

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

Case No. 72788/19

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED

Date: 19/05/2023

In the matter between:

BRANDON CLINTON CELE

Plaintiff

And

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Defendant

JUDGMENT

The judgment and order are *published and distributed electronically*.

VAN NIEKERK PA, AJ

[1] Plaintiff is a 42 year-old male who is employed as a security guard and deployed by his employer at the OR Tambo International Airport.

[2] Defendant is a company incorporated in terms of Section 2 of the Legal Succession to the South African Transport Services Act No. 9 of 1989, which *inter alia* conducts business as the provider of passenger rail transport services.

[3] On the 2nd of October 2019 Plaintiff instituted action against the Defendant pursuant to injuries which the Plaintiff allegedly sustained on the 15th of June 2019 when the Plaintiff was in the process of disembarking a commuter train for which the Plaintiff purchased a valid ticket. In the Particulars of Claim the Plaintiff pleads that the Plaintiff was pushed by other commuters who were disembarking at the station when the train was departing the station and fell through open doors which caused ankle, femur and pelvis injuries as well as general body injuries (“the accident”). The Plaintiff was transported to Tembisa Hospital where he was treated for his injuries and the Plaintiff therefore claims damages for estimated future medical expenses, past medical expenses, estimated future loss of income as well as general damages.

SEPARATION ORDER:

[4] Prior to commencement of the trial the legal representatives acting on behalf of Plaintiff and Defendant agreed that the quantum of the claim instituted by Plaintiff should be separated from the merits of Plaintiff’s claim for damages and that the merits of Plaintiff’s claim for damages be adjudicated first and separately from the quantum issue in terms of the provisions of Rule 33(4). Accordingly, at the commencement of the trial and on application of the parties I granted such order.

THE PLEADINGS:

[5] Plaintiff pleads in paragraph 7 of the Particulars of Claim that the Defendant is vicariously liable for damages suffered by Plaintiff on the grounds that the sole cause of Plaintiff falling from the train was the negligence of the conductor *alternatively* the negligence of the driver of the train. In respect to the alleged negligence of the conductor, Plaintiff pleads that the identity of the conductor is unknown to the Plaintiff and that such conductor at the time of the accident was employed by the Defendant and was acting in the course of, and within the scope of his employment and pleads the following grounds of negligence:

“6.1 He/she allowed the train to travel with open doors, specifically the doors of the coach in which the Plaintiff was a commuter to;

6.2 He/she signaled (sic) to the driver to set the train in motion whilst the doors of the coach in which the Plaintiff was a commuter to, were still open;

6.3 He/she failed to pay due regard to safety of commuters on board of the train;

6.4 He/she failed to seek assistance from the Defendant to provide adequate measures and/or personnel to control and/or protect commuters on board and/or disembarking and/or boarding the train;

6.5 He/she failed to prevent the accident when, by exercise of reasonable care, he/she could and/or should have done so.”

[6] In paragraph 7 of the Particulars of Claim Plaintiff pleads in the alternative that the sole cause of the Plaintiff falling from the train was the negligence of the driver, whose identity is to the Plaintiff unknown, who at the time of the accident was employed by the Defendant and was acting in the course of, and within the scope of his/her employment with Defendant and pleads the following grounds of negligence:

“7.1 He/she set the train in motion at a dangerous and/or inopportune time;

7.2 He/she failed to ensure that it was safe for him/her to set the train in motion;

7.3 He/she failed to keep a proper lookout, and/or

7.4 He/she set the train in motion whilst the train doors, specifically the doors of the coach in which the Plaintiff was a commuter to were wide open;

7.5 He/she failed to prevent the accident when, by exercise of reasonable care, he/she could and/or should have done so.”

[7] As a further alternative Plaintiff pleads that the sole cause of the Plaintiff falling from the train was the unlawful conduct and negligence of the Defendant, which in breach of its duty to take care which it owed to its commuters, specifically the Plaintiff, was negligent in the following respects:

“8.1 By failing to provide competent personnel to guide, control and/or protect commuters boarding the train and/or disembarking from the train;

