REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 13/15939

Delete whichever is not applicable

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

21 November 2014 .....

In the matter between:

LIMAKATSO MAMOTSEKANE SUSANNAH MPSHE **PLAINTIFF**

PASSENGER RAIL AGENCY OF SA (PRASA) **DEFENDANT**

JUDGMENT

ANDREWS, AJ

1. The Plaintiff in this matter, a fare paying train passenger, instituted action for payment of the sum of R2,901,000 in damages arising out of an incident where she was allegedly pushed out of a train owned and/or managed and under the control of the Defendant, and sustained injuries. The trial was confined to the issue of liability of the Defendant after the issues of liability and quantum were separated in terms of rule 33(4) at a previous hearing, and the issue of quantum postponed *sine die.*

2. The Plaintiff's particulars of claim state that on 22nd November 2012, she boarded one of the Defendant's trains at Stretford Station *en route* to Johannesburg station. The pleadings set out the details of her claim extensively and I shall endeavour to summarise them as follows.

3. The Defendant owned and/or managed and was in control of the train as well as the infrastructure, stations, land and property supporting the operation of the train ("associated infrastructure.") It was obliged to operate the train in a safe and secure manner, and to keep the associated infrastructure in a safe and proper condition, pursuant to a written agreement concluded by the Defendant on 28th August 2000, the further terms of which are unknown to the Plaintiff.

4. As a result of these facts the Defendant owed the Plaintiff a duty of care to ensure that: the condition of the train and/or associated infrastructure did not pose a danger to the Plaintiff; and/or adequate steps were taken to prevent it from constituting such a danger; and/or it was maintained in a safe and proper condition. The duty also included the taking of reasonable precautions to ensure that the train did not become overcrowded, the doors remained shut, adequate crowd control was maintained, alternative means existed for the passengers to alight from the train as it had not stopped at a station, that the Plaintiff did not become dislodged from the coach and the incident did not occur.

5. The Plaintiff, in amended particulars of claim, stated that the train came to a stop between Mlamlankunzi Station and New Canada Station. Where the train stopped, the open coach doors and the many passengers caused her to fall from the coach onto the train tracks or area immediately adjacent to the train tracks at

a point between Mlamlankunzi Station and New Canada Station (hereafter referred to as 'the incident').

6. As a result of the incident, Plaintiff sustained bodily injuries including a left tibia fracture, and had to be hospitalised; she was disabled and disfigured and suffered pain and loss of amenities of life which has given rise to this claim.

7. It was pleaded that the incident was caused solely by the negligence of the driver of the train, alternatively the conductor/guard through their failure to avoid the incident, when by the exercise of reasonable care they could and should have done so. As regards the driver it was pleaded that inter alia he failed to stop at a station so commuters could safely disembark from the train, he allowed commuters to alight from the train in a dangerous manner and failed to activate the stair mechanism so that commuters could alight safely. He failed to pay due regard to train commuters in general and to the Plaintiff in particular.

8. Alternatively it was pleaded that incident was caused solely by the negligence of the Defendant and/or its employees acting in the course and scope of their employment in that they failed to prevent the incident from occurring when, by the exercise of reasonable care, they could have done so. Further that they caused and/or allowed the condition of the train and associated infrastructure to pose a danger to commuters in general and to the Plaintiff in particular, and/or failed to take any or adequate steps to prevent the train and/or associated infrastructure from constituting such a danger, and failed to maintain the train and/or the coach and/or associated infrastructure in a safe and proper condition and/or fail to take any or any reasonable precautions to ensure the safety of commuters in general and the Plaintiff in particular, more particularly by failing to:

   a. maintain adequate crowd control in and around the station, train and coach;
   b. ensure that the train, station and coach did not become overcrowded;
   c. ensure that the doors of the coach remained closed while the train was stationary between two stations;
   d. provide alternative means to alight from the train as the train had not stopped at the platform; and ensure that commuters in general and the Plaintiff in particular did not become dislodged from the coach;

9. In breach of the duty of care Defendant's employees caused, or failed to prevent the train and associated infrastructure from posing a danger to the Plaintiff and

failed to prevent the incident from occurring. As a consequence of the Defendant's negligence as aforesaid, alternatively the breach of its duty of care, the Plaintiff suffered damages in the sum of R2 901 000 for which the Plaintiff holds the Defendant liable. The action is therefore based on acts allegedly committed or omitted by the Defendant which are causally linked to the harm suffered by the Plaintiff

10. The Defendant placed most of the Plaintiff's averments in dispute and put the Plaintiff to the proof thereof. It pleaded that the Plaintiff had failed to avoid injury where by reasonable care and skill she could and should have done so; she attempted to disembark from the train at an unauthorised place, and she failed to disembark from the train at the platform of the station. It posed the question as to whether a proprietor should be held liable for the misadventures of its patrons.

