

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: 4206/2016P

In the matter between:

GUGU CAROL NGCOBO

PLAINTIFF

and

**PASSENGER RAIL AGENCY OF SOUTH
AFRICA (PRASA)**

FIRST DEFENDANT

**THE MEMBER OF THE EXECUTIVE COUNCIL
FOR THE KWAZULU-NATAL DEPARTMENT OF
TRANSPORT**

SECOND DEFENDANT

J U D G M E N T

Delivered on: Tuesday, 21 MAY 2019

Olsen J

[1] The plaintiff in this matter, Gugu Carol Ngcobo, has sued Passenger Rail Agency of South Africa (which I shall call “PRASA”) for compensation for injuries sustained when she fell on the platform of Congella station when exiting one of PRASA’s urban commuter trains. The claim is made in delict. PRASA denies liability; but pleads in the alternative that blame and liability must be apportioned.

[2] Three witnesses testified. They were the plaintiff, a first year university student at the time; a Mr Strydom, a retired train driver previously in the employ of PRASA; and a Mr Govender, an electrical fitter in the employ of PRASA who was the only witness called by PRASA. There is no need for me to make any further mention of Mr Govender’s evidence as nothing he said contradicted or added to the evidence of Mr Strydom.

[3] Admissions and facts recorded as being common cause aside, the other source of evidence in this trial is a video recording of the incident. Judging from the recording it was made through a camera placed at an elevated position pointing down and along the platform in the same direction as the train in question in this case was travelling. The side of the train from which passengers would ordinarily emerge onto the platform of the Congella station is clearly visible in the video recording.

[4] I turn to the facts revealed by these sources of evidence.

[5] In 2015 the plaintiff was a first year student at the Howard College campus of the University of KwaZulu-Natal. She lived at Ilfracombe, which is situated some distance to the south of central Durban. Each day she travelled on either a weekly or monthly ticket by train from Ilfracombe to the Congella railway station. There she was accustomed to disembark and then walk up the hill to the Howard College campus which is built on the ridge overlooking the City of Durban.

[6] On the day in question, 14 April 2015, the plaintiff undertook this trip from Ilfracombe to Congella station on train 0733, owned and managed by PRASA. The train comprised eight coaches in all. However the train did not stop at the Congella station as it was supposed to do. The plaintiff stepped off the train notwithstanding that it was still moving. She became a moving body landing on and striking a stationary hardened platform, with predictable results. She tumbled and was thrown about and ended up prone on the platform. She sustained, *inter alia*, a blow to the head. She said in evidence that she cannot recall the accident happening. She cannot recall how she came to be standing in front of an open door on a moving train. But she has viewed the video evidence to which I have referred, and she confirms that it depicts her in the incident which brought her to this court.

[7] In her particulars of claim the plaintiff pleaded that the servants of the defendants were negligent in relation to the incident. The grounds of negligence are pleaded repetitively, but, fairly considered, they amount to this.

- (a) When the train was underway and in the vicinity of the Congella station the coach doors were not secured against opening.
- (b) The driver of the train failed to stop at the station to allow passengers to disembark.

- (c) The train was not in proper working order. (This criticism, one assumes, was directed at the fact that the doors were capable of being opened whilst the train was still in motion.)

The third of these complaints was not pursued at trial as the discovered documents revealed that immediately after the incident the train was taken off the lines and examined. There was no defect in the coach in which the plaintiff was travelling. In other words, the door from which the plaintiff emerged was operating as designed.

[8] During the course of the opening address I asked the parties to agree, if they could, upon a verbal description of what it is that the video recording depicts. Counsel obliged and produced the following account of the recording.

- “(i) A Metro Rail train is seen approaching and then passing the Congella platform.
- (ii) The train set described as 0733 comprises of eight coaches in total.
- (iii) The second of the coach doors on the fourth carriage is open.
- (iv) The plaintiff alone is seen standing at the exit with a bag in her right hand.
- (v) The doors are open with no impediment visible preventing them closing. The plaintiff’s left hand is not visible and there are no other visible occupants in the vicinity of the door.
- (vi) The plaintiff alights from the moving train onto the platform and prior to the end of the platform.
- (vii) The train does not stop at the platform but stops some distance after the end of the platform and passengers are noted emerging from the left side of the train.
- (viii) The plaintiff continues to lie motionless on the platform.
- (ix) The train (0733) continues on the tracks.
- (x) The plaintiff continues to remain motionless on the platform.”

