

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

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DATE

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SIGNATURE

CASE NO.2013/16571

In the matter between:

SOLOMON OUPA MACHEKE

First Plaintiff

GRANT MACHEKE

Second Plaintiff

And

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Defendant

J U D G M E N T

SIWENDU, AJ:

INTRODUCTION

[1] The first plaintiff, Solomon Macheke (**'Solomon'**) and the second plaintiff, Grant Macheke (**'Grant'**) institute proceedings against the defendant, Passenger Rail Agency of South Africa (**'PRASA'**) arising out of a train accident at Dube Station.

- [2] For the sake of convenience, the plaintiffs will be referred to by their first names '**Solomon**' and '**Grant**' respectively throughout the judgment and the defendant will be referred to as '**PRASA**'.
- [3] On or about 10 September 2012, '**Grant**' was injured as a result of the accident and his legs had to be amputated. He was eighteen (18) years old. He claims damages in the amounts set out in the summons.
- [4] At the commencement of the proceedings, '**PRASA**' moved an application for separation of the determination of the merits of the claim (liability) from the determination of quantum pursuant to an agreement between the parties. Based on the preliminary assessment of the facts of the case, the court ruled that the determination of quantum is not inextricably linked to findings on the merits. In the result, the application for separation was granted in terms of Rule 33(4) on the basis that over and above the determination of liability, the court would determine whether or not there had been contributory negligence on the part of '**Grant**' and if found to exist, the degree thereof.
- [5] Only those aspects of the particulars of claim relative to the alleged breach of duty to the safety and security of the public as well as those relating to '**PRASA**'s alleged negligence are referred to in this judgment.
- [6] In the particulars of claim, the plaintiffs plead that '**PRASA**', is obliged to render a rail commuter service in the public interest in terms of the provisions of the South African Transport Services Act 9 of 1989. It is obliged to do so in terms of all statutory obligations and regulations applicable to '**PRASA**' as well as implement policies, procedures and measures to ensure the safety of

the public making use of such a service.

[7] The plaintiffs claim that such measures by '**PRASA**' must ensure against reasonably foreseeable risks of bodily injury to or death of members of the public making use of the service arising from the operation of the trains and ancillary activities, and require that '**PRASA**' monitors the effectiveness of these measures.¹

[8] The plaintiffs claim further that flowing from '**PRASA**'s legal obligation, is a duty of care owed to the public to ensure that safety, adequate control of individuals acting in a dangerous, unsafe or criminal manner, minimization of unsafe conduct, installation of warning signs warning of potential dangers, appropriate barriers and installation of such barriers², including proper and adequate demarcation of potentially dangerous areas, amongst others.³ It is alleged that '**PRASA**' was in breach of this duty of care.

[9] Over and above this, the plaintiffs plead that '**PRASA**' was negligent in that:

- (a) It failed to ensure the safety of members of the public in general, by safeguarding the rail tracks from the public, by erecting a boundary wall around the rail tracks;
- (b) It failed to employ employees, alternatively, failed to employ an adequate number of employees to guarantee the safety of pedestrians in general and '**Grant**' in particular on the platform and/or

¹ Paragraphs 3.3, 3.5.2.1 and 3.5.3 of the Plaintiffs Summons

² Paragraphs 4, 4.1.1.2 and 4.1.2 of the Plaintiffs' Particulars of Claim

³ Paragraph 4.1.3 of the Plaintiffs' Particulars of Claim

its surroundings where he was walking;

- (c) It failed to employ employees, alternatively, failed to employ an adequate number of employees to prevent pedestrians from crossing the rail tracks and in particular **'Grant'** who was crossing towards the veld; and
- (d) It neglected to employ security staff on the platform and/or the area around the rail tracks where **'Grant'** was walking to ensure the safety of the public in general and the minor.

[10] **'PRASA'** disputes that it is liable for the injuries suffered by **'Grant'** and conceded neither the duty of care allegedly owed to **'Grant'** nor the negligence alleged. In particular, **'PRASA'** submits that in the event that the court finds that it had breached its duty of care to **'Grant'**, this breach was not causally related to the accident.

