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

REPORTABLE

APPEAL CASE NO: A135/2024
CASE NUMBER: 13636/2020

In the matter between

SIPHOSETHU MKETO APPELLANT

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA RESPONDENT

JUDGMENT

Date of hearing: 22 January 2025
Date of judgment: 24 February 2025 - Electronically delivered
Coram: Erasmus J, Lekhuleni J, Bhoopchand AJ

BHOOPCHAND AJ:

1. This appeal against the whole judgment of the trial of 6 October 2023 is heard due to leave being granted on petition by the Supreme Court of Appeal on 27 March 2024. The notice of appeal was lodged on 25 April 2024. The appeal lies against the question of liability or the merits of the Appellant's claim

against the Respondent.[1] The Appellant testified and then closed her case. The Respondent closed its case without leading any witnesses. The court a quo dismissed the Appellant's case and declined leave to appeal. The Appellant petitioned the Supreme Court of Appeal with whose leave this Full Bench hears this appeal.

2. The Appellant, a 27-year-old female, was a passenger on a train on 5 February 2020 travelling between Cape Town and Elsies River. The incident that led to her allegedly jumping off the train and sustaining serious injuries began at the Cape Town station and ended after the train departed Goodwood station. She jumped through the open doors of the carriage after three assailants stabbed the commuter standing next to her. The assailants had boarded the train at the Cape Town station and had been boisterous throughout the journey. The Appellant sustained injuries after jumping from the train.

3. The Appellant appeals against her alleged failure to prove a passenger-transporter relationship and that her injuries occurred in an incident on 5 February 2020. The Appellant has raised fifteen grounds of appeal, which amount to twenty-one when the sub-sections of the grounds of appeal are included.

THE PLEADINGS

4. The Appellant's particulars of claim were filed on 25 September 2020. She alleged that she was a passenger on a train operated by the Respondent. She was attacked between Goodwood and Vasco stations by unknown assailants. In the ensuing panic and to avoid being assaulted, she jumped out of the train from the open doors of the carriage.

5. The Appellant alleged that the incident that resulted in her being injured was caused by the negligence of the Respondent and/or its employees. She raised

---

[1] The parties shall be cited as they are in this appeal. References to the Respondent includes its employees.

three grounds of negligence, namely that the Respondent failed to ensure the safety of the passengers on the train by failing to deploy security guards at the station or on the train. The Respondent allowed the train to move while the doors of the carriage where the Appellant was travelling were open. The Respondent failed to avoid the incident when, by exercising reasonable care and diligence, it could and should have done so.

6. The Appellant sustained a skull fracture, cerebral contusion and blunt trauma to her right shoulder, back, and neck.

7. In its amended plea, the Respondent denied that the Appellant was a fare-paying passenger on board a commuter train it operated on 5 February 2020. The Respondent denied knowledge of the alleged incident. The Respondent pleaded that if the Court found that the incident did occur, the Appellant was the sole cause of the incident. She was negligent in one of six ways. She failed to avoid the incident when, by exercising reasonable skill and care, she could and should have done so. She jumped from the moving train of her own volition. She failed to keep a proper lookout when she jumped from the moving train. She jumped from the moving train when it was inopportune, dangerous and unsafe. She failed to disembark the train carriage when it was safe under the prevailing circumstances. As the evidence may prove, she was also negligent by such acts of commission or omission.

8. The Respondent further pleaded that if the Court found the incident occurred and the Respondent was negligent, then it denied that such negligence contributed causally to the incident. As a further alternative, the Respondent pleaded an apportionment of damages.

9. Respondent filed an extensive request for trial particulars. The relevant issues canvassed included questions about whether the Appellant had a valid train ticket, details of her encounter with the assailants, the train's open doors, her jumping out of the train, and whether she received attention from anyone after jumping out. The Respondent further asked about other passengers on the train, the Appellant’s seating position relative to the doors, whether any other

commuters had been attacked or assaulted, whether the Appellant was fearful before she jumped, the number of other commuters who were robbed, whether anything was stolen from the Appellant, whether the passengers attempted to stop the assailants, and whether the Appellant reported the incident to anyone including the South African Police Service (SAPS). The Respondent asked about the Appellant's allegations regarding the deployment of security guards. Based on the number of assailants, the Respondents enquired as to how many security guards would have been required to prevent the attack and whether the assailants would have also attacked the security guards. The Respondent also requested particulars on how the Appellant reached the hospital.

