

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

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H. LOUW

01 February 2024

CASE NUMBER: 2020/17339

In the matter between:

THOMAS BHEKINKOSI MBATHA

Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Defendant

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 01 February 2024

JUDGMENT

LOUW AJ:

- [1] This case again raises the important question of law whether a transport utility, in this instance the Passenger Rail Agency of South Africa ("PRASA") ought to be held delictually liable for damages that flow from an alleged breach of its public law duty to provide safety and security measures for its rail commuters and in considering this

issue it must be determined whether wrongfulness, negligence and causation, necessary for delictual liability to be imputed, have been proved.¹

Parties

- [2] The plaintiff is Mr Thomas Bhekinkosi Mbatha (hereinafter referred to as “Plaintiff” or “Mr Mbatha” used interchangeably), an unemployed adult male residing at the M[...] H[...] in Soweto.
- [3] The Defendant is the Passenger Rail Agency of South Africa (hereinafter referred to as “Defendant” or “PRASA” used interchangeably), an organ of state² and transport utility established in terms of section 2 of the Legal succession to the South African Transport Services Act³ (SATS Act).

Background

- [4] On 17 April 2019 Mr Mbatha was on a train operated by PRASA and at an approximate distance of some 50 meters from the Mzinhllope Station platform an incident occurred in which he fell onto the railway track and ground staining injuries, the cause of the incident being in dispute, he either falling or being pushed from the train, or falling from the outside of the train.
- [5] Mr Mbatha then instituted action against PRASA in the Gauteng Division of the High Court, Johannesburg for delictual damages as a result falling, or being pushed out of the moving train operated by PRASA with the sole cause of the negligence being attributed to PRASA acting through its unknown servants, those servants acting within the course and scope of their employment.
- [6] The unknown servants were the train driver, the conductor and/or ticket examiner, and/or guard and/or security guards contracted through PRASA (“train personnel”).
- [7] The negligence attributed to the train driver was that the driver allowed the train to be in motion without ensuring that all doors were closed and/or locked, the driver allowed that the train be in motion without ensuring that no commuter would be pushed out, alternatively fall out, the driver allowed the train to be overloaded with passengers or commuters endangering them, the driver failed to keep a proper lookout and/or any adequate lookout, the driver failed to prevent the accident when by the exercise of due and reasonable care the driver could have done so.

¹ *Mashongwa v PRASA* [2015] ZACC 36 [1] to [3], 2016 (3) SA 528 CC; *South African Rail Commuter Corporation Ltd v Thwala* (661/2010) [2011] ZASCA 170 (29 September 2011)

² As defined in section 239 of the Constitution.

³ No 9 of 1989.

- [8] The negligence attributed to the conductor and/or ticket examiner and/or guard and/or security guard contacted by the PRASA were that they failed to have due regard to the prevailing conditions inside the train, they allowed the train to commence moving without ensuring that the doors thereof were properly closed and/or locked, they allowed the train to be overloaded with commuters thereby endangering Mr Mbatha, they gave the driver the signal for the train to be set in motion at an inappropriate and dangerous time without ensuring that all the doors were closed and/or locked, they allowed the train to commence moving without ensuring that there were no commuters dangerously close to the doors inside and outside the moving train, particularly when the doors of the train were not closed.
- [9] These allegations of negligence including the allegation that Mr. Mbatha was pushed from or fell from the train were denied, PRASA further pleading that the incident arose as a consequence of the negligent, alternatively reckless conduct of the plaintiff hanging outside of the train while the train was in motion, voluntarily assuming risk and denying liability resulting in all of the allegation by Mr. Mbatha being in dispute, he attracting the relevant onus including the onus of proof of wrongfulness, negligence and causation, necessary for delictual liability to be imputed.⁴
- [10] The matter proceeded to trial on the issue of liability only, which the Defendant denied. It was common cause between the parties that the plaintiff was in possession of a valid ticket number 39853, the issue of jurisdiction was not in dispute and it was not in dispute that the incident occurred on 17 April 2019 and that the Plaintiff was injured because of the incident.

The Evidence

- [11] Mr Mbatha and Mr Bafana Sithole (hereinafter referred to as Mr Sithole) testified in the Plaintiff's case.
- [12] Mr Mbatha testified that he is an unemployed adult male residing at the M[...] H[...] in Soweto and on the day of the incident he arrived at Park Station where he bought a single ticket for a train to Vereeniging with a connecting train at New Canada Station.
- [13] Mr Mbatha boarded a train operated by PRASA and on arrival at New Canada Station he left that train for the connecting train to Naledi Station, also operated by PRASA which train was full of passengers, all of the train coaches being full including the coach in which he was standing. On his version of the events he could position himself in the coach, passing a sliding entry/exit door consisting of two panels, each sliding in the opposite direction to open or close, he moving to a safe position passing approximately six passengers and standing some five feet from the door in the middle of the coach with passengers between him and the door.