MATTERS THAT BECAME COMMON CAUSE

[11] The following matters were common cause between the parties namely that **'Grant'**:

- (a) suffers from a bi-polar mental condition and receives treatment for the condition. He had taken the medication at approximately 07:00 am the morning of the accident and had left his home in Dube for school at approximately 07:35 am.

- (b) He was not a commuter at the time of the accident. He had utilised the pedestrian/passenger bridge that links Dube township to Meadowlands township to cross over on route to Veritas High School which is situated in Meadowlands.
- (c) The side-effects of the medication would cause him to struggle to breath and talk. The medication left his mouth wide open, presumably locking his jaws.
- (d) The manner of the driving or operation of the train was not contested.

[12] On the day in question when he experienced these side-effects he had already gone over the pedestrian bridge above the station to the Meadowlands side of the station but had decided to take a 'short-cut' back to Dube hence why he went across the railway tracks to get to the shops on the Dube side of the station.

[13] The area surrounding the railway tracks near the station had been fenced but this fence was broken and pedestrians could walk through the fence across the railway tracks. This fence had since been replaced with a palisade fence by '**PRASA**'.

[14] Security guards employed by '**PRASA**' were stationed at the Dube station on the day of the accident.

EVALUATION OF THE EVIDENCE

[15] The only evidence led on the merits of the claim was that of '**Grant**' and his

father **'Solomon'**. **'PRASA'** closed its case without calling witnesses.

- [16] Various exhibits depicting the layout of the Dube Station as well as those of surrounding stations were submitted to the court. Both parties agreed that the layout of the station depicted in **'Exhibit E3'** of the defendant's bundle of documents was the correct representation of Dube Station at the time of the accident.
- [17] A notice of objection had been served on the plaintiffs relative to the admission of photographs at **page 14** of the **Plaintiff's Amended Merits Bundle 'B'**, marked photograph **'F'**. Accordingly these were not considered into evidence.
- [18] The plaintiffs and defendant part ways with regards to the exact place where the accident allegedly occurred.⁴
- [19] **'PRASA'** alleges that the accident occurred approximately sixty eight meters (68 m) away from the edge of the station platform. It submits that this is where **'Grant'** was first seen by the security guards the morning of the accident. In contrast, the plaintiffs allege that the accident occurred approximately one hundred and two meters (102 m) away from the edge of the platform of the station.
- [20] Utilizing **'Exhibit E3'**, **'PRASA'** places **'Grant'** and the accident along that portion of the station that is cordoned off, while **'Grant'** places himself and the accident along that portion of the station where the fencing ends. It had

⁴ See **'Exhibit E3'** of the defendant's supplementary bundle of documents

not been disputed that the palisade fencing in '**Exhibit E3**' was installed after the accident and that previously it had been in disrepair, thus allowing pedestrians to access the area and cross the railway tracks.

[21] In his evidence in chief, '**Grant**' testified that on the day in question at approximately 07:00 am he had taken his bi-polar medication. He had left his home in Dube at approximately 07:35 am, travelled along streets and over the Dube railway station pedestrian bridge, which links Dube and Meadowlands townships. This was his routine route to school.

[22] After crossing the bridge he had experienced side-effects caused by the medication which resulted in breathing difficulties leaving his mouth wide open consequently making it difficult to speak.

[23] He testified further that whenever he experienced these side-effects, he found that once he ate 'hard cakes' they diminished and/or were alleviated. On the day in question, he had already crossed the pedestrian bridge when he experienced the side-effects. He decided to return to the Dube side of the station as he needed to access the tuck shops and/or hawkers on the Dube side of the station to buy 'hard cakes' to alleviate his symptoms. He testified that he elected to use a 'short-cut' by walking across the railway tracks instead of utilizing the bridge at the station as he was going to be late for school.

