THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1082/2016

In the matter between:

PASSENGER RAIL AGENCY OF SOUTH AFRICA **APPELLANT**

and

MMAKGABO SIMON MOABELO **RESPONDENT**

Neutral citation: *Passenger Rail Agency of South Africa v Moabelo* (1082/2016) [2017] ZASCA 144 (2 October 2017)

Coram: Ponnan, Leach and Seriti JJA and Mokgohloa and Mbatha AJJA

Heard: 23 August 2017

Delivered: 2 October 2017

Summary: Law of Delict – Damages – appellant falling off the train and sustaining bodily injuries when jostled by fellow passengers – claim based on negligent omission – negligence proved – dissent – appellant injured not by train on which he had fallen off – no proof of patrimonial or legal causation of harm.

ORDER

On appeal from: Gauteng High Court, Johannesburg (Moshidi, Masipa and Francis JJ sitting as court of appeal):

The appeal is dismissed with costs, such costs to include the costs of two counsel.

JUDGMENT

Mbatha AJA (Seriti JA and Mokgohloa AJA concurring):

[1] The respondent, Mmakgabo Simon Moabelo, a 37 year old man, sued the appellant, the Passenger Rail Agency of South Africa (PRASA), in the South Gauteng High Court (per Monama J) for damages arising out of an incident in which the respondent was injured just outside Kaalfontein Station, Gauteng, on 3 August 2009. The trial proceeded only on the issue of liability (which the appellant denied), the parties having obtained a consent order separating the issues of liability and quantum in terms of Rule 33(4) of the Uniform Rules of Court. At the conclusion of the trial, the trial court found that the appellant's negligence was the cause of the respondent's injuries and subsequently liable for damages.

[2] The appeal against the whole judgment was heard by the full court, at the South Gauteng High Court, with leave of the trial court. The full court confirmed the order of the trial court and dismissed the appeal with costs.

[3] Following an application by the appellant, special leave was granted on 14 September 2016 to proceed with the appeal in this court. The issues before this court are as follows:
(a) whether the trial court was correct in accepting the version given by the respondent to the extent that it could be relied upon for purposes of deciding

whether the appellant had discharged the onus upon him that he was pushed out of the train;
(b) whether the trial court was correct in rejecting the version put forward by the train driver, Mr van der Mescht, that the respondent in fact ran in front of the train that ran him over; and
(c) whether the finding by Monama J that the respondent's version was cogent, reliable, plausible and inherently probable and the rejection of the evidence put forward by the appellant's witnesses, was correct.

[4] The background facts according to the respondent, Mr Makgabo Simon Moabelo (Moabelo), are that he was on a train that was en route from Kempton Park Station to Tembisa Station. He boarded the train when it was already dusk. He was a fare paying passenger who was in possession of a weekly ticket.

[5] When he boarded the train he had to stand as the train was full to capacity. He remained standing for the duration of the trip. On the way to Kempton Park Station, the train stopped on Platform 3 in Kaalfontein Station where more people boarded. The train was overcrowded as it left Kaalfontein Station for Tembisa and Leralla Stations. As the train departed for Tembisa Station, the pushing and jostling for door positioning began, as passengers were preparing to alight at the next station. He remained standing in between the doors, holding onto a pole. He did not push as he was in between the doors. He was pushed in all directions by other commuters. When the train changed lanes he was pushed more towards the side of the open coach door. He tried to hold onto the pole but lost his balance and fell out of the moving train. He recalls falling out and only regaining consciousness at the hospital. The respondent's evidence was that he could not recall the number of the train he boarded at Kempton Park Station. He estimated the time he was pushed out of the train to be towards 18h30. Mr Moabelo steadfastly stuck to his version despite the lengthy cross-examination.

[6] He sustained severe tissue injuries, a bilateral amputation of both legs, amputation of third and fourth digits of the left hand, fractured left humerus, multilevel fractured cervical spine and a resultant brachial plexus injury.

[7] The version of the respondent was disputed in toto by PRASA. The defence raised by the appellant was that the respondent ran/walked in front of an oncoming train outside the confines of the station, when it was dangerous or inopportune to do so. Respondent was a pedestrian.

[8] It is common cause that the respondent was hit by train number 1886 driven by Mr van der Mescht at about 19h13, that the trains had been running late for the whole day on the route between Kempton Park and Leralla stations.

[9] Mr Pelani Sam Baloyi (Baloyi), a security officer posted at Kaalfontein Station on 3 August 2009 was called as a witness by the respondent. Baloyi worked for Sinqobile Security Company. He related that he was on duty as from 18h00 on 3 August 2009 and was posted with Ramalata. Their patrolling post started from the beginning of Kaalfontein train station towards the direction of Tembisa Station, covering an area of between 40 and 50 meters. They were not in uniform that night as they operate undercover so as not to be identified as security officers.

