THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 661/2010

In the matter between:

SOUTH AFRICAN RAIL COMMUTER CORPORATION LIMITED **Appellant**

and

ALMMAH PHILISIWE THWALA **Respondent**

Neutral citation: *South African Rail Commuter Corporation Ltd v Thwala* (661/2010) [2011] ZASCA 170 (29 SEPTEMBER 2011)

Coram: MTHIYANE, HEHER, MAYA, MAJIEDT AND WALLIS JJA

Heard: 16 August 2011

Delivered: 29 September 2011

Summary: Damages – appellant falling on train station platform and sustaining bodily injuries when jostled by fellow commuters alighting from a stationary train – claim based on negligent omission – negligence not proved.

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ORDER

On appeal from: South Gauteng High Court, Johannesburg (Lamont J sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the court below is set aside and the following is substituted:

'Absolution from the instance is granted, with costs.'

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JUDGMENT

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MAYA JA (MTHIYANE, HEHER, MAJIEDT, WALLIS JJA concurring):

[1] The respondent, a 54 year-old woman, sued the appellant in the South Gauteng High Court (per Lamont J) for damages arising out of an incident in which the respondent was injured at the Village Main Station, Johannesburg on 1 June 2007. The trial proceeded only on the issue of liability (which the appellant denied), the parties having obtained a consent order separating the issues of liability and quantum in terms of rule 33(4) of the Uniform Rules. At the conclusion of the trial, the court below found that the appellant's negligence caused the respondent's injury and that it was consequently liable for her damages. The appeal is with its leave.

[2] The background facts are simple and largely undisputed. On her way to work on the fateful morning, the respondent, a regular commuter on the

appellant's train service since she took employment in the Village in 1990, boarded her usual train, 9705, at Orlando West, Soweto between 05h00 and 06h00. The train was more crowded than usual because of a civil service strike which brought more passengers. Her regular coach was full to capacity with seated and standing passengers and she was compelled to take the adjacent one, also crowded, in which she stood for the duration of her ride. As the train approached her station, disembarking passengers pushed their way to the doors sweeping her along with the tide. She was pushed in that throng and fell on the station platform. She was trampled whilst lying there in a daze. She sustained soft tissue injuries on the neck and right arm and a further head injury which caused the momentary loss of consciousness. No one came to her aid in the rush and when she could compose herself, she rose and sought a station official to assist her. She found a ticket examiner, Ms Rennet Tshidzumba, to whom she reported the incident and showed her injuries. Ms Tshidzumba took her to Mr Johannes Maleka, a Metrorail[1] leading protection official and manager who had visited the station to investigate a case of theft. The latter simultaneously interviewed and took sworn statements concerning the incident from both the respondent and Ms Tshidzumba. Thereafter, the respondent was conveyed to hospital to receive medical care.

[3] The only dispute which arose related to whether the train was in motion or stationary when the respondent was pushed and fell. In opening addresses at the beginning of the trial, the parties' legal representatives informed the court below that it was not disputed that 'the [respondent] was pushed from [in]side the train onto the platform and basically the only issue ... is whether the train was stationary or in motion'. According to the respondent's counsel, '[the] only other evidence

1 Metrorail is one of the divisions or business units of services Transnet Ltd, a public company with share capital owned by the State, which include South African Airways, port services and freight rail. It was established in terms of the Legal Succession to the South African Transport Services Act 9 of 1989 to render commuter rail services.

on behalf of the [respondent would] be that the train was overcrowded and that the doors of the train remained open from the previous station up to the station where the incident occurred'.

[4] The respondent's testimony was that she noticed that the train doors were open only when it pulled in at Village Main Station (contrary to her counsel's summation of her case above that the train doors were open from the previous station) and jostling passengers, who pushed her causing her fall, started disembarking before the train came to a complete standstill. She claimed to have told both Ms Tshidzumba and Mr Maleka that she was pushed from the train whilst it was still moving, albeit slowly. However these officials, who testified for the appellant, were adamant that she reported that the train had already stopped when she was pushed to the platform and fell.

