



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

Not reportable

Case Number: 46617/2018

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

21 November 2023

.....
SIGNATURE

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DATE

In the matter between:

SIBISI, GLADYS

Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Defendant

JUDGMENT

FORD AJ,

Introduction

[1] The plaintiff instituted a claim for damages against the defendant, on grounds that she was pushed out of a moving train on 9 July 2018 and sustained a number of injuries as a result thereof. In satisfaction of her claim, she seeks

payment from the defendant, in the sum of R850 000.00 (eight hundred and fifty thousand rand), including interests and costs.

- [2] The defendant denies that it is liable to the plaintiff, either as alleged or at all. In turn, contending for a dismissal of the plaintiff's claim, with costs.

Brief factual matrix

- [3] The plaintiff is a 48-year-old female vendor (though referred to as "unemployed" in her particulars of claim), residing at Number 1520, Jabulani, Key Drive Street, Soweto.
- [4] The defendant is the Passenger Rail Agency of South Africa ("PRASA"). It provides rail commuter services to the South African public.
- [5] The plaintiff alleges that, on 9 July 2018, she was a passenger on one of the defendant's trains. She alleges that at Marafe train station in Soweto, when the train was entering the platform, she was pushed out of the train (through an open door) and sustained injuries.
- [6] The defendant denies that the plaintiff was pushed out of its train on 9 July 2018, as alleged or at all.
- [7] On 13 December 2018, the plaintiff instituted action against the defendant, out of this court.
- [8] I am called upon to determine the merits of the action only, as merits and quantum had previously been separated by an order of Wilson J.

Survey of evidence

[9] The plaintiff testified on her own behalf, and the defendant called three witnesses; Dr. L.C. du Preez, Mr. V.H. Mtimkulu and Mrs. B. Mokhutswane. I summarise the evidence of the respective witnesses below.

The plaintiff's case

[10] In July 2018, the plaintiff was residing at 29 Baroto Street, Naledi, which is approximately 10-15 minutes' walking distance from Naledi station. On 9 July 2018 (early that morning), she went to Naledi station, where she purchased a one-way ticket to Marafe train station.

[11] She waited at Naledi station for approximately 3-5 minutes, the train arrived, and she boarded the fourth coach of the train travelling to Marafe station. Upon entering the train, she stood next to the side, where the seats are located, not too far from the door.

[12] The coach in which she was standing was full. She stated, in this regard, that the train was overcrowded.

[13] She testified that, when the train left Naledi station, its doors remained open. She was intending to disembark at Marafe station. As the train entered the platform at Marafe station, there was a shoving and jostling by commuters inside the train and she was pushed out of the train, falling onto the platform. She recalls having some cakes with her, which remained inside the train, when she fell. She also recalls having held onto a plastic bag, before she was pushed out of the train.

[14] Whilst still lying on the platform, two gentlemen, whom she thought were security guards, came to her aid. They tried to lift her, in order for her to stand on her own, but they soon realised that she was unable to do so. The gentlemen then asked her, how they could be of assistance to her and she

requested that they call her son. She then gave them her cell phone, in order for them to call him.

[15] Shortly thereafter, her son arrived, and he with the assistance of the two male persons, assisted her into a vehicle that transported her to the Bheki Mlangeni Hospital (“Bheki Mlangeni”), in Jabulani. She explained that she sustained an injury to her right ankle.

[16] The plaintiff was admitted at Bheki Mlangeni but was later, that same day (between 16h00 and 17h00), transferred to Baragwaneth Hospital (“Baragwaneth”). At Bheki Mlangeni, they fitted a plaster of Paris and gave her medication for pain.

[17] When she arrived at Baragwaneth, she was seen by a doctor, who examined her, but she was unable to recall his/her name because she was in pain. The doctor asked her how she sustained the injuries, and she informed him/her that she was pushed from a train.

[18] After being attended to at Bheki Mlangeni, she was transported to Baragwaneth. She took the documents that she received from Bheki Mlangeni, with her to Baragwaneth.