⁴ *Mashongwa v PRASA supra, South African Rail Commuter Corporation Ltd v Thwala supra*

- [14] Where he was standing in the coach, he could not hold onto a strap hanging from the roof of the coach, there only being some four hanging straps in a coach. The train then departed from New Canada Station to Mzinhlope Station and when the train was approximately 120 meters from arrival at Mzinhlope Station the passengers in the coach started shouting “phuna-naye” meaning get out, get out, we are getting out now.
- [15] There were many passengers to disembark at that station and he was moving with the group, not facing the door and not having any where to hold onto as the group moved, he being pressured to move, being pushed bit by bit.
- [16] The Plaintiff explained that the door of the coach opened by way of two sliding panels, each sliding in an opposite direction and that individuals at the door put their feet against the panels to prevent the door from closing which was explained to the court with reference to a demonstration by the interpreter. He further testified that at the time there was no security on the train.
- [17] At a distance of approximately 50 meters from the platform he felt that he was losing balance, from behind. Whilst losing balance and moving backwards he thought he could balance against those that were behind him in the crowded coach, but there was no one behind him and he then fell out of the train, onto and struck the adjacent railway line and ground with his right shoulder bruising his head and his left knee, apparently losing consciousness.
- [18] Whilst on the railway line Mr Sithole and others came to his assistance and inquired from him how he was and how he got injured, also explaining that an ambulance was to be called, there fortuitously being one in the immediate vicinity and on arrival at the ambulance he heard the paramedics talk and they examined his injuries placing him on a stretcher and putting him into the ambulance, he mostly speaking to Mr. Sithole and no one else.
- [19] He heard Mr Sithole searching for his cell-phone and found the telephone number of his wife and called where, telling her that he was injured and in an ambulance on the way to Baragwanath Hospital.
- [20] He heard conversation in the ambulance and on arrival at Baragwanath Hospital with Mr Sithole he was taken to casualties for examination where he found his wife, Mr Sithole then leaving with the ambulance personnel.
- [21] The Plaintiff referred to hospital records confirming his admission on 18 April 2019, the necessary care at the Baragwanath Hospital which included surgery to his shoulder and his discharge on 21 May 2019.⁵

⁵ Caselines 002-20

- [22] During cross-examination Mr Mbatha confirmed that at New Canada Station he boarded the train to Naledi station with the first station after New Canada Station being Mzinhlope Station. Mr. Mbatha confirmed that when he entered the train coach at New Canada Station he was aware of his environment and that the train and coach was full, further confirming that the coach became more full when those at New Canada Station boarded it. However, he was of the view when he boarded it, it was safe to do so, he forming the view that the coach was safe when he entered it with other passengers also entering after him.
- [23] Notwithstanding the fact that he did not have access to an overhead leather belt hanging from the roof to hold onto, nor a seat, he felt safe in the circumstances, also where he was not next to a door. The first time that he perceived any danger in the coach was when the passengers were moving towards one of the exit doors from the back of coach shouting “phuna-naye” whilst he was standing some five steps from the door and between him and the door there being approximately five other passengers.
- [24] Mr. Mbatha confirmed that when the train departed from the New Canada Station the doors were closed and that he was not in danger. However, he formed the view that the train driver was negligent in that he allowed the door to be opened, or opened it prior to the train arriving at Mzinhlope Station, this opening of the door by the train driver not forming part of his pleadings and evidence-in-chief, contradicting it.
- [25] Mr Mbatha further blamed the driver of the train in that the doors of the train belonged to, or fell under the control of the driver, the driver being able to open it, but he not knowing if the driver had opened one door. He further expressed the view that while being pushed to the door, which door was already opened by those at the door, the driver being responsible in that he was in control of the door.
- [26] Mr Mbatha further speculated as to whether or not the driver had opened the door by pressing a button causing a blowing sound that he associated with the doors opening, he associating the blowing sound to the hydraulic sound of doors opening, it being unclear whether or not passengers had opened the door, or the driver had opened the door by activating the hydraulic system by pressing a button to open a door, there being no evidence presented as to the status of the remaining three doors of the coach. Mr Mbatha also expressed the view that the driver must have opened the door in that he was in control of the doors and there were no buttons inside the coach to press to open the door.
- [27] Mr Mbatha also blamed the conductor in that he was part and parcel with the driver in that although he was not sure who was to close the door, he was of the view that it should have been the conductor.

