

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 4922/2018

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|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: YES |

4 NOVEMBER 2025

DATE

SIGNATURE

In the matter between:

BONGANI MGIJIMA

Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Defendant

JUDGMENT

DOMINGO, AJ

Introduction

- [1] This is a delictual claim brought by the plaintiff (Mr Mgiijima) for compensation for damages against the defendant (Passenger Rail Agency of South Africa ("PRASA")) as a result of personal injuries sustained on the 27 April 2016 when he was robbed and shot at Nancefield train station ("NS").

- [2] The defendant denies liability on the grounds that it properly and lawfully discharged the legal duty to provide security at NS by engaging the services of two independent security company contractors and that at all material times, security guards were posted at NS.
- [3] The parties have agreed that the issues of merits and quantum should be separated and that the court should determine only the issue of merits (liability) and that the issue of quantum be postponed *sine die*. Accordingly, in terms of Rule 33(4) of the Uniform Court of Rules, I have ruled that there be a separation of issues.
- [4] During the trial, the parties relied on their respective trial bundles, that included photographs of NS. The plaintiff was the only witness called on his side. The defendant called two witnesses, Mr Lesele (section security commander) and Ms Mzizi (assistant protection manager). Neither of the parties called witnesses from the security companies.

Common cause facts

- [5] That on 27 April 2016 at NS, in the vicinity of Johannesburg, the plaintiff was at NS when he was robbed and shot by unknown suspects.
- [6] In regard to the plaintiff being in possession of a valid ticket allowing him to travel by train from Johannesburg Station to Stretford Station, the plaintiff states that he was in possession of a valid ticket. Same was admitted to by the defendant in its pleadings, however, on the day of the hearing, counsel for the defendant indicated that this may have been done erroneously as the defendant's "liability report" which is the written record of the events that took place, indicated that the plaintiff did not have a valid ticket. The plaintiff produced a monthly ticket and that ticket was presented to the court when the plaintiff testified. Taking into account the evidence of the ticket, I accept that the plaintiff did have a valid ticket which allowed him to travel on the train.

Plaintiff's pleaded claim

[7] The plaintiff pleaded that on or about the 27 April 2016 at NS, while in possession of a valid ticket allowing him to travel from Johannesburg to Stretford Station, and while he was waiting to board the next train at NS, he was robbed and shot by unknown suspects. He was shot in front of the defendant's guardhouse, which was occupied by security guards who failed to protect him. The security guards were the employees of the defendant alternatively, were furthering the interests of the defendant. As a result of the shooting incident the plaintiff sustained the following injuries: lumbar vertebrae fracture, bullet lodged in his back, gunshot wound in his right forearm and right upper arm, paraplegia, liver and kidney injury, and bruises and lacerations. The plaintiff was treated at Chris Hani Baragwanath Hospital.

[8] The plaintiff averred that his injuries were due to the negligent conduct of PRASA and/or its employees, having negligently:

8.1 caused and/or allowed the condition and/or state of the infrastructure, stations, land and property supporting the operation of the train and/or the coach to pose danger to commuters at large and in particular, to the plaintiff; and/or

8.2 failed to take any or any adequate steps to prevent the armed suspects to enter the station and pose a danger to the commuters and specifically the plaintiff; and/or

8.3 failed to take any or any reasonable precautions to ensure the safety of commuters in general and the plaintiff in particular, more particularly failing to:

8.3.1 maintain adequate crowd control in and around the station,

8.3.2 ensure that commuters were searched to detect firearms,

8.3.3 ensure the safety of the commuters whilst inside the premises of the defendant,

8.3.4 ensure that commuters in general and the plaintiff in particular did not get injured whilst in their custody.

8.4 failed to prevent the incident from occurring when, by the exercise of reasonable care, he, she and they could have done so.

[9] In the alternative the plaintiff averred that by reason of the facts alleged above in paragraph 8, the defendant owed a duty of care to the plaintiff to ensure that:

9.1 The condition and/or state of the infrastructure, stations, land and property supporting the operation of the train and/or coach did not pose danger to the plaintiff and/or;

9.2 Adequate steps were taken to prevent the illegal firearms at the infrastructure, stations, land and property supporting the operation of the train and/or coach from constituting such a danger and/or;

9.3 The train and/or coach and/or infrastructure, stations, land and property supporting the operations of the train were maintained in a safe and proper condition and/or;

9.4 reasonable precautions were taken to ensure the safety of the plaintiff and, more particularly, to ensure that:

9.4.1 adequate crowd control was maintained in and around the station.

9.4.2 the passengers boarding the train were searched for dangerous weapons before boarding the train;

9.4.3 the incident did not occur.

Defendant's defence

[10] The defendant admits that the plaintiff was shot by unknown gunmen in the vicinity of the access gate at NS.

[11] The defendant denied liability because of the following:

11.1 It employed two independent contractors to provide security at NS.

- 11.2 Both security companies posted security guards at NS at the time of the incident.
- 11.3 One, Vusa Isizwe Security Services (Pty) Ltd ("Vusa Isizwe") was responsible for the safety of commuters on the station.
- 11.4 Those security guards:
- 11.4.1 Acted in the course and scope of their employment with the two security companies; and
 - 11.4.2 were not employed by the defendant, PRASA.