[19] In response to the document specifying her admission, examination and treatment, the plaintiff stated that the document is signed at the bottom of the page, which looks like a doctor's signature. She reiterated, that she does not know the name of the doctor who treated her, as she was in pain at that stage. She confirmed further, with reference to the manuscript entries on the document, that the doctor who examined her, examined her right ankle.

[20] The plaintiff conceded that she erred, when stating that the doctor examined her right ankle, which would not have been possible considering the fact that

her ankle was in a plaster of Paris cast. She was discharged on or about 19 July 2018.

- [21] The plaintiff's counsel, put to the plaintiff that when the document appearing to be part of a medical report as captured on page 004-47, at the bottom of that page), is considered, it appears to have been signed by a Dr. Desmond Mohape. The plaintiff stated that she was not certain, because in most cases she was in pain. She agreed that the document appears to be signed on 30 May 2018.
- [22] The plaintiff confirmed that she was examined by doctors, but that she was unable to remember being treated by a Dr. Mohape.
- [23] The plaintiff confirmed further that the train ticket handed up to the court, was the original train ticket which she purchased on 9 July 2018.
- [24] In cross-examination, it was put to the plaintiff that; her legal representatives were not present when the incident took place, she consulted with them and gave them instructions on what happened on the day in question, and that she gave them instructions to institute the action. She agreed.
- [25] Accordingly, so the proposition went, all the facts that are mentioned in the pleadings and everywhere else, are information and facts that were provided by the plaintiff to her legal team.
- [26] She was questioned about her place of residence. In this regard, it was pointed out to her that in her testimony, she stated that she stayed in Baroto Street 29, Soweto at the time or during the incident. However, with reference to page 004-8, her physical address is recorded as 1520 Jabulani Key Drive. She confirmed that the aforementioned address was her residential address as of 9 July 2018.

[27] It was pointed out to her, that on the document a number of details are reflected including her gender, her language and an emergency contact. She confirmed that this was correct.

[28] The emergency contact reflected on the document, is a person by the name of Nonhlanhla whom the plaintiff stated was her son. And that his address is also the same as the one referred to above.

[29] The plaintiff was referred to the pleadings, specifically page 002-7. With reference to that document, the pleadings reflect the following at paragraph 1:

"The plaintiff is Gladys Sibisi, an adult female person who is unemployed and who was born on the 12th December 1975 and who resides at NO 1520 Jabulani, Key Drive Street, Soweto."

[30] She accepted that the address provided in her evidence was not the same as the one she testified about, but explained that the address reflected on the pleadings, is her parental address, and that her home address is the one in Baroto Street, which is where she is renting.

[31] The plaintiff was requested to comment on the time entry notice reflected on the hospital document. She confirmed that the time reflected was 21h05pm. It was put to the plaintiff that the document seem to indicate that she was admitted at Baragwaneth at 21h05.

[32] Mr. Shepstone objected to the usage of the document he said:

Mr Shepstone: M'Lord, I object to this completely. The status of this document is what it purports to be. Right. We have admitted the truth of the content of the document. So my learned friend cannot put to this witness that she was admitted at that time at that time. This might be an admission into the ward. We do not know. But this is not even hearsay. It is just a document part of the record. It purports to be a document from Chris

Baragwaneth Hospital. But unless my learned friend wants to call the doctor or the person who filled out this document so that we can determine or if he wants to bring an application to declare that these documents are admissible as hearsay, then he must do so. But he has not done so at this point. So he cannot put that to this witness, with respect.

[33] I provisionally allowed Mr. Mokotedi to put the proposition, he sought to advance to the plaintiff.

[34] Mr. Mokotedi stated that, insofar as the content of the document is concerned, and given its provisional acceptance, that the document would only be used until such time a witness is called to testify in respect thereof.

[35] The plaintiff confirmed that at 12h15 she was actually still at Bheki Mlangeni. She waited for transport but was later transported Baragwaneth, arriving there between 16h00 and 17h00. She was however only examined by the doctors, at night.

[36] Mr. Mokotedi requested the plaintiff to comment on an entry on the document, where the abbreviation "PT" is reflected. Followed by a statement: "*The patient fell after twisting her ankle in paving.*", and an entry reflected as "X2/7 ago". This reference, so it was put to the witness, means "*two days ago*"¹.

