

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

CASE Number: **25787/21**

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED: YES/~~NO~~

08/12/2025

In the matters between: -

M[...] M[...] L[...]

APPLICANT

and

PASSANGER RAIL AGENCY OF SOUTH AFRICA

RESPONDENT

JUDGMENT

BAQWA, J

Introduction

[1] The Plaintiff, M[...] L[...] M[...] , brings this action in her representative capacity on behalf of her daughter, A[...] M[...], wherein she claims for loss of support arising out of the train accident which occurred between Mabopane station and Soshanguve station, Pretoria, on 28 May 2018.

Separation of issues

[2] At the commencement of this hearing, the parties agreed in terms of Rule 33(4) of the Uniform Rules of Court to separate the issues of liability and quantum, and the trial proceeded on liability only.

Common Cause Facts

[3] 3.1 It is common cause that the accident occurred and that the relevant train was operated by the Defendant.

3.2 It is also common cause that the deceased boarded the train on the day in question and that he died as a result of the accident.

Disputes Facts

4.1 It is disputed whether the deceased was in possession of a valid train ticket.

4.2 It is also disputed whether the Plaintiff has proved the legal nexus between the deceased and the child on behalf of which the claim was lodged.

4.3 It is also in dispute whether the deceased died as a result of his own negligence or as a result of the conduct of the Defendant or its employees.

Pleadings

[5] The Plaintiff's contends in her particulars of claim that the deceased fell out of a moving train and died as a result of the injuries sustained in the fall. She further contends that the Defendant owed a duty of care to the public in general which included the deceased.

[6] The Plaintiff further contends that the defendant breached the aforesaid duty of care in that it failed to ensure the safety of the deceased or to take adequate steps to avoid the incident by failing to employ sufficient employees to prevent commuters from being injured.

[7] The defendant has defended the action and raised a special plea to the effect that there is no nexus pleaded by the Plaintiff connecting the deceased with the Plaintiff, and that, as a consequence, the Plaintiff does not have the requisite locus standi to institute the action against the defendant.

[8] The defendant further pleads in the alternative that the minor child on behalf of whom the Plaintiff claims was born almost three years after the date on which the deceased died, and that there can therefore be no nexus between the deceased and the minor child.

[9] The Plaintiff failed to refuse, replicate or lead evidence to discredit the special plea and its alternative basis. No evidence, be it in the form of a unbridged birth certificate or a paternity affidavit was led as per agreement at the pre-trial conference held on 22 June 2022 between the parties.

[10] In the circumstances the averments in the special plea remain uncontested, and on this basis alone the claim falls to be dismissed, AES obo LTS versus MEC for Health and Social Development of the Free State¹.

11. In *Assets Management (Pty) Ltd and Others v Lazarus Estate Investment (Pty) Ltd*², the court, dealing with an exception, held that:

"A founding pleading that does not set out the basis for the claimant's standing to bring the claim and the court's jurisdiction to entertain it lacks averments which are necessary to sustain an action and is susceptible to exception in terms of Uniform Rule 23, just as it would have been under the rules of procedure that were applied before the introduction of the Uniform Rules. The fact that the objection in issue could have been raised by way of a special plea rather than an exception is no bar to it being advanced by way of an exception, if it is demonstrated ex facie the pleadings that it lacks averments to sustain a cause of action."

Loss of Support

[12] It is trite that in a claim for loss of support, the Plaintiff ought to prove, in addition to the other ordinary requirements for delict, prove that:

- a) the deceased had a legal duty to support the Plaintiff; b) the defendant is liable for the loss suffered.

¹ (1094/2024) [2025] ZAFSHC 37 (13 February 2025).

² (2102/2020) ZAWCHC 136; [2023] 3 ALL SA 589 (WCC) (9 June 2023).

[13] Further, compensation for loss of support can only arise from the unlawful killing or injuring of the breadwinner by the defendant. In circumstances, therefore, where the breadwinner died because of his or her own negligence, the defendant does not have a claim.

[14] The above proposition was confirmed in *C Septoo obo JM Septoo & Another vs Road Accident Fund*³, where the SCA held as follows:

"The reasoning adopted by this court, as illustrated above, is consistent with the common law position. In my view, the Act codifies the common law position, which recognises that compensation for loss of support can only arise from the unlawful killing of the breadwinner by another person. Section 19, subsection A, especially states that liability is excluded in certain cases. Therefore, the defendant in the case of the deceased who died as a result of his own negligence does not have a cause of action for damages for loss of support."

[15] The plaintiff has failed to furnish evidence to prove that the deceased was indeed a breadwinner and to establish the legal nexus as requested by the pre-trial minute referred to above and during the trial. On that ground alone, the claim ought to be dismissed.

