REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 16436/2011

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

22 October 2012 .....
DATE SIGNATURE

In the matter between:

CHOMA MICHAEL Plaintiff

and

PRASA Defendant

JUDGMENT

KATHREE-SETILOANE, J:

[1] This is an action in which the plaintiff sues the defendant for damages arising out of an accident that occurred on 15 September 2010, at approximately 05h00 when the plaintiff was allegedly injured due to the negligence of the defendant, when he attempted to board a train, operated by the defendant at Oakmoor Station.

[2] In terms of rules 33(4) of the Rules of Court, the issue of the quantum was separated from the issue of liability and negligence. The trial accordingly proceeded only on the question of negligence and causation.

[3] Plaintiff testified that, as a result of the injuries sustained, he does not have a clear recollection of what happened on the day of the incident. He indicated that he remembers standing at the platform at Oakmoor Station waiting for a train. There were a many people waiting for trains on the platform. The train entered the station with its doors open, and he then boarded the train with many other passengers. His last memory was that he had boarded the train with many other passengers, and that he was standing in the train. He cannot recall the train departing or the doors closing. It is common cause that the plaintiff was retrieved from underneath the train halfway between the middle of the platform and the end of the platform in the direction in which the train left the station.

[4] Although the plaintiff stated that the train entered the station with open doors, he was unable to testify as to position of the doors when the train left the station indicating that he had no memory as to whether the doors were open or not when the train departed the station. It was conceded, on behalf of the plaintiff that because of the lucuna in the plaintiff's evidence on the the question of whether or not the doors were open or closed when the train departed from the station, and in applying the relevant tests set out in *Stellenbosch Farmers Winery Group Limited v Martel ET Cie and Others*

2003 (1) SA 11 (SCA) the matter must be be decided on the defendant's version. This concession, in my view, is correctly made.

[5] On the defendant's version four platform marshals and security guards were deployed at Oakmoor Station, on that day. One platform marshal, Ms S Sontshantsha and one security officer, Mr Mavundla, gave evidence on behalf of the defendant. The defendant did not call the train guard (Ms Wendy Ndaba) to give evidence, despite an indication from the defendant's counsel that she will be called as a witness for the defendant.

[6] On the day of the incident, at Oakmoor Station, there was a flag system in operation in terms whereof platform marshals would signal the train guard with a white flag that it is safe to depart and the platform marshals would signal the train guard with a red flag to stop the train, when necessary, after it has started to depart. Ms Sontshantsha, a platform marshall gave evidence that she was on duty, at Oakmoor Station, on the day of the incident. She was standing by a set of stairs leading from the entrance of the station to the platform. She saw the train arrive with its doors closed. There were not many people in the train.

[7] She also saw the train when it started to depart from the station. The doors were closed and there not many people in the train. It was "*half full*". She first noticed the plaintiff when he was running down the stairs in the direction of the train which had already started to depart with its doors closed. She immediately realised that he was going to try and board a moving train.

She together with other platform marshalls shouted out warnings to him not to board the moving train when he ran past her, and towards the train. She was standing in the middle of the platform, at the bottom of the staircase, which led to the platform, when she saw him running past her towards the train.

[8] She described how he attempted to board the moving train between the carriages by grabbing hold of a handle, and stepping onto a step that is located at the end of the coach, and how he slipped in so doing, that he eventually fell between the train and the platform, and was dragged for approximately 5 metres.

[9] She and the other marshals raised the red flag to stop the train, which stopped shortly after being signalled to do so. She said that they raised their red flags only when it became apparent that the plaintiff slipped and fell between the train and the platform. She said that other than shouting a warning to him not to board the moving train, she did not physically restrain him because that would have been dangerous. The distance from where the plaintiff ran past the platform marshal and where the plaintiff was retrieved underneath the train is at least 50 metres.

