

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 03095/2017

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

08 FEBRUARY 2022

.....

Date

.....

ML TWALA

In the matter between:

**ZUNGULA:
PLAINTIFF**

SINDISWA

And

PASSENGER AGENCY OF SOUTH AFRICA
DEFENDANT

JUDGMENT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be 8th of February 2022

TWALA J

- [1] This case is about the plaintiff who sustained injuries when she fell and landed between the train and the platform at Horizon Station on the 30th of November 2016. She sues the defendant for damages arising out of that incident and its consequences.
- [2] The parties have agreed that the question of quantum be separated from the issue of liability in terms of Rule 33(4) of the Rules of Court and be postponed for determination at a later date. Furthermore, at the start of the hearing the defendant moved for the amendment to its plea to be admitted which notice of amendment was filed on the 13th of January 2022, just two days before the hearing of this matter. Initially the plaintiff chose not to file any objection to the amendment, instead chose to proceed with the trial of the case. I reserved my judgment as to whether I would allow the amendment or not and indicated that I will deal with same in this judgment.

- [3] It is however, during argument, that counsel for the plaintiff lodged an objection to the proposed amendment of the defendant's plea and submitted that it was agreed at the pre-trial between the parties that the issue of the injuries sustained by the plaintiff in the incident and its sequelae is irrelevant for the determination of liability. It is improper for the defendant to now coming before this court and seek to amend its plea without affording the plaintiff an opportunity to prepare for trial on this point. If the amendment were to be allowed, so it was contended, the plaintiff would be prejudiced in the conduct of its case.
- [4] It is on record that the defendant is defending the matter and filed its initial plea on the 16th of May 2017 wherein it denied knowledge of the injuries sustained by the plaintiff in the incident. The defendant filed an amended plea on the 23rd of July 2018 and again denied knowledge of the injuries sustained by the plaintiff in the incident. In the proposed amendment of the defendant's plea filed on the 13th of January 2022, two days before the hearing of this matter, the defendant now pleads that the injuries sustained by the plaintiff were not directly caused by the incident and that the alleged amputation was as a result of a septic/infection wound whilst admitted at the Hospital.
- [5] It is trite law that a Court may, at any stage of the proceedings before judgment, grant a party leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit. Furthermore, it has long been established that the duty of the presiding Judge is not only that of a referee to ascertain that the rules are observed by the parties but also to ensure that one party does not take advantage of the other and is to ensure that justice is done.

[6] It is necessary to restate what is recorded in the pre-trial minute held between the parties on the 6th of July 2021 which was signed by both parties on the 7th of July 2021 wherein it is stated as follows:

“Para 9. The plaintiff seeks the following admissions from the defendant in respect of the deficits and sequelae the plaintiff suffers from as a result of the injuries sustained in the collision:

9.1 Does the defendant admit that the plaintiff was admitted at Leratong Hospital for medical care and treatment on the 30th of November 2016 and discharged on the 24th of January 2017?

9.2 Does the defendant admit that the plaintiff sustained the following injuries as a direct link of the accident?

9.2.1 Fracture of the left leg which was subsequently amputated;

9.2.2 Soft tissue injuries;

9.2.3 Minor head injury with neurocognitive and psychological sequelae;

9.2.4 Emotional and psychological trauma.

Defendant is required to give basis for which it denies the injuries having regard to the plaintiff’s medical report and hospital records in confirmation:

Defendant’s Answer:

The above is noted as recorded in the hospital records, however, is not relevant in the determination/ adjudication of the aspect of merits/liability.

9.3 *Does the defendant admit the diagnosed injuries are linked with the accident in question?*

Defendant's Answer:

The above is noted as recorded in the hospital records, however, is not relevant in the determination/adjudication of the aspect of merits/liability.

9.4 *Does the defendant admit that the plaintiff was treated as follows following the accident:*

9.4.1 *surgical intervention with fixatives in situ;*

9.4.2 *conservative treatment;*

9.4.3 *crutches;*

9.4.4 *plaster of paris;*

9.4.5 *physiotherapy;*

9.4.6 *amputation;*

9.4.7 *debridement;*

9.4.8 *psychological counselling.*

Defendant's Answer:

The above is noted as recorded in the hospital records, however, is not relevant in the determination/adjudication of the aspect of merits/liability.