Plaintiff's Evidence

[12] The plaintiff testified that he bought a monthly ticket at Johannesburg Station for the purposes of applying for school and looking for a job. On 27 April 2016, he and his friend had gone to Wits University to make use of their internet and computer facilities. After that, they boarded a train from Johannesburg Station to Stretford Station. The train proceeded without stopping all the way until it arrived at NS where it stopped for a long period and did not proceed further. The plaintiff and his friend alighted from the train and looked for security guards. When they could not be found, they took the stairs and went up in search of security guards; to ask why the train was not moving and would another train be coming. When they went up the stairs, there was a guardroom. They knocked on the door of the guardroom which was slightly open, and they asked the guards where the train stationed was travelling to. They spoke to two to three security guards. During this time, the stationed train left, and they then asked the security guards whether another train would be coming, to which the guards answered, yes. The guards did not come out of the guardroom. The plaintiff and his friend then proceeded to stand and wait for the next train outside the guardroom. The plaintiff testified that he stood in front of the guardroom door about 2-3 meters away from the door. The guards closed the door of the guardroom. While standing there for about 15 to 30 minutes, three unknown male suspects came towards the plaintiff and his friend. The plaintiff testified that his friend managed to run away, however, the plaintiff was robbed of his belongings, and he was shot in his right arm. The bullet

went through his arm into his body and was lodged within his body. He fell on the ground, and his blood trickled into the entrance of the guardroom. The plaintiff testified further that when he was shot, he heard voices, he was moved so that his blood did not enter the guardroom, thereafter he became unconscious. He is presently unable to walk properly.

- [13] During cross-examination the plaintiff stated that he bought his monthly ticket at the Johannesburg Station as he was busy applying for school and work; he bought the monthly ticket to be on *“the safe side.”* The plaintiff was provided with photographs of NS to determine where he was at the time of the shooting. When asked how long after speaking to the security guard the shooting took place, he said 30 minutes to an hour, which was different to what he said in his examination-in-chief where he said the wait was between 15-30 minutes. During cross-examination it was put to the plaintiff that the incident happened at 21h00, and this would have been after the last train had left. According to the train schedule for that day, which followed the Sunday schedule because it was a public holiday, the last train to NS was at 19h51. The plaintiff stated that the incident happened at 19h00. During re-examination the plaintiff testified that he did not complete the liability report which stated the incident took place at about 21h00, he testified he was taken to hospital after he got shot.

Defendant's evidence

- [14] The defendant called two witnesses: Mr Lesele and Ms Mzizi.
- [15] Mr Lesele is presently retired, he worked at PRASA in 2016 as a section security commander. He testified that his role was to *“check security officers to see that they were doing what they were meant to do.”* He was based in Residentia and on the night of 27 April 2016, he went on night shift duty from 18h00-06h00.
- [16] Mr Lesele testified that on the day in question at about approximately 21h05, whilst he was on his way back from a place where it was reported that a cable was dug up, he heard a gunshot sound. He proceeded to NS where he found the plaintiff lying in a pool of blood. He spoke to the plaintiff and asked what happened. The plaintiff's friend said they were together. Mr Lesele testified that the plaintiff was lying on the ground and he was in pain and needed an

ambulance. Mr Lesele then called the Joint Operation Centre (JOC) which was protocol during an emergency. Mr Lesele further testified that he learnt the plaintiff's name, surname, address and contact details from the friend of the plaintiff. He noted all this information on a scrap piece paper which he used later to complete the liability report which he wrote that night.

[17] Mr Lesele testified that he spoke to Mr Maloi the security guard on duty that night. Mr Maloi has since passed away. He said that Mr Moloi had said that he was at the main gate guardroom completing the occurrence book (OB), which was kept at the guardroom. Mr Maloi was meant to be stationed at the Vusa Isizwe guardroom at the access gate; however, he completed the OB at the Advanced Security guardroom which was situated near the main gate. Mr Lesele when asked why Mr Maloi was at the main gate guardroom, he said that he might have needed the company, but he did not know. Mr Lesele testified that Mr Maloi informed him that he heard a gunshot sound while at the main gate guardroom and then rushed to the access gate area where he found the plaintiff lying in a pool of blood. Mr Maloi also completed a section of the liability report where he signed off on his statement. The liability report was completed by Mr Lesele and he submitted the report on 28 April 2016 before his shift ended. He also provided feedback to the JOC and control group.

[18] Mr Lesele testified that PRASA employed two security companies to provide security at NS (Vusa Isizwe and Advanced Security). Vusa Isizwe was responsible for the safety of commuters inside the station area. He confirmed that on a daily basis there was a parade inspection before the security guards were dispatched to their various locations. The security guards when they are on shift, they would be under the control of their shift supervisor from their company (for example a Vusa Isizwe shift supervisor).

[19] During cross-examination Mr Lesele acknowledged that NS and the precinct around the station was a high-risk area for robberies. He acknowledged that PRASA had a duty to protect the station, commuters and prevent anyone with firearms entering the premises. In regard to the strategic deployment of security guards, Mr Lesele said that those discussions and decisions were made by senior management. He said he was not part of senior management and

therefore he did not do deployment. Mr Lesele further testified that his job as a section supervisor entailed him monitoring the contract implementation of the security companies, his role was to monitor the contracts to ensure the security companies were complying with PRASA instructions.

[20] The second witness for the defendant, Ms Mzizi, testified that at the time of the incident she was employed by PRASA as the assistant protection manager. She managed two segments, namely, the Vaal segment and Soweto segment. She testified that in 2016, there were two contractors who provided security services to the defendant (Vusa Isizwe and Advanced Security Company); and that two security guards were posted at NS. Ms Mzizi too conceded that the defendant had the overall responsibility of ensuring that the defendant's assets and commuters were safe and that there were no persons with firearms on the station.