[10] They carried a radio, baton stick, firearm and a pocket book. The place that they patrolled was well lit and visibility was good as it was a clear night. The high water mark of Baloyi's evidence is that 'they would be able to see that there walks a person' but 'not be in a clear picture to see who is that one …' He related that when they received a report about the person who fell off the train, he recalled noticing two trains, one coming from Tembisa and another one proceeding to Tembisa. This was between 19h00 and 20h00. They found the injured respondent and made the necessary report.

[11] Though extensively cross-examined Baloyi was adamant that there was no activity or movement in the vicinity of the area he patrolled. He disputed the train driver's version that he saw a figure running across the lines from his right to the left and that that person came onto the line on which the train was travelling. Baloyi's evidence was that if there had been any movement he would have seen it, as they could see both sides of the station

from where they sat. Furthermore, Baloyi testified that there was no way that a person could have approached from the direction that the driver mentioned as the place is fenced and there are industries behind the fence.

[12] On being questioned about the lines proceeding to Tembisa Station, Baloyi's evidence was that at times the trains switched lanes though he knew the dedicated lines for trains to Tembisa.

[13] Mrs Moabela's evidence related to her finding of her husband's weekly train ticket in his wallet and that the respondent had no reason to be suicidal. The same sentiments were echoed by the respondent's supervisor, Mr Mathebula of Guardian Outsourcing Company. He testified that the respondent was employed as a supervisor and confirmed that the latter's leave had been approved. The week he got injured was to be his last week at work prior to going on leave.

[14] The driver of the train 1886, Mr van der Mescht (van der Mescht), testified on behalf of the appellant. He had been a guard for 29 years and had been a train driver for four years preceding the accident on 3 August 2009. His evidence was that, on his return trip back from Leralla to Elandsfontein, his train went past Tembisa Station before proceeding to Kaalfontein Station. It was 41 minutes late. It left Leralla Station at 19h01 instead of 18h20 as on that day the trains were running late.

[15] When he was proceeding to Leralla his train had been on the down slow line, but on his return it was on the down main line. He went past point 135T, a crossover point, where the train crosses over the down slow line and after going past all the crossover points he proceeded to join the main up line.

[16] He testified that as he was approaching Kaalfontein, a train went past on the down slow line, proceeding to Tembisa Station. At the point when the front of his train went past the back of the other train, he saw a movement from the right hand side from underneath the bridge. He saw this movement for the first time, just before the bridge. When he looked again he saw someone running over the rails, who suddenly kneeled in front of the train and

the train ran him over. The movement he had seen was from the right hand side. This person was standing underneath the bridge. When he saw this movement he was about 20 to 25 meters from the crossover points.

[17] He was driving at 30km per hour when he saw the movement. After the train hit the person, he applied the brakes, stopped and phoned operations in Johannesburg. He made an entry in his daily journal that he ran over a person at 19h13.

[18] The cross-examination of the driver revealed that a different version was given on the plea being that 'Plaintiff was injured after he walked or ran in front of an incoming train outside the confines of the station'.

[19] It was also revealed during his cross-examination that when he passed train 0547 on the down slow lane to Leralla, he saw a movement, 'when I was clearing train 0547'. He explained that the movement that he saw was from the right to the left, moving towards his train. This person came from West to East in a straight line, who then knelt in front of the train, between the lines with his back towards his train 'like he was going to start a race'.

[20] Having stopped the train he also phoned the guard Ms Beauty Masete (Beauty), to check on the person that was hit by the train. Beauty reported back to him that it looked like the person was dead. They were about 50 to 60 meters from Kaalfontein Station where the incident took place.

[21] It was pointed out to him under cross examination that he had reported that he saw a movement, was not sure what it was and that when the train came closer, he had seen someone kneeling on the rails and heard a loud bang. This version was contrary to his evidence in chief that he had seen a person from a distance running from underneath the bridge, crossing the rails and kneeling in front of the train.

[22] The appellant had also called Ms Beauty Masete, who testified that her duties are to see that the passengers are in and out of the coaches, close the doors and blow the whistle to alert the driver that the doors are closed so that

he can drive off. She was asked by the respondent's counsel about the procedure in terms of PRASA's procedure book as to what happens when people hang outside the open doors of the train. Her response was that even in that condition she would give the signal to the driver to drive off.

[23] Mr Kgare, the signal man, gave evidence as to the routes taken by trains from Kempton Park to Leralla and Pretoria. His evidence was that in general, trains proceeding to Tembisa Station from Kempton Park Station use the down slow line or the down main line. Platform 3 serves the down main line and Platform 4 serves the down slow line.

[24] What was significant about his evidence in chief was that where there is another train on Platform 4, the train proceeding to Tembisa may be diverted to Platform 3. At times a train could leave Kempton Park on the down slow, but may even cross to the down main line before reaching Kaalfontein Station. Therefore trains to Tembisa Station could be on either line. At times the station gets so busy that he would be forced to switch the lines and platforms particularly at peak hours between 15h00 to 19h00.

