




IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No. 65357/2020

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHERS JUDGES: YES/NO
(3)	REVISED
<div style="display: flex; justify-content: space-between;"><div> SIGNATURE</div><div><u>26/10/2023</u> DATE</div></div>	

In the matter between:

YONELA AMANDA XULABA

Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Defendant

This matter was heard in open court and disposed of in terms of the directives issued by the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

JUDGMENT

RETIEF J

INTRODUCTION

[1] The plaintiff, in her personal capacity, in this action claims contractual alternatively, delictual damages from the defendant [PRASA] arising from injuries she sustained on the 10th of September 2019 whilst she was a passenger aboard a PRASA train.

[2] By agreement between the parties the issue of liability and quantum have been separated in terms of Uniform Rule 33(4) and the matter for adjudication before me is on the issue of PRASA's liability only.

[3] To unpack the procedural steps taken by the parties in setting out their respective versions, I consider the trial bundle.

[4] The plaintiff's version as gleaned from the unamended particulars of claim [particulars] is alleged paragraph 7 thereof. This version has been maintained and recorded in all three of the signed pre-trial minutes (from 3 September 2021 up and until 5 July 2023). The version was: *"on the 10 September 2019, at approximately 20:00, the Plaintiff as a passenger, was involved in a train accident where she fell from the train whilst in transit. The aforesaid train belonged to the Defendant and for which the Defendant was responsible for its control, motion and safety."* At this juncture it is important to note that the pleadings and the pre-trial minutes record that the plaintiff fell from the train at 'Brier Train station'. I believe the spelling is incorrect and should be Berea Road station, Durban, in KwaZulu-Natal.

[5] However, on 2 August 2023, approximately a month before the hearing, the plaintiff's version was amended. In so doing, the affected amendment to paragraph 7 of her particulars now alleges that: *"On or about 10 September 2019 and at approximately 20.00 at and/or near Park Ryne Train, the Plaintiff, as a passenger, and fell through open doors while the train was in motion, which train belongs to the Defendant and for which the Defendant was responsible."* This extract records the exact wording of the amendment and as such, typographical errors are included. Notwithstanding, one gets the gist that the train accident is now described as 'falling

through open doors' and Berea Road station has been replaced with Park Rynie station.

[6] Conversely, PRASA's version has remained unamended from the filing of their plea. The version: *"-the Plaintiff was the sole cause of the incident due to her own negligence in that she fell asleep while the train was in motion and upon waking up, she opened the doors and disembarked the train whilst it was in motion. Alternatively, the negligent conduct of the Plaintiff contributed to her injuries and damages."* PRASA maintained throughout that the incident occurred at Rynie Park station.

[7] A clearer indication of the disputed facts emerges. This having regard to the common cause fact that the train was in motion at the material time. It is how the plaintiff left the moving train and landed on the platform which is eventually to be determined.

[8] Before I deal with this factual dispute, PRASA's Counsel in argument, suggests that to determine whether the plaintiff was in possession of a valid train ticket will be dispositive of at least the plaintiff's contractual claim against PRASA. In this regard I was referred to paragraph 5.1 of the plaintiff's particulars and the matter of **Bhiya v PRASA**¹ [Bhiya matter]. Having regard to the **Bhiya** matter, I am rather of the view that an enquiry into whether the plaintiff was a lawful commuter will be dispositive of the plaintiff's entire claim as pleaded in paragraph 8 of the plaintiff's particulars, namely: both the contractual and a delictual claim due to breach, and in the further alternative, the negligent breach of both such pleaded claims.

[9] If I am correct, then the need for me to deal with the factual dispute in determining negligence and/or contributory negligence if I find in favour of PRASA, becomes unnecessary. For this reason, I deal with this apparent dispositive issue in more detail below but, first deal with the parties' evidence and the respective weight attributed thereto.

¹ (72237/2019) [2023] ZAGPPHC 35 (26 January 2023).

[10] The plaintiff was a single witness testifying on her own behalf and PRASA lead the evidence of one witness, Mr Ngwabe, the train Metro guard. Mr Ngwabe was on board the train at the material time.