[37] In response to an objection, as to what X2/7 meant, Mr. Mokotedi advised that the defendant will be calling a witness who will testify to that effect.

[38] The plaintiff was requested to respond to the manuscript entry on the document, where it is reflected that there was a swollen and tender ankle, followed by the words "*open wounds*". The plaintiff however denied that she had an open wound.

¹ CaseLines 004-12

- [39] The plaintiff confirmed that she bought a ticket at 06h25 on 9 July 2018, and proceeded to the platform, waiting to board the train. Further that the train was overcrowded. She was asked whether the train was full, when it approached the station and she stated that she did not notice, but only became aware, that the train was full, when she was inside.
- [40] The plaintiff explained that Naledi station, is the first station when one travels towards Johannesburg. Further, that there is a train depot next to Naledi station, and that a train will leave the depot station empty and pick up the first load of commuters at Naledi station.
- [41] She conceded that when the train arrived at Naledi station, it did not have passengers, and that commuters boarded the train soon after its arrival.
- [42] When the plaintiff boarded the train, she stood next to the seats. She estimated the distance from the door to where she was standing, to be less than a metre away.
- [43] She reiterated that, the train was full and that she was surrounded by other commuters. There were also commuters where she stood. And the reason why she stood there, so the plaintiff explained, was because she knew that she was going to alight very soon.
- [44] She further confirmed that there were commuters between her and the door, and that there were male commuters who stood at the door, but that there were no commuters standing in front of her.
- [45] It was put to the plaintiff that in her evidence she stated that there were male commuters who stood at the door. The plaintiff then explained that the male commuters were standing on the side of the door. She stated in addition, that commuters were standing in the middle of the door.

- [46] The plaintiff conceded that there were commuters who stood at the door, and that she stood in front of them vis-à-vis the door. It was put to her, that if there was a push, the commuters at the door would have been the first to fall out of the train. The plaintiff disagreed, stating that the commuters stood on the side of the door, and would not have been able to be pushed out of the train.
- [47] She was referred to the defendant's request for further particulars, and the defendant's responses thereto. In this regard, it was pointed out to her, that she said, she held onto a steel pole, located inside the coach, closer to the door.
- [48] The plaintiff was asked about the details pertaining to her being taken to Bheki Mlangeni, by two male persons whom she thought were security guards, including her son. She explained that she was assisted by the security guards and, that they then called her son.
- [49] The plaintiff confirmed that in the request for further particulars, she was asked *"Was the incident reported to the defendant's personnel? If so, plaintiff is requested to state who it was reported to and the date that it was reported."* However, in her evidence, it was put to her, that she stated that the security guards told her son about the incident.
- [50] She explained that, the two gentlemen were the ones who saw her when she was sitting on the floor or on the ground.
- [51] In response to the request for further particulars, it is stated that: *"Plaintiff did not report the incident to any personnel of the defendant. However, she was assisted by two unknown males whom she thought were security guards of PRASA who then took her from the scene of incident to the Mlangeni clinic."*

[52] The plaintiff explained that, she asked the two individuals to call her son, because she was unable to walk, at that stage. And after they called her son, he arrived, sought assistance from somebody outside the station and arranged for the plaintiff to be ferried by vehicle, to the medical facility.

[53] The plaintiff's evidence was contrasted with what is contained in the answer to the request for further particulars. It was put to her that there is no mention of her son having assisted these males to take her to the hospital, nor is her son mentioned, nor is it mentioned that she was taken to hospital by a vehicle which was sourced by her son.

[54] In re-examination, the plaintiff stated, in response to the proposition that a witness will be called to testify, that she (the plaintiff) injured her ankle two days prior to 9 July 2018, that she did not inform the doctors who examined her that she had been injured two days prior to 9 July 2018.

The defendant's case

[55] The defendant called three witnesses. Dr. L.C. du Preez, Mr. V.H. Mtimkulu and Mrs. B. Mokhutswane.

Dr. L.C. du Preez

[56] Dr. L.C. du Preez testified that she is a medical officer at Lenmed Hospital. During July 2018, she was an intern in the orthopaedic department at Baragwaneth.