10. The Appellant replied to the Respondent's request for particulars. She indicated that a copy of the ticket had been provided to the Respondent. She said the doors were open after the train left a station before Goodwood. She did not remember where exactly she fell. Unknown persons assisted her. A few passengers were on the train, and she was seated near the doors. She stated that the incident was reported to the SAPS to the best of her knowledge. She was hospitalised. There were three assailants in her carriage. On the issue of the security guards, the Appellant replied that it was a matter of evidence and argument.

11. The purpose of permitting further particulars for trial is to prevent surprise, that the party is told with greater precision what the other party is going to prove to enable his opponent to prepare his case to combat counter-allegations, but not to tie the other party down and limit its case unfairly. The purpose of particulars for trial is not to elicit evidence or information which will emerge on cross-examination.

THE EVIDENCE

12. The Appellant's Counsel informed the Court *a quo* that their case is summarised in paragraph 3 of the particulars of the claim.[2] The Appellant testified that she travelled on the train departing the Cape Town station at 19h50. She had a single ticket. She boarded the first-class carriage at the back of the train. There were about ten commuters in the carriage she was travelling in. She sat with a person going to Kraaifontein ("the companion"). Five persons boarded the train at Cape Town station, three in their carriage ("the assailants") and two in another carriage. They were smoking drugs. They asked for cigarettes and a lighter from her companion and began smoking on the train.

13. The assailants began misbehaving as the train departed Cape Town station. They banged on doors and scared people. She was scared and spoke to her companion. The plan was for her to get off at his station in Kraaifontein. She attempted to get off the train at Goodwood with others who had alighted. Her companion grabbed her bags and assured her she was safe with him. The train doors were not closing. She decided to stand with her companion next to the door. The assailants began a fight with the commuter standing next to her. They wanted the commuter's phone, and when the commuter was reluctant to hand it over, one of the assailants pulled out a huge knife from his trouser pocket. The assailant holding the knife dangled it in front of the commuter's face. The commuter, unperturbed, continued arguing with the assailant. The Appellant panicked when the assailant tried to stab the commuter. She wanted to escape them as she feared they would stab her. She jumped off the train as the assailant stabbed the commuter.

14. She lost consciousness. The noise from a passing train awoke her. She noticed that she had blood on her face. She had difficulty getting up. She fell often until she got to Voortrekker Road. She was taken to the police station and not the hospital. The police tried to ask her questions, but she could not answer as she remained terrified. She was shaking and crying. The police called the ambulance. She was taken to Elsies River Hospital. She awoke in

---

[2] Paragraph 3 of the particulars of claim is summarised in paragraph XXX of this judgment

Tygerberg Hospital after that. She suffered a head injury with concussion and a back injury.

15. On cross-examination, the Appellant was asked about her memory losses. She volunteered that she was schizophrenic, but she could recall the events of the day. She was asked how long she had travelled the route and whether she knew the stations on that line. The Appellant confirmed she knew the names of the stations on that line. She was scared when she got onto the train because of the three assailants in her carriage. They got onto the train at Cape Town station. The assailants did not ask her for her cell phone.

16. It was put to the Appellant that she could have disembarked the train at any of the stations before Goodwood. The Appellant testified that she wanted to leave the train at every station before Goodwood. No other passenger got off the train at these stations; hence, she did not, as she felt unsafe. She would be on her own at these stations. She left the train at Goodwood station as five passengers left, and she would have their company there. She would then take a taxi to Elsies River. Her companion had her bags, told her she was safe with him, and persuaded her to return to the train.

17. The Appellant agreed she could have left the train at any station. As there were other passengers on the train, she felt safe, but when the assailants sat next to them, she did not feel safe any longer. Respondent's Counsel put to her that she could have alighted at any station or moved to another carriage. The Appellant replied that she could not do so as the other carriages were empty. She testified that there were only people in the carriage she had entered, and if she left, she feared that the assailants would follow her. It was put to her that she was not attacked, nor was there any threat uttered to her. Her testimony was that the assailants did not come to her but had stabbed someone next to her.

18. The Appellant was taken through paragraph 3 of her particulars of claim. In the particulars, the Appellant alleged that she was attacked. It was put to the Appellant that her testimony was that she was not attacked. The Appellant

replied that she heard them talking about her being next. They said they were going to her because they saw her hiding her phone. It was put to her that this was new testimony. She testified in chief that she hid her phone at Cape Town station when she saw them enter. The following sentence in paragraph 3 was put to her, namely that in the ensuing panic and to avoid being assaulted, she jumped off the train from the open doors of the carriage. She agreed that it was correct.

