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

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHERS JUDGES: NO

(3) REVISED: NO

9 April 2024

DATE SIGNATURE

Case No: 83786/2019

MAVIS NOMAWISILE MSIKABA **PLAINTIFF**

And

PASSENGER RAIL AGENCY OF SOUTH AFRICA **DEFENDANT**

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email.

The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge or her Secretary. The date of this judgment is deemed to be 9 APRIL 2024.

JUDGMENT

COLLIS J

INTRODUCTION

"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 service. That is true of taxi operators, bus services and the railways, as attested to by numerous cases in our court. 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 content in that a breach of those duties is wrongful in the delictual sense and could attract liability for damages." [1]

[1] 2016 (3) SA 528 (CC) para 20.

1. On 25 April 2016, the plaintiff embarked on a train which was overloaded and when the train left the station, the doors of the train were never closed. The plaintiff had to stand whilst undertaking the journey, holding onto an overhead belt. As the train approached Golf station, she had to change her handbag to a different shoulder when she lost her balance and was jostled out of the open door of the overcrowded train. As a result, thereof, she sustained serious injuries on her head, left elbow and left hip.

2. Before this Court, the defendant accepted that it has a duty to keep the doors of the train closed to protect commuters such as the plaintiff, but it denied negligence and pleaded either sole or contributory negligence on the part of the plaintiff.

THE PARTIES

3. The plaintiff is Nomawisile Mavis Msikaba, an adult female with full legal capacity born on the 26th February 1981and currently residing at A9, Murray and Roberts, Saulsville Hostel, Gauteng Province.

4. The defendant is Passenger Rail Agency of South Africa (PRASA), a public company incorporated in terms of the Legal Succession to the South

African Transport Services Act 9 of 1989 (as amended). It has limited liability with its place of business and *domicilium citandi et excutandi* at […] B[…] S[…], Hatfield, Pretoria, Gauteng Province.[2] It is trite that the Defendant is under a public law legal duty to provide safe public rail transport.[3]

5. At the commencement of the proceedings, the parties jointly moved that the *merits* and *quantum* be separated.[4] The Court ordered such a separation of the merits and quantum in terms of Rule 33(4) as it deemed it convenient to do so. The trial on quantum is to be postponed *sine die*.

COMMON CAUSE FACTS

6. As per the pleaded case of the Defendant, it admits that an accident occurred on the date, time and place as pleaded by the plaintiff and it is not

[2] Para 2 of the POC: CL 001-4, the citation of the Defendant simply being 'noted' by the Defendant at para 2 of the Plea (CL 001-28) and consequently deemed to be admitted: See Rule 22(3); *Makhuva v Lukoto Bus Service (Pty) Ltd* 1987 (3) SA 376 (V) at 386; *Dlamini v RAF and Others* available at http://www.saflii.org/za/cases/ZAGPPHC /2019/939.pdf.
[3] Rail Commuters Action Group v Transnet Ltd T/a Metrorail 2005 (2) SA 359 (CC); Mashangwa v Passenger Rail Agency of South Africa 2016 (3) SA 528 (CC); Mkhabela and others v PRASA (50819/ 2011) [2016] ZAGPPHC 444 (17 June 2016) par [15].
[4] Para 1 of the pre-trial minute of 19 August 2022: CL 0005-10.

disputed that the Plaintiff indeed had a valid train ticket before embarking the train.[5]

7. It was further admitted that the Plaintiff was pushed out of a moving train whilst the doors to the train was open.

DEFENDANT'S LEGAL DUTY

8. The Defendant from the pleadings, accepted their legal obligations and duty of care towards the Plaintiff as a commuter on the day.

9. To this end, the Plaintiff had pleaded that the Defendant:[6]

"At all material times and in particular on the 25th April 2019 the defendant provided a rail commuter service to members of the public as an organ of state and the defendant had a legal duty to protect the constitutional rights of life, freedom of movement as well as a duty of care towards members (of) the public being in the vicinity of the Defendants' property, facilities, implements and operations."

[5] See para 2 of the Plaintiff's request for further particulars (CL: 002-30) read with para 2 of the Defendant's Answers (CL 002-32 to 002-33)
[6] Para 4 of the Particulars of Claim: CL 001-4.

10. In its plea, the Defendant admitted this very wide duty of care.[7]

11. As per paragraph 5, the Plaintiff further pleaded:[8]

"Defendant, alternatively (the) Defendant's employees.... owed a duty of care to commuters and in particular the Plaintiff to ensure that train doors are always closed while the train is in motion. Defendant's employees also owed a duty of care to commuters to ensure that trains are not overloaded and to take reasonable steps to ensure the safety of all passengers."

