



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

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| (1) | REPORTABLE: Electronic reporting only |
| (2) | OF INTEREST TO OTHER JUDGES: No. |
| (3) | REVISED. |

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SIGNATURE

Case no: 37364/17

In the matter between:

BONAKELE VICTORIA BUTHELEZI

Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Defendant

***Case Summary:* Delictual damages – commuter falling out of train stationery between two stations and sustaining bodily injuries – claim based on negligent omission – negligence not proved.**

JUDGMENT

MEYER J

[1] The plaintiff, a 45 year-old woman, sues the defendant for damages arising out of an incident in which she sustained bodily injuries that happened during the morning on 4 September 2017, between Cleveland and Tooronga stations, Johannesburg. Only the question of liability is presently relevant; a consent order separating the questions of liability and quantum in terms of r 33(4) of the Uniform Rules of Court was granted at the commencement of the trial.

[2] The plaintiff testified and the defendant called as its witnesses the driver of train 0628 (the train), Ms Maggie Mashiane, the Metro guard on duty on the train, Mr Charles Baloyi, and Ms Sithube, a security guard employed by Royal Security, who was on duty at Park Station, Johannesburg, the ultimate destination of the train on the morning in question.

[3] The background facts are simple and were largely undisputed at the conclusion of the trial. The train, driven by Ms Mashiane and guarded by Mr Baloyi, departed from Pretoria at 7:45 am on 4 September 2017, and it was scheduled to arrive at its ultimate destination, Park Station, at 9:24 am. It was what is referred to in the evidence an 'all stop train', stopping *inter alia* at Germiston, Cleveland and Tooronga stations. It was a twelve-coach train, including three motor coaches; one in front where the train driver was seated, one in the middle and one at the rear where the train guard was stationed.

[4] The plaintiff boarded the train around 8:00 am at Germiston station. Once the train had departed from Cleveland station, it experienced mechanical problems and became stationary between that station and the next one, Tooronga station. The train driver rang a bell three times to alert the train guard that the train was stopping. The instruments indicated to her a mechanical problem with the rear motor. It is the duty of a train driver to first inspect the motors to see whether a mechanical problem could be resolved without calling on the defendant's technicians.

[5] The train driver switched off the train and took its keys with her when she alighted from the front motor coach in order to unlock the motor coaches. The effect of switching off a train is that the air pressure is released, and the doors of the coaches can then be forced open easier. While the train driver was walking to the other two motor coaches, commuters opened the windows and enquired from her what the problem was to which she replied that it was a mechanical one. She was unable to resolve the mechanical problem with the rear motor herself and accordingly called the technicians out to the train. She instructed the train guard to tell commuters who become 'impatient' to disembark from the motor coaches where ladders are fitted that can be used for the purpose. When walking back to the front motor coach, she also informed commuters who enquired from her why the train was stationary that if they 'need' to get off the train they should go to either the front,

middle or rear motor coach and use the stairs to disembark. She conversed with commuters in Sepedi and English. Technicians attended to the mechanical problem and the train was back *en route* about an hour later. During that time certain commuters disembarked by using the stairs of the motor coaches and others forced coach doors open and jumped from the train.

[6] The plaintiff testified that disembarking commuters pushed their way to an open door about three metres away from where she was standing in one of the coaches, in the process gradually pushing her to that open door and then out of the train. She fell on the ground and sustained a fracture of the right tibial plateau and other bodily injuries. (Whether the plaintiff was pushed out of the train or jumped of her own accord is an issue to which I return.) Neither the train driver nor the train guard saw the plaintiff lying injured on the ground next to the train. Two young gentleman selling sweets came to her aid and helped her to the platform at Tooronga station, which was about 200 metres away, where she boarded a train to Park station. Ms Sithube, who was on duty at the 'gate concourse' at Park station, was informed about an injured lady on platform 11 – 12. One of her duties as a security officer was to help people who have been injured on trains.

[7] Ms Sithube went to platform 11-12 where she found the plaintiff. She obtained her personal particulars, train ticket and enquired from her how she got injured. (I return to the conflicting accounts of the plaintiff and Ms Sithube regarding the explanation given to Ms Sithube as to how she had got injured.) She requested the plaintiff to stay there while she was going to call for an ambulance and summon a colleague. Ms Sithube then went to the control office where she reported the incident. An official of the defendant, Ms Mazibuko, accompanied her back to the plaintiff, who also explained to Ms Mazibuko what had happened to her. The plaintiff was taken by ambulance to Charlotte Maxeke Johannesburg Academic Hospital, where she was admitted, given treatment and surgical intervention, and she was discharged on 29 September 2017.

[8] The premise of the plaintiff's case is that she fell and sustained injuries as a result of being pushed out of a stationary train that was overcrowded and allowed to run all the way from Germiston station and to be stationary between two stations with open doors. In his opening address the plaintiff's counsel formulated her case thus:

'Had the doors of the train been closed and had the train not been overcrowded she would not have been injured; she would not have been pushed out of the train.'

