THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 39/2014
NOT REPORTABLE

In the matter between:

YENDE: MHLONISHWA LUCKY **APPELLANT**

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA **RESPONDENT**

Neutral citation:	*Yende v Passenger Rail Agency of South Africa (*39/2014 [2015] ZASCA 49 (27 March 2015)
Coram:	Cachalia, Bosielo, Zondi JJA, Van der Merwe and Mayat AJJA
Heard:	**11 March 2015**
Delivered:	**27 March 2015**
Summary:	Delict – Negligence – appellant allegedly falling off train departing from station – whether negligence on the part of respondent proved.

ORDER

On appeal from Gauteng Local Division, Johannesburg (Sutherland J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Cachalia JA and Mayat AJA (Zondi JA and Van der Merwe AJA concurring)

[1] The primary issue in the present appeal, brought with the leave of the court a quo (Sutherland J) is whether or not the appellant (the plaintiff in the court a quo), Mr Lucky Mhlonishwa Yende, discharged the onus of proving before the trial court that the respondent (PRASA) was delictually liable for the bodily injuries sustained by Mr Yende at the Elsburg railway station (the station) on 24 March 2005. The court a quo found that PRASA was negligent because the procedure followed by the guard relating to a train departing from the station was unsafe, but that such negligence was not causally connected to Mr Yende's injuries. Mr Yende appeals against the order dismissing his claim with leave of the trial court.

[2] Mr Yende's pleaded case was that he was injured as a result of PRASA's negligence in one or more of several respects. Specifically, he averred that a train he was boarding at the station had jerked and started to move, causing him to lose balance and to fall under the train. He alleged that PRASA had been negligent in failing to take adequate precautions at the time to prevent passengers from being injured by a moving train, when by the

exercise of reasonable care it could and should have done so. However, he pleaded no facts as to what precautionary steps PRASA ought to have taken.

[3] Mr Yende was the sole witness who testified on how he had been injured. He stated that he had been waiting for a train, and standing about a meter from the edge of the platform, when a train arrived and stopped at the station. His brother, who was in front of him, immediately boarded the train. He followed at the same time, but as he stepped onto one of the carriages, the train jerked and began moving out of the station. The sudden and unexpected movement caused him to lose his balance. He fell backwards onto the platform and does not know how he ended up on the railway tracks. As a result of his fall he sustained injuries to the back of his head, to his shoulder and to his arm. Sadly, his right arm had to be amputated.

[4] The platform where the appellant boarded is curved, concave to the railway line, a fact that was central to the trial court's finding that the guard adopted a negligent procedure when signalling for the train's departure from the station. The guard, Ms Juwulwa, testified that after the train had stopped at the station, she caused the doors of the carriages to be opened by pressing a button meant for this purpose. She stepped off the rear end of the train onto the platform and walked a few meters away from the train from where she was able to observe the full length of the train beyond the curve of the platform. From this vantage point she was able to detect whether commuters had stopped embarking or disembarking. Once she was satisfied that there were no more commuters going on board or coming down from a bridge on the platform, she blew her whistle as a warning to any commuters, and then made her way back to the guard's carriage. From there she was not able to see the front part of the train because it was obscured by the curve in the platform. She closed the doors of the train and signalled for its departure. The driver then set the train in motion.

[5] The fundamental dispute between the versions of the two parties was that on Mr Yende's version the train began departing from the station prematurely (almost immediately after it arrived at the station), barely allowing any time for

the commuters to board. The testimony of PRASA's employees was that a full 45 seconds elapsed between the train's arrival and the point at which it began departing from the station. This was confirmed by a train control official, Mr Underhay, who had completed a log book on 24 March 2005 recording arrival and departure times of trains at the station. On this crucial issue, characterized by the trial court as 'the question of timing', the court accepted PRASA's version and rejected Mr Yende's testimony as implausible. It found that Mr Yende sought to bolster his version by introducing a false corroborating witness – his brother – to confirm that he was with him when they attempted to board the train. The consequence of this finding was that there was simply no explanation before the court as to what happened.