[21] Ms Mzizi testified that each day parades were held before the security guards went on duty to ensure that the guards wore the correct uniform, were equipped, were sober, and they would also be given safety topic talks. After the parade the segment commander responsible for the section inspected the guards to ensure that the parade was successful. Ms Mzizi testified that every Thursday they did a postmortem of the incidences that took place and they strategically plan accordingly. The meeting on Thursdays included herself, the chief protection officials for the Vaal segment and Soweto segment as well and the security company contractor supervisors. When asked during examination-in-chief, how it was determined that two security guards would be deployed at night, Ms Mzizi responded that it was determined according to the risk assessment and the number of commuters. She noted she was not part of the provincial team which drafted the Provincial Team Deployment Plan of 11 October 2017. She testified that "yes" in terms of the October 2017 plan extra guards were planned to be deployed to NS because of the increase in crime. During cross-examination, Ms Mzizi explained that these plans are reviewed monthly; every 10th day of each month a plan is drafted for the following month. Changes in the plans are informed by the "*high risks.*"

[22] Regarding the court only being provided with the 2011 security company contracts with PRASA and there being no 2016 contracts, Ms Mzizi noted that the contracts were renewed on a yearly basis and that there should be one for 2016. She further explained that Vusa Isizwe security company employs and dismisses their security guards. She testified, further, that even though the contracts which form part of the defendant's bundle were for 2011 only, there were other contracts that were valid and in place in 2016. Those contracts have the same clauses and/or terms as the contracts for 2011.

[23] About the security guards being in the guardroom at the time of the plaintiff's incident. Ms Mzizi testified that when security guards are deployed at a station, they have to patrol, and every hour write up their situation reports. This is done in the OB (occurrence book). Contractually, she said, the security guards must write up these reports while being together, they are not allowed to split up, the one security guard does the writing while the other one waits. She said this was done for safety reasons. The one security guard has a radio and the other security guard has a firearm. During cross-examination, Ms Mzizi conceded that when the security guards are writing up their situation reports and both are in the guardroom, there would be no security guards outside.

Liability and duty of care

[24] It is submitted by the plaintiff that there were no contracts between the security companies and the defendant during 2016. It is averred by the plaintiff that the defendant was required in terms of Rule 35 of the Uniform Court of Rules to discover those documents that it intended to use in the trial. In reply to the notice in terms of Rule 35, the defendant discovered and produced contracts for the year 2011. It is averred by the plaintiff, that any other contract is non-existent. Therefore, the court cannot rely on a non-existent contract. In the alternative, and only in the event that the court finds that there were contracts that were concluded for the year 2016, then in that event, the plaintiff submitted that the defendant cannot rely on the terms of the contract to delegate and/or transfer its constitutional liability and/or duties to an independent contractor. Even if there was a delegation of the defendant's constitutional duties (ensuring commuter safety) to a private contractor, the defendant failed to monitor or enforce

performance. Therefore, according to the plaintiff, the defendant cannot escape liability by pointing to a third-party contract, especially when the harm was foreseeable and preventable.

- [25] I am of the view, based on the evidence provided by the defendant's two witnesses that indeed there was the presence of contracts at the time of the incident in 2016 between the defendant and the two security companies. Both witnesses acknowledged that the security guards present at the time of the incident were employed by the security companies. Furthermore, Mr Lesele's role as the section security commander was to oversee the implementation of those contractual relations by monitoring the performance of the contracted security guards. In the premises, I am of the view that the defendant at the time of the incident did employ two security companies to provide security at NS.
- [26] The plaintiff's action is founded on the *Actio Legis Acquillia*. The issue of liability requires the plaintiff to establish conduct, which was wrongful and negligent, on the part of the defendant, which caused him to be injured. In this matter, the plaintiff bears the onus of proving these requirements.
- [27] The plaintiff contended that the defendant owed the plaintiff a duty of care to ensure that the station did not pose a danger to commuters; adequate steps were taken to prevent illegal firearms at the station; the station was maintained in a safe and proper condition; and/or reasonable precautions were taken to ensure the safety of the plaintiff and more particularly, that adequate crowd control was maintained in and around the station, the passengers boarding the train were searched for dangerous weapons before boarding the train and that the incident should not have occurred (see full details in paragraph 8 above).
- [28] Furthermore, the plaintiff averred that as a public carrier and organ of state, the defendant owed passengers a duty of care both in terms of the common law and the Constitution of the Republic of South Africa, Act 108 of 1996, specifically in regard to the right to freedom and security of persons and the right to bodily integrity.

[29] In *Mashongwa v PRASA*¹ (*Mashongwa*) the Constitutional Court set out the duty and obligations placed on a public carrier in safeguarding the well-being of commuters, including that they are to ensure that there are measures in place to provide for the safety of all rail commuters. The Constitutional Court held that:²

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

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

What needs to be stressed, though, is that in these circumstances wrongfulness does not flow directly from the breach of the public duty. The fact that a public duty has been breached is but one of the factors underpinning the development of the private-law delict to recognise a new form of wrongfulness. What we are concerned with here is the development of private law, taking into account public law.

