IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: **24618/2021**

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO
26 September 2022

In the matter between:

**N T[....] obo ST** Plaintiff

and

**PASSENGER RAIL AGENCY OF SOUTH AFRICA** Defendant

**JUDGMENT**

**DE VOS AJ**

Introduction

[1] This is an action for damages. The plaintiff sues PRASA on behalf of her son, who will be referred to as "ST".

[2] ST fell from a moving train when he was 13 years old. He had finished soccer practice and was getting on the train to go home. As he was boarding the train, disembarking passengers pushed him and the train started moving with its doors open. He fell and slipped under the train. He pleads that he suffered a degloving injury of his right foot and a traumatic amputation of several of his toes on his right foot. He claims, through his mother, delictual damages for these injuries.

[3] PRASA opposes this relief. PRASA contends that ST got injured because he "jumped off the moving train".[1]

[4] The parties have a factual dispute whether ST was pushed by other commuters trying to get onto the train or whether he jumped off the train. The parties, however, are in agreement that whether ST was trying to get onto or off the train, pushed or jumped, the train was *moving with its doors open*.

[5] It is within this context that PRASA's liability is to be considered.[2] The facts

[6] ST testified that on 26 November 2019 he went to Mlamlankunzi train station in Soweto at about 18h00 after finishing soccer practice. His friends were ahead of him. Whilst he was boarding the train, he was pushed by disembarking passengers when the train started moving with its doors open. This created the perfect storm that permitted him to fall out of the moving train and fall under it. ST was badly injured. ST reported the incident to private security at Mlamlankunzi and also at Orlando station to PRASA security. From there he was taken to hospital by ambulance.

[7] The core aspects of his evidence is that he was pushed out of a moving train whilst he was trying to get onto the train.

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[1] PRASA's written submissions para 1

[2] The issue of quantum was postponed and the matter continued only on the issue of liability in accordance with the agreement between the parties as well as the certification of trial readiness this Court ruled that the merits, as the issue of liability is more commonly known, be separated from quantum in terms of Rule 33(4); and that the issue of quantum be postponed sine die for subsequent adjudication. The parties had agreed that the matter was ready to proceed on that basis.

[8] ST was cross-examined by PRASA on two main grounds. The first was that he got onto the wrong train, realised his mistake and then jumped whilst the train was in motion. ST admitted that he had boarded the wrong train, but denied that he tried to jump off the train. He held steadfast that he was pushed and fell out whilst trying to get onto the train.

[9] The second line of cross-examination related to a version ST had given two protection officers after the incident. The protection officers took down the version in a statement.The statement recorded that ST told the protection officers that he fell whilst disembarking from the train. ST explained that he did give a statement to protection officers whilst sitting on the platform, injured and waiting for an ambulance. He said during this interview he informed the protection officer that he fell whilst being pushed out when he was trying to get onto the train. ST admits the interview but denies that the told the protection officers that he jumped out of the train.

[10] At the end of ST's evidence the core of this evidence, that the doors were open whilst the train was moving, was left substantially unchallenged.

[11] PRASA called two protection officers, Mr Tsoagang and Mr Hassim. The protection officers testified about the statement ST made to them after the accident. They testified that ST told them that having gotten onto the wrong train, he tried to disembark when his foot got caught and that is when he was injured.

[12] The protection officer's version were tested against each other and the probabilities during cross-examination. They were consistent in their view that ST's mother was present during the time the statement was taken from ST.

[13] The plaintiff sought leave to re-open its case to lead the evidence of ST's mother. PRASA agreed to the reopening on condition that they may call further witnesses. ST's mother testified that she was with ST when his statement was taken by the protection officers and he said he was injured trying to get onto the train and not off the train.

[14] PRASA did not call any officer or guard to testify that the doors of the train were closed before it started to move.

Consideration of the matter

[15] PRASA submits that ST "jumped off the moving train".[3] This is repeated several times by PRASA in its submissions: ST got injured from a moving train as he realised the "train was moving towards Johannesburg he then tried to disembark form the moving train".[4] PRASA's summary of its witness statement is that "after [he] realised that he boarded the wrong train he tried to disembark from a moving train".[5] PRASA submits that "the plaintiff told them he tried to disembark from the moving train after realising he had boarded a wrong train".[6]

[16] It is common cause – on both side's versions – whether ST fell or jumped – he did so, out of a moving train with open doors. The facts that are common to both sides – a train in motion with open doors – is sufficient to ground negligence on the part of PRASA.

[17] Our Courts have concluded, repeatedly[7] that PRASA's failure to ensure the doors of a train in motion were closed, is a negligent act. The reasoning underpinning this is that the harm of falling from a train is reasonably foreseeable, even if the precise

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[3] PRASA's written submissions para 1
[4] PRASA's written submissions para 8
[5] PRASA's written submissions para 11.8
[6] PRASA's written submissions para 23
[7] In Mthombeni v Passenger Rail Agency of South Africa (13304/17) [2021] ZAGPPHC 614 (27 September 2021) the Court held -

> "It bears yet another repetition that there is a high demand for the use of train since they are arguably the most affordable mode of transportation for the poorest members of society, for this reason, trains are often packed to the point where some passengers have to stand very close or even lean against doors. Leaving doors of a moving train open therefore poses a potential danger to passengers on board".7
> "Doors exist not merely to facilitate entry and exit of passengers, but also to secure those inside from danger. PRASA appreciated the importance of keeping the doors of a moving train closed as a necessary safety and security feature. This is borne out by a provision in its operating procedures requiring that doors be closed whenever the train is in motion. Leaving them open is thus an obvious and well known potential danger to passengers".