11. The Plaintiff testified, and the evidence of Mr Luvuyo Tofile was also led. The Defendant led the evidence of Mr Charles Stevens, Mr Nkosana Mzwakali, Mr Thomson Mudau and Ms Virginia Matona. The witnesses will be referred to hereafter by their surnames.

Background facts

12. It is common cause that the Plaintiff travelled on train 9055 from Stretford station bound in the direction of Johannesburg on 22nd November 2012. She embarked at around 15H00 and was due to arrive in Mlamlankunzi approximately an hour later. After arriving at Mlamlankunzi station it departed again and then came to a standstill after leaving this station. Then passengers pulled the doors open and disembarked by jumping onto the ground next to the train. There are no ladder staircases situated on any of the passenger coaches, only on the motor coaches. The Plaintiff also exited the train and sustained injuries to her knees including a fractured left tibia. The manner in which she disembarked from the train was disputed. She was assisted to get to Mlamlankunzi station where she was assisted further by two security guards. Her details and a statement was taken from her in a guard room. Some time after 20H00 she was taken to Baragwanath Hospital. The train was driven by Stevens and was staffed by a train guard named Mzwakali, who remained in the train in the rear coach, while Stevens and other technicians attended to faults that had arisen. The train was eventually able to depart on its journey between 30 and 40 minutes after it had stopped.

Whether the Plaintiff jumped, or was pushed from the train.

13. The following is a summary of the Plaintiff's evidence. The train stopped just past Mlamlankunzi station after 16H00 and part of it was still next to the platform of the station. After about five to ten minutes the passengers pushed the doors open and jumped onto the ground. At the time the Plaintiff was standing and holding onto a steel bar about 1.2 meters from the train coach door. At this point the passengers were pushing one another and she tried to hold on, but was weak and could not do so because of the pushing. She was pushed out of the passage where she was standing and out of the train door. She fell face forward, and was injured in the fall and could not walk as a result. Two women who are unknown to her came to her aid. One stayed with her and the other went to get assistance, bringing back two males whom she was told were security guards. They carried her to the Mlamlankunzi station and then interviewed her. At the station she was in pain, dizzy and confused. She did not recall being interviewed by Ms Matona, a security guard. She stated that she might have spoken to her but she was in such pain that she might not have taken note of her. About four hours after the fall she was taken by ambulance to Baragwanath Hospital.

14. The Defendant's witness, Mudau, who was one of the security guards who assisted the Plaintiff that night was not a witness to the incident and did not provide any clarity as to how the Plaintiff was injured. A sworn statement by him indicated that he arrived at 18H00 which is few hours after the incident. It does not mention how the Plaintiff was hurt, and merely states that he was aware that commuters had jumped off a stationary train nearby. However he testified that the Plaintiff had informed him that she had both jumped, and been pushed off the train, which takes the matter no further. The fact that he did not indicate this information in his sworn statement raises doubt as to the veracity of his evidence in court. His explanation as to why this highly relevant information was absent from the statement was wanting. He explained that he did not think it was necessary to include that information in the statement. He was trying to help the Plaintiff and hence omitted these facts.

15. Under cross examination he conceded that he signed the sworn statement after the Plaintiff had already filed her law suit, and about six months after the event. Counsel for the Plaintiff argued that the use of the word "Plaintiff" throughout the

document to denote the Plaintiff suggests that it was drafted by someone other than Mudau. When asked if he had any evidence to refute her claim that she was pushed off the train he replied that he was not there and did not know that.

16. Ms Matona an employee of PRASA Rail Protection Service, was not a very credible witness. She testified that she attended the scene on the 22nd November 2012 around 19H00, interviewed the Plaintiff and completed a report known as the Defendant's "railway occurrence liability report" which she read back to the Plaintiff who confirmed that it was correct. However the report had the appearance of having been drawn up *ex post facto* ie after the Plaintiff had already been taken to hospital, an event which according to her evidence took place at round 20H00. The detailed description of the incident, including the fact that the Plaintiff had been taken to hospital, was written in the past tense and the document was signed at New Canada station at 22H05, about two hours after the Plaintiff had been taken by ambulance from Mlamlankunzi station to Baragwanath Hospital. It did not bear the Plaintiff's signature. It stated in two places that the Plaintiff was given medical treatment and then taken to Baragwanath Hospital.