19. The Appellant was referred to the request and reply for trial particulars. In her reply, she provided information to suggest she was not long on the train before the assailant approached her. She agreed that the answer was incorrect. She was asked about the open train doors in the request for trial particulars. She answered that she was unsure as to whether the doors were kept open or whether they had malfunctioned. She stated that she noticed the doors were open after the train had left Goodwood. The doors did not close. She did not look at the doors after they left Cape Town station and only saw they were open after she returned to the train at Goodwood station. She testified that she was most scared when she saw the knife.

20. Appellant testified that she jumped out of the train willingly. The answer to a further trial particular stated that the doors were open from when the train left a station before Goodwood. She testified that she feared the assailants were going to get to her and stab her as well.

21. The Court *a quo* asked questions. The Court referred to her testimony, where she said she heard the assailants saying she was next, and she decided to hide her cell phone. She testified that she hid her phone at Cape Town station. The assailants said that she would be next in Goodwood. She testified that her companion pulled her jacket when she was jumping off. Arising from the Court's questions, the Appellant testified that she had already known she might be attacked at Cape Town station when she hid her cell phone. The Appellant closed her case, and the Defendant did the same.

THE COURT *A QUO'S* JUDGMENT

22. The Court *a quo* stated that it was called upon to decide whether the injuries sustained by the Appellant were wrongfully and negligently caused by the Respondent, who should be ordered to compensate the Appellant at a later stage. The Court stated that the starting point would be whether there was any contractual relationship between the parties, as the Appellant was said to have been a fee-paying passenger, before it proceeded to the second enquiry on whether there was an alleged wrongful and negligent act by the Respondent.

23. The Court found that the Appellant did not produce a train ticket establishing a relationship between the Appellant and the Respondent. There was no evidence led that the Appellant was a passenger in the Defendant's train on the alleged day. The Court was troubled by the Appellant's testimony about the initial stage of her journey. She was aware of the suspicious men who had approached her and her companion at the Cape Town station. She nevertheless boarded the train. Her companion always assuaged her heightened fear during the journey.

24. The Court found that even though the Appellant was a vulnerable female, and she jumped off a moving train, no one cared to investigate what happened to her. Her companion, who assured her of her safety, did not get off at the next station to check what had happened to her.

25. The Court found that the Appellant had no evidence to prove that a couple assisted her, that the incident was reported at Elsies River Police Station, that an ambulance conveyed her to Elsies River Hospital, and that she was later at Tygerberg Hospital.

26. The Court found that the gravity of the alleged incident was such that the Appellant would have put evidence before the Court that she was a fee-paying passenger on this unknown train. She could have provided the police report, ambulance report, and medical records, which would have assisted in establishing a relationship between the Appellant and the Respondent.

27. The Appellant's damages claim was premised on the basis that the Respondent had a legal duty to protect its passengers from suffering physical harm when using their transport services. In circumstances where the Appellant had failed dismally to prove that she was a passenger in the unknown train, the Court *a quo* concluded that no contractual relationship existed between them.

28. The Court requested further argument from the parties. That directive is not before this Court. The Court *a quo* rejected the Appellant's contention that although she did not tender direct medical evidence regarding her admission to the hospitals, it appeared from the witness bundle, which was handed into the Court. However, the Appellant could not testify regarding the contents of those notes as they were hearsay. The Court categorically denied that the Appellant had provided a witness bundle. The witness was only referred to the pleadings bundle.

29. The Court reasoned that for liability to arise, there should be a causal link between the Respondent's conduct and the Appellant's loss. Although the Appellant pleaded in her particulars of claim and later testified that she was a fee-paying passenger on board a commuter train, the Respondent had denied that in the plea and had denied knowledge of the incident that resulted in the Appellant being injured. The Respondent denied that it owed a duty of care to the Appellant. Without an established relationship, no liability arose. The Court then stated that a causal link between the Appellant and Respondent is a secondary enquiry.

30. The Court stated that even if it were to assume that the Appellant was a passenger in Respondent's train, no imminent harm or threat justified her jumping off the moving train. If the Appellant failed to overcome the first hurdle, i.e., the passenger-transporter relationship, the Court could not proceed to determine causation. The injuries the Appellant testified to and the injuries pleaded in the particulars are far apart. There is a huge suspicion as to whether the injuries sustained by the Appellant arose from a train incident.

31. The Court reminded itself of the dictum in *Mashongwa*[3] about courts playing an active oversight role in matters that come before them and that a way must be found to impose limitations on the wrongdoer's liability. The imputation of liability to the wrongdoer depends on whether the harmful conduct is closely or remotely connected. The establishment of proximity of the wrongful conduct to the harm is more likely to impute liability to the wrongdoer provided policy considerations are based on the norms and values of the Constitution, and justice also points to the reasonableness of imputing liability to the Defendant.

