REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 20594/2014

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

15 Dec 2016

In the matter between:

LOVENESS MHLONGO **Applicant**

and

PASSENGER RAIL AGENCY **Respondent**

J U D G M E N T

KLAAREN AJ:

Introduction:

[1] This case concerns an accident that occurred on 6 March 2014 while a commuter passenger train was stationary and stuck between stations in the

Johannesburg area. The plaintiff, Loveness Mhlongo, claims damages from the operator of the train, the Passenger Rail Agency (PRASA), which opposed such relief. Mhlongo set out her case in an initial particulars of claim dated 29 May 2014 and later amended her particulars in a document filed with the court on 20 October 2016.

[2] At the hearing of the matter, the parties agreed in terms of Rule 33(4) to separate the questions of liability and of the quantum of damages. I agreed and ordered the separation. The trial thus continued on the question of liability alone. Counsel for Mhlongo led two witnesses, the plaintiff and her daughter, and closed his case. PRASA led two witnesses, a train driver and a train guard, and closed its case. The parties then prepared and delivered heads of argument and I reserved judgment.

[3] There are effectively two issues to be decided: whether PRASA is liable in a commuter train situation such as the one alleged by Mhlongo and, if the answer to that question is affirmative, then whether Mhlongo has brought forward sufficient evidence to meet her onus to establish PRASA's liability in this case. In my view, PRASA is indeed liable to an injured plaintiff in a situation such as that alleged by Mhlongo – where a train proceeding with open doors became stationary between stations for a significant period of time due to a fault on the railway. Mhlongo also succeeds on the second question – she has put forward sufficient evidence to establish PRASA's delictual liability for her injuries in the accident on the day in question.

The Evidence of Loveness Mhlongo

[4] Since her evidence is crucial in defining and deciding both issues, it is convenient to begin with the evidence of Loveness Mhlongo. Mhlongo testified that on 6 March 2014 she went to her usual commuter rail station, Limindlela, at her usual time of about 4:20 am. With her usual valid monthly train ticket, she stood there for an unusual length of time as her usual 4:35 am train did not arrive.

[5] On that day, no announcements were made at the platform regarding the status of the trains. Mhlongo testified that information was often given at the platform if there was a problem with the trains. That way, commuters know they have a choice to leave, pay for, and take a taxi instead of the trains. She acknowledged that she could have taken a taxi on the day in question but she had no money.

[6] A train only arrived at about 5:30 am. This train had its doors open and it was full. It stopped at the station. She thought she would push to enter the train. She did so and entered a coach. Inside the coach, she pushed a second time and turned to face in the direction of the door. She was now holding on a pole a short distance from the door but somewhat towards the middle of the coach. Cross-examined, she admitted she was anxious to get to her workplace. Regarding her pushing, her view was that once she had pushed, she had her space in the coach and that there had been no other way to get

onto the train, though she admitted she could have let it go by in order to catch the next train.

[7] The train she had boarded moved from the Limindlela station and then stopped at Tembisa station. The doors were still open and it was still full. It then left Tembisa. The train then stopped for about 5 minutes between the Tembisa and Kalfontein stations. The doors were still open and it was still full. After this stop, the train then pulled off and stopped at Kalfontein station. It then proceeded to Birchleigh station, where it did not stop at all. The doors were still open and it was still full. Past Birchleigh station, the train then stopped and stayed in a spot somewhere between Birchleigh station and van Riebeck Park station, the next station after Birchleigh.

[8] At this spot, passengers began alighting from the train though not immediately. Mhlongo testified that she was "tired to hold" the pole after a while and let go of it. She thought that she would hold it again when the train pulled off and proceeded to the next station. Mhlongo testified she was aware of the danger of not holding onto the pole. However, some persons behind her were pushing each other; they wanted to alight. Mhlongo was pushed by these persons out of the coach. She fell down onto the railway and fell on her left leg, sustaining some injuries which were painful and required medical attention.