17. This anomaly was explained by Ms Matona as follows. Notwithstanding the fact that Plaintiff had not yet been taken to hospital this information was inserted by her on the form, and read to the Plaintiff. New Canada station was indicated as the place where the statement was taken and incident was reported because it was customary to write the section, not the station where it took place, on the report and Mlamlankunzi falls under the New Canada section.

18. Under cross examination she confirmed that she was still at Mlamlamkunzi at 22h00, which is the time indicated next to the words "Place: New Canada" at the end of the form (it states the time as 22H05). However the report also indicated in two different sections (sections 2 and 3) that she had left Mlamlankunzi Station at 20H30. She could not confirm that this entry on the report was incorrect.

19. Apart from these discrepancies Ms Matona's description of the interview, in the report itself seems tentative as to the version that the Plaintiff jumped off the train. She recorded in one place on the report that "she fell from a train that was stationed near New Canada. She was jumping off, it's when she sustained a broken knee." It seems improbable that Ms Matona would have spent three hours at Mlamlankunzi station attending to a matter of this nature which involved filling

in a form with very little information about the Plaintiff on it. As a result of the inconsistencies and discrepancies I do not regard the evidence of Ms Matona's as to her interview with the Plaintiff as credible.

20. The Plaintiff's evidence was challenged extensively in cross examination on a number of bases. It was put to her that her version differed from that of the Defendant's witnesses in the following respects: whether the security guards assisted her to get from the train to the platform, the position of the stationary train relative to Mlamlankunzi station, and the presence of Ms Matona, who allegedly took a statement from her. It was also put to her that her evidence that she was dizzy and confused was not credible as she had not suffered a head injury and these claims cast doubt over her version. She withstood detailed and repetitive cross examination, and was in general a credible witness.

21. She stated that she might have thought both guards were male as they were wearing trousers. She stated that her details were taken, and then a statement was taken by two security guards who assisted her, but it was not read back to her.

22. Mudau's evidence regarding the taking down of a statement at the guard room sheds some light on his and Ms Matona's respective roles in the interview. He stated that he called Ms Matona (the "client") and the ambulance after the Plaintiff had been brought to the guard room. When she arrived Ms Matona took down the Plaintiff's details. He took a statement from the Plaintiff which he re wrote much later as his sworn statement herein, at the request of investigators. During the interview the Plaintiff explained to him in some detail how the incident occurred and how she sustained her injury. He wrote it while she was in pain and crying. After the ambulance had left he completed the statement; he and Matona did not stop writing. His first statement was handed to his supervisors.

23. He testified that the Plaintiff had waited in the guard room until the arrival of the ambulance. She was very emotional, crying in pain, as she had sustained an injury to her knee. She had been assisted by two male commuters initially, which is consistent with her claim that she was assisted by two men, although they were not initially security guards as she alleged. Mudau's evidence indicated that Ms Matona only took down the Plaintiff's name and address. When she did so he wrote it down.

24. This suggests that Ms Matona may have played a more peripheral role at the interview than Mudau, and that she also did administrative work after the ambulance had left. This is confirmed by the time (22H05) registered at the end of the liability form that she completed, and the fact that Mudau stated that they continued writing after the Plaintiff had left. There is a also a note in the incident report at 20H57 which suggests that at least some of Ms Matona's administrative duties were completed by her much later in the day. The liability form does not have very detailed information about the Plaintiff and certain details could have been completed later by Ms Matona as appears to have been the case from the time entered at the end of it.

25. The Plaintiff's evidence differed from that of the Defendant's two witnesses, Stevens and Mzwakali as regards the position of the train, but they somewhat unsure of its exact position as well, placing it about 100 meters away from the platform.

26. Plaintiff's version was that she was confused and in pain and did not take note of Ms Matona is not implausible in the circumstances. Given that she had to wait for approximately four hours in severe pain after sustaining a left tibia fracture, and (according to her evidence) without any food or water being offered to her, and in a guard room on a station, before being taken to hospital, it is not surprising that she might have omitted taken note of some of the details of the event, such as the distance between the train and the platform, and the gender and identity of one of the security guards who took her name and address. Similarly the drawing of a negative inference because she did not inform them of the state of crowding in the train should be approached with caution, and is not justifiable. I consider that the above discrepancies were not sufficiently material to incline me to doubt that the Plaintiff was a truthful witness.