[9] In *South African Rail Commuter Corporation Limited v Thwala* (661/2010) [2011] ZASCA 170 (29 September 2011), Maya JA said this:

'[11] The test by which to determine delictual liability is trite. It involves, depending upon the particular circumstances of each case, the questions whether (a) a reasonable person in the defendant's position would foresee the reasonable possibility of his or her conduct causing harm resulting in patrimonial loss to another; (b) would take reasonable steps to avert the risk of such harm; and (c) the defendant failed to take such steps. But not every act or omission which causes harm is actionable. For liability for patrimonial loss to arise, the negligent act or omission must have been wrongful. And it is the reasonableness or otherwise of imposing liability for such a negligent act or omission that determines whether it is to be regarded as wrongful. The onus to prove negligence rests on the plaintiff and it requires more than merely proving that harm to others was reasonably foreseeable and that a reasonable person would probably have taken measures to avert the risk of such harm. The plaintiff must adduce evidence as to the reasonable measures which could have been taken to prevent or minimise the risk of harm.

[12] It is settled that the appellant (a corporation whose main object and business in terms of the Legal Succession to the South African Transport Services Act 9 of 1989 under which it was established, is to provide rail commuter services in the public interest and generate income from the exploitation of rail commuter assets on behalf of the State) carries a positive obligation to implement reasonable measures to ensure the safety of rail commuters who travel on its trains. Such obligation must give rise to delictual liability where, as was pleaded here, the risk of harm to commuters resulting from falling out of crowded trains running with open doors is eminently foreseeable.'

(Footnotes omitted.)

[10] The sum of the plaintiff's evidence on the aspect that the train was overcrowded is merely that the train was 'very full'. She stood for the duration of her ride. The train driver testified that the train left Pretoria at 7:45 am, which was off-peak, and it 'was not as full as peak hour traffic'. The train guard testified:

'There were not many people on that train because it was off-peak time. Peak hour normally is from 5:00 to 7:30. The train departed late from Pretoria, 7:45.'

[11] An inference of negligence, in my view, cannot be drawn from the plaintiff's scant evidence on this aspect that the train was very full. More is required. Equally apposite to the present case is what Maya JA said in *Thwala* para 15:

' . . . The sum of the respondent's evidence on this aspect was merely that the train was "very full . . . even up to the door". She neither pleaded nor established in evidence that the appellant had a duty to regulate the numbers of its rail passengers, nor what reasonable measures it ought to have implemented in that regard to ensure passenger safety that it omitted to take. She led no evidence, for example, on the passenger capacity of the coach; if that number was exceeded, how many passengers remained in the coach when the train reached her station etc. One cannot assume simply from the fact that there were standing passengers that the coach carried an impermissible number as the appellant's policy and applicable safety standards might well legitimately have allowed that practice.'

[12] The plaintiff's evidence that the train ran from Germiston station with open doors, which remained open also when the train was stationary between Cleveland and Tooronga stations, is not credible. In chief she testified that when the train left Germiston station, she noticed that the doors of the train were open. In fact, she said '[t]hey were wide open'. When the train was stationery between Cleveland and Tooronga stations the 'doors were still open'. She concluded her evidence in chief by saying this:

'If the doors were closed, I would not have fallen. From the time the train left Germiston I never saw the doors closed. They were never closed.'

Under cross-examination, however, she testified that she did not observe whether the doors of the other coaches were open. And insofar as the coach in which she travelled is concerned, she testified that only the door that was about three metres away from where she was standing was open and the other doors were closed.

[13] The train driver explained that her driving position is in front of the train and that she faces forward, looking out for signals. The train guard is positioned at the rear of the train and responsible for ensuring that commuters get on and off the train and that all the doors are closed before a train leaves a platform. She testified that there was no problem with the train when she took it over in Pretoria. She also did not receive any report from the train guard that indicated any problem with the train doors. If there was a problem, he would have informed her or the defendant's technicians of it.

[14] The train guard testified that when he took over as the train guard in Pretoria, he had not been informed of any problems with the train by the train guard from whom he took over. When a train guard relieves another train guard on a train, the latter guard reports to the guard taking over about the train and the status of its doors. He testified that his duties include the duty to observe the full length of the train on the platform until the full length of the train has left the platform. He took time to observe the doors and did not notice anything unusual. He also did not experience any problems with the doors; they functioned properly.