[25] This corroborated the respondent's evidence in a material respect in that though the train which he boarded in Kempton Park Station was on Platform 4, at Kaalfontein Station it stopped on Platform 3. Platform 3 serves the down main line which is next to the up main line. If the train that had stopped on Platform 3 on the down main line proceeds to Tembisa Station, it will crossover at certain points to proceed to Tembisa Station just beyond Kaalfontein Station. However, this was not reflected on his train register of 3 August 2009. He also confirmed that no train went past between 18h20 and 18h30 that evening as estimated by the respondent. The evidence showed that the only trains that went past Kaalfontein Station were trains no 1886 and 0547, respectively. Train no 0547 which went past the signal cabin at 19h13 was accepted by the respondent as the train from which he fell.

[26] Kgare was cross-examined about the entries in his register reflecting the change in the lanes of certain trains, for example, train 1887 and 0667. His answer was that the train could leave Kempton Park Station on the down

slow line, but could change lanes before reaching Kaalfontein Station. More significantly, it was pointed out to him that there was no column on his control book which is available to reflect that he switched the trains, when they were late, to let the express to Pretoria pass through or to accommodate another train at peak hours. This was raised as he had stated in his evidence in chief that when a train is late on the down slow line, it could be directed to the down main line, if there was a train on the down slow line. On the day in question, van der Mescht's evidence was that since the morning of the 3 August 2009 the trains were running late.

[27] The court below had found that Monama J's approach was correct in accepting that the versions of the respondent and the driver were mutually destructive, and dealing with the matter as advocated in *Stellenbosch Farmer's Winery Group Ltd & another v Martell et Cie & others.*[1] Monama J found that the probabilities prevailed in favour of the respondent. The court below found that there was no irregularity or misdirection on the findings of the trial court.

[28] The respondent in his particulars of claim based his cause of action on the appellant's negligence in that the appellant 'owed a duty of care to the plaintiff to ensure that the doors of the train were closed before the train started moving into/from/out of the station, and to ensure that passengers on board the train would not fall or be ejected therefrom before allowing any train to commence moving into/from/out of the station, and/or to take all reasonable steps to ensure the safety of all passengers on the train at all reasonable times ("the duty of care").'

[29] The test for delictual liability is trite.[2] Reverting to the facts of this case, I accept that it has been proven that the respondent was on the train, which was overcrowded and was in motion with open coach doors. And that the respondent fell as a result of being pushed off by other passengers jostling for positions near the door and sustained injuries as a result thereof. PRASA should have foreseen that by leaving the doors of a moving train open, this

[1] *Stellenbosch Farmer's Winery Group Ltd & another v Martell et Cie & others 2003 (1) SA 11 (SCA) at 14-15*.
[2] *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430 E-F.

would pose potential danger to passengers, like the respondent, who may accidentally be pushed off the train and sustain serious injuries. PRASA should have ensured that the coach doors were closed whilst the train was in motion.

[30] The onus to prove negligence rests on the plaintiff. The plaintiff is required to prove that harm to others was reasonably foreseeable and that a reasonable person would have taken steps to guard against such harm occurring. The plaintiff must adduce evidence as to the reasonable steps that ought to have been taken by the defendant to prevent or reduce the risk of such harm.

[31] The Constitutional Court in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail & others*[3] recognised that the rail commuter services carry a positive obligation to implement reasonable measures to ensure the safety of rail commuters who travel on the trains, and that such obligation should give rise to delictual liability where there is a risk of harm to commuters resulting from falling out of the crowded trains running with open doors, which is foreseeable.

[32] The same court in *Mashongwa v Passenger Rail of South Africa*,[4] in a unanimous judgment, held that PRASA had been negligent because it did not ensure that the doors of the train were closed when the train left the station as

---

[3] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail & others* 2005 (2) SA 359 (CC) para 84:
'In these circumstances, I conclude that Metrorail and the Commuter Corporation bear a positive obligation arising from the provisions of the SATS Act read with the provisions of the Constitution to ensure that reasonable measures are in place to provide for the security of rail commuters when they provide rail commuter services under the SATS Act. It should be clear from the duty thus formulated that it is a duty to ensure that reasonable measures are in place. It does not matter who provides the measures as long as they are in place. The responsibility for ensuring that measures are in place, regardless of who may be implementing them, rests with Metrorail and the Commuter Corporation.'

[4] *Mashongwa v Passenger Rail of South Africa* 2016 (3) SA 528 (CC) para 52:
'It must be emphasised that harm was reasonably foreseeable and PRASA had an actionable legal duty to keep the doors closed while the train was in motion. Not only has it expressly imposed this duty on itself, its importance was also alluded to in *Metrorail*. It is also commonsensical that keeping the doors of a moving train closed is an essential safety procedure. Mr Mashongwa would probably not have sustained the injuries that culminated in the amputation of his leg had PRASA ensured that the doors of the coach in which he was, were closed while the train was in motion. It was thus negligent of PRASA not to observe a basic safety-critical practice of keeping the coach doors closed while the train was in motion and therefore reasonable to impose liability for damages on it, if other elements were proved.'

a result, Mashongwa was thrown out of the train by his assailants. This arose after a contention by this court that the open coach doors while the train was in motion did not dispose of the issue of causation as the appellants could have forced open the coach doors to throw Mashongwa out of the train. The *Mashongwa* matter centered around the issue whether PRASA's conduct was wrongful when physical harm befell passengers travelling on the trains with the coach doors open.