[9] After her fall, Mhlongo screamed and asked some commuters to help her. Some did. These persons picked her up and went away with her from the railway, past a line of fence poles, to some open space. She was then lying

next to the road. Mhlongo testified that some of these persons phoned an ambulance for her but the ambulance did not come. Mhlongo then fainted. When she awoke, a lady was there. Mhlongo asked this lady to call her daughter, taking her phone from her (the plaintiff's) bag. When her daughter did not answer, she asked this lady to call the daughter's employer, which she did. Her daughter then arrived with her daughter's employer and his car and took Mhlongo to Edenvale Hospital for admission and treatment. Neither Mhlongo nor her daughter reported the incident to PRASA.

[10] In Mhlongo's view, PRASA should have reported to her and others that the trains were not on time that day. Mhlongo could not understand why the train was stopped between stations. She blamed PRASA for stopping the train and for the doors being open when the train was stopped in between the stations. Mhlongo also testified that in the situation where trains were stuck in between stations, the train driver or guard would usually alight and walk along the train announcing for instance to the commuters, including her, that there was a "power failure". She once experienced this in a stopped train between Tembisa and Kalfontein.

Was PRASA liable in this situation?

Some of the Existing Jurisprudence

[11] In the world of train liability cases, the factual situation described by the plaintiff appears to be one of first impression. Most of the many recent cases

decided by our courts regarding potential liability by the operators of commuter trains have presented one or the other of two fairly distinct situations. One situation is that of trains moving while they are on their routes between stations. The other situation is that of trains stopped or in the process of stopping at stations.

[12] Commuter train operator liability has been established in numerous "moving train" cases.[1] In *Baloyi*, one issue was precisely whether the train was in motion or not.[2] The "moving train" situation has a number of variations. Some cases involve unlawful activity by passengers on public commuter trains. In *Muhanelwa*, the plaintiff was first robbed by other passengers and then pushed out of open doors from the moving train.[3] Another variant of these moving train cases has concerned the question of overcrowding. In *Phalane*, the commuter train operator was liable in a moving train situation with overcrowding.[4] In another case, the plaintiff was pushed out of a moving train with doors open because the train was too full for them to close.[5]

[13] Perhaps for obvious reasons, the "train at a station" situation has fewer variations and it would seem fewer decided cases. In *Moya*, absolution from the instance was granted at the conclusion of the case where the court

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[1] Maruka v Passenger Rail Agency of South Africa (8905/2014) [2016] ZAGPPHC 213 (15 April 2016).
[2] Passenger Rail Agency of South Africa SOC Limited v Baloyi (69570/2013) [2016] ZAGPPHC 785 (2 August 2016).
[3] Muhanelwa v Passenger Rail Agency of South Africa and Others (21398/2013) [2016] ZAGPPHC 333 (12 April 2016).
[4] Phalane v Passenger Rail Agency of South Africa (71408/2013) [2015] ZAGPPHC 804 (3 December 2015).
[5] Makgopa v Passenger Rail of South Africa (9830/2015) [2016] ZAGPPHC 506 (3 June 2016).

concluded that the plaintiff was not on the train he professed to have fallen from.[6] *Moya* also discussed the element of overcrowding.[7]

[14] The key "train at a station" case is the Supreme Court of Appeal (SCA) decision in *Thwala*.[8] There, the plaintiff had sustained injuries after she was pushed out of a train at a platform. The question was whether the train was stationary or in motion. The High Court found the train was stationary but found liability in the context of overcrowding. In the Supreme Court of Appeal, the plaintiff's claim was dismissed due to the fact that she fell while the train was stationary. The SCA also dismissed the contention that the train was overcrowded.[9] The SCA held that negligence cannot be proved where the doors of the train were open while the train was stationery.[10]

[15] In all these cases, courts have demonstrated creativity in grappling with the questions they have been asked to decide. In one moving train case, *Mokwena*, heard four years ago, Satchwell J made an inspection in loco – a procedure not frequently resorted to. Based on this inspection, she described the Elandsfontein station as being in a "timewarp".[11] Liability was found in that case where the plaintiff was ejected from a moving train by a combination of the pushing of other standing passengers and the movement of the train as

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[6] Moya v Passenger Rail Agency of South Africa (10/46053) [2012] ZAGPJHC 22 (8 March 2012).
[7] Ibid., para. 86.
[8] South African Rail Commuter Corporation Ltd v Thwala (661/2010) [2011] ZASCA 170 (29 September 2011).
[9] Ibid., para. 15.
[10] Ibid., para. 18.
[11] Mokwena v South African Rail Commuter Corporation Ltd and Another (14465/2010) [2012] ZAGPJHC 133 (14 June 2012).

