CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 03/15

In the matter between:

IRVINE VAN SAM MASHONGWA Applicant

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA Respondent

Neutral citation:	*Mashongwa v PRASA* [2015] ZACC 36
Coram:	Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Matojane AJ, Nkabinde J, Van der Westhuizen J, Wallis AJ and Zondo J
Judgment:	Mogoeng CJ (unanimous)
Heard on:	6 August 2015
Decided on:	26 November 2015
Summary:	Delict — transposition — public law duty — private law claim — damages Organ of state — transport utility — duty to prevent harm to passengers

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ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the North Gauteng Division High Court, Pretoria):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside.
4. The respondent is liable for the damages the applicant may prove.
5. The respondent is to pay costs of the applicant in the High Court, the Supreme Court of Appeal and in this Court including costs of two counsel, where applicable.

JUDGMENT

MOGOENG CJ (Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Matojane AJ, Nkabinde J, Van der Westhuizen J, Wallis AJ and Zondo J concurring):

Introduction

[1] This case raises an important question of law. And that is whether a transport utility ought to be held delictually liable for damages that flow from a breach of its public law duty to provide safety and security measures for its rail commuters.

[2] More specifically, when no security guards were deployed on a train or coach in which a passenger was attacked and severely injured by criminals, should this failure result in the responsible transport utility being held delictually liable for the ensuing damages? Additionally, when the doors of a coach were left open while the train was in motion and a passenger was thrown out of it and sustained injuries and damages, should that omission alone, or only when coupled with the non-deployment of security guards, lead to the imputation of delictual liability for the harm?

[3] To answer these questions, it must first be determined whether wrongfulness, negligence and causation, necessary for delictual liability to be imputed, have been proved.

Parties

[4] The applicant is Mr Irvine Van Sam Mashongwa. He resides in Mamelodi East. The respondent is the Passenger Rail Agency of South Africa (PRASA). It is a transport utility established in terms of section 2 of the Legal Succession to the South African Transport Services Act[1] (SATS Act) and trades as Metrorail. PRASA is an "organ of state".[2]

Background

[5] On 1 January 2011, Mr Mashongwa boarded a train operated by PRASA at Walker Street station in Pretoria. He was the only passenger in the coach when the train left the station, but passengers could move from one coach to another. And there were no security guards at Walker Street train station or on the train.

[6] Approximately two minutes into the journey three unarmed men entered the coach in which Mr Mashongwa was traveling, from an adjoining coach. They demanded his money, wallet and cellular phone. He readily obliged. Despite his cooperation, they hit him with fists and kicked him even after he had fallen. That part of the incident lasted for about two minutes. He called for help to no avail. In spite of his resistance, his assailants threw him out of the moving train shortly before it reached Rissik Street station. He landed approximately 30 metres from the station platform and sustained serious injuries to his left leg. That leg was subsequently amputated.

[1] 9 of 1989.

[2] As defined in section 239 of the Constitution.

Litigation history

[7] Mr Mashongwa instituted action against PRASA in the Gauteng Division of the High Court, Pretoria (High Court).[3]

[8] His case was that PRASA did not adopt reasonable measures for his safety. Also that PRASA, as an organ of state, had a duty to respect, protect, promote and fulfil his constitutional rights[4] by reason of its responsibilities in terms of the SATS Act.[5] His main contention was that his constitutional right to be free from all forms of violence from either public or private sources was infringed.[6]

[9] PRASA was found to have been negligent because it did not ensure that the train doors were closed when the train left Walker Street station and that at least one armed guard was deployed on each train during the festive season so as to deter potential criminals.[7] The High Court also held that PRASA had a duty to secure its rail passengers, although crime can never be completely prevented. PRASA was held liable for 100% of Mr Mashongwa's proven or agreed damages with costs.[8] Aggrieved by this outcome, PRASA lodged an appeal to the Supreme Court of Appeal.[9]

[10] The Supreme Court of Appeal disposed of both grounds of negligence on the basis that neither was causative of Mr Mashongwa's loss. It invoked the traditional "but for" test as set out in *International Shipping Co (Pty) Ltd v Bentley* in support of this finding.[10] It took the position that leaving the doors open was not dispositive of

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[3] *Irvine van Sam Mashongwa v Passenger Rail Agency of South Africa (PRASA) t/a Metro Rail* (case number 29906/2011) (High Court judgment).

[4] Section 7(2) of the Constitution.

[5] See for example sections 2(1) and 23(1) of the SATS Act above n 1.

[6] Section 12 of the Constitution.

[7] High Court judgment above n 3 at para 33.

[8] Id at para 34.

[9] *Passenger Rail Agency of South Africa v Mashongwa* [2014] ZASCA 202 (Supreme Court of Appeal judgment).