[24] After crossing the Dube Station bridge, on reaching the railway tracks, he testified that he saw a stationary train at the platform and commuters were alighting. He had been crossing the railway tracks when he heard a loud

noise. He was shocked by the noise and found himself underneath the train.

[25] The following material matters arose from **'Grant's'** testimony during cross examination. There was a time difference of approximately forty (40) minutes between the time he alleges to have crossed the accident point of impact and the occurrence of the actual accident. The accident was recorded to have occurred at 08:20 am. He had testified in his evidence in chief that his school commenced at 07:50 am. He had crossed the station well before school commenced. When pressed to explain this discrepancy, he testified that he had not paid attention to the time and therefore could not dispute the recorded time of the accident. This is inconsistent with his evidence in chief and the rationale he provided for taking the 'short-cut'.

[26] The second aspect relates to **'Grant's'** emotional and mental health. The version put by **'PRASA'** to **'Grant'** was that he had not intended to go to school on the day and the accident had been as a result of a suicide attempt. **'Grant'** had allegedly been seen by **'PRASA's'** security guards sitting across the point of accident⁵ that morning. It was put to him that this was inconsistent with his evidence in chief and the intention to go to school.

[27] It was also put to him that when his father attended the accident scene he had informed and/or intimated to the security guards of **'Grant's'** suicide attempt(s). The allegations about his suicide were recorded in the Metrorail Joint Operations Centre Occurrence Book⁶ and the Metrorail Segment

⁵ At page 27A of the Defendant's Bundle of Documents 'Bundle C'

⁶ At page 24 of the Defendant's Bundle of Documents 'Bundle C'

Occurrence Book⁷ respectively. **'Grant'** denied these allegations during cross examination.

[28] In amplification of this version, it had been put to **'Grant'** that less than three (3) months before the accident, he had taken an overdose of **Epilim** tablets in a suicide attempt and had to be admitted at Chris Hani Baragwanath Hospital's emergency unit.⁸ These allegations were denied. **'Grant's'** version was that he took the overdose of **Epilim** tablets with the view to induce sleep as he had problems sleeping which he attributed to the medication.

[29] **'Grant's'** version that he needed to eat 'hard cakes' to alleviate his symptoms had been cast in doubt by his psychiatrist who reported that eating 'hard cakes' would not have made a change in the medical side-effects⁹ even though **'Grant's'** version was that doing so alleviated the side-effects.

[30] It had also been put to **'Grant'** that he had elected to cross the railways tracks knowing it was dangerous to do so and that if he had been cautious he would have utilised the bridge made available for pedestrians and commuters. He did not deny this election but was emphatic however that he needed to take the 'short-cut' due to the urgency of the side-effects he was experiencing. He testified that the train had been stationary at the time of crossing. He conceded that he had made a choice with regards to crossing and when pressed, conceded that he may have miscalculated.

⁷ At page 26 of the Defendant's Bundle of Documents 'Bundle C'

⁸ At page 24 of the Plaintiff's Amended Merits Bundle 'B'

⁹ Psychiatrist's Report dated 28 October 2014

[31] The second witness called on behalf of the plaintiffs was the '**Grant's** father, '**Solomon**'. He testified that on the morning in question, while at home he had received information that '**Grant**' was involved in an accident and had rushed to Dube station. He had found '**Grant**' under the train with his mouth wide open unable to speak. Nothing much turns on his evidence in chief other than that Dube station was not fenced off and township residents crossed the railway tracks 'willy-nilly'. In cross examination, he had denied advising security guards stationed at the Dube station that the accident had been a suicide attempt. He conceded that the suicide allegation was the only aspect he found fault with in the statement by the '**PRASA**' official, and that all other aspects of the statement relative to the report were correctly recorded.

APPLICABLE LAW

[32] The case advanced by the plaintiffs is premised on two negligent omissions, namely, the alleged breach of duty of care '**PRASA**' owes to the general public and to '**Grant**' as a result of an alleged failure to put reasonable measures to prevent the incident.¹⁰

[33] The first question for this court is whether or not the plaintiffs have discharged the onus of establishing on the balance of probabilities the breach of this duty. Related to this question is an aspect of the burden required to be discharged by the plaintiff, namely whether, 'but for' the inadequate measures allegedly employed, the accident would not have occurred.

