



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Not Reportable

Case no: 569/2020

In the matter between:

**PASSENGER RAIL AGENCY
OF SOUTH AFRICA**

Appellant

and

JOHANNA DIPUO SITHUSE

Respondent

Neutral citation: *Passenger Rail Agency of South Africa v Sithuse* (Case no 569/2020) [2021] ZASCA 78 (11 June 2021)

Coram: WALLIS and ZONDI JJA and LEDWABA, CARELSE and ROGERS AJJA

Heard: 21 May 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 11 June 2021.

Summary: Delict – train colliding with a commuter at train station – whether negligence on the part of rail agency established – onus to establish negligence is on the claimant and the effect of the presumption against suicide does not displace the onus – versions of the parties mutually destructive – evaluation of probabilities.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Kumalo AJ with Mothle J concurring and Van der Westhuizen J dissenting) sitting as court of appeal:

- 1 The appeal is upheld with costs.
- 2 The order of the full court is set aside and replaced with the following order:
'The appeal is dismissed with costs.'

JUDGMENT

Zondi JA (Wallis JA and Ledwaba, Carelse and Rogers AJJA concurring)

[1] On 22 August 2008 at about 15h55 at Rosslyn Station in Pretoria, the respondent, Ms Johanna Dipuo Sithuse, then 21 years of age, was hit by a train driven by one Johannes Spies, an employee of the Passenger Rail Agency of South Africa (PRASA). As a result of the collision, Ms Sithuse sustained serious bodily injuries. She instituted an action for damages against PRASA in the Gauteng Division of the High Court, Pretoria alleging that its negligence caused her injuries. In that action Ms Sithuse had cited the MEC for Transport, Gauteng as a second defendant, but she later withdrew her claim against the MEC.

[2] PRASA denied liability. It alleged that the collision was caused by Ms Sithuse's own action in unexpectedly throwing herself in front of a moving train. The trial court ordered, by agreement between the parties, that the issue of liability and the quantum be separated and that the issue of liability be heard first before other issues. In the event, the trial proceeded before Senyatsi AJ on a separated basis. After hearing the evidence Senyatsi AJ found that Ms Sithuse had failed to prove that PRASA, or its employees, were negligent and dismissed her claim.

[3] Aggrieved by the trial court's judgment, Ms Sithuse, with its leave, appealed to the full court of the same Division. The full court (Kumalo AJ with Mothle J concurring and Van der Westhuizen J dissenting) upheld Ms Sithuse's claim with costs. It held

that PRASA was negligent by failing to deploy security personnel at the station on the day in question to enforce the rules, which were put in place to safeguard the well-being of commuters. As regards causation, the full court held that the incident could have been averted 'but for the lack of supervision of the activities of the commuters and lack of enforcement of the rules that are in place'. PRASA's appeal, which is with the leave of this Court, is directed against the findings and conclusions of the full court.

[4] The issue is whether Ms Sithuse had established that PRASA was negligent and whether such negligence caused her injuries.

[5] The basis for liability on the part of PRASA is set out in Ms Sithuse's particulars of claim as follows:

'6. At all material times hereto, and more specifically on 22 August 2008, [PRASA] had a duty of care to rail commuters and more specifically to the Plaintiff to:

6.1 Ensure proper supervision of [its] railway station facilities;

6.2 Ensure that security services alternatively personnel were on duty at railway stations at all times in order to monitor commuter activities;

6.3 Provide safe and secure commuter facilities for use by members of the public;

6.4 Ensure that adequate safety measures are implemented in order to protect commuters utilising [PRASA's] rail services and infrastructure;

6.5 Ensure that proper crowd control measures were implemented at [its] stations;

6.6 Ensure appropriate and adequate measures are implemented to ensure the safety of rail commuters at [its] stations;

6.7 Provide a safe rail service to members of the public.'

[6] Ms Sithuse alleged that the incident was caused by the negligence of PRASA, alternatively a breach of the duty of care by PRASA, alternatively by its employees acting within the course and scope of their employment with PRASA, alternatively acting in the execution of their mandate. The negligence and causation aspects of her claim were pleaded as follows:

