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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 72237/2019

(1)REPORTABLE: NO

(2)OF INTEREST TO OTHER JUDGES: NO

(3) REVISED:

26 January 2023

In the matter between:

GABRIEL MASIKO BHIYA

Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Defendant

JUDGMENT

SK HASSIM AJ

INTRODUCTION

1. The plaintiff claims compensation from the Passenger Rail Agency of South Africa (“**PRASA**”) for injuries sustained by him when he was allegedly shoved and pushed out of a moving train through carriage doors which suddenly opened just outside Pinedene station on 7 October 2016.

2. The parties agreed to the question of the defendant’s liability to compensate the plaintiff being tried separately.

3. In paragraph 5 of the particulars of claim, the plaintiff pleads amongst others that at all material times he was in possession of a valid train ticket. The defendant does not plead to paragraph 5 at all. This may have been inadvertent. This was not brought to my attention during the trial. It is possible that the parties' counsel overlooked this. Be that as it may, the disputes are identified in the minutes of the pre-trial conference held on 27 January 2022. One of the disputes recorded therein is whether the plaintiff was in possession of a valid train ticket. This is a somewhat ambivalent way of expressing that the plaintiff was not a fare-paying passenger and was therefore not a lawful train user. However, the parties' intention is clear.

THE DISPUTES

4. The defendant disputes that (i) the plaintiff was a passenger on a train as alleged; (ii) if he was a passenger, that he was a fare paying passenger; (iii) the defendant was negligent; (iv) the plaintiff was injured; and (v) the causal connection between the loss and the negligent conduct, if any.

THE ISSUES

The pivotal factual issue

5. A valid train ticket would constitute at the very least *prima facie* proof that the plaintiff was a passenger and a lawful train user. Of course, a ticket is not a *sine qua non* for the defendant's liability. It is however not irrelevant as argued by the plaintiff. This regardless of whether the claim is founded in contract, or in delict based on PRASA'S public law obligations.¹

¹ This was the plaintiff's counsel's submission to avoid the quandary presented by the inability to produce a ticket.

6. The plaintiff has not produced a ticket, nor has he produced any evidence, let alone credible evidence, to prove that he had purchased a train ticket. For this reason, I must decide whether the plaintiff had a ticket permitting him to travel on the train on the day of the incident.

7. The pivotal factual issue is therefore whether the plaintiff was a lawful train user. If he was not, then the legal question which arises is whether the defendant's conduct was wrongful towards the plaintiff.

The legal issue

8. In view of my finding that the plaintiff was not a lawful train user and therefore the defendant owed no duty of care to him, it is not necessary for me to consider whether the alleged injuries sustained were caused by the defendant's conduct. For purposes of determining the legal question alone, I am prepared to accept without finding that the plaintiff was a passenger.

9. The central legal question in this case is therefore whether the defendant's conduct was wrongful towards the plaintiff, bearing in mind the principle that conduct which is unlawful towards one person, may be lawful towards another.²

Lawfulness of a commute on a train

10. Section 11 of the repealed South African Transport Services Act 65 of 1981 (**"the SATS Act"**) prohibited a person from entering a train for the purpose of travelling as a passenger, unless he had with him a valid free pass,³ or a ticket. Section 12(1) imposed a penalty if the passenger travelled on a train without having a free pass or having a ticket available with him but did not criminalise the travel. The SATS Act was repealed by the

² SM Goldstein & Co (Pty) Ltd v Cathkin Park Hotel (Pty) Ltd and Another 2000(4) SA 1019 (SCA) para 7.

³ Defined to mean "authority given in writing by the South African Transport Services or by any officer thereto appointed for the person to whom it is given to travel as in passenger on a railway... under the control of by the South African Transport Services, without the payment of any fare".

Legal Succession to the South African Transport Services Act 9 of 1989 (“**the Legal Succession Act**”). While the latter statute does not expressly prohibit travel on a train without a ticket, it criminalises amongst others travel by train from a station without a ticket. It furthermore, criminalises the failure to produce or present to an authorised person a ticket at the premises of a station where the journey is completed. A court convicting such a person may impose imprisonment or a fine or both. ⁴

11. Item 12(1)(u) of Schedule 1 to the Legal Succession Act puts the end to any doubt that may exist on the lawfulness of the presence on a train without a relevant ticket. If the plaintiff travelled on the train without the ticket relevant to the route in question, he was not a lawful train user.

THE EVIDENCE

12. The first witness was the plaintiff. The second, his sister Ms Thando Bhiya (“**Thando**”). The defendant called one witness, Mr Walter Mashaba (“**Mashaba**”) who is employed as a protection officer at PRASA. He responded to a call to go to the scene where a person allegedly pushed by fellow passengers through an open carriage door of a moving train had landed.