THE EVIDENCE AND THE ANALYSIS THEREOF

PLAINTIFF'S CASE

[11] The plaintiff testified that on 10 September 2021 she needed to attend a job interview in Durban and as such, she intended and needed to use the train as her mode of transportation both to and from such interview. After the interview and on her return journey she bought a ticket at the Berea Road train station in Durban. It was her intention to disembark at Park Rynie train station as she lived in Park Rynie.

[12] The train was delayed leaving Berea Road station. On its arrival she embarked the train and duly sat in the third seat from the door in one of the coaches. The plaintiff testified in chief that: *"if she remembered, the door was open throughout the journey."*

[13] She testified that as the train approached Park Rynie station, and whilst still in motion, she stood up and started moving towards the door. At the door 4 (four) unknown commuters were standing in front of her. She stood behind them approximately 1,5m from the open door. At the material time, she was not holding onto anything to keep herself steady as the commuters in front of her made use of the handles provided. As the train began to slow down to allow passengers to disembark, the train first moved slowly then suddenly faster causing a jerking movement. The sudden jerking movement made her lose her balance, as a result of which, she fell out of the moving train and onto the platform.

[14] The incident occurred at approximately 20h18 in the dark. When she landed on the platform, she hit her head and was rendered unconscious. When she opened her eyes, two security guards were standing next to her. The security guards asked her, for, amongst other things, her personal particulars which she gave freely and correctly.

- [15] Although the plaintiff conceded that her personal particulars were relayed correctly by the security guards and correctly recorded on exhibit "A", she denied that the description recorded by the same security guards in the same exhibit "A" were correct.
- [16] The description relayed and recorded in exhibit "A" accords with PRASA's version, namely that she fell asleep on the train and when she woke up, she needed to disembark, which she did while the train was in motion leaving the station.
- [17] The plaintiff initially did not emphatically deny the version in exhibit "A" during cross examination, but rather replied that she had no reason to jump from the train. She later blamed the conflicting versions on her conscious state at the time. Stating that when she gave her personal details to the security guards, she was conscious, but because she lapsed in and out of consciousness, the version she may have given them of how the incident occurred was not correct, she was confused. When pressed even further, her explanation changed yet again and the plaintiff's response now was that PRASA is biased as they do not want to pay passengers who are injured and will say anything to suit their own purposes.
- [18] The plaintiff accepted that the incident occurred at approximately 20h18 and that she remained in the care of the security guards until the ambulance arrived which they summonsed at approximately 21h30. During this time the plaintiff did not correct or change her version she gave to the security guards. The plaintiff was taken to the GJ Crooks hospital in Scottburgh. She remained in hospital under observation until she insisted on being discharged on 13 September 2019. She was concerned about her children being left unattended at home.
- [19] The plaintive testified further that her unconscious state persisted for three days after the incident, testifying that she only regained consciousness (as she explained an awareness of her surrounding) on 13 September 2019. The plaintiff remained adamant that she did not know that she was in hospital for a period of three days. She maintained this stance notwithstanding the hospital records recording which were put to her during cross-examination. The hospital records recorded circumstance ad variance with her testimony.

[20] The hospital records did indicate that on 10 September 2019 upon arrival the plaintiff was confused and that, as a result of a mild seizure in causality she was sent for a CT scan of her brain and was duly admitted for observation.

[21] Notwithstanding the above recording, it was put to her that on 10 September 2019, her Glasgow Coma Scale [GCS] was recorded as 14/15, that on 11 September 2019, she was communicating with nursing staff; that on 12 September 2019 she received and communicated with visitors, was mobile and walked her relatives to the hospital entrance to say goodbye; and, that on 12 September 2019, she was assessed as fully conscious at GCS 15/15. The plaintiff appeared to miss the relevance of what was being put to her.

[22] The plaintiff was not taken through these hospital records during her evidence in chief, nor adequately in reply. No summary report of the CT scan performed on 10 September 2019 was tendered into evidence, nor did the plaintiff call any expert witness to assist in clarifying the reasonableness of the glaring inconsistencies in her testimony compared to the hospital records in the Court bundle, nor to proffer an opinion regarding her conscious state during the three days in hospital.

