



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 7024/20

In the matter between

SINDISIWE PATIENCE MKHIZE

PLAINTIFF

AND

PASSENGER RAIL AGENCY OF SOUTH AFRICA

DEFENDANT

Date of Hearing: 26 August 2024

Date of Judgment: 21 February 2025 (to be delivered via email to the respective counsel)

JUDGMENT

THULARE J

[1] This was an action wherein the plaintiff sought damages arising out of injuries allegedly sustained whilst she was travelling on the defendant's train on 17 October 2018 between Stikland and Bellville train stations. The defendant provides a rail

commuter public transport service. The plaintiff sustained injuries. The parties agreed to separate the merits from the quantum. The issue to be determined was whether the defendant was liable for the injuries.

[2] The plaintiff alleged that the defendant owed a duty of care. The plaintiff's case was that the defendant failed to implement safety and or security measures to ensure that the carriages of the train were not overcrowded; failed to provide or ensure that there were adequate personnel in authority to control the passengers in the carriage in which the plaintiff was travelling; failed to ensure that the plaintiff was conveyed safely and failed to take steps to prevent the incident when by exercise of reasonable care, defendant could and should have done so. The defendant denied that the incident as alleged by the plaintiff occurred as alleged or at all, and if it was found that the incident occurred, denied that its employees were negligent and in the alternative pleaded contributory negligence.

[3] The plaintiff and Gloria Mahusi (Mahusi) testified in her case whilst the defendant's five employees to wit Mbuyiselo Meyi (Meyi), Magidigidi, Maseti, Ngxoli-Wellem and Klaase testified in its case. The Plaintiff's case was that she and Mahusi did not know each other before the day of the incident. They met on that day at Stikland Hospital where each of them had travelled separately and individually to renew their nursing licences. They met whilst waiting in the queue at the hospital, and upon discovery that they both travelled by train, waited for the other and walked together from the hospital to the Stikland train station to board the same train at about 14H00 enroute to different destinations. In their conversations, they also exchanged particulars including cellphone numbers. Mahusi's destination was the first, Bellville, whilst the plaintiff's destination was Vasco. Both were fare-paying passengers on defendant's train. The plaintiff's train fare ticket for that trip was handed in and marked exhibit A2. At Stikland train station, Mahusi saw two of defendants' guards on the opposite ends of the platform whilst the plaintiff did not see any guards at the platform. They both boarded the train in the same carriage when it arrived and sat next to each other on the bench inside the train.

[4] As the train was moving between Stikland station and Bellville station, the train made a random, unfamiliar and unexpected stop in the middle of nowhere, between the stations. From the experience of travelling by train, the plaintiff's case was that this occasionally happened when more than one train was using the same tracks, generally in opposite directions, and one train was commanded to stop to allow the other to change tracks at a nearby intersection. The train was stationary when passengers from the adjacent carriage came running and screaming into the carriage where the plaintiff and Mahusi were sitting. Some of these passengers were screaming that robbers, *skollies* in local parlance, entered the train and were robbing them. These passengers came in running, pushing and shoving to get through the door to get into the plaintiff's carriage, and were running into the passage in between the benches. Even those who were seated or standing in that carriage started running, pushing and shoving. Some of the passengers climbed onto the benches to move ahead and escape to the next coach. The plaintiff and Mahusi also got a fright. Neither of them personally saw the alleged robbers. There was no security or officials of the defendant in sight in the carriage. As they both tried to get up from the bench and ran in the direction the crowd was fleeing to, they both fell from the running, pushing and shoving. The defendant in cross-examination suggested that the plaintiff should have remained calm, collected and seated on the bench to avoid falling and sustaining the subsequent injuries from being stepped over and trampled on, more so because she did not see the *skollies* herself. It was during the flight, falling, being stepped over and trampled on, that the plaintiff sustained the injuries. Mahusi did not sustain any serious injuries. In cross-examination the defendant suggested that the plaintiff was injured because of her wrong decision to stand up and attempt to flee. The plaintiff stood up and attempted to flee to avoid harm, when she was pushed and fell whereupon she was stepped on and trampled on.

