REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

CASE NO: 2010/47592

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

10-3-14
DATE

SIGNATURE

In the matter between:

HLONGWANE, NYIKO MISHEL **PLAINTIFF**

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA **DEFENDANT**

J U D G M E N T

WRIGHT J

1. The plaintiff, Ms Hlongwane is a 29 year old woman who was injured in an accident on 23 May 2009. She has instituted action against the defendant, PRASA in which she claims damages. By agreement I separated the issues of

liability and the amount of damages and the trial proceeded only on the question of PRASA's liability.

2. The particulars of claim allege that "*Plaintiff was involved in a train accident for which he held a valid ticket. Whilst the train was in motion, it caused Plaintiff to fall down through an open door.*" Throughout the particulars of claim the plaintiff is described as male. To these allegations the defendant pleaded that "*The defendant has no knowledge of the allegations herein contained and accordingly does not admit same and puts the plaintiff to the proof thereof.*" A denial and a statement of the material facts relied on by PRASA would have been in keeping with Rule 22(2) and the evidence led by PRASA.

3. The main allegation in the particulars of claim is that Ms Hlongwane's fall was caused solely by the unlawful conduct and negligence of the conductor of the train acting in the course and scope of his employment with PRASA. In particular it is alleged that:

   3.1. He failed to keep a proper lookout.

   3.2. He signalled the driver that it was safe to set the train in motion with its doors open.

   3.3. He failed to pay due regard to the safety of passengers on board the train.

   3.4. He failed to prevent the accident when by the exercise of due and reasonable care he could and should have done so.

   3.5. He failed to close the doors timeously or at all.

   3.6. He failed to pay due regard to the safety of passengers alighting from the train and especially to the safety of Ms Hlongwane.

   3.7. He failed to seek assistance from PRASA in providing adequate support personnel to guide, supervise, control or protect passengers on board and or alighting from the train.

4. PRASA is alleged in the alternative to be liable through the negligence of the driver. In particular he is alleged to have been negligent in that:

4.1. He set the train in motion at a dangerous or inopportune time with the doors open.

4.2. He failed to check that it was safe for him to set the train in motion.

4.3. He set the train in motion without checking that all the doors were closed.

4.4. He set the train in motion while passengers were alighting from the train.

4.5. He failed to keep a proper lookout.

4.6. He failed to prevent the accident when by the exercise of due and reasonable care he could and should have done so.

5. The joint conduct of the conductor and driver are pleaded in a further alternative to have caused Ms Hlongwane's fall.

6. In another alternative PRASA is alleged to have been negligent itself rather than through the negligent conduct of the conductor or driver. The allegations here are that PRASA breached its duty of care which it owed to passengers:

6.1. By failing to guide, supervise, control or protect passengers on the train or getting off it.

6.2. By failing to put measures in place that would guide, supervise, control and protect passengers on board or getting off the train.

6.3. By failing to provide personnel or conductors to guide, supervise, control or protect passengers on board or getting off the train.

6.4. By failing to put measures in place to ensure that the train was not set in motion with the doors open.

7. As a last alternative, the plaintiff's fall is alleged to have been caused by the conduct of the conductor, the driver and the defendant as pleaded above.

8. The plea was a bare denial. The discovery process did not include any attempt by Ms Hlongwane's legal representatives to coax from the defendant more than the very few documents it discovered if in fact it had made discovery at all. Further particulars for trial were not requested by either side. The pre-trial conference was perfunctory and fruitless.

9. Ms Hlongwane testified that she had boarded a train at Pretoria, which departed when full, with a valid ticket. She had wanted to get off at Olifantsfontein but the train had not stopped until it was some distance beyond the end of the platform at Germiston. The train was full. When the train arrived at Germiston she had got up from her seat. As she got up she was pushed by the throng of passengers seeking to get off the train. As she began stepping off the stationary train she was pushed and at the same time the train jerked. She fell down next to the tracks below. The distance of her fall was about waist height for a woman of average height. When she had risen from her seat she had thought that the train was next to a platform. She did not realise that there was no platform until she fell.

10. Ms Hlongwane withstood cross examination well. She denied having described to any security official how she had left the train. She said that while she was sitting next to the tracks she was in considerable pain and was not in a good state of mind. She did say, later when she was in hospital, that she had told a security guard that she had been injured in a train incident. She struck me as an honest person who was not attempting in any manner to improve her position by giving inaccurate evidence. I cannot infer from the differences between her testimony and her pleadings that she has tailored her evidence. Her pleadings are standard type pleadings clearly not specific to her case.