well as the aperture on the other side of the carriage which was not closed when the train was stationary or moving. Some of her further observations are pertinent to the case at hand: "We observed passenger trains arrive, stop and depart. We saw trains depart the station where the doors had not closed on the platform side – a number of times where it seemed that passengers were holding the doors open and at least twice where there was no one in the vicinity of the doors. On one occasion the door was closing but very slowly as the train was moving off. On another occasion the door did not commence closing at all while the train was moving out the station. We also observed that doors on the opposite side of the carriage to the platform side were open – both while the train was stationery and moving off."[12]

The Mashongwa analysis

[16] The existing train liability jurisprudence has been brought to a sharp point in the 2015 Constitutional Court decision, *Mashongwa*.[13] That case was one of a moving train situation with unlawful activity by other passengers. Mashongwa was robbed by three passengers and then thrown out of the moving train, sustaining serious injuries and resulting in an amputation of one of his legs. Mashongwa alleged two grounds of negligence in his case – that PRASA was negligent because it did not ensure that the doors were closed and that better security should have been provided. Mashongwa was successful at the High Court but PRASA's appeal was upheld in the Supreme Court of Appeal, on the

[12] Ibid., para. 22.
[13] Mashongwa v PRASA (CCT03/15) [2015] ZACC 36; 2016 (2) BCLR 204 (CC); 2016 (3) SA 528 (CC) (26 November 2015).

rationale that the open doors and the lack of security guards could not be said to have caused Mashongwa's injuries.[14] Taking the case in part as one of general public importance, the Constitutional Court comprehensively discussed the elements of the case: wrongfulness, negligence (including foreseeability of harm), and causation.

[17] On wrongfulness, the Court recognized that many rail commuters are constrained to take trains to travel to and from work. As it stated: "Many rail commuters are constrained by the long distances they have to travel and limited financial resources, to use trains as their primary mode of transport. Understandably so, because this well-subsidised public transport system is affordable. Presumably, passengers enter these trains reasonably believing that the transport utility is alive to the dangers to which train users are exposed in the course of their journeys and has taken such steps as are necessary to avert the reasonably foreseeable harm that could otherwise befall them."[15] The Court established that the undoubted public law duty on PRASA did in these circumstances found a private law duty in delict. Wrongfulness was thus established.

[18] Turning to negligence, the Court did not find PRASA negligent for its failure to provide a security guard in every coach but did find PRASA negligent in allowing the trains, particularly during peak periods, to move with open doors. Further, the harm to Mashongwa – even though it resulted from the

[14] Ibid., para. 10.
[15] Ibid., para. 16.

unforeseeable mechanism of the action of criminals – was foreseeable. Negligence was thus established.

[19] On this point of the foreseeability of the harm suffered by the plaintiff, the Court reasoned as follows: "PRASA's duty to keep the coach doors closed while the train was in motion did not owe its existence to the need to stop criminals from throwing passengers out of the trains. That duty existed to prevent passengers falling out of a train when the doors were left open. It was an accidental fall that would be within the contemplation of a reasonable person in the position of PRASA. The foreseeable harm sought to be averted was thus not linked to criminal activity as such. It was the harm caused by slipping out of a moving train, being accidentally thrown out one way or another or being deliberately thrown out, say during a scuffle triggered by an ordinary misunderstanding, that was reasonably foreseeable."[16]

[20] The Court then posed the question: "Being thrown out of a moving train by criminal elements falls outside the realm of reasonably foreseeable incidents of harm alluded to above. How then can PRASA be held liable for injuries caused by a criminal activity taken to its logical conclusion?" Its answer was that "Mr Mashongwa fell from a moving train whose doors were left open. The precise mechanism by which he fell and the injury was sustained did not have to be foreseen. ... Unforeseeable as was the mechanism by which Mr Mashongwa

[16] Ibid., para. 60.

came to fall from the train, it was most certainly harm of the same general nature as the harm that was foreseen."[17]

[21] Turning to causation, the Court disagreed with the finding of the Supreme Court of Appeal. Noting that causation should not be conflated with wrongfulness and negligence, the Court stated that the traditional test ought to used first and only where no causation is shown need a broader inquiry be undertaken as was done in *Lee v Minister of Correctional Services.*[18]

