IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 64015/2018

In the matter between:

DLAMINI THULISILE ANDRIETA Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA (PRASA)
Defendant

DELETE WHICHEVER IS NOT APPLICABLE

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

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DATE
SIGNATURE

JUDGMENT

HF JACOBS, AJ:

[1] On Thursday 4 May 2017 the plaintiff, a female person aged 43 at the time, bought a rail ticket during the early hours of that morning and boarded a train at Mzimhlope station to travel to New Canada station where she connected a Vereeniging bound train referred to in evidence as train

9010. Her final destination was Lenz station which is located on the route between New Canada station and Vereeniging. With her the plaintiff had a bag (measuring 1m x 0.75m) in which she carried clothing. She testified that the bag was heavy and contained merchandise she intended to sell that day. From New Canada station train 9010 docked at the stations of Mlamlankuzi, Orlando, Nancefield, Kliptown, Tstjawelo and Midway before it reached Lenz. Before train 9010 reached New Canada it came from Johannesburg Park Station where all trains on the particular route start their journeys. The lay-out of the passenger coach the plaintiff travelled in is this. It had six exits, three on each side. Each of the six exits had sliding doors. When the train docked before Lenz, it did so on its right hand side. When the train reached Lenz station where the plaintiff had to disembark, so she testified, the train docked on the left and the door closest to her (the centre door) was faulty and did not open and she had to use another door on the left hand side of the same carriage.

[2] On her way to the other door and while still on the stationary train and carrying her bag in front of her person she fell and injured her left leg. Her medical records that form part of exhibit A show that the plaintiff fell on her left knee which showed minimal swelling, that she experienced pain on full extension of the knee which also exhibited lateral collateral instability with the provisional diagnosis of a ligament injury of the knee. The provisional diagnosis was not confirmed despite advice to and attempts by the plaintiff to undergo further medical treatment. She said that the train was full and it was difficult for her to move through the other commuters to the exit. Her evidence

about the faulty train door and the full train is disputed by the defendant. More about that presently. Three witnesses testified over three days, the plaintiff and two witnesses for the defendant, Mr Lieberman an investigator employed by Prasa to investigate incidents of the kind pleaded and Ms Phonokoane the Metro Rail guard on train 9010 on the morning in question. Train 9010 had a two member crew. A driver in the front and the Metro Rail guard, Ms Phonokoane, at the back in the caboose. The matter was certified trial ready on merits only and I am to decide on the liability of the defendant.

NEGLIGENCE

[3] Negligence arises if a *diligens paterfamilias* in the position of a defendant would foresee the possibility of its conduct injuring another and would take reasonable steps to guard against its occurrence and has failed to take steps to do so.[1] Wrongfulness should be considered distinct from the question of negligence.[2] In *Gouda*[3] and *Havekwa*[4] the Supreme Court of Appeal pointed out that, 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.[5] In the case of a positive act that causes physical harm, the act is presumed to be unlawful. However, in the

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1 *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F; *Cape Town v Carelse* 2021 (1) SA 355 SCA at [40]

2 *Cape Town City v Carelse and Others* 2021 (1) SA 355 (SCA) at par 47

3 *Gouda Boedery BK v Transnet* 2005 (5) SA 490 (SCA)

4 *Havekwa Youth Camp and Another v Byrne* 2010 (6) SA 83 (SCA) at par 22

5 See *Cape Town City v Carelse and Others* 2021 (1) SA 355 (SCA) at par 48

case of negligent omission it is only unlawful if in the circumstances the law regard it as sufficient to give rise to a legal duty to avoid negligently causing harm.[6] The pleaded case is premised on an omission and I will follow the process mentioned above.

[4] The plaintiff bears the onus to prove on a balance of probability that Prasa by omission breached its legal duty which, in *Mashongwa*[7] the Constitutional Court held to include:

> *"[26] 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.*
>
> *[27] When account is taken of these factors, including the absence of effective relief for individual commuters who are victims of violence on Prasa's 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.*
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> *[28] What needs to be stressed, though, is that in these circumstances wrongfulness does not flow directly from the breach of the public duty.*

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6 See *Cape Town City v Carelse and Others* 2021 (1) SA 355 (SCA) at par 49; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at par 12

7 *Mashengwa v Prasa* 2016 (3) SA 528 (CC)

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.

[29] It is in this context that the legal duty that falls on Prasa's 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."

[5] I will return to the issue of negligence below.