[10] Id at para 8. See *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) (*International Shipping*).

the causation issue, because the assailants could just as well have forced the doors open in order to throw Mr Mashongwa out.[11] It held that at least one security guard was required in Mr Mashongwa's coach to have averted the attack and expressed reservations whether one security guard in the train would in any event have made a difference.[12] It then concluded that it was unreasonable to require PRASA to have a security guard in every coach because that requirement would far exceed the precautionary measures reasonably to be expected of PRASA.[13] The judgment records that this was accepted by counsel for Mr Mashongwa. Dissatisfied with the unfavourable outcome, Mr Mashongwa escalated the matter to this Court.

Jurisdiction

[11] The engagement with counsel during the hearing necessitated a reflection on whether this Court has jurisdiction to entertain this application.

[12] On the face of it, the determination of the issues does not seem to hinge on any constitutional issue. The case appears to be purely factual in nature with the result that once the requirements of wrongfulness, negligence and causation are met that should be the end of the matter. As I understood the concern in relation to this Court's jurisdiction, it was that no constitutional matter appeared to be implicated.

[13] Although it may not look like the outcome turns on the meaning or vindication of any constitutional provision or right, sections 7(2) and 12(1)(c) of the Constitution are the pillars on which the superstructure of this case rests. Mr Mashongwa's claim owes its origin largely to the obligations imposed on PRASA, an organ of state, by these provisions.[14] In addition, an enquiry into wrongfulness "focuses on the conduct and goes to whether the policy and legal convictions of the community,

[11] Id at para 10.

[12] Id at para 9.

[13] Id.

[14] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) (*Metrorail*) at para 82.

constitutionally understood, regard it as acceptable".[15] On these bases this Court does have jurisdiction in terms of section 167(3)(b)(i) of the Constitution.

[14] This Court also derives jurisdiction from the realisation that this matter raises an arguable point of law of general public importance, which deserves the attention of this Court.[16] In this country, trains are generally used by the overwhelming majority of people who fall within the low income bracket. These are the proverbially voiceless and in reality vulnerable members of our society. Furthermore, incidents of crime on trains and related issues have in the past been sufficiently raised before our courts to warrant a pronouncement by this Court.[17] The safety and security of the poor people who rely on our train network to go to work or move from one place to another does raise an arguable point of law of general public importance.[18]

Leave to appeal

[15] Leave to appeal must be granted. As indicated above,[19] this application raises a constitutional issue. It also raises an arguable point of law of general public importance relating to PRASA's legal obligations to protect its rail commuters from harm. And Mr Mashongwa has reasonable prospects of success. That this is so will become apparent in the ensuing discussion. It is thus in the interests of justice that leave be granted.

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[15] Van der Westhuizen J in *Loureiro and Others v Imvula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC); 2014 (5) BCLR 511 (CC) (*Loureiro*) at para 53 and *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* [2014] ZACC 28; 2015 (1) SA 1 (CC); 2014 (12) BCLR 1397 (CC) (*Country Cloud*) at para 21.

[16] See section 167(3)(b)(ii) of the Constitution. Although this point is not novel in that it was dealt with in *Minister of Safety and Security v Van Duivenboden* [2002] ZASCA 79; [2002] 3 All SA 741 (SCA) (*Van Duivenboden*) and *Van Eeden v Minister of Safety and Security* [2002] ZASCA 132; 2003 (1) SA 389 (SCA) (*Van Eeden*), it is still necessary to address it because it does raise an arguable point of law of general public importance. The public needs a pronouncement by this Court on whether PRASA can be held delictually liable for its failure to provide safety and security measures.

[17] See *Metrorail* above n 14. For pronouncements in the lower courts, see *Shabalala v Metrorail* [2007] ZASCA 157; 2008 (3) SA 142 (SCA) (*Shabalala*).

[18] *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC) (*Paulsen*) at paras 20-4.

[19] At [13].

Wrongfulness

[16] Many rail commuters are constrained by the long distances they have to travel and limited financial resources, to use trains as their primary mode of transport. Understandably so, because this well-subsidised public transport system is affordable. Presumably, passengers enter these trains reasonably believing that the transport utility is alive to the dangers to which train users are exposed in the course of their journeys and has taken such steps as are necessary to avert the reasonably foreseeable harm that could otherwise befall them.

[17] When acts of violence are perpetrated while a train is in motion, commuters are virtually trapped. Confinement to compartments places passengers almost entirely under the control and mercy of PRASA. So does the fact of the train being in motion limit the ability to simply alight at will. Passengers jump out of a moving train to escape an attack by violent criminals, at the risk of breaking their limbs or losing their lives. And the reality is that violent crime is not a rarity on our trains.

[18] The vulnerability of rail commuters 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.[20] Even then it was not a new problem as there were reported decisions in other courts that dealt with it.[21] 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".[22]

[19] What then is this case about? It concerns physical harm suffered by a passenger when attacked and later thrown off a moving train as well as the sufficiency

[20] *Metrorail* above n 14 at paras 84, 102 and 106.