[57] She explained, that before a patient can be admitted to the hospital, that patient must complete certain registration documents. Whereafter, the patient will be examined by a doctor, in order to determine whether the patient ought to be admitted. The registration documents are contained in a white file, and the admission documents are contained in a blue file.

- [58] In her evidence, she explained that the documents in the trial bundle appearing at CaseLines 004-8 and 004-9, were contained in the white registration folder, and that the documents appearing at 004-11 and 004-12, were contained in the blue admission folder.
- [59] On 9 July 2018, she attended to the plaintiff at approximately 21h05. The plaintiff told her that she had fallen after twisting her right ankle on the pavement two days earlier. She proceeded to record that information on the medical records. The observations she made, were that the plaintiff manifested a swollen ankle and no open wounds.
- [60] During cross-examination, she confirmed that the injury suffered by the plaintiff, was complex and severe and not merely a twisting of her ankle.
- [61] She confirmed further, that the conversation between her and the plaintiff, was done in English. It was put to Dr. du Preez, that apart from her notes as reflected in the hospital records, she does not have independent recollection of the matter. She agreed.

Mr. V.H. Mthimkulu

- [62] Mr. Mthimkulu, was the defendant's second witness. He is a train guard in the employ of the defendant. He was the train guard on train 9434, which travelled from Naledi to Johannesburg on 9 July 2018.
- [63] He testified, that the train left the depot and made its first stop at Naledi station. When the train arrived at Naledi station, the train was empty and the doors were working properly. He explained that when the train departed from Naledi station to Marafe station, he closed the doors of the train and signalled to the train driver that it was safe to depart.

[64] The train arrived at the next station (Marafe station). When the train stopped, he opened the doors of the train and some commuters alighted and others boarded the train. Pursuant thereto, and having enjoyed a clear view of the length of the platform, he closed the doors and signalled to the train driver, that it was safe to depart. He testified that no incident took place at Marafe station, as alleged by the plaintiff.

[65] It was put to Mr. Mthimkulu, that he did not have independent recollection of the events of the morning of 9 July 2018. In this regard, it was pointed out that the daily journal is printed a day prior to the date recorded thereon, and that his evidence was completely based on the daily journal appearing at CaseLines 017-14.

[66] Mr. Mthimkulu explained, that if an incident had occurred it would have been noted on the journal and that for 9 July 2018, no incident was recorded.

[67] He confirmed under cross-examination, that the doors of the train he was travelling on were operational, as they had been prepared the night before. He stated that he was not part of the crew who prepared the train to ensure that the doors were working.

Mrs. Brenda Mokhutswane

[68] The last witness to testify was Mrs. Brenda Mokhutswane. She is employed by Vusa Isizwe Security. A security company, subcontracted to Metrorail at PRASA, principally responsible for security at platforms and stations.

[69] On 9 July 2018, she was posted at Marafe station. She commenced her duties at 05h45 and worked until 17h45. She was stationed there with another female security officer and explained that there were no male security officers posted at Marafe station on the day. She stated that the incident, as alleged by the plaintiff, did not occur at Marafe station. Had such an incident occurred,

they would have attended to the patient, interviewed her, informed the control-room and would have recorded the incident in an occurrence book.

[70] In cross-examination, she testified that she does not have independent knowledge of the events of 9 July 2018, and that she relied on the posting sheet in order to confirm that there were only two security officers posted at Marafe station, and that they were both female.

Analysis

[71] In making a determination in this matter, I am called upon to determine which of the versions placed before me, is more probable. The two versions placed before me are essentially the following.

The plaintiff's version

[72] The plaintiff's version is that she purchased a train ticket, the morning of 9 July 2018, intending to travel from Naledi station to Marafe station, where she operates a vending business from. She boarded a train that was overcrowded and stood next to the seats, less than a meter from the doors. There were other commuters behind her, standing next to the doors.

[73] When the train left Naledi station, the doors of the train were open and remained open enroute. As the train was approaching Marafe station, and entering the platform, there was a shoving and jostling by commuters inside the train, and she was pushed out of the train, falling onto the platform.

