REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 41178/2016

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

04 MARCH 2022

…….. ……...

Date **ML TWALA**

In the matter between:

THABO MOHLALA **PLAINTIFF**

And

PASSENGER RAIL AGENCY OF SOUTH AFRICA **DEFENDANT**

JUDGMENT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be 4th of March 2022

TWALA J

[1] The plaintiff, Thabo Mohlala, sued the defendant out of this Court for damages arising out of a train incident that occurred on the 27th of July 2016 at New Canada Station as a result whereof he sustained injuries to his head and broke his left knee and the sequelae thereto.

[2] At the commencement of the trial the parties sought the issue of quantum to be separated from the issue of liability in terms of Rule 33(4) of the Uniform Rules of Court as it was agreed between them in the pre-trial. Therefore, the issue that is for determination before this Court is that of liability/merits.

[3] Furthermore, after the plaintiff had closed its case and during the re-examination of the defendant's first witness, the defendant applied for the reopening of the plaintiff's case in order to afford it the opportunity to cross-examine the plaintiff with regard to the statement or affidavit it deposed to before the protection officer of the defendant. The reason advanced by the defendant was that it did not anticipate that the plaintiff would make an issue

about the contents of the affidavit – hence it did not cross examine him with regard to the contents thereof and did not call the commissioner of oath to testify on how the statement was noted.

[4] Although the plaintiff objected to the re-opening of its case, the prejudice it complained about was with regard to its travelling costs to the premises of its counsel since the matter was heard virtually. Then the defendant tendered the travelling costs of the plaintiff. Since it was in the interest of justice that all the evidence be placed before the court, I granted leave to recall the plaintiff to subject himself to further cross-examination by the defendant.

[5] The background to this case is that on the 27th of July 2016 at about 10h25 the plaintiff and his twin brother, his witness in this case, bought the train tickets and boarded the train at Naledi Station *("Naledi")* with the intention to drop off their curricula vitae at New Canada Police Station and thereafter were to board a train again at New Canada Station *("New Canada")* and proceed to Johannesburg. The train was not full to capacity when it left Naledi but picked up quite a number of passengers as it proceeded on its journey and was full when it reached New Canada. The plaintiff was not familiar with the train route and did not know that the train had reached New Canada until he asked some of the passengers.

[6] Realising that he had reached his first destination, he started to move towards the door in an attempt to disembark the train. His brother was following him but because of the crowd of people who were pushing to embark and others disembarking the train, his brother was a distance behind him. Before reaching the door to disembark the train, the people who were nearer to the door block his way and the train started to depart the platform. He turned around, faced the direction where he came from and where his brother was, and before he

knew it, he was pushed out of the moving train. He fell on his back injuring the back of his head and his left knee. He testified that the doors of the train were wide open at the time he was pushed out of the moving train. The doors of the train were open all the time since he boarded the train in Naledi and there were no guards on the train.

[7] The train moved for a short distance and stopped. The security guards attended on him and asked if he was travelling with somebody and requested him to produce his train ticket. He told them that his train ticket was with his brother who was on the train and the security called his brother and advised him to stay on the train until it gets back to New Canada as it was a Jikeleza. He was then attended to by paramedics whilst he was still on the platform. A police officer came whilst he was relating his story to the security guards and took a statement. The police officer caused him to sign the statement when he was in the ambulance on his way to Helen Joseph Hospital. He did not read the statement nor was it read back to him before signing it.

[8] Thabiso Mohlala testified that on the 27th of July 2016 he was in the company of his twin brother, the plaintiff, when they bought the train tickets and boarded a train at Naledi with the intention to deliver their curricula vitae at New Canada Police Station and further to proceed to Johannesburg. He kept both their train tickets in his backpack. The train was not full with passengers as it left Naledi but picked up more people and it was full by the time it reached New Canada. As they were not familiar with the train route, they asked other passengers if the train was now in New Canada and they started to move towards the door to disembark from the train. The plaintiff was some distance in front and before the plaintiff reached the door, the train started moving.

