In the High Court of South Africa
(Western Cape Division, Cape Town)

CASE NO: 834/021

In the matter between:

SIYAMTHANDA MAPHELA Plaintiff

And

PASSENGER RAIL AGENCY OF SOUTH AFRICA Defendant

Date of hearing: 1 June 2023

Date of judgment: 9 June 2023

Before the Honourable Ms Acting Justice Pangarker

JUDGMENT DELIVERED ELECTRONICALLY ON 9 JUNE 2023

The pleadings

[1] The plaintiff instituted an action against the defendant for damages arising out of an incident which occurred on 1 March 2019 on a train operated by the latter which travelled between Heideveld and Nyanga train stations in Cape Town. The plaintiff pleads in the Particulars of Claim that he was struck by a stone thrown by an unknown person through the open doors of the carriage of the train upon in which he was a fare-paying passenger and the incident caused him to fall from the moving train. He pleads that the incident as described above was as a result of the negligence of the

defendant and/or its employees in that they allowed the moving train to be travelling with its doors open, and accordingly, failed to avoid the incident when, by the exercise of reasonable care and diligence, they could and should have done so.

[2] As a result of the incident, the plaintiff suffered a right frontal decompressed fracture of the skull and blunt trauma injuries to his upper and lower body. He was consequently hospitalized, underwent medical treatment, suffered shock, pain and loss of amenities of life as well as loss of earning capacity. His claim against the defendant totals R3, 5 million.

[3] In its Plea, the defendant denies the averments in the Particulars of Claim and its defence is that the plaintiff was struck by a stone thrown from outside the train station while *en route* home and that this incident caused the plaintiff's injuries. In paragraphs 4 and 5 of the Plea, the defendant pleads in the alternative, that in the event of the Court finding it negligent, such negligence did not contribute to the plaintiff's injuries. The defendant further pleads that the plaintiff contributed to the negligence.

Procedural and related aspects

[4] The merits and quantum in this matter were separated and I am called on to determine the question of liability only. On 13 March 2023, and in terms of rule 37(4), the plaintiff requested the defendant to make certain admissions, more specifically: whether the defendant admits that the plaintiff fell from a moving train which travelled with open doors; whether the defendant admits the clinical notes of Groote Schuur Hospital; and, whether the defendant admits that the Metrorail General Operating Instructions require that all train doors must be closed prior to departure.

[5] The defendant failed to respond to the request for admissions and subsequently also failed to respond to the plaintiff's further request in April seeking the defendant's admission that the plaintiff bore a valid train ticket for the journey on the day in question. The train ticket was discovered in March 2023 and a copy thereof was attached as an

annexure to the further request for admissions.

[6] On 20 April 2023, and by way of an application of the defendant, the trial was postponed to 1 June 2023. The defendant tendered the wasted costs of the postponement which, as explained in an affidavit, was based on the unforeseen challenges experienced in obtaining an investigation report from the department which deals with the defendant's investigation, protection and security services. I further point out that the affidavit deposed to by the plaintiff's witness, Aphelele Tsibiyani[1], forms part of the indexed bundle in this matter.

[7] Subsequent to the plaintiff's counsel's opening address, the defendant's counsel indicated that while his client had not responded to the plaintiff's requests for admissions, the defendant admits that the plaintiff fell from the train on the day in question. However, he reiterated that the defendant's stance was that it had no record nor knowledge of the incident referred to in the Particulars of Claim. It was furthermore indicated that the defendant had no knowledge that the plaintiff was in fact a commuter on the train. The trial proceeded on one day only.

The plaintiff's evidence

[8] The plaintiff testified that he is currently 21 years old and at the time of the incident on 1 March 2019, he was a grade 10 learner at T[…] Secondary School in Mowbray. School was dismissed at 14h40 on the day and he and other learners travelled home per train. He and his friend Aphele, boarded the train at Mowbray station for Salt River on the Southern line. At Salt River, they changed trains to the Central line. They then boarded a train at the Mutual station travelling to Philippi, in which area they both resided. He explained that the stations along the Central line/route were Langa, Bonteheuwel, Netreg, Heideveld, Nyanga and then onward to Philippi. The plaintiff was thus due to alight the train at Philippi station.

[1] Deposed to on 30 November 2020

[9] The plaintiff testified that the train which he boarded at Mutual station was packed and overcrowded with passengers. After boarding, he stood facing the open door of the carriage. There was no place to be seated, there were no windows in the carriage and people stood on either side of him in a formation he described as *"in a line"*. The train left the Mutual station with its carriage doors open. While *en route*, the plaintiff felt something striking or hitting the right side of his forehead. He does not know what struck him. He regained consciousness in Groote Schuur Hospital. He furthermore explained that he was struck by the object while the train was travelling between Heideveld and Nyanga stations, and that as a result of the incident, he sustained an injury to his head and did not return to school for the remainder of the 2019 academic year.

