

SOUTH AFRICA / JUDGMENT

Sikhosana v Passenger Rail Agency of South Africa (38166/2020) [2024] ZAGPPHC 1386 (15 November 2024) [2024] ZAGPPHC 1386

COURT

North Gauteng High Court, Pretoria

BEFORE

Mabuse

CASE / FILE NUMBER

38166/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NUMBER: 38166/2020

DATE:

15 November 2024

(1) REPORTABLE: YES/NO

(2)

OF INTEREST TO THE JUDGES: YES/NO

(3)

REVISED.

DATE:

2024.11.15

SIGNATURE: SIKHOSANA,
SIBUSISO ENDY
PLAINTIFF
and
PASSENGER
RAIL AGENCY OF SOUTH AFRICA
DEFENDANT
(FORMERLY
KNOWN AS SOUTH AFRICAN
RAIL
COMMUTER CORPORATION LIMITED)

JUDGMENT

MABUSE J

[1] This matter is a claim by the Plaintiff against the Defendant for payment of money. The claim has its origin in an incident that took place on 22 August 2018 at Kempton Park Railway station, when the Plaintiff fell off a moving train. The claim is resisted by the Defendant.

[2] Before setting out the background of the Plaintiff's claim, it is necessary to give a brief description of the parties involved in this matter.

[2.1] The Plaintiff, Sibusiso Endy Skhosana, is an adult male who resides at House Number 1 [...], Mofokeng Section, Katlehong. At the material time of this incident, he was employed by OHL at ORT International Airport and was doing morning shifts that started at 06h00 and ended at 16H00. To get to work he used a daily train between Khwezini and Kempton Park railway stations.

[2.2] The Defendant, Passenger Rail Agency of South Africa. (Prasa), is a legal entity created in terms of section 22 of the Legal Succession to The South Africa Transport Service Act No. 9 of 1989, (the Act). Its registered place of business is situated at Prasa House, 1040 Burnett Street, Hatfield, Pretoria. The Defendant operates its services as metro rail services in terms of the Act.

[2.3] On 22 August 2018, the Defendant was the lawful owner of certain rail commuter assets, as envisaged by s 25 of the Act and was the legal owner of the commuter train that operated between Kempton Park and Germiston railway stations.

[3] The Background

[3.1] The Plaintiff has pleaded his case as follows. The Defendant renders rail commuter services as envisaged by the provisions of the Act through the actions or the omissions of its employees, who do so in the course and scope of their employment with the Defendant.

[4] On 22nd August 2018 the Defendant operated and provided rail commuter services to members of the public between Kempton Park and Germiston railway stations, using trains consisting of locomotives and commuter coaches.

- [5] In operating and providing the commuter services, the Defendant controlled and administered all passage and or commuting by members of the public in respect of the said trains.
- [6] The Defendant contemplated and intended that such railway commuter services would be used by members of the public, including the Plaintiff, to travel along the routes referred to in paragraph [4] supra.
- [7] In providing and operating the rail commuter services as set out in paragraphs [4] and [5] above, the Defendant has a legal duty, alternatively a duty of care, to ensure the safety of the commuters, including the Plaintiff, who use such services as passengers. The Defendant's legal duty or duty of care included the following:
- [7.1] The implementation and compliance with the statutory and regulatory safety measures.
- [7.2] Taking such reasonable steps and implementing reasonable policies, procedures, rules and operating instructions to be employed by its servants, agents or persons under its control.
- [7.3] Taking such reasonable steps and implementing possible measures to ensure the safety of the commuters travelling on the said trains and to prevent or minimize the occurrence of crime or injury on such trains.
- [8] Based on the legal duty or duty to care, the Defendant has a duty to ensure that its trains do not travel with open doors.
- [9] On 22 August 2018, the Plaintiff, who was in possession of a train ticket he had bought for R9.50, boarded a stationary train at Kempton Park railway station. The train was full, and the platform was overcrowded.
- [10] After he had boarded it, the train departed from Kempton Park railway station. The doors of the coach compartments in which the Plaintiff was a commuter were open.
- [11] As the train was proceeding, the Plaintiff was pushed from behind. He lost his footing and fell off the train between the railway tracks and the platform.
- [12] It is the Plaintiff's case that the Defendant breached his legal duty or duty of care in one or more or all of following respects. The Defendant:
- [12.1] failed to ensure the safety of the commuters and of the Plaintiff in the coach compartment of the train in which the Plaintiff was a commuter.
- [12.2] 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.
- [12. 3] failed to take any adequate precautions to prevent the Plaintiff from being injured by the moving train, alternatively, being injured by falling from the moving train.