13. Apart from narrating portions of the evidence to give context to the case, I have confined the narrative and the discussion thereof to the central factual dispute: Was the plaintiff a lawful train user on the day in question?

⁴ Section 12(1)(u) provides as follows:

“12. Offences

A person who

...

(u) is present on station premises under the control of [Transnet] or [PRASA], as the case may be, and who—
 (i) intends to travel by train from such station premises; or
 (ii) has completed a train journey at such station premises, and refuses, upon being requested to do so by an authorized employee of the Company or the Corporation, as the case may be, to produce or present a relevant ticket, a letter of authority, cash or other acceptable means of payment for such journey,
 shall be guilty of an offence and on conviction any competent court may impose, in its discretion, a fine or imprisonment, or a fine and imprisonment, or any other suitable punishment within its jurisdiction.”

The plaintiff

14. The plaintiff was a regular commuter on a morning train from his home in Mamelodi-East in the direction of Thembisa (i.e., in a southerly direction) to Midstream, Centurion where he was employed. *En route*, the train would stop at Irene station and then travel onto Pinedene station where he would disembark.

15. On 7 October 2016, he was in possession of a ticket when he boarded the train at the station at Mamelodi on his way to work. He was seated when the train arrived at Irene station. The train stopped at the platform. There was however a delay⁵ in the carriage doors opening. When the doors opened, passengers disembarked. The train proceeded to Pinedene station.

16. The plaintiff was sitting. He stood up and moved towards the door to disembark at Pinedene station. The train was full. Some passengers were sitting, others were standing. The train stopped on the platform at Pinedene station, however, the doors did not open and the train moved away from the platform. Between 200m and 300m away from the platform, the carriage doors opened. Seemingly, in an attempt to steady himself, or for physical support to remain standing, the plaintiff tried to lean against fellow passengers. He was not able to do so and was pushed through the open carriage doors. He fell to the ground and injured his left arm and shoulder.

17. A man in a PRASA branded bakkie and dressed in a PRASA branded T-shirt arrived at the scene where the plaintiff was lying after the fall. It is common cause that the PRASA official is Mashaba (the defendant's only witness). In addition, to asking the plaintiff for his name and residential address, Mashaba enquired whether he had a train ticket. The plaintiff showed the ticket to him. Mashaba looked at the ticket and returned it to the plaintiff. He told the plaintiff to put the ticket into his pocket. He also told the plaintiff that he was willing to assist him to claim compensation from PRASA. The

⁵ He said that the doors "*did not open in time*".

plaintiff's response to the invitation was an expression of a desire to get to a hospital because he was in pain. The plaintiff was transported to a hospital by ambulance.

18. After he was discharged from the hospital the plaintiff, accompanied by Thando, went to PRASA's office because he heard that an injured person could claim from PRASA if he/she had a ticket. He wanted to establish from PRASA whether Mashaba was correct that he had a claim against PRASA. He carried the ticket with him to PRASA and showed it to PRASA employees, at their request; but he did not hand the ticket over to them. The last time he had the ticket in "*his hand*" was when it was put into the boot of his sister's vehicle. His sister assisted him in lodging his claim against PRASA for compensation.

19. It was put to the plaintiff that even if he was on the train, he had not purchased a ticket. His response as translated was "*I hear you*". He argued that if he had not been in possession of a valid ticket why would Mashaba have told him that he had a claim against PRASA.

The plaintiff's sister, Thando Bhiya

20. Thando is the plaintiff's older sister. She holds a degree in microbiology and is reading for a Master's degree in Life Sciences. She testified that she received a call that her brother had been involved in an accident. She visited him at the Thembisa hospital. She took his belongings which included the train ticket and his identity document and mobile phone. After the plaintiff was discharged from the hospital, Thando returned the mobile phone to the plaintiff, but not the identity document and train ticket. She retained them for safe keeping because she was concerned that PRASA may want them for purposes of plaintiff's claim for compensation.

21. Thando visited PRASA. She wanted to establish whether PRASA was aware of her brother's accident. This is one reason for her visit. At PRASA she was directed to Naledi Mamabule ("**Naledi**") who worked in the "Risk" department. Naledi looked at the computer database and asked Thando whether her brother's name was "Bhiya". She

showed Thando the screen on which the plaintiff's name appeared. This satisfied Thando that the accident had been recorded by PRASA.

22. Thando showed the train ticket to Naledi. However, she does not remember whether she handed the ticket to Naledi or not. Her version is that she had the ticket but no longer does; and does not know what happened to it.