[7] Although the Court has the power to grant a party leave to amend its pleadings at any stage of the proceedings before judgment is delivered, the Court must exercise its discretion judicially and will only do so if there is no substantial prejudice that would be meted to the other party. In casu, the parties agreed in the pre-trial minute that issues relating to the injuries of the

plaintiff are irrelevant in the determination of the merits or liability. It is therefore disconcerting for the defendant to resile from that agreement only two days before the trial. The timing of filing the notice of amendment two days before trial deprived the plaintiff the opportunity to prepare and to lead evidence on that particular issue in the trial.

[8] It should be remembered that the privity and sanctity of the contract should prevail at all times. It has been decided in a number of cases that the courts should not easily allow parties not to respect and honour the terms of their agreement unless it is demonstrated that certain terms of the agreement are prejudicial to one of the parties. Put differently, courts have been enjoyed to hold parties to the terms of their agreement unless such terms of the agreement are against public policy.

[9] In *Mohabed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd (183/17) [2017] ZASCA 176 (1 December 2017)* the Supreme Court of Appeal reaffirmed the principle of the privity and sanctity of the contract and stated the following:

“paragraph 23 The privity and sanctity of contract entails that contractual obligations must be honoured when the parties have entered into the contractual agreement freely and voluntarily. The notion of the privity and sanctity of contracts goes hand in hand with the freedom to contract, taking into considerations the requirements of a valid contract, freedom to contract denotes that parties are free to enter into contracts and decide on the terms of the contract.”

[10] The Court continued and quoted with approval a paragraph in *Wells v South African Alumenite Company 1927 AD 69 at 73* wherein the Court held as follows:

“If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by the courts of justice.”

[11] Recently the Constitutional Court in *Beadica 231 and Others v Trustees for the Time Being of Oregon Trust and Others CCT 109/19 [2020] ZACC 13* also had an opportunity to emphasize the principle of *pacta sunt servanda* and stated the following:

“paragraph 84 Moreover, contractual relations are the bedrock of economic activity and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other parties for their mutual gain. Without this confidence, the very motivation for social coordination is diminished. It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.

*Paragraph 85 The fulfilment of many of the rights promises made by our Constitution depends on sound and continued economic development of our country. Certainty in contractual relations fosters a fertile environment for the advancement of constitutional rights. The protection of the sanctity of contracts is thus essential to the achievement of the constitutional vision of our society. Indeed, our constitutional project will be imperilled if courts denude the principle of *pacta sunt servanda*.”*

[12] I am of the respectful view therefore that the proposed amendment should not be allowed since there was an agreement between the parties that the issues relating to the injuries of the plaintiff will only be relevant in the determination of the quantum of the damages. To allow the amendment against what was agreed upon by the parties will be prejudicial to the plaintiff since it deprives her the opportunity to deal with the issues in the present trial. Even if there was no such agreement concluded at the pre-trial, the plaintiff stands to be prejudiced by the proposed amendment for its claim against the hospital might have become proscribed. The defendant had ample opportunity to bring the amendment and has done so twice already without raising the issues of the injuries. It is patently clear that the defendant is taking advantage of the plaintiff and that should not be countenanced. The irresistible conclusion is therefore that the notice of the proposed amendment falls to be dismissed.

[13] The genesis of this case arises from the 30th of November 2016 when the plaintiff and her group, after finishing writing their last examination paper rushed to the Horizon Station to board a train to Stretford. As testified by the plaintiff, she arrived at the Horizon Station with her friends and decided to celebrate the writing of their final examination by buying three litres of red wine. They were about sixteen or seventeen in number though not all of them were drinking. She put her sling-bag on the floor and went to the bathroom with about five of her friends as they prepared to board the train that was about to arrive at the time. As she was dressing herself up in the bathroom, her other friends warned them that the train was coming and as she came out of the bathroom the train was entering the platform.

[14] She waited behind the groups on the platform for her turn to board the train as she was last in line. She testified further that the platform at Horizon

Station was lower than the train. As she put her foot on the train and the other foot was hanging in the air, the train jerked and started to move forward causing her to lose her balance and she fell between the train and the platform. Her left leg was injured in the process and she was taken to Leratong Hospital where she was hospitalised and received treatment for a period of two months. She observed that the train or coach she was entering did not have any hand rails at the door – hence she could not hold on to anything when she lost her balance. Furthermore, there was no security or train marshals and or guards posted at the station nor did she hear any verbal or oral warning nor even a whistle was blown to warn passengers that train is about to depart from the platform or station.

