IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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

25/9/2019
DATE

SIGNATURE

CASE NUMBER: 07424/13

In the matter of

MASHAYA, JABU KHANYISILE **PLAINTIFF**

and

TRANSNET SOC LIMITED **DEFENDANT**

JUDGMENT

DOSIO AJ:

INTRODUCTION

[1] This is an action whereby Jabu Khanyisile Mashaya, ("the plaintiff"), an adult female, has instituted a damages claim against Transnet Limited ("the defendant"), for certain bodily injuries she sustained as a result of a train accident that occurred at dusk on the 1st of March 2010 in Kwazulu-Natal, at the Vryheid East railway station, ("the station"). The result of the accident culminated in the amputation of the plaintiff's leg below the knee.

[2] The matter comes before me for the determination of whether the defendant was negligent in any way. The issue relating to the *quantum* of damages was separated in terms of Rule 33(4), and postponed *sine die*.

THE PLEADINGS

[3] Although there were many amendments in respect to the plaintiff's particulars of claim, the final version states that the defendant's breach amounted to negligent conduct in one or more of the following respects;

"6.1 The Defendant failed to ensure the safety of members of the public in general and the Plaintiff in particular on the Vryheid East Station train yard;

6.2 The Defendant failed to take any or adequate steps to avoid the incident in which the Plaintiff was injured, when by the exercise of reasonable care it should have done so;

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

6.4 The Defendant failed to employ employees, alternatively, failed to employ adequate numbers of employees, further alternatively failed to employ the adequate number of security personnel to ensure the safety of the members of the public in general and the Plaintiff in particular on the Vryheid East train yard;

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

6.6 The Defendant allowed the Plaintiff to gain access to the train yard and to move between the carriages of the Defendant's train;

6.7 The Defendant allowed the train to be set in motion when it was unsafe to do so and while the Plaintiff was in the process of walking in between the coaches.

6.8 The Defendant neglected to employ security staff at the train yard to ensure the safety of the public in general and the Plaintiff in particular;

6.9 The Defendant did not replace the fencing around the train yard and allowed the Plaintiff and other members of the public to gain access to the train yard.

6.10 The Defendant allowed the Plaintiff and other members of the public to transverse the train yard at will.

6.11 The Defendant failed to ensure that the members of the public and the Plaintiff in particular were not warned against the dangers of traversing the train yard."

[4] The defendant has pleaded it has taken all the reasonable steps, within its resources, to discharge its duty of care towards the members of the community, including the plaintiff, by creating alternative routes for them to walk across the station. In addition, the defendant pleaded the defence of *volenti non fit injuria*, and alternatively, pleaded that the amount of damages to be awarded to the plaintiff be reduced in terms of section 1 of Act 34 of 1956, to such an extent that if there is negligence to be shared, that the plaintiff be settled with a bigger portion, namely 80% eighty percent against the plaintiff.

COMMON ISSUES

[5] The following facts are common cause;

1 The date, time and location of the incident;

2 The layout of the station, (exhibit "B"), which includes where the incident occurred, the location of certain 'bridges', the location of warning signs, the location of the farming area (where the plaintiff resides), and the location of the township area. The distance between the X1 markings is 8 kilometres, while the distance between the X2 markings is 2,8 kilometres;

3 Photographs A(i), A(ii), A(iii) and A(iv);

4 Exhibit "C", being an aerial photograph downloaded from the Internet (Google Earth) depicting the station, the adjoining farming area and the adjoining township area, as well as a mark depicting where the incident took place.

[6] The issues in dispute are the following;

1. Whether the defendant omitted to;

1.1 properly fence off its premises on which it conducted dangerous rail movements, thereby preventing access to the premises by members of the public,

1.2 provide proper warning to members of the public of the dangers of entering the premises and/or crossing the rail tracks, particularly between stationary wagons;

1.3 employ adequate security to ensure a reasonable control over the premises thereby preventing unsafe access by members of the public, including the plaintiff;

thereby constituting (an) actionable, wrongful (unlawful) omission.

