REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: **76681/2019**

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

Date: 10 October 2022

In the matter between:

TADIWA MERCY CHIKWANDA Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA Defendant

JUDGMENT

DE VOS AJ

Introduction

[1] This is an action for delictual damages. The plaintiff sues PRASA for injuries sustained after she was thrown through the open doors of a moving train by third parties. She wishes to hold PRASA liable for the injuries she sustained.

[2] The plaintiff needed to get home from a job interview. She had been successful and was told she got the job. To get home, she needed to use the train and from the station she would take a taxi home. As she was returning from a job interview, she had with her, in her handbag, her certificates showing her qualifications, her travel documents, her cellphone and the money she needed to get onto a taxi from the train station. The plaintiff had never used the train before. As the experience was novel, she was assisted by a family member who went to see her off at the station. He showed her the ropes and she boarded the train. She noted four men boarded the carriage with her. The men were communicating with each other and gesturing towards her. She felt unsafe. She decided she would put some space between her and the men by moving to the next carriage. As she got up from her seat, in an attempt to evade the men, they attacked.

[3] The focus of their attack was her handbag. Her handbag held not only documents that are both hard to replace, vital to her employment and consequent livelihood, but also the money she needed to board a taxi to make her way home to her six month old baby. She therefore held onto her possession as much as she could. A scuffle broke out. At this stage, the train was in motion with the doors open. She was overpowered and thrown out of the open doors of the train. From this moment on her memory fails her. The impact of her landing, made her lose consciousness, break her leg and injure her elbow. She believes she landed on grass as she found grass marks on her clothes, but does not remember the moment of impact. She recalls making her way back to the platform where she declined the assistance of an ambulance as her immediate and pressing priority was to return to her child.

[4] The plaintiff claims that PRASA is responsible for the injuries she suffered. At this stage, the Court is called on only to decide the issue of merits. The parties requested the separation of issues and the Court granted such an order at the outset of the trial.

[5] PRASA opposes the relief on several grounds. PRASA denied in its pleadings that the incident occurred. At the hearing PRASA shifted its position and led evidence that the doors of the train were in fact closed, that there was contributory negligence on the part of the plaintiff and that her engagement in the scuffle was a new intervening cause that resulted in the injuries.

[6] PRASA admitted that it bears a duty to take reasonable steps to prevent injuries on its trains. The admission goes to wrongfulness. Distilled, this means that the elements of delict in dispute are the act, negligence (including the defence of contributory negligence) and causation. The Court can make quick work of the dispute relating to the act and causation, before it turns to the issue of negligence.

The act and causation

[7] PRASA in its pleadings denied the act giving rise to the claim (ie it denied that the incident occurred). At the hearing, PRASA's sole witness, Ms Nancy Nethengwe, told the Court that the incident had occurred – though disputing the manner in which it occurred. The pleaded case was contradicted by the evidence led at the hearing. On the common cause facts, as led in evidence, the requirement of an act is met.

[8] As to causation, PRASA submits that had it not been for the alleged attack on the plaintiff, she would not have been injured. PRASA's counsel submitted that "one must also bear in mind that the plaintiff on her own version engaged in a scuffle with her attackers and that during this scuffle she was thrown from the train". PRASA submits that had she not engaged in the scuffle, the incident "may very well have been avoided and so too her injuries".[1] PRASA relies on *Van der Spy v Minister of Correction Services*[2] as authority for the proposition that an intervening act may break the chain of causation. PRASA relies on the test for an intervening act as defined by Nugent AJ in *OK Bazaars Ltd v Standard Bank of South Africa.*[3] The test hinges on "the foreseeability of the new acts" and if the new act was neither unusual nor unexpected, it is not an intervening act. The question is whether a criminal attack on a moving train is an intervening act which breaks the chain of causation.

[9] The Constitutional Court had dealt with this directly in *Mashongwa.*[4] Mr Mashongwa, as the plaintiff in this case, was attacked on a train by unknown assailants and then tried to fight off the assailants. The assailants then threw Mr Mashongwa from the train causing him serious injury. PRASA contended in Mashongwa that the assailants'

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[1] Defendant's written submissions p DH 15 paras 32 - 33

[2] 2004 (2) SA 463 at 474G

[3] OK Bazaars 1929 Limited v Standard Bank of South Africa Limited (278/2000) [2002] ZASCA 5 at para 33

[4] Mashongwa v PRASA (CCT03/15) [2015] ZACC 36; 2016 (2) BCLR 204 (CC); 2016 (3) SA 528 (CC)

criminal act broke the chain of causation. The Constitutional Court held that the attack and Mr Mashongwa fending off the attackers was not an intervening act. The Court considered both aspects of causation – factual and legal. Firstly, in relation to factual causation the court held –

> "Had the doors of the coach in which Mr Mashongwa was travelling been closed, it is more probable than not that he would not have been thrown out of the train.
>
> …
>
> In all likelihood, he would not have been thrown out of the train had the strict safety regime of closing coach doors, when the train is in motion, been observed….. it strikes me as highly unlikely, based on the evidence tendered, that the three attackers would have found it easy to force the doors open and throw out Mr Mashongwa, who was resisting, as quickly as they did taking advantage of the already open doors. **On a preponderance of probabilities Mr Mashongwa would not have sustained the injuries that led to the amputation of his leg had PRASA kept the doors closed**."[5] (emphasis added)

[10] In relation to legal causation the Court held –

> "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**."[6] (emphasis added)

[11] The issue of causation has been settled, by the Constitutional Court in very similar circumstances.