[10] During cross-examination Ms Sontshantsha was asked whether, from where she was standing in the middle of the platform, she could see all the doors of the train. She conceded that she only saw those doors that were allocated to her. Although she tried her level best to state that the doors of the train were closed when the train departed, she ultimately conceded that from

where she was standing she could personally not see all the doors of the train. Ms Sontshantsha could not, in my view, state with any certainty that the door which the plaintiff ran towards was in fact closed. This portion of her testimony, in my view, is as unsatisfactory as her reluctance to concede the obvious, i.e. the train would have stopped sooner if she had raised her flag when she realised that the plaintiff was about to attempt something very dangerous, in order to prevent possible injury at a time when the train was still gathering speed. Instead, she waited until the expected happened – and the plaintiff had already slipped and fallen between the train and the platform.

[11] The security officer, Mr Mavundla, testified that the plaintiff tried to board the moving train by running towards the door of a coach and thereafter tried to grab onto the rail at the back of the coach in order to board in between two coaches. At that time he was more than 50 metres away from the place where Sontshantsha was standing on the platform. On Mr Mavundla's evidence, the plaintiff, in attempting to board the train, ran further away from him, in the direction in which the train was moving.

[12] Despite Mr Mavundla's insistence that the doors of the train were closed, Mr Mavundla could not state, with certainty, that all the doors and more specifically the door to which the plaintiff ran to board the moving train, was closed at the time of the incident. He corroborated the fact that the plaintiff was retrieved from underneath the train approximately halfway between the middle and the end of the platform and that he was dragged for approximately 5 metres as stated by Ms Sontshantsha. He also confirmed that

the train stopped relatively quickly after the signal was given for the train to stop, and confirmed that the train gradually gains speed after its departure from a stationery position.

[13] Only Mr Mavundla made a written statement on the day of the incident According to his statement, and the report which he made to his superiors, Mr Mavundla saw a male commuter running to board a train that was in motion. The commuter missed a step and fell down under the train.

[14] Ms Sontshantsha did not make a written statement after the incident but confirmed that she made a report to Mr Nkosi, from Protection Services, shortly after the incident. Ms Sontshantsha confirmed, under cross-examination, that she made the following report to Nkosi:

"According to the eye-witness Ms Samela Sontshantsha who was at the platform when the incident took place, she alleged that the victim was trying to board a moving train, unfortunately he missed the climbing still on the train and he fell under the train and they quickly stopped it."

During cross-examination, Ms Sontshantsha explained that a climbing still is the footplate at the doors of a coach used by commuters to board a train – something totally different to the step between coaches.

[15] Neither Ms Sontshantsha nor Mr Mavundla could explain why no reference was made in their initial reports of the following crucial facts:

(a) That the doors of the train were closed;

(b) That the plaintiff attempted to board the train between two coaches; and

(c) That the plaintiff grabbed onto the rail at the end of a coach and missed his step when he tried to board the train between coaches.

[16] Both Mr Mavundla and Ms Sonsantsha confirmed that the train was only stopped after the plaintiff fell between the train and the platform. They were unable to provide a reasonable explanation as to why the train could not have been stopped earlier by raising a red flag under the circumstances prevailing. The plaintiff ran more than 50 metres before he fell under the train. Moreover, the train guard, Ms Ndaba, who was on duty that day, could have given evidence regarding the status of the doors of the train, i.e. that she in fact closed the doors of the train prior to departure, was not called to give that evidence despite the fact that her evidence was crucial.

[17] The only reasonable inference to be drawn from the defendant's failure to call this 'crucial' witness is that the doors of the train were not closed when it departed from the station. I accordingly find, on the probabilities, that the doors of the train were not closed when the train departed the station, and that the defendant was negligent in this regard. It is inherently improbable, that an

adult who travels on trains on a daily basis would attempt to board a train with closed doors. It is important to bear in mind, in this regard, that an open door constitutes an invitation to commuters to board a moving train, even though its dangerous for them to do so (*Transnet Ltd t/a Metro Rail v Tshabalala* [2006] 2 All SA 583 (SCA) at para 9).