[74] When she was lying on the platform, two gentlemen (whom she believed were security personnel) came to her aid. She asked them to call her son. Her son arrived and he secured a vehicle to take her to Bheki Mlangeni. At the hospital she received treatment for her ankle. Her ankle was placed in a plaster of Paris cast. Later that afternoon, between 16h00-17h00 she was transported to

Baragwaneth. She informed the first doctor who treated her, that she had fallen on a moving train. She was attended to at 21h05 by Dr. L.C. du Preez.

The defendant's version

[75] The defendant's case, is that the plaintiff was not injured on its train on 9 July 2018. No incident, as alleged, by the plaintiff was reported on the day in question. Had such an incident occurred, it would, according to the security personnel, have been recorded in an occurrence book or in an incident report.

[76] Moreover, the train guard who was stationed on that train on the day in question, confirmed that the train doors were working, that no incident of a person being pushed from the train occurred, as he had a clear view of the platform.

[77] The doctor who treated the plaintiff, and who came to testify, confirmed that the plaintiff informed her that she injured her ankle some two days prior to 9 July 2018 (7 July 2018).

The law

[78] It is immediately apparent that two mutually destructive versions of the incident in question, lie at the heart of this controversy. The question which I am called upon to answer is, which of these should be accepted.

[79] When resolving factual disputes of this nature, the position advanced in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell and Others*², is generally accepted. The Supreme Court of Appeal (per Nienaber JA) explained how a court should resolve factual disputes. It was held as follows:

'To come to a conclusion on the disputed issues a court must make findings on: (a) the credibility of the various factual witnesses; (b) their

² 2003 (1) SA 11 (SCA) at para 5

reliability; and (c) the probability or improbability of each party's version on each of the disputed issues.

In light of the assessment of (a), (b) and (c), the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be a rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors equipoised probabilities prevail.'

[80] In *National Employers' General Insurance Co Ltd v Jager*³, the court, touching on the issue of determining probabilities in two mutually destructive versions, said:

'It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff then the court will accept his version as being probably true. If, however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.

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

³ 1984 (4) SA 437 (ECD) at 440D-441A

case, as though the two aspects constitute separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities.'

[81] In *Govan v Skidmore*⁴, which was followed with approval in *Ocean Accident and Guarantee Corporation Ltd v Koch*⁵ and *South British Insurance Co Ltd v Unicorn Shipping Ltd*⁶ and *Smit v Arthur*⁷ the Court held that, in determining the facts in a matter, one may, by balancing probabilities, select a conclusion that seems to be the more natural or plausible conclusion from amongst several conceivable ones, even if that conclusion may not be the only reasonable one.

[82] The plaintiff's claim against the defendant is a delictual one. Delictual liability is concerned with damages suffered by a person, resulting from a wrongful act, or omission of another, for which that person is entitled to compensation in terms of our common law.

[83] It is trite, that an actionable wrong or delict has five elements or requirements, namely; (a) the commission or omission of an act (actus reus), (b) which is unlawful or wrongful (wrongfulness), (c) committed negligently or with a particular intent (culpa or fault) (d) which results in or causes the harm (causation) and (e) the suffering of injury, loss or damage (harm).

[84] The present matter falls under delict, and the five elements referred to above must be established by the plaintiff, in order to succeed in her claim.

[85] In dealing with wrongfulness, the Constitutional Court said the following in *Country Cloud Trading CC v MEC Department of Infrastructure Development*⁸:

⁴ 1952 (1) SA 732 (N)

⁵ 1963 (4) SA 147 at 159C

⁶ 1976 (1) SA 708 (A) at 713E-G

⁷ 1976 (3) SA 378 (A) at 386A and 386D

⁸ CCT 185/13 delivered 3 October 2014

“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.”

[86] Our law does not recognize negligence as if in the air (in a vacuum). It is now trite, that the issue of wrongfulness must be determined prior to the question of fault. The element of fault is only legally recognized if the act or omission is determined as legally wrongful. Therefore, in the absence of wrongfulness, the issue of fault does not even arise⁹.