It is in this context that the legal duty that falls on PRASA’s shoulders must be understood. That PRASA is under a public-law duty to protect its commuters cannot be disputed. This was declared by this court in *Metrorail*. But here this court goes a step further to pronounce that the duty concerned, together with the constitutional values, has mutated to a private-law duty to prevent harm to commuters.”

[30] It is clear from the *Mashongwa*³ case that it is undisputed that PRASA has a public law duty to protect its commuters whether on the train or on the station, but a breach of this duty does not automatically equate to wrongfulness, it would be but one of the factors taken into account in the private/public law duty to prevent harm to commuters. The defendant’s two witnesses also testified that

¹ 2016 (3) SA 528 (CC).

² *Supra* at paras 26, 27,28, and 29.

³ *Supra*.

there is a general duty on PRASA to ensure the safety and security of its commuters as well as its assets. In this matter, the defendant, PRASA contended that it took measures against the risk of crime on commuters by contracting two security companies to provide security at NS. In this matter we are faced with the following question: whether PRASA ought to be held delictually liable for damages that flow from a breach of its legal duty (public/private) to provide safety and security measures for its rail commuters, where it has employed two security companies to provide such security at NS.

[31] The general rule in our law is that employers are not vicariously liable for the negligent conduct of the employees of sub-contractors.⁴ A recognised exception is where the employer has been negligent in regard to the conduct of the independent contractor that caused harm to a third party.⁵ In the seminal case of *Langley Fox Building Partnership (Pty) Ltd v De Valence (Langley Fox)*⁶ the court held that the test for holding employers liable for the negligent conduct of the independent contractors requires answers to the following three questions:

- “(1) Would a reasonable man have foreseen the risk of danger in consequence of the work he employed the contractor to perform? If so,
- (2) would a reasonable man have taken steps to guard against the danger? If so,
- (3) were such steps taken in the case in question?

Only where the answer to the first two questions is answered in the affirmative does a legal duty arise, the failure to comply with which can form the basis of liability.”

[32] Furthermore, the following dictum from the *Langley Fox*⁷ case is also noteworthy:

“It follows from the foregoing that the existence of a duty upon an employer of an independent contractor to take steps to prevent harm to members of the public will depend in each case upon the facts. It would be relevant to consider the nature of the danger; the context in which the danger may arise; the degree of expertise available to

⁴ See *Saayman v Visser* [2008] ZASCA 71 at para 18.

⁵ *Supra*. See also *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 (1) SA (A) and *Chartaprops 16 (Pty) Ltd v Silberman* 2009 (1) SA 265 (SCA).

⁶ *Supra* at 12H-J.

⁷ *Supra* at 13 A-C.

the employer and the independent contractor respectively; and the means available to the employer to avert the danger. This is in no way intended to be comprehensive.”

[33] It is the defendant’s submission that the plaintiff did not replicate to the defendant’s plea, that it provided security at NS by employing a security company to provide security there. The defendant further submitted that the plaintiff does not allege that the security guards shot and robbed him or that the security guards assisted or colluded in the shooting or robbery. The plaintiff continued at trial to rely on the omission by the defendant to take measures to provide security to ensure the safety of commuters, including his own safety, at NS.

[34] Thus, the defendant contended that the only questions arising are the *Langley Fox*⁸ questions which test for holding employers liable for the negligent conduct of the independent contractors, which are as follows:

34.1 Would reasonable employers have foreseen the risk of the danger of crime against commuters at NS?

34.2 If yes, would reasonable employers have taken steps to guard against the danger of crime against commuters at NS?

34.3 If yes, did the defendant take measures to guard against the danger of crime against commuters at NS?

[35] I am in agreement with the submission made by the defendant that the answer to the first two questions is: yes. That leaves for decision, only the third question. However, it is apt at this point to be reminded of the fact that PRASA is an organ of state, the standard is not that of a reasonable person (or reasonable employer) but a reasonable organ of state.⁹ “Organs of state are in a position that is markedly different from that of an individual. Therefore, it does not follow that what is seen to be reasonable from an individual point of view must also be reasonable in the context of organs of state.”¹⁰

⁸ *Supra* note 5.

⁹ See *Mashongwa supra* note 1 at para 40.

¹⁰ *Supra*.

[36] The defendant submitted that the answer to the third *Langley Fox*¹¹ question is also: yes. The defendant averred that it took measures to guard against the risk of crime against commuters at NS. It did so, by appointing an independent contractor (a registered company) to provide security at NS. It is further submitted by the defendant that those guards were under the supervision and control of the security company's that employed them. If that company or its guards negligently omitted to take specific measures on the evening of 27 April 2016 at NS to prevent the risk of crime against the plaintiff, the defendant is not liable for their negligent omission.

[37] The defendant averred that as for the specific allegation of omission, the court can ignore that the armed robbery and shooting on the plaintiff was due to the omissions related to the following:

37.1 The condition of the station, its infrastructure or a train coach. The evidence is that the armed robbery and shooting was not due to an omission related to the station infrastructure. Nor was it due to an omission related to a train coach. The plaintiff was not on a train when the incident occurred. He was near the access gate to the platforms.

37.2 Adequate crowd control in and around NS. The evidence is not that the armed robbery and shooting was perpetrated in or by a crowd.

37.3 Injury while in custody. The evidence is not that the plaintiff was injured while in the custody of the security guards.

[38] I am in agreement with the defendant that the court need not make a finding which pertains to the station infrastructure, train coach, crowd control and injury while in custody as per the reasons provided by the defendant above.