- [28] Mr Mbatha indicated that there was not a ticket examiner in the coach at the time and he did not see a security guard at New Canada Station when he boarded the train, the door being closed at that time when the train departed.
- [29] After falling from the coach, he felt sensitive and had a head injury with his mental state being somewhat impaired, which impairment did not prevent him from hearing what occurred in his presence. He recalled talking to Mr Sithole and he also remembered being taken to the hospital in the ambulance.
- [30] It was put to him that the defence witness, Mr Phafhatshiefzo Gift Tshitavhadulu (“Mr Tshitavhadulu”) in the employ with the Defendant in the Department of Protection Services attended at the scene and spoke to him. Mr Mbatha confirmed that he heard Mr Sithole speaking to someone who could have been a security officer, he accepting that there was a PRASA security officer at the scene, at the ambulance with whom the ambulance drivers also spoke, he not being in a position to dispute the nature of the discussions. However, he denied that Mr Tshitavandulu had asked anything from him.
- [31] The attention of Mr Mbatha was drawn to a “Metrorail Protection Services” report⁶ signed by Mr Tshitavandulu in which it was recorded that Mr Tshitavandulu spoke to Mr Mbatha who gave his residential address and cell-phone number, also confirming that he had a single ticket from Johannesburg Station, which Mr Mbatha confirmed, stating that he had spoken to Mr Tshitavandulu who had received information from him and that he had also spoken to Mr Tshitavandulu through Mr Sithole, and that his ticket was found in his pocket after a search for it. In addition, Mr Sithole had access to his cell-phone from which his identity number was obtained.
- [32] Mr Mbatha confirmed that the information in the “Rail Occurrence Reporting (Liability Report)”⁷ completed by Mr Tshitavandulu was correct in regard to his name and surname, identity number, address and a description of his wounds and the “mapping of the occurrences scene” recording that on the arrival of Mr Tshitavandulu he found Mr Mbatha already inside of the ambulance.
- [33] Mr Tshitavandulu further recorded in his Metrorail Protection Services report that Mr Mbatha informed him that he was standing outside of the train and that he had felt dizzy and fell, which Mr. Mbatha denied. However, Mr Mbatha confirmed that Mr Tshitavandulu was correct in the recordal on his documents, except for the version of him standing outside the train, feeling dizzy and falling.
- [34] Mr. Bafana Sithole testified that he was employed as a senior clerk at AFBOB and that he was travelling on the same train as Mr Mbatha at the time of the incident whom he knew from travelling on the train together, they not being close friends.

⁶ Caselines 015-22.

⁷ Caselines 015-17.

- [35] Mr Sithole further testified with reference to, and confirming a statement deposed to by him as an eyewitness to the incident⁸. Mr Mbatha boarded the train at New Canada Station and they were in the same coach. He saw Mr Mbatha being pushed from the moving train at Mzinhlope Station some 50 meters from the platform where he found him conscious, lying on the railway line and ground and not being at his senses. Although he and other passengers were communicating with Mr Mbatha, he was not responding to them.
- [36] He and others took Mr Mbatha to a nearby ambulance in the street where a security guard arrived asking us to what had happened and he being informed that Mr Mbatha was pushed from the train and fell. The security guard could not speak to Mr Mbatha in the ambulance as he was not at his senses and could not speak.
- [37] The security guard enquired as to the details of Mr Mbatha whereafter Mr Sithole removed an identity document from Mr Mbatha's bag from which the security guard obtained the full name and details from Mr Mbatha. They further also searched for the ticket which was found in the bag of Mr Mbatha and the security guard recorded the information provided to him in a small pocketbook, he not observing the security guard writing a statement. Soon thereafter the ambulance departed to Baragwanath Hospital with both he and Mr Mbatha.
- [38] Mr Sithole testified that there were less than ten security belts hanging from the roof of each coach with seating on the sidewalls of the coach facing inwards to the passage, with the belts hanging in the middle of the passage. On being questioned on what passengers were to do that could not hold onto belts he responded that they would just stand there or hold onto supporting poles from the roof.
- [39] During the cross-examination of Mr Sithole confirmed that during the journey he was standing in the middle of the coach at a distance of some two to three meters from Mr Mbatha holding onto a belt hanging from the roof with the doors open since the departure from New Canada Station.
- [40] In addition, he testified that before Mzinhlope Station their train stopped because of another faulty train that was stationary and smoking with passengers from that train boarding their train causing further overcrowding, it not forming part of his statement⁹ and it being put to him as being an apparent contradiction to the version of events presented by Mr Mbatha, with which he persisted, further testifying that his version of events were correct and was to be accepted over the version of event by Mr Mbatha.
- [41] It was further put to Mr Sithole that Mr. Mbatha testified that before Mzinhlope Station the train driver opened the door in that Mr Mbatha heard the hydraulic sound

⁸ Caselines 027-1.