8.2 By failing to put measures in place to ensure that the train doors are always closed while the train is in motion”.

[8] In the Defendant’s Plea the Defendant pleads that the Defendant has no knowledge of the averments relating to the Plaintiff’s identity and can neither admit nor deny such averments and Plaintiff is put to the proof thereof. Defendant admits the Defendant’s particulars as pleaded in the Plaintiff’s Particulars of Claim, notes the averments contained in the Plaintiff’s Particulars of Claim relating to jurisdiction, and pleads that the Defendant has no knowledge of the averments made by the Plaintiff in paragraphs 4 and 5 of the Plaintiff’s Particulars of Claim namely the fact that the Plaintiff was a passenger on the train, had a valid ticket for transport, and was involved in the accident on the date as pleaded by Plaintiff. Insofar as Defendant deals with paragraphs 6, 7 and 8 of the Plaintiff’s Particulars of Claim where the Plaintiff pleads the alternative grounds relating to the alleged negligence of the Defendant and/or the Defendant’s employees the Defendant raise a general denial of such averments *“as if specifically traversed”* and Plaintiff is put to the proof thereof. The Defendant thereafter in the alternative pleads that the cause of the accident was due to the sole negligence of the Defendant and that it was caused due to the negligence of its permanent or temporary employees or any of its agents, and pleads that the alleged duty of care owed to the

Plaintiff as alleged in the Particulars of Claim was never breached and that the sole cause of the incident was the Plaintiff's exclusive negligence. In this regard the Defendant pleads that:

"7.1 He failed to avoid the incident where, by the exercise of reasonable care, he could have done so;

7.2 He failed to keep a proper look out".

[9] In paragraph 8 of the Defendant's Plea as a further alternative the Defendant pleads that, in the event that the Court should find that the Defendant breached its duty of care as alleged in the Plaintiff's Particulars of Claim or that there was any negligence on the part of the Defendant's permanent or temporary employees or agents, the Defendant pleads that such breach of negligence was neither the cause of the incident nor that same contributed thereto.

[10] The other averments contained in the Plaintiff's Particulars of Claim and as pleaded to by the Defendant in its Plea relates to the issue of the nature and extent of the Plaintiff's injuries and the quantum of damages, and are not relevant following the order referred to in paragraph [4] *supra*.

[11] In the conclusion of the Defendant's Plea the Defendant pleads:

"Wherefore the Defendant prays that the Plaintiff's claim be dismissed with costs or any other alternative relief, alternatively, that the Plaintiff's damages, if any, be apportioned to the degree of the Plaintiff's own contributory negligence in terms of the Apportionment of Damages Act."

ISSUES FOR DETERMINATION:

[12] Considering the averments as set out in the pleadings *supra*, it follows that the Defendant denies that the accident took place. For purposes of the trial, Defendant made no admissions regarding the accident. The approach of this Court should therefore be to firstly determine whether the accident took place as pleaded by the Plaintiff's Particulars of Claim, which is a factual issue on which the Plaintiff bears the burden of proof on a balance of probabilities. Plaintiff further bears the *onus* of proof that such accident was the cause of the Plaintiff's injuries which caused the alleged damages claimed by Plaintiff.

[13] Should it be found that the accident took place as pleaded by Plaintiff and that such accident was the cause of the alleged injuries resulting in the damages suffered by the Defendant, the Defendant's liability should then be determined which is a legal issue.

[14] Should it be found that the Defendant is liable for the damages which the Plaintiff suffered as a result of the accident and injuries sustained, then the issue of the Plaintiff's contributory negligence as pleaded by the Defendant should be considered which is a legal issue based on the available facts.

PLAINTIFF'S EVIDENCE:

[15] Plaintiff testified that he travels daily between his place of residence and his place of employment by utilising the rail transport service provides by the Defendant. Plaintiff discovered and in evidence identified a copy of a monthly rail commuter ticket issued by the Defendant which was valid at the time when the accident took place.

[16] Plaintiff testified that he "*knocked off*" from work at 17h00 on the 15th of June 2019 and went directly to the train station for purposes of returning to his residence in Tembisa. Plaintiff testified that he embarked a train at the Isando station and that the train was full of commuters and as the journey continued the train stopped at stations where more passengers embarked. During cross-examination Plaintiff was asked to

indicate how many passengers there were in the specific coach in which the Plaintiff travelled, and the Plaintiff's answer was namely that he was unable to give an estimate of the number of passengers but persisted that the train was "*very full*".

[17] During cross-examination it was put to Plaintiff that evidence would be led on behalf of the Defendant that over weekends (the 15th of June 2019 was a Saturday) the trains are normally not very busy and thus carry relatively few passengers. To this question the Plaintiff answered that it depends on the time of day and it was clear from the Plaintiff's evidence that there is a peak period during the mornings and afternoons, including weekends. It was further put to Plaintiff during cross-examination that Defendant will call a witness who will testify that trains are generally empty over weekends and the Plaintiff's response was that on that specific weekend the train was full.

