REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

7/08/2017
DATE

SIGNATURE

CASE NO: 15/38420

In the matter between:

KHUMALO, NELLY THOKO Plaintiff

And

PASSENGER RAIL AGENCY OF SOUTH AFRICA LIMITED Defendant

JUDGMENT

OPPERMAN J

INTRODUCTION

[1] Mrs Khumalo instituted action against the defendant for damages suffered resulting from personal injuries sustained on 30 July 2015 when she fell from a train

operated by the defendant. The parties reached an agreement that the issues of the quantum of damages and the merits (the liability of the defendant) be separated in terms of rule 33(4) of the Uniform Rules of Court, which was duly ordered. The issue of defendant's liability was tried before me. The parties advised the Court that the only issue in dispute in respect of defendant's liability was negligence and the trial was conducted on this basis. I accept that this implies that the issue of causation was conceded by defendant. In other words, if the Court were to find the defendant to have been negligent, that negligence was conceded by defendant to be the cause of Mrs Khumalo's injuries and of her damages. At issue was whether Mrs Khumalo was ejected from the train by reason of some negligence on the part of the defendant.

[2] Mrs Khumalo testified and thereafter closed her case. The defendant called four witnesses: the train driver, the train guard, the controller and the protection official.

[3] As is so often the case, after all five witnesses had testified, it was clear that many of the events of 30 July 2015 were common cause, either because they could not be disputed, or because they had been conceded. In what follows, I summarise the facts that have become common cause or otherwise uncontestable:

COMMON CAUSE FACTS

[4] On 30 July 2015 and at 5h00, Mr van der Merwe, a train driver with some 40 years experience, reported on duty. At about 15h00, and between Croesus and Longdale stations, the train, which was destined for Naledi bearing number 9424, experienced mechanical difficulties in that one of its engines ignited. Having alerted the fault personnel, he waited at New Canada station from about 15h15. The train

guard on duty that day was Mr Maliwa. A train driver and the train guard communicate with one another generally verbally, by cell phone or by ringing a bell. One ring of the bell indicates that the platform is clear. The train guard would ring the bell once and the train driver would respond by ringing once. This the train guard would do after he is satisfied that the platform is clear and after he has closed the doors. On the day in question, they did not have one another's cell phone numbers. The train guard communicates with the commuters by blowing a whistle.

[5] After the fault personnel arrived, a decision was taken to shut down the train. There were three engine coaches. Two only were functioning which would result in a loss of power, particularly on inclines. The brakes of the train were functioning properly though. Train 9424 would have stopped at the following stations on its way to Naledi : (listing them in the sequence in which it would have stopped): Mzimhlope, Phomolong, Phefeni, Dube, Ikwezi, Inhlazane and Merafe.

[6] After the decision was taken that the train should be shut down, Mr van der Merwe changed the number on the front of the train to 0976, which is the number used to indicate that the train is empty i.e. it carries no passengers. Mr Maliwa entered each coach from the first one to the very last one and announced: 'Empty coach, Naledi' in a loud clear voice which he demonstrated in court. It was the end of the month. Many people were on the platform and the commuters were not happy that there were no trains to transport them to their homes.

[7] When he arrived at his coach (the very last one) Mr Maliwa blew his whistle. Instead of the people clearing away and moving away from the train, most ran towards the train and got in. Prior to blowing the whistle the train doors were open. After blowing the whistle, he pressed the button so the doors would close, but the

commuters entering the train blocked the doors and more passengers entered. He explained that train doors functioned similar to lift doors in that a physical blockage would prevent the doors from closing but once such blockage is removed, the doors would close.

[8] Ms Sinyanya, a controller, employed as such at the New Canada station, received a report at about 18h00 of a faulty train stationed at platform 3. She spoke to Mr van der Merwe and decided that the train was to go to Naledi without stopping at any stations on the way. The train became a 'First stop' train. She entered about 3 (of 12) coaches and announced - 'This train is a First stop'.

[9] She explained that all seasoned commuters would understand this to mean that the train would not be stopping at the stations on the way to the Naledi depot. She said that some ignored her and continued getting into the train. Another train to Naledi was available at platform 4 so some commuters disembarked and went to that train but others remained in the train at platform 3.