[5] The train started moving, the report was that the *skollies* disembarked and calm was returned. When the train reached the next station, Bellville, Mahusi alighted. All the other passengers as well joined those who had reached their destination, and moved to alight from the train, and reported their experience to a security officer of the defendant

who was on the platform at Bellville station. The plaintiff also joined the other passengers whose destination was not Bellville but who also wanted to alight for safety concerns. These passengers, together with the plaintiff, were addressed by a security officer of the defendant, at Bellville station and at the door of the train, who assured them that despite their reported concerns, there was now sufficient security to attend to their safety and it was now safe for them to continue their trip on that train. The plaintiff together with other passengers went back to their seats and continued with the trip on that train. The train moved and the plaintiff alighted at her destination, Vasco train station. She immediately went to the offices of the defendant to report her experience and the injuries she had sustained. A representative of the defendant in the office of the defendant at the station advised her to go and report the incident and her injuries to the station in Cape Town. The injuries sustained by the plaintiff included a broken arm. She did not forthwith go to Cape Town to report the incident, but immediately sought medical attention, and it was only on 31 October 2018, a few days later when she was in a position to do so, that she travelled to Cape Town to report the incident.

[6] Meyi was a protection services officer for the defendant who was on duty on the day from 6H00 to 15H00. He and another were the only two who escorted trains on the northern line, which included the area between Kraaifontein and Cape Town. The northern line had 19 stations to cover. In other words, the security presence of the defendant inside the trains on that day was only two protection officers of the defendant, deployed to cover the trains that travelled between 19 stations. Meyi could not say whether he and his partner were on the specific train used by the plaintiff and Mahusi, as the two of them could not be on all the trains at once. He could not provide details of his movements and could not even tell where he was at the time that the plaintiff and Mahusi boarded and travelled on that train. The northern line was a busy line used by many commuters who traveled between the 19 stations. Meyi was aware that the presence of protection services officers was a deterrent for crime as well as unbecoming behaviour on trains. Meyi had no knowledge of the incident involving the plaintiff and the defendant on that day. The area around Stikland was not regarded as crime ridden or notorious for crime.

[7] Magidigidi was acting leading protection officer for the defendant at the time of the incident. He deployed protection service officers and on that day had approximately 122 to 127 of them to deploy between 37 train stations. There were generally two protection officers per station and some stations had more, like Bellville because of their size. Not every train had protection officers as escorts. The defendant did not provide enough personnel to always cover every train and every station, and the reason was provided as budgetary constraints. As a result, protection officers were deployed in preference of trains and lines that had proven prevalence of incidents. The prevalence of incidents of crime and unbecoming conduct led to lines or stations being declared hot spots requiring special and specific attention. During the time of the incident, on the northern line only Elsie's River train station and surrounding area proved prevalent with crime which led to re-enforcements by deploying more protection officers and members of the SAPS. It was mostly robberies, and public drinking or smoking that were reported. The incident involving the plaintiff was not recorded as it was not reported to him.

[8] Maseti was a protection officer who was on duty on the day, patrolling the railway lines between Bellville and Strand. The patrols included looking for unauthorized persons and suspicious persons along the railway lines and tracks, inspection for the detection of faulty signals and the general safety of the defendant's property, employees and commuters. No faulty signal was reported to him which caused a train to randomly stop on that day. He was aware that it happened for two trains to be on the same tracks, which led to one train having to stop at a designated signal, generally a red light before an intersection, to ensure the safe passage of both. Between Stikland and Bellville, there were about 8 such signals, 4 on each side of the tracks travelling in opposite directions. Generally, the patrol in that area, that is between Stikland and Bellville, was conducted in a dual manner, both on foot and using a vehicle. He could not say where he was at the time of the incident as alleged by the plaintiff. Maseti did not know about another incident of robbery that happened at Parow station on the day. His explanation was that he would only know about incidents that happened between stations.