2. Whether the defendant ought reasonably to have foreseen the possibility that its omissions could result in injury and damage to members of the public, including the plaintiff, and having so foreseen such possibility, ought to have taken steps to guard against such an occurrence, and failed to do so (thus establishing negligence on the part of the defendant);

3. Whether the injuries of the plaintiff are causally linked to the wrongful and negligent conduct of the defendant.

BACKGROUND

[7] On the evening of the 1st of March 2010, the plaintiff and Ms Bayisile "Amanda" Khanyile ("Ms khanyile") were walking back from town on route to where they live, which included crossing a railway line, which exists between the town and where the plaintiff lives. While the plaintiff was attempting to cross the railway line, and whilst climbing over a stationary train and its coupling links, the train was set in motion. This caused her to fall onto the railway tracks, her left leg being severally damaged by the wheels of the train. She was transferred to hospital where her leg was amputated below the left knee.

EVIDENCE

[8] The evidence for the plaintiff's case consisted of two witnesses, the plaintiff and Ms Khanyile. At the end of the plaintiff's case, the defendant's counsel brought an application for absolution. After having heard both counsel, I dismissed this application with costs. The defendant called two witnesses namely, Mr Dingaan Robert Makhubo ("Mr Makhubo"), and Mr Johnson Mandla Khumalo ("Mr Khumalo").

Jabu Khanyisile Mashaya (Plaintiff)

[9] This witness stated that she was born on the 1st of March 1986. She stated she did not know of another way to get to town without crossing the railway lines, as she was using this route since she was a scholar, to go to school and the town. She stated this route is still currently being used by the community, young and old. On their way back from town that evening, she encountered a stationary train at the area where she usually crossed.

[10] Ms Khanyile was the first one to mount the coupling links between the coaches and after Ms Khanyile had crossed, the plaintiff climbed over. When the plaintiff's leg was about to reach the gravel, the train moved and she fell backwards. She stated there was no warning before the train moved off, and neither did she hear the sound of a whistle or a hooter before the train moved. Had she heard a warning sound, she would not have attempted to cross over the train. The wheel of the train then rode over her left leg.

[11] She stated that in all the years that she has used this route, she has never seen any warning signs at the station to warn people not to cross the railway lines. There is also no fence erected to keep people from entering the station premises. She stated she has never been stopped by an official of the defendant preventing her from crossing the station premises. She stated that the photos marked exhibits A(i) and A(ii), is the exact place where the accident happened.

[12] During cross-examination the plaintiff stated she knew that these trains transported coal and that this station was not a commuter train station. She admitted that she is not a customer of the defendant and was not invited by the defendant to be on the train station premises.

[13] As regards the warning sign which was shown to her, which depicts "a train", she stated she has never seen this sign before. As regards the "stop sign" which was shown to her, and which is situated at the level crossing, she stated that this is simply a sign to stop. She stated that no one ever told her that she could not cross the railway line. She was not aware of the level crossings on the east and west side of the station. She repeated she has always used the same footpath, which is depicted on photo A(iv), since she was a child and that this is still the route that she and the community still use. When questioned whether she knew whether members of the public were in fact allowed to walk in the station, she stated *"The very same employees at that place even assist us to cross the railway tracks, they will accompany us and assist us to cross those tracks*". She added *"Those who come to my assistance to help me, will be the ones interested in proposing love to me at that stage".*

[14] Apart from the men who usually assist her, the plaintiff stated she had never seen any security guards there. She only became aware of security officers being posted there, after her injury. She added that the security officers posted there after her accident,

were not there for a long time and are currently no longer there. In fact, she stated, children are still crossing the railway at the same point depicted on photo A(iv).

[15] This witness stated that she knows of only one bridge which is very dark and which has water running through it. This witness stated that she would not have crossed the railway tracks if she was aware of bridges and level crossings provided for pedestrians.

[16] This witness impressed me.

Ms Khanyile

[17] This witness corroborated the complainant in respect to the following;

1. That she and the plaintiff crossed the railway line at the same point they always crossed over. They had used this route since they were at school and still used it. They would always walk along a footpath up to where the railway tracks were and then they would cross the railway. The footpath is the one depicted on photo A (iv). Other adults and school children still use this route.
2. She has never seen any sign prohibiting any person from crossing the railway line and no fence has been erected to prevent people from crossing the railway line.
3. There was a stationary train which they had to cross over.
4. She crossed first and when it was the plaintiff's turn, the train started moving.
5. The accident happened whilst the plaintiff was crossing over the coupling links.
6. They have never been stopped from crossing the railway line either by security guards or by other officers working for the defendant. There were employees of the defendant who would help them cross the railway line and who would also propose love to them.