[5] In his evidence, Mr Maleka referred to two documents which he said recorded the respondent's report to him. In the statement she gave to Mr Maleka mentioned above – which he took in her language, Zulu, translated into and wrote in English and then read back to her for confirmation – the respondent said:

'On its arrival at Village Main the train stopped and as I was about to disembark the train I was pushed by commuters who were also disembarking. I then fell out of the train to the ground with my right shoulder. The train was overcrowded. I then went to the ticket offices ... and looked for ticket examiners as they were not yet at the station. At about 7h10 I saw one of the ticket examiners arriving and I reported the incident to her.'

[6] In the appellant's Railway Occurrence Reporting (Liability) Report completed by Mr Maleka contemporaneously with the execution of the respondent's affidavit during her interview, one of the pro forma questions was whether the train was in motion when the accident occurred. Mr Maleka had checked the answer 'No'. He emphasized the importance of this aspect in his

evidence stating that 'it very important … it is one of the major question[s] put on the liability form … and the information which I must write into that form, I must be very certain that it is correctly related to me, what I am writing down'.

[7] Ms Tshidzumba's account was similar and, despite lengthy cross-examination on this point, she steadfastly maintained that the respondent's report was that the accident took place after the train had stopped. This testimony tallies with her affidavit recorded by Mr Maleka, in the respondent's presence, which reads:

'[The respondent] accessed the train at about 05h40. She was inside the train ... at Village Main and was about to disembark ... She alleges that immediately after the train stopped commuters from her back pushed her out of the coach ... and she fell to the ground on her right shoulder. Train according to her was overcrowded.'

[8] The driver of train 9705, Mr Johannes Fourie, testified. He explained that he cannot see the 12-coach train from his driving post in the front as he faces forward and relies on train guards who man the coaches to operate the doors. It is these guards who open and close the train doors (which are inspected daily for mechanical faults and functioned properly at the material time) by pressing certain buttons to release or engage the door locking mechanism when it is safe for passengers to board or disembark. He said he is able to hear, from his driving seat, the whooshing sound from air pressure being released when the doors open after he stops the train. When the train departs the guards sound a bell to alert him that it is safe to drive. From his account, there appears to have no deviation from this procedure on the relevant morning. His train ran smoothly and no mishap was brought to his attention. He sought to dispute that the train was overcrowded but conceded in cross-examination that he could not deny such evidence as he did not and could not see what happened in the coaches behind him.

[9] The court below rejected the respondent's evidence that the train was moving when the accident occurred. It found it improbable that 'the general throng of passengers of whom she was one would' exit a moving train and concluded that the train was stationary when the respondent, pushed along by other passengers, disembarked and fell. The court however accepted the respondent's version that the train was overcrowded. On that basis it found that the harm suffered by the respondent – that a frail commuter such as the respondent, travelling on a crowded train during peak hours, might be pushed, fall and suffer injury – was foreseeable and that the appellant 'was under an obligation to take steps to prevent' it. The court consequently held that by allowing the train to be overcrowded, the appellant negligently failed to take reasonable steps to prevent harm which was foreseeable and that such negligent omission was the direct cause of the respondent's injuries giving rise to liability for her damages.

[10] In her particulars of claim the respondent based her cause of action on the appellant's alleged breach of its 'legal duty, alternatively a duty of care ... to ensure the safety of the public ... making use of such services as passengers or otherwise'. It was alleged that the respondent 'was pushed, by persons unknown to her, from the moving train, through open coach doors and fell on the platform'. The grounds of negligence were then pleaded as follows:

'6.1 The Defendant failed to ensure the safety of members of the public in general and the Plaintiff in particular on the coach of the train in which the Plaintiff travelled;

6.2 The Defendant failed to take any or adequate steps to avoid the incident in which the Plaintiff was injured, when by the exercise of reasonable care it could and should have done so;

6.3 The Defendant failed to take any or adequate precautions to prevent the Plaintiff from being injured by moving train;