[12.4] failed to employ employees, alternatively failed to employ an adequate number of employees to guarantee the safety of commuters in general and the Plaintiff in particular on the coach compartment in which the Plaintiff travelled.

[12.5] failed to employ employees, alternatively to employ an adequate number of employees, to prevent commuters in general and the Plaintiff in particular from being injured in the way he was or sustaining any bodily harm.

[12.6] allowed the train to be set in motion without ensuring that the train doors and the doors of the coach compartment in which the Plaintiff was traveling were closed before the train moved away from the platforms.

[12.7] allowed the train to move with open doors and failed to take any adequate steps to prevent the train from moving with open doors.

[12.8] failed to keep the coach safe for use by the public in general and the Plaintiff in particular.

[12.9] neglected to employ security staff alternatively adequate security staff on the coach compartment in which the Plaintiff was traveling to ensure the safety of the public in general and of the Plaintiff in particular.

[13] Because of falling between the train and the platform, the Plaintiff suffered certain dire personal injuries.

[14] It is consequently because of such serious bodily injuries that the Plaintiff suffered when he fell between the train and the platform, that the Plaintiff claims damages from the Defendant.

[15] After admitting without being specific that an incident took place at Kempton Park railway station on 22 August 2018, the Defendant pleaded that the Plaintiff was the sole cause of any injuries he sustained and that the Plaintiff was himself negligent in one or more or all of the following respects. He:

[15.1] failed to keep a proper look out.

[15.2] failed to heed the warnings inside the train and on the station. [15.3] positioned himself in a dangerous position.

[15.4] failed to prevent being injured when such injuries could and should have been prevented by the application of reasonable care.

[15.5] attempted to board a moving train, which was extremely dangerous to do so.

[15.6] the Defendant pleaded in the alternative that, should it be found that the Defendant or its employees were vicariously liable in the respects alleged by the Plaintiff, which are all denied by the Defendant, then in that case the Defendant pleaded that such negligence was not casually connected to the incident and injuries and damages sustained by the Plaintiff.

[15.7] the Defendant pleaded furthermore in the alternative, that the Plaintiff is guilty of contributory negligence as envisaged by the provisions of the Apportionment of Damages Act 84 of 1956 (the Apportionment Act) and that a just and equitable order should, accordingly, be made in terms of the provisions of the said Apportionment Act.

[15.8] the Defendant pleaded furthermore that the Plaintiff attempted to board a moving train, which was an extremely dangerous thing to do.

[15.9] Finally, the Defendant pleaded further that at the material time of the incident the Plaintiff was not in possession of a train ticket and that therefore his presence on its trains on 22 August 2018 was illegal. On that basis, the Defendant denies that, in such circumstances, it had any legal duty or duty of care to the Plaintiff.

[16] The Plaintiff was the only witness in his case. He was called by his counsel, Adv P M Van Ryneveld, to testify. He testified that on 22 August 2018, on his way home, he was supposed to use a train from Kempton Park railway station to Khwezini railway station.

[16.2] He arrived at Kempton Park railway station and waited for the train. After some time, the train arrived at platform one [1] of the railway station. The platform was full of people who had intended boarding. The train too, was very full. After it had stopped, some commuters disembarked while others boarded the train. He boarded the train and, in the train, held onto the overhead straps. At that stage the train was stationary. The platform was just normal.

[16.3] While he was still holding onto the overhead straps and while some commuters were disembarking, he fell out of the train. The doors were open. Because of falling off the train, he sustained some injuries to the chest, spinal cord, and legs. He sustained those injuries because he fell between the platform and the train.

[17] Mr. Cilliers called the one and only witness for the Defendant, Miss Khauwe Patricia Diamini (Dlamini), an employee of the Defendant. Since 2014 she has been a train guard on Prasa's trains. She described the procedure she follows as a train guard as follows. After the train has stopped, she opens the doors automatically. As a train guard whose duty, inter alia, is to open and close the train doors, she will be occupying the last coach on the train.