⁹ Caselines 027-1

associated with a door being opened. Mr. Sithole did not comment thereon and stated that Mr. Mbatha was wrong.

- [42] Because of the uncertainty and contradictory evidence as to the layout of the coach, the seats and the poles the court requested Mr. Sithole to draw a sketch of the coach. Because of the apparent uncertainty the Court Registrar provided to the Court with a photocopy image of the internal layout of a PRASA coach, the photocopy being handed in as exhibit PW1 with the consent of the parties and the sketch as exhibit PW2, which documents showed a resemblance as to the layout of a coach.
- [43] Mr Sithole then testified with reference to the sketch that the coach had four sliding doors for the purposes of entry and exit, two sliding doors being opposite the other, with two doors in the front of the coach and two doors in the rear of the coach. The two entry and exit doors were opposite the other with a standing area for passengers between the doors.
- [44] There were seating areas against the outer walls of the coach with standing areas in the passage area between the opposing seats. The seating area and the door areas with the associated standing areas were separated with a vertical pole and horizontal barrier. It was further apparent from exhibit PW2 that the horizontal barriers were at the same height as the seats.
- [45] It further transpired that Mr Sithole was standing in the middle of the coach holding onto a strap as identified on the sketch and Mr. Mbatha was standing in the passage next to a vertical metal pole and a horizontal division between the seating area and the standing area, also as identified on the sketch with passengers between him and the doors.
- [46] Mr Sithole was referred to the statement of Mr Tshitavandulu¹⁰ and disputed the content thereof insofar it referred to Mr Tshitavandulu speaking to Mr Mbatha and obtaining the information therein from Mr Mbatha. He did however confirm that Mr Tshitavandulu requested the permission of the ambulance drivers to speak to Mr Mbatha which permission was granted.
- [47] He confirmed that Mr Tshitavandulu did attempt to communicate with Mr Mbatha who could hear him but did not respond to Mr Tshitavandulu, who then stopped talking to Mr Mbatha. He further testified that Mr Mbatha also did not speak to Mr Sithole, he merely making sounds and accordingly Mr Sithole disputed the content of the statement of Mr Tshitavandulu where he recorded that Mr Mbatha stated that he was standing outside of the moving train, felt dizzy and he fell on the rails, as he had seen Mr Mbatha in the train. However, he could not dispute the recorded injuries and the complaint of pain by Mr Mbatha stating that the possibility existed that Mr Mbatha may have communicated with Mr Tshitavandulu.

¹⁰ Caselines 015-22.

- [48] At the close of the Plaintiff's case the Defendant requested an adjournment of the matter to the following day for the purpose of an absolution application that was not launched.
- [49] The Defendant called Mr Tshitavandulu who confirmed that on 17 April 2019 in his capacity as Segmented Security Commander he was required to attend to complaints at the railway tracks and at railway stations and to facilitate the guards which he had done for some 14 years.
- [50] At 18:06 it was reported to him that someone had fallen at Mzinhlope Station and on his arrival at Mzinhlope Station he found Mr Mbatha in an ambulance seated on a small bench whereafter he asked for permission from the ambulance drivers to speak to Mr Mbatha in that he had to know the name of the injured person, what had happened and whether or not the injured person had a train ticket, which permission was granted.
- [51] Because of what he had found and what was told to him he completed a Protection and Security Services report which included a Railway Occurrence Reporting (Liability Report) and a Metro Protection Services statement after the incident¹¹, having spent an additional 30 minutes at the scene after Mr Mbatha and the ambulance had left for Baragwanath Hospital. The documents contained his recordal of the incident as narrated to him, he not taking a written statement from Mr Mbatha who was injured and in circumstances where the ambulance driver was in a hurry, Mr Mbatha and ambulance personnel subsequently leaving for Baragwanath Hospital in circumstances where it was an end to their workday.
- [52] Mr Mbatha provided him with his name, surname and residential address as well as the train ticket which he had taken out of his pocket and narrated that he was standing outside of the moving train, felt dizzy and fell on the rails before the Mzinhlope Station platform.
- [53] The version of the events by Mr Sithole was put to him, which he denied, testifying that he had personally spoken to Mr Mbatha, that the train ticket was produced from Mr Mbatha's pocket, and not a bag. In addition, he denied that Mr Sithole had found the identity document and cell-phone of Mr Mbatha from which information was produced and he went so far as to deny that Mr Sithole was at the ambulance. He further testified that he had completed the information provided to him by Mr Mbatha on an A4 clipboard with paper and that he did not use a small pocketbook to record information.