12. In its plea the Defendant similarly admitted this paragraph, aptly pleaded by the Plaintiff.[9] It must from the very onset be emphasized that the Defendant accept that they owed a legal duty of care to commuters in general and the Plaintiff in particular to ensure that the train doors are closed when the train is in motion.

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[7] Para 4 of the Plea: CL 001-28 by simply pleading 'noted' which is thus consequently deemed to be admitted: See Rule 22(3); Makhuva v Lukoto Bus Service (Pty) Ltd 1987 (3) SA 376 (V) at 386; Dlamini v RAF and Others available at http://www.saflii.org/za/cases/ZAGPPHC/2019/939.pdf.

[8] Para 5 of the Particulars of Claim: CL 001-5.

[9] Para 5 of the Plea: CL 001-28, by the Defendant, by simply pleading '*noted*': See Rule 22(3); *Makhuva v Lukoto Bus Service (Pty) Ltd* 1987 (3) SA 376 (V) at 386; *Dlamini v RAF and Others* available at http://www.saflii.org/za/cases/ZAGPPHC/2019/939.pdf. Also see para 4 and 5 of the Defendant's Answers to the Plaintiff's Request for Further Particulars: CL 002-33, read with the Plaintiff's questions: CL 002-29.

EVIDENTARY BURDEN

13. The Plaintiff before Court carried the evidentiary burden of proof on a balance of probabilities. In respect of negligence on the part of the Defendant, the Plaintiff only has to proof the proverbial 1% (percent) negligence on the part of the Defendant. Once the Plaintiff proves an occurrence giving rise to an inference of negligence on the part of the Defendant, the latter must produce evidence to the contrary. He must tell the remainder of the story, or take a risk that judgment be given against him.

14. In Kabini v Road Accident Fund[10] the court held:

> *"[21] It is trite that a plaintiff only has to prove 1% negligence on the part of an insured driver for a claim to be established. It is then for the defendant to prove contributory negligence on the side of the plaintiff."*

15. In the light of the fact that a Plaintiff needs to prove only 1% negligence on the side of PRASA to succeed with a claim (*Tsotetsi v RAF* (72217/2009) [2016] ZAGPPHC 36), the duty is on the Defendant to adduce evidence to the contrary or take a risk that judgment be given against him - *Ntsala v*

[10] (26209/2018) [2020] ZAGPPHC 100 (19 February 2020) at para 21.

Mutual & *Federal Ins. Co Ltd 1996* (2) SA 184 (T) 190, *Alerts v Engelbrecht 1961* (2) SA 644 (T). Also see *Van Eeden v Road Accident Fund* (19294/17) [2018] ZAGPPHC 783 (14 September 2018) par [12].

16. In this regard, not only is the Defendant required to plead contributory negligence on the part of the Plaintiff, but a Defendant would also be required to adduce evidence to proof contributory negligence on the part of the Plaintiff. This view is supported by the decision in Fox v RAF [11] wherein it was stated that:

> *"Where the defendant had in the alternative pleaded contributory negligence and an apportionment, the defendant would have to adduce evidence to establish negligence on the part of the Plaintiff on a balance of probabilities. Also see Johnson Daniel James v Road Accident Fund case number 13020/2014 GHC paragraph 17, confirming Solomon and Another v Musset and Bright Ltd 1926 AD 427 at 435."*

17. In respect of contributory negligence, the following was pleaded by the Defendant:[12] (1) The Plaintiff stood too close to an open door (2) She failed to take steps to avoid the accident which she could and should have taken (3) She got into an overcrowded train and (4) She forced the doors open.

[11] *(A548/16) [2018] ZAGPPHC (26 April 2018)* at paragraph [13].
[12] Para 9(1) to 9(4) of the Plea: CL 001-29.

18. The Plaintiff before Court certainly adduced evidence of an occurrence giving rise to an inference of negligence. In *Arthur v Bezuidenhout & Mieny* 1962 (2) SA 566 (A) this principle was formulated as follows:

> "*There is in my opinion, only one enquiry, namely: has the Plaintiff having regard to all the evidence in the case, discharged the onus of proving on balance of probabilities the negligence he has averred against the Defendant?*"

EVIDENCE

19. I turn then to the evidence produced before this Court.

20. In relation to the incident the Plaintiff testified that she boarded the train at Saulsville train station on 25 April 2019 between 08h00 and 08h20.On the day, she gave evidence that she woke up at 06h00 that morning and was on her way to search for work at the market. Arriving at the station she purchased a single ticket, asking the salesperson for a ticket to Bosman Station and she subsequently made her way to the ticket examiners. It was the first time that she had used the train on this specific route.

21. When she embarked the train, it was full and there was no seat for her. She made her journey standing, holding onto a belt strap, next to the door. The door did not close as expected and remained open throughout the journey. On the day however, the train took a different journey owing to construction on the normal line. She was supposed to disembark at Schutte train station but missed the train station, as she lacked knowledge of the route. At all times however, she laboured under the impression that she was on the right track. She was oblivious to the fact that she was to disembark at Schutte station, and this only came to her knowledge after the train passed Schutte Station.