In Baloyi v Passenger Rail Agency of South Africa (PRASA) 2018 JDR 2044 (GJ) para 20 it was repeated that 'it was a basic fundamental requirement for the safe operation of a passenger train in any country that "a train should not depart with a door open". The prohibition of trains travelling with

sequence leading to it was not; and the steps reasonably required to prevent it were easy to take.[8]

[18] The principle is quite categorically stated in *Maduna v Passenger Rail Agency of South Africa*[9]:

> "Open train doors and injuries resulting from them have often received judicial attention. **Unsurprisingly the cases all say that a rail operator who leaves train doors open while the train is in motion, acts negligently**." (emphasis added

[19] The Chief Justice put it succinctly in *Mashongwa*[10]-

> "The vulnerability of rail commuters and the precarious situation in which they often find themselves ought, by now, to be self-evident. It is 10 years since Metrorail in effect highlighted the need to keep coach doors closed to secure rail commuters and the significance of failing to provide safety and security measures for them when a train is in motion. Even then it was not a new problem as there were reported decisions in other courts that dealt with it. This underpins the utmost importance of PRASA's duty "to ensure that reasonable measures are in place to provide for the safety of rail commuters"

[20] PRASA, operating a moving train with open doors is, in terms of our settled jurisprudence, a negligent act. The risk of serious injury to an intending commuter resulting from starting a train while persons are in the act of boarding the train are

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open doors keeping the doors of the train closed whilst in motion is an "essential safety procedure" (paragraph 26). Travelling with open trains doors is a negligent act. (paragraph 27)

[8] The Supreme Court of Appeal in Transnet Ltd t/a Metro Rail and Another v Witter (517/2007) 2008 ZASCA 95 (16 September 2008) has categorically stated that "a train leaving with open doors constitutes negligence". Similarly in Rodgers v Passenger Rail Agency of South Africa 2018 JDR 0347 (GP) at para 14 it was held that "PRASA has an obligation to protect its passenger's bodily integrity and failure to do so attracts liability to compensate for damages suffered as a result thereof." In Maruka v Passenger Rail Agency of South Africa 2016 JDR 0720 (GP) at 34 the plaintiff was ejected from a moving train by the pushing and jostling for space from fellow commuters while the doors were open. The Court held that there is a "heavier burden" placed on PRASA "where greater risk exists". A reasonable person or organ of state would have reasonably foreseen a commuter would fall as a result of a train disembarking with open doors. It is also expected that PRASA should have taken reasonable steps to prevent that harm from taking place.

[9] 2017 JDR 1039 (GJ) par [28]

[10] At para 18

self-evident.[11] PRASA was negligent in allowing the train to start moving with its doors open whilst a child was busy embarking.[12]

The two versions: did he fall or jump?

[21] The parties present different versions about how ST was injured. He says he fell and PRASA says he jumped. The factual dispute has bearing on the apportionment of damages.

[22] PRASA did not plead an apportionment of damages. Nowhere in its pleadings does it rely on an apportionment.

[23] The Supreme Court of Appeal in *AA Mutual Insurance v Nomeka* held that the defendant, to obtain such condonation, must have pleaded fault on the part of the plaintiff.[13]

[24] In this case, PRASA did not plead any fault on the part of the plaintiff. Nowhere in its pleadings does PRASA contend that there ought to be an apportionment of damages or that the plaintiff was at fault. PRASA, plainly, did not plead this case.

[25] PRASA, for the first time, in its written submissions refers to apportionment of damages. PRASA, quite muted, submits that damages "should" be apportioned and PRASA ought to be liable for only 10% of the damages. No case law for this proposition is set out. No development of this contention is presented by PRASA. No basis to deviate from the Supreme Court of Appeal's judgment in Nomeka has been presented. No application for leave to amend was sought.

[26] Apportionment has not been pleaded and no basis has been provided to the Court to permit PRASA to rely on it at this stage or to deviate from the Supreme Court of Appeal authority of *Nomeka*.

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[11] Ngubane v SA Transport Services 1991 (1) SA 576 (A) at 777D
[12] Transnet Ltd t/a Metrorail v Witter 2008 (6) SA 549 (SCA) par [1] at 552 and par [5]-[11] at 555
[13] AA Mutual Insurance Association Ltd v Nomeka 1976 (3) SA 45 (A) at 55D)

[27] On this basis alone there can be no apportionment of damages.

[28] However, even if PRASA had pleaded an apportionment of damages, it attracts the onus to prove an apportionment of damages. It has failed to meet this onus for the following reasons.