23. Naledi told Thando that she would give her the forms needed to claim compensation and advised her not to go to a lawyer but rather submit a claim to PRASA directly. During re-examination, Thando said that Naledi told her "I hope you don't get lawyers", and also told her that she would help Thando if she did not go to lawyers.

24. The other reason why Thando visited PRASA was because she wanted to know how the accident happened because her brother's explanation made no sense.

25. According to Thando she and Naledi had communicated "a lot" by e-mail.

26. Thando made a second visit to PRASA because she wanted to know from Naledi whether she had kept a copy of the train ticket. She also wanted to know whether Naledi had sent her the forms to lodge the claim with PRASA. She asked Naledi for a copy of the statement that had been made to PRASA. (It is not clear from the evidence what statement the witness was referring to).

27. Naledi informed Thando that she could not show the statement to her "*anymore*" and in response to the question whether she had taken the ticket, Naledi said a long time had passed and a lot had happened. I understood the witness to be saying that Naledi could not remember because of the passage of time.

28. Thando did not disclose the date of the second visit.

29. During cross examination, Thando was asked whether she “*encountered*” anyone else at PRASA’s office because the plaintiff’s attorney’s response to the defendant’s request for a copy of the ticket in terms of rule 35(3) was that “*Plaintiff’s train ticket was taken by security personnel employed by the Defendant after the incident and the Defendant’s employee stationed at Bosman (Pretoria) with the following details: NALEDI MAMAPULE (0[...] N[...]) confirmed to our client that she is in possession of an incident 1st report confirming that the Plaintiff was in possession of a valid train ticket.*”. Thando answered that a security guard had directed her to Naledi, and she does not know whether she encountered anyone else.

Walter Masahaba on behalf of the defendant

30. Mashaba has been employed by PRASA for the past 13 years as a protection officer. PRASA’s protection officers patrol the train stations in motor vehicles. Where an incident such as one causing injury to a train commuter occurs, Mashaba would receive an instruction from PRASA’s Joint operations Center (“**JoC**”) to go to the scene. If the passenger has a train ticket, he will examine it to establish the route for which it was issued, and whether it was a monthly or a weekly ticket. The practice he adopts is to note the commuter’s personal particulars, details of the incident, and the details of the ticket on “*any paper*” which I understand to mean a random piece of paper. He would return the train ticket to the commuter. If the commuter did not have a ticket, Mashaba would not make a written note of that.

31. Mashaba does not submit a written report of an incident to the JoC. He would convey the information he had noted on the random piece of paper to the JoC telephonically.

32. At approximately 8h00 on 7 October 2016, Mashaba was at the Centurion train station when he received a call from the JoC instructing him to go to a scene where a person had fallen out of a train.

33. When Mashaba arrived at the scene, he found the plaintiff sitting next to the railway tracks a distance from the platform. He had been injured.

34. Mashaba asked the plaintiff for his personal particulars, as well as the train ticket. The plaintiff told him that he did not have a ticket. He furthermore told Mashaba that the train had failed to stop at Pinedene station. The plaintiff made no mention of anything happening at Irene station. The plaintiff informed Mashaba that the commuters on the train had assisted him in opening the carriage doors by force while the train was in motion and pushed him out of the train thereby suggesting that the plaintiff wanted to leave the train through the carriage doors opened by the commuters at his request.

35. In Mashaba's experience, unless a person travelling on a train without a ticket has been injured, the person would be arrested and fined. The plaintiff was not arrested for travelling without a ticket because he had been injured and had to be taken to a hospital.

36. Mashaba reported the information about the incident to the JoC telephonically. He informed the person who took his call that the plaintiff did not have a train ticket. The JoC maintains a record of incidents.⁶

37. Mashaba was referred to a document⁷ on PRASA's letterhead captioned "Final Report", dated 15 August 2022, seemingly compiled, and signed by "A Mavhungu", who was identified as Mashaba's senior at PRASA.⁸ Mashaba was confronted with the fact that there is no mention in the report that the plaintiff did not have a train ticket.

⁶ During the trial a bundle consisting 10 pages (CaseLine pagination 24-1 to 24-10) was handed in as an exhibit and it was marked "Exhibit B". P 24-8 is a document captioned "Daily Journal" dated "Friday, October 7, 2016". It bears the "PRASA" logo in the top right-hand corner. This document was not introduced into evidence. Nor was the document at p. 24-9 which seems to be a reporting record or an incident record. On p. 24-10 appears an e-mail it seems from the defendant's attorney referring to an "incident report part two" which was intended to have been attached to the e-mail. I cannot understand why these documents were handed up when they were not intended to be used as evidence. I may not have regard to the contents of these documents and have not done so.