[9] There are two other matters which in my view need to be mentioned concerning the video recording. The first constitutes mere clarification of an

aspect mentioned by counsel. The plaintiff emerged from the train to land on the platform very near to its end. The platform is elevated above the surrounding ground level. If the plaintiff had exited the train any later than she did she would have missed the platform altogether and landed on ground lower than the level of the platform by some margin, which may very well have resulted in more severe injuries than those she sustained.

[10] The second observation is one I wish to add to those made by counsel. It concerns the speed of the train. It is not possible merely by looking at the video recording to make an estimate (in kilometres per hour) of the speed at which the train was travelling. However the video recording continues for some time after the incident, and one sees another train arrive in the same direction as train number 0733. It stops at the Congella station, presumably at the point where train number 0733 should have stopped. At the point at which it stops many of its coaches to the rear are behind the camera. Eventually that second train moves off, gathering speed. By the time its rear coaches come into view on the video recording that second train has reached a speed (i.e. those rear coaches are passing the platform at a speed) which appears to me to be comparable to the speed at which train number 0733 travelled as it passed through the Congella station without stopping. The video recording allows the viewer the vantage of an arm chair critic when considering the speed of train 0733. Wearing that hat I conclude that the speed at which the train was travelling, and accordingly the speed at which the plaintiff's feet struck the platform, was such as rendered a fall to the ground and some injury inevitable.

[11] Mr Wessel Strydom was first employed by the then South African Railways in 1971 and became a train driver in 1976. In the late 1980s he took up a management position and also became a trainer of drivers. He left the then Spoornet in 1997 but was recalled in 2014 to drive trains on a contract basis as there was a shortage of drivers. He did that until he was compelled to retire in June 2018. Mr Strydom is familiar with the 5M and 10M units used by PRASA on urban railway lines. He has viewed the video of the incident and confirms that the train set involved is the older type, the so-called 5M.

[12] Mr Strydom gave evidence identifying the following salient features of the 5M type urban commuter train.

- (a) Each train has what is called a motor coach at the front and at the back. The driver rides in the front and guard at the back. Two motor coaches are employed so that at journey's end the driver and the guard can swop coaches so that the train can proceed on the return trip without turning around.
- (b) The doors by which one gains access to the motor coaches are manually operated.
- (c) The passenger coaches which are placed between the motor coaches have doors which close automatically. They operate pneumatically, but an electrical system is required for switching. (On the video one sees that the doors are of a sliding type, with two leaves for each door opening.)
- (d) The driver controls a switch in the front motor coach which enables the operation of the pneumatic system controlling the doors to the passenger coaches. The guard in the rear motor coach then controls the opening and closing of doors.
- (e) When the train is about to depart a station, once he has observed that everything is clear, the guard must close the doors by pressing the appropriate switch. Pneumatic pressure then closes all doors to the passenger coaches. Once they are closed they cannot be opened manually. This must be done before the train moves off.
- (f) When a train arrives at the next station it must come to a standstill before the guard presses the other switch. This switch does not actually open the doors, but in effect unlocks them by releasing pneumatic pressure. That process generates a sound which would indicate to passengers inside the train that the doors can then be opened manually. It is possible to open the doors in this unlocked state from the outside or from the inside. Accordingly, although one might say that when the guard presses the second button he or she is "opening" the doors, this is not correct. They are merely unlocked so that they can be opened manually.
- (g) The closing mechanism of the doors is designed to avoid injury to a passenger if some part of her body is in the way of closing doors. If a person's foot is placed in the way of the closing doors the foot will not

be crushed; it is possible for passengers to keep the doors open in this fashion. Once the train is underway such a passenger, having blocked the complete closure of the door, might then open it fully and hold it open by, for instance, standing legs apart so that each foot is holding one of the leaves of the sliding door. Opening a door jammed in this fashion to its full extent requires considerable upper body strength. If a passenger has blocked the closure of the door in this fashion, but then releases the obstacle, the door will close whilst the train is still underway and will not be capable of being opened manually thereafter until unlocked at the next station.