Analysis

[16] Two versions of evidence were presented before the court. On the one hand, the plaintiff alleged that the deceased was pushed out of the moving train. This contention was however not supported by evidence during the trial.

[17] The defendant contends that the deceased was part of a group of passengers who unlawfully occupied and stood in between the train coaches.

[18] On the defendant's version, the defendant raises the defence of volenti non-fit injuria, which implies that:

³ [2017] ZSAb164 para 14.

18.1 whilst knowing that it was dangerous to stand or occupy a position in between coaches whilst the train was in motion, he nevertheless voluntarily took that position.

18.2 whilst knowing that there was a risk that might result in fatal consequences, he voluntarily assumed that risk.

18.3 he acquiesced to the risk of either getting injured or getting killed by boarding the train and proceeding to stand in between the train coaches.

[19] The versions presented by the parties are mutually destructive and the approach adopted by the Court in *National Employers General Insurance Co LTD vs Jagers*⁴ is the approach that ought to be applied in deciding this case as expressed by Mr Justice Eksteen as follows:

*"Where the onus rest on the plaintiff as in the present case and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable and that the other version advanced by the defendant is therefore false or mistaken and false to be rejected." This approach to mutually destructive versions was approved and followed by the Supreme Court of Appeal in 2003 in Stellenbosch Farmers Winery Group Limited and Another vs Martell Et Cie and Others*⁵.

[20] The two witnesses whose evidence was presented by the plaintiff both testified to the effect that they were never at the scene of the incident.

[21] The first witness stated that he had last seen the deceased at the Hercules Station and that some of the commuters were left by the train when it pulled off.

[22] The plaintiff, who was the second witness, testified that she last saw the deceased in the morning of 28 May 2018. She could not testify regarding how the incident that had led to the deceased's death had occurred.

⁴ 1984 (4) 437 (E) 440 E-TG.

⁵ 2023 (1) SA 11 SCA.

[23] The defendant also presented the evidence of two witnesses. Mr Sithole, who worked as the defendant's investigating officer, confirmed the occurrence of the incident from the relevant occurrence book and flimsy report.

[25] the second witness was Mr Mlangeni who is the only witnesses who was able to shed light on how the incident occurred.

[26] Mlangeni testified that he was a qualified security guard who worked for the defendant since 2007 as an employee of Mafoko Security company which was contracted by the defendant.

[27] The incident occurred between Mabopane and Soshanguve stations. He was performing duties patrolling and safeguarding defendant's cables.

[28] Whilst patrolling he saw a group of commuters standing between train couches and as the train changed lanes, one commuter fell onto the railway lines. He proceeded to check and found a black male lying motionless on railway line. This happened about 1.9 kilometres from Mabopane station. This was corroborated by an entry in the Occurrence Book which was testified to by the witness Sithole.

[29] As alluded to above, the version presented by Mr Mlangeni is the only version of an eye witness to the incident which is not contradicted by any other evidence.

Reasonable Foreseeability Test

[30] What the plaintiff is required to prove is conduct, that is negligent , unlawful and wrongful as a probable cause of the death of the deceased. Put differently, the plaintiff must present an account which is consistent with the objective evidence and probabilities and one that is more likely than not *Yende v Prasa*.⁶

[31] It will be a misdirection to simply conclude or draw an inference that because the deceased was on a train on the day in question, the defendant is *ipso facto liable* for

⁶ [2015] ZASCA 49 at [9-11].

causing his death. It is appropriate to be guided by the Supreme Court of Appeal on the issue of inference, which held as follows:

In the matter of Ms Pasqualle Della Gatra MV Filippo Lembo Imperial Marine Co vs Delulemar Campagnia di Navigazione⁷, the Supreme Court of Appeal held that the drawing of an inference must be carefully distinguished from conjecture or speculation. As Lord Wright said in his speech in Caswell versus Powell Duffryn Associated Collieries Ltd; "Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other fact which it is sought to establish. But if there are no positive proved facts from which the inference can be made, the method of inference fails, and what is left is mere speculation or conjecture." This court cannot engage in factual speculation beyond what can be inferred from the common cause facts, especially where such inference would run contrary to the plaintiff's testimony.

[32] The test for negligence is reasonable foreseeability by the defendant that the deceased would wander into the space between the couches and expose himself to the risk of falling from the train. *Kruger v Coetzee*.⁸

Conclusion

[33] Having considered all the above, I am of the view that the following order be made:

33.1 The plaintiff claim is dismissed with costs.

SELBY BAQWA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 20 & 21 November 2025

Date of judgment:

Appearance

⁷ 2012 (1) SA 58 (SCA) at para 24.

⁸ 1966 (2) SA 428 Ad at 430.

On behalf of the Applicants

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