[33] In *Mashongwa* it was found that PRASA's wrongful conduct attracted liability. The Constitutional Court held that public carriers like PRASA have always been regarded as having a duty of care towards passengers to protect them from physical harm whilst making use of their services.

[34] Furthermore, the court had to also consider whether a reasonable train operator would have foreseen the risk of harm befalling its passengers arising from such conduct and whether such operator would have taken the necessary steps to guard against such harm occurring on its trains. The court held that the breach of the public duty by PRASA should translate into a private law breach in delict and that such breach would amount to wrongfulness.

[35] On the question of the overcrowded trains with open doors at peak hours, the court found that this posed real danger to passengers on board. The harm was reasonably foreseeable, and PRASA had a legal duty to keep the doors closed when the trains were in motion. This conduct attracts liability.

[36] In the current case, the question is whether the respondent discharged the onus of proof. The aspect of time, as estimated by the respondent as to when he boarded the train or when he was pushed and fell off, cannot be held against him. It is in my view that the respondent established that it was already dusk when he boarded the train in Kempton Park and that the incident occurred within that period. He was not aware that the trains were running late, his estimate of the times could also be related to that factor.

[37] The respondent did not take note of the train number that he boarded in Kempton Park. When one looks at the objective facts of the case, it was established that van der Mescht's train crossed with train no 0547 proceeding to Tembisa and Leralla Stations. The respondent was found in possession of a valid weekly ticket which was produced to support that he had boarded the train from Kempton Park Station. Mathebula's evidence explained that after a week of the incident the respondent, would have commenced his approved leave of three weeks. In the light thereof, it is immaterial why he had not gone to work on that day and why he had gone to Kempton Park Station as, possession of a valid train ticket proved that he had boarded the train as a fee paying passenger.

[38] The fact that he did not know the number of the train that he boarded, the exact time of the incident and the number of the train that hit him, is immaterial as long as he proved that he was on the train. It does not absolve the appellant of its public law duty to have the doors closed at all material times when the train is in motion. More so, the respondent was hit by a train which had crossed with the train proceeding to Tembisa Station.

[39] The appellant's witnesses including the train driver, the guard and the signal man confirmed that the trains were running late on the day in question. The guard, Beauty, confirmed that the train coach's doors were not closed. Taking all these factors together, one can only conclude that the respondent fell off the train.

[40] The trial court had rejected the evidence of the train driver. It found that it lacked credibility and was improbable and accepted the evidence of the respondent and Baloyi. The train driver gave a completely different version when he reported the incident, shortly after it had occurred. Whereas, a different version was pleaded in the plea and he testified to a different version in court. It is my view that the trial court correctly rejected the train driver's evidence as a fabrication.

[41] The respondent had specifically pleaded, amongst other acts of negligence or omissions, that the appellant's train driver was negligent in

setting the train in motion whilst the coach doors were opened. The respondent had discharged the onus that the train doors remained open whilst the train was in motion. This was also confirmed by the evidence of Beauty.

[42] The issue that needs to be considered is whether it could not have been reasonably foreseeable that a train operating at peak hours, with open doors in motion, would cause injury to the commuters. My view is that injury was foreseeable and the train should not have been in motion with open coach doors.

[43] On the issue of legal causation in *Mashongwa*, the court acknowledged that 'no legal system permits liability without bounds'. Proximity has to be established, to establish a nexus between the incident and the harm caused. The court in para 69 held as follows:

'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 reasonable, fair and just that liability be imputed to Prasa.'

[44] The respondent in this matter was hit by another train as he fell off the train to Tembisa Station. It is my view that even if he had hit a pole or rails, the appellant should be held liable as the injury was foreseeable. I therefore find that the trial court cannot be faulted in finding in favour of the appellant.

[45] Accordingly the following order is made:

The appeal is dismissed with costs, such costs to include the costs of two counsel.

Y T MBATHA

ACTING JUDGE OF APPEAL

Ponnan JA (Leach JA concurring):

[46] I have had the benefit of reading the judgment of my colleague Mbatha AJA, with which I regret I am unable to agree.

[47] This appeal is against a judgment upholding with costs, the claim of the respondent, Mr Simon Moabelo, against the appellant, the Passenger Rail Agency of South Africa (PRASA). Mr Moabelo's claim against PRASA is one in delict for physical injury suffered on 3 August 2009. The issues of liability and quantum having been separated, the matter proceeded to trial in respect of the former before Monama J in the South Gauteng High Court. Monama J held PRASA liable to compensate Mr Moabelo 'for all proven damages suffered by him'. But, he did grant leave to PRASA to appeal to the full court. The appeal to the full court (per Moshidi J, Masipa et Francis JJ concurring) failed. The further appeal by PRASA is with the special leave of this court.