[21] *Transnet Ltd t/a Metrorail and Another v Witter* [2008] ZASCA 95; 2008 (6) SA 549 (SCA) (*Witter*); *Ngubane v South African Transport Services* 1991 (1) SA 756 (A) (*Ngubane*); and *Khupa v South African Transport Services* 1990 (2) SA 627 (W) (*Khupa*).

[22] See *Metrorail* above n 14 at para 86.

of the safety and security measures employed by PRASA. And the question is whether PRASA's conduct was wrongful. Khampepe J pointed out in *Country Cloud* that:

> "Wrongfulness is generally uncontentious in cases of positive conduct that harms the person or property of another. Conduct of this kind is prima facie wrongful." [23]

In my view, that principle remains true whether one is dealing with positive conduct, such as an assault or the negligent driving of a motor vehicle, or negative conduct where there is a pre-existing duty, such as the failure to provide safety equipment in a factory or to protect a vulnerable person from harm.[24] It is also applicable here.

[20] Public carriers like PRASA have always been regarded as owing a legal duty to their passengers to protect them from suffering physical harm while making use of their transport services. That is true of taxi operators, bus services and the railways, as attested to by numerous cases in our courts. That duty arises, in the case of PRASA, from the existence of the relationship between carrier and passenger, usually, but not always, based on a contract. It also stems from its public law obligations. This merely strengthens the contention that a breach of those duties is wrongful in the delictual sense and could attract liability for damages.

[21] The criticism levelled at PRASA by Mr Mashongwa is that it omitted to do two things. First, to ensure that there were security guards on the train. Second, it permitted the train to travel between Walker Street and Rissik Street stations with the coach doors open. Whether a reasonable train operator would have foreseen the risk of harm to passengers arising from this, and taken steps to guard against that risk, are questions that fall to be answered in the enquiry into negligence. But in addressing wrongfulness the question is whether omissions of that type, in breach of PRASA's

[23] *Country Cloud* above n 15 at para 22.

[24] As was the case in *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) and *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) (*Carmichele*).

public law obligations, are to be treated as wrongful for the purposes not only of public law remedies, but also for the purpose of attracting delictual liability sounding in damages. For the reasons that follow, even if one treats both of those as an omission, it makes no difference to the analysis of wrongfulness.

[22] To conclude that an incident of omission, particularly in relation to public law duties, is wrongful and impute delictual liability is an exacting exercise that requires a reflection on a number of important factors.[25] Some of them are: whether the operating statute provides for a delictual claim for damages; whether the legislation's scheme is primarily about protecting individuals or advancing public good; whether the public power conferred is discretionary; whether the imposition of liability for damages is likely to have a "chilling effect" on the performance of government functions; whether the loss was foreseeable; and whether alternative remedies such as an interdict, review or appeal are available to the claimant.[26]

[23] An omission will be regarded as wrongful when it also "evokes moral indignation and the legal convictions of the community require that the omission be regarded as wrongful".[27] This leads to a legal policy question that must of necessity be answered with reference to the norms and values, embedded in our Constitution, which apply to the South African society.[28] And every other norm or value thought to be relevant to the determination of this issue would find application only if it is consistent with the Constitution.[29] As Moseneke DCJ put it: "the ultimate question is whether on a conspectus of all reasonable facts and considerations, public policy and

[25] *Steenkamp N.O. v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16; 2007 (3) SA 12 (CC); 2007 (3) BCLR 300 (CC) (*Steenkamp*) at para 37. See also *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* [2011] ZACC 4; 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC).

[26] *Steenkamp* id at para 42.

[27] See *Van Duivenboden* above n 16 at para 13; *Carmichele* above n 24 at para 56; and *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597A-B.

[28] *Van Duivenboden* above n 16 at para 16.

[29] Id at para 17.

public interest favour holding the conduct unlawful and susceptible to a remedy in damages".[30] (Footnote omitted.)

[24] Where a constitutional duty has been breached the value of accountability assumes a prominent role in the determination of the appropriateness of transposing that breach into a private law breach leading to an award of damages. That transposition will however become an option only if there are no other appropriate non-judicial remedies available to enforce accountability. For, where a political process is best suited to facilitate the observance of the constitutional value of accountability, then separation of powers dictate that courts allow the political arms of state or organs of state the leeway to fully occupy their operational space. This would be so, for example, where issues of state policy arise or the effective and efficient functioning of the affected public authority would otherwise be undermined or the award of damages could have a "chilling effect" on the performance of government functions or more resources would be required if courts were to grant a remedy. The prospects of recognising a private law remedy following upon a breach of a public law duty would be enhanced where no other effective remedy exists.[31] This is in line with the remarks by O'Regan J:

> "In determining whether a legal duty exists whether in private law or public law, careful analysis of the relevant constitutional provisions, any relevant statutory duties and the relevant context will be required. It will be necessary too to take account of other constitutional norms, important and relevant ones being the principles of effectiveness and the need to be responsive to people's needs."[32] (Footnote omitted.)

