IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

Case No: 2005/28863

Elias Raselepe Molefe — Plaintiff

vs

Metrorail — Defendant

JUDGMENT

Labe J:

INTRODUCTION

[1] The plaintiff in this case sues the defendant for damages arising out of an incident which occurred on 3 December 2002 at the Midway railway station (Midway) when the plaintiff fell from or off a moving train. The plaintiff suffered injuries in the fall.

[2] The plaintiff was represented by Mr Advocate H. Kriel. The defendant was represented by Mr Advocate P. V. Ngutshane. Both counsel are members of the Johannesburg bar and they were duly instructed.

[3] The parties asked in terms of rule 33(4) of the Rules of Court that the question of the liability of the parties for the damages sustained by the plaintiff and the question of whether the plaintiff suffered injuries in the incident be

heard separately from the questions of quantum and the extent of the plaintiff's injuries.

[4] A bundle of documents was prepared by the parties. It was taken up as exhibit A. It was agreed that the documents in the bundle were what the purported to be but were not evidence of the truth of the contents thereof. It was agreed that the photographs in the bundle reflect what they purport therein to reflect.

I informed the parties that I would not have regard to any document or photograph not properly referred to in evidence or argument.

THE PLEADINGS

[5] The nub of the plaintiff's case is expressed on the pleadings in these terms:

> "4. At all relevant times hereto:
>
> 4.1 It was the intention and within the contemplation of the Defendant that the said train and Stations situated on the train's designated route, would be visited and used by members of the public, including the Plaintiff.
>
> 4.2 In the circumstances the Defendant owed a duty of care to members of the public, including the Plaintiff, to ensure that:
>
> 4.2.1 the station in general, and in particular all buildings and the platform, were safe for use by the public, including the Plaintiff;
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> 4.2.2 boarding and dismounting from coaches would proceed without endangering the safety of the public, including the Plaintiff;
>
> 4.2.3 safety regulations and precautions would be implemented to ensure safe boarding on and

from the trains by the public, including the Plaintiff;

4.2.4 the coaches of the train would be safe for use by the public, including the Plaintiff;

5. 5.1 On **3 December 2002** and after sunset the Plaintif boarded the train at **Midway Station** to travel to **Grasmere Station**;

5.2 The coach in which the Plaintiff was travelling was overcrowded and at all relevant times the doors were open;

5.3 Shortly after pulling off, the Plaintiff was pushed and/or became dislodged from the said train at a dangerous and inopportune moment by persons unknown to the Plaintiff;

5.4 At the time of the accident, the Plaintiff was in possession of a valid train ticket.

6. The Defendant breached it's obligations as set out in paragraph 4.2 above which breach amounted to negligent conduct on it's part in one or more or all of the following respects:

6.1 The Defendant failed to ensure the safety of members of the public in general and the Plaintiff in particular on the coach of the train in which the Plaintiff travelled;

6.2 The Defendant failed to take any or adequate steps to avoid the incident in which the Plaintiff was injured,

when by the exercise of reasonable care it could and should have done so;

6.3 The Defendant failed to take any or adequate precautions to prevent the Plaintiff from being injured by the moving train;

6.4 The Defendant failed to employ employees, alternatively, failed to employ an adequate number of employees to guarantee the safety of passengers in general and the Plaintiff in particular on the coach in which the Plaintiff travelled;

6.5 The Defendant failed to employ employees, alternatively, failed to employ an adequate number of employees to prevent passengers in general and the Plaintiff in particular from being injured in the manner in which he was;

6.6 The Defendant allowed the coach of the train in which the Plaintiff was travelling to be overcrowded, which resulted in the Plaintiff being pushed out of the train while it was set in motion;

6.7 The Defendant allowed the train to be set in motion without ensuring that the doors of the train and coach in which the Plaintiff was travelling were closed before the train was set in motion;

6.8 The Defendant took no steps to prevent the train and/or coach in which the Plaintiff was travelling from becoming overcrowded;

6.9 The Defendant allowed the train to move with open doors and failed to take any, alternatively, adequate steps to prevent the train from moving with open doors;

6.10 The Defendant neglected to employ security staff on the coach in which the Plaintiff was travelling to ensure the safety of the public in general and the Plaintiff in particular."

