REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 10/46053

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

2012-03-08
DATE

SIGNATURE

In the matter between:

MOYA, MOSES Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA Defendant

J U D G M E N T

KGOMO, J:

INTRODUCTION

[1] The plaintiff has instituted proceedings against the defendant for damages consequent to the former having allegedly been pushed out of a

moving train at Kempton Park Station, Ekurhuleni Municipality, Gauteng Province on 5 August 2010.

[2] The defendant is vehemently opposing the action, its major defence being that no incident akin or similar to the one the plaintiff is basing his claim on took place at Kempton Park Railway Station on the date alleged.

[3] After the close of the plaintiff's case, the defendant has applied for absolution from the instance with costs.

THE PARTIES

[4] The plaintiff, Moses Moya ("*plaintiff*"), is an adult male person of full legal capacity, who gave his birth date in the pleadings as 29 October 1967, thus being 43 years old at the time of the alleged incident and 45 years as at the date of this hearing, who ordinarily reside at No. 1436 Kanana Section, Tembisa, Gauteng Province.

[5] The defendant, the Passenger Rail Agency of South Africa ("*PRASA*") is the successor-in-title and in-law of or to the South African Rail Commuter Corporation, and is a statutory body possessing juridical or legal capacity and established in terms of section 22 of Legal Succession to the South African Transport services Amendment Act,(Act 47 of 1992) as amended ("*the Act*"). It has limited liability with its head office or principal place of business and

chosen *domicilium citandi et executandi* situate at 30 Wolmarans Street, 10th Floor Umjantshi House, Braamfontein, Johannesburg, Gauteng Province.

PLAINTIFF'S ALLEGATIONS IN HIS PARTICULARS OF CLAIM

[6] In order for issues around and peculiar to this application for absolution from the instance at this stage of the proceedings to be understood in their correct or relevant context, it is my considered view and finding that the plaintiff's averments as contained in the particulars of claim insofar as they are relevant to the application be fully set out hereunder. Similarly, the defendant's plea thereto will be set out fully:

Plaintiff's particulars of claim

"5. *On or about 5 August 2010 and at approximately 07h00, at or near Kempton Park Station, Kempton Park, plaintiff was on board a train for which he had a valid ticket. Whilst on board the train with the carriage's doors opened whilst the train was in motion, plaintiff was forced/ejected/dislodged/pushed out of the carriage by other passengers, as a result of which plaintiff lost his balance and fell out of the carriage.*

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

6.1 *He/she signalled to the driver of the train that it was safe for the latter to set the train in motion whilst the carriage's doors were open;*

6.2 *He/she signalled to the driver of the train that it was safe for the latter to set the train in motion without ensuring that all carriages' doors were closed and/or adequately closed;*

6.3 *He/she failed to keep a proper and/or adequate lookout;*

6.4 *He/she failed to pay due regard to the safety of passengers on board the train;*

6.5 *He/she failed to prevent the said accident when by the exercise of due and reasonable care, he/she could and should have done so.*

7. *Alternatively, the sole cause of plaintiff's falling from the train was the negligence of the driver of the said train, whose identity is to the plaintiff unknown, who was negligent in one or more or all of the following respect:*

7.1 *He/she set the train in motion whilst its carriage doors were opened;*

7.2 *He/she failed to close and/or ensure that all carriage doors are closed and/or adequately closed before setting the train in motion and/or opened the doors of the train whilst it was still in motion;*

7.3 *He/she set the train in motion without checking that all carriage doors are closed and/or adequately closed;*

7.4 *He/she failed to keep a proper and/or adequate lookout;*

7.5 *He/she failed to prevent the accident when by the exercise of due and reasonable care, he/she could and should have done so.*

8. *Further alternatively, the sole cause of plaintiff's falling from the train was the joint negligence of the conductor whose identity is to the plaintiff unknown and the driver whose identity is to the plaintiff unknown who was negligent in one or more or all of the respects referred to in paragraphs 6 and 7 respectively above.*

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

9.1 *Fractured right tibial plateau;*

9.2 *Multiple facial lacerations;*

9.3 *Multiple abrasion and laceration.*

10. *As a result of the aforesaid injuries, plaintiff underwent hospitalisation and received medical treatment, was disabled and disfigured and suffered pain and loss of amenities of life.*

Particulars hereof are the following:

10.1 *Hospitalisation and medical treatment*

Plaintiff was admitted at Tembisa Hospital as in-patient from 5 August 2010. X-rays were conducted which showed fractured right tibial plateau. An open reduction and internal fixation was performed on the fractured limb. Plaintiff's abrasion and laceration were sutured. An above knee plaster of Paris was applied. Plaintiff was subsequently discharged to convalesce at home on crutches.

10.2 *Pain and suffering*

Plaintiff initially suffered severe pain, which gradually abated with the passage of time. Plaintiff continues to suffer from symptomatology related to his injuries. In particular, plaintiff suffers from neck pain.

Plaintiff still experience pains on the affected areas. It is anticipated that when plaintiff undergoes the future medical treatment, he will experience attendant pain and discomfort, disablement and risk associated therewith.

10.3 *Disability*

Plaintiff was temporarily totally disabled during the aforesaid period of hospitalisation and whilst convalescing at home;

Plaintiff is presently still temporarily partially disabled as a result on the ongoing symptoms emanating from his injuries;

It is anticipated that despite future surgical and conservative treatment, plaintiff will suffer from ongoing residual functional disability.

