REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

APPEAL CASE NO: 5038/2020

COURT A QUO CASE NO.:14289/2014

Reportable: No
Of interest to other judges: No
26 August 2021 Semenya AJ

In the matter between:

PASSENGER RAIL AGENCY OF SOUTH AFRICA **Appellant (Defendant *a quo*)**

And

MOKOENA: LINDIWE ANNA **Respondent (Plaintiff *a quo*)**

JUDGMENT

Semenya AJ (with Vally J and Flatela AJ concurring)

1. This is an appeal (with leave to appeal having being granted by the *court a quo*), against the judgment and order of Mbongwe AJ, delivered on 20 September 2019, where the *court a quo* found the appellant liable for the injuries sustained by the respondent on 21 June 2011 while commuting between the Johannesburg station and Angelo station. The determination of

the quantum was deferred for later, having separated the merits from the quantum in terms of Rule 33(4) of the Rules of Court.

2. At trial, the only evidence tendered was that of the plaintiff describing how she sustained her injuries. There was no evidence tendered on behalf of the appellant. The significance of the appellant's failure to testify will become apparent later. The pleadings reveal that the allegations of negligence were met by a plea on behalf of the appellant stating - no knowledge and inviting the respondent to the proof of those allegations.

3. The appellant challenges the judgment on four bases. I will deal with each of these challenges below. Before doing so, I recite the facts as found by the *court a quo,* and against which neither the appellant nor the respondent takes issue. In this regard, the *court a quo* stated:

"FACTS

[4] The plaintiff boarded a train on the 21 June 2011 at the Johannesburg Station destined for Boskburg. She was on her way from work and was to disembark at Angelo Station. She counted approximately ten stations between the two points of her commute. The circumstances resulting to (sic) her injuries appear to have occurred just after the train had departed from the Germiston Station, which was the last before Angelo Station.

[5] The doors of the train had closed. The plaintiff, who had been sitting, had (sic) stood up to make her way towards the door reading herself to disembark at Angelo Station. There many people (sic) on the train, some seated and others standing. She was stumbled on by other commuters ostensibly also heading for the doors. She sustained injuries, could no longer see, or breathe. She was eventually lifted up by some people and (sic) placed her near a window. It was those people who asked her if there was anyone/family they could contact and inform them of her ordeal. She directed the people to her identity document, in her handbag, where contact details of her boyfriend would be found. Contact was made with her boyfriend.

[6] At Angelo Station the plaintiff was lifted and placed on the platform where her boyfriend and son were already waiting. She was then taken by car to hospital."

4. It was the respondent's evidence further that what caused her to fall and to sustain her injuries was that she was pushed when commuters were trying to make their way inside the train. She testified that as there was no security and

the train being full of commuters pushing each other to make their way inside the train, she fell as a result. Her evidence further was that inside the train there were no security officers to control the crowd. No evidence gainsaying the respondent's version was tendered and absent the respondent's version being manifestly and patently untrue, the *court a quo* was correct to accept that version.

5. I now turn to deal with the grounds of appeal and the argument advanced on behalf of the appellant, both in its heads of argument as well as in oral argument.

6. It was argued on behalf of the appellant that the evidence did not establish a duty of care towards the commuters who use their services. For good reason, this argument was abandoned in oral submissions made on behalf of the appellant. In interpreting the provisions of ss15(1)[1] and 23(1)[2] of the South African Transport Services Act 9 of 1989 ("*the SATS Act*"), the duty of care placed on the (appellant has been pronounced upon, in most lucid terms, by O'regan J (with all Justices of the court concurring)) in **Rail Commuters Action Group v Transnet LTD t/a METRORAIL**[3]. In the relevant part, it reads:

> "*[84] In these circumstances, I conclude that Metrorail and the Commuter Corporation bear a positive obligation arising from the provisions of the SATS Act read with the provisions of the Constitution to ensure that reasonable measures are in place to provide for security of rail commuters when they provide rail services under the SATS Act. It should be clear from the duty thus formulated that it is a duty to ensure that reasonable measures are in place. It does not matter who provides the measures as long as they are in place. The responsibility for ensuring that the measures are in place, regardless of who may implement them, rests with Metrorail and Commuter Corporation."*

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1 The section reads "*15(1) Subject to the provisions of this section, the company shall provide, at the request of the Corporation or a transport authority, a service that is in the public interest.*"

2 The section reads "*23(1) the main object and the main business of the Corporation are to ensure that, the at the request of the Department of Transport or any local government body designated under section 1 as a transport authority, rail commuter services are provided within, to and from the Republic in their public interest*".