[25] The State and its organs exist to give practical expression to the constitutional rights of citizens. They bear the obligation to ensure that the aspirations held out by the Bill of Rights are realised. That is an immense responsibility that must be

[30] *Steenkamp* above n 25 at para 42.

[31] *Van Duivenboden* above n 16 at paras 21-2 per Nugent JA. See also *Minister of Safety and Security and Another v Carmichele* [2003] ZASCA 117; [2003] 4 All SA 565 (SCA) (*Carmichele SCA judgment*) at paras 37-44 per Harms JA.

[32] *Metrorail* above n 14 at para 78.

matched by the seriousness with which endeavours to discharge them are undertaken. To this end, the State, its organs and functionaries cannot be allowed to adopt a lackadaisical attitude, at the expense of the interests of the public, without consequences. For this reason, exceptions are at times made to the general rule that a breach of public law obligations will not necessarily give rise to a delictual claim for damages. Absent that flexibility public authorities and functionaries might be tempted and emboldened to disregard their duties to the public. And that could create fertile ground for a culture of impunity. These obligations cannot therefore be ignored without any repercussions, particularly where there is no other effective remedy. This would be especially so in circumstances where an organ of state would have been properly apprised of its constitutional duties many years prior to the incident, as in this case.[33]

[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.[34]

[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.[35]

[33] *Shabalala* above n 17 at paras 7-10. See also *Metrorail* above n 14 at paras 78, 81-2, 95 and 109.

[34] See *Van Duivenboden* above n 16 at paras 12-3 and *Shabalala* above n 17 at paras 6-7.

[35] *Van Duivenboden* above n 16; *Carmichele SCA judgment* above n 31 and *Van Eeden* above n 16.

[28] What needs to be stressed though is that in these circumstances wrongfulness does not flow directly from the breach of the public duty. The fact that a public duty has been breached is but one of the factors underpinning the development of the private law of delict to recognise a new form of wrongfulness. What we are concerned with here is the development of private law, taking into account public law.

[29] It is in this context that the legal duty that falls on PRASA's shoulders must be understood. That PRASA is under a public law duty to protect its commuters cannot be disputed. This much was declared by this Court in *Metrorail*. But here this Court goes a step further to pronounce that the duty concerned, together with constitutional values, have mutated to a private law duty to prevent harm to commuters.

[30] Now that the existence of a private law duty has been established, what remains for consideration is whether Mr Mashongwa has proved its breach. This leads us to the question whether there was negligence on the part of PRASA.

Negligence

[31] Would a reasonable person in PRASA's position have reasonably foreseen harm befalling Mr Mashongwa as a result of the absence of security guards or the open doors?[36] If so, would she have taken reasonable steps to prevent harm to Mr Mashongwa?[37] If she would, did PRASA take reasonable steps to avert the foreseeable harm that ultimately occurred?[38]

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[36] 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—
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> (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."

[37] Id.

[38] Id.

(i) Deployment of security guards

[32] Mr Mashongwa's claim for damages is grounded on the failure to take reasonable steps to prevent the harm he suffered. He contended that had there been security guards deployed on the train, the attack on him would have been averted. The evidence led, which was accepted by the trial Court, was to the effect that the posting of a single armed guard on the train in question could have deterred the assault. This was the opinion of PRASA's own expert witness on safety on trains and stations. But according to him the most effective security measure for preventing crime, that was implemented, was the random raids on trains and stations whereby searches for dangerous weapons and illegal substances were conducted.

[33] As I understand PRASA's position, it is that it took all measures reasonably required of it to secure its rail commuters. Apart from employing security guards in the Northern region where Mr Mashongwa was injured, it also assessed security risks on a regular basis, conducted special search operations on trains and developed a security plan which provided for the deployment of security guards where necessary. Beyond this, budgetary constraints simply did not allow it to go.

[34] PRASA is not required to provide measures that will guarantee its rail commuters absolute freedom from crimes of violence. The measures it provided must be understood against this background.[39] It is only obliged to provide measures consonant with a proper appreciation of the constitutional and statutory responsibilities it bears. That acts of violence are perpetrated on our trains is a reality. It is also known that the levels of crime vary from area to area, from season to season and from one time of day to another. An individualisation of solutions to regions, routes, seasons and time of day would thus be an appropriate response to this challenge.

[39] *Shabalala* above n 17 at para 8.

[35] Consistent with the different levels of crime on trains countrywide, there should be a differentiation in the deployment of the limited resources at the command of PRASA for security. The resources allocated to Johannesburg or Cape Town may, for example, have to be significantly different in nature or greater in comparison with those set aside for a city like Kimberly. And this differential treatment extends to the kind of safety and security measures deemed appropriate for areas whose trains are affected more by violent crime than others. That security guards are deployed to trains in one area would thus not necessarily mean that trains in all other areas have to be provided with the same security detail. Security measures must be crime-level and area-specific. A one-size-fits-all approach would be rather too robotic and insensitive to the priorities that compete for the meagre resources that all state subsidised institutions have to contend with.