[23] After being discharged, the plaintiff testified that she went back to the Park Rynie station to enquire from the security guards what indeed transpired on 10 September 2019. The plaintiff's inability to remember exactly what happened not only accords with her own testimony, it is demonstrated on the pleading by the sudden change of versions and the records from the Mthatha General Hospital records dated the 20 September 2019, when the plaintiff's history was taken from her recording that: *" – she got unconscious at a train station in Durban. She regained consciousness in the hospital. She had no recollection of what happened. Today she reports occipital pain..."*

[24] Under cross-examination when questioned about her return to the station, she was asked whether she also enquired into the wellbeing of the other four commuters who were in front of her at the open door and who, on a balance of probabilities, may

have have collided with or who too, may have fallen out when the train jerked. She did not.

[25] Lastly, as to the ticket, the plaintiff testified that she bought a ticket at Park Rynie station but that she could not produce it as her handbag tore as a result of the fall onto the platform. The handbag was made of material, and she presumes she lost the ticket that way.

[26] Having regard to the plaintiff's evidence in totality I do not find her testimony reliable, nor plausible, illogical at times and not credible. Her unexplained inconsistencies weigh more in favour with the clinical picture that she really could not remember what happened. This too accords with her initial version of events when she merely pleaded that she was involved in a train accident without stating or describing how the accident occurred. This was amplified in Court when she testified and offered her version of how the accident occurred for the first time, namely that she fell onto the platform through an open train door because the train jerked when she was not holding on. It also accords with her desire and need to return to the Park Rynie station after being discharged from hospital to find answers. She too displayed unnecessary bias against the security guards' version even when the fact they were not PRASA employees was conveyed to her.

[27] The plaintiff's version as pleaded is not supported by her testimony and no further witnesses were called to bolster it any way.

PRASA'S CASE

[28] PRASA called one witness, Mr Ngwabe, a Metro guard who had been employed by the Metrorail for 15 (fifteen) years. Part of his duties included the inspection of compartment doors to ensure they were in working order before the train commenced with its designated route. The inspection is done at the train depot.

[29] Mr Ngwabe testified that he discharged his duties in respect of train no. 0786. He meticulously testified about the steps taken during an inspection of doors to ascertain if each coaches' doors are in working order. He confirmed that the doors of

train no. 0786 were working. It was common cause that the plaintiff was a passenger aboard train no. 0786.

[30] Mr Ngwabe further testified that his other duties included monitoring the coaches en route, ensuring that the train remained on the tracks and monitoring the safe disembarking and embarking of passengers in and out of the train at each station. If he was satisfied that all the passengers had safely embarked and disembarked, he would blow the whistle. Blowing a whistle was a signal to the passengers that he was going to close the doors and that the train was ready to depart.

[31] Mr Ngwabe testified that on 10 September 2019, he was the Metro guard on the train in question and remained in his coach on the train monitoring both the passengers and train en route. He testified that on that evening and at Park Rynie station after passengers had disembarked, he closed the doors, blew his whistle signalling to the driver, Mr JC De Jager that they could depart. Whilst the train was in motion leaving the station, he noticed an object come from the train and land on the platform. He signalled for the driver to stop; the driver complied. On investigation he came across two security guards and a black woman, identified as the plaintiff, on the platform.

[32] He enquired from the security guards what had happened. They confirmed that the lady had fallen asleep inside the train and woke up as the train was leaving Park Rynie station [PRASA's version]. This was the station she needed to disembark from as she lived at 4th Street, Park Rynie. She jumped off the moving train. He testified that the plaintiff did not dispute this version when it was told to him. He testified further that he did not note any visible injuries, however, the plaintiff did complain of a headache.

[33] Mr Ngwabe immediately contacted the Joint Operating Centre to report the incident and was given permission to proceed en route. He left the plaintiff with the two security guards. According to exhibit "D", the combined accident and incident report, Mr Ngwabe relayed the security guards' version by phone to the operating centre whilst obtaining permission to proceed with the train's route.