[87] In *Mashongwa v PRASA*¹⁰, the Constitutional Court held, in dealing with PRASA's obligations in a claim based on negligence:

“to include safeguarding the physical wellbeing of passengers must be a central obligation of Prasa. It reflects the ordinary duty resting on public carriers and is reinforced by the specific Constitutional obligation to protect passengers, bodily integrity that rests on Prasa, as an organ of State. The norms and values derived from the Constitution demand that a negligent breach of those duties, even by way of omission, should, absent a suitable non-judicial remedy, attract liability to compensate injured persons in damages.

When account is taken of those factors, including the absence of effective relief for individual commuters who are victims of violence on Prasa trains, one is driven to the conclusion that the breach of public duty by Prasa must be transposed into a private-law breach in delict.

Consequently, the breach would amount to wrongfulness. What need to be stressed, though, is that in these circumstances, wrongfulness does not flow directly from the breach of the public duty. The fact that a public duty has been breached is but one of the factors underpinning the development of the private law of delict to recognise a new form of wrongfulness. What we are concerned with here is the development of private law taking into account public law. It is in this context that the legal duty that falls on Prasa shoulders must be understood. That Prasa is under a public law duty to protect its commuters cannot be disputed. This much was declared by this Court, in *Metrorail*, but here this court goes a step further to pronounce that the duty concerned, together with Constitutional values has mutated to a private law duty to prevent harm to commuters.

⁹ See *Administrateur, Transvaal v van der Merwe* 1994 (4) SA 347 (A) at 364.

¹⁰ (CCT 03/15) [2015] ZACC 36; 2016 (2) BCLR 204; (2016) (2) SA 528 (CC) 26 November 2015

[88] In *Dlamini v Passenger Rail Agency of South Africa (PRASA)* Jacobs AJ, summarised the legal position as follows. He stated that negligence arises if a *diligens paterfamilias*¹¹ in the position of a defendant would foresee the possibility of its conduct injuring another, and would take reasonable steps to guard against such occurrence, but he failed to take steps to do so.

[89] It is trite that wrongfulness should be considered separate from the question of negligence. In *Gouda Boerdery BK v Transnet Ltd*¹², the Supreme Court of Appeal said:

“depending on the circumstances, it might be appropriate to enquire first into the question of wrongfulness and during that process to assume negligence should no negligence be found to exist the question of wrongfulness does not arise”.

[90] In *Minister of Safety and Security v Van Duivenboden*¹³, Nugent JA formulated the principle at as follows:

“Negligence, as it is understood in our law, is not inherently unlawful – it is unlawful and thus actionable, only if it occurs in circumstances that the law recognises as making it unlawful. Where the negligence manifests itself in a positive act that causes physical harm it is presumed to be unlawful, but that is not so in the case of a negligent omission. A negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm. It is important to keep that concept quite separate from the concept of fault. Where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability - it will attract liability only if the omission was also culpable as determined by the application of the separate test that has consistently been applied by this court in *Kruger v Coetzee*, namely whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it.”

Applying the law to the facts

¹¹ English: Diligent father of the family

¹² [2004] 4 All SA 500 (SCA); 2005 (5) SA 490 (SCA) (27 September 2004)

¹³ 2002 (6) SA 431 (SCA) 441E- 442B(para 12)

- [91] The plaintiff's claim is premised on the fact that she was pushed out of a moving train on 9 July 2018. This version is somewhat improbable when considering the evidence led by the defendant in disproving that allegation.
- [92] Firstly, the evidence of the train guard stationed on the train on the day in question, competes with the version advanced by the plaintiff. Mr. Mthimkulu testified, and his evidence was not significantly challenged, that no incident occurred on the day in question, as he enjoyed a clear view of the length of the platform. And if an incident had occurred, such an incident would have been recorded. He also testified, that the train doors were operational when the train departed Naledi station, and arrived at Marafe station. I have no reason not to accept this evidence.
- [93] His evidence was criticised by Mr. Shepstone, principally on grounds that, he had no independent recollection of the events of that day. This criticism, for reasons I will address later herein, is misplaced.
- [94] Secondly, the evidence of the security officer Mrs. Mokhutswane was to the effect that no incident occurred at Marafe station on 9 July 2018. Had an incident occurred, they would have attended to the patient, interviewed her, informed the control-room, and would have recorded the incident in an occurrence book. This evidence competes with the plaintiff's version, and remained largely unchallenged as well. I have no reason not to accept the evidence of Mrs. Mokhutswane.
- [95] Her evidence was also subjected to the principal criticism, that apart from the duty roster, she had no independent recollection of the events of 9 July 2018.
- [96] Dr. du Preez's evidence was clear, consistent and cogent. She explained that the information she reflected in the medical records, was information she had obtained from the plaintiff. There is no reason for her to have recorded information, other than to reflect what the plaintiff had told her.