[10] She did not go back to Mr van der Merwe to advise him that the train was not empty. She watched the train leaving and saw that the numbers had not been changed. She recalled that the train she was watching leaving the station, bore the numbers 9424. She went back to the control/monitoring room. She could not communicate with the signal room i.e. the office responsible for making announcements over the intercom, as there was no cell phone reception.

[11] She said it was in any event the responsibility of the train driver to communicate with the signal room. Mr van der Merwe did not testify that he had contacted the signal room and had requested them to make the announcement about the status of his train i.e. that it would not be carrying any passengers.

[12] Mrs Khumalo, a 57 year old woman (55 at the time), testified that she resides in Dube and on 30 July 2015, worked in Randfontein. She had by then been using trains for some 15 years. Her normal route home would be to catch a train from Randfontein to Langlaagte and from Langlaagte to Dube. On the day in question, she Caught a train at Randfontein and disembarked at Langlaagte. She then took a train to Vereeniging (as the train to Naledi did not arrive) and disembarked at New Canada station where she looked for a train going in the direction of Naledi. She knew that if there wasn't an announcement that a train was an 'express' to, for example Dube, it would stop at each station on its way to its ultimate destination.

[13] Having disembarked at New Canada station, Mrs Khumalo proceeded to platform 3. Upon her arrival, she found a stationary train. Because she was standing in the middle of the platform, she did not read either the number on the front or on the back of the train. Having stood there for about 20 minutes, she heard an announcement 'Platform 3 Naledi'. She understood this to mean that the train stationed at platform 3 was to depart with its end destination being Naledi but that it would be stopping at all the stations on the way there including Dube station, which is the station she needed to disembark at.

[14] She got into the train. Because it was full she could not find a seat and eventually ended up in a coach where she stood without having anywhere to hold onto to stabilize herself. She was effectively dependant on human bodies to keep herself balanced. The train doors were open, being held open by commuters who were obstructing the closure of the doors by standing in between them.

[15] The train pulled off and did not stop at the initial stations. Mrs Khumalo decided that she would get off at Naledi and catch a train to the City Centre as it

would stop at Dube station which was her destination. As the train entered Ikwezi station, it started to slow down. She noticed that people were disembarking whilst the train was still moving. The doors of the train opened wider. She was being pushed and had no place to hold onto. She was pushed out of the coach and fell onto the platform. She lay on the platform for some time until the paramedics arrived. She was taken to Baragwanath hospital where she remained until 25 August 2015 being treated for an injury to her lower leg – from her knee down.

[16] Mr van der Merwe, the train driver, explained that he had thought the train was empty but that he had realised, some time during the journey that that it was not. He heard passengers banging on the coach and decided to stop at Ikhwezi station. He slowed down and the train came to a complete stop for about one and a half minutes. Mr Maliwa saw passengers jumping out of the moving train at this station. His evidence was that the majority of passengers disembarked whilst the train was in motion. In his view, they were doing this as they thought the train was not going to stop at all as it had not done so at the previous stations. The commuters started pelting the train with stones and Mr Van der Merwe then pulled off after receiving the appropriate signals from Mr Maliwa.

LEGAL PRINCIPLES

[17] In order for the Plaintiff to succeed in her delictual claim she had to establish on a balance of probabilities that a reasonable person in the Defendant's position would have foreseen a reasonable possibility of harm; that such reasonable person would have taken reasonable steps to avert the risk of such harm; that the Defendant acted wrongfully by failing to take such steps, see *Kruger v Coetzee*, 1966 (2) SA 428 (A) at 430E & G.

[18] The Defendant has statutory obligations, in terms of the applicable legislative framework to individuals using the railway services. For that reason, the Constitutional Court in the matter of *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) held at para [82] :

> "....It must be borne in mind that the first and second respondents enjoy, in effect, a monopoly over the provision of rail commuter services for the period of the agreement they have entered into. Moreover, as organs of state they exercise that monopoly in circumstances where the spatial planning of our cities means that those most in need of subsidised public transport services are those who often have the greatest distances to travel. Those people are also often the poorest members of our communities who have little choice in deciding whether to use rail services or not."