¹⁰ Paragraph 23 of Plaintiff's Heads of Argument

[34] It is not disputed that '**PRASA**' provides a rail commuter service in the public interest, and as an organ of state bears the obligation to protect the rights to dignity, life and security of commuters as well as the general public that utilizes facilities under its control. This obligation was affirmed in Rail Commuters Action Group¹¹ and in considering factors relevant, the court held that:

"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" (Court's emphasis)"

[35] This court must express alarm at the paucity of evidence presented to advance and support '**Grant's** claim. '**PRASA's** version put to witnesses demonstrated that '**PRASA**' concentrated its oversight efforts mainly to passengers and within the station precinct. This version was not disputed. The quality of these efforts is not the subject of this case.

¹¹ Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Other 2005 (2) SA 359 (CC) at paragraph 88

- [36] Evidence further points to the fact that '**Grant**' was injured meters away from the actual station platform and in '**Grant's** own version further from the station precinct. He claims that there were no obvious measures to cordon off the railway tracks from the crossing public.
- [37] The provision of rail commuter services, its apartheid history as well as the disparity in the quality of facilities for black commuters living in townships has been the subject of number references by the courts.¹² In the court's view, delineating the boundary and scope of '**PRASA's** legal duty to the surrounding communities and pedestrians beyond commuters is a matter of public interest and a business social ethical consideration that applies to '**PRASA**' in terms of Regulation 43(5) of the Companies Act 71 of 2008 in so far as the responsibility for the impact of activities and its contribution to the surrounding communities.
- [38] In *South African Rail Commuters Corporation v Almmah Pheliswe Thwala* 661/2010[2011] ZASCA179 [29 September 2011], Maya JA in dealing with the nature of the onus of a claimant like '**Grant**' held that:

"The nature of the onus was such as to oblige her to adduce evidence that gave rise to an inference of negligence. Only then would the (Corporation) have had to rebut that inference by adducing evidence relating to the measure it took to avert the harm but onus of proving such measures are inadequate and unreasonable in the circumstances and would nevertheless remain on the claimant."

¹² Phetole Peter Mokwena v South African Rail Commuter Corporation Limited and 1 Other 2012 SA (GSJ); and Rail Commuters Action Group and Other (*Supra*)

[39] Pertinent evidence which would have assisted the court in this regard was not adduced and/or admitted.

[40] In *Minister of Safety and Security v van Duivenboden* 2002(6) SA 431 SCA Nugent JA held at paragraph 21 that :

"When determining whether the law should recognise the existence of a legal duty in any particular circumstances what is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms. Where the conduct of the State, as represented by the persons who perform functions on its behalf, is in conflict with its constitutional duty to protect rights in the Bill of Rights, in my view, the norm of accountability must necessarily assume an important role in determining whether a legal duty ought to be recognised in any particular case." (Court's emphasis)"

[41] Adducing supporting evidence to of the alleged breach of such a duty cannot be left to the court's intuitive view of what wrongful.

[42] Evidence of where '**PRASA's** duty begins and ends relative to the rest of the railway tracks outside of the proximity of the station platform was not presented, nor was evidence relative to foreseeability of injuries and the gravity thereof. In the court's view, this had to be weighed against relevant human behavioural constraints, and in particular the court was not armed with evidence to prove that 'but for' the alleged inadequate measures resulting in the wrongful breach of its duties, this particular accident would not have occurred.