[12] Our courts have therefore already concluded, in almost identical circumstances, where a person is attached on a train and seeks to defend themselves, that neither the attack nor the defence, breaks the chain of causation.

<u>Negligence – were the doors closed?</u>

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[5] Mashongwa paras 66 and 67

[6] Mashongwa para 69

[13] The parties have raised a material dispute of fact in relation to negligence. The plaintiff's testimony was that the doors were open when she was thrown out whilst the defendant's version was that the doors were closed. It would be attractive to dispose of the matter solely on the probabilities. The plaintiff's injuries are admitted, it is admitted that she was in the train and injured as she landed on the ground outside the train. It is not only highly improbable, but in fact impossible for a person to fall out of a train through a closed door. However, as the dispute of fact is material the Court will make a finding on the evidence.[7]

[14] The Court must weigh the credibility and reliability of the witnesses that present the conflicting versions. Credibility has to do with a witness's veracity. Reliability has to do with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately observe, recall, and recount events in issue.

[15] The plaintiff testified first. Her demeanour was calm. She presented no bias, nor was any suggested. Her version was consistent and presented no contradictions. The only basis on which she was cross-examined, in this regard, was the date of the incident as set out in the particulars of claim. It is not a material issue as the parties are in agreement as to the date of the incident and PRASA did not oppose an application for leave to amend the pleadings to correct the date. It seems to have been a mistake in the pleadings, rather than proof of a lack of truthfulness on the plaintiff's part.

[16] The plaintiff's version is probable. She suffered injuries after being thrown from an open door by her assailants. The only possible way, and therefore probable way, in which the plaintiff exited the train was through open doors. Any other suggestion is fantastical, impossible and therefore improbable. Not only is the plaintiff's version regarding the open doors probable, so is her explanation of how she was accosted, her motivation for clinging to her valuable possessions and the subsequent scuffle.

[17] As to the reliability of her evidence, she was cross-examined on her memory loss. The proposition was put to her that if she suffered memory loss for a period of the incident how could her memory of the entirety of the events be trusted. The plaintiff however explained where her memory was faulty and what events she recalls clearly.

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[7] Venter Du Plessis v RAF (138/2020) [2021] ZASCA 64 (26 May 2021) para 15

She could identify the period during which her memory failed her. Her candour in this regard persuades the Court to find her evidence credible and reliable. The probabilities weigh heavily in her favour.

[18] The defendant's witness does not receive the same report. On the issue of whether the door was open or closed, the witness held steadfast that it was closed when it left the station. However, the evidence that underpins this was inconsistent. At first she testified that she looked at trains as they come into the station. This was her job. However, when asked how she could have seen that the train doors were closed as they left the station, the version changed and she then testified that she also watched trains as they leave the station.

[19] The inconsistencies extend beyond the issue of whether the doors were open or closed. She relied on an entry in an occurrence book she made at the time. The entry was – for much of her evidence – the pilar on which she leaned. She testified first that the entirety of the entry was her own, and later, she changed this version and it was only partly hers.

[20] The version presented to Court must have changed between consultation and the witness taking the stand. During the plaintiff's cross-examination counsel for PRASA, as is appropriate, gave the plaintiff an opportunity to respond to the evidence PRASA would lead. The plaintiff was told that PRASA's witness would testify [1] as to the identities of the men who picked up the plaintiff after she fell from the train as Franco and Nkonoso; and [2] that the plaintiff came from behind the train (after she fell). However, when PRASA's witness was called to present this version, not only was the version not confirmed but in fact a different one was presented. The witness denied knowing the men, let alone their names and changed the version as to where the plaintiff came from on two occasions. The witness deviated from the version counsel informed the court and the plaintiff, would be led. No explanation for this deviation was provided despite such an opportunity being provided. In fact, counsel for the defence sought to ask to questions of clarity in reply.

[21] Matters get worse for PRASA when an affidavit deposed to by the witness was canvassed. The witness conceded her signature on the affidavit and its correctness, but then repudiated it contents when its inconsistencies with her evidence was highlighted. The evidence took a turn for the unfortunate when she alluded to the

possibility of the investigator, Mr Motsoaledi, introducing facts in her statement which she did not provide him with, which were untrue and which she never said.