[15] She recalls having been pulled out from where she landed between the train and the platform by her friends Tshepo and Fats and was placed on the grass on the platform whilst awaiting medical assistance. She did not recall talking to anyone at the time as she was experiencing severe pains on her foot. At the time she was boarding the train, it was stationary and its doors were open. She attempted to board the coach immediately behind that of the drivers and she had a ticket going to Stretfort although she resides in Orlando East in Soweto. This is so because she went to Stretfort the previous day and slept there at a friend's house as they were preparing for the examination. The coach she attempted to was not full of passengers at the time. She had consumed alcohol with her friends at the station but she was not drunk when the incident happened.

[16] Mr Tshepo Eugene Khapule (*"Khapule"*) is the witness for the plaintiff who testified that he was in the company of the plaintiff at the Horizon Station on the day of the incident and was the one who retrieve the plaintiff from where she landed between the train and the platform when she fell. The train was

stationary and its doors were open when the plaintiff attempted to board the train. Her one foot was inside the train and the other floating in the air when the train shook and pulled away causing her to lose her balance and fell between the train and the platform. They banged the body of the coach and shouted for the driver to stop and when it stopped he went down to where the plaintiff landed as she fell and pulled her to the platform. He could clearly see the plaintiff boarding the train from where he was standing inside the coach.

[17] He contributed to the buying of the three litres of wine and participated in consuming the alcohol but it was not much and they were not drunk. When he saw the train approaching, he and the other friends warned the people who were at the bathroom of the coming train and the plaintiff came out as the last group from the bathroom. She was the last to board the train and it shook as she was boarding causing her to lose her balance and fell. The doors of the train were open when it arrived and were still open when it left Horizon Station. He did not hear any verbal or oral warning nor any blowing of the whistle to warn passengers that the train was about to depart the station. It shook and pulled away for about one to four meters and stopped before the head coach left the platform as they shouted for the driver to stop.

[18] The defendant called Mr Russell Faasen Tritchard (*"Tritchard"*) who is its Protection Official to testify. He received a complaint at Horizon Station on the day and attended there to find the plaintiff who was injured on her left leg. He spoke to the friend of the plaintiff who informed him of what had happened. He then called the ambulance and Mr Norman Wayne Laedeman, from the investigating team of the defendant. On his arrival, Mr Laedeman took over the scene and he left to attend to other things. He did not take a

statement from the friend or the plaintiff but only made notes for himself of what he was told by the friend.

[19] Mr Laedeman (*“Laedeman”*) testified that he was called to the scene of the incident on the day in question and noted a statement from a friend of the plaintiff. He further noted statements from the train guard and the train driver. He does not know how the accident happened.

[20] Mr Lebohang Bongani Tlholole (*“Tlholole”*) is the train driver who testified that he reduced speed as he approached Horizon Station and stopped at the platform without incident on the day in question. He waited for the signal from the train guard that it was safe for the train to leave the station and when he received the signal as a single bell chime, he released the handbrake of his train and started moving. The train moved for between six and ten meters and he immediately brought it to a stop as he received the three bell chime from the train guard which signalled for him to stop the train.

[21] As a precaution, he waited in his cabin for some time for another signal from the train guard before he disembarked from his leading coach to investigate what was happening. He saw the security guards and other people surrounding an injured person and when he approached the security guards stopped him. He did not witness how the incident occurred since from where he is seated in his cabin he is unable to see the surroundings of the train. His train did not jerk or shake before leaving since the platform at Horizon Station has an incline or downward gradient – allowing the train to roll forward when its brakes are released.

[22] According to Ms Julia Mapule Mocumi (*“Mocumi”*) who was the train guard on the day in question, she pressed the lever to open the doors when

the train stopped at Horizon Station to allow passengers to disembark and those on the platform to embark the train. She does not know if all the doors were closed or open when the train reached the platform. As the train guard she occupies the rear or last coach of the train. Her duties entail the opening of the doors when the train stops at the platform and after ascertaining that all is safe, to close the doors and signal to the driver that it was safe to depart from the platform. She signals to the driver to depart by pressing the bell which gives a single chime and if there are problems, she would press the bell to signal with three chimes to the driver to stop the train.