[6] The defendant's defence is set out in paragraph 6 of his plea which reads:

"**AD PARAGRAPH 6**

6.1 Each and every allegation in these paragraphs is denied as if specifically traversed and the Plaintiff is accordingly put to the proof thereof.

6.2 Without derogating from the generality of the above denial, the Defendant deny that it acted negligently as alleged by the Plaintiff in the particulars of claim at paragraph 6 to 6.10 and avers that:

6.2.1 The sole cause of the accident was the Plaintiff's sole and exclusive negligence, being negligent in the following respects:

6.2.1.1 He failed to keep a proper lookout;

6.2.1.2 He attempted to board a train which was already in motion in playful manner colloquially referred to as 'staff riding'

6.2.1.3 He attempted to board a train when it was neither safe nor opportune to do so;

6.2.1.4 He failed to avoid the accident when by the exercise of reasonable care he could and should have done so;

6.2.1.5 He failed to act diligently or skilfully like a reasonable train passenger in that he engaged himself in a reckless and dangerous behaviour of 'Staff riding'.

6.2.1.6 He fiddled or tampered with the train doors, when it was clearly unsafe to do so.

6.3 Alternatively, and only in the event of the above Honourable Court finding that the Defendant was negligent (which is still denied), the Defendants plead that such negligence did not contribute to the Plaintiff's accident, resulting in injuries alleged.

6.4 Further alternatively, and in the event of the above Honourable Court finding that the Defendant was negligent and that such negligence contributed to the Plaintiff's accident (which is still denied) then and in that event, the Defendant pleads that the Plaintiff was also contributory (sic) negligent and the damages suffered thereof should be reduced proportionate to the degree of the Plaintiff's negligence in accordance with the Apportionment of Damages Act No. 34 of 1956."

Paragraph 4 of the Plaintiff's claim is admitted.

THE EVIDENCE OF THE PARTIES

The Plaintiff's Evidence

[7] The plaintiff gave evidence more or less in terms of the case as pleaded by him. During the course of his cross-examination the court at the request of the parties inspected a railway coach, which was the same as the one in issue in this case. It became apparent from the inspection that the plaintiff could not have fallen from the train as he said he did because there was on his evidence a half a metre between the place where he was standing and the persons nearest to him in the centre of the coach and there was about one and a half metre between the place where he was standing and the open door which space was not occupied by any person. The place where he was standing, according to him, appears from photographs G and H, which were taken at the inspection and which together with photographs I and L were taken up as exhibits by consent between the parties. Photographs I and L show different aspects of the coach in the immediate vicinity of the door in question.

The notes taken at the inspection were taken up as exhibit B.

The plaintiff was clearly a dishonest witness. Having confirmed under oath what he had said at the inspection, he denied that the coach which was inspected had the same fitting at the coach concerned, after having said at the inspection that the coach had the same fitting.

His evidence in other respects was also unsatisfactory especially in regard to how he was allegedly pushed out of the coach and the part played by the hawkers who had caused the passengers to push him out. It eventually turned out that only one hawker was concerned and he did not see him or what he had in his hands. There are many other contradictions in his evidence, which appear clearly from the record and I do not dwell on them here.

The plaintiff claimed to have been in possession of a ticket entitling him to board the train.

Nothing turned on this because the plaintiff's claim was based on delict. What happened in regard to the ticket was only relevant in regard to the credibility of the plaintiff and the defendant's witness.

[8] The plaintiff closed his case without calling any witnesses.

The Defendant's Evidence

[9] Because I found the defendant's evidence to be more probable than the plaintiff's evidence, I decided the case on the basis of what the defendant's witness said because although the plaintiff did not formally adopt that version, the defendant's version was fully canvassed at the trial (Cf **Tengwa v Metrorail** 2002(1) SA 739 (C) at 747C – 748H). In fact, because of the conclusion to which I came, the question is academic.

