



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

(1)	REPORTABLE: <b>NO</b>
(2)	OF INTEREST TO OTHER JUDGES: <b>NO</b>
(3)	REVISED:

**Date:** 08/06/2022 **Signature:**

**Case No. A5046/2021**

**Court a quo Case No: 41452/2017**

**In the appeal in the matter between:**

**NGOBENI RIXILE LORRAINE**

Appellant

and

**PASSENGER RAIL AGENCY OF SOUTH AFRICA**

Respondent

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**JUDGMENT**

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**CORAM: MAHOMED AJ, WEPENER J, DIPPENAAR J, concurring.**

This appeal is with leave of the Supreme Court of Appeal against the judgment of my sister Crutchfield AJ, as she was then, which was handed down on 20 September 2019, wherein the appellant's claim was dismissed with costs. The appeal is against the whole of the judgment and order of the court a quo.

## **THE FACTS**

1. On 18 October 2017, the appellant was a commuter on a train operated by the respondent when she fell out of a carriage whilst the train was in motion on approaching a station. She fell onto the platform and sustained bodily injuries.
2. She was returning home to Vereeniging, from work. At approximately 18h00, she took the train at the Booyens station to change over at the New Canada station to her destination at Midway station. It was peak time being the end of a workday.
3. The evidence is that when she boarded the train at Booyens, all the seats were taken but she found sufficient room for herself, to stand in the middle of the coach.
4. She noted that the doors of her carriage were closed, until Orlando station and once the train departed that station the doors remained open.
5. She did not see any guards either on the platform or in the coach throughout her journey.
6. At Orlando, the train was full, and more passengers pushed into the carriage, and the doors were open. The doors remained open through Nancefield, Kliptown, Chaiwelo and also as the train approached the

Midway station. People on the train were in a rush to disembark, whilst the train was still in motion, they pushed her about and she heard shouts, to disembark with others, she lost her balance and fell off the train. She was unable to move to any safety point in the carriage, it was just too full, there was no room to move.

7. She knew her friend Charity was behind her and had her hand on her shoulder, when she fell out and others well on top of her. Her evidence is that Charity her friend fell onto her, but as she hit the platform, she lost consciousness and does not remember anything after her fall until she found herself in Chiawelo clinic. She does not remember how she was taken to the Clinic.
8. She was later transported by ambulance to the Chris Hani Baragwanth Hospital where she was admitted from 19 October 2017 to 4 November 2017.
9. As a result of her fall, she injured her legs and right ankle, which was treated at the hospital.
10. The respondent in cross examination highlighted that her responses in her reply to request for further particulars was at variance with her evidence in court. She could only explain it as her attorney having misunderstood her facts and was mistaken.

11. The appellant under cross examination testified that she was a regular train commuter and conceded that at times passengers block the doors of the train.
12. She also knew that often the trains are full at certain times.
13. She testified that she knew passengers jumped out whilst the train was moving and before the train stopped at the platform. It was put to her that she was not on the train and that she did not sustain her injuries on the respondent's property. This was denied.
14. The respondent closed its case without leading any evidence, it relied on the cross examination of the appellant who obviously bears the onus.
15. The grounds of appeal are as follows:
  - 15.1. the court a quo placed too high a burden on the plaintiff, when it expected her to know how many persons were in her carriage
  - 15.2. the court a quo ought not to have made a credibility finding against the plaintiff for any contradictions as those facts were not relevant to the determination of the defendant's liability/negligence.

- 15.3. the court placed too much emphasis on whether the plaintiff saw security guards at the stations and on trains, those facts do not “cure” the negligence of the defendant, in the form of an omission, when it allowed a train to move with open doors, and by permitting the train to be overcrowded.
- 15.4. the court a quo finding incorrectly when she failed to call witnesses to corroborate that she was on the train, when she presented a valid ticket for the relevant date which formed part of the evidence, particularly in that the evidence was unchallenged
- 15.5. the court a quo should not have found against the plaintiff for failing to allege that the defendant owed the plaintiff a legal duty and it breached that duty, as the plaintiff argued a negligent omission.
- 15.6. the court a quo erred in referring to a public duty and overlooking the fact that the plaintiff’s evidence remained unchallenged.