- [43] This brings the court to the second aspect of the alleged negligent omission which is interrelated to the above. In this regard, the question is whether the plaintiffs have discharged the burden of establishing on the balance of probabilities that **'Grant's'** injury was a *causa sine qua non* of **'PRASA's'** alleged wrongful action and sufficiently linked closely or directly to the wrongful act? A demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability.
- [44] On the question of wrongfulness, notwithstanding the court's findings on the limitations in evidence, the plaintiffs' contention through its witnesses is that the rail tracks in Dube Station were not cordoned off and protected compared with other nearby stations. Residents of Dube and Meadowlands took a 'short-cut' by crossing the rail tracks.
- [45] While logic dictates that had there been a proper fence harm would not have occurred, there is no evidence before the court to reach this conclusion or to demonstrate that pedestrians would not have crossed where **'Grant'** crossed or at some other point.
- [46] By his own admission **'Grant'** disregarded the bridge crossing provided at the station, according to him, due to the urgency of his side-effects. Even though he had used it earlier that morning on route to school to cross from Dube township to Meadowlands township.
- [47] This brings the court to unsatisfactory aspects of **'Grant's'** evidence during cross examination and his subjective state of mind. It had been put to him that he was seen by **'PRASA'** security guards earlier that morning across the

railway track. He could not effectively account for the lapse of time from the time he left home, crossed the bridge to the time of the accident which occurred approximately forty (40) minutes later and could not reconcile this discrepancy. In the result, doubt was cast on his version that the reason he took a 'short-cut' was because he was rushing to go to school. He had not disputed that he had been seen across the railway tracks earlier that morning.

[48] The second aspect relates to the version put to him and his father '**Solomon**' regarding his alleged suicide attempt(s). It was not disputed that '**Grant**' had been admitted at Chris Hani Baragwanath Hospital following an overdose of **Epilim**. While he denied that this had been a suicidal attempt, the allegation about his suicidal attempt(s) found their way into a statement by '**PRASA**' officials. While '**Grant**' and his father denied advising '**PRASA**' security of this, when weighed against available evidence and their performance during cross examination it has been enough to cast sufficient doubt in the court's mind, in particular, in the face of there being no other evidence to counter the allegations. On this score, the probabilities do not favour the plaintiffs.

[49] It was submitted in argument that '**Grant's** conduct constituted a voluntary assumption of the risks associated with the crossing of the railway track a long standing principle enunciated in *Waring and Gillow Ltd v Sherborne* 1904 TS 340 at 344 that:

"He who, knowing and realising a danger, voluntarily agrees to undergo it has only himself to thank for the consequences"

[50] 'Grant' testified that he had thought it was safe to cross the railway, he had conceded that he had miscalculated hence why the accident ensued. The consequences of the medication remains a moot point. It had not been contended that it had affected his faculties or judgment.

[51] While in his evidence he was adamant that the train had been stationery at the time he started crossing, thus implying a proper lookout and an awareness of potential danger and risk, the concession that he had miscalculated indicated that he foresaw the prospects but erred. The manner of the driving of the train had not been contested. The plaintiffs evidence falls far short of satisfying the standard of proof required.

[52] On the question of costs, the general principle is that costs follow the result. This is still subject to the court's discretion. Counsel for the defendant correctly did not labour the point. The litigants had brought a *bona fide* claim and the issues raised are of public interest even though they were not successful. It is fitting that each party pays its own costs.

[53] In the result, the following order :

- (a) The plaintiffs' claims be dismissed.
- (b) Each party to pay their own costs.

SIWENDU
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

<u>CASE NO.</u>	<u>2013/16571</u>
<u>HEARD ON:</u>	<u>3 – 7 NOVEMBER 2014</u>
<u>FOR THE PLAINTIFFS:</u>	<u>ADV. R LIPHOSA</u>
<u>INSTRUCTED BY:</u>	<u>MAKAU PHEFADU INC.</u>
<u>FOR THE DEFENDENT:</u>	<u>ADV. T J BRUINDERS SC</u>
<u>INSTRUCTED BY:</u>	<u>NORTON ROSE FULBRIGHT INC.</u> <u>(incorporated at DENEYS REITZ INC.)</u>
<u>DATE OF JUDGMENT:</u>	<u>9 FEBRUARY 2015</u>