22. When she suspected she was not on the right track, she made enquiries from fellow commuters, who advised her that she should have disembarked at Schutte train station. At this time however, it was too late, as the train had already passed Schutte station. She enquired from fellow commuters about what she now stands to do, and was advised that she should wait as the train she was on, will eventually turn to Schutte station at which stage she could disembark the train. She then proceeded along her journey waiting for the opportunity to disembark at the right opportunity.

23. The opportunity however did not present itself, as when the train passed Golf train station, the train did not stop and drove by past the station at a very fast speed. It is at this moment that she changed her handbag from one shoulder to the next, leaving the overhead belt which she was holding onto. Just then, she lost her balance and was jostled out of the open door and fell on the platform at Golf train station. She then sustained injuries as a result of the fall.

24. During cross-examination, she vehemently denied that she fell asleep on the train and that she upon realizing that she had missed Schutte station decided to jump off the train. She amplified her denial of having fallen asleep by testifying that she was standing upright and had no seat. As the train was further overcrowded, and the windows of the train were open causing a lot of dust, the conditions were also not conducive for her to be sleeping whilst standing. She also denied that on the said morning that she was tired as she was embarking on her train ride.

25. During cross-examination she further conceded that she belatedly had asked other commuters for advice concerning her route, as she laboured under the impression that she was on the correct route and when it dawned on her that she was not heading in the direction of Bosman station, she

already had missed Schutte station, where she was to take a different train to Bosman station.

26. Confronted with the question as to why on the day she was the only one jostled out of an overcrowded train, she conceded that this had transpired when she let go of the overhead belt to change her handbag, as she was afraid of being pick-pocketed. It was in this process that she lost her balance and was pushed out of the door by other commuters and eventually she fell out of the train.

27. The Defendant called two former security guards, Elizabeth Morongwa Tselane and Lekgewo Masemola. Ms Tselane testified, that she was in the employ of PRASA from the period 2014 to 2019. On the day of the incident she was at Golf station where she exercised her duties as a security officer working for PRASA. Her duties included protecting assets of PRASA, to work on the platform and also to work inside the train. In addition, she was required to protect the cables, look after commuter safety and make sure pedestrian don’t cross the railway lines. In essence she was to look after the safety of the station. She further was also required to monitor the robots, check the train flow and report back to authorities. On the day, she was doing patrolling between two given posts.

28. In relation to the incident Ms Tselane testified, that as the ‘Jika’ train was approaching Golf station, the robot was not in the train’s favour to proceed, which means the light was orange and the train had to stop. The train then reduced speed and as it was slowing down, the Plaintiff appeared and fell onto the platform. She then approached the Plaintiff and enquired from her why she fell from the train. The Plaintiff informed her that she fell asleep on the train and then jumped from the train as the train was slowing down at Golf Station. She also told that she boarded the wrong train. During cross-examination of this witness her version was entirely refuted by the evidence as presented by the Plaintiff.

29. The evidence of Lekgewo Masemola was practically almost similar. He also did not per se witness how the Plaintiff fell from the train onto the platform. As to the distance between Schutte and Golf station he testified that it was a meagre stone throw away.

30. Apparent from the evidence presented on behalf of the Defendant the following version emerged:

30.1 Both witnesses could not say as to what transpired inside the train prior to the Plaintiff emerging from the train.

30.2 These witnesses both were unable to explain as to whether the Plaintiff was standing or seated inside this train during her ride, as they

could not have observed same. These witnesses were simply not occupants inside the train.

30.3 The witnesses were further unable to refute the evidence of the Plaintiff that the doors to the train remained open during the entire duration off her train ride.

30.4 As such the defense witnesses were unable to refute the Plaintiff's version that she was jostled out of the moving train as it was approaching Golf station.

31.The evidence of the Plaintiff on crucial aspects was also not disputed when witnesses of the Defendant gave evidence. In this regard the following is noteworthy:

31.1 It was put to the Plaintiff during cross-examination that as the train approached Golf station that the train was moving as a high speed and at this point the Plaintiff was jostled out of the train. Contrary to the above, the witnesses of the Defendant had testified that the train on approaching Golf station was facing an orange traffic light which forced the driver to slow down and that the train was in fact driving very slowly as it approached Golf station.