10.4 *Loss of amenities of life*

Plaintiff has lost those amenities of life normally associated with the injuries and sequelae as set out above.

In particular, there has been a severe restriction in the level of physical activities the plaintiff is able to perform since the accident, consequently plaintiff is unable to engage in recreational activities of his pastimes. Plaintiff is at present unable to participate actively due to the severity of pains."

[7] The defendant's plea thereto reads as follows:

"*5. AD PARAGRAPH 5*

The Defendant has no knowledge of the allegations contained in this paragraph; it denies them and puts the Plaintiff to the proof thereof.

6. AD PARAGRAPHS 6, 7 AND 8

6.1 The allegations contained in these paragraphs are denied and the Plaintiff is put to the proof thereof.

6.2 Without derogating from the generality of the above denial, the Defendant, in particular, denies that it acted negligently as alleged by the Plaintiff in the particulars of claim in this paragraph and avers that:

6.2.1 The sole cause of the accident was the Plaintiff's exclusive negligence in one or more or all of the following:

6.2.1.1 He attempted to alight from the train which was at the time already in motion and with its doors already closed;

6.2.1.2 He attempted to board the train which was at the time in motion with its doors already closed;

6.2.1.3 He attempted to alight from the 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 interfered with the train doors when they were already released to close.

6.3 *Alternatively, and only in the event of this Honourable Court finding that the Defendant was negligent, which is still denied, the Defendant pleads that such negligence did not contribute to the Plaintiff being pushed out of the train.*

6.4 *Further alternatively, and only in the event of this Honourable Court finding that the Defendant was negligent and that such negligence contributed to the Plaintiff being pushed out of the train, which is still denied, then and in the event, the Defendant pleads that the Plaintiff was also guilty of contributory negligent and damages suffered by the Plaintiff should be reduced proportionate to the degree of his own negligence in accordance with the Apportionment of Damages Act 34 of 1956.*

7. *AD PARAGRAPHS 9, 10 AND 11*

7.1 *The Defendant denies that the Plaintiff fell from a train or a moving train as a result of the Defendant's negligence.*

7.2 *The remaining allegations contained in these paragraphs are not within the knowledge of the Defendant, it denies same and the Plaintiff is accordingly put to the proof thereof.*"

ISSUE IN DISPUTE BETWEEN THE PARTIES

[8] The real *lis* between the parties is whether or not the plaintiff was indeed in the train that was travelling between Leralla Railway Station near Tembisa and if so, whether he was indeed injured as alleged in the particulars of claim,

alternatively,

should this Court find that he was on that train and was indeed injured when he fell from it, whether or not fault can be arrogated or apportioned on or to the defendant and/or its employees.

PRE-TRIAL AGREEMENT OF THE PARTIES

[9] Before the actual trial began, both parties asked that it be recorded that the issue of quantum should be separated from that which concerned liability or the merits and that the trial only proceed on the merits.

[10] I duly separated the issue of quantum from the merits and postponed the former *sine die*.

PLAINTIFF'S CASE

[11] The plaintiff's case in substantiation of the claim was led through two witnesses, namely, the plaintiff himself and an acquaintance and/or fellow worker in Kempton Park, one Connie Dlamini.

PLAINTIFF (MOSES MOYA)

[12] He testified to the effect that on 5 August 2010 he boarded a metro train at Leralla Railway Station at 06h00 on his way to his workplace at Kempton Park. When he entered the train or station platform, the train was already stationary. According to him the train was jam-packed with

passengers, some of them even stopping the door thereof from closing. The small entrance hall next to the door of the train as well as the main seating area of the coach were all full of passengers. Even standing room was at a premium.

[13] He boarded and pushed his way towards the nearest seat in the coach and stood there facing the door he used to enter the coach. He was the first of about five (5) to seven (7) fellow passengers to embark on that coach. The train then moved on, stopping to load more passengers at the Tembisa, Kaalfontein and other stations on its way towards Kempton Park.

[14] When the train entered the Kempton Park Railway Station where he was to alight, people started jostling and pushing each other, all moving towards the coach door. He also moved gingerly and gradually towards the train door or exit.

[15] As regards what actually happened next, he described it as follows:

> *"... I do not know what happened next. When I woke up or came to my full senses I was lying on the platform, injured. I do not know how I was pushed out. The train then moved on."*

[16] Before the train could move out of the station, as he was still on the ground, he saw two security officers walking towards him from the direction the train approached the train from. A young man, whom he did not identify, rushed to his assistance. This young man hailed at the two security officers to come and help them but the latter ignored them and walked past. At a

distance in front of where he was lying, there were other security officers. After the train had pulled away, the young man then carried him out of the station and placed him in a lying position at some grass embankment not far from the entrance gate into the station.

[17] He gave that young man his cellphone and asked him to phone one Connie who was at that stage in the Kempton Park area or town as she had used a taxi from their township or settlement. He did so and Connie arrived at the scene within a short time, which he estimated at around 5 minutes. He told her that he had been pushed from a moving train.

[18] The said Connie then asked him to give her the train ticket he had used that morning. He gave it to her. She walked with it towards the security officer's offices at the station. When she promptly returned, she told him that the security officers were not co-operating. She gave back his ticket and went away to her workplace.