[13] Mr Strydom viewed and examined the video recording of the incident. He points to the fact that one can see that prior to her fall the plaintiff was standing in the open doorway and that she was not holding the door open. That means that despite the fact that the train was still moving the doors had already been unlocked. A passenger inside the train, having heard the sound of the unlocking, could then have opened the doors preparatory to disembarking when the train came to a standstill. Mr Strydom pointed out also the fact that passengers can be seen disembarking from the train in question after it had stopped some distance from the end of the Congella platform, and doing so from the left side of the train. It is the right side of the train from which passengers would have disembarked onto the Congella platform had the train stopped there. As I understood Mr Strydom's evidence it is to the effect that this opening of doors on both sides could only have been achieved by the driver disengaging the power from the system, thereby unlocking all doors on both sides of the train.

[14] Mr Strydom's analysis of what can be seen from the video is not contradicted.

[15] Given Mr Strydom's description of how the doors of the passenger coaches operated, it is not possible to say whether the fact that the doors were unlocked while the train was still in motion was the fault of the guard or the driver. Indeed, one does not know for how long the doors on the right hand side of the passenger coaches were unlocked before the train arrived at the Congella station.

[16] At the commencement of the trial, shortly after counsel for the plaintiff had completed his opening, counsel for the defendant sought to place on record that the guard and the driver responsible for the train on the day in question were not available to be called as witnesses. His instructions were that one of them was deceased and the other retired, the retiree being untraceable. He could not say which was which. However Mr Strydom revealed in evidence that he knew the driver and had indeed spoken to him in March 2019. His unchallenged hearsay evidence was to the effect that following the disciplinary proceedings generated by the current incident the driver was suspended for 12 months. After he was restored to his position as driver he again missed a station and that resulted in him being demoted to the position of a guard. Counsel for PRASA had this verified and advised the court that the information given by Mr Strydom was in fact correct. The driver was accordingly available but was nevertheless not called.

[17] It strikes me as of no moment that it is not possible from the evidence before me to say which of PRASA's employees (the driver or the guard) was responsible for the fact that the doors to the passenger coaches were unlocked. Neither, in my view, is it significant that we do not know when this unlocking took place. It is sufficient from the point of view of the onus borne by the plaintiff that it is proved that the doors on the right hand side of the train were unlocked when it was still in motion as it ran alongside the Congella platform.

[18] I found Mr Strydom's evidence to be entirely satisfactory, and that it constitutes a sound basis upon which to reason further.

[19] The plaintiff was unable to say whether it was she or someone else who opened the door to allow her to stand in the doorway waiting to disembark. She has no memory for that aspect of the events of the day in question. As far as can be seen she is standing in the doorway alone which suggests that it was her who opened the door. It is more probable than not that the plaintiff in fact opened the door.

[20] I have already mentioned that it was the plaintiff's established practice to get off at the Congella station so that she could walk from there up to the university. Anyone familiar with the layout of the City of Durban would realise that such a walk would take some effort, both by virtue of the distance

involved and the climb up to the ridge on which the university campus is constructed. Missing the Congella station would only make things worse. In my view it is probable that the plaintiff was of that class of passenger for whom it was more than just inconvenient that she or he should miss the station. When I talk of such a class I have in mind, for instance, the worker employed in that area who would be late for work if he missed the station and had to somehow find his way back from the next station to his place of work.

[21] When it was suggested to her during her evidence that she had jumped from the train, the plaintiff denied that vehemently saying that the video depicted her stepping off the train. I agree with the plaintiff's description of what one sees in the video. She appears to be stepping off the train as if it was a stationary one.

[22] As already mentioned the video depicts a second train arriving after the incident and stopping at a certain position alongside of the Congella platform. Assuming that to be the point at which the plaintiff's train ought to have stopped, the point at which the plaintiff stepped off the train was well beyond the point where the driver's motor coach normally comes to a standstill. As I have already pointed out the point at which the plaintiff got off the train was not only past the point at which the driver's motor coach ought to have come to a standstill, but was at a point where the platform was about to end abruptly. It strikes me as probable from all the evidence before the court that the plaintiff was anxious to get off the train at Congella, realised at the last moment that the train was in fact going to miss the Congella station, and accordingly decided to step off the train onto the platform at the last moment despite the fact that the train was still in motion. She must have misjudged the speed of the train when she realised at the last moment that the train was not going to stop. In my view there is no doubt that she was negligent in that regard. A person acting reasonably would have not taken that chance at that speed, even if it was important not to miss that station. The plaintiff's negligence was undoubtedly a cause contributing to the injuries she sustained.

