

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
DATE: 18 April 2024
SIGNATURE: _____

CASE NUMBER: 28957/2014

In the matter between:

MAELA-DIPHEKO MAKUPHU ELIZABETH

Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Defendant

Delivery: *This judgment is issued by the Judge whose name appears herein and is submitted electronically to the parties /legal representatives by email. It is also uploaded on CaseLines and its date of delivery is deemed 18 April 2024.*

Summary: *Claim for delictual liability. Public legal duty-Passenger Rail Services-SA. Negligence-Reasonable and safety measures not in place-negligence-wrongful. Possession of a valid ticket. Contributory negligence pleaded. Defendant -reasonable organ of state - negligent-sole cause of the incident and liable for not providing reasonable measures. Liability – not - pure negligence, but legal duty owed to the plaintiff. Costs granted on a party and party scale.*

JUDGMENT

NTLAMA-MAKHANYA AJ

- [1] This is an application for a delictual claim arising out of the injuries sustained by the plaintiff because of an incident that took place at the Pretoria Train Station on 11 September 2012. The plaintiff suffered multiple injuries after she was pushed off the platform following an announcement for the commuters / passengers to move from platform 8 to platform 2 at the said station. The claim was for delictual liability for damages due to the Defendant's breach of duty to safeguard the safety of the plaintiff.
- [2] During argument and on papers, the merits and quantum were separated in terms of Rule 33(4) of the Uniform Rules of the Court. The quantum was postponed *sine die*. The contentious issue was the question of liability which was grounded on negligence.
- [3] In the particulars of claim, the plaintiff alleged that the Defendant and or its employees:
- [3.1] made a late announcement that the train from Pretoria to Oberholzer, Carletonville will dock on a different platform other than the usual one where the plaintiff and other commuters were waiting, resulting in a stampede and the plaintiff being pushed from the platform to the rails.
 - [3.2] failed to provide security personnel to ensure the safety and control of commuters, alternatively, there were no security personnel at the platform during the accident to ensure proper control and safety of commuters.
 - [3.3] failed to ensure there are safety measures in place at Pretoria train Station.
 - [3.4] as a result of the incident, the plaintiff suffers from long and serious impairment which are but not limited to:

- [3.4.1] serious and persistent headaches.
- [3.4.2] loss of body function, being unable to sleep.
- [3.4.3] long term pain on cold days and after physical exertion.
- [3.4.4] struggling with domestic and daily activities and inconvenienced and has to take pain killers to relieve the pain.
- [3.4.5] experiences persistent headaches and psychological problems; and
- [3.4.5] all amenities have been negatively affected in that ambulatory activities at home and in the community are largely restricted because of her injuries and permanent disability now.

[4] The Defendant did not deny the incident itself, however, a bare denial of liability based on negligence was argued and or alternatively contributory negligence was canvassed on the part of the plaintiff. The Defendant alleged that the plaintiff:

- [4.1] put herself in danger by illegally crossing the railway line.
- [4.2] got injured while trying to get onto the platform; and
- [4.3] failed to avoid the incident by exercise of reasonable care she should and would have done so.

In this regard, the Defendant submitted that all the required safety measures were complied with and in the event the court finds in the alternative, negligence did not contribute to the plaintiff being pushed (out of the train or dislodged from the train) (sic) (Causation). If the plaintiff was pushed, then the latter was contributory negligent, and damages suffered should be reduced proportionately in accordance with the Apportionment of Damages Act 34 of 1956.

Substance of the dispute

[5] The plaintiff's case was that she went with Mrs Ruth Modukanele, who was familiar with Pretoria and the said station where incident took place, from Carletonville to Government Employment Pension Fund (GEPPF) in Pretoria on the said date. After finishing the

business of the day at GEPP, they went to Pretoria Train Station and purchased a ticket at approximately 12h00/13h00 to go back home in Carletonville. Thereafter, they proceeded to platform 8 to wait for the train that was to arrive and depart at 14h30/15h00. The plaintiff testified that the train destined for Carletonville was late and at about 14h40, an announcement was made that commuters on platform 8 should go to board the train at platform 2.

- [6] It was the plaintiff's submission that it was during this period of moving from platform 8 to platform 2 whilst still in possession of her ticket, that she was pushed from the back to the rails by an unknown person as people were running and rushing to get to latter platform. It was her assertion that she fell on the railway lines and sustained injuries on her forehead, legs, eyes, and loss of hearing as she lost consciousness and woke up at Tshwane District Hospital. In conformity with Rule 36(10) of the Uniform Rules of the Court, 8 photos depicting the incident were presented as evidence in support of the claim.
- [7] This case became fundamental in the determination of the fundamentals of the public law duty for reasonable safety measures that is owed by the Defendant not only to the plaintiff but to all commuters. It is also not for this court to regurgitate what is already in the public knowledge, but for the purpose of situating the dispute herein, it would be imperative not to by-pass the foundations for negligent conduct in the resolve of this matter.