[19] Two security officers accompanied by two unknown young men approached him. The officers demanded to see his ticket. He gave it to them. They then told him an ambulance had arrived. The young man who carried him out of the platform and station carried him to where an ambulance was. A railway security officer standing there demanded his ticket again. He gave it to him. He (officer) then recorded the ticket number in a pocket book. He also asked him some questions and wrote his answers in that pocket book. He did not disclose the contents of his discussions with the security officer. When he ultimately was put inside the ambulance the paramedics therein also

put some questions to him, which he answered as they also recorded the answers in their books.

[20] The ambulance ultimately delivered him at a clinic in Kempton Park after first collecting another young lady at a certain location in town as well as a bleeding young man at another place. From the clinic the ambulance transported them to Tembisa Hospital where he was diagnosed with a broken or fractured leg. His leg was put in a plaster of Paris (POP) and he was admitted there for about a week. He said for 5 days.

[21] He stated that what he did, trying to hail at the passing security officers, was to him an act of reporting his fall and injury but the officers ignored him. He further stated that at one stage he heard another Sepedi-speaking security officer saying to him his report will never be accepted. That, he said, was when he was already lying outside the railway station. He did not know why or under what circumstances that security officers came to be where he was lying down.

[22] He further explained that in Kempton Park he was working for one Dennis Horman who was an independent contractor working for "*the firm*".

[23] Concerning the train ticket, he explained that he purchased it that very same morning before he proceeded to board the train at 06h00.

[24] When prompted by his counsel to explain to this Court the condition under which the train was, i.e. what he observed while approaching it, he very, very hesitantly and incoherently spoke as follows:

> "*... when I approached the train ... eh ... eh ...* (silence for about 2 minutes) *... it was right. I boarded the train being right ... when I boarded it it was right for me to board it ...*"

[25] Cross-examination of this witness by counsel for the defendant, Adv Ngoetjana, evinced interesting answers. He conceded that he bought his train ticket at Leralla Railway Station before the actual boarding time of 06h00 as the 06h00 train was his usual train. He was shown the original train ticket which was discovered by his legal representatives which clearly stated that it was purchased at 06h25. He could not reconcile the discrepancies. He was asked if there was any other railway station between his home area and Leralla Railway Station and he stated that it was Limindlela Station. He then changed his version to state that in fact Limindlela Station was beyond Leralla Station when one travels towards Kempton Park. He confirmed that when he entered Leralla Station platform, the train he was to board was already stationary there. He also spoke confusingly about whether the train doors were open when he reached it or whether the doors opened while he was already there. He vacillated between these two answers. In order to get himself out of a sticky situation that was precipitated by the flurry of questions levelled at him on this aspect he dismissively answered that the train entered the platform with its doors open, yet when asked to reconcile this with his earlier evidence, which he confirmed several times, to the effect that the train

was already stationary at the platform when he arrived, he had no answer to give. He insisted that the seats of this commuter train are just next to the doors, that there is no mini foyer at the doors before one enters the main seating area. This piece of evidence is inconsistent with how commuter coaches are – they all have mini foyers next to the doors and in order to enter the main seating area, there is an entrance thereto. The plaintiff in my view and finding, was economical with the truth on this aspect.

[26] He estimated the distance from where he was standing in the train from the entrance/exit at 2½ meters. He conceded that he indeed entered the jam-packed coach which already had standing commuters pressing at each other in the aisle as well as the entrance portion because he did not want to be late at work.

[27] He was taken up on his work issue : When asked what he did or performed at his workplace he stated that he was a casual car washer at a repair and sale car outlet. However, he was also shown and confronted with his own statutory claim notification form which is marked "A26" to "A29" in the documents filed of record and by agreement could be used in this trial : At paragraph 1.9 thereof he stated that he was unemployed. At paragraph 1.10 thereof he stated that:

> "*... The claimant started working (for Dennis Horman) in January 2010 'till the 04 of August* (sic) *2010 ...*"

[28] The above meant that as on 5 August 2010 when he was allegedly injured, he was no more working for Dennis Horman. Consequently his allegation that he was on his way to work at Dennis Horman's place cannot be true.

[29] He further conceded during cross-examination that it was a self-created danger to board a train that was so full that its doors were stopped from closing by the commuters. He also conceded that had it not been for those commuters who stood where the door was to run close, those doors would have been closed when the train moved. He reiterated his earlier testimony that this train stopped and loaded other commuters into the already jam-packed coach at Limindlela, Tembisa, Kaalfontein, Van Riebeeck and another station whose names elude him on its way to Kempton Park. When asked how more people could fit into an already fully packed and jammed coach he stated that in township *lingua franca* or *parlance* it is said that a train is never full. He stated further that at the railway stations he mentioned above not only did people embark. Others did disembark. However he could not explain why at all these other stations he was not flushed out when other passengers did disembark.

[30] He explained the pushing or jostling at Kempton Park as follows: The pushing was coming from the direction of the door he was facing all the time, which is the door he also used to get into this coach because other people were getting into the train. He could not explain how commuters could have been entering this coach as it entered Kempton Park Station as his story was

that the pushing and jostling started as the train was still in motion entering the platform at Kempton Park Station and that he was pushed out while the train was still in motion entering the station. What he further could not explain further is how it came about that he be pushed backwards, i.e. in the direction of the other coach door opposite the one he was facing, yet he proceeded to fall in the direction of where the counterforce or pushing was coming from. Asked again how it came about that in all that *milieu* he happened to be the only person to be ejected from the train, more so that he was standing 2½ meter deeper with a buffer of bodies between him and the door, his answer was that in fact he does not know what happened to him that ultimately led to him finding himself lying injured on the platform. The above in my view and finding negated his averments in the summons as well as his earlier evidence in this Court that he was pushed out of the coach. When specifically asked to explain the obvious contradictions and/or inconsistencies, he kept quiet. He could not state that he does not know how he came to be on the platform and in the same breath state that he saw himself being pushed.