[18] As regards the signs shown to her which reflect "a train" and "a stop sign", this witness stated that she does not know where these signs are positioned and she has never seen these signs where she and the rest of the public cross the railway line. When this witness was confronted during cross-examination that no employees of the defendant would assist her to cross over the railway line, she answered, *"They won't admit they propose love as it could end them up loosing their employment".*

[19] She was aware of a bridge which is dark, situated mostly underground filled with water and as a result pedestrians don't use this bridge.

[20] This witness impressed me.

Dingaan Robert Makhubo

[21] This witness testified that during 2010 he was an area manager responsible for many stations. He ensured that there was strict compliance with the defendant's policies. He testified that there is no commuter rail at this station and that no member of the community is allowed on the station premises. He explained the outlay of the station and the various routes that the community should use when crossing the railway line. He stated that all other routes to cross the railway line are illegal.

[22] He stated that a security company was employed to keep guard in the area and to stop people from crossing the railway line and that these measures, have always been there and are still in place. He added that the signs depicting "a train" and a "stop sign" have always been up at the station and that they are clearly visible. He testified these signs are sufficient as there has been no incident at this station in the past nine years. He testified that to erect a fence at the station would be expensive as the fence would have to span an area of about 2.8 kilometres.

[23] He rejected the notion that the community members, including the plaintiff, cross freely over the railway on a daily basis. He could not comment on claims that officials of the defendant would assist members of the community to cross the railway lines. He stated that these officials would be doing so out of their own accord and would be violating their code of ethics and the company rules.

[24] He denied the plaintiff's evidence that she has never seen a security officer at the station. He stated there was 24 hour security at the station consisting of five people, four on foot and one in a patrol vehicle.

[25] He stated that although he was in charge of the station, each department, including the security department, did not report to him on a daily basis. Only in exceptional circumstances, like an accident, would he be informed. He stated that the bridges that are present at the station, are for the benefit of both pedestrians and motorists. He admitted that the level crossing at the station, where the "stop sign" is situated, is not regulated by a boom.

[26] This witness did not impress me. He maintains that pedestrians are not allowed on the station premises, yet he admits that they are allowed to cross at a level crossing which according to his evidence is not regulated by booms. Although this witness was adamant that pedestrians do not cross at the point depicted on photo A(iv), he did not refer to an occurrence book held by the security personnel at the station premises to confirm whether any transgressions had been noted by the security personnel.

[27] If the community were crossing at the point depicted on photo A(iv), as stated by the plaintiff, Ms Khanyile and supported by Mr Khumalo, then the security officers should have written these transgressions in the occurrence book. When Mr Makhubo was asked this, he said *"It may be so that they report that in their occurrence book but it never came to me"*. I find there has not been much attention placed on this security breach by Mr Makhubo, because when the plaintiff's counsel asked him *"You can't tell the court whether these security personnel ever stopped anyone from traversing the property of Transnet?"* he replied *"I won't be able to can say that because if they indeed stopped people from traversing the premises it was not for them to subsequently come to me and report to me as this was their sole responsibility. The only time when I would be able to be informed is if there had been an incident where a person got injured or if there was a commotion between people of the personnel or if people were stopped from traversing and would have retaliated"*. These answers have not impressed me. It is clear from the evidence of Mr Khumalo that members of the public were indeed crossing the railway lines and that the security were aware of this, and it is perplexing that such reports were never made known to Mr Makhubo.

Mr Khumalo

[28] Mr Khumalo testified that he is a pensioner and that prior to retiring he worked for the defendant since 1977. During 2010, when this incident occurred, he was working as a telemeter-guard. He testified that members of the community are not allowed on the railway lines at the station. He stated that various measures were put in place by the defendant, these measures included two (2) level crossings that have signs for members of the public to see, and three (3) bridges over which the railway lines run.

[29] He admitted that because the bridges are so far apart, the community members elect to take a shorter route by crossing over the railway line. He stated that there are security guards that patrol the yard 24 hours and that such officers' role is to stop people from crossing over the tracks.