[34] The security guards were not called to testify to bolster the probate value of his testimony, but he confirmed that the version conveyed to the operating centre before the train left Park Rynie station correctly recorded what he had relayed. Such versions too, can be found in both exhibit "A" and "H." No objection was recorded vis-à-vis the content or correctness of exhibits "A", "D" nor "H." Furthermore, plaintiff's Counsel never challenged the correctness of Mr Ngwabe's understanding of what the security guards had told him of the plaintiff's version.

[35] However, Mr Ngwabe testified in chief that he closed the doors before the train left Park Rynie station and could not adequately explain how the plaintiff was able to jump from the moving train with the doors closed. His response was unsatisfactory and highly improbable, suggesting that she perhaps exited *via* a window. He too was unsure whether a passenger could open the doors on their own whilst the train was in motion.

[36] However, Mr Ngwabe's testimony as a whole was methodical and candid. His inability to adequately explain how the plaintiff could have jumped through closed doors leads to the inescapable fact that the doors, albeit working, and absent testimony confirming that commuters can open them themselves whilst the train is in motion, must have been open at the material time.

[37] The open door speaks to the aspect of PRASA's negligence. The principle is categorically stated in **Maduna v Passenger Rail Agency of South Africa**:² *"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."*

[38] It too speaks of the possibility of the plaintiff's contributory negligence on both versions. In that, on her version, by choosing to stand in front of an open door without holding whilst a train was in motion when she could have remained seated (third row from the door) until the train came to a standstill, alternatively, on PRASA's version by electing to jump from a moving train. However, this is not the end of the matter. The

² 2017 JDR 1039 (CJ), par [28].

plaintiff must still prove the conclusion of and the terms of an oral contract, alternatively PRASA's wrongfulness justifying its liability as pleaded.

[39] To establish what is pleaded and what the nub of the legal issue is for determination, I turn to the pleadings.

LEGAL ISSUE

[40] According to the paragraph 8 of the plaintiff's particulars, the plaintiff bases her claim, in the alternative on a contractual or a delictual breach, albeit a negligent breach in the further alternative.

[41] The thrust of the plaintiff's contractual claim against harm appears at paragraph 5.1 of her particulars in which she alleges that her safe transportation to her destination without harm arises against her payment of reasonable remuneration.

[42] The thrust of her delictual claim appears in paragraph 6.2 which arises by virtue of PRASA accepting the plaintiff as a passenger.

[43] Having regard to the plaintiff's pleaded case it appears that there is merit in the dispositive issue, namely: the enquiry into whether the plaintiff was a lawful commuter. This is so as if the plaintiff is found not to be a lawful commuter no enforceable contract or legal duty that may have arisen by statute for want of wrongfulness.

[44] This then necessitates an enquiry into whether the plaintiff, at the material time, established that she was a fee-paying passenger. Without proof of an acceptable means of payment for a journey, the provisions of item 12(1)(u) of Schedule 1 to the Legal Succession to the South African Transport Services Act 9 of 1989 [Succession Act] are applicable which declare such omission as a criminal offense attracting criminal sanctions. In consequence, in law, without proof of payment that plaintiff will be regarded as an unlawful passenger.

Was the plaintiff a lawful commuter?

[45] The plaintiff does not plead that she at the material time paid a reasonable remuneration for her journey nor that she was in possession of a valid train ticket for the route travelled. Of course, a ticket is not the *sine qua non* for PRASA's liability, but it is *prima facie* proof at the time that she was a lawful commuter thereby avoiding criminal sanctions in terms of item 12(1)(u) of Schedule 1 of the Succession Act.

[46] Notwithstanding the plaintiff's pleaded case she did not at trial produce any documentary evidence in support of, at least, a valid train ticket nor an acceptable proof of payment for her journey.

[47] Unfortunately, her evidence did not reveal any particularity to assist the assessment of her lawfulness aboard the PRASA train. No evidence was lead nor voluntarily tendered about the cost of any ticket, in particular the cost of the one-way journey, nor how or where she placed her ticket in her material bag for safe keeping, nor for that matter what the ticket looked like. She offered no information pertaining to the ticket to assure the Court or give any indication that she possessed one or paid for one at all.