## **ARGUMENTS**

16. Mr Mashaba SC appeared for the respondent and submitted that there was a “paucity of evidence,” presented on behalf of the appellant at the trial which effectively called upon the court a quo to draw inferences, and

“fill in the gaps” for her. He submitted it is not the function of a court and that the court a quo was correct in dismissing her claim. Counsel submitted that the appellant argued negligence of the respondent but had not proved it, nor the causal link between the injury and the negligence.

17. Mr Mashaba, in a very comprehensive set of heads of argument which this court appreciates, submitted that the appellant failed to allege an omission and any legal duty on the part of the respondent to establish the respondent's liability. No such averments were made in the pleadings and the whole purpose of the pleadings is to enable a party to know the case it is to meet. He submitted that the omission was averred only during argument.
18. The respondent argued further that no causal link was established between the acts or omissions of the respondent and the injuries that the appellant allegedly sustained. The respondent maintained that from her evidence, the appellant was pushed out the moving train, by other commuters on the train when she fell onto the platform and sustained bodily injuries. The respondent cannot be held liable on the facts and accordingly the court a quo was correct in dismissing the appellant's claim.
19. Mr Mntombeni appeared for the appellant, and submitted that the pleadings may not mention an omission but it is clear that the respondent

owed a duty and failed in its duties, when it “allowed” the doors of the train to be left open, when it “allowed” the carriages to be overcrowded and when it “failed to place guards on the trains and platforms”, whose job it is to ensure safety on the trains and at stations.

20. The relevant paragraphs of the particulars of claim, must be considered,

*“5. The foregoing injuries were caused solely as a result of the negligence of the defendant and /or its agents, who were negligent in one or more of the following respects:*

*5.1 By failing to keep the train under proper control.*

*5.2 allowing the train to have open doors whilst it was not at the train platform, and it was in motion.*

*5.3 By failing to maintain the safety of the passengers of the train as a result the plaintiff sustained injuries.*

*5.4 by allowing the train to be overcrowded.*

*5.5 by failing to properly ensure the safety of the passengers.*

*5.6 By failing to safeguard the well-being of the passengers in general, in particular the plaintiff when by exercise of due and reasonable care the defendant could and should have done so.*

*5.7 By failing to maintain the train and keep it in good condition.”*

21. Mr Mtombeni informed the court that those were the allegations that the appellant relied on to prove negligence.<sup>1</sup>
22. He argued that the pleadings as set out must be read in the context of what is “commonsensical” as espoused in the judgment in Mashongwa<sup>2</sup>, where the court stated at [52],

*‘It is also commonsensical that keeping the doors of a moving train closed is an essential safety procedure. Mr Mashongwa would probably not have sustained the injuries that culminated in the amputation of his leg, had Prasa ensured that the doors of the coach in which he was were closed while the train was in motion. It was thus negligent of Prasa not to observe a basic safety-critical practice of keeping the coach doors closed while the train was in motion, and therefor reasonable to impose liability for damages on it if other elements are proved.’*

23. It was not disputed that the appellant alighted a train after work in Booyens and was returning home to Vereeniging, and that she changed trains at the New Canada station. It is common cause that she was to pass several stations before she reached her destination.
24. During argument Mr Mtombeni submitted that <sup>3</sup>,

*“there was no way she could keep her balance because there was a huge group of people pushing from behind, she lost her balance as a result. Had the train doors been closed that would not have happened, ...”*

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<sup>1</sup> Record caselines 08-12 line 24