[19] This was emphasised by Satchwell J in the case of *Mokwena v South African Rail Commuter Corporation Ltd and Another* 14465/2010 [2012] ZAGPJHC 133 at para [70] : "...the defendants were and are obliged to act without negligence."

[20] In the context of injuries caused by third parties on trains, which is relevant to the present case because the plaintiff was forced off the train by the mass of commuters leaving it, the Supreme Court of Appeal in the matter of *Shabalala v Metrorail* (062/07) [2007] ZASCA 157 stated in paragraph [8]:

> "....The question in issue is therefore whether the...Plaintiff...discharged the burden of establishing on a balance of probabilities that those measures were unreasonable in the circumstances and that had reasonable measures been taken the attack would not have occurred. When considering this question it is 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 the Respondent a burden of providing an absolute

guarantee against the consequence of criminal activity on its trains. There clearly is no such burden and the Appellant did not contend that there was".

[21] The Supreme Court of Appeal in the matter of *South African Rail Commuter Corporation Ltd v Thwala* 2011 JDR 1242 (SCA) in para 11 stated:

"...But not every act or omission which causes harm is actionable. For liability for patrimonial loss to arise, the negligent act or omission must have been wrongful. And it is the reasonableness or otherwise of imposing liability for such a negligent act or omission that determines whether it is to be regarded as wrongful. The onus to prove negligence rests on the Plaintiff and it requires more than merely proving that harm to others was reasonably foreseeable and that a reasonable person would probably have taken measures to avert the risk of such harm. The plaintiff must adduce evidence as to the reasonable measures which could have been taken to prevent or minimise the risk of harm".

ANALYSIS

[22] The parties accepted that the true issue which fell for determination was whether or not the train was stationary when Mrs Khumalo was pushed. In this regard, reliance was placed on *Thwala (supra)* in which Maya JA (as she then was), writing for the full bench, determined in paragraph [18]:

"It seems to me that once the Court accepted that the train was stationary when the Respondent disembarked and the accident occurred, that should have been the end of the respondent's case. This, clearly, was the result contemplated by the parties themselves when they defined the issue; that only a finding that the train was in motion when the respondent was pushed and fell would give rise to liability. The court below thus erred in this regard and the appeal must succeed."

[23] The defendant cannot dispute that the plaintiff was pushed. It has no evidence to suggest otherwise. Mrs Khumalo cannot deny that the train did not come to a complete stop. If the court accepts Mrs Khumalo's version ie that she was

ejected from a moving train, the court would also have to accept that she was lying on the platform in pain and would probably not have noticed that the train had indeed stopped for one and a half minutes after she had been ejected, before departing again. The acceptance of her version does not exclude the acceptance of the evidence of Mr van der Merwe and Mr Maliwa in respect of the stopping of the train. I find that the facts are reconcilable on this issue, that she was pushed and that the train did stop.

[24] More significantly though is the fact that Mr Maliwa supported Mrs Khumalo's evidence that the passengers started to disembark whilst the train was still in motion. He testified that the majority of passengers disembarked whilst the train had slowed down but was still moving. The only question which then falls for determination is whether Mrs Khumalo was trapped in the surge of the majority of dismounting passengers for if she was, then she came off a moving train.

[25] Mrs Khumalo testified that the train was moving when she was ejected from it. To counter this the defendant relied on the evidence of what Mrs Khumalo had allegedly reported to Mr Tshitavhadulu, a protection official in the employ of the defendant, shortly after the incident. He testified that she had told him that she had been pushed from a stationary train. Mrs Khumalo disputed this. He testified that he had recorded the salient parts of their conversation on a piece of paper and had handed such paper to the office of Ms Sinyanya. Someone in that office had then transferred this information into the occurrence book and had thereafter destroyed the piece of paper.

[26] Mr Tshitavhadulu testified during cross-examination that he had signed a statement on 29 September 2016 in respect of the events relating to this litigation

('the statement'). That is some 14 months after the incident. When preparing the statement he had referenced the occurrence book and his memory. Despite this, Mrs Khumalo's name did not appear in the statement although she had provided him with her name.