32. The Court concluded that the Appellant failed to demonstrate a connection between herself and the Respondent on a balance of probability. In a society riddled with fraud and corruption, it is not open for the Court to be swayed by a mere say-so of the Appellant that she was in Respondent's train without a minuscule proof that she was indeed a commuter. The Court found that the Appellant failed to prove her case on the merits and dismissed the claim with costs.

GROUNDS OF APPEAL

33. The Appellant raised fifteen grounds of appeal, with the first two being decidedly relevant. The Appellant alleged that the Court erred in finding no contractual relationship between the Appellant and Respondent. She testified that she was a fee-paying passenger. She asked rhetorically how she boarded the train if she did not have a ticket. Her version was not challenged. Section 16 of the Civil Proceedings Evidence Act provides that judgment may be given in any civil proceedings on the evidence of a single, competent and credible witness. The evidence was not challenged under cross-examination.

34. The Appellant's second ground of appeal is that the Court a quo failed to apply the elements of a delict relevant to this matter. The Court also failed to

---

[3] *Mashongwa v PRASA* (CCT03/15) [2015] ZACC 36; 2016 (2) BCLR 204 (CC); 2016 (3) SA 528 (CC) (26 November 2015) ("*Mashongwa*")

deal directly with the Respondent's legal duty regarding commuters, security guards, and open doors.

ANALYSIS

35. It is apparent from an evaluation of the pleadings and the evidence that the Court *a quo* erred and misdirected itself on the interpretation of the evidence, the application of the law to the facts, and for making findings that were neither pleaded, led in evidence or argued by the parties.

36. The Respondent did not allege or argue that the Appellant's claim was fraudulent, nor did it raise any issue about whether anyone, including the companion she befriended, bothered to check on the Appellant after the incident.

37. The Appellant testified that she was a fee-paying passenger. She boarded the train at Cape Town Station at 19h50 on 5 February 2020. She had a single ticket and travelled in a first-class carriage. She was travelling from Cape Town to Elsies River. In her reply to the Respondent's request for trial particulars, the Appellant stated that she had provided the Respondent with a copy of her ticket. The Respondent did not cross-examine the Appellant on her evidence that she was a fare-paying passenger on the train. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged testimony is accepted as correct.[4] The ticket established the contractual nexus between the Appellant and the Respondent. The Court a quo erred when it found that the Appellant had not established a connection between herself and the Respondent.

38. As the Court *a quo* decided the case on the failure of the Appellant to prove a contractual relationship between her and the Respondent, it did not conduct the necessary enquiry to determine whether the Appellant had established the elements of the delict to render the Respondent liable for her damages. As the

---

[4] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 9, 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC)

Court *a quo* erred in the latter respect, this Court is permitted to reconsider the evidence.

39. The five elements of a delict are (1) conduct; (2) which is wrongful and unlawful; (3) committed either negligently or intentionally (fault); (4) which caused the harm or loss complained of (causation); and (5) resulted in actionable harm, loss or damage.[5]

40. Appellant relied upon two omissions as the conduct she attributed to the Respondent that led to the harm she suffered. Her allegations about wrongfulness had to be inferred from her grounds of negligence as particularised in her particulars of claim. They are that the Respondent failed to deploy security guards at the station and on the train and allowed the train to move whilst the carriage doors remained open. Nor did the Appellant suggest a basis for determining causation, which also has to be inferred from the particulars of the claim. A litigant seeking delictual damages risks being non-suited if the particulars do not address each element to establish delictual liability, or lead evidence to address them.

41. The Appellant did not lead any evidence relating to the deployment of security guards on the train. She was not even asked in examination -in-chief as to whether there were any security guards at the station or on the train to trigger an onus on the Respondent to answer this allegation. In the exchange of further particulars for trial, the Respondent directed questions about the Appellant's allegations in her particulars of claim concerning the deployment of security guards on the train. The Appellant replied that they were matters for evidence and argument. The latter response, combined with the failure of the Appellant to place any evidence about this alleged omission on the part of the Respondent, means that the Respondent was entitled to assume that the Appellant did not intend to pursue this particular conduct of the Respondent and that has to be the end of that ground of negligence.

---

5 Neethling, Potgieter, Visser, Law of Delict, 6th ed, page 25

42. The Appellant is then confined to the Respondent's failure to close the carriage door she travelled in. The Appellant's case was that she was a passenger on the train. Unknown assailants attacked her. "In the ensuing panic and to avoid being assaulted, she jumped out of the train from the open doors of the carriage." The open doors of the carriage served as an escape route from an impending attack, even if she perceived it as such. Her testimony was that the assailants were in the process of stabbing a fellow commuter and had indicated that she would be next. She jumped from the moving train.