[18] It was not put to Plaintiff during cross-examination that either the safety officer or the train driver would testify that the specific train on which the Plaintiff travelled was full at the time when the Plaintiff travelled on the train. The statements put to Plaintiff during cross-examination regarding whether or not the train was full was of a generic nature namely that trains are not full over weekends. Plaintiff persisted to confirm his version that, at the specific time when the Plaintiff travelled in the train, it was full. I can see no reason why the Plaintiff's version regarding this aspect should be rejected.

[19] The Plaintiff testified that the train stopped at the Limindlela station where the Plaintiff intended to disembark, but that the specific door nearest to which the Plaintiff was standing in the coach, would not open. Plaintiff indicated that he was approximately 3 metres away from the door amongst a crowd of passengers who intended to disembark through that door at the station. When the train stopped and the door failed to open, passengers started pushing from behind while the passengers who were nearest to the door attempted to force the door open. Just as the train commenced moving off the passengers who attempted to force the door open successfully forced the door open and commenced to disembark while the train was moving. Plaintiff

testified that in the process of passengers attempting to disembark he was pushed from behind and when disembarking the train, he fell which fall caused the injuries. The Plaintiff further testified that the fall was caused by the fact that the train was moving when he stepped outside the train.

[20] Plaintiff testified that a Security Guard at the platform of the station approached the Plaintiff after he fell and was lying next to the platform being unable to move due to injuries which he sustained as a result of the fall. Plaintiff informed the Security Guard that he fell after being pushed out of the train and arrangements were thereafter made which resulted in the Plaintiff being transported to Tembisa Hospital by ambulance.

[21] The Defendant discovered an extract from a logbook of the Joint Operations Centre of Defendant which confirms that an incident was recorded of an injury sustained at the said station on the date and time which the Plaintiff alleges the accident took place, and the Defendant discovered an affidavit of a security guard in the employ of Defendant who stated in the affidavit that she was informed by a passenger that one of the passengers were injured and that she then found a person lying injured next to the platform and that it was then arranged that the person be transported to hospital per ambulance.

[22] During the testimony of the Plaintiff I requested Plaintiff if he could provide an estimation of the speed that the train was travelling at the time when he was allegedly pushed out the train. Plaintiff responded that the train was travelling fast and on being questioned how fast the Plaintiff was unable to provide an answer. I then asked the Plaintiff whether the train was travelling faster than a young man could run and the Plaintiff affirmed this. I then asked the Plaintiff whether the train was travelling faster than a man can ride a bicycle, whereafter the Plaintiff confirmed that it was in fact faster. Plaintiff was cross-examined on this issue and Counsel acting on behalf of the Defendant referred to this aspect of the Plaintiff's evidence as indicative of the improbability of the Plaintiff's version of the accident given the fact that the Plaintiff testified that the train was travelling at such speed at the time when he was pushed out.

Plaintiff is clearly not able to accurately estimate the speed at which the train was travelling. Plaintiff's inability to provide an estimate of the speed and then compare the speed of the train in the manner which the Plaintiff did at my request and prompt, in my view does not justify an inference that Plaintiff is an unreliable witness or provide any basis upon which the Plaintiff's evidence in totality can be rejected.

[23] During cross-examination of the Plaintiff it was not put to the Plaintiff that the Defendant denies that the accident took place and the Plaintiff was therefore not provided with an opportunity to respond to such denial. It was further not put to the Plaintiff that he contributed by his own negligence to the accident, and the Plaintiff was therefore also not provided an opportunity to deal with this issue in his evidence in chief.

[24] After the Plaintiff's testimony was finalised, Counsel for Plaintiff closed the Plaintiff's case.

DEFENDANT'S WITNESSES:

[25] The first witness called on behalf of the Defendant is a female Metro Guard in the employ of the Defendant. The witness testified that her duties are namely to ensure that commuters embarked and disembarked safely at the platform and after she had made sure that it was safe for the train to proceed after disembarkation of passengers, she closes the doors and signals to the driver. She further testified that her duties entail that she should keep a look-out to ensure the safety of passengers until the last coach of the train passed the edge of the platform whereafter her duties are over and commence again at the following stop.

[26] According to the available evidence there were 12 coaches connected to each other consisting of the train which transported the Plaintiff at the time of the accident, and the Metro guard testified that she travels in a "cab" at the one end of the train while the driver of the train is on the opposite side of the train. According to the evidence the

distance between herself and the driver is more than 100 metres. Communication between herself and the driver consists of sound signals made by a whistle.

[27] The witness testified that she has no knowledge of the accident, did not observe the accident, did not see the Plaintiff on the side of the platform and was not aware of any door that failed to open.

[28] On a proper analysis of the evidence of this witness, it did not constitute a denial that the accident took place but serves to establish that the witness did not observe the accident or had any knowledge about a door that did not open. No evidence was adduced through this witness to directly dispute the factual evidence provided by Plaintiff relating to the accident.