[30] He testified that on the day of the accident he had reported to work for night shift duty and had just completed his telemeter duties. He was driving behind a train that had just commenced moving when he met with the plaintiff who was already injured. She informed him that she and her friend were intending to jump over the coupling links of a stationary train and that whilst she was on top of the coupling links the train commenced moving and she jumped off whereupon she was injured.

[31] He strongly disputed that security officials have in the past helped the plaintiff and Ms Khanyile to cross the railway line. He added that if anyone was found to be transgressing these rules that person stood to be expelled from their duties or employment. He disputed that the plaintiff and others have been crossing the railway line since childhood, as he stated that the security officials stop everyone from crossing the railway line.

[32] Mr Khumalo testified that after he completes his routine telemeter duties, he contacts the train driver to ascertain if the driver can read information from the telemeter devices and if everything is in order. Only when the driver is satisfied will the driver sound the horn to warn anyone near the train of its departure. He confirmed that on the day in question he followed this procedure.

[33] During cross-examination he confirmed that on the day in question he communicated via two-way radio with the driver of the train that he had finished placing the telemeter devices at the front and back of the train. This witness stated when the driver is ready to depart, the driver will call CTC for a signal to allow the train to be dispatched. All this is done electronically.

[34] Although this witness impressed me with his detailed knowledge about trains, I was not impressed with his recollection of what procedures were followed by him prior to the train moving off on the night in question. Initially he stated at length that he always affixed telemeters to the front and back of the train and that after he is finished he communicates with the driver that he is finished, only then will the driver sound the horn and depart. However, this is not what happened on this evening as he stated that the train on which the plaintiff climbed on the said evening was not fitted with telemeters, as it was a 200 wagon length train. If he did not affix telemeters to this train on the evening of the incident, the sequence of events that usually unfold would not have occurred, therefore I am not convinced that the driver was notified by Mr Khumalo

that it was safe to move the train, which may be the cause why no horn was sounded by the driver prior to the train departing.

[35] Furthermore, Mr Khumalo is adamant that security personnel are still at the station, however, there is no proof of this, as none was called by the defendant. Furthermore this witness is no longer working at the station so it is unclear how he would know what is going on there in his absence. I accordingly approach his evidence with caution.

[36] It is important to note that Mr Makhubo and Mr Khumalo contradict each other as the former emphatically denies that community members, including the plaintiff, cross freely over the railways, whereas Mr Khumalo admitted he is aware that the community do take short cuts across the railway line.

THE DEFENCE RELIED UPON BY THE DEFENDANT

[37] The defendant's counsel referred me to the defence of *volenti non fit injuria* which states that if the plaintiff knew the nature of the defendant's work and with full knowledge thereof agreed to suffer the risk involved, then she cannot have any claim against the defendant for the loss incurred by her due to the act.

[38] The defendant's counsel referred me to a decision of *Titchner v BRB* [1983] UKHL 10 (24 November 1983) where the plaintiff sued the British Rail Board for damages arising out of injuries she had sustained when she was hit by train. The plaintiff and her boyfriend were walking on the railway tracks having obtained access through a pathway and after jumping over a fence. The Court *a quo*, found that the defendant was not liable for the damages suffered as the plaintiff had assumed the risk of being injured when she and her boyfriend elected to cross the railway line at a point, other than one designated for commuters. The court further held that the fact that the fence erected by the defendant was penetrable and not repaired, was by itself, not sufficient to change its opinion against the plaintiff and held that, under those circumstances, the defendant had done all that it could do to reasonably prevent the foreseen harm from happening. The court held that even though the fences along the north and south sides of the line had gaps, there were sufficient warnings that if she went on she would be entering upon railway premises. By giving her that warning, the court held the defendant was doing more than they were obliged to do. The court accordingly upheld the doctrine of *volenti non fit injuria*.

[39] Counsel referred me to the decision of *Waring and Gillow Ltd v Sherbone* 1904 TS 344, where the learned Innes CJ held that;

"...A man who consents to suffer an injury can as a general rule have no right to complain. He who knowing and realising a danger, voluntarily undertakes to undergo it, has only himself to blame for the consequences."

[40] Counsel argued that there are two (2) level crossings which are intended to cater for pedestrians, three bridges, two warning signs and 24 hour security. Counsel argued that everything the defendant could have done, it did. Counsel argued that another of the factors to consider is the expense to add to the measures already in place. Counsel referred me to the case of *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997) which sets down the legal principles pertaining to a government's obligations within its resources.

