

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



CASE NO: 57589/2020

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

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In the matter between:

BAFANA THAMSANQA NSIBANDE

PLAINTIFF

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

DEFENDANT

JUDGMENT

MANAMELA AJ

Introduction

- [1] The plaintiff, Mr Bafana Thamsanqa Nsibande, claims damages against the defendant, Passenger Rail Agency of South Africa (PRASA), arising from the personal injuries he sustained after he apparently fell from a moving train on or about 11 May 2018. The issues of liability and quantum were separated, and the only aspect of adjudication was the determination of liability.
- [2] The issue to be determined is whether the plaintiff suffered damages as a result of being pushed out of a moving train or whether the train was crowded.
- [3] The defendant denies liability on the basis that all the train doors had been checked and found to be in working order in accordance with the standard operating procedure, alternatively, that the doors were closed at the time of the incident.

Background Facts

- [4] The factual matrix in this matter is largely common cause or is uncontroverted. It is as follows as testified by the plaintiff:
 - [4.1] The plaintiff testified that he boarded a train, at 21h00, from Thambeni to Tianong in Tembisa after visiting his grandmother on 11 May 2018.
 - [4.2] The plaintiff testified that he boarded the train and sat down for the majority of trip until he was about to get off at his intended station. Upon approaching his station, he moved towards the front of the train doors in anticipation to disembark. He was then pushed by unknown commuters while the train was slowly moving and fell to such an extent that he suffered serious injuries on his shoulder and hand.
 - [4.3] The plaintiff further testified that when he boarded the train, he had a valid ticket however after he fell to the ground and temporarily fainted, he woke up and found that his pocket was torn off and his ticket was gone. He then walked out of the train station and went towards a garage where he met a

neighbour who drove him home. He subsequently went to the hospital where he was admitted and treated for his injuries.

[4.4] The plaintiff was a minor at the time of the incident.

Defendant's Evidence

[5] The defendant's case was presented by Ms. Montha who is a driver at the defendant's workplace in another region. She has been working for the defendant for over 10 years in the region of Gauteng.

[6] Montha testified that the train is thoroughly checked by the train assistance for any malfunctions and faults while it's still stationary, that is, prior to collecting its first load of commuters. She further testified that if a train has faults it is reported to the necessary authorities in order to attend to the problem at hand.

[7] Upon the departure from the depot, the train is driven by a driver who travels with the train assistance for the duration of their work shift. The role of the train assistance during these trips is to ensure that the train is safe insofar as it relates to commuters boarding and disembarking on the train.

[8] The train assistance along with the driver use a computerised system to ensure that the train doors are shut before they move the train.

[9] Montha further testified that they utilise a whistle to alert commuters when it is safe to embark and disembark from the train. She further stated that while the train is in motion the doors remain shut and there is no way they would be open unless there was foul play of which they would not be in a position to notice while they are operating the train up front.

ISSUES FOR DETERMINATION

[10] This court is called upon to determine whether the defendant is liable for damages and occurrence of the incident.

LEGAL PRINCIPLES AND ANALYSIS

[11] The law regarding the defendant's legal duty to its passengers is well-established. The elements of wrongfulness, negligence and both factual and legal causation were settled in *Mashongwa v Passenger Rail Agency of South Africa*,¹ and *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others*.² I will not restate the principles herein.

[12] In argument, the issue for determination was only whether the plaintiff had proved factual causation, that is, whether the defendant's conduct or omission was the direct cause for the injuries suffered by the plaintiff. In this regard, counsel for the defendant, submitted that the plaintiff failed to demonstrate that he was at the train station at the instance. This could have been done through producing a train ticket and/or filling an incident report immediately or a couple of days after. The plaintiff indicated that he had an opportunity to file the incident with the defendant's authority but nonetheless failed to do so.

[13] The Constitutional Court held the following in *Mashongwa*:

'That PRASA's conduct was wrongful and negligent, does not quite resolve the question whether liability should be imputed to it. Its concern in the Supreme Court of Appeal was that the element of causation was not established. The question is whether there was a causal link between PRASA's negligent conduct or omission and Mr Mashongwa's injuries. It must also be determined whether there is a close enough connection between PRASA's negligence and Mr Mashongwa's injuries. Before these questions are answered, it must first be determined whether the Lee test or a different approach to causation applies.'³

[14] In cases referred to by both parties, the defendant was held liable where the coach doors were left open.⁴ The defendant has submitted that this case is distinguishable from those cases because the doors were closed. This is an attractive argument because in *Mashongwa* it was held that the objective of

¹ *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC).