27. The Plaintiff was of slight build and she looked somewhat older than her biological age of 57 years. She was described by the witness Mudau at the time of the incident as an "old lady" and described herself as elderly. Ms Matona referred to her as elderly. She stated that an old person of her age would not likely disembark from a train by jumping off it. The Defendant's witnesses estimated the distance between the train door and the ground to have been a distance of between 1.5 and 1.7 meters, onto unstable sloping gravel ballast. Jumping off a train onto this terrain was likely to have been risky conduct for an

older or frail person. She testified that her intention had been to wait until the train was mobile again. I find it implausible that a person of her age would have jumped off a train considering the height of the train floor from the ground and the unstable and rugged terrain of the sloping gravel ballast below.

28. The Plaintiff pleaded that the train was overcrowded when the incident occurred, and defined this in her evidence as a state where passengers were sitting, standing, holding onto strips and poles and there were "even more people beyond the capacity of the coach." From Vereeniging station it was already full and kept on taking more passengers. She was not able to state what the capacity of the passenger train coach is, with reference to permissible numbers of passengers. Under cross examination she referred to the train as both full and overcrowded, and also referred to the fact that passengers were getting off and on.

29. She did not indicate that there were persons hanging out of the open doors of the train, but her evidence indicated that the train was exceedingly full. It was so crowded that she could not even move a short distance within the train and that the passengers were pressed so closely together that they could feel each other's every movement. This she depicted by pressing the palms of her open hands together. Her description of the state of crowding in the respondent's afternoon trains was also generally confirmed by the evidence of her witness, Tofile, who testified that he had regularly caught a train at the same time as the 9055 over the last two years, although he could not testify as to conditions on train 9055 when the incident occurred

30. Stevens did not expect a train running outside of peak hours to be overcrowded, by which he meant persons were hanging on to the outside of the train or on the cowcatcher, but stated that it could have become so as it was running late and it was obviously a possibility that it could have picked up passengers waiting for other trains. He had nothing to gainsay the Plaintiff's evidence as to how crowded it was, as he did not go to her coach. He in fact never saw the Plaintiff.

31. Stevens and Mzwakali confirmed that open doors on a train pose a danger to passengers whether the train is mobile or stationary. Stevens stated that in a very full train, passengers near the door could be pushed out of the train if others chose to disembark by exiting a stationary train between stations. Mzwakali stated that this may be possible and probable.

32. I have no reason to doubt the Plaintiff's description of how crowded the train was and am satisfied that that it was sufficiently crowded that if it stopped between stations and a throng of people disembarked by jumping out, others standing near the doors could be pushed out involuntarily.

33. Stevens and Mzwakali, described events such as the incident as occurring regularly when trains break down, which is also not an uncommon occurrence. Stevens in particular described how passengers are inclined to leave a stationary train first in "drips and drabs" and then in larger numbers. Mzwakali saw persons that day walking along the track after the train had broken down who could have numbered between ten and fifty persons, and whom he assumed had climbed off the train.

34. Having had regard to all the evidence I consider it very probable that a surge of persons trying to get off the train, which was crowded to the extent described by the Plaintiff, could have, and did push her along with it and out of the train door after it stopped after Mlamlankunzi station on the 22nd November 2012. Her version of the events that lead to her injury is accepted as credible.

Evidence of the driver and train guard regarding the incident.

35. Stevens, whom I found to be a candid and credible witness, testified that he had been employed for eight years as a train driver by the Defendant. He was responsible for the safety of passengers when the train was moving between stations. On the 22nd November 2012 he drove train 9055 from Braamfontein to Vereeniging and then set off back again. On the way back from Vereeniging the train was not operating normally, and was running behind schedule. It twice broke down and then completely failed just after Mlamlankunzi station, which is eighteen stations from Vereeniging. When it first broke down he reset the fault on the motor coach and drove the train further, but then it broke down again and had to be reset on a second motor coach. Then the train arrived at Mlamlankunzi station. There is a gradient after this station and if the train is having problems the gradient could affect it. Under cross examination he stated that it was reasonable to foresee problems with the uphill gradient with this train.

36. As it happens the train proceeded with difficulty after Mlamlankunzi station and came to a standstill about a train's length from it, which is where the incident occurred. Stevens could not rectify the engine problem. He called the train

control office to ensure that other trains were informed that the train had stopped, to prevent a collision. He then called for a technician to be dispatched to reset the train. He stepped out of the train and walked along the tracks to check the problem. The train had three motor coaches which he checked. After the section manager had been dispatched to assist him, they were able to get the train moving normally again after a period of 30 to 40 minutes.

