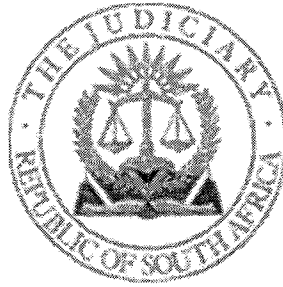


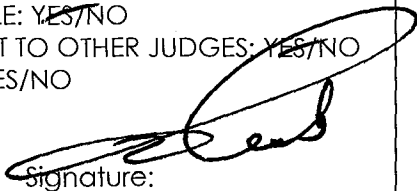
**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 8283/2018**

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
28/6/2019	
Date:	Signature:

In the matter between:

**Chawafambira: Winie obo Minor**

**Plaintiff**

**(Ivy Tendai Chaumba)**

**and**

**Passenger Rail Agency of South Africa**

**Defendant**

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## JUDGMENT

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**Carelse J:**

- [1] The plaintiff, a 17 year old female sued the defendant for damages arising out of an alleged incident in which the plaintiff was injured at the Mayfair Train Station situated in Johannesburg on 20 October 2017. The trial proceeded only on the issue of liability which the defendant denied. The parties by consent have obtained an order separating the issues of liability and quantum in terms of rule 33(4) of the Uniform Rules of Court.
- [2] The plaintiff pleaded that the defendant and or its employees were negligent *inter alia* the defendant allowed the train which was overcrowded/full to be in motion without ensuring the doors of the train were closed.
- [3] The background facts are seriously disputed. The plaintiff testified on her own behalf, the defendant called three witnesses namely:- the train driver, Ms Gaaname , the section security commander, Ms Nonyongo and the metro guard, Ms Sekathi.

**Plaintiff's Evidence- Ms Winnie Chawafambira**

[4] On 20 October 2017 the plaintiff a 15 year old minor accompanied her father from Randfontein Train Station (“Randfontein”) to Johannesburg, Park Train Station (“Park station”). On arrival at Park station, the plaintiff and her father boarded a taxi to Newtown, where her father purchased a bus ticket to Zimbabwe. The reason she accompanied her father was to assist him with his luggage. After her father loaded his luggage onto the bus and with thirty minutes to spare before the bus left for Zimbabwe, her father accompanied her back to Park station where she boarded train T0246 to Randfontein. Because the train was full and there were no seats available, the plaintiff said that she stood near the door of the train holding onto the railing. It is undisputed that the plaintiff had a return ticket to Randfontein.

[5] Train T0246 travelled from Park station to Braamfontein Train Station (“Braamfontein”) and onto Mayfair Train Station (“Mayfair”) where the incident occurred. According to the plaintiff on arrival at Mayfair, the train stopped, commuters disembarked whilst other commuters simultaneously boarded the train. While the commuters were in the process of disembarking and boarding train T0246, the train pulled off with its doors open. All of this she said lasted a few minutes. During argument the defendant was adamant that the plaintiff’s evidence was to the effect that the train had stopped for a few minutes to allow commuters to board and disembark the train. As a result hereof the record was played back and the parties agreed that the plaintiff’s testimony is:

“When train got to Mayfair some alighted and some got on the train? Yes

How long did that take? A few minutes

Now, then you say as the train was departing the station other people wanted to get off the train? Yes

and they pushed you out of the train? Yes

so when train got to station, it stopped for a few minutes in order for commuters to get off and get on and once that process was done and the train was leaving the station in motion at that point commuters get out, put themselves at risk and push you off train? Yes, that is the norm mostly when the train is full.”