WRONGFULNESS

[6] In *Country Cloud Trading CC v MEC Department of Infrastructure Development* the Constitutional Court said 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 or overly burdensome to impose liability.

The statement that harm-causing conduct is wrongful expresses the conclusion that public or legal policy considerations require that the

conduct, if paired with fault, is actionable. And if conduct is not wrongful, the intention is to convey the converse: "that public or legal considerations determine that there should be no liability; that the potential defendant should not be subjected to a claim for damages notwithstanding his or her fault.'[8]

[7] In *Le Roux and Others v Dey* the Constitutional Court held:

'In the more recent past our courts have come to recognise, however, that in the context of the law of delict: (a) the criterion for wrongfulness ultimately depends on a judicial determination of whether — assuming all the other elements of delict to be 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 reasonableness of the defendant's conduct but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from the conduct.'[9]

CAUSATION

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[8] 2015 (1) SA 1 (CC) at par 20 and 21; *Cape Town City v Carelse and Others* 2021 (1) SA 355 (SCA) at par 45

[9] 2011 (3) SA 274 (CC) at par 122

[8] The existence of causation between an act or omission and the harm suffered is considered as appears from the following passage from De Klerk[10]:

> *[24] Causation comprises a factual and legal component. Factual causation relates to the question whether the act or omission caused or materially contributed to the harm. The 'but-for' test (conditio sine qua non) is ordinarily applied to determine factual causation. If, but for a wrongdoer's conduct, the harm would probably not have been suffered by a claimant, then the conduct factually caused the harm.*
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> *…*
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> *[25] Legal causation is concerned with the remoteness of damage. This entails an enquiry into whether the wrongful act is sufficiently closely linked to the harm for legal liability to ensue. Generally, a wrongdoer is not liable for harm that is too remote from the conduct concerned or harm that was not foreseeable.*
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> *[26] The function of legal causation is to ensure that liability on the part of the wrongdoer does not extend indeterminately. This is especially so when conduct factually causes harm x, and then harm y befalls the plaintiff in a manner that factually relates to harm x. An example from our case law demonstrates this. Suppose a defendant negligently causes a brain injury to the plaintiff; the plaintiff then becomes depressed; this depression is treated with a drug called parstellin (which has harmful side effects when consumed with cheese); the plaintiff (unaware of the dangers of doing so) consumes cheese while on parstellin; and then suffers a stroke that results in additional harm. The harm flowing from the stroke is factually caused by the conduct of the defendant — but for their negligent conduct, that harm would not have been suffered by the plaintiff. The question of legal causation is whether that further harm is too remote from the initial conduct for liability to be imputed to the defendant.*

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10 *De Klerk v Minister of Police* 2021 (4) SA 585 CC

[27] In this way, remoteness operates along with wrongfulness as a measure of judicial control regarding the imposition of delictual liability and as a '"longstop" where most right-minded people will regard the imposition of liability in a particular case as untenable, despite the presence of all other elements of delictual liability'.

[28] Legal causation is resolved with reference to public policy. As held by the Supreme Court of Appeal in Fourway Haulage SA, although this implies that the elements of legal causation and wrongfulness will overlap to a certain degree as both are determined with reference to considerations of public policy, they remain conceptually distinct. Accordingly, even where conduct is found, on the basis of public-policy considerations to be wrongful, harm factually caused by that conduct may, for other reasons of public policy, be found to be too remote for the imposition of delictual liability.

[29] Legal causation involves a flexible test that may consider a myriad of factors. This was affirmed by this court in Mashongwa. Traditionally, courts oscillated between different tests for ascertaining legal causation. The traditional criteria are, among others, reasonable foreseeability, adequate causation, whether a novus actus interveniens intrudes, and directness. But each of these tests was not without its problems and could lead to results contrary to public policy, reasonableness, fairness and justice. Hence, in Mokgethi, the then Appellate Division adopted an 'elastic' approach to legal causation. This approach is sensitive to public-policy considerations and aims to keep liability within the bounds of reasonableness, fairness and justice. In Smit the Appellate Division held in the context of delict that the rigid application of legal causation to delineate the imposition of legal liability across all sets of facts is irreconcilable with the flexible approach followed in our law. Any attempt to detract from the flexibility of the test for legal causation should accordingly be resisted.