[22] With respect to factual causation, the Court found that had the doors of the train been closed, the accident would have been unlikely to happen. The Court stated: "It is on the basis of the traditional test that causation will be determined. Had the doors of the coach in which Mr Mashongwa was travelling been closed, it is more probable than not that he would not have been thrown out of the train. The distance to be traversed by the train between the station where he boarded and the station where he was thrown out of the train takes about six minutes to cover. To beat him up and throw him out of a moving train is a mission that would probably have required more than six minutes to accomplish, if the doors were closed. In all likelihood, he would not have been thrown out of the train had the strict safety regime of closing coach doors, when the train is in motion, been observed."[19]

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[17] Ibid., paras. 60–61.
[18] Lee v Minister of Correctional Services (CCT 20/12) [2012] ZACC 30; 2013 (2) BCLR 129 (CC); 2013 (2) SA 144 (CC); 2013 (1) SACR 213 (CC) (11 December 2012).
[19] Mashongwa v PRASA (CCT03/15) [2015] ZACC 36; 2016 (2) BCLR 204 (CC); 2016 (3) SA 528 (CC) (26 November 2015), 66–67.

[23] With respect to legal causation, the Court first stated: "No legal system permits liability without bounds. It is universally accepted that a way must be found to impose limitations on the wrongdoer's liability. The imputation of liability to the wrongdoer depends on whether the harmful conduct is too remotely connected to the harm caused or closely connected to it. When proximity has been established, then liability ought to be imputed to the wrongdoer provided policy considerations based on the norms and values of our Constitution and justice also point to the reasonableness of imputing liability to the defendant."[20]

[24] It then examined the facts of the case and stated: "That the incident happened inside PRASA's moving train whose doors were left open reinforces the legal connection between PRASA's failure to take preventative measures and the amputation of Mr Mashongwa's leg. PRASA's failure to keep the doors closed while the train was in motion is the kind of conduct that ought to attract liability. This is so not only because of the constitutional rights at stake but also because PRASA has imposed the duty to secure commuters on itself through its operating procedures. More importantly, that preventative step could have been carried out at no extra cost. It is inexcusable that its passenger had to lose his leg owing to its failure to do the ordinary. This dereliction of duty certainly arouses the moral indignation of society. And this negligent conduct is closely connected to the harm suffered by Mr Mashongwa. It is thus

[20] Ibid., para. 68.

reasonable, fair and just that liability be imputed to PRASA. (Footnotes omitted)"[21]

Wrongfulness and Negligence in the Train-Stuck-between-Stations Situation

[25] Returning to the case at hand, I turn now to discuss the elements of wrongfulness and negligence where a commuter train proceeding with open doors becomes stationary between stations for a significant period of time due to a fault on the railway. I will discuss factual and legal causation below, in the particular context of Mhlongo's situation on the day in question.

[26] As noted above, we have a relatively new entrant in the train liability genre, the train stopped between stations. In my view, the train-stuck-between-stations situation is more akin to that of the moving train situation than it is to that of the train at the station situation with respect to the element of open or closed doors.

[27] This is so for two reasons. First, there is an inherent danger and risk in having open doors where there is a significant height from the train carriage to the tracks, without any steps or other ladder operating to provide for alighting. While the danger and risk is less (I would think considerably less) than that for open doors with a moving train, the risk is nonetheless significant and

[21] Ibid., paras. 68–69.

foreseeable. There is no such significant risk in alighting from a stationary train onto a train station platform. Indeed, that is the SCA's point in *Thwala*.

[28] Second, from the point of view of the ordinary commuter, a train stuck between stations, at least after a significant period of time, is more akin to the moving train situation described by the Court as one of confinement than the relative freedom of movement provided by a train at a station. Commuter passengers in a train stuck between stations would begin to feel confined and restless after a period of time. This situation might be alleviated by the provision of information regarding the time of delays and the status of trains.

Wrongfulness

[29] With the perspective offered by *Mashongwa*, one can see the situation alleged by Mhlongo fitting within the set of cases where the public commuter train ought to bear liability. As the Constitutional Court stated: "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."[22] Wrongfulness is thus established.