- [6] As a result of the train pulling off with its doors open, the plaintiff said she was pushed out of moving train T0246. Her right leg was caught underneath the train and the platform, where she sustained an injury to her right ankle. After she was pushed off the train continued moving. While she was lying between platform 1 and 2 where she landed, a female security officer in the employ of the defendant approached her. She made her first report to the security officer where she explained that she was pushed off the train by commuters.
- [7] Under cross-examination, she denied that the train doors were closed when the train departed from Mayfair. She explained that the reason she went back to Randfontein was to collect her belongings. She strongly denied that she was injured when she crossed over the railway line at Mayfair with an unknown male person. Pertinently, the plaintiff denied that the incident occurred when train T0246 was entering Mayfair. The plaintiff repeatedly

stated that she was on train T0246 when the incident occurred and not when she was crossing the railway line. She further denied that the train driver hooted and reduced speed. She denied that the train stopped mid-way in the platform. The defendants did not categorically put to the plaintiff that the defendant's witnesses will testify that the train was entering Mayfair when the incident occurred. The question was phrased as follows:

"You were injured when the train entered or left the platform? In response, "when leaving the platform."

- [8] The plaintiff's evidence was not seriously challenged during cross examination. The defendant merely put its version to the plaintiff. Pertinently the plaintiff denied that the incident when the train in question was entering Mayfair. No mention was made in the train driver's statement that the plaintiff was accompanied by a male person. That concluded the evidence for the plaintiff.

#### **Defendant's witnesses- Ms Gaaname**

- [9] The defendant called Ms Gaaname, the train driver of train T0246 whose version is mutually destructive of the plaintiff's version to such an extent that it almost seems that they were describing two completely different incidents.

[10] Ms Gaaname was employed by the defendant for 12 years as a train driver. On the day in question, she was travelling from Johannesburg to Randfontein. The train stopped in Braamfontein where commuters boarded and disembarked the train. When the train was approaching Mayfair, she observed a number of people crossing the railway line. She noticed a 'lady' and a male person attempting to cross the railway line. She hooted and reduced speed. Some of the commuters turned back and others managed to cross over the railway line. The plaintiff was too slow and did not manage to climb onto the platform, whereas the male person that accompanied the plaintiff managed to climb onto the platform. She said that the train hit the plaintiff on her leg. The train driver said that she noticed the 'lady' when the train was about 20 metres away. She stopped the train in the middle of the platform and went to see what happened. She found the 'lady' who she is unable to identify, surrounded by commuters. She did not approach the injured plaintiff. She notified her superiors and requested an ambulance for the plaintiff. While she was in the train she telephoned the train assistant known as the metro guard and told her that someone was hit by the train in question. As a result of which she had to stop the train before it reached the platform.

[11] Under cross-examination Ms Gaaname was adamant that the plaintiff was not pushed out of a moving train. It bears mention that Ms Gaaname did not testify that the train doors were close when the train was in motion. That concluded her evidence.

### **Ms Nonyongo evidence**

[12] Ms Nonyongo is a section security commander in the employ of the defendant. On 20 October 2017, she was informed that someone was injured at Mayfair. On arrival at Mayfair, the train that was involved in the incident had already departed from Mayfair.

[13] At platform 2 at Mayfair, she found the injured plaintiff who made a first report to her. Because the plaintiff was Shona speaking, a bystander interpreted the conversation between her and the plaintiff. The plaintiff told her that she was on her way from Randfontein to Johannesburg when she was pushed out of the moving train at platform 4. That plaintiff was crossing platform 4 was never put to the plaintiff during cross-examination. Ms Nonyongo completed a liability report. That concluded the evidence of Ms Nonyongo, her evidence was not challenged.

### **Ms Sekathi evidence**

[14] Even though Ms Sekathi did not make a written statement, she gave evidence. She has been in the employ of the defendant for 18 years and is a metro guard for 8 years. On 20 October 2017, she was on duty on the train in question. She said that she was responsible for opening and closing the doors of the train and her duties included notifying the train driver when it is safe for the train to depart from a platform. On the day in question, the train departed from Park station and stopped at Braamfontein where commuters

disembarked. On arrival at Mayfair, the train stopped mid-way on the platform. She heard the train driver hoot prior to entering Mayfair.