'7.1 [PRASA] failed to properly alternatively adequately supervise commuter activities at the Rosslyn Station;

7.2 [PRASA] failed to ensure that security services alternatively personnel were on duty at railway stations at all times in order to monitor commuter activities;

7.3 [PRASA] failed to provide safe and secure commuter facilities for use by members of the public;

7.4 [PRASA] failed to ensure that adequate safety measures were implemented in order to protect commuters utilising [its] rail services and infrastructure;

7.5 [PRASA] failed to ensure that proper crowd control measures were implemented at [its] stations;

7.6 [PRASA] failed to ensure that appropriate and adequate measures were implemented to ensure the safety of rail commuters at [its] stations;

7.7 [PRASA] failed to prevent the incident when by the exercise of reasonable care [it] could and should have done so.'

[7] Ms Sithuse alleged that, as a result of the incident and PRASA's negligence, alternatively breach of duty of care as aforesaid, she sustained multiple injuries, including the amputation of the right mid-forearm and hand and dislocation of the left femur.

[8] PRASA admitted that it owed a legal duty to rail commuters, but denied that it was liable for the incident which gave rise to Ms Sithuse's claim. In particular, PRASA denied that Ms Sithuse was pushed from the platform into the path of the moving train, as alleged by her. It contended that the incident was caused by Ms Sithuse's sole negligence. PRASA set out the respects in which it contended that Ms Sithuse was negligent as follows:

'5.3.1 She threw herself in front of a moving train;

5.3.2 She entered the path of the train or railway at a time and place when it was unsafe, dangerous and inopportune to do so;

5.3.3 She failed to avoid the incident when by the exercise of reasonable and proper care and skill; she could and should have done so;

5.3.4 She failed to take proper cognizance of the presence and actions, alternative[ly] visibly intended actions of the train driver;

5.3.5 She knowingly and voluntarily exposed herself to the risk of being injured; and

5.3.6 She failed to keep a proper lookout.'

[9] PRASA went on to state that it was the aforesaid negligence that was the cause of, alternately contributed to, Ms Sithuse's damages. In that latter event, PRASA sought a reduction of such damages as might be awarded to Ms Sithuse.

[10] The minutes of the pre-trial conference recorded Ms Sithuse's version regarding the occurrence of the incident as follows:

'[O]n the 22nd of August 2008 at the Rosslyn Station, she was waiting for a train to take her to Mabopane.

Due to the fact that she commutes on a daily basis she was aware of security guards who are on the platform to manage commuters wearing half coats which are yellow and reflective and are usually easily spotted amongst the crowd.

On the day present, there were no such security officers.

She was waiting on the platform and was first in line when she was pushed from the platform in front of a moving train which had not come to [a] halt.

She sustained multiple serious injuries and [in] particular the loss of her right hand.'

[11] PRASA's version was that Ms Sithuse 'jumped onto the rail [in] the face of an oncoming train. The driver saw her, applied his brakes, but could not stop the train timeously'.

[12] Before dealing with the evidence of the witnesses, it is necessary to have regard to some of the photographs and a sketch plan depicting the layout of Rosslyn Station. The witnesses referred to these documents in order to locate certain points relevant to the incident.

[13] It is apparent from the photographs and the accompanying sketch plan that Rosslyn Station has only two platforms for passengers, marked 'platform 01' and 'platform 02' respectively, situated on each side of a single central platform. The platforms are fairly long. Access is obtained from an overhead pedestrian bridge leading down to the platform, with platform 1 to the right as commuters walk down the stairs and platform 2 to the left. The photographs, among others, show ample safety signage at Rosslyn Station detailing the dangers, in particular, of stepping over the yellow line. The yellow line runs parallel to the edge of each side of the platforms and at least half a metre from the edge of the platform. Ms Sithuse said that she was aware that commuters should stand beyond the yellow line away from the platform edge.