37. When resetting the train Stevens was required to remove the "control key" which de-energised the train, causing the air pressure that keeps the doors closed to cease functioning. As a result the doors could easily be opened. The distance of the train floor from the ballast which is the gravel of the tracks is about 1.6 to 1.7 meters. It was not at all safe to jump off a train. Train breakdowns are a frequent occurrence, and he explained what would normally take place as follows. He would initially communicate with the passengers as they would ask him what was wrong with the train but after a while they would become agitated. Some passengers would remain calm and others would start speaking to him in vulgar language, directing their anger at him and trying to get off the train. He would not engage with them to stay on the train because in his experience this had absolutely no effect, and communicating with them would hamper his attempts to get the train restarted.

38. Most of the passengers would disembark by climbing off the train and walking to other destinations along the train tracks. On the 22nd November it was foreseeable that the passengers would disembark by pulling the doors of the train open, after it had been stationary for any length of time. His duties were to focus on getting the train back in working order and he did not consider communicating with passengers to be one of his duties. In his experience the impact that time spent on a stationary train had on passengers was to create discomfort for them.

39. The passengers in this case opened the doors and the majority exited the train. He stated that open doors even on a stationary train present a danger to passengers, because it was "quite a drop" from train to the ground below. If the coach was really full and some passengers wanted to exit and a throng was moving to the doors it could cause a danger to passengers standing near the doors. This was reasonable to expect. People exiting a train which was stationary between platforms presented a danger to themselves and others. However he did not regard this danger to be on a par with a fire, or other

emergency incident, in that it was not out of the ordinary. In an emergency he would have conducted himself differently. In that case he would have made passengers aware of what was going on, and how it poses a danger to them and to train personnel. When questioned by the court as to what the difference was between this situation and an emergency in the context of the dangers posed to passengers he was unable to explain the difference.

40. The responsibility of the guard, Mzwakali, was to ensure the safety of the passengers embarking and disembarking from the trains at the stations. *En route* Stevens was the one who was responsible for getting the passengers to safety. Stevens notified the station nearby when the train came to a standstill but did not ask for additional guards, even though it was foreseeable that passengers would leave the train in a dangerous fashion, after they had opened the train doors. There was nothing he could do to stop them exiting the train.

41. During re-examination he stated that he would have expected the passengers not to conduct themselves recklessly, but to have conducted themselves with due regard for their own safety.

42. Mzwakali, the train guard, who was often an evasive witness and far less candid than Stevens, nevertheless confirmed much of what Stevens had said as to the foreseeability of events that took place on train 9055 that day. This included the likelihood that passengers would disembark if the train stopped between platforms and the fact that the train was full. His evidence was that the train experienced several problems that day. The power was not reflecting well and it was not working well, which had a negative impact. It was not running on schedule or as smoothly and efficiently as it would normally do.

43. He speculated that the train might have become less full as it was running behind schedule, and some passengers may have been inclined to get off and board other trains. This contrasts with the view of Stevens that it could have become overcrowded, under the same circumstances. Neither of them inspected the train when it left Mlamlankunzi station. Stevens stated that he had no facts to refute the plaintiff's version that it was overcrowded, and Mzwakali was evasive when the same question was posed to him. What is important is that in the mind of Stevens, who took the decision to continue driving, it was foreseeable that the train was overcrowded, or at least had become very full by this stage, because it was running behind schedule.

Liability of the Defendant

44. The Plaintiff's claim is founded in delict. The direct cause of the damages she suffered was being pushed off the train by unknown third parties. However, she wishes to hold the Defendant liable because of the alleged wrongful acts or omissions of its employees when they were acting in the course and scope of their employment. In order to succeed, the applicant would have to establish that:

a. the Defendant's employees owed a legal duty to the applicant to protect her;
b. they acted in breach of such a duty and did so negligently;
c. there was a causal connection between such negligent breach of the duty and the damage suffered by the applicant. (*Carmichele v Minister of Safety and Security*2001(4) SA 938 (CC) at [25];

The legal duty to protect the Plaintiff

45. Counsel for the Plaintiff argued that the Defendant owed the Plaintiff, a fare paying passenger, a duty of care. The duty is owed to persons to whom harm is foreseeable. Referring to the judgment of the *Constitutional Court in Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) at 411, it was argued that Defendant is under a constitutional duty to provide transport that is safe and secure for commuters.[1] The judgment in this matter had held that the Defendant has an obligation to ensure that reasonable measures are taken to provide for the security of rail commuters whilst they are making use of rail transport services provided for and ensured by, respectively, the first and second respondents (the first respondent being the predecessor to the Defendant in the present matter). Counsel for the Plaintiff argued that although the harm to her was foreseeable the Defendant had done absolutely nothing to prevent the acts which led to her injury and hence it was liable to compensate her for the injuries suffered.