<sup>2</sup> Mashongwa v Passenger Rail Agency of South Africa 2016(3) SA 528 CC

<sup>3</sup> Caselines 08-83 lines 17-20



*.... Fact is<sup>4</sup> that they allowed that particular train to take its journey while crowded, with doors open and on that particular coach there was no security guards as the plaintiff testified, that at New Canada station where she boarded the train, she did not see any security guard.*

*M'Lady<sup>5</sup> I want to go back to the to emphasise on the point of the open doors. The form of breach in this regard is gross negligence, for them to allow the train to be in motion with the door open.*

*M'Lady<sup>6</sup> it is clear from that protection that ensuring that the doors are closed while the train is in motion is a precautionary measure that PRASA must take every time when they operate their service.*

*M Lady<sup>7</sup> as like in the plaintiff's case PRASA failed to take reasonable steps to prevent harm from occurring harm in the form of plaintiff falling and getting injured. By taking simple steps, M Lady, of ensuring that from every station before the train continues its journey the doors must be closed, that they failed to do. And that had they had a security guard he would have alerted the driver that there are certain doors that are not closed while the train was in motion.*

25. Counsel's argument traverses the respondent's legal duty and its omission, albeit that he does so only in the argument. I could find nothing on the record that he changed tack when he heard the respondent's submissions.<sup>8</sup> His argument obviously followed the cross examination of the appellant. The argument supported his pleadings.

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<sup>4</sup> Caselines 08-85 lines 1-5

<sup>5</sup> Caselines 08-88 lines 1-4

<sup>6</sup> Caselines 08-99 line 11

<sup>7</sup> Caselines 08 – 99 lines 25

<sup>8</sup> Caselines 05-8 at [26]

26. Counsel submitted that the court placed too high a burden on the appellant, when it required her to know:
  - 26.1. how many passengers were in the coach, or
  - 26.2. how many people from behind her fell on her.
  - 26.3. all details of her falling, as events happened rapidly
  - 26.4. events post-accident, as her evidence is that when she fell onto the platform, she fainted. When she recovered, she was told she was taken to the hospital in a private car.
  
27. Mr Mtombeni submitted that the court ought not to view the grounds of negligence in the particulars of claim in isolation or in a piecemeal fashion, but as a series of events that were interrelated which caused her loss. The doors were open because the carriage was overcrowded as there were no guards or security on the trains to manage the crowd's egress and ingress and the train was "allowed" to move.
  
28. Appellant's counsel submitted that her evidence stood unchallenged. He argued further that the respondent tried to discredit her evidence on facts that have no bearing on the aspect of liability for the omissions, which caused her loss. The respondent in the end put it to her that she was not

on the train and the incident did not happen on its property but outside. However, it failed to lay any basis for the propositions put to her.

29. Mr Mtombeni argued that if the doors were not open and the carriage not overcrowded, she would not have been pushed around, not have lost her balance and fallen out the carriage, the closed doors would have averted the incident that cause her injury.
30. Mr Mashaba SC argued that the appellant conceded that the people blocked doors and she failed to link the conduct of those commuters to the respondent's omission.
31. It was argued further that the appellant in casu failed to discharge her onus in that she failed to prove some of the elements of delict, being act or omission, wrongfulness, causation, negligence, and loss suffered. He submitted the appellant "simply glossed over some of the elements in her evidence and assumed she had proved them."

## **JUDGMENT**

32. The court accepts that the appellant, who included in her discovery a train ticket valid for a month, was on the train on the date at the time. She was a regular commuter on trains, moving between her workplace and home. Her evidence remained uncontroverted.

33. It is probable that she sustained her injuries at the station, the respondent does not provide any evidence to suggest otherwise. The appellant's evidence on the open doors remained unchallenged.

34. The legal writer Beck,<sup>9</sup> writes:

*"The plaintiff's claim must be such as to enable the defendant to know what case he or she is to meet. ... Although pleadings must be carefully drawn and be well turned out, the court ought not to read them pedantically. The rules do not require that pleadings be drawn up in perfect language, but the allegations of the parties should be clearly cognisable. ... "the court should not look at the pleading with a magnifying glass of too high power."*

35. We are of the view that the respondent's legal duty and omission is implicit in the allegations as set out her particulars of claim, in paragraph 20 above.