[6] Counsel for Mr Yende was constrained to concede that the court was correct in its finding that the train must have stopped for at least 45 seconds, before departing from the station. Despite this he sought to persuade us that Mr Yende could only have been injured because the doors probably remained open when the train departed, causing him to fall out. He asked us to take judicial notice of the fact that people do get injured on trains in this manner, and that therefore Mr Yende's injuries were probably sustained because of PRASA's fault.

[8] The submission in this regard is utterly without merit, for it amounts to a plea that the court can impose a form of strict liability on PRASA that jettisons the fault requirement, which lies at the heart of delictual liability. Once the court rejected Mr Yende's version, there was no other explanation based on the evidence for what happened to him or how he sustained his injuries. That ought to have been the end of the matter.

[9] Nevertheless, the court embarked on an enquiry as to whether PRASA's procedure relating to the way it deals with the situation on a curved platform at the station was reasonable. The court said that when the guard returns to the coach to signal, a large part of the train is unsighted and when the doors are closed the guard relies on assumptions. These assumptions are that the hydraulic system is working, that all the doors have been closed and that no

one has arrived at the last second to get onto the train. The way to ensure that problems do not arise, the court said, was to have a second person at the curved platform standing where the guard would have been standing with her whistle, in order to signal that all is safe, the doors can be closed and the train may depart. The employment of a second person to perform this task at the station, said the court, would 'enable (PRASA) to deal with the habitual problem of commuters on trains behaving irresponsibly and trying to hop on at the last moment.' The trial court thus concluded that PRASA was negligent in the way it dealt with this situation on the curved platform at the station.

[10] However, after finding that PRASA was negligent relating to the procedure the guard followed at the curved platform, the learned judge concluded that in the absence of a plausible account of how Mr Yende came to fall under the train, it was not possible to conclude that this negligence was causally connected to his injuries. In arriving at this conclusion, the learned judge was no doubt correct, but this begs the question as to how PRASA could have been found to be negligent at all when the appellant had not presented a plausible account before the court.

[11] It seems that the court a quo arrived at this conclusion by considering PRASA's conduct in the abstract because there was no plausible version for how the harm was actually caused. But negligence in our law cannot be determined in the abstract, without reference to the foreseeable consequences it produces, for it is only consequences that are foreseeable against which the reasonable person should take precautions. In the instant matter, we do not know how the harm was caused. It was therefore not possible to find foreseeable harm, which a reasonable person in the position of PRASA would have been expected to take steps to prevent.[1] In the circumstances, Mr Yende did not discharge the onus of proving negligence either.

[1] See generally Boberg PQR *The Law of Delict* (1991) 274-279.

[12] For all these reasons, the trial court was correct to dismiss Mr Yende's claim and the appeal must fail. The following order is accordingly made:
The appeal is dismissed with costs.

Bosielo JA:

[13] I have had the benefit of reading the judgment by my Colleagues, Cachalia JA and Mayat AJA. I regret the fact that I do not agree with both their reasoning and finding. These are my reasons for parting ways with them.

[14] As my two colleagues have dealt with the factual matrix of the case quite extensively, I will avoid rehashing the same facts except where it is necessary to shed more light on my reasoning.

[15] Essentially my colleagues find that as the court below had found the appellant (Mr Yende) not to be a credible witness and rejected his entire evidence, this automatically meant that there was no version to consider. They hold further that as Mr Yende bore the onus of proof, the court below should have found that he had failed to make a case against the respondent (PRASA) on negligence. As a result, my colleagues hold that this should have been the end of the matter. I do not agree.

[16] I disagree with my colleagues on their finding that the court below erred in finding negligence on the part of PRASA. The following background facts are necessary to explain my dissent. The issue on appeal was the finding by the court below that there was no causal link between alleged negligence on the part of PRASA and the injuries sustained by the appellant.

[17] My colleagues criticise the reasoning and finding by the court below on negligence. Essentially they hold at para 1 (supra) that, having found the appellant not to be a credible witness thus rejecting his version, the court below should have found that Mr Yende had failed in discharging the onus of proving that PRASA was delictually liable for the bodily injuries he sustained

at the Elsburg railway station on 24 March 2005. This is how they express themselves at para 8 above:

'Once the court rejected the appellant's version, there was no other explanation based on the evidence for what happened to Mr Yende or how he sustained his injuries. That ought to have been the end of the matter.'