[18] Having opened the train doors, she gives commuters time to board or to disembark the train. When there is no one boarding or disembarking the train, she blows a whistle and closes the train doors. The purpose of blowing the whistle is to warn commuters that the train is about to leave the platform. She blows the whistle from inside her coach. She simply sticks her head out of the last coach window, making sure that it is safe, that no one boards or disembarks the train and, after verifying that it is safe, blows her whistle and closes the doors. The operating mechanism is centrally situated, on the last coach that she occupies.

[19] To communicate with the driver of the train, she uses a button and when she does so, the driver will know that it is time to leave the platform.

- [20] On 22 August 2018 she was on duty at Kempton Park railway station. She was posted on train number
0530. She is aware of the incident in which the Plaintiff was involved on the said day. She did not know the Plaintiff. The train on which she was a train guard was from Tembisa and was on its way to Johannesburg. At Kempton Park railway station train number 0530 stopped at platform one (1). Once the train had come to a complete stop, she opened the doors for those who wanted to board or disembark. After the commuters had disembarked or boarded the train, she gave a signal to the driver that he could leave the platform.
- [21] At that point another train arrived at Kempton Park railway station and stopped at platform two (2). This was train number 0532. She then observed two boys jumping from train 0532 and rushing to train 0530. At that time train 0530 was moving out of the platform. She screamed at them not to try to jump onto train 0530. She did not see what happened to the two boys but thought that they had successfully jumped onto train 0530 because she did not see them on the platform, where they were supposed to be, if they had missed train number 0530.
- [22] She was surprised by the reaction of the people on the platform, which showed that something serious had happened. As train 0530 was proceeding, she looked behind and saw a person lying on the railway tracks. She signaled for the train driver, by pressing a certain button thrice, to stop. The train stopped. When such an incident takes place, they are not allowed by their instructions to disembark and attend the scene. They are, however, obliged to report the incidence. She reported the incident to their office and recorded it in her pocketbook. After reporting the incident, the train continued its journey.
- [23] Based on what the Plaintiff pleaded in his particulars of claim and on his testimony, counsel for the Plaintiff concluded that there can be no finding by this court as to any negligence of the Plaintiff causing him to fall through the open doors of the train. His case, as he pleaded it and furthermore according to his testimony, was that the Plaintiff fell out of a moving train. According to him, the Defendant has a legal duty to protect the passengers' bodily integrity whilst traveling on a train. The Defendant does not dispute these statements. It accepts that it has a duty to protect commuters who travel on its trains and not those who attempt to jump on its moving trains.
- [24] I agree fully with the view of counsel for the Defendant as extrapolated in his heads of argument that the factual question related only to how the incident occurred. The parties are agreed as to how the Plaintiff suffered his injuries. This is largely a credibility issue. The duty is on the Plaintiff to persuade the court that the incident in question took place in the way he pleaded his case in his particulars of claim and subsequently testified before the court.
- [25] Quite correctly, as pointed out by counsel for the Defendant, there are two mutually destructive versions before this court. One version by the Plaintiff is that he boarded the train at the Kempton Park railway station to travel in the direction of Germiston; the coach

that he boarded was very crowded. He moved to the middle of the coach where he stood and held onto the overhead straps; approximately 20 passengers boarded the train after him; a number of passengers stood around him and between him and the side of the coach or the door of the coach at the time when the train started to move; the train shook sideways when it started to move and thereby caused him to lose his grip on the overhead strap. After losing his balance he was thrown out of the train by its movement; at the stage when he fell the train was already in motion and he fell between the platform and the train; he lost consciousness and cannot explain further how he was injured. When train 0530 left the platform, the doors were open, and he fell off the train.

[26] On the other hand the Defendant's version is that the Plaintiff was not on the train when it left platform 1(one) of Kempton Park railway station; at that stage another train, train 0532, stopped at platform 2 (two) of the same railway station as train 0530 was slowly moving from platform 1(one), she then saw two people who were running from train 0532 to board train 0530, which was already in motion; that she screamed to the two people and warned them not to board train 0530;

that she thought that the two people had succeeded to get onto train 0530; that judging by the reaction of the people who were on the platform that something serious had happened; that the men were unsuccessful and that one of them fell between the train and the platform; That is how the accident took place and that is how the Plaintiff sustained his injuries. These are the two mutually

destructive versions that confront this court in this matter. The acceptance of one version must necessarily lead to the rejection of the other. Accordingly, a court in this situation should adopt an approach when confronted with mutually destructive versions. The court then now turns to considering the proper approach.