35.1. The word "allow" means a permission, which can only apply to one who holds authority or control.

35.2. The authorities are clear on 'open doors, on trains in motion,' there is no ambiguity in the pleadings, at 5.2 of the particulars of claim.

36. The respondent did no more than to plead a bare denial. It relied on the cross examination of the appellant and sought to discredit her. Not much

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<sup>9</sup> Beck's Theory and Principles of Pleading in Civil Actions p46

was achieved except for inconsistencies on peripheral points. At the very end of this exercise, it was put to her that she was not injured on its property, however the respondent failed to lay any basis for such a proposition. The appellant was clear on her version.

37. In **MOKWENA v SOUTH AFRICA RAIL COMMUTER CORPORATION AND METRORAIL**,<sup>10</sup> wherein the defendants adopted a similar defence as in casu, Satchwell J, stated on the aspect of the onus,

*“There is the uncontradicted evidence of the plaintiff as to the circumstances in which the accident happened – crowded carriage, open door, and train in motion. It has become trite that the defendants owe a duty to their passengers to transport them to safety and with concern for such safety. It has become trite that trains should not move when the doors are still open alternately should not move until the doors are closed. These are the positive obligations which give rise to delictual liability where passengers fall out of open doors off moving trains.”* Our emphasis.

38. The Honourable Satchwell J, went on to state<sup>11</sup>,

*“The uncontradicted evidence of the plaintiff and the happening of the event is evidence that the reasonable steps were not taken. No-one needs prove what those steps are – the authorities are replete with comments that unclosed doors and moving trains are anathema. All that needs be said is that “the train should not move” in such circumstances.”* Our emphasis.

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<sup>10</sup> 2021 SA (GSJ) case no. 14465/2010 [93]

<sup>11</sup> [94]

39. The plaintiff's allegations are cognisable, if they were not, the respondent would and could have raised an exception, but it did not, because it knew the appellant's case, therefor it adopted the approach that it did.

40. In **NGUBANE v SOUTH AFRICAN TRANSPORT SERVICES**<sup>12</sup>, where the plaintiff, was pushed about in a crowded coach lost his grip on the overhead strap, and fell out the train, the court stated,

*"but the real cause thereof was the conduct of the railway officials in ordering or allowing the train at that stage, to proceed."*

*It was held, accordingly, that it had been proved that the negligence of the respondent's servants had caused the appellant's injuries.*

41. In **MASHONGWA v PASSENGER RAIL AGENCY OF SOUTH AFRICA**,<sup>13</sup> Khampepe J referred to the judgment in **COUNTRY CLOUD TRADING CC**.<sup>14</sup>

*"wrongfulness is generally uncontentious in cases of positive conduct that harms the person or property of another. Conduct of this kind is prima facie wrongful." The Honourable Judge went on to state:*

*"In my view that principle remains true whether one is dealing with positive conduct, such as assault..., or negative conduct where it is a pre existing duty, such as the failure to provide safety equipment in a factory or to protect a vulnerable person from harm." Apart from a contractual obligation between the*

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<sup>12</sup> 1991 (1) SA 756 A, headnote

<sup>13</sup> 2016 (3) SA 528 CC at [19]

<sup>14</sup> 2014 ZACC 28

*carrier and the passenger, PRASA has a public law obligation, which "if breached is wrongful in the delictual sense and could attract liability for damages."*<sup>15</sup>