[31] When asked how he landed onto the platform when he fell, he could only demonstrate that he was flying out like a bird with his arms or hands outstretched in front of him and his fingers wide apart, landing with or on his side of the chest on the pavement. He was asked on several occasions which part of the body touched the pavement first but he said he did not know. He ascribed his amnesia to the fact that he lost his senses or consciousness while in flight before landing on the pavement. He could also not explain why he would lose consciousness when he did not land on any part of his head or

neck. He also could not explain why he had no injuries whatsoever on his hands and palms or chest. All he could say was that at no stage did his head hit the pavement. He further conceded that the first two security officers they tried to call to them to help were not near the place where the incident happened and that the possibility existed that they may not have been aware that he had fallen out of the train. In fact he answered as follows when asked why the security officers would ignore their call for help:

"*We thought maybe they did not hear us …*"

[32] He could also not explain why his reason for the fall, viz, the over-crowding on this train was not part of his particulars of claim.

[33] Another interesting anomaly in the plaintiff's testimony was the fact that he was adamant that he wrote with his own hand the statutory affidavit as well as the explanatory memorandum therein contained explaining how the fall came about. The form was filled in impeccable English by someone who according to the handwriting and the terminology and tenses and adjectives used in it, pointed to someone who was relatively well versed or well learned. However, when the going started being tougher, he (plaintiff) made an about turn and stated that he only went to school up to Std 5, he cannot read and write any English and is restricted only to understanding little bit of simple English when it was spoken. The above in my view and finding re-enforced and corroborated the defendant's counsel's contention and submissions that the plaintiff was not telling the truth under oath, cannot be trusted and that all indications and probabilities pointed to the plaintiff having been injured

somewhere other than on the railway platform at Kempton Park Railway Station. Counsel for the defendant, as a parting shot, drew his attention to a patient report form completed by the paramedics that transported him from outside Kempton Park Railway Station to a medical facility, wherein it is stated that he (plaintiff) told them that the incident type that led to their call-out to help him was a domestic accident. He could not explain this anomaly too. This inscription is contained in Annexure "A31" to the paginated papers herein.

[34] It was really surprising why, in the face of all that which came out during cross-examination plaintiff's counsel did not re-examine him.

[35] For clarification purposes I put questions to him concerning his family or work relationship with Connie Dlamini. He replied to the effect that Connie was a friend and former colleague at his former workplace.

CONNIE DLAMINI (SECOND PLAINTIFF'S WITNESS)

[36] Her testimony was short and sweet. On this particular day, she was in a taxi on her way to work at Kempton Park when she received a call from the plaintiff's cellphone and an unknown voice told her to hold on. The plaintiff's voice came over on the phone and he told her that he had had an accident on the train at Kempton Park Railway Station. As she was at that stage about 5 minutes from the station she disembarked from her taxi at the Kempton Park Taxi Rank which is about 10 minutes walk from the train station and then

walked to where the plaintiff told her he was. She found him outside the railway station on a grassy patch in the company of the unknown young man. He (plaintiff) had even urinated on himself and had some blood on him. Upon her enquiry why they had not asked for help from the railway security people who were manning the station gate or entrance just a few meters from where they were, the plaintiff told him that they tried but were ignored. She approached two security officers nearby at that railway gate and asked then why they were not helping a man injured on their premises. They looked and sounded surprised at this, even asking her how he could have ended up where he was lying without them having seen him leave the railway premises or him reporting any problem to them at the gate. They explained to her that their regulations did not allow them to help anybody who was not on the railway premises.

[37] However, when she walked back to where the plaintiff was, the two security officers followed her. On their arrival they asked to see his (plaintiff's) train ticket and the plaintiff asked her to retrieve it from the school bag he had with him and give it to them. She did so. They checked it and advised them that unfortunately the plaintiff was lying outside their area of operation.

[38] She went to her workplace and reported the incident to her's and plaintiff's boss, Mr Dennies Wolmarans. The latter sent two of his male employees to the train station to investigate what had taken place and do the necessary. On their return they reported that an ambulance had already transported the plaintiff to Tembisa Hospital when they reached the station.

[39] After work she went to check on him at Tembisa Hospital and he was there for about a week before he was discharged.

[40] During her cross-examination she stated that she was employed at Porto(a) Motors as a car polisher. She did not know any Dennis Horman. She only knew Dennis Wolmarans. She also stated that to her knowledge, just like her, the plaintiff was also employed permanently at Porto(a) Motors. She got him the job he was performing there as a person hired to clean the workshop. She was surprised when told that plaintiff stated in court that he was a casual worker and worked for a Mr Horman.

[41] She noticed that the plaintiff had an injury on his one leg though she could not remember which one it was because he tried to stand up when she asked him to but he failed.

[42] According to her, the railway security check point was about 15 to 20 meters from where she found the plaintiff. That exit which the guards were manning was the only one on the side where the plaintiff was. The other entrance/exit which was accessed through a subway to and from the railway platform was on the other side of the railway station.