[22] On a balance of probabilities, the essential features of the story told by the defendant's witness cannot be held to be true. The defendant's witness testified that the plaintiff bought apples from four men who were hawking outside the station; the plaintiff then boarded the train without a ticket, but with these four men and that she then jumped off the train. The essential features of this version do not flow or follow. The version insinuates something planned about the plaintiff's injuries, but it is unclear how this is arrived at or on what it is based. The Court finds the witness not to be credible. The Court resolves the dispute of fact in favour of the plaintiff and finds that the train was moving with open doors.

[23] Our Courts have concluded, repeatedly[8] that PRASA's failure to ensure the doors of a train in motion were closed, is a negligent act. The reasoning underpinning this is that the harm of falling from a train is reasonably foreseeable, even if the precise sequence leading to it was not; and the steps reasonably required to prevent it were

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[8] In Mthombeni v Passenger Rail Agency of South Africa (13304/17) [2021] ZAGPPHC 614 (27 September 2021) the Court held -

> "It bears yet another repetition that there is a high demand for the use of train since they are arguably the most affordable mode of transportation for the poorest members of society, for this reason, trains are often packed to the point where some passengers have to stand very close or even lean against doors. Leaving doors of a moving train open therefore poses a potential danger to passengers on board".[8]
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> "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".

In Baloyi v Passenger Rail Agency of South Africa (PRASA) 2018 JDR 2044 (GJ) para 20 it was repeated that 'it was a basic fundamental requirement for the safe operation of a passenger train in any country that "a train should not depart with a door open". The prohibition of trains travelling with open doors keeping the doors of the train closed whilst in motion is an "essential safety procedure" (paragraph 26). Travelling with open trains doors is a negligent act. (paragraph 27)

easy to take.[9] The principle is categorically stated in *Maduna v Passenger Rail Agency of South Africa*[10]:

> "Open train doors and injuries resulting from them have often received judicial attention. **Unsurprisingly the cases all say that a rail operator who leaves train doors open while the train is in motion, acts negligently**." (emphasis added)

[24] PRASA, operating a moving train with open doors is, in terms of our settled jurisprudence, a negligent act. The risk of serious injury to an intending commuter resulting from starting a train while persons are in the act of boarding the train are self-evident.[11] PRASA was negligent in allowing the train to start moving with its doors open.[12]

Contributory negligence

[25] There is a second aspect of negligence that must be considered. PRASA pleaded the defence of contributory negligence. The factual basis on which this was pleaded was that the plaintiff [i] stood at an open door [ii] failed to take adequate steps to prevent the accident; [iii] voluntarily got into an overcrowded train; [iv] forced the doors of the train to open. No evidence of [ii] to [iv] were presented to the Court. As for alleging that the plaintiff is negligent as she stood at an open door, it is unclear how this can be the plaintiff's negligence when it is PRASA's case that the doors were closed and if they were not, the law provides that is a basis for negligence on PRASA's part. In any event the plaintiff's version is that she sought to move away from her position close to the door but was prevented from doing so by her assailants. The Court concludes that there was no contributory negligence.

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[9] The Supreme Court of Appeal in Transnet Ltd t/a Metro Rail and Another v Witter (517/2007) 2008 ZASCA 95 (16 September 2008) has categorically stated that "a train leaving with open doors constitutes negligence". Similarly in Rodgers v Passenger Rail Agency of South Africa 2018 JDR 0347 (GP) at para 14 it was held that "PRASA has an obligation to protect its passenger's bodily integrity and failure to do so attracts liability to compensate for damages suffered as a result thereof."

In Maruka v Passenger Rail Agency of South Africa 2016 JDR 0720 (GP) at 34 the plaintiff was ejected from a moving train by the pushing and jostling for space from fellow commuters while the doors were open. The Court held that there is a "heavier burden" placed on PRASA "where greater risk exists". A reasonable person or organ of state would have reasonably foreseen a commuter would fall as a result of a train disembarking with open doors. It is also expected that PRASA should have taken reasonable steps to prevent that harm from taking place.

[10] 2017 JDR 1039 (GJ) par [28]

[11] Ngubane v SA Transport Services 1991 (1) SA 576 (A) at 777D

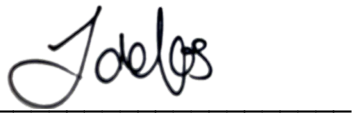
[12] Transnet Ltd t/a Metrorail v Witter 2008 (6) SA 549 (SCA) par [1] at 552 and par [5]-[11] at 555

Order

[26] In the result, the following order is granted:

a) The defendant is liable for 100% of plaintiff's proven or agreed damages.

b) The defendant is ordered to pay the plaintiff's costs on a party and party scale, including the costs of counsel.



I de Vos
Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the plaintiff:	**FHH KEHRHAHN**
Instructed by:	Chueu Incorporated
Counsel for the Respondent:	**Z MARX DU PLESSIS**
Instructed by:	Makhubela Attorneys
Date of the hearing:	7 September 2022
Date of submissions:	15 September 2022
Date of judgment:	10 October 2022