[18] This then brings me to the question of whether the defendant had taken all reasonable steps to guard against the possibility that the train would depart with open doors (*Kruger v Coetzee* 1966 (2) SA 428 (A). As alluded to earlier, the train guard, Ms Ndaba, who apparently closed the doors of the train before it departed the station was not called to explain what steps, if any, were taken by her to ensure that the doors of the train were properly closed before the train commenced its departure (*Myeza v Metrorail*, Case Number A5028/06, (SGH)). In my view, the defendant must certainly have fully appreciated that its failure to close the doors of the coach of a train, would create the "real" possibility of a person being injured as has been the situation in this matter. It is clearly the open door, which "enticed and enabled" the plaintiff to attempt to board the moving train. Had the doors of the train been closed prior to its department, the exercise of attempting to board the train would have been a futility. In the premises, I find the plaintiff has, on a balance of probabilities, discharged his onus of proving causal negligence on the part of the defendant.

[19] On the defendant's version, however, the evidence demonstrates that the plaintiff did try to board a moving train, and he failed to heed the warnings,

of the platform marshalls on duty, not to board the moving train. It is unquestionable that the plaintiff was negligent in doing so, and that his negligence contributed to his injuries.

[20] The defendant seeks to rely on the defence of voluntary assumption of risk. The defendant is, however, disallowed from doing so, as this defence was not pleaded (*Sandton Insurance Co Ltd v Vorster* 1973 (4) SA 764 (A); *Rosseau v Viljoen* 1970 (3) SA 413 (C)). None of the elements, including that the requirement that the plaintiff had knowledge of the risk, appreciated the extent of the risk, and notwitstanding such knowledge and appreciation voluntarily assumed the risk, have been pleaded by the defendant.

[21] This then brings me to the question of how to apportion the respective degrees of blame attributable to each of the parties. The plaintiff was no doubt, negligent failing to ensure that the doors of the coach had been closed prior to the train departing the station. In addition, the defendant's marshalls, in the circumstances of this specific incident, could have stopped the train sooner in order to prevent the incident from occurring, by simply raising the red flag when the reasonable person would have done so in order to avert the harm by stopping the train. It is common cause that although inconvenient, the stoppage time in stopping the train while the commuter unlawfully attempts to board a moving train, in order to arrest such commuter is much less than the stoppage time required to retrieve commuters from underneath the train who did not succeed in boarding a moving train.

[22] In the matters of *Myeza v Metro Rail*, case number A5028/06 (SGH), at para 24-28, and *Lukhele v Metrorail*, Case number A5041/2007 (SGH), both Full Bench decisions of the South Gauteng High Court, the court made (under similar circumstances where commuters were warned not to persist with their dangerous inappropriate activity of attempting to board a moving train), apportionments of 70/30 and 80/20 respectively in favour of the defendant. However, I am of the view that the core distinguishing factor between the abovementioned cases, and the facts in the current matter, is the fact that there were no platform marshals with a flag system deployed when those incidents occurred. In the current matter, the defendant thought it prudent to employ a flag system, and had it acted reasonably, as the reasonable person would have under the circumstances, the train would have been stopped earlier and the incident would have been averted.

[23] It is common cause between the parties that the defendant has a legal duty to ensure the safety of commuters. It is also common cause that it is not uncommon that commuters try to board moving trains under circumstances when they should not do so. The flag system introduced by the defendant at Oakmoor Station was introduced specifically to prevent serious injuries to commuters who try to board moving trains under circumstances when they should not do so.

[24] In the circumstances of this case, I am of the view that the parties are equally to blame. The defendant must accordingly be ordered to compensate the plaintiff for 50% of the plaintiff's proven damages.

[25] In the result, I make the following order:

(1) The plaintiff is entitled to recover 50% of his proven damages from the defendant;

(2) the defendant is ordered to pay the plaintiff's costs of the action;

(3) the issue of quantum is postponed sine die.

F KATHREE-SETILOANE
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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Date of Judgment	22 October 2012