[36] Some lines or trains probably require more security attention than others. It would thus not necessarily be negligent of the transport utility to have not deployed security guards to a particular route at a time a commuter was attacked, if that route were known to be in a low risk or low crime area. To determine the reasonableness of the measures taken by PRASA, in conformity with the value of accountability, reasons for the position taken must be provided.[40] Some of the explanations proffered by PRASA in support for its position follow below.

[40] This was explained further in *Metrorail* above n 14 at para 88 in these terms:

> "Factors that would ordinarily be relevant would include the nature of the duty, the social and economic context in which it arises, the range of factors that are relevant to the performance of the duty, the extent to which the duty is closely related to the core activities of the duty-bearer – the closer they are, the greater the obligation on the duty-bearer, and the extent of any threat to fundamental rights should the duty not be met as well as the intensity of any harm that may result. The more grave is the threat to fundamental rights, the greater is the responsibility on the duty-bearer. Thus, an obligation to take measures to discourage pickpocketing may not be as intense as an obligation to take measures to provide protection against serious threats to life and limb. A final consideration will be the relevant human and financial resource constraints that may hamper the organ of state in meeting its obligation. This last criterion will require careful consideration when raised. In particular, an organ of state will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints. Details of the precise character of the resource constraints, whether human or financial, in the context of the overall resourcing of the organ of state will need to be provided. The standard of reasonableness so understood conforms to the constitutional principles of accountability, on the one hand, in that it requires decision-makers to disclose their reasons for their conduct, and the principle of effectiveness on the other, for it

[37] PRASA put in place some security measures. It enlisted the services of 600 security guards in the Northern region. None of them were ever posted on trains. As a practice, complaints were received through customer surveys and meetings of the rail focus group comprising PRASA officials and interested parties. Hotspots were identified. Thereafter, crime patterns were analysed. Based on that analysis a security and deployment plan was developed to address identified criminal activities at stations. Meetings were also held with frequent regularity by PRASA's senior security officials and the South African Police Service management to assess security. Since incidents of crime were reportedly higher during the festive season, PRASA had to and did reinforce its pre-existing all-year-round security measures as a special dispensation for the festive season. That reinforcement entailed the deployment of security guards for routine operations on a daily basis. Sting stop, search and seizure operations were conducted on trains during the festive season.

[38] The essence of what PRASA said about its budgetary constraints is that at the time of the attack on Mr Mashongwa, its annual budget for security in the Northern region stood at about R80 million. In argument before this Court, several possibilities were raised about the deployment of security guards on each coach or train in the region and the cost implications thereof, excluding leave and other benefits. The cost of deploying security guards on trains, depending on their number, could according to PRASA easily rise to well over R200 million per annum for the Northern region alone. This was all speculation in the absence of a proper explanation based on a pre-existing safety and security plan for the region. It would thus be a fruitless exercise for a court to seek to attempt to make sense of PRASA's somewhat ill-considered thoughts on security.

[39] Mr Mashongwa was thrown out of a train that operated in a region that had very few incidents of violent crime. So low was the risk, that the highest incidence

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does not unduly hamper the decision-maker's authority to determine what are reasonable and appropriate measures in the overall context of their activities."

reported in the entire region was five per month. This is the context within which PRASA asks that its explanation in relation to the provision of safety and security measures, however lean, be understood. Information in relation to PRASA's financial constraints arguably amounts to bald assertions. Added to this is a paucity of information on a range of reasonable security measures potentially available, such as panic buttons or alarms, and whether they were in fact necessary for the line on which Mr Mashongwa was travelling. Even if they were considered necessary to implement, it would still not be possible to assess the reasonableness of implementing them in the absence of clear information on their affordability.

[40] The real issue on this aspect of the case is not whether the posting of a single guard, or three guards, could have prevented the attack. It is whether the steps taken by PRASA could reasonably have averted the assault. Crucial to this inquiry is the reasonableness of the steps taken. However, it must be emphasised that owing to the fact that PRASA is an organ of state, the standard is not that of a reasonable person but a reasonable organ of state. Organs of state are in a position that is markedly different from that of an individual. Therefore, it does not follow that what is seen to be reasonable from an individual's point of view must also be reasonable in the context of organs of state. That approach would be overlooking the fundamental differences between the State and an individual. It would also be losing sight of the fact that the standard of a reasonable person was developed in the context of private persons.[41]

[41] The standard of a reasonable organ of state is sourced from the Constitution. The Constitution is replete with the phrase that the State must take reasonable measures to advance the realisation of rights in the Bill of Rights. In the context of socio-economic rights the availability of resources plays a major part in an enquiry whether reasonable steps have been taken. I can think of no reason in principle or logic why that standard is inappropriate for present purposes. Here, as in the case of socio-economic rights, the choice of steps taken depends mainly on the available