[97] The plaintiff's claim hinges principally on two considerations. The events at Marafe station on 9 July 2018, and what she had conveyed to the first treating doctor.

[98] Mr. Shepstone argued, that the hospital records constitute admissible hearsay evidence. And that the entry on the hospital records, which reflects a certain "*Dr. Maseng*" must be accepted as such. Mr. Mokotedi disagreed, contending instead, that the entry remains hearsay, until such time that a witness who made the entry, is called to testify. That is the correct legal position.

[99] What the plaintiff told "*Dr. Maseng*" constitutes her evidence, but what he records in manuscript constitutes hearsay evidence. Hearsay evidence is only admissible under certain conditions.

[100] Section 3(4) of the Law of Evidence Amendment Act 45 of 1988 defines hearsay evidence as:

"evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence" (Accentuation added). Hearsay evidence is only admissible in very limited circumstances and is presumed to be inadmissible unless proven otherwise.

[101] Section 3 of the Law of Evidence Amendment Act 45 of 1988 (the [Law of Evidence Amendment Act](#)) that substituted and codified the common law on hearsay evidence, reads as follows:

Section 3:

- (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless—
 - (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
 - (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

- (c) the court, having regard to —
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1) (b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

[102] In the present matter, there is no agreement for the inclusion of the hearsay evidence as contemplated in section 3 (1)(a) of the Act, nor was I requested to exercise my discretion to permit the admission thereof, in the interest of justice.

[103] The plaintiff's case, as alluded to above, depends significantly on the statement reflected in the hospital records (CaseLines 004-9). I am perplexed as to the reason why the legal team elected not to *call "Dr. Maseng"*, and the plaintiff's son, to testify in support of her case.

[104] Mr. Shepstone criticised the defendant's witnesses for their inability to demonstrate independent recollection of the events of 9 July 2018, instead relying on documentary evidence for purposes of recollection. This criticism, as alluded to earlier herein, is misplaced.

[105] The nature of a witness' work (e.g. a doctor), is often such that a number of patients are seen, over a given period. In this regard, the doctor's notes would be relied upon, for future reference. It is unrealistic, if not absurd, to expect a medical practitioner, who attends to significant numbers of patients over extended periods of time, i.e. 5 years, to have independent recollection of engagements with a patient on any given date. A doctor's reliance on medical reports in order to recall certain events, is not in my mind, a basis for rejecting his/her evidence on account of him/her lacking independent recollection. In instances where there had been a number of incidents, and a long time span, it is quite reasonable for a witness to rely on any such reports, and documents so as to refresh his memory of a particular day.

[106] In *Radebe v Passanger Rail Agency of South Africa*¹⁴, a recent decision of this court, Malindi J, in dealing with the issue of whether to accept the evidence of a witness, relying on certain journals, said the following:

The train driver and guard had no independent recollection of the incident. I accept their contemporaneous records in their Daily Journals that the train doors were functional on the day, permitting control by the guard as to opening and closing them automatically. I accept the evidence of the guard that had any of the doors of the coach not been opening up on command by the guard it would have been noticed by her if it did happen.