[27] This court has been referred, by counsel for the Defendant, to the authority of National Employers' General Insurance Company Ltd v Jager 1984(4) 437 [ECD] at page 440D in which the court emphasized the practical approach that a court in the position of this court should follow. The court stated that:

" Where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he[the plaintiff] can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and is therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected."

[28] Further according to National Employers' General Insurance v Jager page 440F-G "The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do to the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is

false."

The question of unlawfulness, in this regard, is whether the principle of *volenti non fit injuria* should be applied in this case. Counsel for the Plaintiff has, in his heads of argument, already expressed his view on this aspect. According to him, based on the testimony of Dlamini, there can be no finding by this court of the *volenti* defence raised by the Defendant in its plea. This is because after seeing the two boys run from train 0532 to train 0530, she did not see them jump onto train 0530 nor did she see what happened to them. Of course, she did not have to see the two boys jump onto train 0530 but by the application of objective facts, like for instance that when train 0530 passed the platform, she could not see those two boys and furthermore, from the reaction of the people on the platform, she could conclude that something serious had happened to the two boys and lastly, by seeing one of them behind the train lying in the railway tracks that one of them must have missed the train.

According to him, the circumstances of this case do not justify that finding. It will be recalled that, in its plea, the Defendant raised, *inter alia*, a plea of *volenti non fit injuria*. The basis of this plea was, according to the Defendant, the Plaintiffs attempts to board a moving train, train number 0530, when he lost his balance and was seriously injured by the train. According to counsel for the Defendant, this issue relates to the question of unlawfulness and not culpa.

[29] No man can complain of an act to which he has expressly or impliedly assented. This principle is commonly expressed by the maxim *volenti non fit injuria*. The maxim is applicable only in cases where a person has consented to suffering something which would otherwise be an intentional wrong. When used in a wider sense, the maximum is applied to cases where a person has consented to run the risk of unintentional harm, which would otherwise be actionable, as attributable to the negligence of the person who caused it.

[30] In paragraph 6.5 of his particulars of claim, the Plaintiff claimed that he was pushed from behind. And at that time the doors of the train were open. In the said paragraph the Plaintiff pleaded as follows:

"6.5 As the train entered Kempton Park station, and while the doors were still open the plaintiff was pushed from behind, lost his footing, and fell out of the train, in between the railroad and the platform."

This is the case that the Defendant came to meet. This is the case that the Defendant had prepared itself for. This statement contradicts his evidence-in-chief in which he testified that he fell out of the train as it moved from the platform at Kempton Park railway station and not when it arrived.

But in his evidence-in-chief he testified that"

"As I was holding on to the holding strap, some commuters were disembarking. I fell out of the train. The doors were open."

In his evidence-in-chief, the Plaintiff mentions nowhere that he was pushed from behind. He also provides no reason why he fell off the train. The Plaintiff could not explain this material contradiction between his version as pleaded in his particulars of claim and his testimony.'

The pretrial minutes dated 27 May 2022 record the following:

"The Plaintiff's version of the incident is as pleaded in paragraphs 6, 7 and 8 of the Particulars of Claim.

Quite clearly, there is a material contradiction between his testimony before court and what is recorded in the pre-trial minutes.

[30.1] During cross examination, Adv Cilliers SC explained to him that he did not understand his explanation of how he fell off the train. The Plaintiff confirmed that while he was holding onto the holding straps some commuters were entering his coach while others were disembarking.

[30.2] He testified, on the question from Mr. Cilliers, that when he fell out of the train some commuters were boarding the train while others were disembarking.

[30.3] He then said that he fell out of the train when the train started moving. He fell because the train was shaking vigorously. He contradicts himself when he was asked whether there were commuters who were getting into the train while others were getting off the train when he fell out of the and he said, No.

[30.4] He testified during cross-examination when he was asked what forced him to get out of the train, he said that he lost his grip of the overhead strap because the train was moving from side to side. He lost balance as the train started to move.