[18] However, that did not happen because PRASA, testified through the train guard Ms Juwula (Juwulwa), the protection officer, Mr Molefe (Molefe) and Mr Underhay (Underhay), the train control officer. Based on PRASA's version, the court below found that Juwulwa did not act like a reasonable train guard on the ill-fated day. It found her conduct to constitute negligence.

[19] This is how the court below expressed itself in finding PRASA negligent:

'It seems to me self- evident that the particular procedure followed by her, which I accept is the prescribed procedure, has some serious flaws. This particular train did not have a conductor and by way of contrast there was therefore no one who could have signalled from, say, the middle of the train that there was no one arriving or getting onto the train. Thus when she moved from the spot where she blows her whistle, the doors are still open and she has to rely on her assumption about the reliability of the hydraulic system to close all the doors before the train leaves the station. All this is done unsighted. Obviously, the way to make sure this is not done unsighted is to have a second person at a curved platform station standing where she would have been standing with her whistle, in order to signal to her that all remains safe throughout the door closing and departure process. The importance of this is self- evident. In my view such a procedure would enable the defendant to be a position to deal with what is a habitual problem of commuters on trains behaving irresponsibly and trying to hop on at the last moment. A somewhat spirited debate arose about whether or not this particular procedure was itself of such a nature that the defendant could be accused of negligence. In my view the answer to that question can be unequivocally answered that the defendant is indeed negligent in the way it proceeds to deal with this situation on a curved station.'

[20] Notwithstanding having found PRASA to have been negligent, the court below dismissed Mr Yende's claim on the basis that there was no causal

nexus between PRASA's negligent behaviour and the damages sustained by Yende. My colleagues agree with the court below that causation was not proved. They find that it was not possible for it to find a reasonable harm, which a reasonable person in PRASA's position would have been expected to take steps to guard against. I do not agree.

[21] Grappling with the intractable question of causation the Constitutional Court seized the opportunity in *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC) paras 40-41 and enunciated the correct legal approach to causation as follows:

'Although different theories have developed on causation, the one frequently employed by courts in determining factual causation is the *conditio sine qua non* theory or but-for test. This test is not without problems, especially when determining whether a specific omission caused a certain consequence. According to this test the enquiry to determine causal link, put in its simplest formulation, is whether 'one fact follows from another'. The test –

"may involve the metal 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; [otherwise] 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."

In the case of "positive" conduct or commission on the part of the defendant, the conduct is mentally removed to determine whether the relevant consequence would still have resulted. However, in the case of an omission the but-for test requires that a hypothetical positive act be inserted in the particular set of facts, the so-called mental removal of the defendant's omission. This means that reasonable conduct of the defendant would be inserted into the set of facts. However, as will be shown in detail later, the rule regarding the application of the test in positive acts and omission cases is not inflexible. There are cases in which the strict application of the rule would result in an injustice, hence a requirement for flexibility. The other reason is because it is not always easy to draw the line between a positive act and an omission. Indeed there is no magic formula by which one can generally establish a causal nexus. The existence of the nexus will be dependent on the facts of a particular case.'

[22] I interpose to restate the salutary warning given by the Constitutional Court in *Lee* (supra) para 73 where it stated:

'Our law has always recognised that the but-for test should not be applied inflexibly. A court ultimately has to make a finding as to whether causation was established on a balance of probabilities on the facts of each specific case.'

[23] The following salient facts cannot be disputed; that Mr Yende was at the railway station on the ill-fated day; that he attempted to board a train that was in motion already; the train guard never saw him before she sounded the whistle for the train driver to put the train in motion; he was only seen by the train guard whilst already lying on the railway tracks and, importantly, that he sustained the injuries reflected on the medical report at Elsburg railway station on 24 March 2005.