43. The Appellant wanted the Court to find that by providing an escape route from an impending attack by assailants, the Respondent's conduct was wrongful and negligent and caused her injuries. At first blush, the proposition as a whole is conceptually unsound. Had the Appellant pursued her case against the Respondent for failing to deploy security guards to ensure her safety, it would have been easier to correlate the conduct as an omission to the harm suffered. The open door was also not directly causative of the Appellant's loss.

44. This court is cognisant of the whole line of cases involving commuters' mishaps with open doors of train carriages. The peculiar facts of this case, i.e., where the Appellant took the option of jumping off a moving train, are distinguishable from the other train cases. In *Mashongwa*, the Plaintiff was thrown out of the train by criminals.[6] In *Maobelo*, the Plaintiff fell out of a moving train as it changed rails, and fellow commuters pushed the Plaintiff out.[7] In *Mokoena*, the commuter fell as others pushed her while making their way out of the train.[8] In *Davids*, the movement of the train and the jostling of other passengers carried the Plaintiff to the open door of the moving train. Another commuter clung onto the Plaintiff, and they both fell off the train.[9] In *Seti*, the Plaintiff fell when he attempted to board a train departing with its

---

[6] *Mashongwa* supra

[7] *Passenger Rail Agency of South Africa v Moabelo* (1082/2016) [2017] ZASCA 144 (2 October 2017)

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

[9] *Davids v Passenger Rail Agency of South Africa* (9794/2019) [2023] ZAWCHC 174 (24 November 2023)

carriage doors open.[10] In the latter cases, including many others that appear in a search of the cases, the Courts found the Respondent liable for the damages claimed by the Plaintiffs. Appellant's Counsel could not find a case where the Claimant jumped off a moving train. Neither could this Court. This Court shall examine the leading case in adjudicating a delictual claim involving commuters who suffer harm from travelling in trains with open carriage doors to determine whether the principles evolved and applied there, find application in this case.

45. *Mashongwa* specifically mentions the situation encountered in this case, although it deals with a commuter thrown out of a train. In paragraph 17, it says:

"When acts of violence are perpetrated while a train is in motion, commuters are virtually trapped. Confinement to compartments places passengers almost entirely under the control and mercy of PRASA. So does the fact of the train being in motion limit the ability to simply alight at will. Passengers **jump out of a moving train** to escape an attack by violent criminals, at the risk of breaking their limbs or losing their lives. And the reality is that violent crime is not a rarity on our trains."

WRONGFULNESS

46. The enquiry regarding wrongfulness is no longer contentious.

"The wrongfulness enquiry focuses on the conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability."[11]

47. The Constitutional Court elaborated further:

---

[10] *Seti v South African Rail Commuter Corporation Ltd* (10026/2009) [2013] ZAWCHC 109 (8 August 2013) ("Seti")

[11] *Loureiro and Others v Imvula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC); 2014 (5) BCLR 511 (CC) (Loureiro) at para 53

"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 and overly burdensome to impose liability."[12]

48. When it comes to conduct:

"Wrongfulness is generally uncontentious in cases of positive conduct that harms the person or property of another. Conduct of this kind is prima facie wrongful."[13]

49. An omission is wrongful when it evokes moral indignation and the legal convictions of the community require that the omission be regarded as wrongful".[14] In *Mashongwa*, Mogoeng CJ explained that the principles relating to positive conduct remain true whether one is dealing with positive conduct, such as an assault or the negligent driving of a motor vehicle, or negative conduct, where there is a pre-existing duty, such as the failure to provide safety equipment in a factory or to protect a vulnerable person from harm. It also applies to PRASA, a public carrier that owes a legal duty to its passengers to ensure that reasonable measures are in place to provide for the safety of rail commuters and protect them from suffering physical harm while using its transport services.[15] The duty stems from the contract between

---

12 *Country Cloud Trading CC v MEC Department of Infrastructure Development* [2014] ZACC 28; 2015 (1) SA 1 (CC) ("Country Cloud"), paras 20-21

13 *Country Cloud,* supra at para 22

14 *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597A-B, *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC), *Minister of Safety and Security v Van Duivenboden* [2002] ZASCA 79; [2002] 3 All SA 741 (SCA),

15 *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)

itself and its passengers or its public law obligations. A breach of that duty is wrongful in the delictual sense and could attract liability for damages.[16]

50. *Mashongwa* is a milestone decision as it developed the element of wrongfulness in the context of omissions to impute the Respondent's public duty to protect its commuters to a private law legal duty to ensure the safety of its commuters and prevent harm to them. A breach of that duty would amount to wrongfulness.