[10] In cross examination, the plaintiff confirmed that from Mowbray to Salt River stations, the doors of the train (on the Southern line) were closed, but from Mutual station and throughout the further stations on the Central line to Philippi, the doors of the train carriage were, and remained, open. He explained that at the various stations prior to him being struck against the forehead, commuters would alight from the train while others would board the train. The result was that the train remained full throughout the journey and there was no seating space available for him and his friend.

[11] The plaintiff was asked why he had boarded a train that was full or overcrowded and he testified that he did not have a choice as he wanted to go home and that there were many learners from his school who travelled on the same train. He stated that Aphelele stood behind him and he confirmed that he was standing in front of the carriage door, with other commuters next to him. He did not hold onto any grab rails as he was too short to reach them. The plaintiff explained that if he moved from where he stood, he would have lost his place in the carriage and it would have been difficult to exit the train at the Philippi station. He also stated that when the train would approach a station, he would move aside for commuters to alight.

[12] When questioned about standing at the open carriage door, the plaintiff's

evidence was that it never crossed his mind that people would push him. When the train left Heideveld, he did not see anyone throwing stones or objects at the train, but he heard the impact of the object as it hit him against his forehead. When he was discharged from Groote Schuur Hospital, he was informed by his friend that he had been struck by a stone thrown at the train. The plaintiff stated that he did not know if anyone else on the train had also been struck by an object.

[13] The witness had informed him that he had flagged down a vehicle and was taken to Gugulethu Day Hospital for treatment. The plaintiff, with reference to the Gugulethu Day Hospital emergency notes[2], was asked about arriving at the day hospital at 16h31 but he stated that he did not remember being at the day hospital. It was put to him that the emergency notes indicate that he was assaulted, and the plaintiff's response was to deny that he was assaulted. The plaintiff was referred to the Groote Schuur Hospital records and the time of his admission but he was unable to indicate admission or arrival time at Groote Schuur Hospital[3].

[14] Aphelele Tsibiyani confirmed that he and the plaintiff travelled daily from Mowbray to Philippi per train. His evidence regarding which train was boarded, the change at Salt River station to the Mutual station on the Central line and the date of the incident, corroborates the plaintiff's evidence and version. He testified that 1 March 2019 stands out and is significant in his life. He confirmed the plaintiff's version that when the train entered the Mutual station, its carriage doors were open. He boarded the train with the plaintiff.

[15] Mr Tsibiyani furthermore confirmed that when they boarded at Mutual station, the train was already full and that he stood on the side of the carriage door. As he was taller than the plaintiff, he was able to hold onto the side of the train and explained that he could see above the heads of other passengers in the carriage. Mr Tsibiyani corroborated the plaintiff's explanation regarding passengers alighting and others

[2] Exhibit A, p28
[3] Exhibit A, p36

boarding the train at the various stations along the Mutual-Philippi route.

[16] The witness testified that after departing Heideveld but before they reached Nyanga station, he witnessed that stones were thrown at the train by people at a garage next to the station. He saw that someone inside the train was struck by a stone that was thrown. At the time, he was unsure of or unable to say who had fallen from the train but then he realized that he could no longer see the plaintiff. The witness then waited for the train to come to a halt at the Nyanga station, whereafter he jumped from the train, and ran back in the direction of where the person had fallen from the train. Mr Tsibiyani explained that he then saw the plaintiff lying unresponsive on the railway track, and bleeding from his forehead.

[17] Mr Tsibiyani shouted at the security officer on the platform for assistance but nobody assisted him. He then picked up the unconscious plaintiff and managed to flag down a taxi which transported them to the Gugulethu Day Hospital where the plaintiff was admitted for emergency treatment. At the day hospital, Mr Tsibiyani provided the medical staff with the plaintiff's details and then left to report the incident to the plaintiff's family. In cross examination, the witness confirmed that they were seated on the train from Mowbray to Salt River and to Mutual station. He corroborated the plaintiff's evidence in all material respects as follows:

17.1 that the train from Mutual station was overcrowded;

17.2 the reason why they boarded the train was because there was no other train and they were on their way home to Philippi;

17.3 the carriage doors of the train which travelled from the stations Mutual to Langa, Langa to Bonteheuwel, Bonteheuwel to Netreg, Netreg to Heideveld, and Heideveld to Nyanga, were open for the duration of the journey;

17.4 that the plaintiff was standing at and facing the carriage door throughout

the journey and other passengers alongside him; and

17.5 that they could not move because people were boarding the train and others were alighting at the stations.

[18] Mr Tsibiyani did not stray from his version in examination in chief regarding finding the plaintiff lying on the railway tracks, seeking assistance and taking him to the day hospital. Similarly, he could not say whether any other commuter was struck by a stone. When it was put to him that the defendant would state that it's investigation did not indicate that anyone had fallen from the train and that the train had been pelted with stones, Mr Tsibiyani's response was that the defendant did not care about anyone: he elaborated that the security officer on the platform did not assist him when he called for help for the plaintiff.

