IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 18678/2019

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

08 MARCH 2022

Date **K. La M Manamela**

In the matter between:

JIYANE THULISILE ELIZABETH Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA Defendant

DATES OF HEARING: 15 AND 16 NOVEMBER 2021

DATE OF JUDGMENT: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 10h00 on **08 MARCH 2022**.

JUDGMENT

KHASHANE MANAMELA, AJ

Introduction

[1] Just after celebrating her 40th birthday, the plaintiff, Thulisile Elizabeth Jiyane, was involved in a train accident (or rather an accidental fall) on 14 January 2019 at the train station of Merafe, Soweto. She was a passenger in a train travelling from the Johannesburg or Park station in central Johannesburg to Naledi station in Soweto. At the time of the accidental fall she was employed at Morena Cleaning Services in Wadeville, Germiston. She was residing at Senawane or Senaoane, Soweto. The train involved is owned or operated by the defendant, the Passenger Rail Agency of South Africa (PRASA). She sustained serious injuries, including a right distal fracture. She issued summons in March 2019 against PRASA claiming an amount of R4.3 million for general damages, future medical expenses and future loss of income or earning capacity. PRASA is defending the action.

[2] The matter came before me on trial on 15 and 16 November 2021. This was through a virtual connection or platform. Mr RB Mphela, appeared for the plaintiff and, Mr BD Molojoa, appeared for PRASA. I reserved this judgment at the end of the second day of trial. The trial only proceeded with regard to the issues relating to the merits and the issues relating to *quantum* are to be postponed *sine die* by agreement between the parties.

[3] Although the matter had been certified ready for a trial of a duration of 3 to 4 days it only lasted for less than 2 days, including closing legal argument by counsel. This was in fact one of Mr Molojoa's concerns, on behalf of PRASA, when he appeared to urge the Court against proceeding with the trial. He was concerned that the trial will not be completed within the allocated duration. He indicated that PRASA would rely on the evidence of 3 to 4 witnesses, hence the requirement of a duration of 3 to 4 days for the trial. As matters were to develop, the

plaintiff was the only witness to testify in the trial. PRASA actually closed its case without calling any witness.

Evidence (the trial)

[4] As already indicated above, the plaintiff, Ms Jiyane, was the only witness called to testify in the trial. Therefore what appears below is her testimony from the examination-in-chief, cross examination and re-examination. I will deal with legal argument by counsel under a separate heading, below.

Examination-in-chief

[5] The Plaintiff testified that she currently resides in Newcastle, KwaZulu-Natal. She resided in Senaoane, Soweto in 2019 when the accidental fall occurred. She is currently unemployed.

[6] In 2019 the plaintiff was employed by Morena Cleaning Services in Germiston. She travelled by train to and from work, including on 14 January 2019 when the accidental fall took place. She had bought a weekly train ticket. The plaintiff displayed (or held up on the screen) a copy of her train ticket. Mr Molojoa for PRASA stated that there was no objection. I was also assured that the rules of this Court applicable to the discovery of documents had been observed in this regard. The plaintiff testified that she used her train ticket to travel to and from work during the material time. She bought the ticket at the Germiston train station. She had the original of the ticket.

[7] On the date of her accidental fall, she boarded the train in the morning at Merafe station. She disembarked at Park station to connect or take the train to her workplace in Germiston. In

the afternoon, she knocked off from work at 14h00. At 15h00, she took the train from Germiston station to Park station. When she arrived at Park station, she waited for the train to Naledi, Soweto. This train did not arrive on schedule. She then decided to take the train to Vereeniging and disembarked at New Canada. At New Canada she took the train to Naledi.

[8] When the train she took to Naledi arrived at Merafe station it stopped. She rose from her seat to disembark and headed towards the door of the train. The door was open. She had placed her right foot on the platform to disembark when the train moved and she fell to the ground (i.e. the platform). Her left foot was still in the train when her right foot was on the platform, before she fell.