Framework

- [8] In the present matter, the application of Schedule 1, section 12(1)(e) of the Legal Succession to the South African Transport Services Act 90 of 1989, (Legal Succession Act) is of fundamental importance. The Legal Succession Act provides that *'a person who occupies a seat in a vehicle enters a part of the vehicle or is present at a place in a vehicle that he is not entitled to occupy, enter or be present in' ... 'shall be guilty of an offence and on conviction any competent court may impose, in its discretion, a fine or imprisonment, or a fine and imprisonment, or any other suitable punishment within its jurisdiction'*. This means that the conduct carries a criminal sanction to be imposed by the court if found guilty of such an offence of occupying a vehicle which is defined as a *'train, a passenger coach or other form of rolling stock, an aircraft, a motor vehicle, a ship or other marine craft'*, (**section 12(2) of the Legal Succession Act**). As noted herein, the definition is

extended to the railway lines that are designed for exclusive use by the trains. The exclusive use is of further importance in that the normal motor-vehicles or buses are not designed as a mode of transport to use the railway line. It is in this regard that the plaintiff's possession of a valid ticket for her journey was never meant for any other mode of transportation except for the train. The Defendant did not dispute the possession of the said ticket and its intended purpose. This meant compliance with the requirements of the requirements of the Legal Succession Act. The ticket, therefore, '*served as a prima facie proof that justified the status of the plaintiff as a lawful passenger in the train*', (***Xulaba v Passenger Rail Agency of South Africa (65357/2020) [2023] ZAGPPHC 1847, para 45***). This also meant that the plaintiff was lawfully waiting to board the train at platform 8 save for the announcement for the move to platform 2 that resulted in her injuries.

- [9] The primary question resulting from the claim is to determine whether the Defendant should be held liable for the injuries sustained by the plaintiff during the fall from platform 8 to platform 2 when people shoved and tried to pass each other in getting to the latter when the call was made. Simply, did the Defendant compromise the safety precautions for its commuters in line with the public law duties that it owes in the carriage and provision of quality transport services within the framework of the rail and transport industry? These questions are linked to the test for delictual liability based on negligence in that (i) a reasonable person in the position of the Defendant as an organ of state would have foreseen the reasonable possibility of the conduct causing harm, which requires the (ii) taking of reasonable steps to avert the risk, and failing which, (iii) to bear the consequences for such a failure, (***South African Rail Commuter Corporation Ltd v Thwala (661/2010) [2011] ZASCA 170, para 11***). These principles entail the enforcement of wrongfulness in delictual liability which was explained by Ponnann JA in ***Home Talk Developments (Pty) Ltd v Ekurhuleni Metropolitan Municipality (225/2026) [[2017]***. Ponnann JA captured the content of wrongfulness within the framework of these principles in the holding of the Defendant's liability and held:

conduct is wrongful in the delictual sense if public policy considerations demand that in the circumstances the plaintiff has to be compensated for the loss caused by the negligent act or omission of the defendant. It is then that it can be said that the legal convictions of society regard the conduct as wrongful. 'Wrongfulness', the Constitutional Court held, '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'. It elaborated: '[wrongfulness] 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". 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, (para 20, all footnotes omitted).

This becomes necessary in establishing the Defendant's liability, as a reasonable organ of state, who in the circumstances of this case, could have exercised due care in the provision of reasonable measures in protecting the safety of the plaintiff.

Discussion and analysis

[10] In this case, the plaintiff was called upon as the main and only witness by her Counsel. The evidence presented by the plaintiff during the main and cross examinations as a witness, took this court into confidence about the sequence of events on the day without evading the questions asked. The photos depicting the incident were at the centre of the examination for both the plaintiff's Counsel and the Defendant's Counsel. It was in these photos where the plaintiff had to confirm before this court how the incident took place. What emerged from the examination for this court was that the plaintiff, as they were trying to move from the initial platform (8), she *'felt someone pushing her and she fell on the railway lines'*. The plaintiff, with the presentation of photos: P1,3,4;5 and 6) with a visible yellow line painted on the floor, was acknowledged with a further confirmation of the people being prohibited from walking or coming near the yellow line. Overall, the witness was honest and reliable, and the Defendant drew unnecessary inferences from the facts surrounding the incident.