[19] On the Court's questions in clarification, Mr Tsibiyani stated that there were no window panes in the window frames of the train. This concluded the evidence for the plaintiff. The plaintiff's version that the train was overcrowded and remained so, notwithstanding commuters alighting and others boarding at the various stations, is accepted.

The defendant's evidence

[20] The defendant called Thando Klaas, its investigator who investigated the incident pursuant to being provided with a copy of the Summons and Particulars of Claim. Mr Klaas was the author of Exhibit B, an incident report regarding the plaintiff's claim that he fell from the train travelling on the Central line. According to the plaintiff's counsel, Exhibit B was provided and made available only a day prior to the trial date.

[21] Mr Klaas testified that the CMOCC[4] occurrence book indicated all rail incidents recorded by Metrorail. He referred to the entry recorded under serial number 88/118 at

[4] Cape Metrorail Operations Control Centre

16h16 on 1 March 2019 which indicated that an unknown caller had reported that while he (the anonymous caller) was on the train to Khayelitsha, he saw the body of a person lying next to the railway tracks between Heideveld and Nyanga stations. The further entry at 21h05 under the same serial number, recorded that security officers were sent to investigate between the two stations and had not found any person lying next to the railway tracks.

[22] According to Mr Klaas, the *"minimal information"* he obtained during his investigation indicated two scenarios: either the plaintiff had fallen from the train or he had not. According to his investigations as set out in Exhibit B, there was no evidence nor record of stones having been thrown at the train.

[23] In cross examination, Mr Klaas conceded that the matter – that is, the plaintiff having been struck by a stone and then falling from the moving train - was serious. When pressed on the aspect of stones thrown at the train, he admitted that colleagues had reported such incidents and/or that he was made aware of such incidents, but he had no personal experience of reports nor investigations conducted of stone throwing incidents. With reference to the entry in the CMOCC Daily Report of 1 March 2019[5], which recorded that a report was made at 14h30 by security officers that an unknown male was struck by a stone while travelling on a train between Nonkqubela and Khayelitsha[6] and that he sustained an open cut, counsel for the plaintiff put to the witness that it could not be stated that there were no instances where stones were thrown at trains. The witness agreed with the statement and could not deny that the defendant knew that passengers or commuters were struck by stones thrown at trains.

[24] Mr Klaas also agreed that the defendant would know that it is foreseeable that open doors posed a danger to commuters. When it was put to the witness that he did not deny that the plaintiff and Mr Tsibiyani were fare-paying passengers on the day of the incident, Mr Klaas's response was that he could not dispute their version but also

[5] Exhibit B, CMOCC Daily Report, un-numbered page – it is noted that Exhibit B was not paginated
[6] This is an unrelated incident

could not agree as he had not seen proof that they were indeed fare-paying passengers. Mr Klaas could not dispute that the train had arrived at Mutual station with its carriage doors open, that the plaintiff and his friend had travelled on the train and that its doors were open throughout the journey. He could also not dispute that the train had no windows.

[25] Mr Klaas was instructed in March to investigate the matter in order to present a report in this case. When it was put to him that he had not investigated the particular train being pelted with stones, his response was that because there were so many variables[7], he did not conduct such an investigation. Mr Klaas denied having sight of the plaintiff's train ticket, which was discovered, and confirmed that he did not investigate nor check on which train the plaintiff had travelled.

[26] Importantly, Mr Klaas could not dispute the plaintiff's version that he had been struck by a stone while travelling on the defendant's train. In respect of Exhibit B, he explained that the report made at 16h16 in the occurrence book that an unknown caller had reported seeing someone lying next to the railway tracks was contemporaneous with the time the call was made to the CMOCC[8]. He also agreed with counsel that five hours after the anonymous call was made, security officers patrolled the tracks between Heideveld and Nyanga stations[9]. The witness did not dispute that by that time, the plaintiff had already been hospitalized.

[27] In re-examination, Mr Klaas explained that the purpose of his attendance at trial was not to dispute the plaintiff's version but also not to accept what he was saying, the reason being that the information in the Particulars of Claim was not recorded in PRASA's records. According to him, security officers between the two stations[10] would have known of the incident and/or would have seen what happened and reported it.

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[7] There are many trains per day, and even though there are train schedules, there are train delays which affect the time schedule

[8] Exhibit B, serial no. 88/18, entry at 16h16 on 1 March 2019 – un-numbered page (p133 of occurrence book)

[9] Exhibit B, serial no. 88/18, entry at 21h05 on 1 March 2019 – un-numbered page (p138 of occurrence book)

The parties' submissions

[28] Counsel for the plaintiff submitted that in terms of Metrorail General Operating Instructions[11], the doors of a train must be closed when the train was in motion. He argued that the plaintiff and Mr Tsibiyani's versions were reliable and credible in all material respects and that they had not embellished their evidence. In this regard, I was referred to the evidence that the doors of the train from Mowbray to Salt River were closed during the journey and that the witnesses were seated. Counsel submitted that the plaintiff and Mr Tsibiyani were consistent and not shaken during cross examination. It is contended that the plaintiff was lawfully on the train and that the defendant was negligent in that the doors of the train were open while the train was in motion.