[9] After she fell onto the platform, she was assisted by some unknown people or bystanders to get to her feet. The same people handed back her handbag which had fallen nearby to the ground or platform. These people attended to her right wrist area in an attempt to assist her with the injury. When counsel asked her to indicate the area where she was injured, she pointed her wrist area. After the people had assisted her, she left the train station for her house.

[10] When she arrived home, she tried to rub her hand to alleviate the pain. She also took a pain “blog”. The hand was painful at night and there was even swelling. In the morning she went to the clinic at Tshiawelo, Soweto. The clinic referred the plaintiff to a doctor. The doctor took X-Ray images of her hand and thereafter placed her hand in plaster of Paris. She was also given pills for her pain. The Plaster of Paris was fitted from the plaintiff’s elbow to half-way on her fingers.

[11] She did not consult a medical doctor on the day of the accidental fall and simply went home because she had thought it was a minor issue which would pass. She doesn't know if the people who assisted her were employed at that train station. They were dressed in civilian clothes. She did not see anyone employed by PRASA.

[12] She also does not know how far from the exit/entrance gate (used by the ticket examiners) she fell. But it was not that far, but nearby. She would not be drawn into estimating the distance in terms of kilometres. There was no ticket examiner in sight when she exited the station after her accidental fall.

[13] After she fell, the train moved forward for a short distance and then stopped again. The train door was always open. In fact, the train doors were open for the entire trip from New Canada to Naledi. There was no warning that the train is about to move before she fell. She remembered that she was the first passenger to disembark. She did not report the accidental fall to Metrorail, the operators of the trains. She actually did not know that she had to report it.

Cross-examination

[14] Under cross-examination, the Plaintiff simply stuck to her version under evidence-in-chief. It is not necessary for me to repeat the aspects of the evidence already dealt with above, unless there is something warranting such an approach.

[15] The plaintiff testified that she was alert when the train arrived at Merafe station. She was seated near the door or exit from the train, when the train slowed down. She stood up and proceeded to the door. She agreed that she was not the only person disembarking at that station. Merafe is a busy station. But she was the only person injured. She disembarked from the second

coach. She noticed other passengers from the nearby coaches, also disembarking. None of these passengers were injured, she again testified.

[16] The train made the "*gudlu*" sound (or jerking movement) and then stopped. She said she has no knowledge of where the other passengers were when the train made the "*gudlu*" sound. Her right foot was already on the platform whilst her left was still in the train when the train moved forward and she fell. She did not see other passengers falling. She actually does not have knowledge of this. She estimated by hands gesture that the platform is not at the same level as the train surface. The Court, jointly with counsel, set the estimation at 7 to 15 centimetres. She also mentioned that she was not holding on to a rail or anything when she disembarked. She fell on her right and her right hand and leg were affected. But, the worst affected was her arm. She sustained no other injuries, except for the right distal fracture.

[17] The ordinary civilians at the station pulled her injured hand when trying to assist her. She doesn't know if by pulling they worsened her injury. She also does not know what made the people to come to her rescue. After the bystanders assisted her, she went home, as she trusted or accepted that the injury was not serious. She did not seek help from the offices of PRASA or Metrorail.

[18] She had used a train for six days or a week as at 14 January 2014. She had worked at Morena for a week after the holidays. She had been employed at Morena from October 2018, but had until then used other modes of transportation, such as a taxi or company vehicle. From Merafe station she would walk home on foot. She could not say what the distance was from the station to her home, though.

[19] She does not know how far the train travelled or moved after making the jerking sound. She fell and it moved. There were still other commuters still to disembark from the train. She does not know if there was an alert or signal from the guard or the commuters after the train stopped for the second time. She saw people disembarking after she had been helped to her feet by the bystanders. She could not tell when (i.e. after how long) the train left the platform whilst she was being assisted by the bystanders, as many people had surrounded her.

Re-examination

[20] The re-examination of the plaintiff was very brief. She, among others, testified that there was no rail by the train door to hold on to, but only by the seats. When she was helped to her feet the train was already on its way *en route* Naledi.