[39] I am also in agreement with the defendant that what remains are the plaintiff's allegations of omission relating to the following:

¹¹ *Supra* note 6.

39.1 The failure by the defendant to take measures to prevent armed suspects entering the station and posing a danger to commuters and to the plaintiff.

39.2 The failure to take measures to ensure the safety of commuters like the plaintiff at NS.

39.3 The failure to search persons entering NS to detect firearms.

[40] The defendant submitted that should the court find that the guards employed by the security company omitted to take those measures, then the negligent omission of the guards (or the security company) does not make the defendant liable for their negligent conduct because:

40.1 The general legal rule is that the defendant is not liable for the negligent conduct of independent contractors employed by it.

40.2 The defendant took measure against the risk of the danger of crime on commuters by contracting the security company to provide security at NS.

40.3 The defendant foresaw the risk that security guards might for example, not be on duty, or not be sober on duty, or not be equipped for night shift on 27 April 2016. The defendant took the following measures against that risk:

40.3.1 It required Vusa Isizwe to hold a parade of its guards before they went on duty on night shift to ensure that guards were on duty, sober and equipped.

40.3.2 After the parade the commander responsible for the section under which NS fell, inspected the guards on parade to confirm that the parade was successful.

[41] It is submitted by the plaintiff that the defendant failed to take adequate and reasonable steps to prevent and/or protect the plaintiff from being robbed and

shot by unknown suspects who entered the premises of the defendant whilst carrying dangerous weapons.

Causation

[42] In *De Klerk v Minister of Police*¹² the court set out a detailed approach on the existence of causation between an act or omission and the harm suffered as follows:

“Causation comprises a factual and legal component. Factual causation relates to the question whether the act or omission caused or materially contributed to the harm. The ‘but-for’ test (*condictio sine qua non*) is ordinarily applied to determine factual causation. If, but for a wrongdoer’s conduct, the harm would probably not have been suffered by a claimant, then the conduct factually caused the harm.

Legal causation is concerned with the remoteness of damage. This entails an enquiry into whether the wrongful act is sufficiently closely linked to the harm for legal liability to ensue. Generally, a wrongdoer is not liable for harm that is too remote from the conduct concerned or harm that was not foreseeable.

In this way, remoteness operates along with wrongfulness as a measure of judicial control regarding the imposition of delictual liability and as a ‘longstop’ where most right-minded people will regard the imposition of liability in a particular case as untenable, despite the presence of all other elements of delictual liability.

Legal causation is resolved with reference to public policy. As held by the Supreme Court of Appeal in *Fourway Haulage SA*, although this implies that the elements of legal causation and wrongfulness will overlap to a certain degree both are determined with reference to considerations of public policy, they remain conceptually distinct. Accordingly, even where the conduct is found, on the basis of public-policy considerations to be wrongful, harm factually caused by that conduct may, for other reasons of public policy, be found too remote for the imposition of delictual liability.

Legal causation invokes a flexible test that may consider a myriad of factors. This was affirmed by this court in *Mashongwa*. Traditionally, courts oscillated between different tests for ascertaining legal causation. The traditional criteria are, among others, reasonable foreseeability, adequate causation, whether a *novas actus interveniens*

¹² 2021 (4) SA 585 (CC) paras 24, 25 and 27-31.

intrudes, and directness. But each of these tests as not without its problems and could lead to results contrary to public policy, reasonableness, fairness and justice. Hence, in *Mokgethi*, the Appellate Division adopted an 'elastic' approach to legal causation. This approach is sensitive to public-policy considerations and aimed to keep liability within the bounds of reasonableness, fairness and justice. In *Smit* the Appellate Division held in the context of delict that the rigid application of legal causation to delineate the imposition of legal liability across all set of facts is irreconcilable with the flexible approach followed in our law. Any attempt to detract from the flexibility of the test for legal causation should accordingly be resisted.

The traditional tests for legal causation remain relevant as subsidiary determinants. These traditional criteria should be applied in a 'flexible manner so as to avoid a result which is so unfair or unjust that it is regarded as untenable.' It follows that the traditional criteria must be treated as being subsidiary to the considerations of public policy, reasonableness, fairness and justice. It is trite that these considerations of public policy are grounded in the Constitution and its values. This court has affirmed this position in the context of contract law and wrongfulness in delict. But it has also made it clear in the context of legal causation. In *Mashongwa* this court held:

'No legal system permitted liability without bounds. It is universally accepted 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 too remotely connected to the harm caused or closely connected to it. When proximity has been established, then 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.'

Grounding public policy in constitutional values accordingly offers an opportunity to infuse the common law with the values of the Constitution. The determination of remoteness entails applying traditional factors, ascertaining their implications, and testing those implications against considerations of public policy as infused with constitutional values.

Negligence

[43] In summary the plaintiff alleges negligent conduct to be the following:

- 43.1 PRASA allowed the condition of the station, its infrastructure and the coach to pose a danger to commuters and to him.
- 43.2 PRASA failed to take steps to prevent armed suspects entering the station and posing a danger to commuters and to him.
- 43.3 PRASA failed to take any precautions to ensure the safety of commuters and him.
- 43.4 PRASA failed to maintain adequate crowd control in and around NS.
- 43.5 PRASA failed to ensure that commuters were searched to detect firearms.
- 43.6 PRASA failed to ensure the safety of commuters inside the premises.
- 43.7 PRASA failed to ensure that commuters and the plaintiff did not get injured while in custody.