I therefore deal with the evidence of the defendant's witness in more detail than I dealt with the evidence of the plaintiff.

[10] Avhavhudzani Cosmo Nemaitoni (Nemaitoni) said that on the day in question he was in the employ of Transizwe Security Company (TS) as a security guard at Midway. He had been so employed since April 2001 and had worked at Midway since then.

The incident occurred at 7:40 p.m. He saw three young men running behind each other on the steps of a railway bridge. They were running one behind the other.

The young man in front of the three boarded the coach as the doors were

about to close. The train was stationary at that time. He then prevented the doors from closing. The next young man jumped on the coach as the coach was in motion but had not gathered speed and prevented the other door from closing. At that time the plaintiff was some distance from the coach running down the stairs of the bridge. The bridge in question is reflected in photograph B. "X" on photograph F is the place where Nemaitoni was standing. The plaintiff then ran along the yellow line shown on photograph B and tried to jump onto the train. He did not succeed in doing that and fell under the platform. At that time the train had begun to pick up speed. Nemaitoni did not realise when the plaintiff was running along the yellow line that his intention was to board the train, regard being had to the speed at which the train was travelling.

Nemaitoni and a colleague and some of the commuters helped the plaintiff up. He enquired of the plaintiff whether he had a ticket and the plaintiff said that he had one but he could not produce it. The plaintiff gave Nemaitoni and his colleague his particulars. An ambulance was called and the plaintiff was taken to hospital.

A member of the Metro Protection Services (MPS) arrived at the scene. She prepared a report. She described the type of incident as "staff riding". "Staff riding", said Nemaitoni, means boarding a train in a dangerous manner, more particularly when the train is in motion. He was not questioned on this answer.

The accident occurred between the pole marked "X" on photograph B and a pole which is not on photograph B, but is further away out of the photograph in the direction of the disused bridge shown on photograph C looking in to photograph B. The disused bridge is in the direction away from photograph B at the bottom of the photograph.

Nemaitoni did not see a metro guard in the last coach because he was concentrating on what the plaintiff was doing.

He did see the metro guard on one occasion (which was not established). The guard was on the train. He did not see him on the platform.

Nemaitoni admitted to the plaintiff's counsel that one of his functions was to ensure that people who are on the platform did not engage in illegal or dangerous activities. He said that while the plaintiff was running on the yellow line, some commuters told the plaintiff to stop running. He, himself, could not do anything. If he had tried to do anything, it would have placed his own life in danger.

[11] I was impressed by Nemaitoni's evidence. The cogency of his evidence in chief was not affected by a lengthy cross-examination. His evidence was in fact not seriously challenged in cross-examination. His demeanour in the box was of a man confident of his facts and who was speaking the truth as he saw it.

[12] I had no difficulty in accepting Nemaitoni's evidence as being true where it differed from that of the plaintiff and I am satisfied that I was correct in deciding the case on the basis of such evidence.

THE LAW

[13] **Ngubane v South African Transport Services** 1991(1) SA 756 (A) was a case in which the plaintiff was injured when he fell from a train which was set in motion while commuters were still trying to board that train and disembark from it. The facts are therefore different from the facts in casu.

However, the following principle was applied in considering whether the defendant was negligent which are apposite to this case:

> "Liability in delict based on negligence is proved if:
>
> '*(a)* a *diligens paterfamilias* in the position of the defendant –

i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

ii) would take reasonable steps to guard against such occurrence; and

b) the defendant failed to take such steps.

This has been constantly stated by this Court for some 50 years. Requirement *(a)*(ii) is sometimes overlooked. Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases.'

(*Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E – G.)

As regards the requirement in para (a)(ii) above in this judgment, it is acknowledged that reasonable steps are not necessarily those which would ensure that foreseeable harm of any kind does not in any circumstances eventuate. The contributor (Prof J C van der Walt) in Joubert (ed) *The Law of South Africa* vol 8 *sv* 'Delict' para 43 at 78 comments in this regard that:

'Once it is established that a reasonable man would have foreseen the possibility of harm, the question arises whether he would have taken measures to prevent the occurrence of the foreseeable harm. The answer depends on the circumstances of the case. There are, however, four basic considerations in each case which influence the reaction of the reasonable man in a situation posing a foreseeable risk of harm to others: *(a)* the degree or extent of the risk created by the actor's conduct; *(b)*

> the gravity of the possible consequences if the risk of harm materialises; *(c)* the utility of the actor's conduct; and *(d)* the burden of eliminating the risk of harm.'"