[1]The order in this matter stated as follows: "It is declared that the first and second respondents have an obligation to ensure that reasonable measures are taken to provide for the security of rail commuters whilst they are making use of rail transport services provided and ensured by, respectively, the first and second respondents."

Negligence

46. The following summary of the applicable legal principles was set out by van Heerden, AJA in *Minister of Safety and Security and another v Rudman and another*
[2004] 3 All SA 667 (SCA) at paragraph 65:

> "The classic test for establishing the existence or otherwise of negligence, quoted with approval in numerous decisions of this Court, is that formulated by Holmes JA in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-G.
>
> "For the purposes of liability culpa arises if –
>
> (a) a *diligens paterfamilias* in the position of the Defendant –
>
> (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
>
> (ii) would take reasonable steps to guard against such occurrence; and
>
> (b) the Defendant failed to take such steps.
>
> Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down.
>
> As was emphasised by this Court in *Sea Harvest Corporation (Pty) Ltd and another v Duncan Dock Cold Storage (Pty) Limited and Another*: 2000 (1) SA 827 (SCA) paragraph 21-22 at 839G-840 in the following terms:
>
> '[21] ..it should not be overlooked that in the ultimate analysis the true criterion for determining negligence is whether in the particular circumstances the conduct complained of falls short of the standard of the reasonable person. Dividing the inquiry into

various stages, however useful, is no more than an aid or guideline for resolving this issue.

[22] It is probably so that there can be no universally applicable formula which will prove to be appropriate in every case . . .'

' . . . it has been recognised that, while the precise or exact manner in which the harm occurs need not be foreseeable, the general manner of its occurrence must indeed be reasonably foreseeable.'"

Foreseeability and the breach of the duty of care.

47. The incident leading to Plaintiff's injuries was defined in her particulars of claim as follows: "The area where the train stopped, the open coach doors and the many passengers caused the Plaintiff to fall from the coach onto the train tracks or area immediately adjacent to the train tracks at a point between these two stations." It was pleaded *inter alia* that Defendant owed the Plaintiff a duty of care to ensure that the condition of the train and/or associated infrastructure did not pose a danger to the Plaintiff; and that the incident did not occur.

48. In this case as the evidence has shown that harm to commuters standing near the doors of train coaches on a very full train was foreseeable if it broke down between stations. The train was very full and by the time it the train left Mlamlankunzi station Stevens was aware of the fact that it was full and could foresee that it could by then have become very full or even overcrowded, because it was running behind schedule.

49. Stevens was aware of the fact that passengers would experience discomfort and become frustrated when the train stopped between stations. He could foresee passengers getting hurt if a throng tried to exit from a very full train. Mudau stated that people fell off trains belonging to the Respondent, on four out of five days.

50. After it broke down, and the control key was removed which was required in order to reset the train, and the doors could easily be opened by passengers. Once the train had stopped between stations for any length of time nothing Stevens or Mzwakali could do would stop passengers from pulling open the doors and

exiting the train, which they did on the day in question. It was not only foreseeable but inevitable that passengers would attempt to disembark within a relatively short time after the train had come to a standstill between stations.

51. Stevens stated that open doors on a train, stationary or moving represented a danger to passengers, and passengers exiting between platforms presented a danger to themselves and others, although it was nothing out of the ordinary. It was the norm. He considered getting off the train in that way hazardous by virtue of the drop of between 1.6 to 1.7 meters to the gravel ballast below, and the danger of walking along the ballast where there were oncoming trains.

52. Stevens, acting in the course and scope of his employment as a train driver of 9055 foresaw that after the train had broken down twice and was facing an incline after Mlamlankunzi station it might face further problems, and by this I understand that there was a foreseeable risk that it would break down again. The Defendant's trains according to both Stevens and Mzwakali, regularly break down. When probed by the court Stevens could not distinguish the danger posed to passengers by mass disembarkation between stations under these circumstances, from an emergency. However he did not remain at Mlamlankunzi station to effect, or arrange to be effected, repairs to the train to prevent this eventuality, and to allow passengers to safely disembark should they have chosen to do so. He simply carried on driving. Mlamlankunzi is not a station as such, but a halt. However Stevens' evidence was that it has a platform, and presumably passengers could safely disembark there.

Reasonable measures.

53. The essence of Plaintiff's case is that the incident was caused by employees of the Defendant, acting within the course and scope of their employment, who either caused the train to pose a danger to commuters or had failed to take reasonable steps to prevent the incident. *Inter alia*, they failed to operate the train in a safe and proper condition, and/or to prevent the train from constituting a danger, and to ensure the safety of commuters in general, when by the exercise of reasonable care they could and should have done so. These acts were causally linked to the Plaintiff's injury.