Discussion

¹¹ Caselines 015-15 to 015-23.

- [54] Mr Mbatha, on his version entered a coach at New Canada Station which was full of passengers, having neither a seat nor access to a belt hanging from the roof of the coach and he positioning himself in the middle of the coach five feet from the door with passengers between himself and the door, in circumstances where he felt safe. During the journey to Mzinhlope Station the door/s of the coach were closed. At the time there were no security officers, conductor nor a ticket examiner in the coach and it is not known how far the lead coach in which the train driver was, was from the coach in which Mr Mbatha found himself.
- [55] Mr Mbatha only felt unsafe when passengers in the coach started shouting the words “phuna-naye” moving towards a door of the coach near him, he being pressured to move with the group and there being nothing to hold onto, despite the existence of vertical poles as reflected on Exhibits PW1 and PW2 and as testified to by Mr Sithole.
- [56] Both Mr Mbatha and Mr Sithole testified that at the point where Mr. Mbatha was standing, there were a number of passengers behind Mr Mbatha between him and the door in the overcrowded coach.
- [57] At a distance of approximately 50 meters from the Mzinhlope Station platform he felt that he was losing balance moving backwards wanting to balance against those that were behind him in the crowded or full coach in the standing area between him and the door, he being unsuccessful in that attempt and it not known what had happened to those passengers in the standing area before the door.
- [58] At that stage the door of the coach was opened by passengers, they also jamming the door with their feet, preventing its closure. As an alternative version he testified that the train driver may have opened a door in the coach by pressing an opening button in that he had heard a sound resembling a hydraulic sound when the coach doors opened, there being no opening buttons in the coach itself.
- [59] Mr Mbatha, on losing his balance, or being pushed by the moving crowd of passengers in the full, or crowded coach then fell out of the coach onto and struck the adjacent railway line and ground.
- [60] Mr Sithole presented a somewhat differ version of events. The coach in which they were traveling was overcrowded and the doors of the coach in which they were traveling were open from their departure at New Canada Station to Mzinhlope Station. At some point in time their train stopped because of a stationary and smoking train with the passengers from that train boarding their train, creating further overcrowding in their train which events Mr Mbatha did not testify to.
- [61] In the coach in which they were traveling there were approximately ten safety straps hanging from the roof with various horizontal and vertical poles as reflected on Exhibits PW1 and PW2 with Mr Mbatha standing in the middle of the coach,

immediately next to a vertical pole at a distance of some two to three meters from Mr Sithole with, presumably passengers between them in the crowded train and with passengers behind Mr Mbatha, between Mr Mbatha and the door. Whilst in this environment he saw Mr Mbatha being pushed from the coach 50 meters before the platform of Mzinhlope Station.

- [62] The incident of Mr Mbatha falling from the train was common cause although from where he fell from was in dispute. The version of the incident by Mr Mbatha and Mr Sithole differed, there being three possibilities, the first version presented by Mr Mbatha being that the doors of the coach was closed at all times from the commencement of the journey at New Canada Station and that passengers opened it and held open the door by jamming it with their feet and preventing closure, the second version being that the doors were closed at all times from the commencement of the journey at New Canada Station and that the train driver had opened the door/s of the coach by pressing a button causing the door/s to open because of a blowing, or hydraulic sound heard by Mr Mbatha. The third conflicting version presented by Mr Sithole was that the doors of the coach was open, from New Canada Station until the occurrence of the incident.
- [63] Mr Mbatha further testified that whilst he was on the railway track and ground, and at the ambulance he heard various individuals talk and stated that he was mostly speaking to Mr Sithole. He further confirmed hearing Mr Sithole speaking to a security officer which transpired to be Mr Tshitavandulu, denying that Mr Tshitavandulu had asked anything from him, although he also admitted speaking to Mr Tshitavandulu through Mr Sithole, further confirming that his railway ticket was found in his pocket.
- [64] Mr Mbatha further confirmed that the information recorded by Mr Tshitavandulu and his reports as correct with reference to his name and surname, identity number, address and injuries but denied telling Mr Tshitavandulu that he was standing outside of the train, feeling dizzy and falling.
- [65] Mr Sithole testified that when he, and other passengers attempted to communicate with Mr Mbatha at the railway track he was not responding in that although he was conscious, he was not at his senses. He further indicated that at the ambulance Mr Mbatha also did not speak to Mr Tshitavandulu in that he was not at his senses and merely making sounds, also later admitting that Mr Sithole would have spoken to Mr Tshitavandulu.
- [66] Mr Sithole also stated that he searched for the identity document, cell-phone and railway ticket of Mr Mbatha which he found in the bag of Mr Mbatha also providing information to Mr Tshitavandulu which was recorded in a pocketbook which information included the physical address of Mr Sithole. It is further noteworthy that Mr Sithole denied that Mr Mbatha informed the security officer that he was standing outside of the train, feeling dizzy and falling because Mr Mbatha could not speak and