Closure of the parties' respective cases

[21] No other witness was called to testify, besides the plaintiff. The plaintiff closed her case after her testimony. PRASA closed its case without calling any witness.

[22] The closing legal argument by counsel were on the second day (i.e. 16 November 2021). Gratefully, counsel had filed written legal argument in the morning before appearing to make oral submissions in the afternoon.

Submissions on behalf of the Plaintiff

General

[23] Plaintiff's counsel reiterated that PRASA is disputing all aspects of liability, save for the citation of the parties and the *locus standi* of the plaintiff. The plaintiff has successfully established all elements of delict and, consequently, the liability of PRASA regarding her

damages, the plaintiff's counsel submitted. It was further submitted that there is no evidence on behalf of PRASA to refute or contradict the plaintiff's testimony on how the accidental fall occurred. This includes under cross examination.[1] Therefore, the plaintiff's unchallenged version ought to be accepted as correct. There is also nothing justifying this Court to reject the plaintiff's testimony.

Negligence

[24] The plaintiff's uncontroverted evidence also clearly confirms that the driver of the impugned train acted negligently when he or she allowed the train to move whilst the plaintiff was still disembarking, and did so without the guard(s) at the station signalling or warning that it was safe for the train to move. The guard was also negligent in allowing the train to depart from the station with open doors, the submission continues. The negligent conduct of both the train driver and guard(s) accords with the test for negligence as set out in *Kruger v Coetzee*.[2]

[25] In *Mashongwa v Passenger Rail Agency of South Africa*[3] the Constitutional Court confirmed the presence of negligence when a train is allowed to travel with open doors.[4] The

[1] *President of the Republic of South Africa and others v South African Rugby Football Union and others* 2000 (1) SA 1 (CC) at par [61] where it was held by the Constitutional Court that: "[t]he institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct." See also *National Employers' Mutual General Insurance Association v Gany* 1931 AD 187 at 199; *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440D, and *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at 14I-15A, par 5.

[2] *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F in which it was held: "[f]or 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."

[3] *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC) (hereafter "*Mashongwa*").

[4] In *Mashongwa* it was held (at par [52]) that "[i]t must be emphasised that harm was reasonably foreseeable and Prasa had an actionable legal duty to keep the doors closed while the train was in motion. Not only has it expressly imposed this duty on itself, its importance was also alluded to in [*Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) (2005 (4) BCLR 301; [2004] ZACC 20 at par 82]. It is also commonsensical that keeping the doors of a moving train closed is an essential safety procedure. Mr Mashongwa would probably

injury sustained under those circumstances is foreseeable and preventable.[5] Therefore, PRASA's negligence has been established by the uncontroverted evidence of the plaintiff.

Wrongfulness

[26] In as far as wrongfulness is concerned, Mr Mphela for the plaintiff again relied on *Mashongwa* for the view that a breach of the legal duty owed by PRASA to its passengers to protect them from suffering physical harm while making use of PRASA's transport services is wrongful in the delictual sense and could attract liability for damages.[6] The legal duty arises from the relationship between PRASA, as the carrier, and persons, such as Ms Jiyane (i.e. the plaintiff in this matter), as passengers. The relationship is usually based on a contract, but not always so, as it also stems from PRASA's obligations in terms of public law.[7]

[27] The plaintiff had a valid train ticket. She was entitled to travel by train as she was lawfully on the train, counsel submitted. The plaintiff ought to have been protected from suffering physical harm.

[28] The protection required from PRASA includes by not allowing the train in which she was been ferried to travel with open doors and to move whilst she was busy disembarking. The absence of the protection constitutes a wrongful breach of legal duty by PRASA. Therefore, the wrongfulness in the conduct of PRASA has been established, the submission is concluded.

not have sustained the injuries that culminated in the amputation of his leg, had Prasa ensured that the doors of the coach in which he was were closed while the train was in motion. It was thus negligent of Prasa not to observe a basic safety-critical practice of keeping the coach doors closed while the train was in motion, and therefore reasonable to impose liability for damages on it, if other elements were proved." See also *Mashongwa* at par [62].