6.4 The Defendant failed to employ employees, alternatively, failed to employ an adequate number of employees to guarantee the safety of passengers in general and the Plaintiff in particular on the coach in which the Plaintiff intended to travel;

6.5 The Defendant failed to employ employees, alternatively, failed to employ an adequate

number of employees to prevent passengers in general and the Plaintiff in particular from being injured in the manner in which she was;

6.6 The Defendant allowed the coach of the train in which the Plaintiff was travelling to be overcrowded;

6.7 The Defendant allowed the train to be set in motion without ensuring that the doors of the train and coach in which the Plaintiff was travelling were closed before the train was set in motion;

6.8 The Defendant took no steps to prevent the coach in which the Plaintiff was travelling from becoming overcrowded;

6.9 The Defendant allowed the train to move with open doors and failed to take any, alternatively, adequate steps to prevent the train from moving with open doors;

6.10 The Defendant failed to keep the coach safe for use by the public in general and the Plaintiff particular;

6.11 The Defendant neglected to employ security staff on the platform and/or the coach in which the Plaintiff was travelling to ensure the safety of the public in general and the Plaintiff.'

[11] The test by which to determine delictual liability is trite. It involves, depending upon the particular circumstances of each case, the questions whether (a) a reasonable person in the defendant's position would foresee the reasonable possibility of his or her conduct causing harm resulting in patrimonial loss to another; (b) would take reasonable steps to avert the risk of such harm; and (c) the defendant failed to take such steps.[2] But not every act or omission which causes harm is actionable. For liability for patrimonial loss to arise, the negligent act or omission must have been wrongful.[3] And it is the reasonableness or otherwise of imposing liability for such a negligent act or omission that determines whether it is to be regarded as wrongful.[4] The onus to prove negligence rests on the plaintiff and it requires more than merely proving that harm to others was reasonably

2 *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F; *Mkhatshwa v Minister of Defence* 2000 (1) SA 1104 (SCA) paras 19-22; *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 (1) SA 827 (SCA) para 22.

3 See, for example, *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* 2006 (1) SA 461 (SCA) para 12; *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) para 10; *Charter Hi (Pty) Ltd v Minister of Transport* [2011] ZASCA 89.

4 *Trustees,Two Oceans* above para 11; *Shabalala v Metrorail* 2008 (3) SA 142 (SCA) para 7.

foreseeable and that a reasonable person would probably have taken measures to avert the risk of such harm. The plaintiff must adduce evidence as to the reasonable measures which could have been taken to prevent or minimise the risk of harm.[5]

[12] It is settled that the appellant (a corporation whose main object and business in terms of the Legal Succession to the South African Transport Services Act 9 of 1989 under which it was established, is to provide rail commuter services in the public interest and generate income from the exploitation of rail commuter assets on behalf of the State)[6] carries a positive obligation to implement reasonable measures to ensure the safety of rail commuters who travel on its trains.[7] Such obligation must give rise to delictual liability where, as was pleaded here, the risk of harm to commuters resulting from falling out of crowded trains running with open doors is eminently foreseeable.

[13] Reverting to the facts of the present matter, I respectfully agree with the court below that the train must have stopped before the respondent was unceremoniously ejected from her coach. Any other conclusion would necessitate a finding that Mr Maleka and Ms Tshidzumba who interviewed the respondent directly after the accident, for an unknown reason and no obvious gain to them, somehow concocted a grand scheme to cover for the appellant and, to achieve that goal, falsified documentation by deliberately recording a report contrary to what the respondent told them and were prepared to perjure themselves in court. Notably, it was not put to either of them in their thorough cross-examination that they were lying in this regard to afford them an opportunity to deal with such a charge. There is, in my view, simply

5 *Shabalala* para 11.
6 See ss 15(1), 22 and 23(1) of the Legal Succession to the South African Transport Services Act 9 of 1989.
7 *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) paras 82-88.

no basis to draw the far-fetched conclusion of a conspiracy on the acceptable evidence.

