

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 35083/2019

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

4 August 2023

In the matter between:

NYAMBENI MATHEWS

Plaintiff

and

PASSANGER RAIL AGENCY OF SOUTH AFRICA

Defendant

JUDGMENT

Mdalana-Mayisela J

Introduction

[1] The plaintiff instituted an action against the defendant for delictual damages arising from a train incident that occurred on 13 September 2019 between Croesus and Langlaagte train stations (“the incident”). By agreement between the parties the issues of liability and quantum were separated in terms of rule 33(4) of the Uniform Rules of Court. The issue of quantum was postponed *sine die*. This court is required to determine only the issue of the defendant’s liability.

[2] In his amended particulars of claim the plaintiff alleged that the defendant breached its legal duty through the omissions and/or negligent conduct of its employees who, while acting within the course and scope of their employment with the defendant, were negligent in one or more of the following respects:

[2.1] By failing to keep the train under proper and adequate control;

[2.2] By operating or allowing the train to be in motion, travelling between two train stations while its doors were open;

[2.3] By failing to ensure the safety of passengers including having a security guard inside the train coach to ensure safety and security towards lawful commuters of trains belonging to the defendant;

[2.4] By allowing the train to be overcrowded with commuters which posed a danger to commuters more particularly as the train was operating or travelling with doors open;

[2.5] By failing to safeguard the well-being of passengers and in particular the plaintiff when by exercise of due and reasonable care the defendant could and should have done so;

[2.6] By failing to take any precautions to prevent the plaintiff from falling;

[2.7] By allowing the train to be in motion without ensuring that all train doors were properly closed.

[3] The defendant’s version is that it has no knowledge of the alleged incident because it was not reported, and put the plaintiff to the proof thereof.

Evidence

[4] To prove his case the plaintiff testified and called two witnesses, Sithole Martin and Winnie Nambehe.

[5] The plaintiff testified that in September 2019 he was residing at Lawley. He was employed as a machine operator by Johannesburg City Parks. In the morning of 13 September 2019, he was a passenger in a train no 05 travelling from Grasmere to Johannesburg Park Station. He was going to work. He was inside carriage no 03 towards the back. The carriage was full. It had two doors on each side and they were left open while the train was in motion. He was standing +- 4 meters from the entrance and holding on the fixed iron pole. He was in possession of a valid monthly train ticket which he bought for R190.00.

The train ticket dated 1 September 2019 and expiring on 30 September 2019 was handed up as evidence in court and marked exhibit "A". It was shown to the ticket examiner when he boarded the train on platform no 01 at Grasmere station in the morning on the day of the incident.

[6] At Croesus station many people boarded the train, and as a result there was pushing inside carriage 03. Whilst the train was in motion between Croesus and Langlaagte train stations, overcrowded and with its doors left open, he was pushed out of the train through an open door. He fell in a forward motion next to railway tracks. His face hit the ground and his forehead was pierced by the steel pipe. The train did not stop where he fell. It nearly ran over his leg but he managed to quickly pull himself away. The spot where he fell was not far from Croesus station and it was about 100 meters from the platform edge.

[7] While lying next to railway tracks and bleeding from his forehead, he was assisted by an unknown male person, who accompanied him to Antia hostel. He exited the Croesus train station through the access point situated on the platform. There were no security guards or ticket examiners on the platform when he exited. If they were present, he was going to report the incident and request them to call an ambulance for him. On arrival at Antia hostel his colleagues covered his head with a bandage because he was bleeding profusely. Sithole Bashin Martin and Winnie Nembahe transported him with Sithole's private car to Helen Joseph hospital. He was admitted in hospital for about two weeks. The incident occurred before 7h00.

[8] Winnie Nembahe testified she was working with the plaintiff at Johannesburg City Parks from 2017 until he was laid off due to his ill-health in January 2020. On 13 September 2019 before 7h00, an unknown male person came to Antia hostel holding the plaintiff with his hand. At that time, she and her colleague Martin Sithole were waiting for their transport to go to work. The plaintiff was bleeding profusely. He looked unstable and dizzy. He had sustained an injury on his face and forehead. It was not a good sight of him. She and Martin transported the plaintiff to Helen Joseph hospital. On their way to hospital the plaintiff informed them that he got pushed from the moving train, he fell and sustained injuries. He also informed them that the doors of the moving train were not closed. The plaintiff was admitted in hospital.

[9] Martin Sithole testified he was working with the plaintiff at Johannesburg City Parks from 1997 until he was laid off work due to the injuries. In the morning of the incident he and his colleagues were waiting for their transport outside Antia hostel to go to work. The Antia hostel accommodates municipal workers. The plaintiff arrived with his hand held by an unknown male person. He was severely injured. The unknown male person informed them that he

found the plaintiff injured at the train station. The plaintiff informed them that he was pushed out of the moving train and fell. He used a bandage to cover the plaintiff's head but it could not help because he was bleeding profusely. He then used the plaintiff's work overall to cover his injured head. Thereafter, he and Winnie transported the plaintiff to Helen Joseph hospital with his car, a mazda 323. He left the plaintiff with Winnie at the hospital and went to their workplace to report the incident. He reported the incident to the manager. The plaintiff closed his case.