51. The Appellant's case is premised upon the Respondent's failure to ensure the safety of passengers, including herself, on the train. This Court accepts that the Respondent's failure to ensure her safety from unknown assailants on the train, which led her to jump out of its open doors, is wrongful. She still had to prove the elements of negligence and causation.

NEGLIGENCE

52. Would a reasonable person in PRASA's position have reasonably foreseen harm befalling the Appellant due to the open doors? If so, would the person have taken reasonable steps to prevent harm to the Appellant? If the person would, did PRASA take reasonable steps to avert the foreseeable harm that ultimately occurred?[17] The standard employed in the circumstances of this case would be that of the reasonable organ of the state. An organ of state must present information to the court to enable it to assess the reasonableness of the steps taken. The Respondent, in this case, made no effort to comply with either of the grounds of negligence raised by the Appellant.

The failure to close the doors of the carriage

---

16 *Mashongwa* at paras 18-20

17 *Kruger v Coetzee* 1966 (2) SA 428 at 430E-F: For the purposes of liability culpa arises if— (a) a diligens paterfamilias in the position of the defendant— (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and (ii)would take reasonable steps to guard against such occurrence; and (b) the defendant failed to take such steps."

53. The Appellant testified that the carriage remained open from at least Goodwood Station. She disembarked the train at Goodwood but was persuaded by her companion to return. They stood close to the open doors, her companion behind her and another commuter standing alongside her when the assailants attacked the fellow commuter. They indicated that she was their next target, and as they stabbed the fellow commuter, she jumped out of the moving train.

54. *Metrorail* underscored the need to keep coach doors closed when a train is in motion.[18] The Appellant jumped out of the moving train when faced with imminent danger. Had the train doors been closed, she would have had to consider another escape route, of which the options belong to the realm of speculation.

55. The Respondent could not have foreseen that a commuter would jump out of an open door in a moving train to escape the risk of an impending attack. The incident was caused by a known source of danger, i.e., the open doors, but caused in such a way the Respondent could not have foreseen. *Mashongwa* relied on the English case of *Hughes v Lord Advocate*[19], which addressed a situation where the harm that occurred was unexpected. Nonetheless, in that case, the Court held the Defendant liable because the harm that materialised was of the same general nature as the reasonably foreseeable harm. The doctrine of foreseeability concerning the remoteness of damage does not require foresight regarding the exact nature and extent of the damage. It suffices if the person sought to be held liable could reasonably have foreseen the general nature of the harm that might, as a result of their conduct, befall someone exposed to a risk of harm from such conduct.[20]

56. The Respondent could have foreseen a commuter accidentally falling or slipping off a train through open carriage doors, but it could not have foreseen a commuter jumping through open doors to avoid an impending attack.

---

18 *Metrorail*, supra, at paras 84,102,106

19 *Hughes v Lord Advocate* [1963] AC 837 (HL); 1 ALL ER 705 (HL),

20 *Mashongwa* at paras 53-59

Jumping out of the train to avoid a knife attack is equivalent, as was reasoned in *Mashongwa*, to the facts underlying the English case of *Hughes v Lord Advocate.* Two boys climbed down a Post Office manhole at night. One of them, carrying a paraffin lamp, tripped while climbing out of the manhole. The paraffin spilt, caught fire and an explosion. Landing out of a moving train due to an accidental fall at the risk of limb or life is not materially different from jumping out whilst escaping criminal activity.[21] The Appellant had thus established negligence.

CAUSATION:

57. In this enquiry, the question that arises is whether the harm would have nevertheless ensued, even if the omission had not occurred. The Appellant would not have jumped from the moving train if the doors were closed. The application of the 'but-for' test[22] is a matter of common sense based on the practical way in which the minds of ordinary people work against the background of everyday life experiences. A Plaintiff has to establish that it is more likely than not, but for the Defendant's wrongful and negligent conduct, her harm would not have ensued. The Appellant did not have to establish the causal link with certainty.[23]

58. The Appellant testified that she was standing close to the open doors with a fellow commuter beside her and her companion behind her. The assailants and the fellow commuter began arguing, and one of the assailants began stabbing him. The doors were open, and she decided to jump because she was scared they were going to stab her. This Court can infer that she would not have taken the option if the doors had been closed and would not have suffered the injuries she did. Factual causation has thus been established under the 'but-for' test.