11. After Ms Hlongwane had testified, her counsel, Mr Ralikhuvhana closed her case without calling further witnesses or relying on any documentary evidence. Mr Kgomongwe, for PRASA called three witnesses but lead no documentary evidence.

12. Mr Jongwana was a security officer at Germiston station at the time. He saw numerous people anxiously leaving the stationary train which had stopped about 50 meters beyond the end of the platform. He did not see how Ms Hlongwane left the train. He said that after some of the passengers had alerted him to Ms Hlongwane's predicament he had found her sitting next to the tracks. He asked her what had happed and she replied that when she had jumped out of the train she must have mis-stepped. Mr Jongwana said that the train was not scheduled to stop between Pretoria and Germiston. He was not

challenged on this testimony. It calls into question the validity of Ms Hlongwane's ticket between Olifantsfontein and Germiston particularly when considered with Ms Hlongwane's own evidence that she had expected to get off the train at Olifantsfontein, a station between Pretoria and Germiston.

13. Mr Tshuma, a senior security officer employed by PRASA had gone to the scene and found Ms Hlongwane next to the tracks. She told him that she had forced opened the doors of the coach and jumped out. Mr Tshuma testified that Mr Jongwana had told him that Mr Jongwana had seen Ms Hlongwane opening the door of the train and jumping out. This testimony is in stark contrast to Mr Jongwana's evidence that he had not seen how Ms Hlongwane left the train. It detracts from the reliability of the evidence of both Mr Jongwana and Mr Tshuma on the question of how Ms Hlongwane left the train.

14. Mr Shapo is a train driver employed by PRASA. He was not the driver of the train in question but he was in an office at Germiston station when he was informed that a woman had been injured. He went to Ms Hlongwane who was sitting next to the tracks. In his evidence in chief he said that she had told him that she had fallen out of the train. In cross examination he said that she had told him that she had been pushed out of the train.

15. Apart from the validity or otherwise of the ticket and the fact that the train had stopped about 50 meters beyond the end of the platform, the significant contradiction in the evidence of Mr Shapo and the even bigger contradiction between the evidence of Mr Jongwana and that of Mr Tshuma lead me to prefer to decide the case on the evidence of Ms Hlongwane. She has proved on a balance of probabilities that:

    15.1. She boarded the train at Pretoria and sat in a seat.

    15.2. The train was full when it left Pretoria.

    15.3. The train did not stop until it was about 50 meters beyond the end of the platform at Germiston.

    15.4. At Germiston station Ms Hlongwane stood up. She was caught in a throng of people anxious to get off the train. She did not realise that her coach had not stopped next to the platform. As she stepped out the

door of the stationary train she was pushed and the train jerked. She fell down next to the tracks. The distance of the fall was waist height for a woman of average height.

15.5. She did not tell any security guard either on the scene or in hospital that she had jumped off the train.

16. There is no evidence on whether or not the doors were open or closed when the train left Pretoria, when it stopped or at any time between. There is no evidence as to how the doors opened if they were ever in a closed position. Mr Kgomongwe asked me to hold that the doors were opened by passengers anxious to leave the train where it had stopped. He submitted that this is a common occurrence.

17. From the report of the decision in **Ngubane v South African Transport Services 1991(1) SA 756 AD**, particularly at page 775 B it would appear that the trial court had the benefit of evidence relating to the operation of doors on passenger trains.

18. From the decision in **Transnet Ltd t/a Metrorail v Witter 2008(6) SA 549 SCA**, at paragraph 5, it would appear that the learned trial Judge had the benefit of expert testimony. The experts had agreed that it was a basic requirement for the safe operation of a passenger train that it should not depart with a door open.

19. In **Shabalala v Metrorail 2008(3) SA 142 SCA** the court dealt with a case in which the plaintiff had alleged that he had been robbed on a train. He had sought to hold the defendant liable on the basis that it had not taken sufficient measures to protect him from robbers. From paragraphs 4 and 5 of the judgment it would appear that the case had to be decided on the scant evidence of the plaintiff that he had been robbed on the train between Dunswart and Benoni stations. The plaintiff testified that usually there were uniformed security guards on the trains, especially during the day and on occasion at night. Some of the security guards were armed while others had two-way radios. In paragraph 7, Scott JA, speaking for the court reiterated that a negligent omission, unless wrongful will not give rise to delictual liability. The failure to take reasonable steps to prevent foreseeable harm to another will

result in liability only if the failure is wrongful. It is the reasonableness or otherwise of imposing liability for such a negligent failure that will determine whether it is to be regarded as wrongful. The learned Judge of Appeal referred to the decision of the Constitutional Court in **Rail Commuters Action Group v Transnet 2005(2) SA 359 CC**. It had been held that Metrorail was obliged to take reasonable steps to provide for the security of commuters while making use of its rail transport. The Constitutional Court had however emphasised that the obligation which arose by virtue of the Legal Succession to the South African Transport Services Act 9 of 1989 was a public law obligation and did not automatically give rise to a delictual duty.