was merely making sounds, contradicting his evidence in the evidence of Mr Mbatha that Mr Tshitavandulu communicate with Mr Mbatha.

[67] Mr Tshitavandulu testified that in the execution of his duties he attended to the incident and spoke to Mr Sithole which information he recorded on a A4 board and paper which he used to compile his reports, specifically denying the use of a pocketbook. During discussion in the ambulance and with the permission of the paramedics Mr Mbatha provided him with his name, surname and residential address as well as the train ticket removed from his pocket. During such discussion Mr Mbatha informed him that he was standing outside of the moving train, feeling dizzy and falling on the rails which was consequently recorded by him in his reports.

[68] The only portion of the information recorded by Mr Tshitavandulu from discussion with Mr Mbatha that was disputed was the narration of Mr Mbatha standing outside of the train, feeling dizzy and falling.

[69] The Plaintiff did not present any evidence as to what had happened to the passengers standing been him and the coach door and how it came about that only he fell, or was pushed from the coach, it being improbable that no one behind him, or some of them would not have befallen the same fate, especially those passengers jamming the door with their feet.

[70] In addition, the Plaintiff did not present any evidence with reference to the duties and obligations of train personnel as to the actual overcrowding or overloading of the coach, the passenger limitation of the coach, the manner and methodology in which the train personnel could prevent overloading in those circumstances, the manner in which the train driver opened and closed doors of various coaches, collectively or individually, or whether he could do so, or did so. The Plaintiff did not present any evidence with reference to the train personnel allowing the train to depart once the doors were open nor any manner or methodology in which they could prevent commuters from opening and jamming doors from closing, nor any knowledge of the train personnel regarding such issue.

[71] The Plaintiff further did not plead, nor present any evidence in the way the train personnel could prevent Mr Mbatha from falling, or being pushed from the coach, or that the doors, or a door was opened by the driver. One cannot assume simply as a matter of fact that the coach was full, overloaded, carried an impermissible number of passengers with the door opened by the train driver in that PRASA's train operating procedures, policy and applicable safety standards might well have been complied with.¹²

[72] The Plaintiff bore the responsibility to produce evidence giving rise to an inference of negligence whereafter PRASA would attract the responsibility to rebut inferences by

¹² *South African Rail Commuter Corporation Ltd v Thwala* (661/2010) [2011] ZASCA 170 (29 September 2011) at [15].

adducing evidence relating to measures it, and its train personnel could implement to avert harm. In addition, that would attract a further onus to the Plaintiff in proving that such measures were inadequate and unreasonable in the circumstances.¹³

[73] One of the questions for determination is whether; on the evidence that the Plaintiff presented he fell and sustained injuries as a result of being pushed from, or falling from the coach because of fellow passengers opening a door and jamming it, preventing it from closing while the train was moving over which conduct of the passengers PRASA had no control, impatient fellow passengers pushing fellow passengers over which PRASA had no control, or falling from the outside of the coach because he felt dizzy over which PRASA likewise had no control, the Plaintiff discharged the onus resting upon him of proving on a balance of probabilities that PRASA was negligent, taking into consideration that whether or not conduct constitutes negligence ultimately depends upon a realistic and sensible judicial approach to all the relevant facts and circumstances.¹⁴

[74] Central to the matter is whether the court could find that the defendant was negligent based on the evidence adduced during the trial of the matter and the plaintiff's witnesses. In drawing conclusions counsel on behalf of the plaintiff requested the court to draw inferences on the facts presented. The court is obliged to reach a conclusion on all of the evidence¹⁵ and the drawing of inferences of negligence requires properly established objective facts. In *Caswell v Powell Duffryn Associated Colliers Ltd*¹⁶ the court distinguished between inference and conjecture or speculation:

"Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases, the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases, the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture."