[43] She vehemently denied demanding a ticket from the plaintiff upon her arrival at the scene where the plaintiff was and taking it with her towards the security officers. She also denied telling the plaintiff upon her return that the security police were unwilling to help. She insisted that the security men

came back with her to where the plaintiff was lying and that it was them who demanded to see the plaintiff's train ticket.

[44] The plaintiff closed his case after this witness.

APPLICATION FOR ABSOLUTION AT CLOSE OF PLAINTIFF'S CASE

[45] At the end of the plaintiff's case counsel for the defendant made an application in terms of Rule 39(6) of the Uniform Rules of Court for absolution from the instance. The main grounds for this application were among others that the plaintiff has neither led evidence that substantiate the allegations contained in his pleadings nor is the evidence led by and on his behalf supportive of supported by the pleadings he filed or caused to be filed.

[46] After counsel for the defendant had outlined the basis of his application, counsel for the plaintiff responded thereto. The gist of the plaintiff's counsel's address was to the effect that the plaintiff, just like most passengers on the trains on this particular line did not want to be late for work and as such are justified in boarding any train destined for his direction of travel irrespective of whether it was full or not. Furthermore, he argued that this Court should find that the incident in question here did happen and as such absolution should be refused at this stage. I may mention at this stage that I had postponed the matter from the previous day when counsel for the defendant wanted to launch the application, to this day (of arguments) so as

to afford both counsel the opportunity to adequately prepare themselves for this application.

[47] Counsel for the defendant interspersed his argument and submissions with a myriad of decided cases in support of his point of view. On the other hand, counsel for the plaintiff did not quote a single decided case, save to make cursory remarks about one of those that were referred to by counsel for the defendant.

[48] By stating as such above I am not alluding or saying that the plaintiff's submission's lack of authorities would be to his disadvantage or the defendant's reliance on the many decisions would advantage it.

EVALUATION OF THE EVIDENCE

[49] It was the plaintiff's case that he entered or boarded the train at Leralla Station at 06h00, after having bought his train ticket before that. This aspect is not borne out by the real evidence that was produced by himself in substantiation of this aspect, namely, the train ticket itself. The ticket bandied about anD handed in as exhibit was purchased at 06h25, i.e. twenty five (25) minutes after he (plaintiff) had allegedly boarded the train.

[50] This piece of evidence should be juxtaposed with his insistency that he always boarded the 06h00 train between Leralla Station and Kempton Park Station and that this train on this particular day was such usual train.

[51] He further testified that when he entered the station platform on this morning of 5 August 2010, the train was already stationary thereat. This piece of evidence is contradictory to his further testimony under cross-examination that he saw the train enter the Leralla Station with its doors open. When pressed to explain the anomaly several times, he contradicted himself further by moving from admitting that he was right when he said he found the train at the platform and then in the next statement or answer stating that he saw it enter the train station. This happened more than once. At the end of the day this Court is not certain which version should be regarded as the plaintiff's on this material aspect.

[52] What was further of peculiar interest is when the plaintiff stated that irrespective of the fact that the train was ostensibly full, such that people stood in the foyer and passages or aisles, even blocking the doors from closing, he was still going to board it nevertheless, irrespective of potential danger to himself.

[53] The plaintiff's description of what actually happened prior to him allegedly falling out of the train was in my considered view, not only convoluted but also confusing and contrary to gravity laws and common practice or sense. He stated in chief that when the train entered Kempton Park Station platform people who were in front of him as he faced the door he used to enter it, some 2½ meters deeper, are the ones who were pushing at him as there was a jostling for positions, obviously of being first to alight.

[54] It is my considered view and finding that had the plaintiff been pushed from his front as he alleged, it would have been highly improbable for him to have fallen in that direction. The more probable thing would have been that he would have been pushed to the other train door that was directly behind him as evidence proved. To make matters worse, at this stage of cross-examination when the above aspects were elicited, plaintiff came up with a new explanation out of the blue to the effect that there was also pushing from his rear or back. He had no plausible explanation why he was only coming up with this piece of evidence at this stage.

[55] It is common cause or agreed between the parties that train doors when on a platform are usually level with the platform itself. If there is any variance or fault line, it is never more than a few centimeters. None of the parties disagreed when I asked them if this Court can take judicial notice of this fact.

[56] With the above in mind, the question the court asks itself is how it came about that the plaintiff only had a leg injury : His evidence is that he fell out of the train head or torso first with his arms outstretched in front of him and his fingers opened wide. Why he had no injuries on his torso, arms, head or hands could not be satisfactorily explained.

[57] Another aspect that begs explanation is the plaintiff's evidence as well as his witness Connie's observations that he was dazed and incoherent after

it all. His dizziness or incoherence does not, in my view, tally with the facts in this case that the plaintiff was not injured on his head or neck which may have precipitated the symptoms testified to above. Medical reports from Tembisa Hospital contemporaneous with this day and allegations also do not mention any injuries other than his knee and leg injury.

[58] What compounds the situation further is what is contained in the Patient Report Form marked Annexure "A40" herein filed by the paramedics who carried him from Kempton Park Railway Station (outside the station) to Tembisa Hospital. Under "*incident type*" they recorded "*Domestic accident*".