[11] The Defendant called two witnesses: Mrs Mphaka, the Investigating Officer who testified that she investigated the incident that was recorded in the Occurrence Book at the station. She took statements as they appeared in the Occurrence from Mrs Mamushiana to be referred below and Mr Thabo Paulos Masiwa (who, could not testify as he had passed away). There is nothing major to draw any inference from her evidence except for the confirmation of the statements from the two Security Guards and denial of overcrowding

and the fact that it was not a 'peak hour' at the station. The Second witness: Mrs Mamushiana, the Security Guard, who has been in the employ of PRASA since 2007 and was on duty on the date of the injury. She testified that she was on platform 4 when the call was made and saw commuters jumping onto the rails to get to platform 2. She did not see how and where the plaintiff was injured but heard about an injured person who was seated on a bench in platform 5 or 6. I do not intend to exhaust her evidence except her confirmation that the situation did not get out of control, but it was the behaviour of commuters that made things to out of control.

[12] The Counsel for the Defendant attempted to discredit the plaintiff's claim due to the time frame in which the incident occurred-11 years ago to an extent of even questioning whether the plaintiff was not in regular contact and communication with Ms Modukanele who was not called as a witness by the plaintiff's Counsel. I am not inclined to accept that a lapse of time could have wiped the memory of the plaintiff regarding the way in which the incident happened. The communication of the plaintiff and Ms Modukanele was also not of weight to this court as any other information that might have been possible shared, would not have made any difference without Ms Modukanele being sworn in as a witness and testify under oath herein. I am therefore, not to give substance to this argument as it was designed to evade the gist of the claim based on the duty owed by the Defendant to plaintiff, which is also extended to all other commuters. The Defendant's witnesses attempting to put the blame on the commuters and the 'no peak hour' justification of the incident is also not of substance in response to the main question raised herein on the legal duty owed by the Defendant as a 'reasonable organ of state'.

[13] The core-content of the claim in this case was that the Defendant re-directed the commuters from the platform where they were waiting in which they were to board the train with the consequent result of the injuries sustained by the plaintiff. Without prejudice, it is public knowledge that the rail service is the main mode of transport for most South Africans. It is not the purpose in this case to water down the experiences faced by many of the ordinary citizens who are thirsting for a safe mode of transport requiring the Defendant to marshal the resources in ensuring a safe transport environment. In the context of this case, a provision of more personnel that could have guarded against and controlled the overcrowding and properly direct people to the said platform without any danger to the commuters could have been made. On the other hand, I am also not to dig

into the Defendant's pockets to determine how many of the Security Guards that were supposed to have been posted on each of the platforms, but the underlying obligation is to ensure the general safety and security of the commuters.

[14] I am also not to raise any issue about the credibility of the Defendant's witnesses as they were equally honest about their role as employees and particularly regarding the incident on the day in question. They were not to protect their employer, Ms Mphaka as the Investigating Officer did not manufacture the evidence from the Occurrence Book and Mrs Mamushiana sharing the observations and told this court that after the announcement, people that were rushing to platform 2 could not be controlled. In this regard, the posting of One (1) Security Guard on the platform considering the high number of people during peak hours was evidenced by the confirmation of being unable to control people that were trying to get to platform 2. It is not for this court to justify any impossibility for the Guards to control the people at the expense of holding the Defendant for having faulted in adopting reasonable measures that could have eliminated any risk associated with the injuries suffered by the plaintiff.

[15] I am persuaded by O'Regan J in ***Rail Commuters Action Group v Transnet Ltd t/a/ Metrorail 2005 (2) SA 359 (CC)*** regarding the provision of quality rail services in the transport industry. The Judge held:

it must be borne in mind that the [defendant] enjoy, in effect, a monopoly over the provision of rail commuter services for the period of the agreement they have entered into. Moreover, as organs of state they exercise that monopoly in circumstances where the spatial planning of our cities means that those most in need of subsidised public transport services are those who often have the greatest distances to travel. Those people are also often the poorest members of our communities who have little choice in deciding whether to use rail services or not. The rail commuter services operated by the [defendant] are used by hundreds of thousands of commuters daily. Another relevant consideration is the fact that once a commuter enters a train, he or she cannot easily leave it while it is in motion. Boarding a train renders commuters intensely vulnerable to violent criminals who target them. The applicants emphasised in argument the double bind in which commuters find themselves: they generally have little choice about using the train,

and once on the train they are unable to protect themselves against attack by criminals, (para 82).