[75] The inference sought to be drawn by the plaintiff must be consistent with all the proved facts and if not, the inferences sought cannot be drawn by the court.¹⁷

[76] The plaintiff seeks PRASA be held liable in that it allowed the train to proceed and the plaintiff from falling from the train in circumstances where train driver, other train

¹³ *Thwala* supra at [16].

¹⁴ *Mkhatshwa v Minister of Defence* 2000 (1) SA 1104 (SCA) paras 19-23; *Thwala* supra [17] – [18].

¹⁵ *S v Van der Meyden* 1999 (2) SA 79 (W) and *S v Van Aswegen* 2001 (2) SACR (SCA).

¹⁶ [1939] 3 ALL ER 722 (HL) 733 E-F.

¹⁷ *R v Blom* 1939 AD 188 at 202-3.

personnel and PRASA could and should have closed the door or stopped the train before the plaintiff either fell from it, or was pushed from it.

[77] The plaintiff failed to place objective evidence on record how the defendant could have prevented passengers from opening a door, how the train personnel could close the door in circumstances where passengers prevented it from closing by jamming the door, or if PRASA could or could not stop the train in those circumstances where passengers opened the door and forcefully prevented it from closing. There is also no objective evidence how any of the train personnel could have known that the door was opened by passengers and forcefully held open and how the defendant or the train personnel could have prevented it circumstances where the plaintiff did present evidence in both his versions that the door/s were closed when the journey commenced at New Canada Station with its being opened at some unknown point in time.

[78] The plaintiff also did not present facts or evidence about the speed, length or braking ability of the train, or whether the train personnel, more particularly the driver was aware of the door being kept forcefully open by passengers. There is also no evidence whether the train driver opened the door or whether there was a hydraulic open activation of the door.

[79] It is trite that the defendant has a Constitutional duty to ensure that reasonable measures are in place to provide for the safety of rail commuters and its passengers, the plaintiff carrying the obligation to present evidence to show that the defendant did not discharge its Constitutional duty in circumstances where there is no onus on the defendant to do so,¹⁸ the plaintiff bearing the onus on the balance of probabilities to prove negligence, wrongfulness and causation on the part of the defendant circumstances where a breach of public duty by PRASA is transposed into private-law breach in delict. PRASA is under a public-law duty to protect its passengers and the duty concerned, together with constitutional values, have mutated to a private-law duty to prevent harm to commuters.¹⁹

Breach of Delict

[80] The Plaintiff wishes to attribute negligence to PRASA in that a reasonable person in PRASA's position would have reasonably foreseen harm befalling Mr Mbatha as a result of the absence of a security guards, the examiner or conductor, or the open door/s²⁰ If so, would a reasonable person have taken reasonable steps to prevent

¹⁸ *Passenger Rail Agency of South Africa (PRASA) v Seleke* (A5016/2022) [2023] ZAGPJHC 51 (25 January 2023) at [20] – [33]

¹⁹ *Mashongwa v PRASA* supra at [3], [27]; *Rail Commuters Action Group transnet t/a Metrorail* 2005 (2) SA 359 (CC)

²⁰ See *Kruger v Coetzee* 1966 (2) SA 428 at 430E-F where the proper approach for establishing the existence, or otherwise, of negligence was formulated by Holmes JA as follows: “For the purposes of liability culpa arises if— (a) a *diligens paterfamilias* in the position of the defendant— (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and (ii) would take reasonable steps to guard against

harm to Mr Mbatha and if a reasonable person would have taken such reasonable steps, did PRASA take reasonable steps to avert the foreseeable harm that ultimately occurred in the circumstances of this matter?²¹