[29] On the defence of contributory negligence, counsel for the plaintiff argued that the defence does not arise as it was not put to the plaintiff that he could have anticipated that by standing at the carriage door, he would have been hit by an object from outside. I was also reminded that there were passengers standing next to the plaintiff during the train journey. I am thus asked to find that the defendant's witness could not dispute the plaintiff's version, despite his *"double-barreled"*[12] answers to certain questions. I was referred to two judgments to support the plaintiff's case, **Phelelo Centane v PRASA**[13], a recent unreported judgment in this Division by Allie J, and a Constitutional Court judgment, **Mashongwa v PRASA**[14].

[30] With reference to **Mashongwa,** the submission is that it was the defendant's obligation to ensure that the train had windows intact and that its doors were closed when it was in motion. Counsel submitted that PRASA did not heed the warning of the Constitutional Court in **Mashongwa**. As for Mr Klaas, the submission is that he was argumentative and ultimately could not dispute the plaintiff's version. I am asked to find

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[10] Presumably between Heideveld and Nyanga stations
[11] Exhibit A, p19-21
[12] The plaintiff's counsel's description of some of Mr Tsibiyani's response
[13] Western Cape High Court, case number 5672/2019, judgment delivered on 3 March 2023

that the defendant is 100% liable for the plaintiff's proven damages. As to costs, the motivation for a punitive costs order is based on the following grounds: Mr Tsibiyani's affidavit was available in 2020 and provided corroboration of the facts as pleaded in the Particulars of Claim; that Mr Klaas eventually could not dispute the material aspects of the plaintiff's version and the information contained in Exhibit B supports the plaintiff's version that he was struck by a stone and consequently fell out of the moving train.

[31] The defendant's counsel submitted that the defendant is an organ of State and given the fact that no record nor information were available regarding the incident as set out in the Particulars of Claim, it cannot be expected that the defendant should simply concede the merits and hand over R3, 5 million to the plaintiff. The submission was made more than once that the defendant was entitled to question or test the plaintiff's version. I was reminded that the plaintiff bears the onus of proof in respect of negligence and that the incident led to the plaintiff sustaining injuries.

[32] Significantly, the defendant's counsel conceded that the plaintiff and Mr Tsibiyani were honest and credible witnesses and accepted their version of events of 1 March 2019, and correctly so in my view. However, the argument followed that the plaintiff chose to stand at the open train door and thus reconciled himself with the risk which accompanied an open door of a moving train. He submitted that the risk was not specific. It was further submitted that the plaintiff assumed such risk and was thus contributorily negligent in the circumstances. I point out that I was not referred to any authority to support the defendant's submissions[15]. Counsel for the defendant argued that the facts in **Mashongwa** are distinguishable from the facts in this matter. On the issue of costs, the submission is that were the plaintiff to be successful on the merits, the usual costs order should follow.

[33] In reply, the plaintiff's counsel contends that the grounds for contributory negligence have not been pleaded and in addition, the nature of the harm was not

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[14] [2015] ZACC 36
[15] Closing argument occurred on 1 June 2023

foreseeable to the plaintiff. It is emphasized that the doors of the train on which the plaintiff travelled, remained open and had they not been open, any stone thrown at the train would not have hit the plaintiff. It is submitted that the defendant does not address causal negligence and that there is thus no basis for a defence of contributory negligence.

Evaluation of evidence

[34] The plaintiff was a good and credible witness who relayed the incident of 1 March 2019 in a clear and uncomplicated fashion. He answered questions put to him in a direct manner and in my view, was steadfast under cross examination. I find that his explanation as to why he boarded the over-crowded train to be reasonable and logical: after school was dismissed, it was the only train available and he needed to board it to get home to Philippi. This is a plausible explanation, given that he lived in Philippi and that other learners also boarded the same train.

[35] The plaintiff was consistent in his explanation regarding passengers alighting and new commuters boarding the train at the various stations along the way. There is nothing unusual in the explanation that he stood at the door and gave way to people boarding the train. I am of the view that he did not attempt to exaggerate his evidence nor did he conjure up a version that he saw people throwing stones at the train. In short, I agree with the submission that the plaintiff was a credible, honest witness, who remained consistent under cross-examination. This was recognized by the defendant's counsel who submitted that he had no issue with his version of events.

[36] Mr Tsibiyani too was an honest and impressive witness. He was clear and concise and his evidence corroborates that of the plaintiff in all material respects as set out above. His version that he saw people throwing stones at the train while it travelled between Heideveld and Nyanga, was not disputed. Similarly, his evidence that the plaintiff was found lying on the railway tracks and admitted to the day hospital and later transferred to Groote Schuur Hospital, was not disputed. As to any differences in the

version of events of 1 March 2019, these are minor differences and make no inroads into the consistent and corroborative effect of Mr Tsibiyani's evidence.