Adv Cilliers: How did it happen? How did you get out of the train?

Plaintiff: I lost my grip of the holding strap. The train was moving from side to side.

Adv Cilliers: What caused you to lose your grip?

Plaintiff: As I said, I was holding onto the holding strap. The train started to move. Then I lost my balance.

Adv Cilliers: So, it was because of the shaking train that you lost your balance? Plaintiff: Yes.

Adv Cilliers: Nothing else?

Plaintiff: Yes, nothing else.

[30.5] He confirmed, quite evidently on a question from Mr. Cilliers, that nothing else caused him to fall out of the train. But this statement is inconsistent with what Plaintiff has pleaded in paragraph 6.5 of his particulars of claim and other parts of his testimony. There in paragraph 6.5 of his particulars of claim he states that: "As the train entered Kempton Park and while the doors were still open the Plaintiff was pushed from behind, lost his footing, and fell out of the moving train".

[30.6] This allegation is confusing. It clearly states that the Plaintiff was pushed out of the train as the train arrived at Kempton Park railway station (see paragraph 6.5 of the particulars of claim).

[30.7] When he was pushed from behind, the Plaintiff lost his balance or footing, as he pleaded.

[30.8] When he lost his balance, he fell out of the train. He does not mention any holding strap nor that he was pushed.

[31] What appears surreal is that he was the only commuter who fell out of the train when it started moving (contrast this with paragraph 7 of his particulars of claim) despite the fact that the overhead straps to the which he was holding are in the middle of the coach, about 1.5 meters from the doors of the coach and more importantly, notwithstanding the fact that there were some commuters, some of them closer to the door, between him and the door through which he fell out of the train.

[32] It was put to him that his version was improbable, in other words, the version that he put up in the preceding paragraph. In response he said that he lost balance. When he was asked whether it must be assumed that he could not explain how he was the only person who lost his balance he said that he thought that the other commuters had balanced themselves well.

[33] It was suggested to the Plaintiff that to fall out of the train in a situation:

[33.1] where he was clinging to the overhead straps (not clear why he lost his grip while holding straps because the overhead straps are designed to keep him firm on the floor of the train while the train is in motion or when it comes to a halt) even if the train shook, as he testified, he could not lose the balance.

[33.2] where he was 1.5 meters from the side of the coach or door of the train.

[33.3] where there were commuters between him and the door through which he fell,

[33.4] where he would have had to push through commuters who were standing between him and the door, to fall out.

[33.5] it is difficult to imagine how he could fall between the train and the platform. He fell between the train and the platform like a Cape gannet diving for food into the sea. This, in my view, is impossible, considering:

[33.5.1] the space between the platform and the train. There is no evidence on record about the interval between the train and the platform. That space, in my view, was designed in such a way as not to allow a human being to slip through it.

[33.5.2] The Court will assume that when the Plaintiff was ejected from the train he moved at a speed and that that momentum with which he got out of the train would propel him forward on the platform and not underneath the train. In this regard, the Court was referred to the judgment of *Komako v PRASA*, Case NO. 43704/2012 where Adams J. was confronted by similar allegations that the plaintiff in that case fell off the train between then train and the platform. Taking such allegations and evidence with a pinch of salt, he made, and in my view quite correctly so, the

following statement:

"[13] What is more though is that all things considered, the plaintiff's version seems to me to be an inherently improbable one. His version that he was pushed off the train onto the platform and then inexplicably landed on the space between the platform and the railway tracks, makes very little, if any, sense. In my view, this sequence of events is a physical impossibility, especially if regard is had to the common cause fact that there would have been insufficient space between the train and the platform for a person to fall onto the floor beneath the platform. Moreover, his version that he was jostled out of the trail onto the platform by other passengers suggests that his momentum would have propelled him away from the train and not backwards towards the train. The sum total of the foregoing is that the plaintiff's version is inherently improbable and for that reason alone, it starts to be rejected"

He could only say that, as the train started moving, it was shaking, and it shook him out of the train. This was obviously new evidence. He did not deny that to be thrown out of the train, he had to push through the people who were standing between him and the door. This seems to be impossible. Firstly, and what makes the situation rather surreal is that no commuter who stood between him and the open door of the train tried to block him from falling out of the train. Secondly, he was the only commuter in the train who fell out of the train when it moved away from platform. Thirdly, there was no one to grab him as he flew out of the train. He testified that no one helped him. There is no evidence on this aspect. No one seemed to complain that he was knocking against them. There is no evidence here too. It appears that he had a clear passage to the door through which he fell out, which is highly improbable.