[30] The traditional tests for legal causation remain relevant as subsidiary determinants. These traditional criteria should be applied in a

'flexible manner so as to avoid a result which is so unfair or unjust that it is regarded as untenable'. It follows that the traditional criteria must be treated as being subsidiary to the considerations of public policy, reasonableness, fairness and justice. It is trite that these considerations of public policy are grounded in the Constitution and its values. This court has affirmed this position in the context of contract law and wrongfulness in delict. But it has also made it clear in the context of legal causation. In Mashongwa this court held:

'No legal system permits liability without bounds. It is universally accepted that a way must be found to impose limitations on the wrongdoer's liability. The imputation of liability to the wrongdoer depends on whether the harmful conduct is too remotely connected to the harm caused or closely connected to it. When proximity has been established, then liability ought to be imputed to the wrongdoer, provided policy considerations based on the norms and values of our Constitution and justice also point to the reasonableness of imputing liability to the defendant.' [Emphasis added.]

[31] Grounding public policy in constitutional values accordingly offers an opportunity to infuse the common law with the values of the Constitution. The determination of remoteness entails applying the traditional factors, ascertaining their implications, and testing those implications against considerations of public policy as infused with constitutional values."

THE EVIDENCE

[9] At this stage it is convenient to record some evidence that was not in dispute and which is needed to contextualize the disputed evidence. Ms Phonokoane was equipped with a whistle and her task was to see to the safety of the passengers. She also, from her position at the back of the train, control the opening and closing of the doors. She does so by the push of a button. That way she can open the doors on the left or the right hand side,

depending on which side the train the docks. When the Metro Rail guard pushes the button to open the doors on the left, the sliding doors of each of the three exits on that side open automatically. There are two rows of seats, lengthwise along each of the two outside walls of a coach. The two rows of seats are interrupted by the six door openings, three on each side. Between the rows of seats, passengers stand and can hold on to an overhead handrail when the train is in motion.

[10] Ms Phonokoane explained that prior to the departure of train 9010 from Johannesburg's Park station she and the driver checked the functioning of the train and found it to be in good working order. No document was discovered by the defendant that shows that the doors (or other parts of train 9010) had been checked on the morning. She also said that should any of the doors have malfunctioned, she would have noticed that for she looks outside down the train while passengers embark and disembark and on the day no malfunctioning of the doors were detected at any of the stations. She keeps a pocket book to record incidents while on duty. No entry was made by her in her note book on the day in question she said.[11]

[11] The plaintiff blames the defendant for her fall, that the defendant was negligent by causing the door concerned not to function thus causing her to rush to an adjacent exit and that the defendant's negligence is causally

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[11] During the hearing three exhibits were handed up and referred to in evidence to wit Exhibit A which is a printed version of the papers loaded on Caselines platform and Exhibit B that records the rail network concerned and Exhibit C which is a rough hand drawn sketch of a rail carriage (not according to scale) on which the witnesses indicated certain points they referred to during evidence.

connected to her injuries and resultant loss. Exhibit A contains a statement of the plaintiff signed before Mr Lieberman, Prasa's investigator wherein the plaintiff states that she, when realising that the centre door of the train could not open she, "*…. ran towards that open door…..*" and "*…. tripped over one of the commuter's feet and fell onto the floor of the coach [she] was in*" while during evidence she said that she walked hurriedly, did not mention having tripped at all, and said that the fall occurred close to the open door, so close that had that door closed when she was lying on the floor of the train, her foot would have obstructed the door's travel. The statement which on the face of it seems contradictory, was not translated properly and the translator recorded that she translated from not Zulu but from Sesotho at a time when the plaintiff was injured and in pain and during an interview conducted by the defendant's investigator a few hours after the fall. The plaintiff does not speak Sesotho. I therefore do not hold the content of that statement against the plaintiff and decide the matter on the plaintiff's evidence in court measured against the common cause facts and acceptable evidence of the defendant. I will now turn to the pleaded cause of action and the evidence presented by both parties.

[12] During testimony and in her particulars of claim the plaintiff relies on the alleged crowdedness of train 9010 and the failing door thereof to constitute a manifestation of the defendant's negligence. The plaintiff was a satisfactory witness. However I find her evidence about the alleged crowdedness of train 9010 not more probable than that of Ms Phonokoane. Ms Phonokoane whom also impressed me as a satisfactory witness testified,

also through an interpreter, that train 9010 was not crowded that time of day as few people commute in the direction of Vereeniging at that time. Only those (mostly security personnel) who work nightshift and returns home use train 9010 at that early hour. I found Ms Phonokoane also to be an satisfactory witness and I cannot doubt her evidence as improbable or unreliable for want of credibility. Ms Phonokoane's version is on the aspect of crowdedness and the functioning of the doors more plausible and probable than the version of the plaintiff. The onus is on the plaintiff to prove on a balance of probability the elements of the delict.