[107] The material evidence on which the plaintiff sought to advance her case can be categorised as follows:

- 107.1. She bought a ticket at Naledi station and travelled to Marafe station on 9 July 2018;
- 107.2. She boarded a train, that was overcrowded;
- 107.3. She was pushed out of a moving train, injuring herself;
- 107.4. Two gentlemen whom she thought were security personnel, came to her aid;

¹⁴ (2018/2844) [2023] ZAGPJHC 269 (27 March 2023) para 23

- 107.5. She gave her cell phone to the gentlemen to call her son;
- 107.6. Her son arrived, and secured a vehicle to transport her to Bheki Mlangeni;
- 107.7. She was attended to at Bheki Mlangeni, but was later transferred to Baragwaneth;
- 107.8. At Baragwaneth she told the doctor, that she was pushed out of moving a train.

[108] I found the evidence of the plaintiff altogether, improbable.

[109] The plaintiff alleges that she was pushed out of a moving train. This evidence I find improbable when regard is had to the fact that the plaintiff, on her own version, did not stand at the door of the train. She was standing next to the seats, holding on to a steel pole inside the train. The reason why anyone, in a moving train would hold on to a pole, is to maintain one's sense of balance. It is not clear to me, where the pole is exactly located, but from the evidence presented, it is evident that the pole is not in front of the train door. The plaintiff confirmed that there were other commuters standing next to the door, some in front of her. I find it improbable, considering where the plaintiff was standing (holding on to a steel pole), and the fact that other commuters stood around her (some behind her, next to the door) that she would have been pushed out of the train as she claimed.

[110] The plaintiff's evidence, that she was pushed out of a moving train, becomes even more tenuous when contrasted against the evidence led by the defendant's witnesses. Mr. Mthimkulu's evidence, which I have accepted, was to the effect that the train doors were operational, and that the incident that the plaintiff alleged to have happened, never did. Had she fallen out, as she alleged, there would have been an incident report to that effect. Moreover, his evidence was, corroborated by Mrs. Mokhutswane. She stated that no incident of a person falling out of a moving train was reported, and if the incident did take place, they would have attended to the patient, interviewed

her, informed the control-room and would have recorded the incident in an occurrence book. This did not happen on 9 July 2018.

[111] I find the plaintiff's evidence of what occurred after she fell on to the platform, also improbable. She stated that she was assisted by two gentlemen whom she thought were security personnel, that she gave them her cell phone in order for them to call her son. This evidence, in light of the evidence led by Mrs. Mokhutswane is improbable. There were, on the evidence which I've accepted, only two female security officers on duty at Marafe station. Had the plaintiff fallen out of the train as alleged, then Mrs. Mokhutswane and her colleague would have been aware of it. And it would have been reported.

[112] Had the plaintiff's son been called as a witness, such evidence would have corroborated the plaintiff's evidence. It may have made her evidence more probable.

[113] When the plaintiff arrived at the hospital, she had mentioned to a "doctor" that she was pushed on a moving train. That person recorded the information on the hospital records. It is most unfortunate that the person whom the plaintiff made that statement to, was not called as a witness. Had that person been called it may have corroborated the plaintiff's evidence and made her evidence in that regard more probable as well.

[114] The fact that the plaintiff had a valid ticket for 9 July 2018, does not mean that she was in fact injured, at Marafe station, on that day. The injuries she manifested and the possession of a valid train ticket are not mutually inclusive. This is especially so when considering the evidence of Dr. du Preez, who confirmed that the plaintiff told her that she was injured two days prior to 9 July 2018.

[115] On the evidence before me, I cannot conclude, as alleged by the plaintiff, that she was pushed off a moving train. And if she was not pushed off the train, then no liability can arise for the defendant.

[116] In the premises, I make the following order:

Order

1. The plaintiff's claim is dismissed.
2. The plaintiff is ordered to pay the defendant's costs.

B. FORD

Acting Judge of the High Court
Gauteng Division of the High Court,
Johannesburg

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 21 November 2023 and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 21 November 2023.

Date of hearing: 26, 27 July 2023
Date of judgment: 21 November 2023

Appearances:

For the plaintiff:	Adv. R. Shepstone
Instructed by:	Mngqibisa Attorneys
For the defendant:	Adv. K. Mokotedi
Instructed by:	Cliff Dekker Hofmeyr Inc