[23] After the train had stopped, she witnessed and observed the plaintiff disembarking the train from the front coaches and started running towards the gates of the ticket examiners. She was moving in zig-zag fashion. She blew her whistle twice to signal that the train is about to depart and eventually pressed the lever to close the doors and signalled to the driver that it was safe to depart the station. When the train started moving, she observed the plaintiff starting to run alongside the train towards the end of the platform and at the point when the plaintiff attempted to reach for the doors of the train, she pressed the three chime bell to signal to the driver to stop the train. When she saw the plaintiff running alongside the train towards the end of the platform and as she was behind the yellow line, she thought she is one of those people who are avoiding the ticket examiners.

[24] She testified further that the train did not jerk when it departed the but it smoothly pulled away from the platform. She did not know what caused the plaintiff to fall between the train and the platform. She alighted from her cabin and went to investigate and found the plaintiff lying on the grass surrounded by other passengers with her foot covered with handkerchiefs where it was injured. She then reported the matter to her office. She made a

statement to the investigators of the defendant about eight months after the incident.

[25] It is trite that for the plaintiff to succeed in the cases that involves negligence, it must prove that there was a duty of care owed to it by the defendant which the defendant has breached and that the breach has caused harm to occur which resulted in damages.

[26] In *Kruger v Coetzee* 1966 (2) SA (A) 430 the Supreme Court of Appeal stated the following:

- 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.*

[27] In *Le Roux and Others v Dey* [2011] (3) ZACC SA 274 (CC) the Constitutional Court stated the following at para 122:

“In the more recent past our courts have come to recognise, however, that in the context of the law of delict: (a) the criterion of wrongfulness ultimately depends on a judicial determination of whether – assuming all the other elements of delictual liability to present – it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and (b) that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it should be

borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct."

[28] In *Country Cloud Trading cc v MEC Department of Infrastructure Development* [2014] ZACC 28; 2015 (1) SA 1 (CC) the Constitutional Court sated the following:

"Wrongfulness is an element of delictual liability. It functions to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether 'the social, economic and other costs are just too high to justify the use of the law of delict for the resolution of the particular issue'. Wrongfulness typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirable and overly burdensome to impose liability."

[29] The central issue in this case is whether the defendant, through its employees, is to blame for the incident which caused the plaintiff serious injuries to her left leg. It is undisputed that the plaintiff was involved in the incident which caused her to suffer injuries on the day in question. What is in dispute is whether the defendant, through its employees was negligent which negligence caused the plaintiff to fall between the platform and the train causing her to suffer the said injuries. The crux of the dispute is whether the plaintiff attempted to board a moving train or the train was stationary when she started boarding it but it then started moving before she could put her whole body inside the train causing her to lose balance and fall between the train and the platform.

[30] It is well established that in civil cases the onus is on the plaintiff to prove its case on a balance of probabilities and where there are factual disputes, in resolving those factual disputes the Court will employ the technique which was summarised as follows in *Stellenbosch Farmers' Winery Group Limited and Another v Martell & Cie SA and Others 2003 (1) SA 11 (SCA)*:

“Paragraph 5 On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by court in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witnesses’ candour and demeanour in the witness-box; (ii) his bias, latent and blatant; (iii) internal contradictions in his evidence; (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions; (v) the probability or improbability of particular aspects of his version; (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness’s reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party’s version on each of the disputed issues.

In the light of its 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 the 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 are equipoised probabilities prevail."

- [31] The defendant's case is that the plaintiff attempted to board a moving train and thereby placed herself in danger of sustaining an injury. In other words, by attempting to board a moving train the plaintiff voluntarily assumed the risk of sustaining an injury or causing harm to herself. The relevant and factual witnesses for the defendant on this point are the train driver and the train guard.
- [32] The defendant criticised the evidence of the plaintiff in that she disclosed that she had consumed alcohol before the incident occurred only when she was under cross examination. This criticism, as contended by the defendant, creates doubt as to the credibility of the evidence of the plaintiff. Furthermore, it was contended that by consuming alcohol before boarding a train the plaintiff voluntarily assumed the risk of injuring herself in the process and the situation became worse when she attempted to board a moving train.
- [33] It is undisputed that the plaintiff had consumed alcohol at the station before the incident occurred. However, as I understood her evidence and that of Khapule, they organised and bought three litres of wine which was shared amongst the sixteen to seventeen individuals. Although it is not clear exactly

what quantity was consumed by the plaintiff, it was urged upon the court to take cognisance of the undisputed evidence that her breath smelled of alcohol even five hours after the incident when she was preparing for theatre at the hospital.