² *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC).

³ See *Mashongwa*, para 63.

⁴ *Mazibuko v PRASA* (Gauteng High Court, case number 2011/40493), *Mothobi v PRASA* (Gauteng High Court, case number 2010/26087), *Transnet Ltd t/a Metrorail & Another v Witter* 2008 (6) SA 549 (SCA).

closed doors was to secure the passengers from falling out and taking ill-advised actions because of the open doors.⁵

[15] What constitutes 'open' doors requires examination in view of what the defendant has instituted as standard operations instructions. In *Mazibuko*, Weiner J, held that '*no train should be in motion unless all the doors are properly closed*'.⁶ I align myself with the view that 'open' doors include instances where the vacuum pressure system is malfunctioning thereby allowing easy opening of the doors.

[16] The Constitutional Court in *Mashongwa* said that the defendant's general operating instructions 'prohibiting trains travelling with open doors' serve the purpose of ensuring that they do not facilitate passengers being thrown out or suffering injuries as a result of the doors being open.⁷

[17] The defendant has failed to demonstrate that its officials were at the train station from the instance. This could have been done through producing an incident report immediately or a couple of days after. The plaintiff indicated that he had an opportunity to file the incident with the defendant's authority but nonetheless failed to do so. There was no mention of the incident ever been filed or recorded anywhere, only salient facts through testimony were the date and time of the accident, the details of the person injured, the direction of the train and that he was in possession of a valid ticket (a requirement for liability). This evidence was in itself, therefore, inconclusive.

[18] In *Mokoena v Passenger Rail of South Africa*,⁸ the court held that absence of security personnel undoubtedly played a role in the occurrence of the circumstances leading to the plaintiff sustaining injuries and found the defendant liable as a result. Negligence was readily found to have been established if the plaintiff was pushed from a train that was in motion.⁹

⁵ *Mashongwa* case, para 53.

⁶ *Mazibuko* case, para 33.

⁷ *Ibid*, para 48 and 49.

⁸ *Mokoena v Passenger Rail of South Africa* (14289/14) [2019] ZAGPJHC 548.

[19] The plaintiff had no other witnesses to corroborate his evidence. The difficulty in this case, is whether the train was still in motion, at the time of the incident or it had come to a complete stop, and if so, the defendant would be exonerated from any form of liability.

[20] In *South African Railway Commuter Corporation Ltd v Thwala*,¹⁰ the court held as follows:

'It seems to me that the train was stationary when the respondent disembarked and the accident occurred, that should be the end of respondent's case that only a finding that a train was in motion when the respondent was pushed and fell would give rise to liability'. Emphasis added.

In light of the above, I cannot rule out the possibility that the doors could not close firmly or properly as a result of the malfunctioning pressure mechanism, whilst the train was in motion and approaching the platform, at the time of the incident. It is common cause that the plaintiff could not establish that the train was moving at the time he allegedly fell. The fact that, after falling, the plaintiff managed to stand up and walk to the nearest BP garage, where he got assisted by a neighbour, may support the probability that the train was not in motion when the incident took place.

[21] In this regard, the causal link between the defendant's negligent conduct or omission and the plaintiff's injuries is not ascertainable. There is no close enough connection between the defendant's negligence and the plaintiff's injuries. In terms of the cautionary rule the court must warn itself against uncorroborated evidence of a single witness.

[22] Other pleaded forms of negligence are irrelevant for the purpose of this judgment and were not pursued in evidence.

Conclusion

⁹*Mhlongo v Passenger Rail of South Africa* (20594/2014) [2016] ZAGPJHC353, *Matuka v Passenger Rail of South Africa* (8905/2014) [2016] ZAGPPHC213.

¹⁰ *South African Railway Commuter Corporation Ltd v Thwala* 661/2010 [2011] ZASCA 170.

[23] I have come to the conclusion that the plaintiff has failed to discharge the onus that he bears and therefore the defendant is not liable for the damages suffered by the plaintiff.

The following order is made:

1. The Plaintiff's case is dismissed with costs.

P N Manamela
Acting Judge of the High Court
Gauteng Division, Pretoria

Date of hearing: 22 August 2022
Judgment delivered: 7 February 2023

APPEARANCES:

Counsel for the Plaintiff: Adv. NR Shithlelana
Attorneys for the Plaintiff: Mashapa Attorneys

Counsels for the Defendant: Adv. L Ntshangase
Attorneys for the Defendant: Makhubela Attorneys