[34] He confirmed, during the cross-examination, that no one pushed him out of the train. He then added another version when he said:

"I only saw myself in the platform. I did not see what happened."

This statement speaks for itself. It needs no explanation. It means that he cannot satisfy this court that he fell out of the train because he was pushed or because the train was shaking from side to side or that he lost his balance as the train shook from side to side. I therefore conclude that the Plaintiff cannot explain reasonably how he fell out of the train.

[35] According to Mr. Van Ryneveld, there are two areas of dissatisfaction in evidence of Dlamini. The first problem with her evidence is that, during the cross-examination, it was put to her that the evidence of the Plaintiff was that train 0530 was full. She disputed this allegation and stated that it is not correct, in other words, it was not full. She was told that that evidence that the train was not full was never put to the Plaintiff. She then said that she did not know why that was not done.

[36] It is not clear how this witness was able, from the last coach of the train, to see that the train was not full. She did not testify how she ascertained this. She was never asked to explain how she ascertained that the train was not full because she was always on the last coach of the train. There is no evidence that she walked along the train to inspect if it was full or not.

There are no facts placed before the court which support her testimony that the train was not full. She cannot say with certitude that the train was full without informing the court how she made that determination. In the premises her testimony that the train was not full lacks merit. In the circumstances, the court has inevitably to accept the testimony of

the Plaintiff that the train was full. The evidence of evidential value of this statement is not clear.

- [37] What is of importance though regarding the fact or testimony that the train was full still is how did the Plaintiff fall off the train, if it was full and he was among other commuters? The plaintiff was unable to explain how he fell off the train in circumstances where, on his own evidence, the train was full.
- [38] The second point with which counsel for the Plaintiff was unhappy was the fact that Dlamini did not keep a proper lookout. Mr. Van Ryneveld did not dispute the evidence of Mr. Dlamini that two boys or young men disembarked from train 0532 and rushed to train 0530 which, at that material, was leaving the platform; and that notwithstanding Dlamini's warning to the two boys not to try and get onto train 0530 the two boys failed to heed the warning. Dlamini did not see what ultimately happened to the two boys. Because she did not see them on the platform as the train proceeded, she assumed that they succeeded in jumping onto train 0530. The problem that Mr. Van Ryneveld had with Dlamini's evidence is that she testified that she thought that the two boys had jumped onto train 0530 because she saw no one falling off the train.
- [39] This witness testified that she thought that the two boys were able to jump into train 0530. This was a conclusion she reached after she did not see the boys on the platform when the last coach of the train was passing the platform. She concluded that, because the two boys she had seen rushing to train 0530 were not on the platform, it meant that they had succeeded in jumping onto train 0530. It was put to her that the two boys could jump onto train 0530 only if the doors of the

train were open. But she testified that the train was in motion and was traveling at a speed. She told the court that she screamed at them to leave the train. It was put to her that that she screamed to the boys who came from train 0532 to desist from trying to jump onto train 0530 was new evidence.

- [40] Finally, it was put to her that she did not keep a proper look out. She testified that no one fell off train 0530 while she was looking. She disagreed with the statement that she did not have a proper lookout. This aspect that no one fell off the train while she was looking was not fully explored. I assume that this is so because, and I assume, that Mr. Van Ryneveld accepted that no one fell off the train. She also told the court that she was not sure that the person she saw lying on the railway tracks was one of the two boys who came rushing to train 0530. But she was sure that train 0530 was already

in motion when the two boys came rushing to it. She was adamant that no one fell off the train 0530 while she was looking.