- [15] She remained in her carriage which was situated at the back of the train. Whilst in her carriage, the train driver telephoned her to tell her that someone had crossed the railway line and as a result of which, was hit by the train.
- [16] During questioning by the court, she explained that she serves as a look-out for the train driver. Part of her duties included observing the platform to make sure it was clear of any commuters before the train departed. She further explained that after observing that the platform was clear, she closed the train doors. She confirmed that she doesn't physically check that the train doors are in fact closed. She stated that she is well aware that commuters often prevent the doors from closing even if she closes the train doors whilst inside her carriage.
- [17] It is common cause that the plaintiff was injured on 20 October 2019 at Mayfair by train T0246. It is further common cause that the plaintiff bought a return ticket to Randfontein and that the train in question was in motion when the incident occurred.



[18] What is in dispute is whether the plaintiff was injured when she was pushed from a moving train departing from Mayfair or whether the plaintiff was injured when she was attempting to cross the railway line when she was hit by the train in question. If I find that the plaintiff was inside a moving train whose doors were open when she was pushed by commuters, this would give rise to liability on the part of the defendant. If I find that the plaintiff was running across the railway line, that would be the end of the matter and the plaintiff's claim must fail.

[19] The versions of the plaintiff and the defendant are mutually exclusive. The plaintiff bears the onus of proof on a balance of probabilities. In deciding which version is more probable, I am guided by the judgment of Nienaber JA in Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie and Others 2003(1) SA 11 SCA at para 5 where Nienaber JA said that the technique applied by courts in resolving factual disputes is to make findings on (a), the credibility of the various factual witnesses (b) their reliability and (c) the probabilities.

[20] The plaintiff was a single witness. There were no inconsistencies or contradictions in her evidence. She gave a coherent account of what took place in the day in question. She was an honest witness and made a good impression on this court.

[21] Ms Gaaname gave a completely different account of what took place on the day in question. Her version was corroborated by the train assistant in so far as what she had told the train assistant on the day in question. It bears mentioning that she is employed by the defendant and is not an independent witness for all intents and purposes. I find her behaviour after the incident surprising. She was aware that someone was injured and left the scene before any help arrived for the injured plaintiff. Furthermore she made a statement two days later where no mention was made that the plaintiff was accompanied by a male person. It was mentioned for the first time during her evidence.

[22] Ms Sekathi, the metro train guard could not rebut the plaintiff's version that the doors were open when the incident occurred because she was seated in her carriage. Similarly Ms Sekathi is not an independent witness. She conceded that if she did not follow protocol she would be disciplined she corroborated Ms Gaaname to the extent that Ms Gaaname told her what had happened. It is quite surprising that if she heard the train hoot she would have not made enquiries on her own. Instead she waited for the train driver to tell her what happened. Be that as it may, I cannot conclude that Ms Gaaname and Ms Sekathi were dishonest.

[23] Ms Nonyongo was an honest and impressive witness. She corroborated the plaintiff's version to the extent that the plaintiff told her that she was pushed from a moving train. There was a debate about which platform the plaintiff

was initially at. It is common cause that the plaintiff was found injured between platform 1 and 2. It was never put to the plaintiff during cross-examination that she was crossing platform 4 when the incident occurred.

[24] This case turn on the probabilities and improbabilities in the various witnesses versions. The defendant submits the following improbabilities in the plaintiff's version:

1. That she travelled with her father by taxi back to Johannesburg Park station 30 minutes prior to the bus which was about to leave to Zimbabwe. There is nothing improbable about this. In fact, it is more probable that her father would have wanted to ensure that she safely boarded the train back to Randfontein before he left to Zimbabwe. She was only 15 years old at the time.
2. It is highly improbable that the plaintiff would have gone back to Randfontein after she had dropped off her father. In all probability the plaintiff would have gone back to Orange farm where she lived, so the defendant submits. In my view, there is no merit in this submission. The plaintiff's evidence was uncontested and clear that she had to go back to Randfontein to fetch her belongings which she left behind in order to assist her father. It is therefore highly probable that she had to go back to Randfontein.
3. The defendant further submits that it is highly improbable that the plaintiff said no statement was taken from her, yet a liability report was

completed by Ms Nonyongo. There is also no merit in this submission because Ms Nonyongo clearly said that no written statement was taken from the plaintiff. The plaintiff made a verbal report to her while she was lying on the platform injured.