- [16] The above is made distinct by what O'Regan J contextualised as the primary legal obligations of the Defendant as the Judge held:

construing the nature of the obligations imposed upon Metrorail and the Commuter Corporation, the need to hold these respondents accountable for the exercise of their powers is important. Institutions which are organs of state, performing public functions and providing a public service of this kind, should be held accountable for the provision of that service. It is for this reason that the Constitution affirms accountability as a value governing public administration. Metrorail has the obligation to provide rail commuter services in a way that is consistent with the constitutional rights of commuters. In the absence of a public law obligation of the kind contended for by the applicants, there is no way of ensuring that Metrorail complies with this duty. Nor could it be argued by Metrorail and the Commuter Corporation that a public law obligation of this sort would impose undue burdens on them that would impair their ability to provide the service effectively or efficiently. ... [Defendant] bear a positive obligation arising from the provisions of the [Legal Succession Act] read with the provisions of the Constitution to ensure that reasonable measures are in place to provide for the security of rail commuters when they provide rail commuter services under the [Legal Succession Act]. It should be clear from the duty thus formulated that it is a duty to ensure that reasonable measures are in place. It does not matter who provides the measures if they are in place. The responsibility for ensuring that measures are in place, regardless of who may be implementing them, rests with [the Defendant], (paras 83-84).

- [17] The Defendant is also bound to fulfil the requisites of the Bill of Rights as envisaged in many provisions of the Constitution of the Republic of South Africa, 1996 (Constitution). Mogoeng-CJ in ***Mashongwa v Passenger Rail Service of South Africa 2016 (2) BCLR 204 (CC)*** expressed that:

the State and its organs exist to give practical expression to the constitutional rights of citizens. They bear the obligation to ensure that the aspirations held out by the Bill of Rights are realised. That is an immense responsibility that must be matched by the seriousness with which endeavours to discharge them are undertaken. To this end, the State, its organs and functionaries cannot be allowed to adopt a lackadaisical attitude, at the expense of the interests of the public, without consequences. For this reason, exceptions are at times made to the general rule that a breach of public law obligations will not necessarily give rise to a delictual claim for damages. Absent that flexibility public authorities and functionaries might be tempted and emboldened to disregard their duties to the public. And that could create fertile ground for a culture of impunity. These obligations cannot therefore be ignored without any repercussions, particularly where there is no other effective remedy. This would be especially so in circumstances where an organ of state would have been properly apprised of its constitutional duties many years prior to the incident, as in this case, (para 25).

- [18] In this case, PRASA/ Defendant, being a state organ of the new dispensation, having been established in 2009 as a transformed rail passenger service with the foundations of the Legal Succession Act (section 22), is assumed, with the historic lessons on the provision of quality rail services which are today grounded by the prescripts of the democracy, could not allege to have lost sight of the duties which are equally envisaged in the Constitution as Mogoeng CJ held in **Mashongwa**. In the present matter, the Counsel for the Defendant argued for contributory negligence towards the determination of liability to sway the undertaking of the primary responsibility. I must express that the Defendant sought to hold this court by a '*string*' with the '*part to blame conduct*' of the plaintiff. I am not to misplace an insight of the fact that the Defendant acknowledged that the incident did happen, and the apportioning of the blame was designed to '*strip the eyes*' from taking full accountability for the breach of the legal duty in ensuring not just the safety of the plaintiff but future litigants. The issue of contributory negligence was indicative of an admission by the Defendant that the quality of safety measures provided to the commuters are not at the level of the deserved status towards the fulfilment of the public law duty, particularly its infusion within the framework of the fulfilment of the rights in the Bill of Rights.

