

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 24580/2019

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 13/06/2023

SIGNATURE

THUBAKGALE MADIMETJA LUCAS

Plaintiff

And

PRASA

Defendant

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date of judgment is deemed to be 13 June 2023 at 10h00

JUDGMENT

MAKAMU AJ:

INTRODUCTION

[1] The Plaintiff, Mr Madimetja Lucas Thubakgale who is by combined summons, claim from the Defendant, Passenger Rail Agency of South Africa (PRASA) payment of money in compensation for loss of future income, future medical expenses and

general damages for a total amount of R950 000 (Nine hundred and fifty thousand rand)

Parties by agreed to seperate issues, the Court to deal with the merits and quantum was to be determined at a later stage, followed by an order of this Court. The quantum was postponed *sine die*. The Plaintiff led the evidence of one witness being the plaintiff himself.

[2] Mr Madimetja Lucas Thubakgale testified that he was employed by City of Tshwane stationed at Mamelodi West in roads and storm water section. He took a bus from Soshanguve Block X to Mabopane train station, he arrived at 4h20am. He waited for the train at platform 8. However, when the train came, entered at platform 5. He together with other commuters moved to platform 5 to board the train. When he was about to reach the train, he was tripped by unknown individual or individuals who were part of the commuters that made him to fall down.

[3] He struggled to get up due to people who were boarding the train, until the train started to leave after all the passengers boarded the train. He was caught on his clothing by the train which dragged him for few meters before stopping. In the meantime, he fell below the platform but fortunately no part of his body fell under the moving train. He suffered chest and ribs injuries. He was taken by an ambulance to the nearest hospital for further treatment.

[4] He further testified that had the train not snag him and pull him he would not have suffered the injuries he sustained. He further stated that had the employees of PRASA not moved the train he would not have suffered those injuries although he was already on the ground as a result of having been tripped or pushed by fellow commuters.

[5] At the close of Plaintiff's case Adv. Jordaan for the defendant brought an application for absolution from the instance as the evidence of the plaintiff did not prove his claim on the balance of probability. Adv. Mphela for the plaintiff opposed the application. The Court gave a ruling dismissing the application for absolution from the instance summarily.

[6] Two witnesses testified on behalf of the defendant's case, Paulina Machweni Mohwadiba who used to be a security officer deployed at Mabopane train station by a private company contracted to PRASA was on duty on the 30th of July 2018, when the incident/accident happened. It suffices to say that she was no longer working as security officer contracted to PRASA. There were two trains which arrived earlier before this one in platform 8 The train in question was then directed to platform 5. There was no public announcement for such a change. The driver alighted and proceeded to the back of the train as it had to go back to Mamelodi and then he was at the head of the train. The Metrorail guard proceeded to the head which turned to be the back of the train, as it was to go back to the direction it came from.

[7] When all the passengers were inside the train, the Metrorail guard blew her whistle to signal to the driver that all was well, the train could leave the station. A man came running from the subway attempting to catch the moving train, and that man was later came to be identified as Mr Madimetja Lucas Thubakgale the plaintiff. She got a shock as she realised that what he was trying to do was dangerous, as the train was in motion and the doors were already closed. She screamed to try and warn him to stop doing what he was attempting, also out of shock, but he never listened and tried to catch the door of the train in the process he slipped and fell down and disappeared under the platform on the tracks of the train.

[8] The Metrorail guard stopped the train which stopped immediately. Some commuters disembarked from the train to watch and other commuters emerged and went to see where the plaintiff fell. The Metrorail guard and the train driver also went to check if the plaintiff was not injured. The police and the ambulance were called to the scene. The driver of the train after having satisfied himself about the situation and that help was called for the plaintiff, the train proceeded to leave the station. The ambulance came and the plaintiff was taken to the nearest hospital.

[9] She was adamant that there were no other commuters with the plaintiff, he was alone when he attempted to board the moving train. She denied that the plaintiff could have been tripped by other commuters as he was alone and he fell whilst trying to board the moving train as the doors of the train were closed already. When

the plaintiff fell the Metrorail guard having heard the screaming of the security officer and having seen the plaintiff fall signalled to the driver to stop the train and he obliged.

[10] The second witness Gladys Ledwaba identified herself as the Metrorail guard who was operating in the said train on the day in question. She explained her routine that the train has engines on either end, in the middle there are coaches. When the train got to Mabopane station, it was the last station and the train had to go back to where it came from, so she changed the lights on both engines in order to show the front and the back of the train. When she was satisfied that there were no longer passengers boarding the train she signalled by blowing her whistle for the train to leave the station.