[23] Counsel for PRASA conceded at the outset of his argument that PRASA's servants (assuming both the driver and the guard were involved) were negligent. The negligent conduct comprised the failure to stop at the

Congella station and the unlocking of the doors so that they could be opened when the train was still in motion.

[24] However counsel sought to argue in the first instance that the conduct of the plaintiff in manually opening the unlocked door and stepping onto the platform when the train was still in motion constituted a *novus actus interveniens* which broke what might otherwise have been a chain of causation between the negligent misconduct attributable to PRASA and the injuries sustained by the plaintiff. He argued further, in pursuit of the same conclusion, that it was not reasonably foreseeable that if the doors were unlocked, someone might open them and jump off the moving train. These two arguments are in my view interrelated. In advancing them counsel referred to *Standard Chartered Bank of Canada v Nedperm Bank Limited* 1994 (4) SA 747A at pages 764 – 5 and *OK Bazaars (1929) Limited v Standard Bank of South Africa Limited* 2002 (3) SA 688 (SCA) at para 32 – 33.

[25] There is no difficulty in concluding that PRASA's negligent conduct was a *conditio sine qua non* of the injuries sustained by the plaintiff. It is clear that the plaintiff would not have been injured if the train had stopped at the Congella station as it was supposed to do. It is equally clear that the plaintiff would not have been injured if, despite the fact that the train did not stop as it should have done at the station, the train doors had remained locked because the train was still in motion. Factual causation was undoubtedly established.

[26] As far as legal causation is concerned as pointed out by Corbett CJ in *Standard Chartered Bank of Canada* at 765 A-B,

'the test to be applied is a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a *novus actus interveniens*, legal policy, reasonability, fairness and justice all play their part.'

As pointed out in *OK Bazaars* at para 33, a decision as to whether any alleged new intervening cause should be regarded as having broken the chain of causation is affected by the foreseeability of the intervening act occurring. Indeed it plays a prominent role. As the learned Judge said

'If the new intervening cause is neither unusual nor unexpected, and it was reasonably foreseeable that it might occur, the original actor can have no reason to complain if it does not relieve him of liability.'

[27] I do not agree with counsel's submission, in regard to these tests, that it was not foreseeable, and indeed not to be expected, that a passenger would try to disembark from a moving train at a station at which the train was expected to stop, if, contrary to all instructions concerning the management of such trains, the doors were unlocked at the relevant time. This case is not about an overnight express train flashing through a station at 100 kilometres per hour. This was urban commuter train. The speed at which it passed the station was comparable to the speed it would ordinarily achieve within the confines of the station (i.e. whilst still adjacent to the platform) if it had stopped and then taken off. The disembarkation of passengers at an urban commuter station which is a scheduled stop is the expected, not the unexpected. Unless the guard's negligence extended so far as having allowed the train to travel all the way from the previous station with the doors unlocked, the unlocking of the doors would have signalled to commuters wishing to disembark that the train was going to stop so that passengers could disembark.

[28] In my view the negligent misconduct of PRASA's employees created a dangerous situation. The doors to passenger coaches are supposed to remain closed until the train is at a standstill, *inter alia* to prevent commuters who may be in a hurry from swinging off the train onto the platform before the train has come to a complete standstill. The fact that on this occasion the train was travelling at a speed at which one would not expect even a young athletically inclined person to attempt to disembark does not change the fact that the situation was dangerous for someone who might misjudge the speed of the train as, in my view, it has been established the plaintiff did.

[29] In my view it is undoubtedly foreseeable that if the doors to a train are opened before the train has come to a stop at a destination station, the impatient traveller, or one displaying the exuberance of youthful athleticism, may attempt to disembark before the train comes to a final stop. It is perhaps even more predictable that such an attempt will be made if it should become apparent that the train is not actually going to come to a complete stop. People need to get off at their stations. All that has to be added into the mix when, as here, the train travels through the station at a speed at which disembarkation will inevitably lead to some injury, is an error of judgment

concerning the speed of the train made by the person who attempts to disembark.

[30] I conclude that it has been established that the negligent misconduct attributable to PRASA was a cause contributing to the injuries suffered by the plaintiff.

[31] Having decided that both parties were negligent, and that the negligence of each contributed to the plaintiff's injuries, what remains is to determine the extent to which any amount of damages to be awarded to the plaintiff should be reduced in terms of s 1 of Act 34 of 1956.