⁷ Document was discovered by the defendant.

⁸ Exhibit "B" p.24-3.

38. It was put to him that if the plaintiff had told him that he did not have a ticket, that fact would have been recorded in the final report. He replied that he made a written note on the random piece of paper⁹ that the plaintiff did not have a ticket and mentioned this to the JoC in during the telephonic reporting.

39. Mashaba was taken to an affidavit written, and deposed to, by him on 13 August 2022. It was pointed out to him that there too no mention is made of the plaintiff not having a ticket. He responded that he did not mention anything about a ticket in the affidavit because the plaintiff did not have one. He added that this was not the only occasion he had not noted in writing that a commuter did not have a ticket.

DISCUSSION OF THE ISSUES

The factual issue: Analysis of the evidence

40. The parties' counsel were *ad idem* that there are factual disputes amongst others on whether the plaintiff had a valid ticket. The defendant's counsel submitted that the versions presented by the parties are mutually destructive and that I should apply the dictum in National Employers' General Insurance Co Ltd v Jagers.¹⁰ He also submitted that the plaintiff is a single witness, and in the evaluation of his evidence I should apply the cautionary rule.¹¹

41. The plaintiff's version is that he showed the ticket to Mr Mashaba and after looking at the ticket Mr Mashaba told him to put the ticket into his pocket. Mashaba denied that the plaintiff showed a train ticket to him. Neither version is more probable, either inherently or otherwise, than the other. Unless I am satisfied that the plaintiff's witnesses' evidence is true and that of Mashaba false, the plaintiff has failed to prove on a balance of probabilities that he had a valid ticket and was therefore a lawful train user.

⁹ This was my understanding from the context of this evidence.

¹⁰ 1984 (4) SA 437 (E).

¹¹ There is no cautionary rule in civil cases as in criminal cases. Cf. Daniels v General Accident Insurance Co Ltd 1992 (1) SA 757 (C)

42. There are glaring inconsistencies between the plaintiff's evidence and Thando's evidence. The inconsistencies lead me to conclude that neither are truthful, and their evidence must be rejected.

43. According to the plaintiff, Thando accompanied him to PRASA. Thando's evidence is that she went to PRASA's office and was directed to Naledi. She did not mention her accompanying the plaintiff. My impression of Thando's evidence was that she went to PRASA's offices on two separate occasions, and did so alone.

44. The plaintiff's version is that he had the ticket when he went to PRASA's office, he showed it to a PRASA employee, and he did not leave the ticket at PRASA's office when he left. On the plaintiff's version the ticket would have been in his sister's car after they had been to PRASA because he had showed it to a PRASA employee. Thando testified that she showed the ticket to Naledi but cannot recall whether Naledi handed the ticket back to her and if she had handed it back to Thando what happened to the ticket after that.

45. I am not persuaded that Thando's evidence that she cannot recall what happened to the ticket is true. She had taken pains to safeguard the plaintiff's identity document and the ticket when he was in hospital. Even though she returned his cell phone to him after he was discharged from the hospital, she kept the identity document and the ticket with her for safe-keeping. Against this background, I cannot accept that she cannot recall what happened to the ticket.

46. She does not disclose when she discovered that she could not find the ticket or how soon thereafter she returned to PRASA. Nor does she disclose whether the ticket existed when the claim was lodged with PRASA or when attorneys were instructed to act for the plaintiff.

47. Insofar as her return visit to PRASA is concerned, she does not disclose when this happened.

48. Thando was acutely aware that the ticket was vital to the plaintiff's claim against PRASA. After all, she had taken the trouble to safeguard it up to the time of her visit to PRASA. One would have expected her to ensure that the ticket remained safe, at least until a claim had been lodged against PRASA.

49. Though Thando and Naledi had communicated by e-mail not a single e-mail received from, or sent to, Naledi has been produced. Thando claims that she has searched for the e-mails in her e-mail box but has not been able to find them. In an attempt to explain why she could not find any e-mails to and from Naledi she testified that she searched for the key word "*PRASA*" and not "*Metrorail*" thereby suggesting that she believed that had she used "*Metrorail*" as the keyword she would have found the e-mails to or from Naledi. I cannot accept this explanation. Naledi's e-mail address according to the plaintiff's response to the defendant's notice in terms of rule 35(3) was *N[...]*. If e-mails had been exchanged between Naledi and Thando a search for the keyword "*PRASA*" would have identified the e-mails that had passed. Thando does not explain, nor was she asked, why she believed that if she had searched for the keyword "*Metrorail*" (or that a search for the keyword "*Metrorail*" if done) may have identified e-mails exchanged between Naledi and Thando when the keyword "*PRASA*" which forms part of Naledi's e-mail address did not.