[27] The statement is in some obvious respects inaccurate. It reflects that Ms Sinyanya had called him to tell him that the train was a 'first stop' from New Canada station to Ikwezi station as opposed to Naledi depot. He had recorded the undisputed conversation incorrectly. How much weight is to be attached to the content of the *disputed* conversation if the undisputed conversation (the one between him and Ms Sinyanya) had been recorded incorrectly?

[28] The occurrence book was not discovered nor was it made available by the defendant when it was clear that the alleged communication by Mrs Khumalo was in dispute. The statement was prepared with reference to the occurrence book and Mr Tshitavhadulu's memory. Despite a challenge, the occurrence book was not produced.

[29] In *Thwala* (supra), all the documents recording the reports to two officials of the defendant were produced. In this matter, no supporting documents were produced. This, despite the defendant's own witness, Mr Maliwa having testified that the majority of commuters had disembarked from a moving train. The content of the conversation was squarely challenged. It was put to Mr Tshitavhadulu that he was protecting his employer. It would have been a simple matter to produce the occurrence book. The defendant chose not to and did so at its peril.

[30] The argument that Mrs Khumalo's legal representatives ought to have compelled production of the occurrence book is without substance. The defendant

deposed to a discovery affidavit stating, under oath, that no other documents, other than those discovered, were in its possession. Such statement has been shown to be false. Be that as it may, it was for the defendant to produce the occurrence book. I find that its failure to have done so affects the credibility of Mr Tshitavhadulu adversely.

[31] Mrs Khumalo on the other hand struck me as a modest, dignified and mature individual who was at pains to answer clearly and accurately the questions which were posed. There is clearly nothing improbable about her account of having been pushed out of a moving train. The defendant's witness, Mr Maliwa, testified that the majority of commuters disembarked whilst the train was in motion. This they did as they thought that the train was not going to stop at all. Mrs Khumalo was a standing passenger. The probabilities are overwhelmingly in her favour that she was one of the 'majority' who got pushed along by the other passengers eager to disembark.

[32] This case is distinguishable from *Thwala* (supra) in that there the court of appeal agreed with the court *a quo* that it was improbable that '*the general throng of passengers of whom she was one*' would exit a moving train. In this case, it is common cause that the majority of passengers exited a moving train. The minority probably consisted of those passengers who were seated. It was an extraordinary day. The passengers were agitated and were annoyed that transport was not available to them.

[33] The defendant argued that Mrs Khumalo had given four different answers about what she had said to Mr Tshitavhadulu, namely that she had said that she was in pain and confused and could thus not remember, that the security official had asked her what had happened, that she had not told the security guard what had

happened and that the train had not stopped. I don't accept that these were the versions advanced but assuming so, I don't see the contradictions. Mrs Khumalo was emphatic about the fact that the train was moving when she was pushed. She said that the incident had occurred a long time ago and could not recall that clearly what she had discussed with the person who she understood to have been a security guard. She disputed that they had had a discussion about whether the train was stationary or moving. The gist of her evidence was that she would not have said that the train was stationary when she was pushed as it did not happen that way. In my view, Mrs Khumalo did not contradict herself in respect of the content of the discussion she had had with the security person. I accordingly find that Mrs Khumalo was pushed from a moving train.

[34] In *Transnet Ltd t/a Metrorail and Another v Witter*, 2008 (6) SA 549 (SCA) at para [5] the following is recorded:

> "[5] The test for negligence was formulated in *Kruger v Coetzee* as follows:
> 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.
> The first two requirements contained in para *(a)* were - correctly - not placed in issue by the defendants. All of the experts were agreed. Mr Myatt, an electrical engineer and specialist in train door-control systems, who testified on behalf of the plaintiff, expressed the view that it was a basic fundamental requirement for the safe operation of a passenger train in any country that a train should not depart with a door open. Mr Taute, a mechanical engineer and retired General Manager (Operations and Technical) of the second defendant, who had gained experience over many years on inter alia the safe running of trains and commuter safety and who was also called as an expert on behalf of the plaintiff, said:

> As an operator you must have clear guidelines and proper staff to make sure that you safely convey your passengers. One of the prime issues, prime things to do, is to make sure that the doors are closed. In other words you must lay down proper procedures, have staff to do it. . . . I'll never accept the fact that you can accept running a train with doors open. I can't accept that that is an acceptable situation to operate a suburban service on.
>
> The evidence of the defendants' expert, Mr Carver, a mechanical engineer previously employed by the second defendant, was that a responsible train operator should do 'everything in his power' to prevent trains departing with doors open."