[37] Having regard to the evidence of the plaintiff and Mr Tsibiyani, and in circumstances where their evidence was unchallenged, it is fair to conclude that the impact or effect of being struck by a stone against his forehead, caused the plaintiff to fall from the train through its open carriage doors, and to land on the railway tracks somewhere between Heideveld and Nyanga stations. The plaintiff's evidence that he did not know that he was admitted to the day hospital and could not testify about the time of his admission, makes sense as he was found unconscious on the railway tracks.

[38] The plaintiff was certainly a fare-paying passenger and the defendant's counsel, notwithstanding the evidence of Mr Klaas that there was no proof of this, accepted that the plaintiff was validly and lawfully on the train on 1 March 2019. A copy of the plaintiff's monthly train ticket certainly expels any doubt about this[16].

[39] The criticism of Mr Klaas is justified to a certain extent only. I agree with counsel for the plaintiff that he gave *"double-barreled"* answers to certain questions but on the issue of whether the plaintiff was a fare-paying passenger, it seemed that he had not seen a copy of the discovered train ticket, which may have swayed him to make the admission. That said, to Mr Klaas's credit, many of the important aspects in relation to the plaintiff's version, were ultimately not disputed: for example, that the train doors were open while the train was in motion; that there were no windows in the train; where the plaintiff and his friend stood in the carriage, and that the plaintiff was struck by a stone thrown from outside.

[40] In relation to Exhibit B and what was recorded in his incident report, Mr Klaas admitted that there was very little information to rely on. That notwithstanding, the witness clarified that the entries under serial number 88/18 were contemporaneous, meaning that the reports were made at 16h16 and 21h05 on 1 March 2019 respectively.

[16] Record, p16

[41] Inasmuch as the defendant's witness bemoaned the fact that the information contained in Exhibit B was sparse, my view is that the information nonetheless lends credence and supports the version of events presented by the plaintiff and the witness. The entry at 16h16 indicates:

> *'Information: An unknown caller reported that while he was on the train to Khayelitsha and when it was between Heideveld and Nyanga closer to Nyanga he saw a body laying [sic] next to the tracks. PO Mqhovuki informed to send securities to go and check.'*

This was a contemporaneous entry with the anonymous call and if regard is had to the day hospital's record of the plaintiff's admission time of 16h31[17], then the conclusion I reach is that the information corresponds with the plaintiff and Mr Tsibiyani's version of the location and time of the incident when the plaintiff fell from the train.

[42] Where I, however, disagree with Mr Klaas is in re-examination when he stated that a security officer would have known about the incident and would have seen what happened to the plaintiff. In this matter, the evidence indicates that nothing could be further from the truth. I say this because the second relevant entry, which pertains to the information provided by the anonymous caller, only occurs at 21h05, almost five hours after the caller informs the CMOCC that someone was seen lying on the railway tracks near Nyanga station.

[43] Clearly, all indications are that there was no haste from the defendant's side to send security to the scene where the person was lying on or next to the railway tracks. Thus, the evidence that a security officer would have known of the incident and seen what happened must be considered in the circumstances where no security was deployed to the scene where the person was seen lying at the time or shortly after the anonymous caller provided the information, and there seemed to be no interest nor

[17] Exhibit A, p28

urgency in patrolling the area to determine whether the person was injured as a result of falling on the tracks. The alternative view, is that the security officer whom Mr Tsibiyani called on for assistance and who failed to assist him with the unresponsive/unconscious plaintiff, simply did not report that event with the CMOCC. In my view, Mr Tsibiyani's comment that the defendant did not care, certainly then rings true.

[44] When I have regard to the facts in this matter, I must draw a parallel with those which presented itself in the **Centane** judgment to which I was referred. There too, the plaintiff fell from the train which also had its doors open while in motion, but the circumstances differed in that he was standing about a metre from the open door when he was pushed out of the train as a result of a group of passengers pushing from further inside the carriage. He had his back to the open door. Similarly, he was not holding onto anything to steady himself due to the overcrowding in the carriage. As in **Centane**, the highwater mark of cross examination in this matter was also that the plaintiff boarded an overcrowded train. However, in this matter, the difference is that the defendant submits that the plaintiff elected to stand at the open door thus assuming the risk that something could happen to him.

Wrongfulness and the defendant's duty to commuters

[45] In **Rail Commuters Action Group v Transnet Ltd t/a Metrorail** [18], the Constitutional Court recognized that rail commuters in their thousands use the rail system daily and once they board a train, find themselves in a vulnerable position and even targeted by criminals on board the same train. At paragraph 82 of the aforementioned judgment, it was held that Metrorail owed a positive duty to ensure that reasonable measures were in place to cater for the safety and security of rail commuters. Significantly, the Constitutional Court was clear that it mattered not who implemented these measures as long as they were in place[19].