[41] *Kruger* v *Coetzee* above n 36.

resources. That is why an organ of state must present information to the court to enable it to assess the reasonableness of the steps taken.[42]

[42] The reasonableness of the steps taken here must be evaluated in the light of the available evidence. What PRASA put forward as a step to prevent crime on trains was the random raids. But at the hearing the ineffectiveness of this method became apparent. During those raids, the body search conducted on commuters depended entirely on the commuter's consent. Naturally a commuter who carries a dangerous weapon would not consent to be searched. Therefore he would not be discouraged from carrying a dangerous weapon into the train. There was also no evidence on how often these raids were, if ever, done on the route Mr Mashongwa was travelling on. Nor was there evidence that a raid was done on the train in which Mr Mashongwa was attacked, on the day of the assault. Apart from the raids, there were no steps taken to safeguard commuters when the trains were in motion. This failure to deploy security guards on the train, to disarm criminals, is highly neutralised by the fact that none of Mr Mashongwa's attackers was armed.

[43] Absent information on all, if any, security measures explored or those put in place in certain areas and why the security-related resources were deployed in the manner in which they were, it is impossible to contextualise the decisions taken and assess the reasonableness[43] of the conduct complained of. We cannot conclude that negligence has been established.

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[42] See *Metrorail* above n 14 at para 88.

[43] This, in a way, is what the standard of reasonableness required of PRASA in the execution of its legal duty entails. See also *Metrorail* above n 14 at para 86:

> "The standard of reasonableness requires the conduct of Metrorail and the Commuter Corporation to fall within the range of possible conduct that a reasonable decision-maker in the circumstances would have adopted. In assessing the reasonableness of conduct, therefore, the context within which decisions are made is of fundamental importance. Furthermore, a court must be careful not to usurp the proper role of the decision-maker. The Court held that the standard would need to be assessed in the light of the 'social, historical and economic context' of housing and in the light of institutional capacity." (Footnotes omitted.)

(ii) Open doors

[44] Mr Mashongwa testified that the doors of the coach, out of which he was thrown, were left open from Walker Street to Rissik Street stations. To rebut this evidence, Ms Beauty Mothotsi, a former security guard who was on the Rissik station platform at the time of the incident, testified on behalf of PRASA. She said that the coach doors had been closed, but were forced open by the attackers at the time when they threw Mr Mashongwa out of the train. PRASA's technician, Mr Godfrey Raphadu, told the High Court that he had checked the doors 10 days prior to and 17 days after the incident. On both occasions they were fully functional. Because the High Court rejected PRASA's versions and made a finding favourable to Mr Mashongwa, PRASA has urged us to revisit those findings.

[45] It is undesirable for this Court to second-guess the well-reasoned factual findings of the trial court. Only under certain circumstances may an appellate court interfere with the factual findings of a trial court. What constitutes those circumstances are a demonstrable and material misdirection and a finding that is clearly wrong.[44] Otherwise trial courts are best placed to make such findings.[45] The discussion will thus proceed on the basis that the coach doors were left open from the time Mr Mashongwa boarded the train until he was thrown out of it.

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

[44] *S v Hadebe and Others* [1997] ZASCA 86 at 11-2; 1998 (1) SACR 422 at 426 and *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705-6.

[45] *Bernert v Absa Bank Ltd* [2010] ZACC 28; 2011 (3) SA 92 (CC); 2011 (4) BCLR 329 (CC) at paras 105-6 and *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at paras 58-65 and 78-80.

[47] Any passenger could deliberately or accidentally be pushed out of a moving train. Several scenarios that could result in a passenger falling out of a train come to mind. Slipping or losing one's balance before the train comes to a standstill or as it takes off or after it has taken off, falling out of the already open door and sustaining serious injuries are some of the potential risks of harm. Open doors are just as dangerous for the elderly, the infirm and small children, as they are for those who might be preoccupied with one thing or another and thus not paying adequate attention to the danger they are exposed to.

[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.

[49] PRASA's general operating instructions have rules "prohibiting trains traveling with open doors".[46] The very existence of these instructions and the fact that they were an issue of note whose importance was explained in *Metrorail*,[47] ought to have fuelled PRASA's zeal to ensure that all doors were closed when the train took off. Keeping them open rendered throwing Mr Mashongwa out of a moving train a virtually irresistible temptation to criminals. It thus facilitated his being thrown out. Importantly, it must have been known to PRASA that criminals at times throw their victims out of its moving trains.[48]

[50] It is telling that in *Witter*, a case decided after *Metrorail*, witnesses led by the plaintiff and PRASA's predecessor were at one that allowing a train to operate with

[46] *Metrorail* above n 14 at para 102.

[47] Id.