54. A reasonable person in the position Stevens found himself, facing an incline and foreseeing a further train breakdown, where the norm was for passengers to

disembark from the train and possibly injure themselves, especially when the train was very full, would have used common sense. He would not have departed from Mlamlankunzi station before the condition of the train was such that he was confident that it was safe to do so. Stevens was the person responsible for the safety of the passengers while driving the train between stations, and he confirmed this fact in his evidence. He had an intimate knowledge of the train and the route. He was able to call for assistance from a position in the vicinity of Mlamlankunzi station. It is therefore reasonable to infer that he could have called for assistance on arrival at that station, when he knew that the train now faced an incline. The facts speak for themselves. By the exercise of reasonable care he could have prevented the incident.

55. Stevens thus acted negligently. He departed from Mlamlankunzi station when it was not safe to do so. In so doing he set in motion a chain of events which ended in the Plaintiff being pushed off the train

Legal causation and liability for the delicts of third parties.

56. But for the actions of the Defendant's employees acting within the course and scope of their employment, the Plaintiff would not have been injured. Her injuries are therefore factually causally linked to the Defendant's employees' actions. The second inquiry is whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue, or whether the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part, referred to sometimes as "legal causation." (See: *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) 700; *LAWSA Volume, 8 Delict,* paragraph 132).

57. According to Corbett CJ, in *Standard Chartered Bank of Canada versus Nedperm Bank Limited* 1994 (4) SA 747 (A) at 765 A-B, the test for legal causation is:

> "a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a *novus actus interveniens*, legal policy, reasonability, fairness and justice all play their part."

58. The question arises whether the harm caused to Plaintiff is too remote to impute to the Defendant. On this issue Corbett CJ, in *OK Bazaars 1929 Ltd versus*

Standard Bank of South Africa Ltd 2003 (3) 688 (SCA) referred with approval to the following summary by Fleming in the *Law of Torts*, 7th edition, at 173:

> "The problem involves the question whether, or as to what extent, the Defendant should have to answer for the consequences which his conduct had actually helped to produce. As a matter of practical politics, some limitation must be placed upon legal responsibility, because the consequences of an act theoretically stretch into infinity. There must be a reasonable connection between the harm threatened and the harm done. This inquiry, unlike the first, presents a much larger area of choice in which legal policy and accepted value judgments must be the final arbiter of what balance to strike between the claim to full reparation for the loss suffered by innocent victim of another's culpable conduct and excessive burden that would be imposed on human activity if a wrongdoer were held to on so for all the consequences of these default."

59. The Plaintiff pleaded that her injuries were caused solely by the negligence of the Defendant and/or its employees acting within the course and scope of their employment. From the evidence it is clear that the direct cause of the Plaintiff's injuries was the conduct of third party passengers who pushed her off the train. During the presentation of argument, counsel for the Plaintiff sought to amend its pleadings to include the wrongful acts of third parties. This application was opposed by the Defendant. It is not necessary for me to consider this application for amendment as will become clear from the paragraphs that follow.

60. The Defendant argued that it cannot be held liable for the delicts of its patrons and has a reasonable expectation that all passengers would conduct themselves with due regard for their own personal safety and the safety of others, and that they would not endanger themselves or others with reckless conduct. Its liability is limited to instances where its omissions are of such a nature that it has failed to act positively in circumstances in which it had a positive duty to act. In essence the conduct of the passengers was an intervening cause for which it was not liable.

61. As stated in *Van Der Spuy v Minister of Correctional Services* 2004 (2) SA 463 at 474 G:

> "Although a new intervening cause, such as the negligent or intentional wrongful conduct of a third party may often result in the harm suffered being

too remote, each case must be decided in the light of its own particular facts and circumstances and depending on the facts, an intervening cause may also not break the chain of causation."

62. The question as to whether an intervening cause has broken the chain of causation was considered by Nugent, JA in *OK Bazaars [1929] Ltd Versus Standard Bank of South Africa Ltd* at 699 where the learned judge stated:

"I have already called attention to the fact that the test for legal causation in general is a flexible one. When directed specifically to whether a new intervening cause should be regarded as having interrupted the chain of causation (at least as a matter of law if not as a matter of fact) the foreseeability of the new acts occurring will clearly play a prominent role.(*Joffe and Co. Limited versus Hoskins and Another* 1941 A.D. 431 at 455-6; *Finchback back Versus Pretoria City Council* 1969 (2) SA 559 (T) at 560 6B-C, *Neethling et al* (supra at 205); *Boberg Law of Delict* at 441) if the new intervening cause is neither unusual nor unexpected, and it was reasonably foreseeable that it might occur, the original actor can have no reason to complain if it does not relieve him of liability."