[29] First, the reliability of PRASA's version is questionable. PRASA relies on a version presented by an injured 13 year old sitting on a platform at a train station. The context within which this statement was made, causes concern.

[30] Mr Tsoagang testified that he took ST's statement on the day ST was injuredST was severely injured, in pain and must have been bleeding from his wounds for more than two hours. He had a traumatic amputation to his right foot, suffered a degloving injury of his leg and was only 13 years old at the time. ST speaks Xhosa. The protection officers Sotho. ST's attention must have been on his injuries and the hope for help. All of this occurred on a busy platform surrounded by people coming and going. The circumstances were hardly conducive to the detailing of an accurate statement and the exclusion of any possibility of a mistake being made. The circumstances in which this statement was taken leaves the Court with a sense of unease whether it was conducive to accuracy. The possibilities of miscommunication were great.

[31] To compound the Court's discomfort, Mr Tsoagang's contemporaneous notes have gone missing. The statement was taken orally and then later transcribed from these missing contemporaneous notes. The actual recording of what was said by ST cannot be presented to the Court as the contemporaneous notes went missing. This adds another layer to the possibilities of errors.

[32] Second, the two protection officers contradicted each other. This leaves doubt in the court's mind as to the clarity of their memory of the events. They contradicted each other regarding where they were when the call from the JOC (Joint Operations Centre) came through; when and where the manuscript statement by Mr Tsoagong[14]

[14] The last two pages of Exhibit A

was written out; and at what stage it was determined that ST had a fracture.[15]

[33] Third, the Court has doubts concerning the reliability of the memory of the protection officer Tsoagang. Mr Tsoagang wavered regarding material aspects of the statement. Mr Tsoagang testified that he took a written statement from ST. He backtracked on this and indicated that he did not take a written statement from ST. Mr Tsoagang testified that he wrote out the statement at the day of the incident whilst ST was waiting for the ambulance. After further questions, this was also altered and Mr Tsoagang conceded that he had transcribed it later from some contemporaneous notes that he had made at the time, but which since went missing.

[34] PRASA's fourth difficulty is Mr Tsoagang's trustworthiness as a witness. Mr Tsoagang claims never to make mistakes, yet when confronted with a mistake in his handwritten statement was quick to counter 'it was a human error'. He claimed to be able to remember this incident very well, but he could not recall whether the injured minor child was sitting or lying down when he was being interviewed by himself. He claimed that there was security at the Mlamlankunzi train station "24/7" and sought to discredit the version of ST that there was no PRASA security there to whom the injured child could report the incident, even though he never went there to the Mlamlankunzi train station at any time that day. Not only was he willing to testify to events he could not know about, but he was willing to testify to them in a manner that is prejudicial to ST's case. Worse, his version is contradicted by Mr Hassim who testified that there was no security on the platform at Mlamlankunzi train station.

[35] To compound this, Mr Tsoagang would not concede, at all, that ST must have been in pain. Mr Tsoagang's version that ST was not in pain is not only improbably but also at odds with the testimony of the other protection officer Mr Hassim who, unsurprisingly, testified that ST was in fact in pain and bleeding.

[36] Mr Tsoagang claimed to have an independent recollection of this very incident despite it having happened years ago. Notwithstanding numerous similar incidents in the intervening period without recourse to his written statement is improbable,

[15] P.O TSOAGANG stating that it was only after the paramedics had arrived (which he confirmed as per par 6 of his handwritten statement was only at 23:15), whilst P.O. Hassim conceded it had been

particularly as he was only reminded of the incident by the attorney a few days before he testified. However, Mr Tsoagang's claim of an independent recollection faltered as he changed his memory of the events after being shown the statement. In particular, after being vague in his memory whether ST was lying down or sitting when the statement was taken, when shown his statement, he appeared to have gained a clear recollection and was convinced that ST had been lying down.

[37] Fifth, is ST's adamant, credible and consistent evidence that he fell.

[38] Lastly, the version of the protection officers, that ST told them he fell trying to get off the train, is rebutted and defeated by the testimony of the plaintiff. The plaintiff, ST's mother, testified clearly and convincingly that ST had told the Protection Officer that he had been getting onto the train at the time. Had this been the only evidence against PRASA the Court would have approached it with caution due to the timing of when this evidence was presented. However, when seen together with the remainder of the evidence, it is another hurdle PRASA has failed to overcome in discharging its onus.

Order

[39] In the result, the following order is granted:

a) Defendant is liable for 100% of Plaintiff's proven or agreed damages.

I de Vos
Acting Judge of the High Court

much earlier, by 22:26 (as per OB (Occurrence Book) entry 1100 p305).

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

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| Counsel for the plaintiff: | **B P GEACH, SC** |
| Instructed by: | Masapha Attorneys Inc |
| | |
| Counsel for the Respondent: | **ADV NC RANGULULU** |
| Instructed by: | Makhubela Attorneys |
| | |
| Date of the hearing: | 06 September 2022 |
| Date of judgment: | 26 September 2022 |