3 2005 (2) SA 359 at paragraph 84.

7. O'Regan J continues against paragraph 86 to say:

"*[86] The duty thus identified requires Metrorail and the Commuter Corporation to ensure that reasonable measures are in place to provide for the safety of rail commuters. The standard of reasonableness requires the conduct of Metrorail and Commuter Corporation to fall within the range of possible conduct that a reasonable decision-maker in the circumstances would have adopted. In assessing the reasonableness of conduct, therefore, the context within which decisions are made is of fundamental importance. Furthermore, a court must be careful not to usurp the proper role of the decision maker. In particular, '[a] decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker.' This Court considered the manner in which the standard of reasonableness should be applied to positive constitutional obligations in Government of the Republic of South Africa and Others v Grootboom and Others[4]. The Court held that the standard would need to be assessed in the light of the 'social, historical and economic context' and the light of institutional capacity"*

8. In the context of the facts of this matter the positive constitutional obligation of the appellant has been established. The next enquiry should be whether evidence, not argument, was placed showing the reasonable measures which were taken by the appellant. Since no evidence was tendered at all on what measures the appellant put in place to ensure the safety of the commuters, the ineluctable conclusion to be drawn was that no measures at all were in place to ensure the safety of the commuters and that of the respondent.

9. The criticism mounted by the appellant against the judgment of the *court a quo* that Mbongwe AJ erred in finding that the absence of security personnel played a role in the injuries sustained by the respondent, cannot be sustained.The learned Judge held that:

"*[10] The absence of security personnel undoubtedly played a role in the occurrence of the circumstances leading to the plaintiff sustaining*

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4 2001 (1) SA 46 (CC).

injuries. The initial push that resulted in her falling was unlikely to occur in the presence of a security guard/s. In general, people tend to behave and exercise restraint where security personnel insight (sic) or the likelihood of their presence anticipated and some would do the opposite when the opportunity avails is (sic) itself such as in this case, where there had been no security personnel insight (sic) ostensibly throughout the plaintiff's travels. Further, the possibility exist that the plaintiff could have been rescued earlier with swift action by a guard which could have minimised the extent of her injuries.

[11] Unfortunate circumstances in commuter trains can arise at any moment. For this reason, I find, reasonable measures to counter or mitigate the effects of such circumstances have to be constantly in place. That would pale any difference, real or perceived, in circumstances demanding, of the defendant, the provision of reasonable measures to ensure the security and safety of train commuters."

10. The further challenges to the judgment of the *court a quo* is that Mbongwe AJ erred by concluding that the presence of security personnel in the coach could have prevented the respondent from falling; that the appellant had a duty to provide security personnel in the coach that the respondent was traveling in; or by finding that the appellant was negligent by not providing security personnel in the coach that the plaintiff was travelling in are also without merit. Equally baseless were the arguments that the respondent bore a duty to adduce evidence to the effect of the origin and nature of the duty of care, or that she had to lead evidence on what preventative measures and reasonableness of such measures to prevent the injuries that the respondent suffered. A commuter who sustains injuries whilst commuting has no such duty to lead such evidence. It is different where some evidence is tendered, and the enquiry is whether such measures in the circumstances of that particular case were reasonable or not[5].

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5 Passenger Rail Agency of South Africa v Mashongwa [2014] ZASCA 202 (By contrast there was evidence about the security processes that were in place on the facts of that matter); South

11. Without rebuttal evidence, the appellant will be unable to show how on the facts of this particular case it discharged its constitutional obligation to ensure the safety of the commuters including the respondent, as it was by law required to.

12. The further argument made on behalf of the appellant was that the respondent's particulars of claim suggested that she may have suffered the injuries having disembarked the train and her evidence was that she got injured inside the train. This argument too is without consequence. One would have expected the appellant to have addressed any embarrassment before trial.

13. In the circumstances I make the following order:

(a) The appeal is dismissed with costs; and

(b) The matter is remitted to the High Court for the determination of the quantum.

Semenya AJ
Gauteng High Court (Johannesburg Division)

I agree:

Vally J

I agree:

Flatela AJ

African Rail Commuter Corporation v Thwala (2011) ZASCA 170 (In this matter there was evidence to counter of the claimant).

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Date of hearing:	28 July 2021
Date of judgment:	26 August 2021
For the appellant:	E Raubenheimer
Instructed by:	Cliffe Dekker Hofmeyr Inc
For the respondent:	A Sewpersadh
Instructed by:	Raphael & David Smith Inc