[5] *Ibid.*

[6] *Mashongwa* at par [20].

[7] *Ibid*.

Causation

[29] Regarding the delictual element of causation, counsel for the plaintiff submitted that, the injuries sustained by the plaintiff were factually caused by the train driver and guard's negligent and wrongful conduct. The injuries would have not been sustained had the train driver and the guard not conducted themselves negligently and wrongfully as indicated above.[8] The plaintiff's injuries are closely connected to the negligence and wrongful conduct of PRASA[9]. Therefore, both legs of causation have been established, the submission concludes.

Damages and apportionment of damages

[30] The common cause evidence is that the plaintiff has injured her right hand and experienced pain due to the accidental fall. This, at least, would entitle her to compensation in the form of general damages, due to the pain and suffering and possible future medical treatment. The damages resulted from the negligent and wrongful conduct of PRASA.

[31] No evidence was led to establish any contributory negligence on the part of the plaintiff and therefore no apportionment of damages is possible. PRASA ought to be held liable for 100% of the plaintiff's proven or agreed damages.

Costs of suit

[32] Costs ought to follow the result. The costs should include costs for preparation and attendance of a pre-trial conference on 18 August 2021 held only two days before the trial.[10] Costs of the pre-trial conference were not agreed to be costs in the cause. Counsel's costs for

[8] See pars [24]-[28] above.
[9] *Mashongwa* at pars [68]-[69].
[10] Uniform Rule 37(9)(b) provides: "[e]xcept in respect of an attendance in terms of subrule (8)*(a)* no advocate's fees shall be allowed on a party-and-party basis in respect of a pre-trial conference held more than 10 days prior to the hearing." Also, paragraph 6.2 of the Practice Manual requires counsel to be briefed timeously and be prepared to conduct the trial.

preparation and attendance of the pre-trial conference, as with the attorney, were necessary and should be allowed.

Submissions on behalf of the defendant (i.e. PRASA)

[33] As indicated above, Mr Molojoa appeared at the virtual trial on behalf of the defendant (i.e. PRASA). Below are his summarised submissions. I have omitted those on the common cause facts or on issues where there appears to be no real dispute. The subheadings used below, as with the plaintiff's submissions, are only to facilitate the presentation of the issues thereunder.

No other fallen or falling passengers

[34] Counsel submitted that the plaintiff is the only passenger from the impugned train who fell on the material day when the train made the forward or jerking movement. She ought to have seen the other fallen or falling passengers. The fallen passengers, as with the plaintiff, would have been extended the same courtesy by the bystanders and/or commuters.

Novus actus interveniens

[35] Further, counsel for PRASA submitted that, the bystanders and/or commuters who seemingly "twisted" the plaintiff's wrist may have adversely affected the injury. In her opinion she was not seriously injured. After being reunited with her handbag lost during the fall, she simply walked from Merafe Station to her home in Senaoane.

[36] Counsel further submitted that considering that causation involves two distinct enquiries (i.e. factual[11] and legal[12] causation),[13] the *impromptu* medical intervention at the platform by the bystanders – with no medical qualification – constitutes a *novus actus interveniens*[14] in the circumstances. Without suitable qualification in medicine these individuals probably caused damage to the plaintiff's right distal radius.

Causation

[37] Counsel also referred to the application of the "but-for test" in the determination of causation, as formulated in *International Shipping v Bentley*[15] and reiterated in *ZA v Smith*.[16] And in *Minister of Finance and Others v Gore NO*[17] it was held that, the:

> "[a]pplication of the 'but for' test is not based on mathematics, pure science or philosophy. It is a matter of common sense based on the practical way in which the ordinary person's mind works against the background of everyday life experiences."[18]

[11] *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) in which it was held (at 700E-H) that the factual enquiry relates "to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss", also referred to as "factual causation". The enquiry in this regard is generally conducted by applying the "but-for" test. The latter test is designed to "determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question".

[12] *International Shipping v Bentley* it was held at (700H-I) that second enquiry of causation in the law of delict arises where "the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or [where] the loss is [not] too remote."