[34] I find myself in disagreement with the plaintiff. I cannot consider the issue of the plaintiff disclosing that she consumed alcohol only under cross examination in isolation. It has been established in a number of decisions that the court should consider the testimony of the plaintiff and all other evidence before it to make a credibility finding. The fact that she did not voluntarily disclose that she had consumed alcohol before the incident when she was giving evidence in chief does not mean that I should discard her testimony as an untruth of what happened on the day. In my view, the plaintiff gave a detailed account of the incident in a clear, unambiguous and satisfactory manner.

[35] I am unable to disagree with the plaintiff that she was not drunk when the incident happened. She testified that she was aware of what was happening around her at the time – hence she was able to give a full account of the incident. I do not intend to venture on speculation as to whether the plaintiff was drunk and or whether the alcohol consumption by the plaintiff contributed to the incident occurring. There is no evidence before me that the plaintiff was drunk at the time of the incident. Mocumi testified that she saw a lady on the platform who she could not tell whether she was running or walking but later mentioned that this lady was walking in a zig-zag fashion. I am of the respectful view that this is insufficient to make a finding as to whether the plaintiff, if that is the person Mocumi is talking about, was drunk at the time nor to find that the drunkenness of the plaintiff contributed to the occurrence of this incident.

- [36] Undoubtedly Khapule's testimony in as far as being with the plaintiff from the college to the point when he and other fellow students or passengers called for the people who had gone to the bathroom that the train was coming corroborates that of the plaintiff. However, Khapule had difficulties in explaining his position in the coach at which the plaintiff was injured when she attempted to embark the train. His testimony also corroborates that of the plaintiff in that there were no hand rails at the door entering the coach – hence she could not hang onto something as she lost her balance when the train jerked or started moving. Khapule placed himself in different positions in the coach and it is clear that his evidence cannot be relied upon in determining how the plaintiff got injured. But regard being had to the fact that it was him and one Fats who immediately jumped to rescue the plaintiff, it is undisputable that he saw the plaintiff fell and acted as he did.
- [37] Khapule's testimony stands uncontroverted when he testified that the train doors were wide open when it arrived at the station and that they remained open when people disembarked and embarked and even when the train departed the doors were still wide open. Mocumi testified that she only presses the lever to close and open the doors but she does not know if the doors were closed or open when the train departed the platform. The plaintiff's version is that she embarked a stationary train and the doors were open at the time. This is in line with Mocumi's testimony that she opened the doors when the train arrived and stopped at the platform.
- [38] Nothing turns in the argument that the train never jerked and or shook that day before departing because of the way the rail line is laid out at Horison Station. It is my considered view that both phenomena of shaking or jerking are indicative that the train moved at that particular moment. Considering the

uncontroverted testimony of the plaintiff that there were no hand rails at the door of the train at the time which testimony was corroborated by Khapule who went to the extent of saying that the train was vandalised, jerking and or shaking signifies movement of the train which caught the plaintiff by surprise as she was embarking the train with one foot on the train and the other floating in the air. Thus, the plaintiff lost her footing or balance and could not hold onto any hand rail to save herself and landed between the platform and the train in the process sustaining serious injury to her left leg.

[39] Tlholole was calm when he gave his evidence and was clear and to the point. In a nutshell his evidence was that the train did not jerk or shake when it departed the platform since the rail line is in the incline gradient or downward slope at Horison Station. However, he did not see the incident and could not dispute that the plaintiff lost her balance and fell between the train and platform when she was boarding the train which then started to depart the platform. From his position as the driver he is unable to see what is going on around his train – he relies on the guard who signals for him that it was clear and safe, and if the robot signal in front of him signals that the passage in front is also clear, he then proceeds to depart the platform.