[18] 2005 (2) SA 359 (CC) para 82-84 **(the Metrorail judgment)**
[19] **Metrorail** supra, par 84

[46] Turning to the defendant, it is an organ of State established in terms of section 2 of the Legal Succession to the South African Transport Services Act[20] and provides rail services in South Africa. In **Mashongwa**, the public duty owed by the defendant to rail commuters was described as follows:

> *"[26] Safeguarding the physical well-being of passengers must be a central obligation of PRASA. It reflects the ordinary duty resting on public carriers and is reinforced by the specific constitutional obligation to protect passengers' bodily integrity that rests on PRASA, as an organ of state. The norms and values derived from the Constitution demand that a negligent breach of those duties, even by way of omission, should, absent a suitable non-judicial remedy, attract liability to compensate injured persons in damages.*
>
> *[27] When account is taken of these factors, including the absence of effective relief for individual commuters who are victims of violence on PRASA's trains, one is driven to the conclusion that the breach of public duty by PRASA must be transposed into a private law breach in delict. Consequently, the breach would amount to wrongfulness."*[21]

[47] From the above paragraphs in the **Mashongwa** judgment, read with its predecessor, the **Metrorail** judgment, it is thus apparent that the defendant has a public law duty to protect rail commuters but this does not mean that it has a legal duty for purposes of delict. For that legal duty to arise, the defendant is required to take reasonable steps to provide for the safety of commuters and any failure to take such steps may render it liable in delict[22]. This leads to the next question, which is whether the defendant was negligent in relation to the plaintiff.

The question of negligence

[20] 9 of 1989
[21] Footnotes 34 and 35 to paragraphs 26 and 27 of **Mashongwa** judgment excluded from above

[48] The classic test for negligence is set out in **Kruger v Coetzee**[23], which may be summarized as follows: would a reasonable person in the position of the defendant foresee the reasonable possibility of its conduct injuring the plaintiff and causing him patrimonial loss?; secondly, if so, would the defendant have taken reasonable steps to guard against such harm occurring?; and thirdly, did the defendant take such reasonable steps to avert the harm? In respect of the facts of this matter, the defendant's conduct complained of was that it operated a moving train whilst its carriage doors were open.

[49] The Metrorail General Operating Instruction 12017.12.4 requires that on arrival at or departure from stations, the Metro Guard must close the train doors[24]. The evidence in this matter, which is un-challenged, is that the train arrived at Mutual station with its doors open and continued on its journey on the Central line, stopping at the various stations referred to above, with its doors remaining open. At the moment when the plaintiff was struck by a stone, the train doors were open.

[50] General Operating Instruction 12019.2.1 requires of the platform Marshall, where deployed at a station, to ensure that the train doors are closed before the train departs. There was no evidence presented that there were no platform Marshalls on station platforms along the Central line on 1 March 2019. As the General Operation Instructions apply to the defendant, it would have been for the defendant to lead evidence indicating why the Instruction could not be adhered to and/or why it was not possible to deploy Marshalls at all or some of the stations. This was not done and consequently I shall thus accept that in all probability, these officials were present and deployed, but had failed in their peremptory duties to ensure that the train doors were closed before departing from the various stations including Heideveld.

[51] I must add that Mr Klaas's evidence that it would have been impossible to check the particular train on which the plaintiff travelled, does not absolve the Marshalls and

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[22] **Shabalala v Metrorail** [2007] ZASCA 157 par 7
[23] 1966 (2) SA 428 (A) at 430

guards from complying with the Operating Instructions as referred to above. Furthermore, there was also no evidence to suggest, for example, that the doors of the train were faulty, incapable of operating, or had been kept open[25] by commuters, hence preventing it from closing.

[52] In **Mashongwa**, when considering the negligence of PRASA in the circumstances of the commuter who was pushed from a moving train while its doors were open, the Constitutional Court specified that the test involves the reasonable organ of State test[26], which recognizes that an organ of State is in a different position to that of an individual. The question thus is whether a reasonable organ of State, in the defendant's position, would reasonably have foreseen harm befalling the plaintiff as a result of the train doors being open while the train was in motion.

[53] There can be no doubt that leaving the train doors open is a danger to commuters on board that train, as he/she could slip, be pushed, lose their balance, fall from the train and sustain injury, and even be thrown from the train by criminals on board, as was the case in **Mashongwa**. Thus, the open train door clearly is a potential danger while the train is in motion, and in my view, that potential danger exists in relation to every commuter on board the train.

[54] The facts of this case echo those in **Centane**, **Metrorail** and a host of other similar matters in relation to the daily reality of overcrowded trains operated by the defendant[27]. Commuters pushing against each other in order to alight at the stations, a fact which the plaintiff and Mr Tsibiyani testified about, seems to be a normal occurrence and part of the daily train journey for many South African commuters. While this matter does not involve a scenario where the plaintiff was pushed from the train, the evidence (which follows the pleading) is that the plaintiff fell through the open door of the train while it was in motion.