---

21 *Mashongwa* at para 62

22 *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700 E-H

23 *Za v Smith and Another* (20134/2014) [2015] ZASCA 75; 2015 (4) SA 574 (SCA); [2015] 3 All SA 288 (SCA) (27 May 2015)

59. The imputation of liability to the wrongdoer depends on whether the harmful conduct is too remotely connected to the harm caused or closely connected to it. When proximity has been established, liability ought to be imputed to the wrongdoer provided policy considerations based on the norms and values of our Constitution and justice also point to the reasonableness of imputing liability to the defendant. As the apex Court reasoned in *Mashongwa*, the negligent conduct of leaving the doors open is closely connected to the harm suffered. The apex Court found that legal causation had been established, and it was reasonable, fair, and just that liability be imputed to the Respondent. Similarly, this Court finds that the negligent conduct of the Respondent in leaving the doors openis closely connected to the harm the Appellant suffered.

THE RESPONDENTS DEFENCES

60. This Court accepts that the Appellant proved that the Respondent was delictually liable for her damages that are yet to be proved or settled. The Court will now consider the defences raised by the Respondent. The first has many sub-categories. The Respondent pleaded that the incident was caused solely by the negligence of the Appellant. The Respondent pleaded that the Appellant failed to avoid the incident by exercising reasonable skill and care, she jumped from the moving train out of her own volition, she failed to keep a proper lookout when she jumped from the moving train, she jumped from the moving train when it was inopportune, dangerous, and unsafe to do so, she failed to disembark the train carriage when it was safe to do so under the prevailing circumstances, or by such act of commission or omission as the evidence may prove.

61. This Court will not give credence to defences couched in absurd terms. Regrettably, certain grounds of negligence were extracted from the handbook of motor vehicle accidents and transposed to a different genre of delict. It is inconceivable how a commuter on a train can exercise reasonable skill, fail to keep a proper lookout or jump when it is inopportune to do so.

62. In its written heads of argument, the Respondent concentrated on just two aspects of its defence raised in the plea: its contentions relating to the Appellant's failure to establish a contractual connection with the Respondent and the omission complained of was not causally related to the damages suffered by the Appellant. In the latter respect, the Respondent relied upon the Appellant's failure to prove legal causation and tendered the Appellant's departure from the train as one where she acted out of her own volition. In oral argument, the Respondent pursued its defence that if the Court found it liable, then the incident would have been caused partly through the Appellant's negligence and partly through the Respondent's. The Respondent motivated for a fifty-fifty apportionment.

63. This Court has addressed the contractual relationship between the Appellant and the Respondent and need say no further about it. Although the Respondent relied solely on legal causation to support its argument that the Appellant had not demonstrated a causal nexus between the omission and the harm alleged. The passages relied upon in the cases cited by the Respondent deal with factual causation alone.

64. The Respondent pleaded that the Appellant jumped out of the train of her own volition. This defence was not pursued by the Respondent with any vigour except for relying upon it to argue that the Appellant had not proved legal causation. The onus rests on the Respondent to establish the defence of *volenti non fit iniuria* (A willing person who consents to the defendant's act, in the form of either a specific harmful act or an activity involving risk or harm, cannot be wronged). The Respondent had to allege and prove that the Appellant had knowledge of the risk, appreciated the ambit of the risk, and consented to the risk.[24] The Respondent did none in its pleadings or cross-examination of the Appellant.

---

[24] Harms, Amler's Precedents of Pleadings, Lawsa Vol 8 Part 1, Lexis Nexis Butterworths 2005 par 96), *Seti v South African Rail Commuter Corporation Ltd* (10026/2009) [2013] ZAWCHC 109 (8 August 2013) at para 23.

65. Concerning legal causation, the Respondent relied upon the passage in *Mashongwa*, which affirmed that no legal system permits liability without bounds and that liability ought to be imputed to the wrongdoer when proximity is established.[25] The Respondent failed to recognise that after stating these principles, the Court in *Mashongwa* concluded that the Respondent's failure to keep the doors closed while the train was in motion is the kind of conduct that ought to attract liability as the negligent conduct is closely connected to the harm suffered.

66. This Court has been guided by the principles applied in *Mashongwa* to determine whether this apparently novel way of suffering harm could be extrapolated to the case where a commuter jumps out of the Respondent's train to evade an impending criminal attack. The analysis included the element of causation, and the Court found that it could be applied to the situation in *casu,* and found that it did and that the harm suffered by the Appellant was closely connected to the Respondent.