[35] Mr Maliwa, before departing from New Canada station, gave Mr Van der Merwe the go ahead, despite seeing that the doors were open. There was absolutely no reason to depart from the station at that particular time. In *Mashongwa v PRASA*, 2016 (3) SA 528 (CC) at [51] Mogoeng CJ speaking unanimously held as follows:

> "[51] No additional resources were required for PRASA to do the obvious. And that mundane task was simply to comply with its own general operating instructions and ensure that the doors of all coaches, including the coach occupied by Mr Mashongwa, were closed. It is something so easy to accomplish and yet so necessary that any attempt to provide an "acceptable" excuse for not doing it would inevitably be met with resistance and likely rejection."

[36] The train had been standing at New Canada station for almost three hours. There was no need for it to have departed when it did, though Mr Van der Merwe had then been on shift for many hours. Ms Sinyanya saw and knew that passengers had remained in the train. She had only told passengers in 3 of the 12 coaches that the train would not be stopping *en route* to the Naledi depot. Mrs Khumalo was clearly not in one of the 3 coaches as she said she did not hear this announcement. Mrs Khumalo had also not heard Mr Maliwa's announcement. She must have entered a coach after he had made the announcement.

[37] Mr van der Merwe had not advised the signal room that there was a change of plan. This corroborates Mrs Khumalo's evidence that she had heard an announcement over the intercom indicating that the train stationed at platform 3 was heading to the Naledi depot, which, in the absence of an announcement that it is 'express,' means, that it would be stopping at each station including Dube station, which is where she wanted to disembark.

[38] Mrs Khumalo testified that, in her view, she was ejected because the doors were open and the train slowed down. Had the train not slowed down as it did, the commuters would not have disembarked. In my view, the combination of these facts caused Mrs Khumalo to have been ejected, and this was foreseeable in the circumstances.

[39] The defendant sought to argue causation during its closing argument. During the opening address the issue for determination was limited to negligence. Be that as it may, in my view, the negligence of the defendant in failing to ensure that the train doors were closed when it departed from New Canada station coupled with the defendant's failure to have clearly advised the commuters where the train was going and where it would be stopping, created a foreseeable reasonable possibility that a commuter would be injured.

[40] The defendant failed to communicate with the signal room instructing it to make an announcement over the intercom, failed to change the numbers on the train (Mr van der Merwe and Ms Sinyaya contradict one another on this issue), departed from New Canada knowing that the doors of at least one coach was open, created an expectation with the commuters that the train would not be stopping at the stations by the speed at which it was travelling and then slowed down at Ikwezi station. This was

not an ordinary journey and I find that the defendant's conduct falls far short of what a reasonable person would have done under such circumstances.

[41] I note that the communication by the service provider to those dependant on its service is less than ideal, and even the communication between the driver of the train and the other defendant's employees responsible for the operation of the train, and ultimately for passenger safety, left much to be desired. It is surprising to me that cell phone numbers were not available to all concerned to facilitate better communication, and it is surprising that if cell phone reception was not available there should not be radio communication between the defendants staff members provided *via* other radio devices.

[42] I accordingly find that the defendant's negligence caused the plaintiff's injuries sustained on 30 July 2015.

ORDER

[43] In the result the following order is made:

43.1. The defendant caused the plaintiff's injuries sustained by her in falling from the defendant's train on 30 July 2015;

43.2. The defendant is liable for the damages arising from those injuries; and,

43.3. The defendant is to pay the plaintiff's costs.

I OPPERMAN
Judge of the High Court
Gauteng Division, Johannesburg

Heard: 19 - 22 June 2017, and 30 June 2017
Judgment delivered: 7 August 2017
Appearances:
For the Plaintiff: Mr B. Mzamo
Instructed by: Mzamo Attorneys
For the Defendant: Adv M. Kgomongwe
Instructed by: Cliffe Dekker Hofmeyr Inc