[40] Mocumi, whose duties as a train guard was to ascertain that the platform is safe before signalling to the driver to depart, was all over the place when she initially testified. She testified that she saw a woman on the platform but she was not sure whether this woman was running or walking. Later on she testified that she observed the plaintiff disembark from the train but cannot account when exactly the plaintiff boarded the train. If she was keeping a proper lookout as her duties required her to do, she should have seen the plaintiff boarding the train. However, the uncontroverted evidence is that, after writing her final examination paper the plaintiff came from college with

her student friends to board the train at Horison Station. They waited for the train from around 12H30 until after 14H00 when the train arrived. She never embarked and disembarked from the train at any stage. The only time she attempted to embark on the train is when this incident occurred.

[41] Mocumi's testimony that she saw the plaintiff disembark from the front coaches and ran towards the entrance gate manned by the ticket examiners and when the train started moving, she turned around and started running alongside the train towards the end of the platform appears to be her own fabrication. The undisputed evidence is that the plaintiff had a train ticket when the incident occurred and therefore she had no reason to run to the entrance gate manned by the ticket examiners and thereafter turn around and run towards the end of the platform 'like the people who run away from the ticket examiners' as testified by Mocumi.

[42] Mocumi testified that the bathrooms on the platform were near to her coach when the train stopped and next to it would have been the entrance gate manned by the ticket examiners. The undisputed evidence is that the plaintiff went to the bathroom earlier before the train arrived at the station and she came out of the toilet when the train was arriving at the platform. Mocumi now wants the Court to believe that she saw the plaintiff run to the train from the direction of the bathrooms which are situate next to the gate of the ticket examiners. It seems to me this is another fabrication by Mocumi to make as though she was keeping a proper look as her duties demand and she saw the plaintiff. If I were to accept this version, it boggles the mind as to why Mocumi signalled that it was safe and clear for the train to depart when there was this lady on the platform who was behaving in a strange way.

[43] On the other hand, if Mocumi had already issued the signal for the train to depart, it is worrisome why she did not signal for the train to stop when she saw this lady turning around and starting to run alongside the train. The other problem I have with her testimony on this aspect is that Tlholole and Khapule testified that the train did not move for a long distance. Khapule testified that it moved for about one to four meters and stopped and Tlholole said about six but not more than ten meters. According to Mocumi the plaintiff turned from the gate and started running after the train which was already in motion. If the train stopped within six meters from its point of departure, Mocumi's version is improbable for the train would have stopped before the plaintiff reached it. Plaintiff would not have had to run alongside the train considering that the distance between the entrance gate and the train is estimated at thirty meters by Mocumi.

[44] If Mocumi's duties are to protect and promote the safety of the passengers and should only signal for the train to depart the platform if it is safe to do so, it boggles the mind why she would signal for the train to depart when there is this lady on the platform who is walking in a zig-zag fashion and running towards the entrance gate manned by ticket examiners and suddenly changes her course and start to run alongside the train. Mocumi testified that what drew her attention to this lady was because she was behaving in a strange way. Given the strange behaviour of the plaintiff at the time, Mocumi should have signalled for the train to stop immediately she saw this lady changing her direction and beginning to run first towards the train and then alongside it. Mocumi should not have waited for the plaintiff to attempt to reach for the doors of the train before she signalled for the train to stop.

[45] I understand the common thread in the cases quoted above as that the test to be applied in these circumstances is that of a reasonable person in the

position Mocumi as the train guard. Assuming that the version of Mocumi is correct, the test would then be would a reasonable train guard in the position of Mocumi have signalled for the train to depart when there was a person on the platform who behave in a strange manner. Given the circumstances prevailing at the platform at the time, a reasonable train guard would not have signalled for the train to depart because she would have foreseen that this lady might attempt to board the train when it starts moving which may result in her being injured or harmed.

[46] It shall be recalled that the evidence of Mocumi is that she was concerned with the behaviour of this lady on the platform. Assuming that she had signalled for the train to depart the platform whilst this lady was running towards the entrance gate as contended and the train started moving, Mocumi, as a reasonable train guard should have foreseen the danger of harm being caused immediately the lady changed her course and started running towards the train. She should have signalled for the train to stop at that point before the lady started running alongside the train and attempting to reach for its doors.