[25] There are a few glaring improbabilities in Ms Gaaname and Ms Sekathi's evidence. According to Ms Sekathi's evidence, she saw that the train did not stop in its usual place at Mayfair. She was the train guard on the day in question. It is highly unlikely that if the train stopped in an unusual place she would have remained in her carriage and not enquire or even look out to see if there was a problem. Bearing in mind that the train hooted and reduced speed, she made no enquiries. Instead the train driver called to tell her what had happened, this I find highly improbable.

[26] It is highly improbable that Ms Sekathi would have remained in her carriage after someone was hit by the train that she was assigned to as a metro guard. It is highly improbable that the train guard remained in the carriage after an accident. Both the train driver and metro guard showed no interest in the injured person. The impression I gained is that they were in a hurry to leave the station.

[27] On the defendant's version the plaintiff did not managed to climb the platform. Therefore, she would have been in the path of the oncoming train. It is highly improbable that she would have only sustained an injury to the right ankle. In fact I'm surprised that she was alive to testify.

[28] The defendant submits that it is improbable that the commuters would have waited for the train to be in motion given that the train had stopped for a few minutes, to disembark placing themselves at risk. This submission is not borne out by the evidence. The plaintiff's uncontroverted evidence is that the commuters had not completed alighting when the train departed. It is further improbable that the plaintiff, if pushed her foot would have become stuck between the platform and the train, so the defendant submits. I disagree, to the contrary, this is more probable then if she had been hit by a train.

[29] It is common cause that the plaintiff sustained an injury to her right ankle. In my view the plaintiff's injury is more consistent with someone who was pushed out of a moving train whose doors were open than someone that was crossing a railway line. On the defendant's version, the plaintiff did not manage to climb the platform, that being so, in my view she would have sustained far more serious injuries and in all probability would not have lived to tell the tale.

[30] In *Mashongwa vs Passenger Rail Agency of South Africa* 2016(2) BCLR 204 (CC):

“That the incident happened inside PRASA’s moving train whose doors were left open reinforces the legal connection between PRASA’s failure to take preventative measures and the amputation of Mr Mashongwa’s leg. PRASA’s failure to keep the doors closed while the train was in motion is the kind of conduct that ought to attract liability. This is so not only because the constitutional rights at stake but also because PRASA has imposed the duty to secure commuters on itself through its operating procedures. More importantly, that preventative step could have been carried out at no extra cost. It is inexcusable that its passenger had to lose his leg owing to its failure to do the ordinary. This dereliction of duty certainly arouses the moral indignation of society. And this negligent conduct is closely connected to the harm suffered by Mr Mashongwa. It is thus reasonable, fair and just that liability be imputed to PRASA.”

[31] I reject the defendant’s version on the probabilities and accept the plaintiff’s version of the probabilities and am therefore satisfied that the plaintiff was pushed out of moving train T0246 leaving Mayfair, resulting in an injury to the plaintiff’s right ankle.

[32] The only evidence on the open doors is the uncontested evidence of the plaintiff. I accept the version that the train occupied by the plaintiff, doors were open when she was pushed. In my view, the defendant should have foreseen that leaving the doors of the coach open would endanger the safety and lives

of train commuters. The defendant in the circumstances of this case owed its commuters a duty of care to ensure their safety whilst travelling on the train. The defendant had a duty to ensure that its coach/train doors were closed. In particular, when the train was in motion.

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

1. The defendant is liable for 100% of the plaintiff's proven and agreed damages.
2. Defendant to pay plaintiff's costs.
3. The issue of quantum is postponed sine die.



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**Z Carelse**

**Judge Of The High Court**

**Counsel for the plaintiff:**

**Ms L.R Mpllope**

**Plaintiffs' attorneys:**

**S.S Ntshangase Attorneys**

**Counsel for the defendant:**

**Adv B Ford**

**Defendants' attorneys:**

**Jerry Nkeli & Associates Inc**

**Date of hearing:**

**07 June 2019**

**Date of judgment:**

**28 June 2019**