20. In paragraph 8 of his judgment, Scott JA held that the question was whether or not the plaintiff had discharged the burden of establishing on a balance of probabilities that those measures taken by Metrorail were unreasonable and that had reasonable measures been taken the attack would not have occurred. The learned Judge of Appeal held that it was important to bear in mind that merely because the harm which was foreseeable did eventuate does not mean that the steps taken to avert it were necessarily unreasonable. To hold otherwise would be to impose on Metrorail a burden of providing an absolute guarantee against the consequence of criminal activity on its trains. There was no such burden. In paragraph 11 he noted that the nature and extent of the precautionary measures taken by the defendant were peculiarly within its knowledge. However, he held further that the onus remained on the plaintiff throughout and in the absence of at least some evidence for the plaintiff giving rise to an inference of negligence on the part of the defendant the latter would not be required to produce rebutting evidence.

21. In paragraph 16 of her judgment in **South African Rail Commuter Corporation v Thwala**, a case decided by the SCA on 29 September 2011, Maya JA, referring to the decision in **Shabalala**, held that the defendant in that case would know what its safety policies are and what measures it takes to prevent foreseeable harm to passengers. Nonetheless the duty remains on a plaintiff to lead evidence giving rise to an inference of negligence on the part of the defendant. Only then would the defendant need to rebut that inference with evidence of the measures it took to avert harm.

22. In **South British Insurance Company Ltd v Unicorn Shipping Lines Ltd 1976(1) SA 708 AD at 713 E**, Holmes JA upheld the words of Selke J in **Govan v Skidmore 1952(1) SA 732 (N) at page 734 D** that in finding facts or making inferences one may, by balancing probabilities select a conclusion which seems to be the more natural or plausible conclusion from amongst several conceivable ones even though that conclusion is not the only reasonable one.

23. Like Mr Kgomongwe, Mr Ralikhuvhana for Ms Hlongwane suggested that the doors were opened by passengers anxious to get off the train. Mr Ralikhuvhana suggested that this was conduct reasonably foreseeable by PRASA and that accordingly PRASA had a duty to take steps to prevent the door being opened in this manner. That the doors could be opened at all by passengers rather than only by responsible PRASA employees was unwise and had led to Ms Hlongwane's fall. I asked Mr Ralikhuvhana to consider the following set of imagined facts. Before the train had departed from Pretoria the doors were properly closed and remained so. When the train stopped where it did all passengers remained calmly seated or standing as the case may be. Suddenly a fire broke out in the coach in circumstances for which PRASA was not responsible. Passengers desperate to exit the coach were unable to open the doors as they were locked pursuant to the duty on PRASA as suggested by Mr Ralikhuvhana. Would PRASA's conduct in ensuring that the doors could not be opened by passengers lead to liability on the part of PRASA ? I posed this question simply to test Mr Ralikhuvhana's proposition. I prefer not to attempt an answer in this case as it was not raised in either the pleadings or in the evidence and I am able to base my decision on other grounds.

24. Many different factual scenarios are possible. I decline to speculate and this is not a case in which I may properly take judicial notice of any fact.

25. On the proved facts Ms Hlongwane has shown that the harm to her was reasonably foreseeable and that PRASA was obliged to take reasonable steps to prevent her injuries. However, in my view she has failed to show that PRASA took inadequate steps to prevent her injuries and that had reasonable steps been taken she would not have been injured.

26. Mr Kgomongwe moved for absolution with costs. In the same breath he offered that I might be minded not to order costs against Ms Hlongwane. He suggested obliquely that I should bear in mind that she probably could not afford to pay PRASA's costs. Normally a mere inability to pay costs on the part of an unsuccessful litigant would not lead to a finding excusing such litigant from paying the other side's costs. Seeing that the suggestion came from PRASA's counsel and that Ms Hlongwane is an honest person who is not responsible for the dearth of evidence before me I accede to Mr Kgomongwe's kind suggestion.

Order

1. The defendant is absolved from the instance.

JUDGE OF THE HIGH COURT

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Dates of Hearing:	6 March 2014
Date of Judgment:	13 March 2014