THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No.: 966/2013
Reportable

In the matter between

PASSENGER RAIL AGENCY OF SOUTH AFRICA **APPELLANT**

and

IRVINE VAN SAM MASHONGWA **RESPONDENT**

Neutral citation: *Passenger Rail Agency of South Africa v Mashongwa* (966/13) [2014] ZASCA 202 (28 November 2014)

Coram: Ponnan, Majiedt, Pillay and Zondi JJA and Dambuza AJA

Heard: **4 November 2014**

Delivered: **28 November 2014**

Summary: Delict – passenger thrown off train - liability for- whether rail agency negligent.

ORDER

On appeal from: Gauteng Division, Pretoria (Pretorius J sitting as court of first instance):

1. The appeal succeeds with costs.
2. The order of the high court is set aside and replaced with the following:
'The plaintiff's claim is dismissed with costs.'

JUDGMENT

DAMBUZA AJA (Ponnan, Majiedt, Pillay and Zondi JJA concurring):

[1] This is an appeal, with leave of the trial court, against the judgment of the Gauteng Division, Pretoria (Pretorius J) which held the appellant, the Passenger Rail Agency of South Africa (PRASA) liable for damages suffered by the respondent, Mr Irvine Sam Mashongwa (Mr Mashongwa) in consequence of a robbery and assault perpetrated on him whilst he was a fare-paying passenger on a train in Pretoria. At the request of both parties the high court had separated the issues of liability and quantum of damages and the matter proceeded solely in respect of the former.

[2] PRASA conducts business as Metro Rail and is charged with the function of rendering public rail transportation nationally. On 1 January 2011, at approximately 11h00, Mr Mashongwa was travelling on a train from Walker Street

where he had boarded, to the Mamelodi Gardens Station. He was the sole occupant of his coach. His evidence was that the doors of his coach remained open as the train left Walker Street Station. Shortly after the train departed, four men entered his coach from an adjacent coach. They demanded his cellphone and money, which he handed over. They then assaulted him causing him to fall. They continued to assault him with fists and kicked him whilst he was lying on the floor of the train. Then they picked him up and threw him off the train through the open doors of the coach as the train approached the next station, Rissik Street. He landed on the railway platform where he cried out for help and two security guards came to his assistance.

[3] The robbery and assault on Mr Mashongwa was common cause in the high court, although the version of the incident by Ms Beauty Mothotsi, one of the security guards who responded to Mr Mashongwa's cries for help, was different to that of Mr Mashongwa. It appears from the evidence that PRASA had indeed adopted measures to avert crime. The question here is whether Mr Mashongwa had discharged the burden of establishing on a balance of probabilities that those measures were inadequate in the circumstances and that had certain additional measures which he postulates should have been taken, had indeed been taken, the attack would not have occurred.

[4] In his claim for damages Mr Mashongwa relied on two negligent omissions on the part of PRASA: firstly, that PRASA had failed to provide adequate security guards to ensure his safety and the safety of other rail commuters; and secondly, that PRASA had negligently failed to ensure that the coach doors were closed whilst the train was in motion. Both of those found favour with the high court.

[5] The classic test for negligence was set out by Holmes JA in *Kruger v Coetzee*[1] as follows:

'For the purposes of liability *culpa* arises if –

(a) a *diligens paterfamilias* in the position of the defendant-

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps.'

[6] In *Shabalala v Metrorail*[2] this court warned that:

'[M]erely because the harm which was foreseeable did eventuate does not mean that the steps taken to avert it were necessarily unreasonable . . . To hold otherwise would be to impose on the respondent a burden of providing an absolute guarantee against the consequence of criminal activity on its trains. There clearly is no such burden and the appellant did not contend that there was.'