50. Another startling claim by Thando is that she cannot remember whether she received the forms from Naledi to lodge a claim for compensation. Thando knew that she needed forms to submit a claim. One of the reasons for her second visit to PRASA's office was to enquire whether Naledi had sent the forms to her by e-mail. She knew that the plaintiff wanted to claim compensation and needed the forms to do so. If what she testified about had happened she would have recalled more details than she disclosed.

51. The plaintiff is a single witness as to whether he had a valid ticket and whether he showed the ticket to Mashaba. Section 16 of the Civil Proceedings Evidence Act 25 of 1965 provides that judgment may be given in any civil proceedings on the evidence of any single, competent and credible witness. The single witness, more particularly where he is one of the parties, must be credible to the extent that his uncorroborated evidence must satisfy the court that on the probabilities it is the truth.¹²

52. The plaintiff does not disclose when he realised the ticket was missing, whether he took any steps to find it and perhaps most importantly whether he asked his sister where the ticket was. Notwithstanding being cognisant of the importance of a ticket for a claim against PRASA, he took no steps after visiting PRASA to keep the ticket safe. He was content to leave it in the boot of his sister's car. If he had a ticket, one would have expected him to have given specificity as to whether it was a weekly ticket or a monthly ticket, for what route, when and where he bought the ticket, and its period of validity.

53. I am not persuaded that the plaintiff went to PRASA's offices with or without his sister. He gave no details as to, for instance, the date and time of the visit, the location of the PRASA office he visited and how he travelled there. I am also not persuaded he showed the ticket to PRASA's employees at PRASA's offices. This version is at odds with the reply to the defendant's rule 35(3) notice¹³ which suggests that the ticket was taken from the plaintiff at the scene of the incident.

54. Neither counsel questioned the plaintiff about the version given in the plaintiff's response to the defendant's notice in terms of rule 35(3)¹⁴ for the production of the train ticket. The plaintiff did not give the ticket to Mashaba, nor did he leave it at PRASA's office. If Thando had given the train ticket to anyone, it would have been to Naledi. There is no evidence that Naledi was "security personnel". On this basis the plaintiff either lied

¹² Cf. Daniels v General Accident Insurance Co Ltd 1992 (1) SA 757 (C) at 759J-760C.

¹³ Para 29 above.

¹⁴ The "*Train Ticket was not taken by security personnel employed by the Defendant after the incident...*"

to his attorney who prepared the response to the rule 35(3) notice or his evidence that he took the ticket to PRASA's office is untrue.

55. If Thando had accompanied the plaintiff to PRASA then she neither showed the ticket to Naledi nor left it with her because the plaintiff saw the ticket in the boot of Thando's car after the visit. If Thando had not accompanied the plaintiff to PRASA's office, then the plaintiff's evidence that he went to PRASA and showed the ticket to an employee there, as well as his evidence where he last saw the ticket, is false.

56. Neither the plaintiff nor Naledi are reliable witnesses. I am not persuaded that the plaintiff was a lawful train user.

57. Turning to Mashaba's evidence. He denies that the plaintiff showed the ticket to him. Neither the incident report nor the affidavit deposed to by Mashaba on 13 August 2022 refer to the plaintiff's alleged admission to Mashaba that he did not have a ticket. The plaintiff argues that because these two documents do not record that the plaintiff did not have a ticket, one must infer therefrom that he did have a ticket. I do not agree. This is not the only reasonable inference that can be drawn. One can equally infer that the reason why it was not recorded was because the plaintiff did not have a ticket.

58. Mashaba records the particulars on a random piece of paper. If the person has a ticket, he will record the particulars of the ticket such as the route and whether it was a weekly or monthly ticket on the piece of paper. However, if the person did not have a ticket, he made no note of that. He conveys the information he notes on the random piece of paper telephonically to the JoC.

59. It follows from this that Mashaba would not have noted on the random piece of paper that the plaintiff did not have a train ticket and would therefore not have informed the JoC that the plaintiff did not have a ticket. Yet he did so. Under cross-examination Mashaba said that he had made a written note that the plaintiff did not have a ticket. Mashaba, like the plaintiff and Thando, is not a reliable witness.

60. While I am unable to find that Mashaba's evidence is true, this does not assist the plaintiff. In order for me to find that the plaintiff had a ticket I must find that the evidence given for the plaintiff that he had a train ticket is true. I am not able to make such a finding.