[59] It is trite that a claimant who is a witness and plaintiff also is expected to tender evidence that substantiates and is in line with his particulars of claim. The plaintiff's particulars of claim did not mention any head injury or the cause of his fall being overcrowding. What he pleaded in his particulars of claim is the alleged negligence of the train driver and train conductor. In paragraph 9 of the particulars of claim he mentioned injuries sustained in the fall as a fractured tibia plateau, multiple facial lacerations and multiple abrasions and lacerations. Except for the tibia (leg) injury, none of the other pleaded injuries were mentioned in his (plaintiff's) testimony. Neither were they mentioned by the paramedics and Tembisa Hospital records.

[60] Plaintiff also testified that he completed the PRASA accident report form annexed to the papers herein as Annexure "A26" in his own and personal handwriting. However, during cross-examination he contradicted this

aspect when he was categoric that he only went to school up to Std 5 and as such cannot read and write in English. He could not explain this contradiction. Nevertheless, he owned up that the contents of Annexure "A26" were obtained from him.

[61] This report or information form stated that as on 5 August 2010 he was unemployed. This contradicted his own evidence that on 5 August 2010 he was on his way back to work at the same employer where he was working on 4 August 2010. He stated at paragraph 1.10 of the PRASA Information Form that his employer was Dennis Horman and:

> "*This claimant* (plaintiff) *started working in January 2010 till the 04th of August 2010 ...*"

[62] The above explanations were and are, in my considered view, as mutually destructive as they are contradictory. When regard is had to the fact that the plaintiff testified that he was employed as a casual labourer there, which evidence was contradicted by his own witness's Connie's version that she knew him to have been a permanent employee where they worked for the same employer, the situation becomes more hazy.

[63] It is also common cause that this incident as testified to by the plaintiff does not appear in the records and daily reports of the Kempton Park Station, be it in the security reports or segment reports. The plaintiff stated that it does

not appear therein because the security officers on duty at the station ignored his endeavours to report it.

[64] The above aspects bring into sharp focus the testimony of Connie Dlamini. According to the plaintiff, when Connie came to or arrived where he was lying outside the Kempton Park Station, she immediately demanded his train ticket and went with it to where railway security officers were manning a station entrance/exit a few meters away. Connie's version is that she never took or asked for his ticket. Instead she went to the security officers to enquire from them why they were not helping a man injured by a fall from a train inside the station, whereupon the officers told her they were not aware of such an incident. Plaintiff further testified that Connie returned to tell them that the security officers were not prepared to or interested in helping him. On the other hand, Connie testified that after confronting the security officers and they responded to her as set out above, the two security officers followed her back to where the plaintiff was. She further stated that it was the security officers who demanded to see the plaintiff's train ticket there where he lay.

[65] The above again in my considered view and finding are material contradictions that go a long way towards discrediting the plaintiff as a witness and labelling his version of events as dubious.

[66] It is not clear why if the plaintiff was injured within the train station, he decided to go out of it without or before reporting it to the security office or station master's office inside the station. There is also evidence in this case

that there were security guards or railway employees at the station gate through which the plaintiff was carried to the outside. It is my considered view and finding that if this incident had occurred within the station precinct, at the least the plaintiff would and should have reported it at the gate or booms or the "*surprised*" security officers would have seen or noticed him being carried out injured.

[67] When invited to explain this anomaly the plaintiff responded by stating that maybe the two security officers on the platform did not hear them when they hailed at them for assistance.

[68] This explanation is in my view so flimsy and incredulous that it does not deserve further scrutiny. It was on its own, a contradiction of the plaintiff's own evidence-in-chief in the first place. Secondly, if the officers on the platform or those that he said were further ahead of where he fell did not see him fall or injured or ignored him, surely he should have reported at the exit gate. I regard his explanation as being implausible and/or a recent fabrication and consequently rejected it.

[69] The questions firmly before us are:

69.1 Was the plaintiff a passenger on this train? And

69.2 Was any negligence or *prima facie* proof thereof proven by the plaintiff against the defendant?

[70] It is my considered view and finding that the evidence tendered by and on behalf of the plaintiff leaves much to be desired.

[71] However, at the close of the plaintiff's case, when absolution from the instance is applied for the measure of proof required is not the same as when it is made at the end of the defendant's case when the court has the benefit of the totality of the evidence in the case.

[72] The next question this Court asks itself is whether or not inferences of negligence can be drawn from the evidence led this far which may require the defendant to place evidence before court in rebuttal. Even though the plaintiff does not call himself upon the existence of circumstantial evidence, justice will be seen to have been done if I look into this aspect.

[73] Care should be taken by courts when they attempt to draw inferences from the proven facts in a case, that the exercise should not amount to reliance on conjecture and speculation.

[74] Reference to conjecture and speculation is best demonstrated among others in the case of *Casswell v Powell Duffryn Associated Collieries Ltd* 1939 (3) All ER 722 at 733 as follows:

> "*Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish ... But if there are no positive approved facts from which the inference can be*

made, the method of inference fails and what is left is mere speculation or conjecture."

[75] It is trite that in civil cases at this stage of the proceedings when absolution is sought, a plaintiff seeking to invoke reliance on inferences should merely show that the inference he seeks to rely on and which he wants the court to make is the most readily apparent and acceptable from a number of possible inferences.

See: *AA Onderlinge Assuransie Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A) at 614H-615B.