- [41] The evidence of Dlamini is clear. No part of her evidence gives any indication that she was uncertain of what she told the court. Her evidence is beyond reproach and because of its value, I am unable to make any adverse remarks about it. One of the remarks about this witness as pointed out by Mr. Van Ryneveld was that even when requested to do so on questions by counsel for the Plaintiff, she was unable to provide for a satisfactory version of why passengers who disembarked a train in motion would run or attempt to board another train. This observation is, in my view, unfair because it now takes the witness into the realm of speculation. How would this witness know the answer to such a question?
- [42] Counsel for the Plaintiff seems to have missed a crucial point that the Plaintiff's evidence as to how he fell off the train was inconsistent. He has not remarked about it, and I guess for fear of playing in the hands of the Defendant's counsel. It makes the task of this court to find out whether the Plaintiff was an unsatisfactory witness an easy one. If he had analyzed Plaintiff's evidence and taken all those different versions of how he fell off the train 0530 into account, he would have found, as this court does, that the Plaintiff's version is highly improbable, and as Counsel for the Defendant has it, "to the extent that it may be impossible in material respects." The Plaintiff's version of the incident cannot be reconciled with his version as set out in his pleadings. I have referred to this in paragraph [33] above. Moreover, the Plaintiff's evidence stands uncorroborated. Regarding the incident of 22 August 2018, he was a single witness.
- [43] Although Dlamini did not see the Plaintiff fall or disappear underneath the train, the only inference that this court can make is that she indeed saw the Plaintiff rushing to board the moving train. Dlamini's evidence was that within less than a second after the person attempted to board the moving train, the people on the platform screamed and when she looked back, the Plaintiff was lying behind the train between the railway tracks. The inference is irresistible that the Plaintiff was indeed one of the two boys she saw rushing to board a moving train.
- [44] It will be recalled that in paragraph [29] *supra*, the court dealt with the principle of *volenti non fit inuria* and that it is one of the defences raised by the Defendant against the Plaintiff's claim. The court also set out the grounds upon which that defence of *volenti non fit injuria* is based. The defence of *volenti non fit injuria* operates as a bar to the Plaintiff's action because it negates the existence of a duty of care. To recap, according to the Defendant, whether the doors of the train were open, when train 0530 left the platform at Kempton Park railway station on 22 August 2018, the Plaintiff was not on that train. The circumstances point out that the Plaintiff attempted to board a moving train. He lost his balance and ended up being injured by the train. He did not fall out of the train. And this is the finding of this court. In my view, the balance of the probabilities favours the Defendant. In conclusion, this court finds that his evidence is not true. The Plaintiff, in my view, positioned himself in a dangerous position. He failed to prevent being injured when such injuries could and should have been avoided by the application of reasonable care

[45] In his heads of argument, counsel for the Defendant argued that *volenti non fit injuria* is a ground for justification which excludes the element of unlawfulness. To establish the defence of voluntary assumption of risk, it is necessary for the Defendant to show not only that the Plaintiff had knowledge of the danger, see *Alberts v Engelbrecht* 1961 (3) SA 644 (TPD) 645F, but also that with a full appreciation of its nature and extent, the Plaintiff voluntarily elected to encounter it or consented to take the risk upon himself. See *Warring & Gillow Ltd v Sherbome* 1904 T.S. 340 at 344, where the court stated that:

"It must be clearly shown that the risk was known that it was realized, and that it was voluntarily undertaken." This principle of the law set out in 1904 is still applicable today.

[46] Before I refer to the authorities in which the above principle was applied as referred to in Adv Cilliers' heads of argument, it is crucial, in my view, to ascertain if the Defendant was has shown firstly that the Plaintiff had knowledge of the danger and secondly that with, full appreciation of its nature and extent. the Plaintiff elected to take the risk upon himself.

[47] the plaintiff admitted during cross-examination that:

[47.1] he was a regular user of the Defendant's trains.

[47.2] on 22 August 2018, it was not the first time he used or was going to use a train.

[47.3] he knew how the trains operated.

[47.4] he knew that travelling by train could sometimes be dangerous if you do not comply with the rules and the regulations of using a tray. This he admitted he knew before 22 August 2018.

[47.5] trying to board a moving train was dangerous.

[47.6] if you attempt to board a moving train you could even lose your life.

I am consequently satisfied that, based on the foregoing admissions by the Plaintiff during cross-examination, that the Defendant has established that the Plaintiff had knowledge of the danger involved in not complying with the rules and regulations of using a train; that it was dangerous to try and board a moving train; that you could even lose your life or get serious bodily injuries if you try to board a moving train. Finally, the Defendant has shown, based on circumstantial evidence, that the Plaintiff elected to take the risk upon himself. In this regard it will be recalled that Dlamini testified that she warned the two boys who rushed to train 0530 not to try and board the train. It was never disputed that she did so.