- [81] Mr Mbatha claimed damages because of PRASA's, the train driver and its train personnel based upon their failure to take reasonable steps to prevent the harm he suffered. He pleaded, and presented little evidence as to their deployment, duties and obligations and the manner and methodology in which they could have prevented the harm suffered by him. In addition, the plaintiff did not plead that the train driver had open the door from which he had allegedly fallen.
- [82] PRASA pleaded a bear denial, and that the incident arose as a consequence of the negligent, alternatively reckless conduct of the plaintiff hanging outside of the train while the train was in motion, voluntarily assuming risk and denying liability.
- [83] In the absence of information and evidence it is impossible for the court to consider what reasonable steps a reasonable person in PRASA's position would have taken to prevent harm to Mr Mbatha and whether PRASA had taken such reasonable steps to avert the harm that ultimately occurred on the circumstances of this matter.
- [84] Mr Mbatha further claimed damages because of an opened the door, the train personnel allowing the train to commence moving and remaining in motion without ensuring that the doors were properly closed and/or locked, and the train and coach being overloaded. However, plaintiff did present contradictory evidence and testified that at the commencement of the journey until the occurrence of the incident the door was closed, it being opened at some unknown point in time and by unknown passengers, the passengers jamming the door it with their feet and preventing it from closing, distinguishing this matter from matter of *Mashongwa v PRASA*.²²
- [85] As stated before, PRASA pleaded a bear denial and that the plaintiff is to be blamed for his own negligent, alternatively reckless conduct by hanging outside of the train while in motion, voluntarily assuming risk and denying liability.
- [86] In the absence of information and evidence on the status of the door and the conflicting evidence as to PRASA departing with an open door and its associated negligence therewith it is likewise impossible for the court to consider what reasonable steps a reasonable person in PRASA's position would have taken to prevent harm to Mr Mbatha and whether or not PRASA had taken such reasonable steps to avert the harm in the circumstances of the matter.

such occurrence; and (b) the defendant failed to take such steps."

²¹ *Mashongwa v PRASA* at [31]

²² *Mashongwa v PRASA* 2016 (3) SA 528 CC at [45]

- [87] Absent a finding by the court on the issue of wrongfulness and negligence in favour of the plaintiff the issue of factual and legal causation need not be addressed.
- [88] The plaintiff further presented three conflicting versions as to the incident and the open status of the door/s in the coach, the version of the train the driver opening the door also not being pleaded.²³
- [89] The facts and evidence presented do not support the inference which the plaintiff seeks the court to draw and the court was not put in the position to determine if reasonable person in PRASA's position would have reasonably foreseen harm befalling Mr Mbatha as a result of the absence of a security guards, the examiner or conductor, or the open door/s²⁴ The court can further not determine if a reasonable person would have, or could have taken reasonable steps to prevent harm to Mr Mbatha and what those reasonable steps would have been, and whether or not PRASA took reasonable steps to avert the harm that ultimately occurred on the circumstances of this matter.
- [90] I am not satisfied that the plaintiff has proved on the balance of probabilities that the incident occurred, nor that PRASA acted wrongfully and negligently to attract delictual liability. The Plaintiff, on his own version had interactions with Mr Tshitavandulu who appeared to be a credible witness testifying with reference to his handwritten notes with information obtained the scene, in an ambulance and from Mr Mbatha which was subsequently transcribed, some 30 minutes after the incident.
- [91] The version presented by Mr Tshitavandulu is further probable considering that only Mr Mbatha fell, or was pushed from the moving train by the moving crowd of passengers shouting the words "phuna-naye" in circumstances where he was not standing at the door but approximately five foot from the door and further in circumstances where there were various passengers behind him in a full coach which, in all probability would also have been pushed from the coach, the version presented by Mr Tshitavandulu being the probable and accepted version in the circumstances.

Conclusion

- [92] In considering the evidence and facts presented I conclude that the plaintiff has not proved his claims on a balance of probabilities and the facts do not support the inferences which the plaintiff's representatives sought the court to draw that the

²³ *Pillay v Krishna and another* 1946 AD 946; *Neethling v The Weekly Mail & others* 1994 (1) SA 708 (A) at 761; *The South African Law of Evidence*, LexisNexis at 90

²⁴ See *Kruger v Coetzee* 1966 (2) SA 428 at 430E-F where the proper approach for establishing the existence, or otherwise, of negligence was formulated by Holmes JA as follows: "*For the purposes of liability culpa arises if— (a) a diligens paterfamilias in the position of the defendant— (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and (ii) would take reasonable steps to guard against such occurrence; and (b) the defendant failed to take such steps.*"

defendant was negligent or that its negligence contributed to the injuries sustained by the plaintiff.

[93] Although it is trite that the defendant has a Constitutional duty to provide for the safety of rail passengers and commuters the plaintiff did not provide evidence that the defendant did not discharge its Constitutional duty in circumstances where, also considering the pleadings and conflict in the evidence presented by the plaintiff, there is no onus upon the defendant to do so.

Order

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

1. The action is dismissed with costs.

H. LOUW
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 18 August 2023
Judgment: 01 February 2024

Appearances

For Plaintiff: T Mhlanga
Instructed by: SS Ntshangase Attorneys

For Defendant: KM Kgomongwe
Instructed by: Kekana Hlatshwayo Radebe Inc