[76] The above decision follows on an earlier one of *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 38H wherein the learned justice expressed the following view:

"*Hierdie skyn daarop te dui dat by 'n aansoek om absolusie aan die einde van 'n eiser se saak, daar nie 'n oorweging van verskillende moontlike afleidings sou geskied nie, maar slegs 'n bepaling of een van die redelike afleidings ten gunste van die eiser is.*"

[77] The test for absolution from the instance at the close of the plaintiff's case was for formulated in *Gascoyne v Paul and Hunter* 1917 TPD. It states that when absolution is sought at the close of the plaintiff's case, the test to be applied is whether or not there is evidence upon which a court applying its mind reasonably to such evidence, could or might find for the plaintiff.

[78] Sight should at all times not be lost that what is required is that only one reasonable inference is sufficient for a *prima facie* inference of negligence to be drawn. Circumstantial evidence depends ultimately upon facts which are proved by direct evidence. A word of caution : When we deal with circumstantial evidence we should always bear in mind that its use involves an additional source of potential error because the court is not immune from being mistaken in its reasoning.

[79] As stated in *Ocean Accident & Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A), the inference which the court seeks to or may draw may be a *non sequitur* or it may overlook the possibility of other inferences which are equally probable or at least reasonably possible. It may happen that the trier of fact is so pleased at having thought of a theory to explain the facts that he or she may tend to overlook inconsistent circumstances or assume the existence of facts which have not been proved and which thus cannot legitimately be inferred.

See: LH Hoffmann & D Zeffert's : *The South African Law of Evidence*, 4th Edition at 589.

[80] Viljoen JA aptly summed it up in *AA Onderlinge Assuransie v De Beer* (*supra*) as follows:

> *"Dit is na my mening/oordeel, nie nodig dat 'n eiser wat hom op omstandigheidsgetuienis in 'n siviele saak beroep, moet bewys dat die afleidings wat hy die hof vra om te maak die enigste redelike afleiding moet wees nie. Hy sal die bewyslas wat op hom rus kwyt indien hy die hof kan oortuig dat die afleiding wat hy voorstaan die mees voor-die-*

hand-liggende en aanvaarbare afleiding van 'n aantal moontlike afleidings."

[81] In *Govan v Skidmore* 1952 (1) SA 732 (N) at 734C-D, Selke J held among others that the selected inference must:

"*... by the balancing of probabilities be the more natural and plausible conclusion from among several conceivable ones ...*"

[82] In the *AA Onderlinge* and *Ocean Accident* cases (*supra*) Holmes JA remarked that the expressions or terms "*plausible*" in the context of an application such as this means "*acceptable*", "*credible*", "*suitable*". I concur with the learned justice's interpretation.

[83] In a Supreme Court of Appeal ("*SCA*") decision whose facts are almost similar to the facts in our matter at hand, namely, *South African Rail Commuter Corporation Ltd v Almmah Philisiwe Twala* 661/2010 [2011] ZASCA 170 (29 September 2011), Maya JA was also dealing with an appeal case where a passenger fell out of an overcrowded train after being pushed out during a jostling for vantage position to alight first. In this case also it was the claimant's case that the train was overcrowded and that the doors of the train remained open from the previous station up to the station where the incident occurred.

[84] The court *a quo* per Lamont J had held the Corporation liable for the negligence and that it was the cause of her injuries. He (Lamont J) found that it was improbable that the general throng of passengers of whom the claimant was one would exit a moving train. He concluded that the train was stationary when the respondent, pushed along by other passengers, disembarked and fell. The court ultimately found that by allowing the train to be overcrowded, the Corporation negligently failed to take reasonable steps to prevent harm which was foreseeable and that such negligent omission was the direct cause of the respondent's injuries giving rise to liability for her damages.

[85] The SCA held that the Corporation carries a positive obligation to implement reasonable measures to ensure the safety of rail commuters who travel on its trains. Such obligation, the court further held, must give rise to delictual liability where the risk of harm to commuters resulting from falling out of crowded trains running with open doors is eminently foreseeable.

See: *Rail Commuter Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 at paras [82] to [88].

[86] Importantly, as a pre-cursor towards overturning the court *a quo's* judgment that the Corporation was liable, Maya JA held among others that the sum total of the respondent's evidence was merely that the train was very full, even up to the door, as was also the evidence in our present case. The learned judge further found that the claimant neither pleaded nor established in evidence that the appellant had a duty to regulate the numbers of its rail

passengers nor what reasonable measures it ought to have implemented in that regard to ensure passenger safety that it omitted to take. She (claimant) led no evidence, for e.g., on the passenger capacity of the coach; if that number was exceeded, how many passengers remained in the coach when the train reached her station, etc. The court further held that one cannot assume simply from the fact that there were standing passengers that the coach carried an impermissible number as the Corporation's policy and applicable safety standards might well legitimately have allowed that practice.

[87] Acknowledging that the Corporation's policies and legal obligations in the conduct of its rail service as well the nature and extent of the relevant precautionary measures it must take to ensure rail commuter safety were peculiarly within its knowledge, the learned judge of appeal went on to find that:

> "*..., the fact remains that it* (corporation) *did not have to prove that it could not reasonably have prevented the respondent's fall. The record shows no indication that the* (claimant) *attempted to ascertain this kind of evidence by, for example, employing the mechanisms provided by the rules of court such as seeking discovery, requesting particulars for trial, etc. The nature of the* (claimant's) *onus was such as to oblige her to adduce evidence that gave rise to an inference of negligence. Only then would the* (corporation) *have had to rebut that inference by adducing evidence relating to the measure it took to avert harm. But the onus of proving that such measures were inadequate and unreasonable in the circumstances would nevertheless remain on the* (claimant)."