[24] What is not clear from the evidence is how Mr Yende got injured as there is serious paucity of evidence. To resolve this, we have to ask ourselves the question: given everyday life experience what could have happened? Is it probable that he flew himself against a moving train with its doors closed? Unless he was drunk or mad, this sounds patently preposterous. The converse thereof is: is it not probable that the train doors were open, that Mr Yende was late for the train and tried to board it whilst it was already in motion? And further that in the process he lost his balance and fell down into the rail tracks and got injured in that process? To my mind, this appears to be most likely scenario which accords with common sense and the probabilities.

[25] Applying the time-worn 'but for' test to the facts of this matter flexibly as we have been cautioned to by the Constitutional Court in *Lee* (supra), I fail to see how one cannot find that, but for the failure of the train guard to make sure that all the doors were closed before the train got into motion; the inability of the train guard to see beyond the curve to ensure that no person including Mr Yende was still attempting to board the train when she blew the whistle for the train driver to put the train in motion; and for her, notwithstanding this, to give a signal to the train driver to put the train in

motion, such conduct constitutes a direct and immediate cause of Mr Yende's injuries.

[26] The Constitutional Court expounded the 'but for' test further as follows in *Lee* (supra) at para 46:

'In *Kakamas*[2] it was stated that "(c)ausality often raises difficult legal questions which cannot always be answered by strict adherence to logic. Recourse may sometimes be had to what [the House of Lords] called the laws 'empirical or common-sense view of causation'". In *Siman*[3] the minority judgment noted that "(f)inally, as in other problems relating to causation in delict in applying the 'but for' test the court should not overlook the importance of applying common sense standards to the facts of the case"'.

[27] Whilst dealing with the same problem, this Court held in *Minster of Finance & others v Gore NO* 2007 (1) SA 111 (SCA) that:

'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 ordinary person's mind works against the background of everyday life experiences.'

[28] Most recently, Nugent JA put it even more succinctly in *Minister of Safety and Security v Van Duivenboden*[4] as follows:

'A plaintiff is not required to establish a causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than the metaphysics.'

[29] Common sense and simple logic dictates to me that had it not been of PRASA's negligence, Mr Yende would not have been injured by the train in the manner it did. I am fortified in my view by the fact that there is no evidence that he was injured elsewhere and not by PRASA's train at Elsburg railway station on the ill-fated day. Significantly, there is no evidence or suggestion

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[2] *Kakamas Bestuursraad v Louw* 1960 (2) SA 202 (A) at 220B-C.
[3] *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A).
[4] *Minister of Safety and Security v Van Duivenboden* (209/2001) [2002] ZASCA 79; [2002] 3 All SA 741 (SCA) at 917H-918A.

that there were any concurrent or supervening causes of wrongful acts by other agents other than PRASA which could have caused his injuries. I am satisfied that there's clear evidence of a causal nexus between Mr Yende's injuries and PRASA's negligence. It follows that I disagree with the finding by the court below.

[30] This brings me to the final aspect of this case. Whether on Mr Yende's version, he did not make himself guilty of contributory negligence. If one accepts as the most plausible or likely hypothesis which accords with common sense and everyday life experience, that he was injured whilst trying to board a train that was in motion already, then there can be no doubt that he acted negligently as his actions deviated markedly from that of a reasonable man. Furthermore, there is no doubt that his negligence contributed causally to his injuries. To my mind, there is therefore a clear basis for apportionment of damages based on his contributory negligence.

[31] I now turn to determine the extent of Mr Yende's contributory negligence. This is no easy task as this cannot be the subject of pure mathematical calculations. The difficulty is that there is no set standard to determine apportionment. It is trite that such an enquiry involves a careful consideration of all the facts and a measure of individual judgment and discretion. Inevitably, there will always be a difference of opinions by different minds.[5] In the circumstances, I think that it would be fair and equitable to reduce the appellant's damages by 50%.

[32] In the result, I would uphold the appeal with costs and order the respondent to pay 50% of the appellant's proven damages.

Majority judgment:

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A Cachalia

[5] *South British Insurance Co Ltd v Smit* 1962 (3) SA 826 at 837F-838A.

Judge of Appeal

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H Mayat

Acting Judge of Appeal

Dissenting:

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L O Bosielo

Judge of Appeal

Appearances

For the Appellants:	I Smith
	Instructed by:
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For the Respondent:	T J Bruinders SC
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