[48] The pleadings are a useful starting point. In the summons filed on behalf of the respondent, it was alleged that:

'5. On or about the 3rd of August 2009 and at approximately 18h20, at or near Kaalfontein Station, Tembisa, within the jurisdiction of the above Honourable Court, plaintiff was on board a train for which he had a valid ticket. Whilst on board the train with the carriage's doors opened whilst the train was in motion, plaintiff was forced/ejected/pushed/jostled out of the carriage by other passengers, as a result of which plaintiff lost his balance and fell out of the carriage.

6. The sole cause of plaintiff's falling from the train, was the negligence of the conductor, whose identity is to the plaintiff unknown, who was negligent in one or more or all of the respects.

9. As a result of the Plaintiff's falling from the moving train and the negligence of the defendant aforesaid, plaintiff sustained the following injuries.'

[49] The further particulars elaborated:

'3.5. The plaintiff records that he boarded a train from Kempton Park which was going to Tembisa, when the train was moving out of Kaalfontein Station it was overcrowded with its doors not closed and the passengers were pushing each other as they were preparing to disembark the train at the next station. The plaintiff records that he was pushed out of the train when it was changing lanes and he tried to hold

an iron rail which is in between the doors but he lost balance on his feet and could no longer hold the iron rail and he fell. The plaintiff also records that before he fell he was not close to the open doors.

3.6. The plaintiff records that he was standing far away from the open doors.

3.7. Plaintiff puts on record that the train was overcrowded and passengers were pushing each other. Plaintiff also records that he was pushed whilst the train was changing lanes and lost balance and tried to hold on the iron rail in between the doors but also lost balance and fell.'

[50] The plea in response to those allegations was:

'4.3. The defendant pleads that the plaintiff was injured after the plaintiff walked or ran in front of an oncoming train, outside the confines of a station, when it was dangerous and inopportune to do so.

5.1. The defendant denies each and every allegation contained in these paragraphs, as if specifically traversed, and the plaintiff is put to the proof thereof.

5.2. Alternative to 5.1 above, the defendant pleads that, in the event of the above Honourable Court finding that the incident occurred in the manner as alleged, and that the defendant was negligent in any manner as alleged, then the defendant pleads that such negligence was not causally related to the incident and any injuries sustained by the plaintiff.'

[51] The respondent testified that he awoke on the morning of 3 August 2009 feeling ill. As a result he did not go to work. He consumed medication and went back to sleep. At about 3pm that afternoon, he made his way by train from his home in Tembisa to Kempton Park. He alighted at the Kempton Park station and made his way on foot to the Festival Shopping Mall. Having withdrawn cash at an ATM machine and spent some time window shopping in the mall, he decided to return home. In his evidence in chief he stated:

'Now, do you know more or less what time it was when you decided to go home? --- My estimation of the time says it could be 17:00 when I left the mall on my way home now.

And where did you go to form the mall? --- I went to the station.

Which station? --- Kempton Park Station.

Why did you go to Kempton Park Station? --- Well, I was at the mall which is in Kempton Park, so I went back to the station. Kempton Park train station.

To catch the train? --- Yes.

To go where? --- On my way to Tembisa.

. . .
Now it was August month. When you got onto the train was it light or was it already dark? --- Slightly dark.'

[52] Although he was unable to identify the train, Mr Moabelo did say that he boarded the first train on his arrival at the Kempton Park station. The train was already full and picked up more passengers at the Van Riebeck, Birchleigh and Kaalfontein stations. As the train left Kaalfontein station, so stated Mr Moabelo:

'There was some pushing your Lordship. Well, I was standing . . . [incomplete]. As I was standing the people who were just in front of us they were pushing us.
Yes. --- That moment is when the train pulled off leaving the platform, that is when the pushing started as the train was leaving the platform.
Yes. --- I have been pushed till such time when I noticed myself that I was now near the doors. I had been pushed up to the doors.
Ja. --- I turned so that I could hold onto the aisle which is situated on the middle of the coach.
Ja. --- Unfortunately they were powerful than myself then I fell, I had been pushed out of the moving train.
Which way did you fall? --- Backward your Lordship on my back. I fell on my back.
And when that happened, was the train still at Kaalfontein station or had it left the station? --- It has left the platform at Kaalfontein when it happened.'

That was his last recollection of the events of that day. He subsequently regained consciousness in a ward at Tembisa Hospital, when he became aware that his lower limbs had been amputated.

[53] As to how Mr Moabelo came to sustain his injuries, it is to the evidence of Mr van der Mescht, a train driver in the employ of Metro Rail, that one must look. He was driving train 1886 en route from Tembisa to Kaalfontein when, so he testfied:

. . . 'I saw a movement from the right hand side from underneath the bridge. When I saw that movement it was just before the bridge. Then I saw the movement and when I look again I saw somebody is running over the rails.
In which direction? --- In the direction of my train. When he was running over the rails he suddenly kneeled in front of my train and then I ran him over.
. . .