[44] The defendant denied liability and also denied that the security guards who were on duty at the time (employed by an independent contractor) were negligent.

[45] I now proceed to deal with whether the guards on duty were negligent. It is trite in our law that the plaintiff has the onus to prove that the guards were negligent. The onus required of the plaintiff is set out succinctly in the *Shabalala*¹³ case as follows:

“It was also emphasised on behalf of the appellant that the nature and extent of the precautionary measures adopted by the respondent were peculiarly within its knowledge. This, of course, is so. But it does not mean that the respondent bore the onus of establishing that it could not reasonably have prevented the robbery from taking place. The onus of proof remained on the appellant throughout. Had, however, the appellant placed before the court at least some evidence giving rise to an inference of negligence on the part of the respondent which was causally connected to the robbery, the latter would have been obliged to adduce evidence to rebut that inference or face the prospect of having judgment granted against it. But, as I have indicated, the evidence of the appellant makes it clear that the attack could only have been averted by having

¹³ *Shabalala v Metrorail* [2007] ZASCA 157 at para 11.

an armed security guard in that particular coach. In the absence of further evidence to justify the need for a security guard in each coach, the failure on the part of the respondent to ensure that there was such security guard present in each coach does not give rise to an inference of negligence. It is true, as counsel argued, that any such further evidence that there may have been, would have been within the knowledge of the respondent, but that did not preclude the Respondent from ascertaining the existence of such evidence, whether by seeking discovery of documents in the respondent's possession, or requesting particulars for trial or otherwise.”

[46] The defendant contended that in the *Shabalala*¹⁴ case the plaintiff was a victim on a train on which there were no security guards, that is, no security was provided by Metrorail on the train, yet, the Supreme Court of Appeal refused to find that Metrorail was negligent for not providing security in every coach. In this matter, security guards were present at NS.

[47] In order to determine whether the guards were negligent, the test for negligence tests the conduct of the guards against that of reasonable security guards in the same situation for the purposes of determining whether the security guards here, are at fault.¹⁵ Counsel for the defendant directed the court to the Supreme Court of Appeal case, *Frederica ZA v Smith and Another*¹⁶ where the court formulated the test as follows:

“This is to be compared with the well-known formulation of the test for negligence by Holmes JA in *Kruger v Coetzee* 1996 (2) SA 428 (A) 430E-G when he said that negligence would be established if:

- ‘(a) a *diligent 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.

¹⁴ *Supra*.

¹⁵ See *Loureiro v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) at para 53.

¹⁶ [2015] ZASCA 75 at para 18.

This has been constantly stated by this Court for some 50 years. Requirement (a)(ii) is sometimes overlooked. Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable must always depend upon the particular circumstances of each case.”

[48] I have observed in this matter, as in the *Shabalala case*¹⁷ that the grounds of negligence relied upon by the plaintiff as set out in his particulars of claim which are set out in paragraph 8 above are all of a general nature and relate to a systemic failure on the part of PRASA and/or the security guards to protect and ensure the safety of commuters. The plaintiff does not directly plead the negligent omission by the security guards, in that the security guards by being in the guardhouse (whether at the main gate or access gate guardhouse) should have foreseen the risk of the robbery and shooting of the plaintiff at the time that the unknown suspects approached the plaintiff and that they failed to take measures reasonably available to them to prevent or minimise that risk because they were in the guardhouse.

[49] The test for negligence, applied here, submitted by the defendant is that (which I am in agreement with): the guards saw the plaintiff’s assailants enter NS; they should have suspected that the assailants were armed; they failed to stop, search and disarm the plaintiff’s assailants; and/or they should have suspected that assailants were about to confront, shoot and rob the plaintiff; they failed to intervene to prevent the plaintiff from being confronted, shot or robbed. Here, the plaintiff has to discharge his onus by adducing evidence from which negligence by the guards can be inferred.

[50] It is submitted by the defendant that the liability report contains vital information. Mr Lesele, wrote up his liability report shortly after the time of the incident. The time of the incident was around 21h00 on 27 April 2016. Mr Lesele submitted the liability report at the end of his night shift on the morning of 28 April 2016. Having heard the totality of evidence, I am persuaded to rely on the liability report because the probabilities is more reliably deduced from the objective evidence (contemporaneous or near contemporaneous documentary evidence) and conduct at the time, rather than the time line testified to by the plaintiff, which is

¹⁷ *Supra* note 13 at para 6.

nine years after the incident and which must have undoubtedly been a traumatic experience for the plaintiff.¹⁸ Even if I were to accept the timeline testified to by the plaintiff that the incident took place at 19h00 as correct, at that time, the security guards would have been inside the guardhouse writing up their situation report, as they were required to do so every hour.

[51] The liability report confirms that the shooting and robbery occurred at NS at 21h05 on 27 April 2016. It occurred in the vicinity of the access gate area to the platforms at NS. Mr Lesele arrived at the scene of the incident at 21h15. He left the scene at 23h07. Mr Lesele in the report accurately recorded the plaintiff's details, the personal details of the friend of the plaintiff; the plaintiff's injuries that were visible to him at the time and that the plaintiff was not in possession of a ticket.