[10] The defendant called Sibongile Stuurman and Tsidiso Patrick Tsiu. Sibongile testified that she is employed by the defendant as an Access controller stationed at Croesus train station. Her duty is to verify customers' train tickets at the access point situated on the platforms. During her testimony a sign-off document showing that she was on duty on the 13th of September 2019 from 05h00 to 12h30 at the access point situated on the platform was produced and admitted as exhibit "B". There are two platforms, and she could not remember which platform she was working on. She did not see the plaintiff exiting the station. There was no other way to exit the station other than through the access point. She did not have knowledge of which employees were posted at which areas at the station on the day of the incident.

[11] Tsidiso testified that he is employed by the defendant as a Croesus station manager from 2016. He is responsible for the management of ticket examiners, access controllers and security guards. In September 2019, there were security guards employed by the defendant and those employed by Vusa Isizwe Security company contracted to the defendant. The defendant's Protection Services department was responsible for the deployment of the security guards on the site. There are two access points at the station. One ticket examiner and one access controller are posted at each access point. Two security guards are deployed at the northern side and another two at the southern side of the platform.

[12] On the day of the incident he was on duty from 7h00 to 16h00. His time card for the day of the incident was handed up and marked exhibit "C". He confirmed that Sibongile was on duty on the day of the incident. He testified that another access controller, Christo Bulebule, and two ticket examiners, Zakes Tyali and James Mafutha were also on duty. There were also security guards on duty on that day. He could not recall the names of the security guards that were on duty.

[13] He testified that he did not witness the incident. He did not see the plaintiff on the day of the incident. The incident was not reported to him by the

employees that were deployed on the site on that day. The defendant closed its case.

Discussion

[14] The defendant disputes that the incident occurred and therefore, the plaintiff bears onus to prove on a balance of probabilities that it did occur.

[15] The plaintiff was a single witness in respect of how the incident occurred. During his cross-examination he was asked to explain a discrepancy between the evidence in chief and the pleadings about where he boarded the train in the morning of the incident. He explained that he lives at Lawley and he boarded the train at Grasmere because it is a closest train station. He knows Lenasia to be the place where the Indian people reside. His pleadings were drafted by his lawyers. I accept the plaintiffs evidence given under oath that he boarded the train at Grasmere train station in the morning of the incident.

[16] It is common cause that the plaintiff did not report the incident to the defendant's employees on the day of the incident. He was asked why he did not report it. His explanation was that when he exited the train station he did not see the security guards and ticket examiners on the platform. Had he seen them, he was going to report the incident and ask them to call an ambulance for him. He could not report the incident after he was discharged from hospital because he was still sick.

[17] Sibongile testified that there were security guards on duty on the day of the incident, but she could not tell if they were present on the platform when the plaintiff exited the station. She could not remember some of the information because the incident occurred a long time ago. She said that when working at her access point she could not see people entering or exiting at another access point. Her evidence was not helpful.

[18] Tsidiso conceded under cross-examination that he could not say whether there were security guards or not on site at the relevant time because he reported on duty after the incident occurred. No documentation was produced

to show that the said employees and security guards were on site at the relevant time. They were also not called to testify.

[19] He disputed the plaintiff's version that he exited the station through the access point. He said that the plaintiff exited at the area where the fence was vandalized. This version was not put to the plaintiff during his testimony by the defendant's counsel. He contradicted Sibongile, who said that the only way to exit the station was through the access point. Furthermore, in his own version he said that he did not see the plaintiff on the day of the incident, and therefore he could not have seen him exiting at the area where the fence was vandalized. This version is a speculation and stands to be rejected.

[20] Tsidiso said that if the plaintiff exited the station through the access point there must have been drops of blood on the platform because he was bleeding from his head. The plaintiff testified that the unknown man who assisted him at the station covered his head with his work overall at the place where he fell. In my view this explains why there were no drops of blood on the platform where he exited. Counsel for the defendant conceded that it is possible that the plaintiff exited the station through the other access point, and Sibongile did not see him. I accept the plaintiff's explanation for failure to report the incident to the defendant as being reasonable and true.

[21] The plaintiff's testimony about how the incident occurred was clear in all material respects. He was corroborated by Martin and Winnie in the report he made to them about how he got injured, and their observations of his injuries. He produced documentary evidence to substantiate his allegations, where it was relevant. The defendant could not adduce evidence to rebut his version that on the 13th of September 2019 he was a passenger in train number 05, and that between Croesus and Langlaagte train stations he was pushed out of the moving train, he fell and sustained injuries. It also could not rebut his evidence that the train was overcrowded and the doors were not closed. There were no material contradictions and improbabilities in his evidence. I find him to be a credible witness. I accept his uncontested version as true.