THE LAW

[41] The test for negligence and the determination of liability for damages under the common law is derived from the *locus classicus* case of *Kruger v Coetzee* 1966 (2) SA 428. The learned Holmes JA at page 430E stated;

"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."

[42] A court must ask in these instances whether a reasonable man would have foreseen the harm happening; and whether a reasonable man would have taken steps to avoid the harm happening, and whether the defendant had taken those steps to prevent the harm from happening.

[43] What constitutes reasonable measures depends on the circumstances of each case.[1]

[44] As stated by the learned O'Reagan J in the case of *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* (CCT 56/03) [2004]ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) (26 November 2004), at paragraph [88] reasonable measures would be;

"...Factors that would ordinarily be relevant would include the nature of the duty, the social and economic context in which it arises, the range of factors that are relevant to the performance of the duty, the extent to which the duty is closely related to the core activities of the duty-bearer-the closer they are, the greater the obligation on the duty-bearer, and the extent of any threat to fundamental rights should the duty not be met as well as the intensity of any harm that may result. The more grave is the threat to fundamental rights, the greater is the responsibility on the duty bearer...a final consideration will be the relevant human and financial resource constraints that may hamper the organ of state in meeting its obligation. This last criterion will require careful consideration when raised. In particular, an organ of state will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints."

[45] The *causa sine qua* non test (or the "but for" test) is widely accepted as the method by which the factual causal link or absence thereof is determined. In *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 at 700 F-G the learned Corbett CJ stated;

"...in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as "factual causation". The enquiry as to factual causation is generally conducted by applying the so-called "but-for" test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test, one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant... If the event would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a *causa sine qua*

[1] See J Neethling & JM Potgieter *Law of Delict* (6th ed,2010) at page 148

non of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called 'legal causation'. "

The defence of *volenti non fit injuria*

[46] The essential elements that the defendant must prove are expressed in the well-known dictum of Innes CJ in *Waring and Gillow Ltd v Sherborne* 1904 TS 340 at 344 where it is stated;

"It must be clearly shown that the risk (of injury) was known that it was realized, and that it was voluntarily undertaken. Knowledge, appreciation, consent – these are the essential elements, but knowledge does not invariably imply appreciation, and both together are not necessarily equivalent to consent."

[47] As to the last requirement of consent, it is the law that the plaintiff will not be taken to have consented to the harm in instances where the defendant is also guilty of negligence.

EVALUATION

Defence of *volenti non fit injuria*

[48] The onus rests on the defendant to prove the defence of *volenti non fit injuria*.

[49] The defendant relies on the matter of *Titchner v BRB* (*supra*), however, the distinguishing factor between the matter of *Titchner v BRB* (*supra*) and the facts of the matter *in casu*, is that the defendant *in casu* did not erect any fences whatsoever. Furthermore, in the matter *in casu* there was a well-used short cut through the veld, which the employees of the defendant were aware the community utilised frequently to cross the railway. If a fence had been erected together with pedestrian bridges and clear signs prohibiting pedestrians from crossing the railway then there would have been sufficient grounds of justification to exclude wrongfulness (unlawfulness) or negligence on the part of the defendant.

[50] In the case of *Slater v Clay Cross Co Ltd* [1956] All ER 625 the plaintiff was injured when she was struck by a train and claimed damages. The court held that (i) the defendants were under a duty, in carrying out their operations, to take reasonable care not to injure anybody lawfully walking on the railway and they had failed in that duty as the driver had failed to blow the train whistle before entering the tunnel, (ii) the defence of *volenti non fit injuria* was not available since, although the plaintiff in walking through the tunnel voluntarily took the risk of danger, she did not take the risk of negligence by the driver. The court held that her knowledge of the danger was a factor in considering the plaintiff's contributory negligence.

[51] It is evident that the plaintiff *in casu* knew and appreciated the danger that her actions in crossing the railway at dusk would present. However, as regards the third element for the defence of *volenti non fit injuria* to succeed, there must be consent on the part of the plaintiff. I cannot find that she consented to the harm occurring. I find that the train driver on this evening did not blow the horn or sound a whistle to warn either the plaintiff or Ms Khanyile that the train was to depart. Accordingly the third element needed for the defence of *volenti non fit injuria* to exist has not been established and accordingly this defence is dismissed.