[13] *International Shipping v Bentley* at 700E-I.

[14] *Novus actus interveniens*, an "intervening cause is an independent, unconnected and extraneous factor or event which is not foreseeable, and which actively contributes to the occurrence of harm after the defendant's original conduct has occurred." [quoted without footnotes] See Midley, JR. 2016. *Delict* in Law of South Africa (*LAWSA*), 3rd ed, vol 15 (LexisNexis online version - last updated on 31 March 2016) (hereafter *Midley Delict (LAWSA)*) at par 184 and the authorities cited there.

[15] *International Shipping v Bentley* at 700E-J.

[16] *ZA v Smith & another* [2015] ZASCA 75; 2015 (4) SA 574 (SCA) at par 30.

[17] *Minister of Finance and Others v Gore NO* (230/06) [2006] ZASCA 98; [2007] 1 All SA 309 (SCA); 2007 (1) SA 111 (SCA) (8 September 2006).

[18] *Minister of Finance v Gore* at par [33], cited with approval in *Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape* (CCT185/14) [2015] ZACC 33; 2016 (1) SA 325 (CC); 2015 (12) BCLR 1471 (CC) (14 October 2015) at par [46].

[38] What needs to be established by a plaintiff is more likely than not that, but for the defendant's wrongful and negligent conduct, his or her harm would not have ensued. There is no need to establish such causal link with certainty.[19] The Constitutional Court has recently reaffirmed the continued relevance of this approach to causation.[20]

Inconsistency in the description of her injury and cautionary approach

[39] Mr Molojoa for PRASA further submitted that the plaintiff's evidence ought to be assessed with "a huge dose of circumspection and caution". This is due to the obvious and glaring contradiction pertaining to the nature of her injury. The absence of a reference to hospital records during the trial to satisfy the Court as to the exact nature of the plaintiff's injury and the consequential damages therefrom is telling, counsel submitted.

[40] The plaintiff, according to Mr Molojoa, was also not consistent in the description of her injury when she testified. This relates to her explanation why the intervention by the bystanders was necessary or required. In her examination-in-chief she postured her right wrist and signified a more serious injury in the form of a dislocated wrist. The wrist had to be "clicked" back into place. But under cross-examination this was reduced to something not more than a twisted wrist.

Credibility

[41] Counsel for PRASA referred to a number of authorities regarding the assessment of the credibility of witnesses. Some of these authorities are to the effect that the demeanour of a witness is the primary base upon which credibility is assessed; demeanour cannot serve as a

[19] *Minister of Safety and Security v Van Duivenboden* (209/2001) [2002] ZASCA 79; [2002] 3 All SA 741 (SCA) (22 August 2002) at par [25], cited with approval in *Minister of Finance v Gore* at par [33]. See also *Lee v Minister for Correctional Services* 2013 (2) SA 144 (CC) at par [41].
[20] *Mashongwa v Passenger Rail Agency of South Africa* at par [65].

substitute for evidence, but often reflects on and enhance the credibility of oral testimony;[21] the credibility of a witness may be determined by considering factors such as the general veracity or candour and demeanour in the witness box, internal contradictions, the probability or improbability of aspects of her version.[22]

[42] The determination of what is probable requires of a court to consider a number of factors, such as the inherent probabilities of the respective versions, the credibility of witnesses and their reliability.[23] Further, the reliability of a witness is considered primarily against the opportunities she had to experience or observe the particular event.[24]

Determination

[43] The proper approach to the determination of the facts in a civil case, as set out in *National Employers' General Insurance Co Ltd v Jagers*,[25] includes that the onus is ordinarily discharged by adducing credible evidence to support the case of the bearer of the onus. In a civil case the onus rests on the plaintiff and to succeed the plaintiff ought to satisfy the Court on a preponderance of probabilities. For a decision whether the evidence is true or not, the Court would weigh up and test the plaintiff's allegations against the general probabilities. The level of credibility of a witness is inextricably bound with a consideration of the probabilities of the case. In the event of the balance of probabilities favouring a plaintiff, the Court would accept her version as being probably true.[26]

[21] *S v Kelly* 1980 (3) SA 301 at 308B-C.
[22] *Stellenbosch Farmers' Winery v Martell* at 14J-15C.
[23] *Stellenbosch Farmers' Winery v Martell.*
[24] *Stellenbosch Farmers' Winery v Martell* at 15B-C.
[25] *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E).
[26] *National Employers' General Insurance Co Ltd v Jagers* at 440D-G.