[22] Martin was asked to explain the contradiction between his evidence and the plaintiff's evidence about who covered the plaintiff's head with his work overall. Martin explained that he is the one that covered the plaintiff's head with his work overall. I do not find this contradiction to be material because Martin corroborates the plaintiff's version about the head injury and bleeding. Martin did not contradict himself as a witness. There were no improbabilities in his evidence.

[23] Winnie was a good witness. There were no contradictions and improbabilities in her evidence. Her evidence was clear in all material respects and was corroborated by the plaintiff and Martin. I accept her evidence as true.

[24] I am satisfied that the plaintiff has proved on the balance of probabilities that the incident occurred.

[25] The further issue to be determined is the liability of the defendant. It is well established that the defendant has a public law duty to provide safety and security measures for its rail commuters. The plaintiff bears onus on the balance of probabilities to prove negligence, wrongfulness and causation on the part of the defendant.

[26] As stated above, the plaintiff has proved an omission on the part of the defendant that the doors of coach no 03 were left open while the train was in motion and that he was pushed out of it and sustained injuries. In *Mashongwa v Passanger Rail Agency of South Africa 2016 (3) SA 528 (CC) paras [18], [26], 27, 48, 52 and 69*, the Constitutional Court in determining the issues of wrongfulness, negligence and causation stated as follows.

“Wrongfulness

.....

[18] *The vulnerability and the precarious situation in which they often find themselves ought, by now, to be self-evident. It is 10 years since Metrorail in effect highlighted the need to keep coach doors closed to secure rail commuters and the significance of failing to provide safety and security measures for them when a train is in motion. Even then it was not a new problem as there were reported decisions in other courts that dealt with it.*

This underpins the utmost importance of Prasa's duty 'to ensure that reasonable measures are in place to provide for the safety of rail commuters'.

.....

[26] Safeguarding the physical well-being 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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Negligence

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(ii) Open doors

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[48] Doors exist not merely to facilitate entry and exit of passengers, but also to secure those inside from danger. Prasa appreciated the importance of keeping the doors of a moving train closed as a necessary safety and security feature. This is borne out by a provision in its operating procedures requiring that doors be closed whenever the train is in motion. Leaving them open is thus an obvious and well- known potential danger to passengers.

.....

[52] It must be emphasized that harm was reasonably foreseeable and Prasa had an actionable legal duty to keep the doors closed while the train was in motion. Not only has it expressly imposed this duty on itself, its importance was also alluded to in Metrorail. 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 therefore reasonable to impose liability for damages on it, if other elements were proved.

.....

Legal causation

.....

[69] That the incident happened inside Prasa's moving train whose doors were left open reinforces the legal connection between Prasa's failure to take preventative measures and the amputation of Mr Mashongwa's leg. Prasa's failure to keep the doors closed while the train was in motion is the kind of conduct that ought to attract liability. This is so not only because of the constitutional rights at stake but also because Prasa has imposed the duty to secure commuters on itself through its operating procedures. More importantly, that preventative step could have been carried out at no extra cost. It is inexcusable that its passenger had to lose his leg owing to its failure to do the ordinary. This dereliction of duty certainly arouses the moral indignation of society. And this negligent conduct is closely connected to the harm suffered by Mr Mashongwa. It is thus reasonable, fair and just that liability be imputed to Prasa."

Conclusion

[27] In applying the aforementioned Constitutional Court principles on the facts of this case, I find that the plaintiff has proved on the balance of probabilities that the defendant's omission to ensure that the doors of a coach where the plaintiff was were closed while the train was in motion was negligent and wrongful. The defendant's negligent and wrongful conduct is closely connected to the harm suffered by the plaintiff. Accordingly, he should succeed on the issue of liability.

Costs

[28] The plaintiff seeks costs of the action. He is successful on liability. I find no reason why the costs should not follow the event. He also seeks the costs of the interlocutory application compelling the defendant to have a pre-trial conference reserved by Siwendu J. I heard the parties on this issue. I am inclined to award those costs on a party and party scale.

Order

[29] In the result the following order is made:

1. The defendant is liable for the plaintiff's proven damages resulting from the train incident that occurred on the 13th of September 2019.
2. The defendant is to pay the plaintiff's costs for the action.
3. The defendant is to pay the plaintiff's costs for the interlocutory application reserved by Siwendu J on a party and party scale.

**MMP Mdalana-Mayisela J
Judge of the High Court
Gauteng Division, Johannesburg**

(Digitally submitted by uploading on Caselines and emailing to the parties)

Date of delivery: 4 August 2023

Appearances:

On behalf of the plaintiff: Adv M Mthombeni

Instructed by: Jerry Ntsedi Attorneys

On behalf of the defendant: Adv F Opperman

Instructed by: Mngqibisa Attorneys