[19] I am also of the considered view, that the Defendant did not take the necessary and reasonable precautionary measures to protect the commuters who were returning home that afternoon. With the picture of hawkers, passengers and school learners who were heading home around the time the call was made, O'Regan J mentioned above that the passengers are vulnerable, and the Defendant has monopoly over the rail system. I am not going to assume the Defendant's experience thus, lessons could have been learnt for managing commuters around the periods, whether it was the afternoon or morning, when commuters are heading home or places of work and prepare for any eventualities that could not have been foreseeable. Khwinana AJ in ***Mthombeni v Passenger Rail Agency of South Africa (13304.17) [2021] ZAGPPHC 614*** in reinforcing the Defendants legal duty and went a step further and held the '*[Defendant] is under a public law duty to protect its commuters cannot be disputed. ... [and] pronounc[ing] that the duty concerned, together with constitutional values, have mutated to a private law duty to prevent harm to commuters*', (**para 19**). The plaintiff's version which was also not refuted in that a call was made for commuters to move platform 8 to platform 2 became evident that commuters not only the plaintiff were at risk due to no reasonable safety measures in place to control the crowd at the time of the afternoon when most people were anxious to get home. Another issue, the plaintiff was an eligible commuter awaiting to board train to ferry to her place of alighting, Carletonville which was also not refuted. It was the valid ticket that justified the plaintiff's boarding of the train save for the late announcement for the move from platform 8 to platform 2 that resulted in her injuries. This also meant that the possession of a valid ticket during evidence in chief and cross examination including the happening of the incident itself was not disputed. Therefore, the plaintiff's awaiting at the station, her being pushed '*by an unknown person*' could not have been reasonably foreseeable. However, what became evident, the Defendant, as a reasonable organ of state, attempted to avoid taking responsibility and account for the incident that happened on 11 September 2012, resulting in the plaintiff's injuries. At the risk of repetition, irrespective of whether there was no injured person, the plaintiff was caught up in several people to the detriment of her safety that were pushing to get to platform 2.

[20] I am also not to second-guess the Assessor's Report in that the Defendant, through its employees who were not visible at the Platforms when the Call was made for the move of people breached the duty to ensure the smooth transition of the commuters from platform 8 to platform 2. The Assessor's Report dated 16 October 2023 from the Claims Assist

Services after having conducted a comprehensive assessment of the evidence regarding the claim established that:

- [20.1] The plaintiff was not in control of the situation when she was pushed from the platform.
- [20.2] The overcrowding of the platform caused by hawkers and a crowd pushing and shoving was already a dangerous situation even before the call was made.
- [20.3] The plaintiff was not negligent in any way as the attempt was to portray her as such by the Two Prasa Guards. We are of the opinion that they did not even see this incident happening.
- [20.4] PRASA is 100% to be blamed because they allowed a dangerous situation on an overcrowded platform with hawkers and commuters to escalate in this incident when the train was re-routed to platform 2 from platform 8 after being late.

In essence, having a security guard, who was called into the scene was indicative of the fact that there were no reasonable measures in place to ensure the safety of the commuters and is a type of a '*legal blunder*' that attracted the Defendant's delictual responsibility.

- [21] On the basis of the evidence before this Court, not only of the plaintiff but the Defendant's employees who testified about the uncontrollable crowd at the time the call was made, the rush of commuters was indicative of an uncontrollable situation that could have been, in the position of the Defendant, reasonably foreseeable, (***Thwala para 14***). In this case, the Defendant's action was not pure negligence but one that was wrong in that no reasonable safety measures put in place to prevent any eventualities during the peak hour at the train station. I am satisfied that the plaintiff satisfied this test in proving the Defendant's negligence because the overall scheme of the Defendant's responsibility is grounded in the Constitution, 1996 which protects many of the fundamental rights and responsibilities included therein. As simply stated, Mogoeng CJ in *Mashongwa* held that the Defendants' '*public law obligations attract liability should the body fail to uphold the duties upon it*', (***para 21***). Therefore, as the plaintiff was pushed by *an unknown commuter* during the move from platform 8 to platform 2, the Defendant must take responsibility for not putting

reasonable measures that would have ameliorated any risks that were associated with an uncontrollable situation at the station. This court is not to attribute any contributory negligence on the part of the plaintiff regarding the Defendant's unreasonable conduct for not having had an insight and drew lessons from the experience in managing the flow of the many people during peak hours at the station. It is also my view that the Defendant be held liable for the plaintiff's injuries. At first, the Defendant barely liability and subsequently argued for contributory negligence which is indicative of not being a reliable organ of state in upholding the legal duty it owes towards the fulfilment of the prescripts of the new dispensation. Secondly, contributory negligence was a frivolous argument with no prospect of success by imputing liability on the plaintiff. The Defendant must also pay the plaintiff's reasonable costs of the Assessor that conducted research and formulated an opinion on the incident.

[22] Accordingly, it is ordered that:

[22.1] The Defendant is 100% liable for the Plaintiff's proven or agreed damages.

[22.2] The Defendant shall be liable to pay the reasonable costs of the Assessor's fees: Claims Assist Services.

[22.3] The Defendant shall be liable to pay the Plaintiff's costs including the costs for 20, 21 and 22 November 2023.

[22.4] The Defendant is to pay the costs of this application on a party and party scale.

[22.5] The quantum is postponed *sine die*.



NTLAMA-MAKHANYA
ACTING JUDGE, THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Dates Heard: 20; 21 and 22 November 2023

Date Delivered: 18 April 2024

Appearances:

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