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[24] Exhibit A, p19-21
[25] Or, prevented from being closed
[26] **Mashongwa** supra, par 40; according to paragraph 41 of the judgment, the standard of the reasonable organ of State has its basis in the Constitution

[55] In my view, all that was required of the defendant was to comply with its own operating instructions. Yet, the defendant failed to do so and operated its train from Mutual to Nyanga stations with its carriage doors open; put another way, the defendant's employees omitted to close the train doors, and such conduct is not acceptable[28]. In allowing the train doors to be and remain open while the train was in motion, the defendant failed in its legal duty towards the plaintiff as a commuter. The resultant finding is that the defendant failed to ensure that the safety precaution (closing the train doors) was complied with and such failure amounts to negligence on its part. A reasonable organ of State in the defendant's position, which owes a public law duty to commuters, would have ensured that the train doors were kept closed to prevent the plaintiff's fall or slip from the train onto the railway tracks. Thus, the reasonable possibility of the plaintiff, a commuter, falling from the packed, moving train whilst the doors were open, was foreseeable.

[56] At paragraph 60 of **Mashongwa**, Mogoeng CJ [29] emphasized that the defendant's duty to keep train doors closed while the train was moving *"existed to prevent passengers falling out of a train when the doors were left open"*. This is the safety precaution I refer to above. Clearly, as already found, no steps, reasonable or otherwise, were taken to guard against the plaintiff falling from the train. The failure to take such steps and precautions is entirely that of the defendant.

[57] Having regard to the defendant's counsel's submission that the defendant could not (or had not) foresee (n) that the plaintiff would be struck by a stone thrown by people outside and that he would thus fall to the tracks, it must be stated that the *"precise mechanism by which he fell and the injury was sustained did not have to be foreseen"*[30]*.* In this regard, there was a vague reference – albeit unsupported by

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[27] See for example **Mashongwa,** par 46
[28] **Transnet Ltd t/a Metrorail and Another v Witter [2008] ZASCA 95 par 5**
[29] As he then was
[30] **Mashongwa**, par 61

authority – to an intervening event which caused the plaintiff to fall from the train[31]. While I appreciate that the defendant could not foresee that at that moment, a commuter would be struck by a stone thrown from outside, what was reasonably foreseeable was the plaintiff's fall from the train in circumstances where the door was open.

Causation

[58] Is there a causal connection between the defendant's negligent conduct and the plaintiff's injuries? In this regard, I have to enquire whether the harm would nonetheless have ensued even if the omission (the failure to close the train doors while it was in motion) had not occurred. From the facts of the matter, the defendant was not unaware that stones were or had been thrown at its trains along the Central line: this is evident from reports made in Exhibit B, which Mr Klaas was referred to and which the witness admitted. Thus any suggestion of an absence of knowledge by the defendant that its trains on the Central line were being pelted with stones, is rejected.

[59] There is no evidence as to the structure and detail of the train doors and I cannot speculate regarding it but it is more than reasonable and logical to conclude that the stone would or could not have penetrated a closed door and then struck the plaintiff. I must also add that Mr Tsibiyani indicated that there were also no window panes which simply completes the picture that there were little or no safety mechanisms in place and commuters such as the plaintiff were at risk of harm.

[60] A causal nexus must exist between the defendant's conduct and the damage or harm suffered by the plaintiff[32]. Applying the *conditio sine qua non* test and causation by omission, I have to ask what would probably have happened had the defendant ensured that the train doors were closed on the journey which the plaintiff took. The probabilities indicate that the plaintiff would not have been struck by a stone thrown from outside, not

[31] The he was struck by a stone thrown from outside the train
[32] Law of Delict, 7th edition, Neethling- Potgieter- Visser, p125

have received an impact against his forehead, and not have fallen from the train (through the open door). He would have remained standing at the closed door, in all probability, until he reached Philippi. At worst, the stone would have struck the train's door[33]. Importantly, the plaintiff would have remained unharmed and un-injured as the door would have been closed.

[61] The defendant's conduct in failing to close the doors and in circumstances where it takes upon itself the duty to provide safe passage to the plaintiff and other commuters, lead me to conclude that its negligent omission is closely connected to the harm suffered by the plaintiff as a result of the incident. Accordingly, the defendant is liable to the plaintiff for his loss.

Contributory negligence and assumption of risk

[62] The remaining aspect is the issue of contributory negligence. The defendant's counsel has submitted that the plaintiff elected to stand at the open doors and thus he would have reconciled himself with what that means. Firstly, the plaintiff's evidence regarding overcrowding, and movement on and off the train of commuters, remained unchallenged. The evidence indicates that he remained at the open door except to give way to people boarding and alighting.