You say you see the movement and then you see him run toward your train and you see somebody kneeling before your train. When you saw that did you do anything? --- When he kneels in front of my train it was a shock. It was a shock. After I hit him then I applied the brakes and when the train stopped I phoned operating.
From where? --- From inside the cab.'
It is undisputed that this incident occurred at 7.13 pm.

[54] The trial court recorded:
'There are two train stations between Kempton Park train station and Kaalfontein train station. These are Van Riebeeck Park and Birchleigh. All these stations have four platforms [platform 1 – 4]. There are four lines or lanes or tracks that pass at these platforms.'
. . .
The down main line passes on platform three at each and every relevant station. Like dsl it runs in the northern direction towards Tembisa and Pretoria. The tracks are 1.2m wide, the distrance between dsl and dml is some 2.9m, the distance between the dml and uml is 2.82m and the distrance between dsl and uml is 6.92m.
. . .
Train No. 0547 was scheduled to depart at 18:52. It was 21 minutes late. It passed the signal cabin at or just after 19:13 (i.e. at the same time as 18:86 passed the signal cabin approaching Kaalfontein station from Leralla.
. . .
Mr Van der Mescht was the train driver of train number 1889. This train was coming from Tembisa. He was travelling on the up main line. As it approached Kaalfontein he had to cross train No.0547 which was on the down slow line . . .'

[55] The trial court reasoned:
'The plaintiff bears the onus to proof his case. The first question which the court had to determine was whether the plaintiff was on a train as he alleges or whether he was a trespasser running across the train tracks at Kaalfontein station as alleged by Mr van der Mescht.'
It approached that enquiry thus:
'The versions of the plaintiff and Mr van der Mescht are important. To determine whether the plaintiff was on a train or whether he was trespassing as stated above. The two versions are mutually destructive. The court has developed a technique to resolve the factual dispute where there are two irreconcilable versions. The technique is formulated as follows: "To come to a conclusion on the disputed issue the court must make a finding on (a) the credibility of various factual witnesses; their

reliability and (c) the probabilities . . . But when all factors are equipoised the probabilities . . . But when all factors are equipoised the probabilities prevail." In my view the factors are equipoised save to state that the version of the train driver cannot be relied upon. He testified that he saw a movement under the bridge. That bridge is in the vicinity of the signal cabin as well as a place where he diverted his train to up main line in order to give the train from Kaalfontein station to Tembisa a space on the down slow lane. Consequently he could not have seen the events properly. To suggest that the plaintiff wanted to commit suicide is absurd. He was happily married, happily employed and he was indeed looking forward to a holiday. These factors militate against any suggestion of suicide. He had a valid train ticket and Mr Baloyi testified that the area where the accident occurred is sufficiently secured. This strengthens my view that the plaintiff was indeed on the alleged train. He was not trespassing. On these objective facts there are overwhelming probabilities which favour the plaintiff, in this regard. Accordingly, I am not persuaded that the plaintiff was trespassing as alleged. I find that the plaintiff was a passenger with a valid train ticket travelling on a train to Tembisa township.'

[56] The trial court ultimately concluded:

'In my view, the version by Mr van der Mescht stands to be rejected on account of the evidence of Mr Baloyi. It is therefore reasonable to infer that the plaintiff was on the train that passed the train driven by Mr van der Mescht. The plaintiff fell from the train in and around the area of cross over by train 1886 to usl.'

[57] In the main, the full court endorsed the approach of the trial court. The full court made two important observations, both of which find support in the recorded evidence: first, 'when [Mr Moabelo] boarded [the] train at about 18h00, it was already dusk'; and, second, '[Mr Moabelo] could not point out the exact spot where he was pushed out of the moving train, and fell.' Those observations are destructive of the inference drawn by the trial court that Mr Moabelo was a passenger on train 0547. If, indeed, Mr Moabelo left the Festival Shopping Mall at approximately 5 pm and boarded the first train heading to Tembisa, he could not have been a passenger on train 0547. Although all the trains were running late, the evidence reveals that there were in all some 17 trains that departed from Kempton Park to Tembisa between 5 and 7 pm that evening. According to the summons, Mr Moabelo sustained his injuries at 6.20 pm when he fell out of a moving train. The only train that passed that area at around 6.20 pm was a business express train to Pretoria

that did not stop at Kaalfontein Station. There is thus no support at all for Mr Moabelo's allegation that he sustained his injuries at 6.20 pm.

[58] I have great difficulty with the approach of both courts below that the versions of Mr Moabelo and Mr van der Mescht were mutually destructive. Even if Mr Moabelo's evidence is to be accepted in its totality it does not explain how he came to sustain his injuries. On the version of Mr Moabelo at least one hour remains unaccounted for. Mr Moabelo's account ends with him being pushed off the train. Mr van der Mescht was the only eye witness to the collision. There was simply nothing to gainsay his version. One therefore cannot simply juxtapose the two versions and reject his version as the trial court did. In any event, both courts appeared not to appreciate that the rejection of Mr van der Mescht's evidence meant that there was simply no evidence as to how Mr Moabelo sustained his injuries. Rejecting Mr van der Mescht's version, in and of itself, carried the destruction of Mr Moabelo's case. Importantly, the trial court simply ignored Mr Moabelo's evidence that: 'I was never hit by a train. What I know is that I fell out of the moving train. That is what I know, Your Lordship I was not hit by a train, no'. It accordingly found in his favour on a basis entirely different to that sought to be advanced by him.