[14] I may just add that I accept that it is common human behaviour for railway commuters, particularly during morning peak periods when most are in a hurry to get to work, to rush to the doors of a coach, when it nears their destination, so as to disembark quickly. This, in fact, is supported by the respondent's evidence that 'if the train is about to stop or to arrive at the station, people push each other ... because they want to get off the train'. I find it most unlikely, as did the court below, that the majority of the passengers, no matter how much in a rush they are, would engage in such a dangerous exercise as to exit a moving train as the respondent would have it. What seems more probable is that when the doors of the stationary train opened, the respondent was trapped in the surge of dismounting passengers, shoved in the rush and lost her balance.

[15] But I have a difficulty with the factual finding made by the court below that the train and, in particular, the respondent's coach, was 'overcrowded', from which the inference of negligence was drawn. The sum of the respondent's evidence on this aspect was merely that the train was 'very full … even up to the door'. She neither pleaded nor established in evidence that the appellant had a duty to regulate the numbers of its rail passengers nor what reasonable measures it ought to have implemented in that regard to ensure passenger safety that it omitted to take. She led no evidence, for example, on the passenger capacity of the coach; if that number was exceeded, how many passengers remained in the coach when the train reached her station etc. One cannot assume simply from the fact that there were standing passengers that the coach carried an impermissible number as the appellant's policy and applicable safety standards might well legitimately have allowed that practice.

[16] I say this aware that the appellant's policies and legal obligations in the conduct of its rail service are, of course, peculiarly within its knowledge. So too is the nature and extent of the relevant precautionary measures it must take to ensure rail commuter safety. However, the fact remains that it did not have to prove that it could not reasonably have prevented the respondent's fall. The record shows no indication that the respondent attempted to ascertain this kind of evidence by, for example, employing the mechanisms provided by the rules of court such as seeking discovery, requesting particulars for trial etc. The nature of the respondent's onus was such as to oblige her to adduce evidence that gave rise to an inference of negligence. Only then would the appellant have had to rebut that inference by adducing evidence relating to the measures it took to avert harm. But the onus of proving that such measures were inadequate and unreasonable in the circumstances would nevertheless remain on the respondent.

[17] The question which remains for determination is whether on the evidence that the respondent fell and sustained injury as a result of being pushed from a stationary train by impatient fellow commuters – a happenstance over which the appellant was not shown to have control – she discharged the onus resting upon her, of proving on a balance of probabilities that the appellant was negligent: bearing in mind that whether or not conduct constitutes negligence ultimately depends upon a realistic and sensible judicial approach to all the relevant facts and circumstances.[8]

[18] As indicated above, the premise of the respondent's case was that she fell and sustained injury as a result of being pushed by an excessive crowd 'from inside' a moving train. Quite apart from the finding that the evidence does not

8 *Mkhatshwa* para 23.

establish that she was pushed and fell because the coach was overcrowded and her failure to establish the reasonable precautionary measures that the appellant could have taken to prevent passengers knocking one another down when disembarking from stationary trains, the respondent's single, insurmountable hurdle is her failure to establish that the train was in motion when she was ejected from it. It seems to me that once the court accepted that the train was stationary when the respondent disembarked and the accident occurred, that should have been the end of the respondent's case. This, clearly, was the result contemplated by the parties themselves when they defined the issue; that only a finding that the train was in motion when the respondent was pushed and fell would give rise to liability. The court below thus erred in this regard and the appeal must succeed.

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

1 The appeal is upheld with costs.

2 The order of the court below is set aside and the following is substituted:

'Absolution from the instance is granted, with costs.'

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MML Maya

Judge of Appeal

APPEARANCES

FOR THE APPELLANT:	M Smith Instructed by Cliffe Dekker Hofmeyer Inc, Johannesburg McIntyre & Van der Post, Bloemfontein
FOR THE RESPONDENT:	JC Pieterse Instructed by Edeling Van Niekerk Inc, Johannesburg Lovius-Block, Bloemfontein