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[22] Ibid., para. 26.

[30] As stated above, the present case is apparently one of first impression. There is at least one other decided case concerning a train stopped between stations. In *Mpshe*, the train had come to a stop between Mlamlankunzi Station and New Canada Station with open doors. In alighting, the plaintiff fell and sustained injuries. The court noted that the train driver in that case testified that: "Open doors on a train, stationary or moving represented a danger to passengers, and passengers exiting between platforms presented a danger to themselves and others, although it was nothing out of the ordinary. It was the norm. He considered getting off the train in that way hazardous by virtue of the drop of between 1.6 to 1.7 meters to the gravel ballast below, and the danger of walking along the ballast where there were oncoming trains."[23] This case supports the conclusion regarding wrongfulness above.

Negligence

[31] In the case at hand, two distinct theories of negligence were advanced. One was based on PRASA's duty to ensure that the doors were shut when the train was in between stations. The other was based on a train operator's supposed duty to communicate regarding the delay that occurs when a train is stuck between stations.

[32] PRASA put on evidence that it is not PRASA policy for train drivers or guards to exit the train and announce information to the passengers. In the testimony of the train driver, Duncan Mampuru, in situations where the train is

[23] Mpshe v Passenger Rail Agency of SA (PRASA) (13/15939) [2014] ZAGPJHC 404 (21 November 2014), 51.

stuck, there is unfortunately no way of informing passengers because there are no intercoms. He testified that, as a train driver, he was not obliged to go out to inform the passengers of delays, although he admitted that another train driver might have opted to inform the passengers. In his testimony, "[y]ou are only obliged to go out to investigate a fault on your train." Mampuru noted that when he was obliged to get out on the track in order to investigate a fault on his train, he would then feel obliged to respond to passengers asking questions and might announce, for instance, a power failure. The testimony of the train guard, Mxolisi Pakisi, was to the same effect on this question.

[33] I agree that negligence can be founded on the first theory and do not need to decide on the second. PRASA was negligent in omitting to close the doors while the train was journeying – while the train was moving from station to station and while it was stopped in between stations. The scenario of this case fits alongside those noted by the Constitutional Court regarding open doors on a moving train: "Several scenarios that could result in a passenger falling out of a train come to mind. Slipping or losing one's balance before the train comes to a standstill or as it takes off or after it has taken off, falling out of the already open door and sustaining serious injuries are some of the potential risks of harm. Open doors are just as dangerous for the elderly, the infirm and small children, as they are for those who might be preoccupied with one thing or another and thus not paying adequate attention to the danger they are exposed to. Doors exist not merely to facilitate entry and exit of passengers,

but also to secure those inside from danger."[24] And as further pointed out in *Mashongwa*, there was no additional burden that PRASA would suffer were it to have ensured that the train did not depart from its stations with open doors.[25] Negligence is thus established.

[34] It should be noted that PRASA's negligence here in operating a train with open doors differs from the negligence alleged and established in *Mpshe*. In *Mpshe*, two theories of negligence were alleged. In one, the driver ought not to have departed from the station with a potentially faulty train. In the other, the train guard ought to have taken steps to allow the passengers to alight safely. *Mpshe* was decided on the basis of the first theory of negligence advanced there. There are significant distinctions between the case at hand and *Mpshe*. While both trains ended up stopped between stations, the reason was a train fault in *Mpshe* and a fault on the tracks in the case at hand. Further, while both trains when stopped had open doors, the passengers opened the doors in *Mpshe* and the doors in the case at hand were open throughout the journey of the train.

Foreseeability of harm

[35] In the case at hand, the type of injuries suffered by Mhlongo were the same type, although presumably as a general matter less severe, as the injuries foreseeable in allowing trains to depart from stations with open doors.

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[24] Mashongwa v PRASA (CCT03/15) [2015] ZACC 36; 2016 (2) BCLR 204 (CC); 2016 (3) SA 528 (CC) (26 November 2015), 47–48.
[25] Ibid., para. 51.