[63] The evidence, again uncontested, was that it was not within his contemplation or on his mind that people would push him and that he would fall. He was a fare paying passenger with a monthly ticket and travelled this route daily from school. The circumstances of this matter differ from that in **Witter (supra)** where the commuter ran and jumped from the platform to catch a train while it was leaving a station, with the result that he fell and part of his leg was severed.

[64] For a defence of contributory negligence to succeed, the defendant must allege

[33] See **International Shipping Co (Pty) Ltd v Bentley 1990 (1) SA 680 (A) 700** for the formulation of the *conditio sine qua non* theory; also **Lee v Minister of Correctional Services 2013 (2) SA 144 (CC)**

and prove that the plaintiff was negligent and that the negligence was causally connected to the damages he suffered[34]. The defendant's Plea avers that the plaintiff was injured by a stone thrown from outside the station while he was on his way home. The pleading is not a model of clarity but I shall assume that what is actually meant is that he was injured by a stone thrown at him while on the train *en route* home. This certainly seems to be the gist of the defendant's argument.

[65] I emphasize that it remained the defendant's duty and operational obligations to ensure that the train's doors were closed when it left a station and when it was in motion. The defendant bears the onus in respect of proving that the plaintiff was negligent and that the negligence was causally connected to the damages which he suffered[35]. Questions posed under cross examination as to people boarding and alighting at the various stations prior to the incident, in no way assists the defendant's submission that the plaintiff was negligent when he stood at the train's door.

[66] In addition, the defendant led no evidence that the plaintiff foresaw the reasonable possibility that he would fall from the train and/or that he would fall if struck by an object in circumstances where the train's door was open, nor was this elicited from the plaintiff during cross examination. Accordingly, I find that the defendant has failed to discharge the onus in respect of its defence of contributory negligence and such defence is accordingly dismissed.

[67] The defendant submitted that the plaintiff assumed the risk which accompanied one who stands at an open door of a train. Again, no authority was provided to motivate this submission. As a matter of completeness, to the extent that this submission seems to refer to a defence of *volenti non fit iniuria*, the defendant is reminded that such a defence must be pleaded and this was not done.

[68] Furthermore, the defendant bears the onus of proving that the plaintiff had

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[34] Amler's Precedents of Pleadings, Seventh Edition, LTC Harms p125
[35] **South British Insurance Co Ltd v Smit 1962 (3) SA 826 (A)**

knowledge of the risk associated with standing at the open door of a train while it was in motion, that he appreciated the extent of such risk[36] and that he consented to the risk. In this regard, the defendant led no evidence which would cause me to consider that the above essential elements of the defence were proved. Thus, the onus attached to a defence of *volenti non fit iniuria* was not discharged and the submission by the defendant's counsel was un-substantiated. In view of all the above conclusions, I find that the defendant is solely liable for the plaintiff's harm suffered and that he therefore succeeds with his claim on the merits.

Costs

[69] The plaintiff's motivation for a punitive costs order has merit for the following reasons: Mr Tsibiyani's affidavit, which clearly supports the plaintiff's case as pleaded, must have alerted the defendant to the case which would be presented at trial, but the defence of the claim continued; no response was received to very specific requests for admissions, including an admission that the plaintiff was a fare-paying commuter; the incident report was provided a day before the trial; the defendant had no version but the incident report, which ultimately supports the plaintiff's version of stone throwing and having fallen from the train.

[70] As if the above were not cause for concern as to the defendant's approach to the matter, at the commencement of the trial, the defendant then accepted that the plaintiff was a fare-paying passenger and that he fell from the train. Furthermore, the plaintiff's witness eventually made various concessions which supported the plaintiff's case. As to the facts itself, it bears mentioning that it took five hours from the anonymous call before the defendant's employees investigated whether someone was lying on the railway tracks close to Nyanga station. This conduct is shocking as I wonder what would have happened to the plaintiff had he been travelling without being accompanied by Mr Tsibiyani, who had the concern and foresight to run back to the railway tracks once he realized that his friend was no longer in the train.

[36] **Lampert v Hefer** 1955 (2) SA 507 (A); Law of Delict supra, p178

[71] In conclusion, this is a matter which was capable of settlement on the merits. A young learner fell from a train and the disquieting lack of care and interest in the safety of commuters such as the plaintiff continued, despite the warnings issued by the Constitutional Court in the **Metrorail** and **Mashongwa** judgments several years ago. In light of the above reasons, I am of the view that a punitive costs order is warranted.

Order

[72] In the result, I grant the following orders:

1. The plaintiff's claim on the merits is upheld.

2. The defendant is 100% liable for the plaintiff's proven damages.

3. The defendant is ordered to pay the plaintiff's costs on an attorney and client scale as taxed or agreed and including the costs of senior counsel.

M PANGARKER
ACTING JUDGE OF THE HIGH COURT

For Plaintiff: Adv M Salie SC
Instructed by: Adendorff Attorneys Inc.

For Defendant: Adv N Mjiyako
Instructed by: Padi Incorporated Attorneys