[48] Now, counsel for the Defendant has, in support of the Defendant's defence of *volenti non fit injuria*, referred the court to the following authorities on which he relies in support of his subsequent submissions. *Santam Insurance Co. Ltd v Vorster* 1973 (4) SA 764 on page 781A-F, where the court had the following to say:

"I am accordingly of opinion that, if it be shown that, addition to knowledge and appreciation of the danger, the claimant foresaw the risk of injury to himself. that will ordinarily suffice to establish the "consent" required to render him *volens*- provided always that the particular risk

which culminated in his injuries falls within the ambit of the thus foreseen risk. The inherent difficulty that the central factum probandum-viz the consent to the particular risk which occasioned the supervening injuries- is basically a subjective inquiry which can, I suggest, only be bridged by way of inference from the proved facts. In the nature of things, direct evidence will seldom, if ever, be available; and manifestly the negative ipsi dixit of the claimant

himself can be itself usually carry but little weight. The court must, in my view, thus perforce resort first to an objective assessment of the relevant facts in order to determine what, in the premises, may fairly be said to have been the inherent risks or the particular hazardous activity under consideration. Thereafter the court must proceed to make a factual finding upon the vital question as to whether or not the claimant must, despite his probable protestations to the contrary, have foreseen the particular risk which later eventuated and caused his injuries, and is accordingly to be held to have consented thereto. The foregoing appears to me to afford a practical method of dealing with what is admittedly a somewhat difficult problem, not to be in general conformity with our decisions insofar as they touch this point."

[49] The second judgment which counsel for the Defendant referred this court to and on which he relies in support of his submissions regarding the principle or defence of *volenti non fit in injuria* is the unreported judgments of Mynardt in *Moepya v Transvaal Ltd* and Another Case Number 2475/05 delivered on 12 July 2017. According to Mr. Cilliers, in that case the court dealt with a situation very similar to the current one. After considering the defence of *volenti non fit in injuria*, Mynardt J had the following to say:

"On the facts of the present case, I think that Mr. Cillier's argument is correct that there are serious risks of injury, and perhaps even death, inherent in someone trying to board a moving train. The plaintiff in his evidence also conceded that he was aware of those risks. The plaintiff is not a newcomer to trains. He has been commuting for quite some time by means of trains. Even objectively considered, I think that it is obvious to any person that if one tries to board a moving train, especially one that is picking up speed like the train in question on the day in question and which would have moved at the speed testified to by Mr. Carver, that the risk of injury, and possibly also death, is not a farfetched risk and the possibility of injury is not a farfetched possibility

As far as the plaintiff is concerned, subjectively speaking, it appears from the evidence of Mr. Mawelele that despite the warning to him not board the train, he persisted in doing what he was doing and it eventually brought about injuries for him.

I am satisfied that on the evidence adduced, the plaintiff had the necessary knowledge of the risk involved in what he was trying to do. He appreciated what the danger was, and I can come to no other conclusion than that he consented or assumed the risk of being seriously injured doing what he was doing.

I think the defendant has acquitted himself on the onus which it had in proving that particular defence. On that basis too, I find that the plaintiff has no claim against the defendant." See also the Full Court judgment of this Division which confirmed and relied on the judgment of Mynardt J in *M L Shongwe v Passenger Rail Agency of South Africa* Case Number A512/2010. In my view, the Defendant has succeeded in establishing the defence of *volenti non fit injuria*.

[50] I am satisfied that the Plaintiff has, on balance of probabilities, failed to discharge the onus that rested on him. In the circumstances, I would follow the example set out in *Govan v Skidmore* 1952 (1) SA 732 (N) in which the court held that in trying to balance the facts in a matter, one may, by balancing the probabilities, select the conclusion which seems to be the more natural or plausible conclusion from amongst several conceivable ones, even though that

conclusion

may not be the only reasonable one.

Accordingly, I make the following order:

1. The Plaintiff's claim is hereby dismissed, with costs.

PM MABUSE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG, PRETORIA

Appearances:

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Date of Hearing 28- 30 May 2024

Date of Judgment 15 November 2024

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