42. In **MASHONGWA**<sup>16</sup> supra, the court adopted the traditional test to determine causation, the but for test. We are of the view the test is appropriate in casu and the approach to adopt is, "*had the doors of the coach in which the appellant was travelling been closed, the appellant would not have fallen out the coach whilst the train was moving.*"
43. On consideration of the judgment of the court a quo at paragraph 59<sup>17</sup>, the appellant's reliance of the two cases referred to i.e., Mashongwa and the Rail Commuter's Action Group, were for distinct reasons.
- 43.1. The appellant relied on the Rail Commuters case to demonstrate that the court granted a "declarator which established the legal and constitutional duties of the respondent."
- 43.2. The appellant relied on the Mashongwa case to demonstrate that the "Constitutional Court has confirmed that open doors make no sense on any moving train" serviced by the respondent, it must attract liability in delict. Mr Mtombeni in his argument referred to the cases interchangeably at various times.

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<sup>15</sup> Mashongwa supra at [20]

<sup>16</sup> [66]

<sup>17</sup> Caselines 04-29

44. We are of the view that the court a quo rather than to have distinguished the facts in casu from those in Mashongwa,<sup>18</sup> ought to have followed the established fact, as followed in **RAUTINI v PASSENGER RAIL AGENCY OF SOUTH AFRICA**,<sup>19</sup>

*“the Constitutional Court in Mashongwa v PRASA, held that open doors constituted negligence on the part of PRASA and that PRASA’s failure to keep the doors closed while the train was in motion, attracted liability. In essence, the appellant would not have suffered injuries in the manner he did if the carriage doors were closed while the train was in motion.”*

45. We disagree with Mr Mashaba on his submission that, based on the plaintiff’s concession that the doors were closed until Orlando station, the doors were working and therefore the respondent had complied with its duties, as “nothing happened through the other stations until the Midway station.”<sup>20</sup>

45.1 Counsel suggests that for as long as nothing happened, it was permissible for the doors to be kept open.

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<sup>18</sup> Caselines 04-29 , Judgment a quo [59]

<sup>19</sup> (Case No. 853/2020) [2021] ZASCA 158 (8 November 2021) [25]

<sup>20</sup> Caselines 21-28



45.2 It is clear from all the authorities, open doors are the very basis for liability, it is wrongful, and by no stretch of one's imagination, could the legal convictions of any community condone such an omission.

46. The appellant's evidence that she sustained her injury from falling out the moving train with open doors remained uncontroverted. "*When proximity has been established, then liability ought to be imputed to the wrongdoer.*"<sup>21</sup> The court held,

*"PRASA's failure to keep the doors closed while the train was in motion is the kind of conduct that ought to attract liability, ... the court held "it is thus reasonable, fair and just that liability be imputed to Prasa."*<sup>22</sup>

47. In **RAIL COMMUTERS ACTION GROUP AND OTHERS v TRANSNET t/a METRORAIL AND OTHERS**<sup>23</sup>, is noted

*"s11 constitutional rights of commuters, enjoying constitutional rights to life, freedom and security of person, including right to be free from all forms of violence from either public or private sources."* The appellant's constitutionally protected right cannot be compromised where her pleadings and evidence, peripheral in nature, is wanting.

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<sup>21</sup> [68]

<sup>22</sup> [69]

<sup>23</sup> 2005 (2) SA 359 CC flynote

48. We noted Mr Mtombeni's submissions that the stare decisis principles must apply and with reference to the confirmation by the Constitutional Court in Mashongwa supra, closed doors on a moving train are basic common sense. We agree.

49. Accordingly, the appeal must be upheld.

50. The following order is issued:

50.1. The appeal is upheld with costs, such costs to include the costs incurred in the application for leave to appeal both in the court a quo and the Supreme Court of Appeal.

50.2. The order of the court below is set aside and substituted with the following order:

50.2.1. The defendant is liable for the damages suffered by the plaintiff as proved or agreed between the parties.

50.2.2. The defendant is ordered to pay the costs of the plaintiff.

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**MAHOMED AJ**

**Acting Judge of the High Court**

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 8 June 2022.

Heard on: 9 March 2022

Delivered on: 8 June 2022

### **Appearances**

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