[29] Defendant thereafter called the train driver who testified that his function is to wait until he receives a signal from the Safety Officer (Metro guard) and thereafter to proceed to slowly move the train out of the station until the train has cleared the platform whereafter the train increases speed.

[30] This witness also testified that he had no knowledge of the accident, and did not observe the accident. This witness denied that the accident took place. On closer scrutiny of his evidence it is clear that the basis of his denial of the accident is namely the fact that he did not, according to his evidence, observe the accident but is not able to directly dispute the Plaintiff's version regarding the accident.

EVALUATION OF THE EVIDENCE:

[31] Plaintiff's evidence regarding the accident remained consistent during cross-examination and her evidence-in-chief. The fact that an accident occurred at the date, time and place as alleged by the Plaintiff in the Particulars of Claim and as testified by the Plaintiff in his evidence, is corroborated by the documentary evidence discovered by the Defendant namely the entry in the Joint Operation Centre Logbook as well as the

affidavit of the Metro guard who was on duty at the station at the relevant time and who found an injured person lying next to the platform.

[32] Notwithstanding the fact that the Defendant denied that such an accident occurred, it was never put to the Plaintiff during cross-examination that his evidence regarding the accident is denied or constitute a fabrication, but what was repeatedly put to the Plaintiff was namely that neither the train driver nor the train guard saw the accident, that neither the driver nor the guard were aware of the fact that a door would not open and that they have no knowledge of the alleged incident. There is a stark difference between putting to the Plaintiff that the witnesses called on behalf of the Defendant were not aware of the accident, compared to putting to the Plaintiff that his evidence regarding the fact that the accident occurred is disputed. It is established law that there is a duty on a litigant during cross-examination to put to a witness directly that specific evidence is untruthful in order to provide the witness an opportunity to respond to such statement.¹

[33] The Defendant further failed to call the Metro Guard who deposed to the affidavit which confirms the occurrence of an accident at the date, time and place which the Plaintiff alleges the accident took place, nor did the Defendant call the person who effected the entry into the logbook of the Joint Operations Centre confirming the occurrence of such incident. Defendant failed to provide any basis upon which the Court may find that these witnesses were not available and the presumption therefore follows that these witnesses would have confirmed the Plaintiff's version of the accident.²

[34] The Defendant's case being squarely aimed at a denial of the fact that the accident took place, it was never put to the Plaintiff during cross-examination that any act or omission on the part of the Plaintiff constituted negligence and contributed to the accident. Defendant further failed to present any evidence which would enable the

¹ **Vide:** *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 2000 (1) SA 1 (CC) at paras. [61] to [63]

² **Vide:** *Elgin Fireclays Limited v Webb* 1947 (4) SA 744 (A) at 745

Court to find that the Plaintiff, through any act or omission, was negligent and that such negligence was attributable or contributory to the damages sustained by the Plaintiff as a result of the accident.

[35] On Plaintiff's evidence as corroborated by the affidavit of the Metro guard who found a person lying next to the platform, the Plaintiff sustained the injuries referred to in the Particulars of Claim as a result of the accident. Again, the Defendant adduced no evidence to the contrary and neither was this issue regarding causation between the injuries sustained and the accident challenged by Defendant's Counsel in cross-examination.

[36] Considering the aforesaid, and based on the impression which the Plaintiff made on me in the witness box, there is no reason why the Plaintiff's evidence regarding the occurrence of the accident and resultant injuries sustained by the Plaintiff can be rejected and I therefore find that the Plaintiff's injuries were caused by the fact that the Plaintiff was pushed out through an open door of the train after the train commenced to move out of the station which door was forcefully opened by other passengers.

DEFENDANT'S LIABILITY:

[37] There is a legal obligation upon Metrorail (a division of Defendant) to ensure that reasonable measures are taken to provide for the safety and security of rail commuters on the rail commuter service which they operate.³ It was submitted on behalf of Plaintiff that the obligation to ensure that reasonable measures are taken to provide for the safety and security of rail commuters on the rail commuter service provided by the Plaintiff includes the obligation to ensure that carriage doors are in a proper working condition, and if not, that commuters are warned accordingly and allowed sufficient time to board and disembark a coach with a malfunctioning door. The obligation is further to ensure that when the train does travel it is not with open doors. It is also to ensure that

³ *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) par. [84]

the train is not overcrowded posing a risk on commuters. The obligation is also on the Metro Guard who observes the platform to ensure that no commuters are boarding or disembarking the train whilst in motion and to stop the train if commuters disembark while the train is in motion and Defendant is obliged to ensure that she is properly trained and does her work correctly. I agree that these measures constitute reasonable measures and the Metro guard who testified on behalf of the Defendant essentially confirmed that those are her duties.