[47] In the more recent past in *Mashongwa v Prasa (CCT03/15) [2015] ZACC 36; 2016 (2) BCLR 204 (CC); 2016 (3) SA 528 (CC) (26 November 2015)* the Constitutional Court stated the following when it was dealing with the issue of wrongfulness:

“Para 19 What then is this case about? It concerns physical harm suffered by a passenger when attacked and later thrown off a moving train as well at the sufficiency of the safety and security measures employed by PRASA. And the question is whether PRASA’s conduct was wrongful. Khampepe J pointed out in Country Cloud that:

‘Wrongfulness is generally uncontentionous in cases of positive conduct that harms the person or property of another. Conduct of this kind is prima facie wrongful’.

In my view, that principle remains true whether one is dealing with positive conduct, such as an assault or the negligent driving of a motor vehicle, or negative conduct where there is a pre-existing duty, such as the failure to provide safety equipment in a factory or to protect a vulnerable person from harm. It is also applicable here.

[48] The Court continued to state the following in paragraph 20:

“Public carriers like PRASA have always been regarded as owing a legal duty to their passengers to protect them from suffering physical harm while making use of their transport services. That is true of taxi operators, bus services and the railways, as attested to by numerous cases in our courts. That duty arises, in the case of PRASA, from the existence of the relationship between carrier and passenger, usually, but not always, based on a contract. It also stems from its public law obligations. This merely strengthens the contention that a breach of those duties is wrongful in the delictual sense and could attract liability for damages”.

[49] There is no merit in the defendant’s contention that the train guards are experiencing these situations every day and if they were always to ascertain what people were doing at the platform, the trains would otherwise never depart on time or at all. It has been decided in a number of cases that the defendant owes a duty to protect and transport its passengers in a safe manner. Put differently, there is a pre-existing duty on the defendant to safely transport its passengers. It is therefore not open to the defendant to place the issues of time above the safety of its passengers. The ineluctable

conclusion is therefore that Mocumi failed to execute her duties and her conduct was wrongful and resulted in causing harm to the plaintiff.

[50] In my view, there is merit in the criticism levelled against the defendant that there were no train marshals and or security guards on the platform on the day in question. The presence of the train marshals and or security guards at the platform would have ameliorate the difficulties and challenges faced by the train guard in ensuring the safety of the passenger before signalling for the train to depart. The marshals and or guards would have been in a better position to deal with this lady who was behaving in a strange manner and stop her from attempting to board a moving train as contended by the defendant. The failure to provide such a safety measure by the defendant is wrongful and resulted in the plaintiff suffering harm in her person.

[51] It is my respectful view therefore that the irresistible conclusion is that the defendant's conduct was wrongful in not providing the train marshals and or guards at the station. Furthermore, the conduct of the defendant was wrongful in that the train had no hand rails at the door and in that the train guard delayed to stop the train when by the exercise of reasonable care and deligence, she should have foreseen the danger of the plaintiff causing harm to herself when she turned around and started running alongside the train and should have immediately signalled for the train to stop. I therefore conclude that the defendant owed the plaintiff a duty of care and has breached that duty which breach has caused harm to the plaintiff as a result whereof it suffered damages.

[52] The plaintiff sought an order from this court for the costs of two counsel in this case. The plaintiff's contention is that this case has been in and out of the court for a considerable time now due to its complexity. I do not agree.

This is an ordinary claim for damages against one of the State entities. There is nothing complex about the matter which required the attention of two counsel of almost the same level in practice. Moreover, it has been decided in a number of judgments that the plaintiff must also minimise its damages and the costs related thereto. I am not persuaded by the plaintiff's submission that the matter has been in and out of the court since no evidence was proffered as to what caused the matter to be handled in that manner nor why should the defendant be mulct with the costs thereof.

[53] In the circumstances, I make the following order:

1. The proposed amendment of the defendant's plea is refused;
2. The issue of the quantum of damages is separated from the merits of this case in terms of Rule 33(4) of the Uniform Rules of Court;
3. The defendant is liable to pay 100% of the plaintiff's proven damages;
4. The defendant shall pay the party and party costs of the plaintiff including the costs of one counsel.

TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of Hearing: 17 – 21 January 2022

Date of Judgment: 8th February 2022

For the Plaintiff: Advocate F. Matika
Advocate S. Tshungu

Instructed by: Z & Z Ngogodo Attorneys Inc
Tel: 011 028 1258
Chepape@ngoiawjhb.co.za

For the Defendant: Advocate B.D. Molojoa

Instructed by: Jerry Nkeli & Associates
Tel: 011 838 7280
khuliso@jerryinkelilaw.co.za