[9] As the train was moving, he saw the plaintiff being pushed out of the moving train and he fell on the platform. The train moved for some distance but came to a stop, however, he was unable to disembark as there were still people at the door. The doors of the train were continuously open from the time it left Naledi and were still open when the plaintiff was pushed off the train. The was no security guard posted on the train. They never got a chance to disembarking the train at New Canada due to the number of people who were pushing to embark and disembark the train. He deposed to an affidavit but it was not read back to him when he placed his signature on it. He came back to the scene of the incident later with the same train since it was a Jikeleza to find his brother being attend to by the security guards and paramedics.

[10] Ms Sylvia Nyadzeni Nethonzhe *("Nethonzhe"),* testified that she was the train guard of train number 9927 on the 27th of July 2016 having started her shift at 09H25 at the Naledi Depot. Her duties entailed the opening and closing of the doors of the train and to signal to the driver to depart the platforms when she has ascertained that the platform was clear and nobody was in danger. She opens the doors of the train when it reaches the platform of the station by pressing a button or door release which releases the pressure allowing the passengers to open the doors. She again presses the door release button to close the doors of the train before signalling to the driver that it was safe for the train to depart the platform.

[11] As a train guard she occupies the rear cabin of the last coach of the train. The train was a Jikeleza, i.e. it was going around to a number of stations before reaching its final destination, and was not full since it was not pick hour at the time. The door mechanism was working, however, she could not dispute that the doors were not closed when the train left New Canada for she could not see all the coaches from her cabin when the train was stationary in a straight

line especially in New Canada. The train had twelve coaches on that day. At New Canada she continued with her duties, opened the doors when the train arrived at the platform, observed what was happening on the platform and when she was certain that it was safe, she blew her whistle twice to signal that she was about to close the doors of the train, closed the doors of the train and signalled to the driver that it was safe to depart the platform.

[12] Whilst observing what was happening on the platform, she noticed two young men standing on the staircase which was near her coach. As the train started to depart the platform, one of the two young men started to run towards the train. He ran past her coach and attempted to board the train at the second coach from her cabin. He attempted to board the second coach from her cabin and he bumped against the train and fell onto the platform. He stood up and walked towards the staircase. Realising that the plaintiff has collided the train, she signalled for the driver to immediately stop the train and it stopped with about three coaches having left the platform. She called the control office and thereafter disembarked from her cabin to investigate what had happened to the plaintiff but before reaching him, the security guards attended to him – thus she went back to her cabin and signalled to the driver that it was safe to depart the platform.

[13] When the train came back to New Canada, she saw that the plaintiff was still lying on the platform but was being attended to by the paramedics. She did not investigate what was happening but submitted a statement to her manager in Naledi about the incident. She was interviewed by protection officers from the defendant some time later and she confirmed her statement. She testified further that she could not have done anything to save the plaintiff for this happened very fast. The train moved for about ten meters from its stationary

position until it stopped after she rang the safety bell thrice to signal an emergency.

[14] Mr Norman Wayne Liedeman *("Liedeman"),* testified that he is working for the defendant as an investigation officer, however, he does not remember this particular incident nor could he deny that he caused the plaintiff to sign his statement whilst he was in the ambulance about to be transported to Helen Joseph Hospital. All the information he has written on the statement he obtained from the plaintiff but he could not testify about the state of mind of the plaintiff on that day.

[15] Mr Siyabonga Mhlongo *("Mhlongo"),* a protection officer of the defendant stationed at New Canada, testified that his duties are to ascertain that the customers or passengers of the defendant are protected and safe at all times. On the day in question he was standing at the top of the middle overhead bridge over platforms five and six. It's a pedestrian bridge with closed sides of about one comma six *("1.6m")* meters in height and five meters in width. Because of his height he was able to observe what was happening on platform five where train number 9927 came from his behind as he was facing in the Johannesburg direction. The train stopped at platform five for passengers to disembark and embark at the same time.