[59] Mr Moabelo simply had no version or recollection as to how he got to the up main line a little to the north of Kaalfontein Station, where the train driven by Mr van der Mescht collided with him. The evidence of the signalman in the employ of PRASA, Mr Kgare, supported by the train schedule for the evening and the four-platform layout at Kaalfontein station, is that Mr Moabelo, having fallen off a train travelling on the down slow line, would have had to have landed 6.92 metres away on the up main line for Mr van der Mescht's train to have collided with him. Mr Moabelo was simply unable to proffer an account as to how that could have occurred.

[60] Both courts below appear to have placed much store on the evidence of Mr Baloyi for rejecting that of Mr van der Mescht. According to the trial court, Mr Baloyi 'vehemently denied that the plaintiff was running across the train's line and kneeled on the lane uml. He stated that he could have seen him.' But, Mr Baloyi did not have a version as to how the plaintiff could have

ended up in front of Mr van der Mescht's train. Mr Baloyi did not see the plaintiff fall from the train, run across the tracks or the train driven by Mr van der Mescht collide with Mr Moabelo. His evidence was that when he walked from Kaalfontein to a hut north of the signal cabin, he did not see anything. His evidence in chief was to the effect that it was whilst he and his colleague were getting ready to go on patrol, that they received a radio call instructing them to go and look for an injured person. In any event Mr Baloyi's opportunity for observation was far from ideal. According to Mr Baloyi, he and his partner commenced their shift at 6 pm. They left the platform at Kaalfontein station at 6.05 pm and proceeded to their 'post', which was located approximately 50 to 60 metres from the platform, where they placed their personal belongings and got ready to patrol. Whilst at their post they received a radio call instructing them to look for an injured person. They did so and found Mr Moabelo. Mr Baloyi did not vehemently deny that Mr Moabelo ran across the lines and knelt on the up main line. He merely testified that he did not see Mr Moabelo. Mr van der Mescht testified that it was dark and he had his headlights on at the time that he collided with Mr Moabelo. Moreover, train 0547 would have obscured Mr Baloyi's view. To the extent that Mr Baloyi made reference to the fencing in the area of the signal cabin, it is noteworthy that the plaintiff was hit by Mr van der Mescht's train under the overhead bridge which was some distance from the signal cabin. There was no evidence about the state of fencing under the bridge.

[61] In a matter such as this we would do well to carefully distinguish inference from conjecture or speculation. The trial court inferred that: first, Mr Moabelo was on train 0547; and, second, he 'fell from [that] train in and around the area of cross over by train 1886 to usl'. I am far from persuaded that each of those inferences are indeed the most readily apparent and acceptable inference in the circumstances of this case.[5] Moreover, with respect to the trial court, it appears to have impermissibly reasoned by way of an inference upon an inference. As I have already shown, Mr Moabelo was neither able to identify train 0547 as the one on which he travelled, nor point out where train 1886 collided with him. Even if it were permissible for the trial

[5] *AA Onderlinge Assuransie Bpk v De Beer* 1982 (2) SA (A); see also *Cooper and Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA).

court to have drawn the first inference, the second, which lacked a proper factual foundation and was clearly dependent upon the first, was impermissible. What is more, in straining to find for Mr Moabelo, the trial court appears to have reasoned backwards from effect to cause.

[62] It goes without saying that such sympathy as we may have for Mr Moabelo should not impel us to a conclusion in his favour. We would do well to remind ourselves, as Harms JA did in *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) par 12, that:

'The first principle of the law of delict, which is so easily forgotten and hardly appears in any local text on the subject, is, as the Dutch author *Asser* points out, that everyone has to bear the loss he or she suffers. The Afrikaans aphorism is that 'skade rus waar dit val'. Aquilian liability provides for an exception to the rule and, in order to be liable for the loss of someone else, the act or omission of the defendant must have been wrongful and negligent and have caused the loss. But the fact that an act is negligent does not make it wrongful. To elevate negligence to the determining factor confuses wrongfulness with negligence and leads to the absorption of the English law tort of negligence into our law, thereby distorting it.'

[63] At the close of Mr Moabelo's case, his counsel placed on record:

'M'lord it can never be nor would it be the plaintiff's case that Mr Van der Mescht was responsible for the plaintiff's injuries'. In that, counsel was undoubtedly correct, for it was no part of Mr Moabelo's pleaded case that Mr van der Mescht had in any respect been negligent in colliding with him. Mr Moabelo's case was confined to PRASA's negligent failure to ensure that the doors were closed whilst the train was in motion. On that score the trial court held: 'Accordingly I find that the plaintiff has proven negligence on the part of the defendant's servants.' It then added: 'It is trite law that negligence is a question of fact and there is no such a thing as negligence in the air.'