[9] Thando Klaas was a chief investigating officer of the defendant and was the acting head of security for the Western cape in 2018. He investigated claims and drafted reports. In the investigation of the matter relating to the plaintiff, his sources would be the incident register and occurrence books including the Control Room register. He could not find any mention of the incident involving the plaintiff in any of the records of the defendant on the day of the incident. A train stopping for a signal was a regular occurrence in the operations of the defendant and would not be recorded as an incident. His basis for disputing the occurrence involving the plaintiff was because it was not recorded. The alleged incident involving the plaintiff happened at the time when their risk assessment motivated additional security measures and resources to their principals. It was only in 2020 that security was beefed up. They now try to ensure that every train has guards on it. He could not dispute that the plaintiff was a commuter on the defendant's train with a valid train ticket and that the plaintiff sustained injuries. His investigation and report did not include material which the plaintiff had provided to the defendant. He struggled to explain why the report was only completed in April 2022, when the plaintiff submitted a claim to the defendant on 31 October 2018, that is after 3 years. It would not have been difficult, for instance, to locate the driver of the train. If the train stopped for a valid reason, like as instructed by a signal, it would not be captured as a fault and there would be no record of such a stop by protection services. However, if it was for something like cable theft it would be reported.

[10] Ngxoli-Wellem was employed by the defendant as an administration official and amongst others sold tickets in the ticket office. She had no recollection of the day of the alleged incident, and somebody told her that according to the system she was on duty at Vasco that day. There was an incident book in which they noted incidents, and they also had to report incidents to the protection services. If someone had reported an incident to her, she would have recorded it. She would not have sent the person to report to Cape Town. The incident book of Vasco station during that period had disappeared and as a result, she could not consult those records.

[11] It is probable, on the preponderance, that the plaintiff sustained injuries in the manner that she described whilst travelling on the defendant's train on 17 October 2018. The defendant did not provide any evidence to gainsay the evidence of the plaintiff that she was the holder of a valid train ticket and that she travelled on the defendant's train between Stikland and Vasco on that afternoon. The evidence of the plaintiff about what happened on the train was supported by Mahusi, an independent witness who had nothing to gain. The defendant's own witnesses indicated that where a train stopped for a robot because another was using the same tracks and waited for its path of travel to clear first at the intersection, the defendant's security did not keep such records. The investigation done by the defendant was not only late, but poor. The defendant could not lead evidence as to whether in fact that train which the plaintiff used, did or did not stop between Stikland and Bellville that afternoon. The defendant sought to rebut the direct evidence of the plaintiff through the speculative opinions of its protection services, which speculative opinions were irrelevant. Would the driver of that train or anyone in operations have records of the travel times including any unscheduled stops? Were there available records rebutting a delay of the train because of having stopped? Was the train on the scheduled time especially after leaving Stikland station? Did the defendant investigate these obvious questions in the light of its attitude towards the plaintiff's claim and if it did what were the outcomes? If not, why not? The defendant simply brought a poorly investigated, highly opinionated and factually emaciated denial to court. I find that the plaintiff sustained her injuries inside the defendant's train in the manner and under the circumstances that she described on 17 October 2018.

[12] The defendant bore a positive obligation to ensure that reasonable measures were in place to provide for the security of the plaintiff.¹ That duty, together with constitutional values, has mutated to a private-law duty to prevent harm to commuters.² The breach of that duty is one of the factors underpinning wrongfulness.³ The evidence did not show that the defendant had a security guard on the train used by the plaintiff. To the contrary,

¹ *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* (CCT 56/03) [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) (26 November 2004) at para 84.

² *Mashongwa v PRASA* 2016 (3) SA 528 (CC) at para 29.

³ *Mashongwa* at para 28.

the evidence of Magidigidi and Klaas showed that the incident involving the plaintiff happened at the time when the risk assessment of the defendant's employees motivated for additional security measures and resources including for the area where the incident involving the plaintiff happened. Meyi, the security officer whose evidence the defendant attempted to use to show some presence on the train, cannot tell where he was at the time of the incident. This is also the position with Maseti, who the defendant called to suggest that there were patrols on foot and by vehicle along the railway line used by the train used by the plaintiff on that day. The failure by the defendant to timeously answer the call of its protection services for additional security measures and resources for the area where the incident happened, and the failure to place available protection officers at the area which its own risk assessment showed a demand, did not amount to reasonable measures taken by the defendant.