[16] Mhlongo testified that he observed two gentlemen who disembarked from the middle coaches of the train and were following each other at a distance of about seven meters between them as they approached the staircase which leads to the exit of the station. The staircase is about sixteen meters from where the train had stopped. The train guard blew its whistle twice signalling that the train is about to depart the station. As the train started moving, he saw the gentlemen who was seven meters behind the other turning back and started

running after the train. He tried to open the door of the coach but the train knocked him and he fell onto the platform. He came down the stairs and attended to the plaintiff on the platform and enquired from him as to why he was trying to board a moving train. Plaintiff replied he was trying to retrieve his file or backpack in the train. At the time the plaintiff was with his brother who came back from the staircase to be with him.

[17] Mhlongo then left the plaintiff in the care of the security guard and went to the monitor room to fetch the incident report file *("Liability form")* which he completed with the information he received from the injured plaintiff. Plaintiff is the only person who was injured in the incident and the train was not full at the time since it was not pick hour. The doors were closed at the time the plaintiff attempted to board the moving train. It took him four seconds to get to the plaintiff on the platform but he first waited for the train to stop before he went down the stairs.

[18] It is trite that for the plaintiff to succeed in a case that involves negligence, it must prove that there was a duty of care owed to it by the defendant which the defendant has breached and that the breach has caused harm to occur which resulted in damages.

[19] In *Kruger v Coetzee 1966 (2) SA (A) 430* the Supreme Court of Appeal stated the following:

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.

[20] In *Le Roux and Others v Dey [2011] (3) ZACC SA 274 (CC)* the Constitutional Court stated the following at para 122:

> *"In the more recent past our courts have come to recognise, however, that in the context of the law of delict: (a) the criterion of wrongfulness ultimately depends on a judicial determination of whether – assuming all the other elements of delictual liability to present – it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and (b) that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct."*

[21] In *Country Cloud Trading cc v MEC Department of Infrastructure Development [2014] ZACC 28; 2015 (1) SA 1 (CC)* the Constitutional Court sated the following:

> *"Wrongfulness is an element of delictual liability. It functions to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether 'the social, economic and other costs are just too high to justify the use of the law of delict for the resolution of the particular issue'. Wrongfulness typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirable and overly burdensome to impose liability."*

[22] The central issue in this case is whether the defendant, through its employees, is to blame for the incident which caused the plaintiff injuries to the back of his heard and on his left knee. It is undisputed that the plaintiff was involved in the incident which caused him to suffer injuries on the day in question. However, the dispute is whether the plaintiff attempted to board a moving train or whether he was pushed out of a moving train and fell onto the platform.

[23] It is well established that in civil cases the onus is on the plaintiff to prove its case on a balance of probabilities and where there are factual disputes, in resolving those factual disputes the Court will employ the technique which was summarised as follows in *Stellenbosch Farmers' Winery Group Limited and Another v Martell & Cie SA and Others 2003 (1) SA 11 (SCA):*

> *"Paragraph 5 On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by court in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witnesses' candour and demeanour in the witness-box; (ii) his bias, latent and blatant; (iii) internal contradictions in his evidence; (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions; (v) the probability or improbability of particular aspects of his version; (vi) the calibre and cogency of his performance compared to that of*

other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[24] The defendant's case is that the plaintiff attempted to board a moving train and thereby placed himself in danger of sustaining an injury. In other words, by attempting to board a moving train the plaintiff voluntarily assumed the risk of sustaining an injury or causing harm to himself. The relevant and factual witnesses for the defendant on this point are the train guard and the protection officer.

[25] The difficulty I have with the testimony of the defence witnesses is that they place the plaintiff in two different places at the same time. Nethonzhe completely refuted the version that the plaintiff disembarked from the train but placed the plaintiff and his brother on the staircase next to her cabin. She testified that the plaintiff ran past her cabin and attempted to board the second coach of the train whereas Mhlongo said the plaintiff disembarked from the middle coaches of the train and attempted to board that same coach when the

train started to depart from the station. It should be recalled that the train had twelve coaches on the day and Nethonzhe was occupying the last coach. It is therefore improbable for the plaintiff to have been in two different places at the same time.