[48] When prompted in cross-examination about the ticket, she stated she lost it. She testified that her material bag had broken with the fall, inferring, rather than actually stating, that it must have fallen out of the bag. She did not testify to the loss of any other documents or valuables in the material bag which too may have suffered the same fate as the ticket. It is not unusual to expect a person possessing other valuable documents on her person when going for a job interview. The plaintiff testified she was returning from a job interview.

[49] Her evidence about possessing a ticket appeared to be an afterthought. This is supported by the fact that it was not pleaded when it was a material allegation in support of not only her statutory obligation, but a term of her one and only pleaded contractual obligation. Failure to plead this fact was a glaring omission and the dispute raised by PRASA at the trial of the plaintiff of not being in possession of a ticket is echoed in the dispute raised on the pleadings.

[50] In consequence, the weight of testimony relating to the ticket, like her testimony in support of her version is insufficient, not credible nor reliable having regard to her testimony as a whole. Absent the pleaded material fact of paying reasonable remuneration for such fare and/or possession of a ticket the plaintiff has failed to discharge the onus of proving that she was a lawful commuter.

[51] Therefore, all her claims as pleaded must fail and this includes her claim based on a legal duty of care as pleaded in paragraph 4.1 of her particulars. The plaintiff has failed to prove PRASA's wrongful conduct.

[52] No other proposition other than what was pleaded, was argued before me nor dealt with in written argument for further judicial determination. This includes another determination on the establishment of a legal duty arising, notwithstanding her unlawfulness aboard the train. In consequence, I do not venture there and in any event, if I were to, I would rely on the **Bhiya** matter in which Hassim AJ aptly dealt with the proposition of public policy considerations on similar facts as in this matter and came to the same conclusion as I have, that no wrongfulness has been established by the plaintiff and thus PRASA attracts no liability even in circumstances where they may be negligent.

[53] I further deem it appropriate to, for completeness, illustrate the plaintiff's further difficulties on the pleadings with regard to establishing a legal duty against PRASA other than the lawful commuter enquiry.

[54] I turn to paragraph 4 of the particulars. Unfortunately, the plaintiff in paragraph 4.1 relies, *inter alia*, on the provisions of the 'SATS ACT' to establish one of the sources of PRASA's legal liability. However, after the last effected amendment to paragraph 2 of the particulars, no reference to which Act the use of the acronym 'SATS ACT' in paragraph 4 now refers. This is confusing and not clarified.

[55] No further amendment was moved at trial. The SATS Act as it stands to be interpreted in the pleadings finds no application in the matter.

[56] This confusion is compounded by that fact that the SATS Act is generally an accepted acronym for the South African Transport Act 65 of 1981 which has now been repealed. This is probably why PRASA, in paragraph 5 of its plea, when pleading to paragraph 4 of the plaintiff's particulars, attempted to deny the legal duty as pleaded, save for admitting obligations which are echoed in section 22 of the Succession Act, which in context, too, appear misplaced as section 22 deals with the establishment of name and not obligations.

[57] The plaintiff's Counsel in written argument appeared to ignore all the glaring inconsistencies in the pleadings, repealed statutes and typing errors which compounded my difficulty in the adjudication of the matter. The plaintiff's Counsel's written argument did not assist me either with the aspect of PRASA's wrongfulness on the papers, nor on the evidence adduced at trial in support thereof and the conclusion of the oral contract. He focused mainly on the aspect of negligence, factual causation and disputes of facts referring me to **Mashongwa v Passenger Rail Agency of South Africa**³ on the aspect of factual causation and the principles of evidence⁴ on the aspect of credibility of a witness. No thought to the pleadings and the evidence in support thereof appeared apparent.


[58] In consequence, the inevitable must flow. I find that the plaintiff failed to prove that a contract had been concluded or that any breached as pleaded, nor that PRASA's conduct was wrongful. The necessity for me to deal with negligent breach of the contract alternatively negligence and causation in delict, falls away.

In the result, the following order is granted:

1. Absolution from the instance;
2. The plaintiff is ordered to pay the defendant's costs.

³ [2015] ZACC 36.

⁴ PJ Schwikard and SE Van der Merwe, Principles of evidence, 4th edition at page 574.



L.A. RETIEF
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Date of argument:

04 & 05 September 2023

Date of judgment:

26 October 2023