61. I am not satisfied that the plaintiff has acquitted himself of the burden of proving that he had a train ticket entitling him to travel on the train. I accordingly find that the plaintiff was not a lawful train user.

The legal issue: Wrongfulness and the duty of care

62. In Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA,¹⁵ Harms JA succinctly restated the elementary principles of delictual liability as follows:

"[12] The first principle of the law of delict, which is so easily forgotten and hardly appears in any local text on the subject, is ... that everyone has to bear the loss he or she suffers... Aquilian liability provides for an exception to the rule and, in order to be liable for the loss of someone else, the act or omission of the defendant must have been wrongful and negligent and have caused the loss. But the fact that an act is negligent does not make it wrongful although foreseeability of damage may be a factor in establishing whether or not a particular act was wrongful. ..."

63. The Constitutional Court in Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as amici curiae)¹⁶ discussed the role of wrongfulness in determining when it is suitable to impose liability on a wrongdoer.

"[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

¹⁵ 2006 (1) SA 461 (SCA)

¹⁶ 2011 (3) SA 274 (CC)

judicial determination of whether — assuming all the other elements of delictual liability to be 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.”

64. The plaintiff's pleaded case is that the defendant owed to him a duty of care to protect and guarantee the safety of commuters including the constitutional rights of commuters to life, humanity, freedom of movement, property, and the rights to be protected against violence and crime. In this regard, the plaintiff relied on amongst others the decision of the Constitutional Court in Irvine Van Sam Mashongwa v Passenger Rail Agency of South Africa¹⁷ in which it was found that the defendant had a legal duty to protect rail commuters from suffering physical harm while making use of its transport services.¹⁸ The *fons et origo* thereof being not only the contractual relationship between a carrier and the passenger but the defendant's public and private duty to prevent harm to commuters.¹⁹

65. Relying on, amongst others, the decision in Irvine Van Sam Mashongwa v Passenger Rail Agency of South Africa, the plaintiff argued that the defendant owed the duty of care to the plaintiff to protect him from physical harm and that the defendant had breached that duty negligently. The pleaded grounds of negligence are the following:

¹⁷ 2016 (3) SA 528 (CC)

¹⁸ Irvine Van Sam Mashongwa v Passenger Rail Agency of South Africa 2016 (3) SA 528 (CC) par 20

¹⁹ Irvine Van Sam Mashongwa v Passenger Rail Agency of South Africa par 20 and par 29.

“6.1 The Defendant failed and/or neglected to take any adequate steps to prevent the incident, when by the exercise of reasonable care, the defendant could and should have done so;

6.2 The Defendant failed and/or neglected to ensure the safety of and/or protect members of the public in general and the plaintiff in particular when the defendant could and should have done so;

6.3 The Defendant failed and/or neglected to [sic] employees, alternatively, failed to employ adequate number of employees on the train and/ or station to prevent members of the public in general and the plaintiff in particular, from being injured in the manner as mentioned, when the defendant could and should have done so;

6.4 The Defendant failed and/or neglected to take care of the rights of the commuters and ensure their safety and well-being, more particularly those of the plaintiff into account, alternatively, properly into account when the defendant could and should have done so;

6.5 The Defendant failed and/or neglected to exercise any, alternatively sufficient control over commuters boarding and disembarking from trains in such a fashion that would have prevented the incident when by the exercise of reasonable control over the boarding and disembarking of commuters onto and from the train, the defendant could and should have done so;

6.3 [sic] The Defendant failed and/or neglected to protect commuters from overcrowding outside or inside the train thus exposing commuters to [sic]stampede[.]”

66. However, the plaintiff overlooked that it is irrelevant whether the alleged negligent conduct breached the duty of care owed to other passengers on the train. Conduct that is unlawful against some, may be lawful against others.²⁰

²⁰ Cf. SM Goldstein & Co para 7; Country Cloud Trading CC v MEC Department of Infrastructure Development par 19

67. The legal question in this case comes down to this: Did the defendant owe a duty of care to the plaintiff where he had no right in law to be on the train? ²¹ If not, then the alleged negligent conduct was not wrongful because no duty of care was owed to the plaintiff.