[44] In the unreported decision in *South African Rail Commuter Corporation Ltd v Thwala*[27] it was made clear that once the court accepted that the train was stationary when a passenger disembarked and the accidental fall occurred, this would be the end of the case of the claimant passenger, as no liability would ensue once the train was not in motion when the accidental fall occurred.[28] Therefore, it is critical to determine whether the train was moving or not when determining negligence.[29]

[45] Overall, counsel for PRASA submitted that the plaintiff has failed to discharge her onus and should in the premises not succeed as she has not proven that PRASA is liable to compensate her for any damages. There is no evidence of negligence established against PRASA and the plaintiff's claim ought to be dismissed with costs, counsel argued.

Submissions and the applicable legal principles (discussed)

[46] I have considered the submissions and the legal authorities cited by both counsel. I would consider the submissions and the principles from these authorities for the determination. But before I do so, I add and reiterate some of these principles.

[47] The learned author JR Midgley (in *Delict (LAWSA)*) states against the formulation in *Perlman v Zoutendyk*[30] on the law of delict that the basic principle is that all harm caused by wrongful and blameworthy (or culpable) conduct can be recovered by delictual action.[31] Further, that in order to claim compensation for the patrimonial loss, a plaintiff ought

[27] *South African Rail Commuter Corporation Ltd v Thwala* (661/2010) [2011] ZASCA 170 (29 September 2011).
[28] *South African Rail Commuter Corporation v Thwala* at par [18].
[29] *Passenger Rail Agency of South Africa v Baloyi* (69570/2013)[2016] ZAGPPHC785(2 August 2016. In the unreported decision in *Hlongwane v Passenger Rail Agency South Africa* (26582/2016) [2018] ZAGPJHC 401 (29 May 2018) the court granted absolution from the instance as it was found that the train had already stopped when the plaintiff was pushed to the platform and fell.
[30] *Perlman v Zoutendyk* 1934 CPD 151 at 155. See also *Universiteit van Pretoria v Tommie Meyer Films* (*Edms*) *Bpk* 1977 4 All SA 610 (T); 1977 4 SA 376 (T) 383.
[31] *Midley Delict (LAWSA)* at par [26].

to show that she sustained harm (*damnum*) which was wrongfully and culpably (*iniuria*) caused (*datum*) by the defendant.[32]

[48] Recently in *Oppelt v Department of Health, Western Cape*[33] the proper approach for establishing the existence or otherwise of negligence (as formulated in *Kruger v Coetzee*),[34] was endorsed by the Constitutional Court.[35]

[49] The determination whether a *diligens paterfamilias* in the position of the person, such as PRASA in this matter (after foreseeing a reasonable possibility of its conduct injuring another person, such as Ms Jiyane, and causing her patrimonial loss), would take any guarding steps and, if so, what steps would be reasonable, ought to always depend upon the circumstances of a particular matter.[36] It is incompetent to lay down any hard and fast rules in this regard.[37]

[50] In *Sea Harvest Corporation (Pty) Ltd and another v Duncan Dock Cold Storage (Pty) Ltd and another*[38] the Supreme Court of Appeal cautioned against overlooking that in the ultimate analysis the true criterion for a determination of negligence is whether in the specific facts of the matter the conduct complained of falls short of the standard of a reasonable person, although a universally applicable formula appropriate in every case is impossible.[39]