[48] As testified by Mr Vermaak in High Court judgment above n 3 at para 9.

open doors was fundamentally unacceptable. This is recorded in the judgment as follows:

> "All of the experts were agreed. Mr Myatt, an electrical engineer and specialist in train door-control systems, who testified on behalf of the plaintiff, expressed the view 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. Mr Taute, a mechanical engineer and retired General Manager (Operations and Technical) of the second defendant, who had gained experience over many years on inter alia the safe running of trains and commuter safety and who was also called as an expert on behalf of the plaintiff, said:
>
> > 'As an operator you must have clear guidelines and proper staff to make sure that you safely convey your passengers. One of the prime issues, prime things to do, is to make sure that the doors are closed. In other words you must lay down proper procedures, have staff to do it. . . . I'll never accept the fact that you can accept running a train with doors open. I can't accept that that is an acceptable situation to operate a suburban service on.'
>
> The evidence of the defendants' expert, Mr Carver, a mechanical engineer previously employed by the second defendant, was that a responsible train operator should do 'everything in his power' to prevent trains departing with doors open."[49]

[51] No additional resources were required for PRASA to do the obvious. And that mundane task was simply to comply with its own general operating instructions and ensure that the doors of all coaches, including the coach occupied by Mr Mashongwa, were closed. It is something so easy to accomplish and yet so necessary that any attempt to provide an "acceptable" excuse for not doing it would inevitably be met with resistance and likely rejection.[50]

[52] It must be emphasised that harm was reasonably foreseeable and PRASA had an actionable legal duty to keep the doors closed while the train was in motion. Not

[49] *Witter* above n 21 at para 5.

[50] Id at paras 8-9; *Ngubane* above n 21 at 779B-E; and *Khupa* above n 21 at 637E-H.

only has it expressly imposed this duty on itself, its importance was also alluded to in *Metrorail*.[51] 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.

[53] It may be argued that what was reasonably foreseeable and preventable was an accidental falling from the coach, and not a deliberate throwing out of a passenger by criminals. This would be the case in a relatively quiet or crime-free route, like the one Mr Mashongwa was travelling on. Counsel for PRASA argued that preventing the doors from being open was not required for the purpose of stopping passengers being thrown from trains by criminals. But this renders *Hughes v Lord Advocate*[52] relevant.

[54] In that case, Post Office employees left a manhole open and unattended. They had erected a small tent over it and left paraffin lamps next to it. This caught the attention of two boys who climbed down into the manhole using the ladder that was already there and climbed back again. One of them took one of the paraffin lamps. He tripped while climbing out of the manhole, the lamp fell and spilled the paraffin into the manhole. The paraffin vaporised and exploded. The boy was thrown down the manhole and sustained serious burn injuries.

[55] The Court held that it was foreseeable that left unattended, the tent and manhole might attract curious children who would take one of the lamps to see what was down the manhole and might suffer burns if the lamp fell over or was carelessly handled. The explosion was however not foreseeable. Although the manner in which

[51] *Metrorail* above n 14 at para 82.

[52] *Hughes v Lord Advocate* [1963] AC 837 (HL); 1 ALL ER 705 (HL).

the harm arose was unexpected, the Post Office was held liable because the harm that materialised was of the same general nature as the harm that was reasonably foreseen.

[56] Lord Reid reasoned as follows:

> "This accident was caused by a known source of danger, but caused in a way which could not have been foreseen, and, in my judgment, that affords no defence."[53]

[57] Lord Guest said:

> "[I]t is sufficient if the accident which occurred is of a type which should have been foreseeable by a reasonably careful person."[54] (Reference omitted.)

[58] And Lord Pearce explained:

> "When an accident is of a different type and kind from anything that a defender could have foreseen he is not liable for it. But to demand too great precision in the test of foreseeability would be unfair to the pursuer since the facets of misadventure are innumerable."[55] (Footnote and reference omitted.)

[59] The essence of this ratio found endorsement, albeit indirectly, in *Kruger v Van der Merwe* in these words:

> "The doctrine of foreseeability in relation to the remoteness of damage does not require foresight as to the exact nature and extent of the damage. It is sufficient if the person sought to be held liable therefor should reasonably have foreseen the general nature of the harm that might, as a result of his conduct, befall some person exposed to a risk of harm by such conduct."[56] (Reference omitted.)

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[53] Id at 847.

[54] Id at 846.

[55] Id at 848.

[56] *Kruger v Van der Merwe and Another* 1966 (2) SA 266 (A) at 272F. Also see *Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another* [1999] ZASCA 87; [2000] 1 All SA 128 (SCA) at para 22 and Neethling and Potgieter *Law of Delict* 7 ed (LexisNexis, Durban 2015) at 150 fn 152 (Neethling).