68. The right of every man that others shall not by their negligence injure him in his person or property imposes the duty on each to exercise due and reasonable care.²² As a general rule, an owner is exempt from liability for an injury caused by conditions of danger on his property to persons not lawfully there ²³, unless the owner is in fact aware of the presence of a trespasser, in which case he is bound to observe a certain degree of care.²⁴

69. The Appellate Division in Farmer v Robinson Gold Mining Company Limited ²⁵ had to confront whether a landowner was liable to compensate a trespasser for injuries sustained on the land. It was established therein by Innes CJ that liability in such circumstances is dependent upon negligence, and in determining whether the wrongdoer owed to the injured person a duty of care, the relationship between the wrongdoer and the injured person is an important element.²⁶

70. The reason why the law exempts the owner from liability to a trespasser is explained in Farmer v Robinson Gold Mining Company Limited. It is not because the act of trespass deprives the injured person of the right to protection ²⁷, but because in the case of a trespasser the owner is not obliged to be careful because he cannot be reasonably expected to anticipate the presence of the trespasser. The ordinary

²¹ Country Cloud Trading CC v MEC Department of Infrastructure Development par 19

²² Farmer v Robinson Gold Mining Company Limited at p521.

²³ Farmer v Robinson Gold Mining Company Limited at p521

²⁴ Farmer v Robinson Gold Mining Company Limited at p522

²⁵ 1917 AD 501

²⁶ At p.519.

²⁷ Farmer v Robinson Gold Mining Company Limited at p.522

reasonable man would, under such circumstances, take no precautions unless he would anticipate such presence.²⁸

71. The following passage from the judgment in Farmer v Robinson Gold Mining Company Limited where Innes CJ discusses the opinion of Street in *Foundations of Legal Liability*, Vol I, p.155 on a wrongdoer's liability to a trespasser explains why and under what circumstances compensation is denied to an injured person whose presence on land or in a vehicle or train is not authorised:

“One reason why the law does not impose a positive duty on the owner of premises to use due care to prevent injury to persons or things trespassing on his premises is this - viz. - injury to trespassers is not reasonably foreseeable as a natural consequence of the owner's lack of care. The law justly assumes in favour of the owner that the trespasser will not ordinarily be there. That this is the true rationale of the owner's exemption sufficiently appears from decisions which hold that where the presence of a trespasser can be in fact foreseen, then the duty to use due care not to hurt such trespasser is imposed.’ These remarks seem to me to be in accord with the principles of the Civil law; and they lead up to a further point, - namely, that the reason for exemption from liability in the case of a trespasser indicates the true limits of that exemption. In most cases the presence of trespassers cannot reasonably be foreseen; but if in any instance a reasonable man would anticipate such presence, then it seems to me that the owner should observe towards the trespassers due and reasonable care. The measure of that care would depend upon all the circumstances, among them being the probability of the exercise of greater circumspection by the trespasser than by the person using his accustomed rights.”²⁹

72. The question whether a wrongdoer was liable for injuries sustained by an unauthorized passenger on a trailer drawn by a tractor arose in Daniels v General Accident Insurance Co Ltd.

²⁸ Farmer v Robinson Gold Mining Company Limited at p.521-522

²⁹ Farmer v Robinson Gold Mining Company Limited at p.522

73. Daniels, despite not being allowed to ride on a trailer drawn by a tractor boarded the trailer which was carrying authorised passengers. During the journey the plaintiff fell off the trailer. King J was called upon to consider whether the driver of the tractor owed to the plaintiff a duty of care. The learned Judge surveyed the South African law on the duty of care owed by a wrongdoer to a person whose presence was not permitted, in other words a trespasser. He found the wrongdoer was not liable to compensate an unauthorised passenger whose presence was also unknown to the wrongdoer. King J found in this regard as follows:

*“The driver's conduct must be judged in the context of a foreseeable kind of harm to a foreseeable class of plaintiff. It is not merely that plaintiff was a trespasser; he was a trespasser of whom the driver was unaware and whose unlawful presence the driver could not reasonably have been expected to anticipate. See Farmer v Robinson Gold Mining Co Ltd 1917 AD 501 at 522; Sasverbijl Beleggings & Verdiskonteringsmaatskappy Bpk v Van Rhynsdorp Town Council and Another 1980 (1) SA 621 (W). See also South African Railways v Metter 1921 CPD 190; Workmen's Compensation Commissioner v De Villiers 1949 (1) SA 474 (C); Paterson v South African Railways 1931 CPD 289 at 294; Bellstedt v SA Railways and Harbours 1936 CPD 397; Fourie v Du Preez 1943 TPD 50; Van Tonder v SA Railways 1936 OPD 9; Miller v Durban Corporation 1926 NLR 241; Veiera v Van Rensburg 1953 (3) SA 647 (T), which are authority for the proposition that in such circumstances no liability attaches to the alleged wrongdoer. It cannot thus be said that the driver of the vehicle drove negligently or that he in any way failed in his duty towards any of his passengers, including plaintiff. It has not been shown that he failed to exercise the care of a reasonable man in the circumstances. Compare Johannesburg Consolidated Investment Co Ltd v Langleigh J Construction (Pty) Ltd 1991 (1) SA 576 (A) at 579C.”*³⁰