[15] From the testimony of the train driver and guard it appears that the train ran smoothly the morning in question until it had a mechanical breakdown of its rear motor once it had left Cleveland station, and that the doors were properly functional. The plaintiff did not discharge the onus of establishing that the train ran with open doors or that a door of the coach in which she was travelling remained open from Germiston station and while the train was stationary between Cleveland and Tooronga stations. It seems to me more probable that some commuters forced open some of the train doors, including the door where the plaintiff jumped off or was pushed off the train. I accept that it is common human behaviour for railway commuters, particularly during morning periods when most are in a hurry to get to work or to other destinations, to rush to the doors of a coach when a train gets stuck between two nearby stations, and to rather get off the train and walk to the nearest station to board another train. (Cf. *Thwala* para 14.)

[16] This, in fact, is supported by the evidence of the plaintiff, the train driver and the guard. The plaintiff testified that during the time when the train was stationary between Cleveland and Tooronga stations, people started to rush to the door close to where she was standing and started to push each other, 'because they were in a hurry and must go to work'. The train driver testified that she had instructed the train guard to tell commuters who become 'impatient' and wished to get off the train to use the stairs fitted to the motor coaches to disembark, and she herself also told this to commuters who 'need to get off' the train. The train guard testified that commuters forced the doors open and were jumping off the train while it was stationary. In his view those commuters acted like that because they did not know when the train was going to leave again.

[17] The plaintiff's testimony is that she was standing in one of the coaches about three paces away from a door that remained open since she had boarded the train; she was gradually pushed to the open door by fellow commuters; she attempted to resist the pushing until she got to the open door, but then made her 'body light' (she stopped resisting) in order not to fall on her head, and that is when she was pushed out of the train. The obstacle in the way of accepting the plaintiff's account of being pushed off the train, however, is the testimony of Ms Sithube, who is adamant that the plaintiff reported to her that the train was stuck between Cleveland and Tooronga stations; that people then started to jump off the train; that she remained seated in the hope that the train 'will move on'; and when that did not happen, she decided to also jump from the train and to walk to Tooronga station from where she would catch the next train. That, according to Ms Sithube, is the explanation the plaintiff gave to her as to how she got injured.

[18] Ms Sithube made a good impression as a witness and the plaintiff's attempts at discrediting her evidence were not convincing. The plaintiff agreed that she explained to Ms Sithube (the security officer) what happened to her and how she got injured, but, according to the plaintiff, what she explained to Ms Sithube 'is what [she] explained to this court', that she was gradually pushed to the open door and out of the train. Furthermore, she accuses Ms Sithube of 'not taking any notes', of 'tapping' her phone while she was explaining to her what had happened, that she did not speak isiZulu to her (which is her mother tongue) and that they did not understand each other. When Ms Sithube was confronted with the evidence of the plaintiff on these aspects, she replied by saying that her own mother tongue is Venda, but that she is able to express herself in isiZulu in a way that isiZulu-speaking people understand, that they indeed conversed in isiZulu and understood each other, that she recorded everything that the plaintiff had told her in her pocket book, which she handed to her supervisor at the Royal Security Office when it was full and she was issued with a new one.

[19] I find it improbable that Ms Sithube would fabricate evidence prejudicial to the plaintiff's case. It is not suggested that she either foresaw the litigation or had any interest in the outcome of this litigation; she merely worked as a security officer for a company that renders security and other services to the defendant. Furthermore, it is not suggested that she and the plaintiff are known to each other and that there is

any acrimony between them, or that she had any other motive to fabricate evidence against the plaintiff. I am unable to find that Ms Sithube's evidence is false. (See *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) 437 (ECD) at 440 D-G.)

[20] It should be borne in mind, as was said by Maya JA in *Thwala* para 18, 'that whether or not conduct constitutes negligence ultimately depends upon a realistic and sensible judicial approach to all the facts and circumstances'. As I have mentioned, the premise of the plaintiff's case is that she fell and sustained injuries as a result of being pushed by fellow commuters from the inside of an overcrowded train that was allowed to run and be stationery between two stations with its doors 'wide open'. The plaintiff, however, failed to establish that the train was overcrowded or that the open door of the coach in which she travelled and which she fell from the train was a happenstance over which the defendant had control or that she was pushed out of the train by fellow commuters. She thus failed to discharge the onus resting upon her of proving on a balance of probabilities that the defendant was negligent. I should add that my conclusion would not have been different if I were to have found that the plaintiff established that she was pushed off the train by fellow commuters. That on the relevant facts and circumstances of this case would also have been a happenstance over which the defendant was not shown to have control.

[21] In the result the following order is made:
Absolution from the instance is granted, with costs.

P.A. MEYER
JUDGE OF THE HIGH COURT

Hearing:	22-24 April 2019 and 3 June 2019
Judgment:	25 February 2020
Plaintiff's counsel:	Mr Bulelani Mzamo (B Mzamo Inc)
Instructed by:	B Mzamo Inc., Fox Street, Johannesburg
Defendant's counsel:	Adv FF Opperman

Instructed by:

Cliffe Dekker Hofmeyr Inc., Sandown, Sandton