67. On the question of apportionment of damages, the Respondent cross-examined the Appellant on whether she should have boarded that train when she was aware of the assailants at its point of departure from Cape Town station and whether she should not have alighted the train at the various stations the train stopped at. The Appellant testified that she had contemplated leaving the train at each station, but no other commuter left the train, and she was afraid of being all alone at those stations. The Appellant testified that she was comforted by the presence of the companion she befriended at the Cape Town station, who assured her and dissuaded her from leaving the train at Goodwood station even after she had alighted. The actual attack eventuated when the assailants pulled out the knife after Goodwood station and began stabbing a fellow commuter. This Court has to consider that the Appellant is a young woman travelling at night in circumstances where travel options are limited, freedom of movement is at risk from criminal elements, and crime is rife. The suggestion that the

---

25 *Mashongwa*, supra at para 68

Appellant should not have boarded the train or disembarked at any of the deserted stations before she jumped or moved to other unoccupied carriages is incongruent with the realities faced by women in this country. In the premises, there are no grounds to apportion the damages.

CONCLUSIONS

68. The Appellant was a commuter travelling from Cape Town station to Elsies River on the Respondent's train. Unknown assailants boarded the train at Cape Town station and proceeded to make a nuisance of themselves throughout the journey. The Appellant was scared and considered leaving the train when it stopped at each station. Her companion dissuaded her from doing so. After the train departed Goodwood station, the assailants became embroiled in an argument with a fellow commuter standing next to her close to the open door of the carriage. The Appellant jumped from the moving train when the assailants stabbed the fellow commuter.

69. The Appellant suffered head and back injuries. She lodged a claim for damages she suffered against the Respondent. She alleged that the Respondent was negligent for failing to ensure that the train's doors were closed whilst it was moving and for failing to provide adequate security on the train. The Court *a quo* decided the case against the Appellant solely on the basis that she failed to demonstrate a probable connection between herself and the Respondent.

70. This Court found that the Court a quo had erred in finding that the Appellant did not prove a contractual relationship between herself and the Respondent. This Court found that the Appellant had established that she was a fare-paying commuter on one of Respondent's trains. She had a ticket for a single journey from the Cape Town station to the Elsies River. She had provided a copy of the ticket to the Respondent. This Court also found that the Court *a quo* misdirected itself by considering issues that were neither pleaded nor argued by either side, especially whether the claim was fraudulent or not. The Court *a quo* resisted engaging the delictual elements of the Appellant’s claim

to determine whether the Respondent was liable for the harm suffered by the Appellant. In the premises, this Court was free to reconsider the evidence on appeal.

71. This Court found that the Appellant failed to provide even the barest of evidence to support her second ground of negligence relating to the absence of security on the train. This meant that the Appellant could only rely on one ground of negligence, namely that the Respondent had failed to close the doors of the moving train.

72. This Court grappled with the circumstances that this case presented. A commuter jumps out of a moving train through its open doors to escape an impending knife attack. The Appellant wanted the Court to find the Respondent liable, in essence, for providing her with an escape path from the impending attack. This Court pondered whether imputing liability in these circumstances was conceptually sound.

73. This Court considered the facts of this case against the leading case on claims against train operators. The apex Court contemplated this type of situation, although the latter had considered and determined a case in which a commuter was thrown off a train. The Respondent has been found to be liable in many cases similar to the leading case, but neither the Appellant's Counsel nor this Court could find a case on all fours where a Plaintiff's claim is premised upon her jumping off the moving train. This Court applied the principles enunciated in the leading case to the facts of this case and concluded that they applied just as equally to this situation.

74. This Court considered the defences raised by the Respondent, none of which had any merit. It concluded that the Appellant had to prevail in its appeal of the judgment and order of the Court below. The order of this Court will reflect that.

75. The Appellant sought her costs in the Court *a quo* and the costs of the appeal. She sought Counsel's fees on the B scale. The cost order sought is reasonable and shall be reflected in the following order.

ORDER

1. The appeal is upheld,

2. The order of the Court *a quo* is set aside,

3. The Respondent is liable for the damages the Appellant may prove,

4. The Respondent is to pay the costs of the Appellant in the Court *a quo* as well as the costs of the appeal

5. Counsel's fees are to be taxed or agreed on the B scale.

_____

Bhoopchand AJ

I agree

_____

Lekhuleni J

I agree, and it is so ordered.

_____

Erasmus J

Judgment was handed down and delivered to the parties by e-mail on 24 February 2025

Appellant's Counsel: E Benade

Instructed by Adendorff Attorneys

Respondent's Counsel: M Salie SC, M Nduli

Instructed by Mncedisi Ndlovu & Sedumedi Attorneys