[14] Ms Sithuse testified that, on the day in question, she was returning home from work in Daspoort, Pretoria. She left her workplace at about 13h00 without permission,

as she was angry following a work-related dispute she had had with her supervisor. She took a train at Daspoort Station thinking that it was travelling to Mabopane. The train travelled through Mountain View, Wonderboom, Pretoria North, Wolmerstan and Winterneest train stations. On arrival at Winterneest Station, she realised that she had taken the wrong train. The train proceeded to Rosslyn Station instead of to Akasiaboom Station, and thence to Mabopane. It arrived at Rosslyn Station at about 15h00. According to Ms Sithuse, the train arrived at platform 1 and she disembarked. (This accords with the evidence that trains travelling away from Pretoria North in the direction east to west towards De Wildt ran past platform 1). Having realised her error, she intended to catch a train travelling from De Wildt to Pretoria North Station, where she would get a connecting train to Mabopane.

[15] Ms Sithuse, so she testified, waited for the train to Pretoria North Station at platform 2. There were about 100 commuters on the platform. She observed that there were no security personnel at the station to direct commuters where to stand in relation to the yellow line. Two or three express trains drove past Rosslyn Station through platform 1, while she was waiting. Express trains do not stop at Rosslyn Station. She waited for some time at the station. After a while the train Ms Sithuse intended to board approached platform 2.

[16] Ms Sithuse's evidence as to what happened shortly before the accident is as follows:

'But now, other commuters at that time on a Friday afternoon what did you see on the station with regards to other commuters? --- The train came along and it stopped by the robot but it came slowly but surely.

Okay that is it what I wanted to establish, you to testify. It stopped at the robot and then it came in slowly. --- Yes, M'Lord.

All right now, you already testified you wanted to get on that train and did you get the impression the people around you also wanted to do that? --- Yes.

Okay, now you already testified it came in slowly. Now in your own words, tell us what happened from there on? Slowly that the court can make notes please? --- Whilst we were still standing there and the train came on slowly applying brakes and there were some commuters who were pushing each other. We were standing beyond the yellow line and the pushing continued.

Yes? --- And I fell in front of the third coach.

Now just stop there please. What was the reason that you fell in front of the first coach? --- I lost balance as I was pushed.

In as far as the defendants may put to you that you jumped in front of the train out of your own, you threw yourself in front of the train, what is your comment on that? --- No, I did not throw myself I did not feel the pain of the arm but I could feel my leg, my right leg pulling up.'

[17] Under cross-examination her evidence was as follows:

'Do you remember when or what time the train stopped at the robot, what time was that? --- I did not check time but that is the train in which the accident occurred.

How long was this train stopped for at the robot? --- It stood for quite a long time.

...

Now the pushing and shoving is it pushing you into the yellow line zone or are you still pushing and shoving each other beyond the yellow line? --- When the train approaches and it is nearer the people will then start pushing each other. They then start ignoring that yellow line.

When you are saying ignoring that yellow line do you mean that there are people who then [go] to enter beyond that yellow line into that zone between the yellow line and railway tracks? --- Yes.

Now when that begins happening, where do you find yourself? --- I was amongst the people. Amongst the people are you saying you are amongst the people who are now themselves beyond the yellow line? --- Yes.'

[18] Ms Sithuse's version as summarised above was simple and apparently consistent. She had inadvertently caught the wrong train and, when she realised the mistake, she alighted from it at platform 1 at Rosslyn Station. She then crossed to the other side of the platform to platform 2 in order to take a train in the opposite direction back towards Pretoria North, where she could get off the train and catch a train heading to Mabopane. When a suitable train arrived and was drawing to a halt at platform 2 she was pushed and jostled by other commuters as a result of which she fell under the wheels of the third coach.

[19] The evidence on behalf of PRASA flatly contradicted this version. Mr Spies testified for PRASA. He was on duty as a train driver at the time of the accident on train 9451 on its way to De Wildt Station from Pretoria Station. His duty at each station was to bring the train to a complete stop at the designated mark, whilst remaining

within the speed limit. As he approached Rosslyn Station, he guided the train towards platform 1. Mr Spies then applied full brake and brought the train down to a speed of approximately 15 to 20 km/h. As he approached the designated mark, he noticed a group of approximately 15 to 20 women standing in the shade of the overhead pedestrian bridge on platform 1.