[88] It is my considered view and finding that the plaintiff in our case has not moved beyond or past the threshold laid down in the abovementioned SCA

decision. The plaintiff bore the *onus* but he did not acquit himself well of that *onus*.

[89] The test by which delictual liability is determined is trite. It involves, depending upon the particular circumstances of each case, the questions whether

(a) a reasonable person in the defendant's position would foresee the reasonable possibility of its conduct causing harm resulting in patrimonial loss to another;

(b) would take reasonable steps to avert the risk of such harm; and

(c) the defendant failed to take such steps.

See: *Mkhatshwa v Minister of Defence* 2000 (1) SA 1104 (SCA) at paras [19] to [22].
Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd 2000 (1) SA 827 (SCA) at para [22].

[90] However, not every act or omission which causes harm is actionable. For liability for patrimonial loss to arise, the negligent act or omission must have been wrongful.

See: *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* 2006 (1) SA 461 (SCA) at para [12].

Charter Hi (Pty) Ltd v Minister of Transport [2011] ZASCA 89.

Shabalala v Metrorail 2008 (3) SA 142 (SCA) at para [7].

[91] The *onus* to prove negligence rests squarely on the plaintiff and it requires more than merely proving that harm to others was reasonably foreseeable and that a reasonable person would probably have taken measures to avert the risk of such harm. The plaintiff is enjoined to adduce evidence as to the reasonable measures which could have been taken to prevent or minimise the risk of harm.

See: *Shabalala* (*supra*).

[92] Unfortunately in this case, the plaintiff did not come near to doing so. His counsel argued that this Court should acknowledge that the plaintiff is a lay-man when it comes to matters of the law and as such his omissions should be condoned. It is my finding that the above submission does not take into account the fact that the plaintiff was duly assisted and advised by qualified attorneys and counsel.

[93] The legal issues decided in *Lukhuni Nomfusi Prudence v Passenger Rail Agency of South Africa*, a yet unreported case of Mayat J in the South Gauteng High Court on 8 February 2012 are in my view similar to those found

in our case. The particulars of claim are worded almost verbatim word for word except for the names of the claimant and the dates of the incident.

[94] At para [49] thereof, the learned judge held among others that it was improbable in the circumstances that certain commuters, ..., kept the doors of the train open ... Moreover, even if it is hypothetically accepted that there were certain commuters (without valid tickets) on the train, who jumped from the train whilst it was still in motion (which is improbable given the inherent danger of such conduct), there was no evidence to establish how such averred conduct on the part of these commuters was linked to any delictual liability on the part of the defendant. Thus, the court held further, notwithstanding the further suggestion by the plaintiff that there were no security officers on or in the train, or on the platform, there was simply no evidence to demonstrate that the defendant was lawfully liable for the conduct of those commuters allegedly responsible for keeping the doors of the train open ...

[95] At para [50] thereof the learned judge proceeds to further hold that:

> "*Moreover, notwithstanding the allegations relating to the absence of security officers on the train, there was no specific evidence relating to the reasonable steps the defendant could and/or should have taken to prevent harm to the plaintiff.*"

[96] Similar sentiments were propounded by Makume J in *Mngoma Sizwe Celasibonge v Passenger Rail Agency of South Africa*, an unreported case

under Case Number 21387/10 delivered on 9 November 2011 handed down in the South Gauteng High Court

CONCLUSION

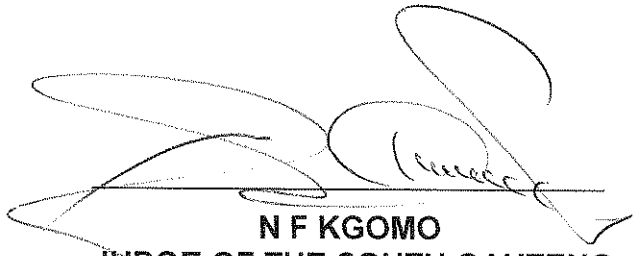
[97] From the totality of the plaintiff's evidence led this far in this case, it is my considered view and finding that the probabilities favour the view and submission that he was not on the train he professess to have fallen from on the early morning of 5 August 2010. He does not know or is not certain whether or not the train in question entered Kempton Park Railway or Leralla Stations with its doors open or not. His description of his alleged fall is so improbable that it can be dismissed as a figment of his own imagination, however fertile it could or may have been. The injuries he testified about are different from the injuries described in the medical reports relevant to this issue. The results or consequences of his alleged fall are irreconcilable with the *sequelae* reasonably expected from circumstances similar to those he testified about. In short, his version as a plaintiff falls far short of satisfying the standard of proof required at this stage of the proceedings.

[98] Even in the unlikely situation of this Court accepting that events unfolded in the manner he described to the court, he still falls short of satisfying the test for delictual liability on the part of the defendant.

[99] This, in my view and finding, is an example of a typical case where absolution from the instance should be granted at the close of the plaintiff's case.

ORDER

[100] Absolution from the instance is granted with costs against the plaintiff as applied for by the defendant.



N F KGOMO
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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DATE OF HEARING	27 FEBRUARY 2012
DATE OF JUDGMENT	8 MARCH 2012