[64] Insofar as that last proposition is concerned, the trial court was plainly wrong. It is useful to revisit first principles in this regard. In *Overseas Tankship (U.K.) Ltd v Morts Dock and Engineering Co. Ltd* [1961] 1 All ER 404 (PC) (*Wagon Mound No 1*) at 415A Viscount Simonds explained:

'But there can be no liability until the damage has been done. It is not the act but the consequences on which tortious liability is founded. Just as (as it has been said) that there is no such thing as negligence in the air, so there is no such thing as liability in the air.'

In *Premier of The Province of the Western Cape v Fair Cape Property Developers* (Pty) Ltd [2003] 2 All SA 465 (SCA), it was put thus:

'Just as there cannot be negligence in the air,[6] so too there cannot be wrongfulness (the breach of a legal duty) in the air: "it is as well to remember that conduct which is lawful to one person may be unlawful towards another" – per Harms JA in *S M Goldstein & Co (Pty) Ltd v Cathkin Park Hotel (Pty) Ltd*.'

[65] The enquiry did not end, as the trial court appears to have thought, with a finding that PRASA was negligent. It remained for the trial court to have considered the element of causation. Causation involves two distinct enquiries.[7] The first is a factual one and relates to the question as to whether the negligent act or omission in question caused or materially contributed to the harm giving rise to the claim. The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test. Lack of factual causation is the end of the matter. No legal liability can follow. But, if factual causation is established the second enquiry arises, namely whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote.[8] According to Brand JA in *ZA v Smith* 2015(4) SA 574 (SCA) para 30): 'The application of the "but-for test" is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the minds of ordinary people work, against the background of every-day experiences.'

---

[6] Per Lord Russell of Killowen in *Bourhill v Young* [1943] AC 92 (HL) (Sc) at 101--2.

[7] *Home Talk Developments (Pty) Ltd & others v Ekurhuleni Metropolitan Municipality* [2017] 3 All SA 382 (SCA) para 45; In International *Shipping Company (Pty) Ltd v Bentley* [1989] ZASCA 138; 1990 (1) SA 680 (A); [1990] 1 All SA 498 (A) para 64-66, Corbett CJ expressed the position thus: '. . . in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as "factual causation". The enquiry as to factual causation is generally conducted by applying the so-called "but-for" test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; aliter, if it would not so have ensued. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called "legal causation".'

[8] *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34E-G.

[66] To succeed in an action for damages, Mr Moabelo had to establish that it was probable that the negligent conduct found by the trial court, namely PRASA in allowing the train to travel with open doors, caused the harm. Mr Maobelo simply did not know the source of the harm. Had he known the source it is possible that he might have established a causal link between it and the specific negligent conduct sought to be established. Regard being had to the evidence of Mr van der Mescht, Mr Maobelo's injuries were caused not by him having fallen out of a train, but by another train driven by the former colliding with him. Those two occurrences are not inextricably linked to each other. From the bar in this court counsel for Mr Moabelo sought to meet this difficulty with the argument that after having fallen from the train, Mr Moabelo must have knocked his head become disorientated and, consequently at some time later, wandered in front of Mr van der Mescht's train. However, there is simply no evidence to support that speculative hypothesis. And, as I see it Mr Moabelo failed the test for factual causation. It follows that on this ground as well, Mr Moabelo should have failed.

[67] But even if Mr Moabelo had succeeded in establishing factual causation – which as I have demonstrated he had not – his claim should in any event have failed at the legal causation stage. The issue of legal causation or remoteness is determined by considerations of policy. It is a measure of control. This is basically a juridical problem in which considerations of legal policy may play a part. It serves as a 'longstop' where right-minded people, including judges, will regard the imposition of liability in a particular case as untenable, despite the presence of all the other elements of delictual liability.[9] Even if one accepts that: (i) Mr Moabelo was a passenger on train 0547; (ii) PRASA was negligent in allowing that train to travel with open doors; (iii) Mr Moabelo fell off that train as a consequence of PRASA's negligence; and (iv) factual casation has been established - the issue of remoteness still looms large in this case. In reality, Mr Maobelo's injuries and consequent loss were not caused by those events. It was instead attributable to something very different – train 1886, which was driven by Mr Van der

[9] *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA); *mCubed International v Singer* 2009 (4) SA 471 (SCA);

Mescht, colliding with him. And, as I have already pointed out, it was no part of Mr Moabelo's case that Mr van der Mescht was negligent in any respect or that this occurrence is in any way causally connected to the earlier events.

[68] In my view, for the reasons given, PRASA's appeal ought to succeed.

_____

V M Ponnan

Judge of Appeal

APPEARANCES:

For the Appellants:	T J Bruinders SC
	Instructed by: Norton Rose Fulbright, Johannesburg Webbers, Bloemfontein
For the Respondents:	M Chaitowitz SC (with him M Sibuyi)
	Instructed by: Mafori Lesufi Inc., Johannesburg Morobane Inc., Bloemfontein