[26] Mhlongo's testimony is that he completed the liability form from information furnished to him by the injured plaintiff immediately after the incident. However, he noted the name of the plaintiff on the form as 'Thabo Nhlapo' instead of Thabo Mohlala. Again, he noted on the form that the plaintiff was travelling alone but in Court he testified that the plaintiff was in the company of his twin brother. Furthermore, he noted on the form that there were no witnesses to the incident but he included Ms Maihlole as a witness and left out the other guard saying that it is company policy that they mention only one witness. He said he obtained the ticket from the plaintiff when the evidence of the plaintiff and his brother is that the ticket was with his brother who later joined him after the Jikeleza train came back to New Canada.

[27] It is telling that people who are employed by the defendant specifically to observe what is happening on its train platforms and stations and protect its customers and passengers observe the same incident and come out with different views or see it differently. If Mhlongo witnessed the incident and spoke to the plaintiff whom he said was fine at the time, he would not have written his name as Nhlapo and that he was travelling alone when he completed the form. Furthermore, Mhlongo would not have disclosed Ms Maihlome as the only witness on the form whereas his testimony in court is that there were two people whom he says witnessed the incident. On the same liability form, Mhlongo placed the plaintiff as lying on the platform but in his testimony he said the plaintiff was sited on the bench on the platform.

[28] These contradictions in the evidence of the defence witnesses are material and goes to the root of their credibility. In a nutshell the evidence of both defence witnesses is unreliable because of the contradictions. The improbabilities of their testimony is clear when considering their positioning at the top of the bridge and at the back of the last coach of the train and the distances between the plaintiff and the train. Mhlongo says the plaintiff was less than a meter from the train when he turned around and started running towards it whereas Nethonzhe has about sixteen meters for the plaintiff to cover before reaching the train.

[29] The testimony of Nethonze is that she saw the plaintiff and his brother standing on the staircase and since the platform was clear, she signalled the driver to depart the station. She then saw the plaintiff turning around and running towards the train and he continued to run and went past her cabin in an attempt to board the second coach of the moving train. She only signalled to the driver to stop the train after the plaintiff had fallen. She could not explain why she did not stop the train when she saw the plaintiff for the first time running towards the train. She could not give a cogent explaination why she did not signalled the train to stop when the plaintiff ran past her coach in an attempt to board the second coach from hers except to say that it happened very fast.

[30] Regard being had that her testimony is that the train moved for only ten meters and stopped, it is improbable that the plaintiff would run the distances she alleges and went past her coach to attempt to board the second coach of the train. Even if I were, for a moment, accept her version of the events of that day, it fortifies the contention that she had ample time to signal to the driver to stop the train but failed and neglected to do so. Therefore, the conduct of the defendant was wrongful in that Nethonzhe who was sited at the back of

the train delayed to stop the train when by the exercise of reasonable care and diligence, she should have foreseen the danger of the plaintiff causing harm to himself when he turned around and started running alongside the train and should have immediately signalled for the train to stop. I therefore conclude that, on the version of the defendant, it owed the plaintiff a duty of care and has breached that duty which breach has caused harm to the plaintiff as a result whereof the plaintiff has suffered damages.

[31] In the more recent past in *Mashongwa v Prasa (CCT03/15) [2015] ZACC 36; 2016 (2) BCLR 204 (CC); 2016 (3) SA 528 (CC) (26 November 2015)* the Constitutional Court stated the following when it was dealing with the issue of wrongfulness:

> *"Para 19 What then is this case about? It concerns physical harm suffered by a passenger when attacked and later thrown off a moving train as well at the sufficiency of the safety and security measures employed by PRASA. And the question is whether PRASA's conduct was wrongful. Khampepe J pointed out in Country Cloud that:*
>
> > *'Wrongfulness is generally uncontentious in cases of positive conduct that harms the person or property of another. Conduct of this kind is prima facie wrongful'.*
>
> *In my view, that principle remains true whether one is dealing with positive conduct, such as an assault or the negligent driving of a motor vehicle, or negative conduct where there is a pre-existing duty, such as the failure to provide safety equipment in a factory or to protect a vulnerable person from harm. It is also applicable here.*