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[32] *Midley Delict (LAWSA)* at par [26] relying on *Smit v Abrahams* 1992 4 All SA 238 (C); 1992 3 SA 158 (C) 160.
[33] *Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape* (CCT185/14) [2015] ZACC 33; 2016 (1) SA 325 (CC); 2015 (12) BCLR 1471 (CC) (14 October 2015).
[34] See footnote 2 above.
[35] *Oppelt v Department of Health, Western Cape* at par [69]. See also *SATAWU and Another v Garvas and Others* 2013 (1) SA 83 (CC) (2012 (8) BCLR 840; [2012] ZACC 13).
[36] *Kruger v Coetzee* at 430E-G.
[37] *Ibid.*
[38] *Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another* (12/97) [1999] ZASCA 87; [2000] 1 All SA 128 (A) (26 November 1999.
[39] *Sea Harvest Corporation v Duncan Dock* at pars [21]-[22], quoted with approval in *Oppelt v Department of Health, Western Cape* at par [70].

[51] Essentially, the concept of negligence is about the blameworthy conduct of a person whom it is established has acted unlawfully. The question to answer in this regard in the current matter would be how a reasonable train driver and guard in the position of the employees of PRASA and Metrorail would have acted during the afternoon of 14 January 2019 at Merafe train station when the plaintiff was disembarking the impugned train.[40]

[52] On the other hand, the question of the reasonable foreseeability of the possibility of one person's conduct injuring another is "a fact bound enquiry" and, therefore, seldom would other cases with materially distinguishable facts be of assistance to the case in hand.[41]

Conclusion

[53] The evidence in this matter is not complicated. It is obviously that of a single witness in the person of the plaintiff, Ms Jiyane. The complication only comes in when one considers the fact that everything is disputed by the defendant, PRASA. But PRASA's denials have reduced in number as the trial went on. I will deal with the relevant issues below.

[54] The basic rule of evidence is that he who asserts must prove.[42] This means that in our law the point of departure is that a litigant requesting a remedy ought to prove that he is entitled to the remedy.[43] Often, the plaintiff or applicant, is the party with the onus.[44] But a defendant sometimes may go beyond just denying the allegations by the plaintiff, by making his or her own positive allegations in order to refute the plaintiff's claim. Such allegations by the

[40] *Oppelt v Department of Health, Western Cape* at par [71]. See also *Blyth v Van den Heever* 1980 (1) SA 191 (A).
[41] *Pitzer v Eskom* (336/11) [2012] ZASCA 44 (29 March 2012) at par 24, cited with approval in *Oppelt v Department of Health, Western Cape* at par [72].
[42] Schmidt, CWH & Rademeyer, H. 2021. *Law of Evidence.* LexisNexis (online version-last updated: June 2021), par 2.2.1.1 at p 2-11.
[43] *Ibid.*
[44] Schmidt *Law of Evidence*, par 2.2.1.1 at p 2-11, relying among others on *Mobil Oil Southern Africa (Pty) Ltd v Mechin* 1965 (2) SA 706 (A) at 711.

defendant, in turn, may be denied by the plaintiff. The defendant as the party which has raised the particular issue would have the onus of furnishing proof. Therefore, it is not always the plaintiff who bears the burden of proof, but the party who asserts (and not the one who denies) who has the onus.[45] The latter aspect will become clearer in a moment or so.

[55] The material part of the plaintiff's evidence, for current purposes, is that in the afternoon of 14 January 2019 on her way home from work, the plaintiff was involved in an accidental fall when she was disembarking from a train operated by PRASA at Merafe station. The evidence further shows that, the train stopped, but whilst the plaintiff was in the process of disembarking and having placed her right foot on the platform whilst her left foot was still in the train, the train moved and she fell onto the platform. The further evidence is that the plaintiff injured her right-hand wrist. Some bystanders at the station helped her get back to her feet and handed her handbag back to her, and also attended to her injured right wrist in order to alleviate the injury sustained. Regarding the extent of the injury sustained the evidence is not clear. In her particulars of claim the plaintiff stated that she sustained injuries which included "the right distal fracture". But in Court her evidence differed slightly as to the degree of the injury under examination-in-chief (being more serious injury in the form of a dislocated wrist) and under cross-examination reducing to what counsel for PRASA labels not more than a "twisted" wrist. She further testified that she didn't think much of the injury after leaving the train station, but it became painful during that night and she subsequently received medical attention.