[52] The liability report also included the statement taken from Mr Moloi, who was one of the security guards on duty that night. Mr Moloi's recorded statement states that they were writing up the OB (occurrence book) when he heard a gunshot coming from the access gate and when he got to the access gate, he saw a person lying in a pool of blood. According to Mr Lesele, at the time that the plaintiff was shot and robbed, Mr Moloi was carrying out one of his duties, that was to complete the OB every hour on the hour. Mr Moloi said that he completed the OB at the guardhouse at the main gate. This version of events is consistent with Mr Moloi's recorded statement in the liability report where it states that he "*heard one gunshot from the access gates.*" Then, "*on my arrival, I found a man lying in a pool of blood.*" It is submitted by the defendant that if Mr Moloi arrived at the access gates, he must have arrived from somewhere. That could not be the guardhouse at the access gate. If it were, he would not have said that he heard a gunshot from the access gate, after which he arrived at the access gates, where he found the victim of a shooting.

[53] This would then also mean that Mr Moloi was completing the OB book at the main access gate, where he was not stationed. Mr Moloi was deployed to provide

¹⁸ See *Mashele v MEC for Health, Gauteng Province Department* [2022] ZAGPHC 444 at paras 39-41 where the court applied the *Gestmin* test (a commercial matter); see the English case, *Gestmin SGPS S.A v Credit Suisse (UK) Limited and Credit Suisse Securities (Europe) Limited* [2013] EWHC 3560 (Comm).

security inside the station in the vicinity of the access gate and was therefore meant to have completed his OB at the guardhouse at the access gate, where the plaintiff was robbed and shot at. During examination-in-chief, Mr Lesele, testified he was not sure why Mr Moloi completed the OB at the main access gate and not at his designated guardroom which was the main access gate. Mr Lesele speculated that perhaps, Mr Moloi might have needed the company and concluded by saying, *“I don’t know why.”*

[54] During cross-examination of Ms Mzizi, plaintiff’s counsel faulted the second guard for not patrolling the access area while Mr Moloi was completing the OB. Ms Mzizi said that there were two guards on duty at NS. That was considered commensurate with the risk of security breaches, at the time. One security guard carried a gun and the other carried a radio. They were not permitted to split. That is because it was unsafe to split two security guards. The defendant submitted that it is apparent from Ms Mzizi’s evidence that effective security was best served, if one guard had a gun, the other a radio, and they acted in tandem.

[55] The defendant further submitted that sadly crimes committed with impunity, are an inevitable feature of daily life in South Africa. But the duty of the security guard, is not to combat crime. He is not a police officer. His duty is to conduct security at NS. He cannot be faulted for a crime happening in one area of NS, while carrying out his duty in another area of the station. He cannot be expected to be omnipresent. That is an unreasonable expectation of a security guard.

[56] The plaintiff’s evidence about the incident was rather short, cursory and inconsistent with the Mr Lesele’s liability report. The plaintiff testified that the incident occurred between 19h00-20h00. He was about 2 to 3 meters away from the guardhouse at the access gate. There were 2 to 3 guards inside the guardhouse, and the door was closed. While waiting there, 2 to 3 persons robbed and shot at him, and they then ran away.

[57] In the premises, I am in agreement with the defendant that this means that it was incumbent upon the plaintiff to have adduced evidence from which the following could have been inferred:

57.1 While the guards were completing the OB at the guardhouse at the main gate, they should have suspected that the plaintiff was about to be a victim of a robbery and shooting at the access area.

57.2 Yet, they failed to stop, search and disarm the plaintiff's assailants and they failed to intervene to stop the robbery and shooting.

[58] Furthermore, I am in agreement with the defendant, that the evidence provided by the plaintiff gives the impression that the whole incident happened quickly. He did not say: where his assailants came from; or how long he had them in sight before he was attacked; or whether the guards had an opportunity to see his assailants, suspect that they were armed, or suspect that they were about to rob or harm him; or whether, having seen and suspected his assailants, the guard had time to disarm them or intervene to stop or minimise the risks of robbery or being shot; and having reason to suspect the assailants and see them about to attack him, and having time an opportunity to disarm and intervene to stop the robbery and shooting, the guards did nothing.

[59] It is for this reason that I return to the claims of negligence relied upon by the plaintiff as set out in his particular of claims which I reiterate are all general in nature and relate to a systemic failure on the part of PRASA to protect and ensure the safety of commuters. I wish to deal with these general claims in the context of the *Langley Fox*¹⁹ test, particularly addressing the answer to the third question: "did the defendant take steps/measures to guard against the danger", as we must not lose sight that in this matter we are not dealing with security guards who are in the employ of PRASA.

[60] It appears from the evidence of the defendant, that the defendant had adopted measures to avert crime by employing two security companies to provide security at NS. In terms of their contractual duties as set out in the contract and as testified by Ms Mzizi and Mr Moloi, the security guards perform their services to protect passengers against crime, harm, damages and loss to any person. They have to protect and patrol stations to prevent attacks on persons. Perform random risk verification at the station to enforce the ban on dangerous weapons. They must

¹⁹ *Supra* note 5.

comply with all security measures and directives imposed by the defendant, and/or management body or person tasked with managing the service area as a whole. The security guards must report all problems/incidents or accidents, including without limitation, all shooting incidents, encountered during their shifts, immediately to the defendant.