[13] Mr Lieberman who also impressed me as a satisfactory witness testified that during or at the conclusion of his investigation he prepared a report to Prasa that is not before court and has not been discovered by the defendant. Counsel for the plaintiff urged me to make a finding adverse to the defendant for its failure to discover inspection records of the train doors, the report Mr Lieberman said exist and the defendant's failure to place "*further evidence*" before court. In my view the inference cannot be drawn. A litigant in the position of the defendant is obliged to discover documents "*relating to any matter in question".* When the defendant was called upon to do so, it discovered under Rule 35. If the plaintiff believes that there are in addition to the defendant's discovered documents, other documents that may be relevant to any matter in question in the defendant's possession, she could have used the machinery provided for by Rule 35(3) to secure further and better discovery. This she did not do. Counsel for the plaintiff also submitted that the defendant's failure to present in evidence documentation the plaintiff

mentions, amounts to an infringement of the plaintiff's right to access to court and constitutes a denial of the plaintiff's constitutional rights guaranteed by section 34 of the Constitution. I do not agree. A right of that kind is adequately protected by our law of civil procedure and, if applied and if the rights are exercised by a litigant in the position of the plaintiff, the law would afford her adequate redress during interlocutory proceedings or civil proceedings of the kind afoot here. In my view of the absence of documentary or electronic evidence that the plaintiff's counsel says might or might not exist or, might or might not prove or disprove a fact in dispute, does not allow for the adverse inference or a finding that had the defendant made further discovery, the discovered items would have shown the door of the train to have been faulty at the time. The defendant's stance and pleaded case, as counsel pointed out from the outset, was a denial that the incident occurred as the plaintiff alleged in her pleadings and testified in court.

[14] In my view, and while assuming negligence on the part of the defendant for failing to ensure that the centre door of the carriage of train 9010 in which the plaintiff travelled on the day functioned properly, does not demand the imposition of liability in the circumstances of the case. The evidence presented by the plaintiff is in my view so scant that to conclude otherwise would be wrong. All the alleged failure of the centre door could have caused the plaintiff to do, was to walk (hurriedly on her own account of the events) a further five or ten or twenty paces to an alternative exit which existed and functioned and allowed for exit from the carriage. That the plaintiff fell could not have been caused by the negligent act or omission of

the defendant and does not demand the imposition of liability. I therefore conclude that even if negligence is assumed with a negligent omission on the part of the defendants' employees, the plaintiff failed to prove the required wrongfulness on its part and that her claim cannot succeed.

[15] Prasa is obliged to provide protection to rail commuters in the position of the plaintiff. It also has to provide, as part of its obligation, safe entry to and exit from railway coaches. As part of its enterprise, it might, for example, decide not to open or more doors of a coach at a time during night or early mornings to minimize the risk of robbers attacking commuters as recorded in Mashongwa. One or more doors of train may fail, jam or not open for any reason. Machinery fail, break down and jam. The mere non-functioning of a door does not, in my view, amount to wrongful conduct on the part of Prasa. In my view plaintiff has not proven that the defendant should be subjected to a claim for damages in the facts before me.

[16] I also hold the view the plaintiff has not proven that the defendant was negligent as alleged or at all and on that score she should fail in her claim. But if negligence and wrongfulness are both assumed I cannot conclude that the alleged and assumed negligence of Prasa caused or materially contributed to the plaintiff's harm. To do so would extend liability of the defendant indeterminately and would be at variance with the principles stated by our courts. The plaintiff's injury is not causally linked to the assumed negligent omission. In my view the plaintiffs claim must fail for these reasons.

[17] No evidence was presented in this litigation by the plaintiff of other commuters with whom she must have become acquainted over the many

years she travelled on train 9010. The plaintiff's legal representatives did not exhaust any of the pre-trial procedures to compel further and better discovery (if any further documentary evidence exist). Under the circumstances I am of the view that an order absolving the defendant from the instance would be just and equitable.

THE ORDER

1. The defendant is absolved from the instance with costs.

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H F JACOBS
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 1st February 2023.

APPERANCES

Plaintiffs' counsel: Adv T C Kwinda

Plaintiffs' attorneys: Mashego P Attorneys

Defendant’s counsel:	Adv G Nameng
Defendant’s attorneys:	Ngeno & Mteto Inc