[60] PRASA's duty to keep the coach doors closed while the train was in motion did not owe its existence to the need to stop criminals from throwing passengers out of the trains. That duty existed to prevent passengers falling out of a train when the doors were left open. It was an accidental fall that would be within the contemplation of a reasonable person in the position of PRASA. The foreseeable harm sought to be averted was thus not linked to criminal activity as such. It was the harm caused by slipping out of a moving train, being accidentally thrown out one way or another or being deliberately thrown out, say during a scuffle triggered by an ordinary misunderstanding, that was reasonably foreseeable. It was that harm that would ordinarily be prevented from occurring by keeping the doors closed while the train is in motion. Being thrown out of a moving train by criminal elements falls outside the realm of reasonably foreseeable incidents of harm alluded to above. How then can PRASA be held liable for injuries caused by a criminal activity taken to its logical conclusion?

[61] Mr Mashongwa fell from a moving train whose doors were left open. The precise mechanism by which he fell and the injury was sustained did not have to be foreseen. In my view, the criminal act of throwing Mr Mashongwa from the train is the equivalent of the paraffin that vaporised, exploded, burnt the boy and threw him down into the manhole. Unforeseeable as was the mechanism by which Mr Mashongwa came to fall from the train, it was most certainly harm of the same general nature as the harm that was foreseen. Besides, open doors temptingly beckon to criminals, desirous of disposing of evidence, to take advantage of them in pursuit of that objective. It must be much easier to throw out a heavy object through an already-open door, than first having to force the door open, before that mission could be accomplished under tight time constraints. It ought to be all the more difficult when it is a resisting mature man that is sought to be disposed of. The open door by far lightens the burden and allows an outcome that is substantively similar to the result of someone falling by whatever mechanism through the same open door.

[62] Open doors evidently facilitated the ease with which Mr Mashongwa was thrown out of the train. Landing out of a moving train as a result of an accidental fall at the risk of limb or life is not materially different from so landing as a result of some criminal activity. Negligence has thus been established.

Factual causation

[63] 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.[57] 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*[58] test or a different approach to causation applies.

[64] Mr Mashongwa relied on this Court's approach to causation in *Lee*. His analysis of wrongfulness and how he sought to rely on *Lee's* approach to causation, conflated wrongfulness and causation. In *Lee*, this Court explained how the wrongfulness element – the normative consideration based on social and policy considerations – should not be used to contaminate the factual dimension of the causation enquiry.[59] If Mr Mashongwa's approach were to be accepted notwithstanding its deleterious effect on factual causation, then the net of liability would be cast too wide. That approach is wrong and cannot be followed.

[57] *International Shipping* above n 10 at 700E-H. See also *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 35B.

[58] *Lee v Minister for Correctional Services* [2012] ZACC 30; 2013 (2) SA 144 (CC); 2013 (2) BCLR 129 (CC) (*Lee*).

[59] Id at para 53.

[65] *Lee* never sought to replace the pre-existing approach to factual causation.[60] It adopted an approach to causation premised on the flexibility that has always been recognised in the traditional approach. It is particularly apt where the harm that has ensued is closely connected to an omission of a defendant that carries the duty to prevent the harm. Regard being had to all the facts, the question is whether the harm would nevertheless have ensued, even if the omission had not occurred. However, where the traditional but-for test is adequate to establish a causal link it may not be necessary, as in the present case, to resort to the *Lee* test.

[66] It is on the basis of the traditional test that causation will be determined. 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. The distance to be traversed by the train between the station where he boarded and the station where he was thrown out of the train takes about six minutes to cover. To beat him up and throw him out of a moving train is a mission that would probably have required more than six minutes to accomplish, if the doors were closed.

[67] 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. Contrary to what the Supreme Court of Appeal held, 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.

[60] Id at para 72 where the Court held that it was not necessary to develop the test for causation. The pre-existing test for determining factual causation is the *conditio sine qua non* theory or but-for test.

Legal causation

[68] No legal system permits liability without bounds. It is universally accepted that a way must be found to impose limitations on the wrongdoer's liability.[61] The imputation of liability to the wrongdoer depends on whether the harmful conduct is too remotely connected to the harm caused or closely connected to it.[62] When proximity has been established, then liability ought to be imputed to the wrongdoer provided policy considerations based on the norms and values of our Constitution and justice also point to the reasonableness of imputing liability to the defendant.[63]

[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.

[70] PRASA is thus liable for the damages suffered by Mr Mashongwa.

Order

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

1. Leave to appeal is granted.

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[61] *Neethling* above n 56 at 197.

[62] *Carmichele SCA judgment* above n 31 at para 72.

[63] *Minister for Safety and Security v Scott and Another* [2014] ZASCA 84; 2014 (6) SA 1 (SCA) at paras 37-8 and *S v Mokgethi en Andere* 1990 (1) SA 32 (A).

2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside.
4. The respondent is liable for the damages the applicant may prove.
5. The respondent is to pay costs of the applicant in the High Court, the Supreme Court of Appeal and in this Court including costs of two counsel, where applicable.

For the Applicant:	G Marcus SC and S G Maritz instructed by C P van Zyl Inc.
For the Respondent:	J G Cilliers SC instructed by Stone Attorneys.