[11] When the train started moving and gathering speed, she saw a man who came running on the platform trying to catch the moving train. She testified that she was far from where he was, but she saw him colliding with the train and fell down and people who came to the platform which obscured her view. She did not see where the man ended up but at the same time she rang the bell three times which is a sign of danger to the train driver who stopped the train immediately. She alighted from the train heading towards where the plaintiff fell and she realised that he fell under the platform on the railway tracks and she was informed by the driver that he was fine he will get paramedics help. The train left the station.

[12] She was cross examined at length to test the truthfulness of her evidence but she was adamant that at the time she saw the plaintiff running to catch the train he was alone and he was trying to board the moving train. She could not say if he was attempting to open the door of the train or he bumped the train and fell down as she was at a distance from where the plaintiff fell. She did not go too close to the where the plaintiff fell as people gathered there. The train left before she could see paramedics or police arrive.

[13] When she was cross examined more about the specifics she stated that she does not remember and she does not want to remember as she was traumatised, to such an extent that she was admitted in hospital for treatment as a result of that

trauma. Since that time she was moved from working with the trains to help her heal from the trauma.

APPLICATION OF THE LAW TO THE FACTS

[14] The plaintiff bears the onus to prove on a balance of probability that Prasa by omission breached its legal duty which the Constitutional Court in *Mashongwa v PRASA* (CCT 03/15) [2015] ZACC 36; 2016 (2) BCLR 204; (2016) (2) SA 528 (CC) 26 November 2015, held:

“to include safeguarding the physical wellbeing of passengers must be a central obligation of Prasa. It reflects the ordinary duty resting on public carriers and is reinforced by the specific Constitutional obligation to protect passengers, bodily integrity that rests on Prasa, as an organ of State. The norms and values derived from the Constitution demand that a negligent breach of those duties, even by way of omission, should, absent a suitable non-judicial remedy, attract liability to compensate injured persons in damages.

When account is taken of those factors, including the absence of effective relief for individual commuters who are victims of violence on Prasa trains, one is driven to the conclusion that the breach of public duty by Prasa must be transposed into a private-law breach in delict.

*Consequently, the breach would amount to wrongfulness. What need to be stressed, though, is that in these circumstances, wrongfulness does not flow directly from the breach of the public duty. The fact that a public duty has been breached is but one of the factors underpinning the development of the private law of delict to recognise a new form of wrongfulness. What we are concerned with here is the development of private law taking into account public law. It is in this context that the legal duty that falls on Prasa shoulders must be understood. That Prasa is under a public law duty to protect its commuters cannot be disputed. This much was declared by this Court, in *Metrorail*, but here this court goes a step further to pronounce that the duty concerned, together with Constitutional values has mutated to a private law duty to prevent harm to commuters.*

[15] Jacobs AJ; in *Dlamini v Passenger Rail Agency of South Africa (PRASA)* stated that; Negligence arises if a *diligens paterfamilias* in the position of a defendant would foresee the possibility of its conduct injuring another and would take reasonable steps to guard against occurrence but he failed to take steps to do so. Wrongfulness should be considered distinct from the question of negligence. In *Gouda Boerdery BK* CASE NO; 314/03 (SCA) delivered 27 September 2004, the SCA pointed out that;

“depending on the circumstances, it might be appropriate to enquire first into the question of wrongfulness and during that process to assume negligence should no negligence be found to exist the question of wrongfulness does not arise”.

[16] In dealing with wrongfulness, the Constitutional Court said the following in *Country Cloud Trading CC v MEC Department of Infrastructure Development CCT* 185/13 delivered 3 October 2014:

“Wrongfulness is an element of delictual liability. It functions to determine whether the infliction of culpably caused harm demands the imposition of liability or conversely, whether the social, economic and other costs are just too high to justify the use of the law of delict for the resolution of the particular issue.”

Wrongfulness typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirable or overly burdensome to impose liability. The statement that harm Causing conduct is wrongful express the conclusion that public or legal policy consideration require that the conduct, if paired with fault, is actionable. And if conduct is not wrongful, the intention is to convey the converse. That public or legal considerations determine that there should be no liability, that the potential defendant should not be subjected to a claim for damages notwithstanding his or her fault.

[19] Adv. Mphela submitted that the defendant was liable for the injuries sustained by the plaintiff in that;

(1) They failed to keep a proper lookout

(2) The employees of the Defendant failed to take any or adequate steps to avoid accident when by the exercise of reasonable care and diligence; could and should have done so.