31.2 It was never put to the Plaintiff that the witnesses for the Defendant will testify that the train was not full on the day of the incident. Her evidence to this end was not disputed. It was put to the witnesses that the accident occurred on a weekday, early in the morning during rush hour

when commuters made their way to work. The witnesses had no acceptable explanation why the train would be empty on their version during rush hour time. This version as testified to by the Defendant witnesses, in any event, is noteworthy, was not pleaded, by the Defendant. At para 9(3)[13] of the Plea, the Defendant pleaded that the Plaintiff *'voluntarily got into an overcrowded train where there was no space for anyone to get into the train'.*

31.3 It was also never disputed with the Plaintiff that the distance is too far to walk between the two stations.

31.4 The Defendant's counsel also failed to put it to the Plaintiff that she got onto the wrong train because she did not check the train number. It was never put to the Plaintiff that the witness disputes the construction on the railway.

EVALUATION

32. The Plaintiff was a credible witness and frank witness. She was prepared to make reasonable concessions where needed, such as admitting that she had left the overhead belt which she was holding onto in order to

[13] CL 001-29.

change her handbag. She presented her evidence in a candid manner to the Court and her demeanor came across as honest and sincere.

33. The same good qualities displayed by the Plaintiff as a witness cannot be said of the Defendant witnesses. Both witnesses came across as argumentative and more often than not gave evidence in a speculative fashion. By way of example, these witnesses were not inside the train but testified that the Plaintiff was sleeping inside the train. So too they both testified that the Plaintiff had jumped out of a moving train (this not even being their pleaded case). Both defense witnesses also found it difficult to make concessions where necessary. On both their versions a person jumping out of a moving train and landing on a platform will have injuries, but yet they failed to make this concession. These witnesses failed to impress as credible witnesses and their versions came across as rehearsed.

34. Ultimately, this Court was only faced with the evidence of the Plaintiff as to how it came about that she had landed on the platform on the day of the incident, and her evidence in this regard remains uncontroverted. On her evidence she was jostled out of a moving train as the doors to this train was open whilst the train was in motion. This points to negligence on the part of the Defendant. The Plaintiff, being the holder of a valid ticket on the day of the incident and being a person lawfully on the train.

35. Our Constitutional Court has dealt with the duty of PRASA towards its passengers in *Baloyi v Passenger Rail Agency of South Africa (PRASA)*[14] it was repeated at para 27 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'.*

36. Further in *Mthombeni v Passenger Rail Agency of South Africa* [15] 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*".

[14] 2018 JDR 2044 (GJ) para 20.
[15] (13304/17) [2021] ZAGPPHC 614 (27 September 2021).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."

"*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*".

37. The principle is categorically stated in *Maduna v Passenger Rail Agency of South Africa* 2017 JDR 1039 (GJ) par [28]:

"....so far as the doors are concerned[16] *and the thrust of the judgment is that in failing to ensure that the doors of a moving train were closed, PRASA fails in its duty."*[17]

38. In casu this is exactly what transpired in the present case. If the doors were closed, as it should have been, and as it could easily have been, the accident would never have occurred. The open doors resulted in the occurrence of the train accident in question and in this regard negligence, is attributed to the Defendant.

39. In the present matter, PRASA failed to display or observe the degree of care required by law, of which the standards required are those of a

[16] Mashongwa v Prasa 2016 (3) SA 528 (CC).
[17] Zulu v PRASA (33073/2016) [2017] ZAGPPHC 468 (29 June 2017) par [18]

reasonable man in the position of PRASA. The liability arises if a reasonable man would foresee the likelihood of his conduct injuring another in his person or property and would take reasonable steps to avoid the injury but failed to take such steps.[18] As the Defendant failed to prevent the injury to the Plaintiff, it should be held liable for her damages.

40. That PRASA is further under a public law duty to protect its commuters cannot be disputed, but the courts have gone 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.[19] There is thus a duty on PRASA to take active steps to guard against harm which may come to commuters. In this case, PRASA failed to take such steps, specifically failing to ensure that the doors of the coach remained closed at all times.

41. On the conspectus of evidence presented, I am as a consequence satisfied, that the Plaintiff has discharged her *onus* on a balance of probabilities.

[18] Mthombeni v Passenger Rail Agency of South Africa (13304/17) [2021] ZAGPPHC 614 (27 September 2021): Para 14.
[19] Shabalala v Metrorail (062/07) 2008 (3) SA 142 (SCA); Transnet Ltd t/a Metrorail and Another v Witter 2008 (6) SA 549 (SCA).

ORDER

42. In the result the following order is made.

42.1. In terms of Rule 33(4) judgment on the merits is granted 100% in favour of the Plaintiff against the Defendant with costs.

42.2 The trial on quantum is postponed *sine die*.

C.COLLIS

JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:

Plaintiff:

Plaintiff's Counsel: Adv F.H.H Kehrhahn

Instructed by: Mr K.M Mashapa Attorneys

Defendant's Counsel: Adv L. Ntshangase

Instructed by:	Makhubela Attorneys
Date of Hearing:	26, 27 & 28 October 2022 6 September 2023.
Date of Judgment:	09 April 2024