[7] What constitutes reasonable measures depends on the circumstances of each case.[3] The presence of Ms Mothotsi and her colleague Mr Malatji at Rissik Street Station is evidence that there were security measures in place and that guards had indeed been deployed. The evidence of Mr Mzwandile Khumalo, the Gauteng provincial security manager for Metrorail at the time of the incident, was general in nature, being an explanation of security strategies that PRASA had in place during that period. Mr Khumalo's evidence was that during the period of the incident Metrorail had employed about 800 security personnel. Part of PRASA's security enforcement strategy was directed at increased levels of crime over peak periods, such as the festive season which would include the day of the incident, namely New Year's Day. But, nothing, it would appear turns on all of this, and in

[1] *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F.
[2] 2008 (3) SA 142 (SCA) at 145F-G.
[3] J Neethling &J M Potgieter *Law of Delict* (6th ed, 2010) at 148.

determining whether PRASA should be held liable, I shall limit myself to the case foreshadowed in the pleadings and sought to be advanced before us on appeal. In that regard to the extent that there are factual disputes on the evidence I shall – as the high court did - approach the matter on the basis that Mr Mashongwa's evidence is to be preferred.

[8] The *causa sine qua non* test (or the 'but for' test) is widely accepted, by courts both in this country and in other jurisdictions, as the method by which the factual causal link or absence thereof is determined.[4] *In International Shipping Co (Pty) Ltd v Bentley*[5] Corbett CJ set out the test as follows:

'As has previously been pointed out by this Court, in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as "factual causation". The enquiry as to factual causation is generally conducted by applying the so-called "but-for" test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; aliter, if it would not so have ensued. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a causa *sine qua non* of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a

[4] J Neethling & JM Potgieter *Law of Delict* (6 ed, 2010) at 178-179.
[5] 1990 (1) SA 680 at 700 F-G.

juridical problem in the solution of which considerations of policy may play a part. This is sometimes called "legal causation.'

[9] Each of the two grounds of negligence relied on by Mr Mashongwa will be considered in turn. As to the first: Let us assume in his favour that two guards had been stationed at the Walker Street Station and that they had ensured that the coach doors were closed before the train departed that station; that would not have prevented the occurrence complained of, because on his own version the assailants would have still entered his coach, robbed and assaulted him, inasmuch as they had not boarded the train at Walker Street Station. According to him, they entered his coach from an adjoining coach. He thus accepted that they must have boarded the train prior to Walker Street Station. Whether there were security guards on the other coaches is unclear. What is clear is that there were no guards in his coach. It is also clear that to avert the attack there would have had to have been at least one security guard in his coach. I say at least one because, given the number of attackers, a single security guard may well have made no difference. But even if one were sufficient to avert the attack, the question remains whether it would be reasonable to require PRASA to have a security guard in every coach. To insist on such a requirement would exceed by far the precautionary measures to be expected of PRASA (*Shabalala* para 9). Counsel for Mr Mashongwa accepted as much. In *Shabalala*[6] Scott JA accepted that in order to avert the attack on the appellant, there would have had to be, at least, one security guard in Mr Shabalala's coach. But in view of the brazen nature of the attack, where the assailant had shot Mr Shabalala three times when he said he had no money on him, the learned judge found that it was doubtful that one guard, even if armed, would have made any difference. Like

[6]Para 9.

Scott JA, I too have my doubts whether the presence of a guard in the particular coach would have made any difference in this case.

[10] As to the second: Having decided that they were going to remove Mr Mashongwa from the train after robbing him (probably to avoid identification), nothing would have stopped them from forcing the coach doors open and throwing him out. The evidence was that the doors could be forcibly opened from the inside – they were deliberately designed in that manner to allow for an exit from the coach in cases of emergency. The highly speculative submission by Mr Maritz that had the doors been closed the assailants would have struggled to open them until the train reached the Rissik Street Station, is untenable. No evidence was adduced as to precisely how long it would ordinarily take to open the doors of a coach in a moving train. Nor, for that matter, was any evidence adduced as to the time that it takes for the train to make its way from the one station to the next. The evidence is to the effect that Mr Mashongwa was thrown off the train in close proximity to the platform of the Rissik Street Station. It therefore must follow that the fear of reaching the following station did not deter the assailants. It follows that the appeal must succeed.

[11] The following order is made:

1. The appeal succeeds with costs.
2. The order of the high court is set aside and replaced with the following:

‘The plaintiff’s claim is dismissed with costs.’

N Dambuza
Acting Judge of Appeal

APPEARANCES:

For Appellant:	JG Cilliers SC
	Instructed by: Stone Attorneys; Pretoria Symington & De Kok; Bloemfontein
For Respondent:	SG Maritz (S Maritz)
	Instructed by: CP van Zyl Incorporated; Pretoria Spangenberg, Zietsman, Bloem Incorporated, Bloemfontein