[20] The women were standing well clear of the yellow safety line. As the train approached the designated mark, Mr Spies heard loud screams emanating from them. As he looked closer, he noticed one woman emerge from the group and approach the train by crossing the yellow line safety zone. She was the only person standing inside the yellow line. He testified that passengers are not supposed to cross the yellow line before a train comes to a complete stop.

[21] Mr Spies immediately applied the emergency brake. At the same time he sounded the train's hooter, which was very loud. When he blew the hooter the female person panicked and she tripped. She fell between the tracks and the train hit her. The train came to a stop approximately five metres past the point of impact.

[22] Mr Spies emerged from the driver's cab and saw Ms Sithuse lying underneath the motor coach. He observed that she appeared to have sustained an amputation of the right hand. Mr Spies called Central Train Control, who closed the line and called the ambulance. Mr Spies waited for the ambulance to arrive. The train was stationary at platform 1 for approximately an hour. In the important respect that the accident occurred next to platform 1 and involved a train travelling from Pretoria North to De Wildt, the evidence of Ms Manyama, the control room operator, confirmed that of Mr Spies.

[23] As already stated, the trial court dismissed Ms Sithuse's claim. The trial court rejected Ms Sithuse's evidence that the accident took place at platform 2 and accepted the evidence of Mr Spies that it occurred at platform 1 and that Ms Sithuse 'intentionally jumped in front of the train as it came to platform 1 of Roslyn station'. I consider it necessary to quote paras 52 to 54 of the trial court's judgment as they are central to its findings and conclusions.

'In my judgment, the accident was unavoidable and even if the defendant had deployed security personnel at the station, it is unlikely that they would have been able to stop the plaintiff from jumping in front of the moving train. I therefore find that the omission of deployment of security personnel was [not] a direct cause of the injuries sustained by the plaintiff. The defendant could not have reasonably foreseen that the plaintiff would deliberately throw herself in front of the oncoming train. Consequently, no legal liability can be imposed on the defendant.

It has been submitted on behalf of the plaintiff that failure to have the proper warning signs was a direct cause of the injuries to the plaintiff. This argument is not sustainable because the plaintiff was a regular user of the rail transport services and likely aware of the basic safety precautions on platforms. She was fully aware of the designated yellow line beyond which as a passenger she was not supposed to stand whilst waiting for the train. In my judgment, the platform was adequately marked for safety precautions of the passengers.

After having considered the evidence adduced by the plaintiff, I am of the view that the plaintiff has failed to discharge the burden of proving that the defendant was negligent and directly responsible for the injuries suffered.'

[24] On appeal, the full court upheld the appeal and rejected the trial court's finding that it was highly probable that Ms Sithuse deliberately jumped into the path of the oncoming train. It held that it was not proved by PRASA that she had attempted to commit suicide. The full court found PRASA to have been negligent in failing to take the steps that could have reasonably averted the incident. Such steps, in its view, involved the deployment at the station of security personnel to enforce rules aimed at the protection of commuters while using PRASA's trains.

[25] Before us, and indeed in the full court, the issue was whether Ms Sithuse had proved that PRASA was negligent. The core of Ms Sithuse's case was that PRASA, in breach of a legal duty, failed to ensure that security personnel were on duty at Rosslyn Station at the time of the incident to monitor commuter activities and to ensure that proper crowd control measures were implemented, so that waiting passengers were not pushed in front of an oncoming train.

[26] The onus was on Ms Sithuse to allege and prove negligence on the part of PRASA and/or its employees.¹ The fact that PRASA in its plea alleged that Ms Sithuse intentionally jumped in front of an oncoming train in an attempt to commit suicide, did not affect the incidence of the onus of proof.² The presumption against suicide, contrary to the full court's finding, did not displace the time-honoured onus. It is a presumption of fact, bringing with it an evidentiary burden to adduce evidence to displace it, and the weight to be accorded to it would depend upon the circumstances of a particular case. The full court accordingly misdirected itself by impermissibly placing the onus on PRASA to prove that Ms Sithuse had attempted to commit suicide. Its decision to hold PRASA liable was made on an incorrect legal basis, and for that reason it cannot be supported.