³⁰At 761 F-J

74. There is no evidence that the defendant's employees knew that the plaintiff was travelling on the train nor that they should reasonably have anticipated the plaintiff's presence. Not only was the plaintiff a trespasser, he was a trespasser of whom the defendant's employees were unaware and whose unlawful presence they could not reasonably have been expected to anticipate. In the circumstances the plaintiff has failed to prove that the defendant owed a duty of care to him. It follows from this that the plaintiff has failed to prove that the defendant acted wrongfully *vis-à-vis* him, and the plaintiff is therefore not liable for any loss suffered by the plaintiff.

75. Additionally, this is not the type of case where public policy and the legal convictions of the community demand that the defendant compensates the plaintiff.³¹

76. It is well to remember that the element of wrongfulness in an *aquilian* action is directed to whether the law should recognise a claim for the recovery of loss caused negligently in the circumstances of the case at hand. The question is one of legal policy which is determined by "*the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall.*"³²

77. The following observations by Ackermann J in Fose v Minister of Justice,³³ albeit made in the context of punitive constitutional damages where the plaintiffs were already fully compensated, constitute a relevant consideration and apply in assessing whether the legal convictions of the community demand that the plaintiff is compensated in circumstances where he was a trespasser on the train:

"In a country where there is a great demand generally on scarce resources, where the government has various constitutionally prescribed commitments which have substantial economic implications and where there are 'multifarious demands on the public purse

³¹ Cf. Telematrix Pty) Ltd v Matrix Vehicle Tracking and Advertising Standards Authority SA at 468D-E and at 469D-E

³² First National Bank of South Africa v Duvenhage 2006 (5) SA 319 at 321 A-C.

³³ 1997 (3) SA 786 (CC)

*and the machinery of government that flow from the urgent need for economic and social reform', it seems to me to be inappropriate to use these scarce resources to pay ... damages to plaintiffs ...who are already fully compensated."*³⁴

78. A commuter is obliged to purchase a train ticket if he or she wishes to travel on a train.³⁵ Once the commuter has purchased a ticket, he/she is entitled to travel on the train. A carrier and a passenger thus have reciprocal obligations. It is unreasonable to impose liability on the defendant when the plaintiff travelled on the train not only in breach of a statutory obligation to pay a fare, but where the failure to comply with the statutory obligation constitutes an offence. Public policy and the legal convictions of society demand that members of society pay for services rendered to them. The plaintiff wanted to benefit from a free train ride. This incites moral indignation.³⁶

79. It is unconscionable that in these circumstances the plaintiff is exempted from the first principle of the law of delict *"that everyone has to bear the loss he or she suffers"*.

80. The legal convictions of the community do not demand that an injured person who travelled without paying should have made good to him any loss from the resources of the country which are scarcer more than ever and the need for economic and social reform greater than ever. Moral indignation will not be incited if the plaintiff is not compensated. To the contrary it will be incited if the public purse is depleted by a person who wished to derive a benefit without paying for it.

81. In the circumstances I find that the plaintiff has failed to prove wrongful conduct on the part of the defendant. The defendant must therefore be absolved from the instance.

³⁴ par 72

³⁵ Cf. Section 12(1)(u) of the Legal Succession of the South African Transport Services Act 9 of 1989.

³⁶ Makulu Plastics & Packaging CC v Born Free Investments 128 (Pty) Ltd 2013 (1) SA 377 (GSJ) at 382H

82. Lastly, I feel constrained to say something about the conduct of the trial. The examination and cross examination of the witnesses by both counsel was unstructured. The evidence necessary to support a delictual claim and to defend a delictual claim was not adequately elicited in the examination and cross examination of the witnesses. The closing arguments were wholly unhelpful. It seemed to me that little if any thought had been given to identifying the central issue in the case. And no effort had been made to prepare a cogent and well-researched argument about why the claim was good and the defence bad (and vice versa). In the interests of justice and fairness, judicial time is used to research issues which counsel should have addressed in their closing arguments. The result is prejudice to the litigating parties and a waste of judicial time.

ORDER

In the result the following order is made

1. Absolution from the instance is granted.
2. The plaintiff is to pay the defendant's costs.

S K HASSIM AJ

Acting Judge: Gauteng Division, Pretoria
(electronic signature appended)

26 January 2023

Date of hearing: 8 and 12 September 2022

Appearances:

Plaintiff: Adv Marema

Defendant: Adv Ntshangase

This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the plaintiff's legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 26 January 2023.