[36] While they must of course be read in context of the full judgment, the words of the Constitutional Court in paragraph 60 of *Mashongwa* bear repeating: "PRASA's duty to keep the coach doors closed while the train was in motion did not owe its existence to the need to stop criminals from throwing passengers out of the trains. That duty existed to prevent passengers falling out of a train when the doors were left open. It was an accidental fall that would be within the contemplation of a reasonable person in the position of PRASA. The foreseeable harm sought to be averted was thus not linked to criminal activity as such. It was the harm caused by slipping out of a moving train, being accidentally thrown out one way or another or being deliberately thrown out, say during a scuffle triggered by an ordinary misunderstanding, that was reasonably foreseeable."

On these facts, has Mhlongo made her case?

[37] As decided above, a public commuter train operator may be liable in the situation where a full train proceeding with open doors becomes stationary between stations for a significant period of time due to a fault on the railway. The question now is whether Mhlongo has put forward sufficient evidence to establish liability on the part of PRASA on the day in question. If so, then her case may proceed.

[38] Mhlongo's evidence as described above about the events after her fall and injury was corroborated by that of her 31-year old daughter, Faith Mahlalela. Mahlalela testified that she was at her workplace around Kempton Park when

her employer received a call around 6:00 am and was informed that her mother was injured. She and her employer quickly went to the spot in her employer's car. She found her mother alone and crying. They put the plaintiff into the employer's car and took her to Edenvale Hospital where Mahlalela registered her mother. Mahlalela did not check the times during this activity but estimated the trip to the spot of the injury as 5 minutes, 2 to 3 minutes for talking to and picking up her mother, and then 15 minutes for the trip to the hospital. The admission record there records the time as 7:00 am, which could be after some time waiting for admission and registration.

[39] Neither Mahlalela nor Mhlongo went back to PRASA to report the incident. This aspect of the case left PRASA at a distinct disadvantage in assessing its position and conducting this litigation. It had no records regarding the incident. It also needed to depend on the plaintiff's information in order to search for information regarding the operation of the trains likely to have transported the plaintiff. Mampuru signed a protection and injury statement to the effect that "[d]uring my shift, I did not witness any person who was injured and/or no one reported to me that he/she was injured at the station and or train." The train guard, Mxolisi Pakisi, signed a similar statement. Mampuru testified that, as a driver, one is usually not aware of incidents; they occur "at the back."

[40] While it was by no means clear on the papers, it is probable based on the evidence led at the hearing that Mhlongo was a passenger on the number 0506 train that was scheduled to leave Limindlela station at 5:35 am and did so on 6 March 2014. Limindlela lies between the station, Leralla, at the start of one of

the routes to Braamfontein and the next station Tembisa. The train driver, Mampuru, testified that he was driving the 0506 train on the day in question and that it departed on time from Leralla at 5:20 am. This fits with Mhlongo's testimony that she boarded the first train that came at about 5:30 am after she had arrived at the station at about 4:20 am and waited a lengthy period.

[41] Mampuru further noted there was a power failure due to a "hook-up" on the tracks on the day in question. A hook-up is a fault on the tracks where the power stops flowing into the commuter trains. His memory was refreshed by consultation with a train register prior to the hearing. His train stopped and lost time. Mampuru testified that there was a possibility that his train became stationary between Birchleigh and van Riebeck Park stations, as well as other stops. There was however no fault on his train, the fault was on the tracks. Mampuru concurred with the estimate of Mhlongo as put by counsel that the first stop of this train between Tembisa and Kalfontein station could have been five minutes and the second stop between Birchleigh station and van Riebeck Park station could have been at least ten minutes.

Were the doors open?

[42] A significant question is whether the doors of this train were open and if so, why were they open. In addition to Mhlongo's, the key evidence given here was that of the train guard, Mxolisi Pakisi. Mampuru and Pakisi both testified that it was the duty of the train guard to open and close the doors of the train.

[43] Pakisi testified that as far as he knew, in terms of the doors opening and closing, all was normal on the day in question. Pakisi testified that he always closes the doors as per PRASA policy when the train is in motion. If doors were open that day, he would have taken action to have the doors closed. Pakisi's evidence was that during the period when this train was stopped, he did not open the doors. In that sort of situation, there were no instructions by his employers to inform passengers of the situation and he was not obliged to get off the train to go and inform them.