[32] Counsel for PRASA has argued that in considering an apportionment PRASA should not have to pay more than 15% to 25% of what the compensation would have been if the incident had been solely caused by the negligence of PRASA's employees. It is argued that the plaintiff's conduct was deliberate and that her negligence was greater than that which might be attributed to a commuter who attempts prematurely to disembark from a train moving slowly. There is merit in these arguments, but one must take care not to introduce an element of the discredited last opportunity rule into the debate. Account should also be taken of the fact that there is no reason to suppose, in the absence of evidence from either the driver or the guard, that the premature opening of the doors was anything other than deliberate.

[33] Counsel for the plaintiff referred me to a number of cases involving a passenger being injured whilst attempting to board a moving train, or exiting a moving train (not necessarily willingly) through open doors which ought to have been closed whilst the train was moving. Some of the more helpful ones are *Khupa v South African Transport Services* 1990 (2) SA 627 (W); *Transnet Limited t/a Metro Rail and Another v Witter* 2008 (6) SA 549 (SCA); *South African Rail Commuter Corporation Limited and Another v Mojopelo* (A891-2008) [2011] ZAGPPHC 169 (16 September 2011) and *Transnet Limited t/a Metro Rail v Tshabalala* [2006] 2 All SA 583 (SCA). The exercise of determining what is just and equitable in cases of apportionment of liability is one which almost inevitably generates an outcome upon which reasonable people may differ. Previous more or less comparable decisions are of assistance, but each case must be decided on its own facts.

[34] In considering PRASA's position sight should not be lost of the findings and statements of principle made by the Constitutional Court in *Mashongwa vs PRASA* 2016 (3) SA 528 (CC). Paragraph 16 of the judgment resonates in the present context.

'Many rail commuters are constrained, by the long distances they have to travel and limited financial resources, to use trains as their primary mode of transport. Understandably so, because this well-subsidised public-transport system is affordable. Presumably, passengers enter these trains reasonably believing that the transport utility is alive to the dangers to which train users are exposed in the course of their journeys and has undertaken such steps as are necessary to avert the reasonably foreseeable harm that could otherwise befall them.'

Under the same heading ("Wrongfulness") the following appears in paragraph 26 of the judgment.

'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.'

[35] The court in *Mashongwa* pointed out (at paragraph 51) that additional resources are not required for PRASA to perform the obvious and mundane task of complying with its own general operating instructions by ensuring that the doors of all coaches are closed before the train moves. The court continued as follows.

'It is something so easy to accomplish and yet so necessary that any attempt to provide an "acceptable" excuse for not doing it would inevitably be met with resistance and likely rejection.'

I venture to suggest that stopping at a scheduled railway station is something just as easily achieved by a reasonable train driver unless, of course, there is something wrong with the train. There is no evidence of that in this case.

[36] On the other hand the plaintiff's own negligence was by no means minor. Whilst one appreciates why she might have done what she did, it seems clear on the evidence before me that a person acting reasonably would have regarded it as perfectly obvious, given the speed of the train, that alighting from it onto the platform, as the plaintiff did, was inevitably going to cause injury. I reach that conclusion cautiously, bearing in mind that I assess the speed of the train with the benefits of an arm-chair critic; and also bearing in mind, *inter alia*, that, judging from the video evidence, the plaintiff would have had very little time to react once she realised that the train was not going to stop to let her off at the Congella station.

[37] I conclude that the plaintiff and PRASA should share equal blame for the injuries suffered by the plaintiff.

[38] At the outset of the trial I made an order at the request of the parties separating for later consideration the question of the nature and extent of the injuries suffered by the plaintiff, and the quantum of compensation due in respect thereof. The parties asked me to make a declaratory order with regard to the liability of PRASA, if any. The parties were common cause in argument that a costs order should be made at this stage, but PRASA's counsel argued against the proposition that the costs of two counsel (where employed) should be allowed. I agree that allowing the costs of two counsel would not be appropriate in this case.

I make the following order.

- (a) The defendant is declared to be liable for one-half of such damages as the plaintiff may prove she suffered as a result of her fall on the platform at the Congella station on 14 April 2015.**
 - (b) The costs of the action up to and including 7 May 2019 are to be paid by the defendant.**
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(c) Date of Hearing: MONDAY, 06 MAY 2019; and
TUESDAY, 07 MAY 2019

Date of Judgment: TUESDAY, 21 MAY 2019

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