See the judgment at 776D – I

[14] Both sides referred me to the judgment in **Transnet Limited v Tshabalala** [2006] SCA 25 (RSA) as yet unreported in the South African Law Reports or the All South African Law Reports as far as I am aware.

The facts in Tshabalala's case appear from paragraphs [3] and [4] of the judgment which read:

> "[3] At Winternest the plaintiff alighted from the train with another passenger, Mr Gavin Emmanuel. He then asked for directions as to where he could catch a train to Johannesburg whereupon Emmanual told him to return to the train and alight at Bosman station, where he could get a train to Johannesburg. As he was talking to Emmanuel the train started to move. He gave chase, running past three coaches from the rear. When he reached the fourth coach, he held on to a vertical hand rail which was inside the coach near the door. Unfortunately he lost his footing and fell onto the rail tracks, where he was found shortly after the accident. His right foot was completely severed from the leg. An ambulance was summoned and paramedics treated him on the scene before conveying him to hospital.
>
> [4] The doors were open when the train arrived at Soshanguve station and remained open until the accident occurred. The plaintiff's version of the accident which differed from that of the defendant was correctly rejected by the court *a quo*. It held that the plaintiff was negligent in attempting to board a moving train. The defendant was also found to have been negligent in operating a train whilst the doors were open."

In Tshabalala's case the court found that the failure of the defendant to close the doors was sufficiently linked to the injuries suffered by the plaintiff to render the defendant liable to the plaintiff for a portion of the damages sustained by the plaintiff, the plaintiff also having been found to have been negligent in relation to the damages sustained by him.

The court referred to **Road Accident Fund v Russell** 2001(2) SA 34 (SCA) where this was said at 39D – I (paragraphs [17] and [18]):

> " [17] In *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) Corbett CJ reaffirmed that the determination of causation in the law of delict involves two distinct enquiries, which he formulated as follows at 700E – I:
>
> > 'As has previously been pointed out by this Court, 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'.'

[18] In our law, the test to be applied in determining legal causation was described by Corbett CJ as 'a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a *novus actus interveniens*, legal policy, reasonability, fairness and justice all play their part'. (*Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 764I – 765B.)"

See also **Marine and Trade Insurance Co Ltd v Singh** 1980 (1) SA 5 (A) at 12H – 13A

THE PROVISIONS OF THE METRORAIL GENERAL OPERATING INSTRUCTIONS NO 1 (PART 1)

SAFETY AND EFFICIENCY (the Instructions)

[15] Mr Kriel asked me to have regard to these provisions of the instructions:

> "Employees must exert continuous effort to ensure the attainment of safety and efficiency, and they must constantly bear in mind that their first and most important duty is to ensure the safe working of Metrorail. Their responsibility is not confined to a general observance of the rule or any instructions which may be issued for their guidance, but they must be vigilant and observant at all times."

> "12001.2 Operation of sliding doors on arrival at and before

starting from stations or other stopping places.

12001.2.1 Immediately after stopping at a station or halt where the train is required to stop for commuters, the metro guard must release the sliding doors on the platform side so that they can be opened manually

12001.2.2 When the train is ready to depart and after the metro guard has announced it orally, he must blow his whistle as warning that the sliding doors are going to be closed. Thereafter he must press the 'Door-CLOSING' button and give the right-away bell signal to the train driver.

12001.2.3 While performing their duties, metro guards must observe whether or not sliding doors are closing properly. If any sliding doors are not operating correctly the instructions in subclause 12001.4 must be complied with. They must also warn commuters against the undesirable practice of keeping sliding doors open when the train is about to depart or en route."

