548, Hoffmann & Zeffertt The South African Law of Evidence 4th ed. 1988 p 496, and Schwikkard & Others Principles of Evidence 4th ed. 2014 par. 31.2.
- [19] In the words of Weiner J (as she then was) in Mazibuko v Passenger Rail Agency of South Africa, 2011/40493, South Gauteng High Court, 7 December 2012, the defendant “failed to provide any evidence of measures adopted to protect the plaintiff in such a situation.”
- [20] See the distinction between factual causation and legal causation in Mashongwa v Passenger Rail Agency of South Africa 2016 (3) SA 528 (CC) paras 63 to 69.

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