[61] What is clear from the evidence in this matter is that at the time of the shooting the security guard on duty, Mr Moloi was completing the OB together with his partner. It was required of the security guards that every hour they write up their situation reports in the OB, which means the security guards were acting in the scope of their duties. Because they were completing the OB, what is also clear is that there were no security guards on the station platform in the vicinity of the access gate at the time the shooting and robbery took place. Thus, would the attack on the plaintiff have been averted if the security guards were visibly present outside the guardhouse. The answer is speculative. All we know from the evidence provided by the plaintiff, is that there were three assailants who approached him, robbed him and shot him. We are not told how they approached him or whether the assailants spoke to him; from the evidence it can be inferred that the incident happened very quickly. It is unclear whether the presence of the two security guards would have made a difference. The visibility of the security guards may have thwarted the attempts of the assailants, or the assailants may have proceeded with the armed robbery. “Indeed, attacks by armed robbers on security guards, even when armed, are sadly not uncommon.”²⁰

[62] During cross-examination, the plaintiff’s counsel raised the issue with Ms Mzizi, that if both security guards are required to be in the guardroom when the OB was to be completed, it would mean that no-one was “manning” or providing security to the outside area. Ms Mzizi conceded that point. However, she did point out that it was standing operating procedure that both security guards work in tandem and are paired at all times -as one has a gun and the other a radio. It therefore may be reasonable to expect that the defendant, regardless of cost should have employed extra security guards. Ms Mzizi noted that at the time, the deployment of security guards would only be increased if the need arose. It would have

²⁰ *Shabalala supra* note 13 at para 8.

formed part of their discussions at their Thursday postmortem meetings, where all incidences would be reviewed to assess the security risk. At the time NS was not identified as a station with repeated criminal activity that necessitated the extra deployment of security guards. However, the court was presented with a provincial task team deployment plan of 11 October 2017, which cited NS as a critical site where protection services would deploy four guards for the night shift. It is important to note that this deployment plan was a plan drafted after the 27 April 2016 incident. However, in my view the inference that can be drawn from the plan is that it accords with the testimony of Ms Mzizi and Mr Lesele that the defendant does monitor and track crime incidences and when a need arises action is taken with the deployment of extra guards to a station where for example, a station is regarded as a critical site because of the high rate of crime incidences targeting commuters.

[63] On the night of the incident, Mr Lesele was on-site at NS to ensure that the security guards, in his words “*were doing what they were meant to be doing*”. The defendant did not simply leave the oversight of the contracted security guards to the contract shift supervisor but also undertook to deploy PRASA security commanders, like Mr Lesele to ensure that the security guards from the contracted companies were in fact performing their duties.

[64] Regarding the random risk verification or checking of armed suspects as they enter the station or board the train, Mr Lesele said it was impossible to check every single commuter for firearms due to the voluminous number of commuters entering the station at different access points. During the plaintiff’s closing argument, counsel for the plaintiff said that metal detectors or CCTV cameras could be installed at these entrance/access points. It must be noted that these propositions of safety measures were not put to the defendant’s witnesses.

[65] In the premises, I am of the view that the defendant was obliged as a state organ to take no more than reasonable steps to guard against the foreseeable harm to commuters and the plaintiff. Here, *City Council of Pretoria v De Jager*²¹ is instructive; the court held:

²¹ [1997] 1 All SA 635 (A) at para 26.

“Whether in any particular case the steps actually taken are to be regarded as reasonable or not depends upon a consideration of all the facts and circumstances of the case. It follows that merely because the harm which was foreseeable did eventuate does not mean that the steps taken were necessarily unreasonable. Ultimately the inquiry involves a value judgement.”

[66] Furthermore, Horn J, in the context of dealing with element of negligence in *Shabalala v Metrorail*²² (High Court) stated (my own emphasis):

“In my view the employment of security officials is not a guarantee against criminality or violent attack. The way I see it, the defendant employs security officials in order to curb attacks of that nature. It does not employ security officials as a guarantee against such attacks. Even the police cannot warrant absolute safety. The fact that there were no security officials present or visible on that day in question cannot for that reason alone mean that the defendant is liable.”

[67] On the element of causation, if I were to assume that negligent omission is present, I cannot conclude that the negligent omission materially contributed to the plaintiff’s harm. Having regard to the *De Klerk*²³ case, I am not satisfied that the plaintiff discharged the onus that the harm suffered by the plaintiff was causally linked to the negligent omission.

Conclusion

[68] In the circumstances, I am of the view that the plaintiff failed to discharge the onus of proving that the guards were negligent. The plaintiff also failed to discharge the onus that the defendant was negligent as alleged. On that note the delictual claim brought by the plaintiff for compensation for damages against the defendant as a result of personal injuries sustained on 27 April 2016 when he was shot and robbed at NS, fails.

Order

[69] Having regard to the totality of evidence and having heard the representations made by both parties’ counsel, I hereby make the following order:

²² 2007 (3) SA 167 (W) at 170H.

²³ *Supra* note 12.

69.1 The plaintiff's claim is dismissed.

69.2 The plaintiff is ordered to pay the defendant's costs on scale C.



W DOMINGO
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Delivered: This judgment was prepared and delivered by the Judge whose name is reflected and is haded down electronically by circulation to the parties' representatives by email and by uploading it to the electronic file of this matter on CaseLines. This matter was heard in open court on the 30 and 31 July 2025. Closing arguments was heard virtually on 1 August 2025. The date for hand-down is deemed to be 4 November 2025.

APPEARANCES:

For the plaintiff: MR K MOKETEDI (SC) instructed by DENG A INCORPORATED

For the Defendant: MR T BRUINDERS (SC) instructed by Norton Rose Fulbright
South Africa INC