(3) They failed to see that the Plaintiff had fallen next to the train

(4) They failed to appreciate that the position the Plaintiff was lying, could be dangerous to him when the train began to move the station.

(5) They failed to operate a train safely by ensuring that it was safe to allow the train to leave

[20] Adv. Jordaan for the Plaintiff submitted that, the Plaintiff got injured after he attempted to catch the moving train in order to board whilst the train was in motion as per the two witnesses, which was a very dangerous move that may cause serious injuries or even death. But the Plaintiff assumed voluntary assumption of risk, *volenti Non Fit Iniuria*. Which principle was applied by Msmeki J in *Shongwe v Passenger Rail Agency of South Africa (PRASA)* in unreported case number A512/2010 by full court judgment delivered on the 15 June 2012 at Gauteng Division, Pretoria,

[21] The evidence prove that the Plaintiff was attempting to board a moving train when even doors were closed which was dangerous and could even lead to death. Although he denied that when he attempted to board the train was in motion but that he fell down whilst the train was stationery and it only moved whilst he was no the ground which version was disputed by the two witnesses of the defendant.

[22] It is worth mentioning that Ms Mohwadiba the security officer had no interest in the matter as she was no longer working for the security company, which was

contracted to the defendant, probabilities are that she has no personal interest in the outcome of the matter.

[23] The two defendant witnesses contradicted one another as to what the plaintiff did when he came into contact with the train. Ms Mohwadiba said he was trying to open a closed door of a moving train whilst running along the side of the train and Ms Ledwaba said he collided with the train but she justified her observation by saying she was a little far from the scene as compared to Ms Mohwadiba. This demonstrate their independent observation without influencing each other.

[24] The contradiction demonstrated that the two witnesses did not fabricate their version but each one testified about their own personal observation of the events as they unfolded. I am satisfied that the contradiction is not material that it can negatively affect the case of the Defendant.

[25] If one may for a second consider the version of the plaintiff when he fell next to the stationery train he was pushed or tripped by the fellow commuters which has nothing to do with the defendant. After he fell down he remained on the ground irrespective of him being too close to the train. He was caught by the train with his clothes, but he is not certain but think it was his shoe as his legs were much more closer to the train. He could have easily dragged himself away from the train whilst lying down he had enough opportunity to do so.

[26] The plaintiff said there is bit of space between the train and the platform which was clear from the photograph submitted by the plaintiff taken from the scene in trying to reconstruct the incident. It is very clear that he was far from the train itself for him to can get caught by the train. He actually fell whilst trying to board a moving train with its doors already closed.

[27] I am not persuaded to believe that the plaintiff was tripped by fellow commuters but he fell in an attempt to board a moving train as it is clear that he was alone at the time of the incident and the two defendant witnesses saw clearly what happened. Msimeki J writing for the full court stated the following in paragraph 13 of the judgment *Shongwe v PRASA*: “*Volenti Non Fit Iniuria*” simply means that he who

consents cannot receive an injury. It is voluntary assumption of risk of being injured which is a ground of justification which excludes the element of unlawfulness.

[28] The defence has properly been dealt with in *Santam Insurance Company Ltd v Vorster* 1973 (4) SA 764 (A) as follows:

“resort first to an objective assessment of the relevant facts in order to determine what, in the premises, may fairly be said to have been the inherent risks of the particular hazardous activity under consideration. Thereafter the court must proceed to make a factual finding upon the vital question as to whether or not the claimant must, despite his probable protestations to the contrary, have foreseen the particular risk which later eventuated and caused his injuries, and is accordingly to be held to have consented thereto.”

[29] The plaintiff engaged in an attempt to board the running train knowing all the dangers associated with his activity. Ms Ledwaba assisted this court by clarifying that she closed the train doors when there was nobody boarding the train all the passengers were safely inside the train, when the plaintiff came running towards the moving train attempting to board the train with its doors closed.

[30] The plaintiff was not a trustworthy witness and I did not believe his version, whereas. He fabricated his version in an attempt to suit the possibilities but left much to be desired. The defendant witnesses were reliable and even where the version was not favouring them to demonstrate their honesty.

[31] I have no doubt that the plaintiff's claim should be dismissed with costs,

I therefore make the following order.

Order: The claim is dismissed with costs

M.S MAKAMU
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA.

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THIS JUDGMENT WAS ELECTRONICALLY TRANSMITTED TO THE PARTIES ON
13 JUNE 2023.