[13] Opinions and arguments are simply not enough to meet plaintiff's case. The defendant simply did not present rebuttal evidence to show that it discharged its obligations on the safety of the plaintiff as it was required to do. The level of violence on commuters' trains in the Western Cape is a matter of public record. It led to formations of interest groups that approached courts for intervention, including up to the Constitutional Court. The decision in *Metrorail* is a classic example. The litigation in the civil courts against the defendant, and the prevalent prosecution of *Skollies* who commit crimes on trains in motion, including those who board trains when they stop at signals to rob commuters in the carriages and alight either when the train starts moving or at the next station, especially on the northern line, is notorious in the Western Cape. I am not persuaded that the measures provided by the defendant were consonant with a proper appreciation of its duty against the background of the challenge from *skollies* to its commuters in the Cape Metropolitan area but especially on the northern line. The absence of protection services consistent with the levels of crime in the deployment of resources on the northern line was negligent. In the light of the request by its own risk assessment for more resources, the defendant should have explained its challenges, especially its resource provisioning challenges if any, better for the court to understand 'the budgetary constraints from above' message that Klaas brought. On the evidence,

the 'budgetary constraints marching order' is an empty tin famous for simply making more noise with no content.

[13] On evidence, the defendant could not account for the whereabouts of its protection officers whose duty it sought to present as preventative measures, at the most crucial time. The defendant provided little to no evidence of the particularity of where its protection officials were, at what time, on which trains or at which stations to enable the court to make an assessment with reference to the incident. The protection services of the defendant merely gave a general overview of what they ordinarily do. The information presented by the defendant was insufficient to gainsay the plaintiff's case that the defendant took no steps to safeguard commuters of the train she used when it was in motion on that day. I am not persuaded that the defendant established that the steps it took could reasonably have averted the *skollies* entering the train that day, causing the pandemonium that resulted in the plaintiff sustaining the injuries. The evidence in total including that of the defendant's protection services officials, was that the presence of protection services officers on the train deterred commission of crime. The defendant failed to establish that it had its protection officers on that train or along the tracks where the train was moving, especially around where there were between 4 and 8 intersections where unscheduled stops occurred.

[14] Having concluded that the defendant's negligence was established, I am persuaded that the harm to the plaintiff which ensued was closely connected to the defendant's omission. Had the defendant deployed guards on the train, and there were known and visible protection services patrolling the area where there were 4 to 8 stops of intersections where trains changed tracks, it is more probable than not that the *skollies* would not have entered the stationary train waiting at the intersection, leading to the pandemonium that occasioned injuries to the plaintiff. On a preponderance of probabilities, the plaintiff would not have been injured had the defendant deployed protection services on that train.⁴ In my view there is a legal connection between the

⁴ *Passenger Rail Agency of South Africa v Mokoena* (5038/2020;14289/2014) [2021] ZAGPJHC 650 (26 August 2021) at para 10.

defendant's failure to take preventative measures and the injuries to the plaintiff. The suggestion that the plaintiff should have remained seated when people ran for safety is simply inhuman. It suggests that those who instruct the defendant's legal representatives are sometimes simply bored, unoccupied or lack interest in their duties and responsibilities. The suggestion that it was inconceivable that the incident would not be reflected in the defendant's books if it happened, must be considered together with the fact that the plaintiff reported the incident at Cape Town on 31 October 2018 and only after 3 years did the defendant conduct a clumsy investigation. The evidence did not encourage a finding of competence and skill, especially where material presented by the plaintiff was not dealt with. It suggests bias.

[15] For these reasons I find that the defendant is solely liable for the plaintiff's proven or agreed damages suffered because of the incident on the defendant's train. I make the following order:

- (a) The defendant is to pay the costs on scale B.
- (b) The issue of quantum is postponed *sine die*.

DM THULARE
JUDGE OF THE HIGH COURT