[45] Schmidt *Law of Evidence*, par 2.2.1.1 at p 2-11, relying among others on *Mobil Oil Southern Africa v Mechin* at 711.

[56] According to the plaintiff's counsel the plaintiff has successfully established all the requisite elements of delict and therefore PRASA ought to be found liable for the plaintiff's damages. There is no evidence to the contrary. There is also no contributory negligence on the part of the plaintiff to justify any apportionment of damages. Therefore, PRASA ought to be held 100% liable for the proven or agreed damages suffered by the plaintiff.

[57] But, counsel for PRASA sought to cast doubt on the credibility of the plaintiff as a witness before the Court. He expressed doubt regarding the fact that the plaintiff was the only passenger who fell when there were other passengers. He further argued that the possibility of a *novus actus interveniens* due to the bystanders having tried to assist the plaintiff. He used the word "twisted" with regard to what was done to the plaintiff's wrist by the bystanders. He also described what was done as "the *impromptu* medical intervention". But with his client having made the averment, PRASA bore the onus to prove the nature and extent of the *novus actus interveniens*. There was no evidence to establish this intervening extraneous factor.[46]

[58] With regard to the alleged inconsistency with the degree or seriousness of the injury sustained, I do not deem it warranted to express any view in this regard. Suffice to state that I find that the plaintiff sustained an injury to her right wrist during the accidental fall. I did not get any impression that she was untruthful about sustaining the injury from the fall. As to the degree of such injury the parties would have an opportunity to argue same when they appear before the Court again for the determination of the postponed matters relating to *quantum*.

[59] To recap: there is no doubt that the plaintiff was on the impugned train operated by PRASA and that she held a valid ticket placing her lawfully on the train. I accept the plaintiff's

[46] *Midley Delict (LAWSA)* at par 184.

evidence that the train stopped, then moved again when she was busy disembarking, she fell and injured herself as a result. It is - no doubt - reasonably foreseeable that if a train stops and then immediately moves again whilst its passengers are disembarking, there will be a possibility of such conduct injuring another. Such would attract liability regarding the subsequent loss.[47] I find that there is such liability on the part of PRASA with regard to the plaintiff's proven or agreed damages.

Costs

[60] Costs will follow the outcome indicate above. I will allow the costs for preparation and attendance of a pre-trial conference on 18 August 2021, provided there was no other pre-trial conference held thereafter. With the subsequent postponement of the trial on 20 August 2021 the requirement for same to be held ten days prior to the hearing was ameliorated. Also bearing in mind the issues in this matter the attendance of the pre-trial conference by both attorney and counsel was necessary and would be allowed.

Order

[61] In the premises, I make the order, that:

a) pursuant to the agreement between the parties the determination of the issues relating to liability is separated from that of the issues relating to *quantum* and the determination of the issues relating to *quantum* is postponed *sine die*;

b) the defendant is 100% liable for the plaintiff's proven or agreed damages;

c) the defendant is ordered to pay the costs of this part of the trial on party and party scale, and

[47] *South African Rail Commuter Corporation v Thwala* at par [18]; *Passenger Rail Agency of South Africa v Baloyi*; *Hlongwane v Passenger Rail Agency South Africa*.

d) the costs in c) hereof should include the costs of plaintiff's counsel and attorney for preparation and attendance of a pre-trial conference on 18 August 2021, provided no subsequent pre-trial conference was held by the parties in which event the costs are disallowed.

Khashane La M. Manamela
Acting Judge of the High Court
08 March 2022

Appearances:

For the Plaintiff	:	Mr RB Mphela
Instructed by	:	Ledwaba Attorneys, Johannesburg Phukubye Attorneys, Pretoria
For the Defendant	:	Mr BD Molojoa
Instructed by	:	Jerry Nkeli & Associates Inc, Pretoria