[27] The question is therefore whether Ms Sithuse discharged the onus of proof that PRASA and/or its employees were negligent and that her injuries were caused by such negligence. Her claim for damages is grounded on the failure of PRASA to take reasonable steps to prevent the harm she suffered. Ms Sithuse contended that, had there been security personnel at Rosslyn Station to enforce safety rules by policing the activities of commuters, her injuries would have been averted. Stated differently, her contention is that PRASA did not take reasonable steps that could have prevented harm to her. As I have stated, the full court found in her favour on this aspect of her case. The question is whether its finding on negligence and causation was supported by the evidence adduced by Ms Sithuse.

[28] The test for negligence was set out by Holmes JA in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F as follows:

'For 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.'

¹ *Pillay v Krishna and Another* 1946 AD 946 at 952-953.

² *Aegis Insurance Company Limited v Consani NO* [1996] 3 All SA 547 (A) at 552.

[29] In *Mashongwa v Passenger Rail Agency of South Africa* [2015] ZACC 36; 2016 (3) SA 528 CC at para 40, the Constitutional Court pointed out that ‘the standard of a reasonable person was developed in the context of private persons’ and, given the fundamental difference between the State and individuals, ‘it does not follow that what is seen to be reasonable from an individual’s point of view must also be reasonable in the context of organs of state’. The standard to be applied is not that of the reasonable person, but that of a reasonable organ of state.

[30] On the central issue, as to where at the station the incident occurred and what happened, there were two mutually irreconcilable versions. The factual disputes fell to be resolved by applying the principles set out in *Stellenbosch Farmers’ Wineries Group Ltd and Another v Martell et CIE SA and Others* 2003 (1) SA 11 (SCA).³ Ms Sithuse’s case was built on the foundation of the incident having occurred on platform 2 and not on platform 1. PRASA’s witnesses placed the occurrences which gave rise to the incident on platform 1. The correct location of the place where the incident occurred at the station was important, because it was crucial in determining the weight to be attached to the evidence adduced and in assessing the probabilities and improbabilities of Ms Sithuse’s case against those of the case for PRASA. On Ms Sithuse’s version the incident would have occurred on the north-eastern side of the station, while on the version of PRASA’s witnesses it would have occurred on the south-western side of the station. Regrettably, the full court did not make a finding as to where the incident occurred and neither did it reject Mr Spies’ and Mr Manyama’s version that the incident occurred on platform 1. Once it had held that it was improbable that Ms Sithuse had tried to commit suicide it appears to have accepted her version of how the incident occurred without any regard for the difficulties occasioned by her insistence that it occurred next to platform 2 while she was waiting for a train going back to Pretoria North. No consideration was given to the host of improbabilities that arose if it was held as the trial court had done that Mr Spies’ evidence was to be accepted.

[31] During argument it was conceded, correctly so, by counsel for Ms Sithuse that there was no basis to reject Mr Spies’ evidence, and that the debate could continue

³ Para 5.

on the basis that the incident occurred on platform 1, and in the vicinity of the overhead pedestrian bridge, depicted on the photographs to which reference was made in the trial, and not away from it, as testified to by Ms Sithuse.

[32] Mr Spies' evidence was that his train was travelling from Pretoria Station (east) in the direction of De Wildt Station (west). Based on what Ms Sithuse said her intended destination was, a train on platform 1 could not have taken her to Mabopane. She had to catch a train to Pretoria North Station to catch a connecting train to Mabopane. She would have waited for that train at platform 2. Mr Spies' train was travelling away from what Ms Sithuse's intended destination was. It is therefore improbable that she would have wanted to board Mr Spies' train when she got injured.

[33] Once it was accepted that the accident occurred adjacent to platform 1, with a train travelling towards De Wildt, the entire fabric of Ms Sithuse's evidence crumbled leaving unanswered what she was doing before the accident. Her version depended on her having caught the incorrect train, waiting for a train in the opposite direction in order to enable her to retrace her route and being pushed and jostled causing her to fall as she sought to board a train for Pretoria North. None of that could be correct when the incident occurred adjacent to platform 1 in relation to a train heading to De Wildt, not Pretoria North. She could not have been confused and did not claim that she was. She had after all alighted earlier on platform 1 from a train bound for De Wildt. But then what was she doing next to platform 1 as the train driven by Mr Spies pulled in? She was near the engine of the train not a coach that she might have wished to board.