[44] If the doors were open, the reason would be that passengers had opened the doors themselves. In this respect, Pakisi acknowledged that passengers had before forced opened the doors on the occasion of a stop between stations. When this happens, he testified that he tries to press the doors close button again. Further, Pakisi testified that he was aware of no incident on the day in question and no one reported an incident.

[45] Under cross-examination, Pakisi admitted that he could not refute Mhlongo's evidence regarding whether or not the train doors were open on the day in question. He also admitted that he did not remember the train stopping between Birchleigh and van Riebeck Park stations, although the papers he consulted as part of preparing did mention a hook-up on that day. Finally, he testified that he had never seen a train passing and moving with open doors.

[46] On the question whether the doors were open or not, there is – at least to some extent – a dispute of fact between Mhlongo and Pakisi. I accept

Mhlongo's evidence that the doors were open and had been open throughout the journey for several reasons. First, Mhlongo's evidence was internally consistent. Throughout her testimony, Mhlongo was clear that when she was injured the train was not in motion and that the doors were open all the time from boarding to injury and that the train was full. That the train was full makes it more probable that the doors were open. When asked whether the train doors could be forced open by commuters, she said she did not know about that. Second, there are several aspects of her testimony that to some extent harm her own case yet she continued to stand by her testimony. One such aspect was her admission that she pushed her way onto the train at Limindlela station. Another is that she let go of the pole when the train was stopped because she was tired. Third, her evidence with respect to the train journey was to some extent corroborated by Mampuru's testimony about the power failure and the train stoppage on the day in question. Her testimony with respect to the events after the injury was corroborated by the testimony of her daughter. Fourth, I find it probable that trains do operate with open doors. As noted above, this is a common feature of the albeit limited selection of cases discussed above. Further, as noted above, a judge of this division has previously found evidence of trains departing from a station with open doors through an inspection in loco.

[47] While not entirely unhelpful, Pakisi's evidence suffers in two respects on the question of whether the doors were open or closed on the day in question. First, he admits that he is unable to remember the specific events of the day in question and was thus unable to refute Mhlongo's evidence. Second, his

credibility suffers from his statement made under cross-examination that he had never seen a passing train with its doors open.

Was the accident caused by PRASA's negligence?

[48] The matter of causation must be separately canvassed. As emphasized in Mashongwa, the question of causation ought not to be conflated with that of wrongfulness. It is thus properly part of the enquiry into whether Mhlongo has brought forward sufficient evidence to meet her onus.

[49] With respect to factual causation, this case is akin to Mashongwa in that one may use the traditional but-for causation test. Here, there was but-for causation. Had PRASA closed the doors of the coach in which Mhlongo was travelling, it is more probable than not that Mhlongo would not have been injured.

[50] With respect to legal causation, again one cannot say in this case that the act of negligence (the omission to close the doors) is too remote from the injury – the pushing by other passengers and the fall to the tracks -- to deny liability. It seems likely to me that the open doors contributed to the mass exit and the pushing of the passengers in the situation where the train was stopped between stations. On a preponderance of probabilities, Ms Mhlongo would not have sustained the injuries she did had PRASA kept the doors closed.

Conclusion

[51] As noted above, the circumstances of this case put PRASA at a certain disadvantage. The incident occurred between stations in a physical location not easily monitored or controlled by PRASA and its employees. The incident also was not soon reported to PRASA by the person who suffered injury. These circumstances and their relatively novel character may have contributed to PRASA's evident reluctance to admit liability in this particular case.

[52] As noted by the Constitutional Court in *Mashongwa*, there is not a one to one correspondence between the breach of the public duty and the private law remedy of delict. That Court also was of the opinion that the legislature is well placed to devise an appropriate regime for assessing and funding liability for injuries on public commuter trains. It may be that placing some responsibility and timelines on passengers to report their injuries to the train operator would be a facilitative element of such a regime. Of course, such questions are not matters for this court to go into any further.

[53] Having heard the parties and read the documents of record filed in this matter, I thus order

1. The defendant is liable for 100% of plaintiff's proven or agreed damages.

2. Defendant to pay plaintiff's costs in respect of the dispute on the merits of the case.

3. The question of quantum is postponed sine die.

KLAAREN AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION (JOHANNESBURG)

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DATE OF HEARING	: 24-26/10/2016
DATE OF JUDGMENT	: 15/12/2016