[16] The following is found in the METRORAIL TRAIN WORKING RULES (the Rules):

"4. IN THE WORKING OF TRAINS, EMPLOYEES SHALL AT ALL TIMES REGARD THE SAFETY OF THE PUBLIC AND OF OTHER EMPLOYEES AS THE FIRST CONSIDERATION. THEY MUST AT ALL TIMES EXERCISE CARE IN THE PERFORMANCE OF THEIR DUTIES AND MUST NOT EXPOSE THEMSELVES UNNECESSARILY TO DANGER AND THEY MUST, AS FAR AS POSSIBLE, PREVENT THEIR FELLOW EMPLOYEES FROM EXPOSING THEMSELVES AND

OTHERS TO DANGER."

THE APPLICATION OF THE LAW, THE INSTRUCTIONS AND THE RULES TO THE FACTS

[17] In casu the facts differ from the facts in the cases referred to. The most important differences are that in casu the train was not overcrowded, the instructions to close the doors had been given and the plaintiff ran from some distance away from the coach which he attempted to board at a time when the train was gathering speed and the doors were being held open by two companions of the plaintiff – doors that would in the normal course have been closed.

[18] Mr Kriel relied heavily on the fact that the guard was not called to give evidence. In my opinion, the plaintiff did not lead sufficient evidence to require the defendant to call the guard, even if it were shown that the guard was available to give evidence which was not shown.

There was no evidence to show that the defendant ought to have foreseen that the plaintiff would run from a point some distance from the coach which the plaintiff sought to board and that the doors would be held open by his companions for him to be able to carry out an inherently dangerous manoeuvre at a time when the train was gathering speed. There was no evidence to show that the fact that the doors were being held open would have been known to the guard, who, in the circumstances of this case was entitled to assume everything was in order. There was no evidence that in holding the doors open, the bodies of the young men protruded from the train. The train had pulled off and was gathering speed. There was no evidence of facts which should have alerted the guard to the possibility that the plaintiff would act in the way he did. The provisions of the instructions and the rules take the matter

no further. The plaintiff accepted the evidence of the defendant in relation to the meaning of "staff riding". There was no evidence to suggest that this unusual combination of circumstances had ever occurred before, which may have put the defendant under an obligation to guard against it occurring. On the evidence before me, I would classify the risk of that combination of circumstances occurring as very low indeed. In short I do not see the behaviour of the plaintiff in this case as being reasonably foreseeable. It would have been an unfair and unjustified burden for me to have put on the defendant to have taken steps to have prevented this injury happening in the circumstances in which it did. There was no behaviour of the defendant in casu directly linking the injuries of the plaintiff to it.

THE QUESTION OF INTENTION

[19] After I had already reserved judgment, I asked the parties to address written argument to me on:

1. whether the defendant was entitled to argue intention on the pleadings as they stood and, if so
2. what the argument of the parties would be on this point.

Because of the conclusion at which I have arrived, the questions are academic. However, I would state this briefly: The question of intention was not raised on the pleadings. In its plea the defendant raised only the allegation of negligence of the plaintiff in asking for his claim to be reduced.

It was not pleaded that because the plaintiff had acted intentionally, he was not entitled to an apportionment of damages.

The defendant did not seek to amend its plea to raise the question of intention and the plaintiff's state of mind was not canvassed at all during the hearing.

The plaintiff cannot be said to have consented by his conduct to intention being an issue in the trial.

CONCLUSION

[20] In my opinion the evidence discloses no relevant negligence on the part of the defendant in regard to the damage suffered by the plaintiff.

[21] It may be that the plaintiff may be able to adduce further evidence in the furtherance of his claim. I will therefore not make an order dismissing his claim. I will rather absolve the defendant from the instance.

ORDER

[22] I make the following order:

The defendant is absolved from the instance. The plaintiff is ordered to pay the defendant's costs incurred in defending the plaintiff's claim.

DATED THE _____ DAY OF _____ 2007 AT JOHANNESBURG

_____
M. B. LABE
JUDGE OF THE HIGH COURT

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Date of trial: 5 – 8 March 2007