[32] The Court continued to state the following in paragraph 20:

> *"Public carriers like PRASA have always been regarded as owing a legal duty to their passengers to protect them from suffering physical harm while making use of their transport services. That is true of taxi operators, bus services and the railways, as attested to by numerous cases in our courts. That duty arises, in the case of PRASA, from the existence of the relationship between carrier and passenger, usually, but not always, based on a contract. It also stems from its public law obligations. This merely strengthens the contention that a breach of those duties is wrongful in the delictual sense and could attract liability for damages".*

[33] The uncontroverted evidence of the plaintiff which is corroborated by his brother is that the doors of the train were open as from the time they boarded the train in Naledi and even at the time it departed New Canada. The plaintiff maintained this version even in his statement which was noted by the investigators of the defendant on the scene of the incident the same day that the train doors were open at all times. Nothing turns on the defendant's contention that the plaintiff has made two affidavits and has failed to disclose this fact in Court. Considering the contents and context of both affidavits, it is undisputed that the plaintiff maintains that the doors of the train were always open on that day. The train guard testified that she only presses the lever to release the pressure so that the doors can be opened by the passengers and presses the lever again to allow them to be closed. She could not dispute that the doors were open when the train left New Canada.

[34] In the Mashongwa case quoted above, the Court stated the following:

> *"Paragraph 46: It bears yet another repetition that there is a high demand for the use of trains since they are the arguably the most*

affordable mode of transportation for the poorest members of our society. For this reason, trains are often packed to the point where some passengers have to stand very close to or even lean against the doors. Leaving doors of the moving train open therefore poses a potential danger to passengers on board."

[35] The Court continued to state the following:

"Paragraph 48: Doors exist not merely to facilitate entry and exit of passengers, but also to secure those inside from danger. PRASA appreciated the importance of keeping the doors of a moving train closed as a necessary safety and security feature. This is borne out by a provision in its operating procedures requiring that doors be closed whenever the train is in motion. Leaving them open is thus an obvious and well known potential danger to passengers.

[36] The testimony of the plaintiff is clear and unambiguous that he boarded the train at Naledi and was unable to disembark at his first stop at New Canada because his way to the exit door was blocked by other people but found himself being pushed out of the train as it departed New Canada. There is no merit in the contention that why is it only the plaintiff that fell from the train at New Canada when he says the were people before him at the door – hence he could not disembark because the train was full. It is not for the plaintiff to know why he was pushed out of the train and why other people did not fall with him when he was pushed out of the train.

[37] The defendant has failed to proffer any evidence why there were no guards and or train marshals posted in the train. It is my respectful view therefore that the irresistible conclusion is that the defendant's conduct was wrongful in not providing the train marshals and or guards on the train who could have assisted

and prevented the plaintiff from being pushed out of the moving train. Furthermore, the defendant's failure to provide guards or marshal in the train was a neglect of the defendant's duty to provide protection and safety for the passengers including the plaintiff which negligence resulted in the plaintiff suffering harm to his body and has suffered damages therefrom.

[38] In the circumstances, I make the following order:

1. The issue of quantum of damages is in terms of Rule 33(4) of the Uniform Rules of Court postponed sine die;
2. The defendant is liable to pay 100% of the proven damages of the plaintiff;
3. The defendant is liable to pay the costs of the action.

TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of Trial: **14th – 17th February 2022**

Date of Judgment: **4th March 2022**

For the Plaintiff: **Advocate L Molope**

Instructed by: **SS Ntshangase Attorneys**
Tel: 011 333 0926
Ref: Mr Ntshangase

For the Defendant: **Advocate K Mokotedi**

Instructed by: **Cliff Dekker Hofmeyr Inc**
Tel: 011 526 1140
Ref: B O'Connor/01994493