[34] Faced with these difficulties, counsel for Ms Sithuse submitted that the finding that the incident occurred on platform 1, and not on platform 2, was not dispositive of the matter. The enquiry, he argued, must go further than this finding. He stated that whether the incident occurred on platform 1 or platform 2 was immaterial. This was so, proceeded the argument, because it was common cause that the incident did occur at Rosslyn Station. He stated that Ms Sithuse might have been mistaken about the platforms at Rosslyn Station, due to her unfamiliarity with the station and the direction of travel of the train she was to board. Counsel submitted that the version of the events

on platform 2 could be transposed onto platform 1 and the real question was how the incident occurred.

[35] Firstly, the suggestion that Ms Sithuse was mistaken about the platforms at Rosslyn Station, which is a fairly simple station, should be rejected. Subsequent to the incident and in preparation for the trial, Ms Sithuse visited Rosslyn Station twice. She went there in 2013 and in 2017 when the photographs were taken of the layout of the station and to point out the spot where she was standing immediately before the incident. On each occasion she pointed out the identical spot on platform 2 as the place at which the incident occurred. The acceptance of PRASA's witnesses' version that the incident occurred on platform 1, which on Spies' version was not crowded, seriously undermined the foundation of Ms Sithuse's story that she was pushed while standing at platform 2. There was no reason for the commuters to push and jostle to board a train which had a number of coaches. There was no evidence that the train at that time of the day was full.

[36] Secondly, the version of events on platform 2 cannot be transposed onto platform 1. On Ms Sithuse's version the pushing and jostling occurred on platform 2 and no incident occurred on platform 1. The onus was on Ms Sithuse to allege and prove facts to support her contention that PRASA or its employees were negligent. The evidence adduced by Ms Sithuse to support the allegation of negligence on the part of PRASA or its employees was improbable. Having regard to what her intended destination was, her presence on platform 1 remained inexplicable. Her translocation of the incident to platform 2 created an insurmountable problem for her, having regard to the evidence of Mr Spies and Ms Manyama, which must be accepted, that the incident occurred on platform 1. Her evidence that the incident happened on platform 2 was the only version she could offer if she wanted to say that she needed to catch a train back in the direction of Pretoria North. If, as must be found, the incident in truth happened on platform 1, she offered no explanation for having been on that platform. Whatever her state of mind was at the time, it was not the one she told the trial court about. I find that the incident occurred in the manner as described by Mr Spies, namely that Ms Sithuse unexpectedly fell in front of his train and it collided with her.

[37] The full court's finding that PRASA was negligent in failing to make security personnel available on the platforms on the day in question, to monitor and/ or supervise the activities of the commuters at the station, cannot be supported in the light of the improbable evidence of Ms Sithuse. The question whether the security measures in place at Rosslyn Station, on the day in question, were reasonable could only arise if her version of events was accepted as more probable than that of PRASA. It was not. No evidence was presented by Ms Sithuse to show that the safety signs at Rosslyn Station were in general disobeyed by commuters and that the security personnel were needed to enforce their compliance. In the circumstance, no negligence can be ascribed to PRASA and/or its employees. She did not, in her oral testimony, repeat the version recorded in the pre-trial minute, namely that she was familiar with the station and that there were usually security guards on duty. On her version, Rosslyn Station was not along the route of her regular commute, and she gave no evidence indicating that she was familiar with the security measures usually employed at the station.

[38] In the result, I make an order in the following terms:

- 1 The appeal is upheld with costs.
- 2 The order of the full court is set aside and replaced with the following order:
'The appeal is dismissed with costs.'

D H Zondi
Judge of Appeal

Appearances:

For appellant: S M Tisani

Instructed by: Diale Mogashoa Attorneys, Pretoria
Honey Attorneys, Bloemfontein

For respondent: G Jacobs

Instructed by: V Rea & Associates, Pretoria
Pieter Skein Attorneys, Bloemfontein