63. In the present case, the fact that passengers would disembark and those standing near the doors on a very full train could be pushed off train if it stopped for any length of time between stations was foreseeable. This was according to the Defendant's two witnesses who were in charge of the safety on the train, as driver and guard. The Defendant's conduct is therefore causally linked to harm to passengers standing near the coach doors who might be injured by being pushed off or falling off the train in these circumstances. It remains to be determined whether this would include the Plaintiff.

Forseeability of the specific harm to Plaintiff.

64. The precise nature of the harm to Plaintiff need not have been foreseen. As stated in *Kruger v van der Merwe and Another* [1996] 2 SA 362 (A) at 366, the doctrine of foreseeability in relation to the remoteness of damage does not require foresight as to the exact nature and extent of the damage; cf. *American Restatement of the Law, Torts* (Negligence), paragraph 435. It is sufficient if the person sought to be held liable therefore should reasonably have foreseen the

general nature of the harm that might, as a result of his conduct, befall some person exposed to a risk of harm by such conduct.

65. In the present case the harm suffered by the Plaintiff fell within the general nature of foreseeable harm under the circumstances of the incident. In my view the general manner of the harm suffered by the Plaintiff was reasonably foreseeable. Her evidence was that she was standing about 1.2 meters from the coach door, and that she fell face down. She was an older person of slight build and was pushed along by a crowd very closely packed together in the train. Once the train doors were open, it is readily apparent that she was standing sufficiently close to the doors that she need only have been pushed a few paces to fall out of the open train door and down a drop of over 1.5 -1.7 meters to the gravel below.

66. Defendant contended that it had a reasonable expectation that passengers would conduct themselves with due regard to their personal safety and would not endanger themselves or other commuters with reckless conduct, this issue does not require consideration in the light of the above. It is also doubtful whether such expectation can validly exist when the defendant itself has been less than responsible and has created a situation of great discomfort for its passengers, when by the exercise of reasonable measures this could and should have been avoided. The evidence of Mzwakali was that the train was not air conditioned. The incident occurred in the afternoon on a midsummer's day. After initially communicating with the passengers it was not Stevens' practice to go on communicating with them as he thought this would hamper his efforts to get the train to function. Trains regularly broke down. The train was very full. The passengers were therefore cooped up in the heat facing an indeterminate delay. Stevens acknowledged that this would result in them experiencing discomfort. Opening the unlocked doors and exiting in these circumstances is not conduct which is so reckless that it would allow the defendant to escape liability.

Conclusion.

67. The Plaintiff pleaded that the Defendant owed her a duty of care to ensure that the condition of the train and/or associated infrastructure did not pose a danger to her and that the incident did not occur. The evidence led establishes that the final breakdown of the train was an incident without which Plaintiff would not have

been injured, and that her injury was caused by the driver's negligent conduct, through his failure to avoid the incident.

68. Defendant has a duty of care towards its passengers, to ensure that all reasonable measures have been taken to provide for their safety whilst in transit making use of rail transport services. By the exercise of reasonable care Stevens could and should have taken measures to avoid the incident but failed to do so. While acting in the course and scope of his employment, he failed to pay due regard to train commuters in general and to the Plaintiff in particular. The Plaintiff's pleadings were drafted sufficiently widely for the Defendant to be held liable for the injuries suffered by the Plaintiff during the incident on this basis.

69. Much emphasis was placed in argument on the alleged negligent omissions of the Defendant to prevent injury to the Plaintiff after the train had come to a halt. In the light of the fact that liability has been established for the negligent acts committed by the driver it is not necessary to consider these arguments. Apart from this it is also not necessary to consider the application to amend the pleadings.

I make the following order

a. The Defendant is liable to the Plaintiff for the damages suffered as a result of the incident on 22nd November 2012 when she fell off one of the defendant's trains;
b. Costs to be paid by Defendant to the Plaintiff on the scale as between party and party.
c. The determination of the quantum herein is postponed sine die.

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A ANDREWS
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

DATE HEARD : 4th September 2014

DATE DELIVERED : 21 November 2014

For the Plaintiff : Adv Anderson

Instructed by :.Mokoduo Attorneys

For the Defendant : Adv Tisani

Instructed by : Cliffe Decker HofmeyrInc