[38] The legal duty of PRASA to ensure that train doors are closed was confirmed in the matter of *Mashongwa*⁴ and in that matter it was held that PRASA's failure to ensure that a door is closed constitutes negligence.

[39] In the matter of *Mashongwa (supra)* it was further held that an omission will be regarded as wrongful when it also "*evokes moral indignation and legal convictions of the community require that the omission be regarded as wrongful*".⁵

[40] The Constitutional Court further held that the legal duty that falls on PRASA's shoulders, together with constitutional values, has mutated to a private law duty to prevent harm to commuters.⁶

[41] In that judgment the potential harm which may befall a passenger when a train travels with open doors was dealt with extensively by the Constitutional Court⁷ and concludes in par. [62] as follows:

"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

⁴ *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC)

⁵ *Mashongwa (supra)*, par. [23]

⁶ *Mashongwa (supra)*, par. [29]

⁷ *Mashongwa (supra)*, par. [44] to [62]

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.”

[42] Applying the judgment of *Mashongwa (supra)*, it therefore follows that Defendant was negligent. This finding is based on the fact that the train guard failed to take the necessary or any steps to ensure that all the doors of the train was closed at the time when the train pulled from the station, or to ensure that the train be stopped immediately when it became apparent that passengers were still disembarking at the time when the train pulled away from the station. The fact that this accident occurred notwithstanding the evidence of the Metro guard that she never saw the accident infers that she failed to keep a proper look-out as she was required to do in her capacity as security guard who had to safeguard passengers during the process of embarkation and disembarkation of the train.

[43] I am further of the view that the fact that passengers who are returning to their homes in the late afternoon and who are faced with a train door which refuses to open at the station where they intend to disembark will in all probability follow the course of conduct which the passengers did who forced open the door as testified by the Plaintiff. I am of the view that this conduct is reasonably foreseeable and that the omission of Defendant to provide the necessary safety measures in the event of such an occurrence also constitutes negligence.

[44] But for the Plaintiff being pushed out of the train doors while the train was already in motion, the Plaintiff would not have suffered the injuries that he did. Applying the traditional “but-for” test I am satisfied that the Plaintiff has established the required causation between the accident and the Plaintiff’s injuries.⁸

[45] The Plaintiff further established legal causation on the basis that Defendant neglected through its employees to take the necessary steps to prevent the train doors being forced open, the failure to keep a proper look-out resulting in the train moving out

⁸ *Vide: Mashongwa* judgment, par. [63] to [67]

of the station while passengers were unable to disembark the train and then resulting in a situation where the train door is forced open and passengers disembark while the train is in movement without being observed by the security officer is in my view the kind of omission that ought to attract liability.⁹

[46] I therefore find that the Defendant is liable for the damages suffered by Plaintiff.

PLAINTIFF'S CONTRIBUTORY NEGLIGENCE:

[47] As referred to *supra*, it was never put to Plaintiff that any act or omission of the Plaintiff caused or contributed to the accident. No evidence in support of the Defendant's claim for an apportionment of damages was led by the Defendant.

[48] I am therefore unable to apportion any negligence to the Plaintiff on the defence to the Plaintiff's claims as presented by the Defendant.

CONCLUSION:

[49] The Plaintiff satisfied the elements of the Defendant's delictual liability for a breach of the Defendant's private law duty to prevent harm to the Plaintiff as a result of which it is ordered that the Defendant is liable for the damages sustained by the Plaintiff as a result of the Plaintiff's injuries sustained during the accident and the Defendant is liable to pay the Plaintiff's costs of the action.

[50] I therefore make the following order:

[1] It is ordered that the Defendant is liable for all damages suffered by Plaintiff for injuries which the Plaintiff sustained on 15 June 2019 when Plaintiff was pushed from a train operated by the Defendant;

⁹ *Mashongwa* judgment, para. [68] to [[70]

[2] Defendant is ordered to pay the Plaintiff's costs.

P A VAN NIEKERK AJ.
Acting Judge of the High Court
Gauteng Division, Pretoria

CASE NUMBER: 72788/2019

HEARD ON: 11 AND 12 MAY 2023

FOR THE PLAINTIFF: ADV. R.B. MPHELA
INSTRUCTED BY: Oupa Ledwaba Attorneys

FOR THE DEFENDANT: ADV. N. MATIDZA
INSTRUCTED BY: Ledwaba Mazwai Attorneys

DATE OF JUDGMENT: 19 May 2023