Probabilities

[52] From the oral evidence that has been presented it is clear to me that there are two mutually destructive and irreconcilable versions. The plaintiff believes the defendant is at fault for allowing the accident to occur and the defendant alleges it did everything it could have done to safeguard the area where the accident occurred, and furthermore that the plaintiff was aware of the danger in crossing the railway and proceeded to cross, thereby negating any liability on the part of the defendant for the injuries sustained.

[53] The decision of *Stellenbosch Farmers' Winery Group Ltd. and Another v Martell & Cie SA and Others* [2002] ZASCA 98 is instructive, in that it lays down the guidelines to be employed by the court in resolving factual disputes. The learned Nienaber JA stated at paragraph [5] the following;

"On the central issue, as to what the parties actually decided, there are two irreconcilable versions...The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed

issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities."

[54] The defendants say they have security personal 24 hours at the station. I find this improbable because if there are security guards posted at the station, children and adults alike would not be crossing this railway line. No security guard was called by the defendant that currently works there to rebut the version of the plaintiff that to date adults and children are still crossing these railway lines. In addition, no evidence was placed before me by a security officer who was on duty on the evening of the accident to say he or she was on duty and patrolled the area where the plaintiff was injured.

[55] The fact that there is adequate lighting in the area where the plaintiff was crossing the railway line is not disputed by the defendant. Accordingly I find it puzzling that both the plaintiff and Ms Khanyile were able to cross this railway line without being detected by the security guards.

[56] Irrespective of when the photos A(ii) and A(iii) were taken, (which depict a school child crossing the railway at the exact point where the plaintiff met her accident), the fact remains, there were no security guards on the day this photo was taken to stop the child from crossing the railway line or to prevent the photographer from taking the photo. This suggests that the measures in place to prevent the community from crossing are not sufficient.

[57] The defendant alleges there is adequate bridges to attend to the needs of pedestrians who need to cross the railway. I find this improbable because the community, the plaintiff and Ms Khanyile use the area where the foot path is situated to cross the railway. This suggests the bridges are too far away from where the need arises for them to be present. This is confirmed by Mr Khumalo who states that the community take short cuts to cross the railway line. The defendant's employers knew where these short cuts are and with this knowledge the defendant should have acted proactively to create safe crossings for pedestrians, or to cordon off these areas with a fence. This would prevent the community from crossing the railway at these points.

[58] As regards a horn being sounded by the driver of the train on the evening of the accident I find on the probabilities this did not occur. I say this for the following reasons; namely, at the inception of Mr Khumalo's evidence he explained in great detail that

after he usually affixed the telemeters to the train, he would communicate this to the driver of the train, who would then get a signal from CTC. Only then would the train driver blow the horn. However during the latter part of his cross- examination he conceded that the train which caused the injury of the plaintiff was a 200 wagon length train and he does not affix telemeters to such a train. Accordingly on the evidence of Mr Khumalo I find that he did not affix telemeters to this train on the evening that this incident occurred, and accordingly he would not have communicated with the driver after affixing the telemeters. He explained that with a 200 wagon length train *"It is electronically operated, that is where the driver of the train can see everything as there are no other of these problematic areas like a train using a telemeter. Once the driver is ready to depart the driver will ask for a signal as he can see everything is correct."* No mention was made by Mr Khumalo that the driver would in this instance still sound the horn prior to departure. In addition, the actual driver of the train on the said evening was not called by the defendant to confirm that a horn had in fact been blown prior to the trains departure that evening.

[59] From the evidence of Mr Khumalo, it is clear that the movement of trains, particularly on the so-called block road portion of the station, were controlled by electronic remote sensing, without regard to human observation. It is on this basis that I find that there is a need for strict access control to the premises as potentially dangerous train movements are being performed there.

[60] The defendant relies on two signs, one which shows "a train" and the other "a stop sign". The defendant also states that the presence of two level crossings, and three bridges are adequate. The two level crossings are 2.8 kilometres apart. Mr Makhubo agreed that the two signs of "a train" and "a stop sign" are not placed where the community are in fact crossing the railway line. I find that two road signs are not sufficient to convey the message that moving trains can cause a danger to pedestrians. The "stop sign" at the level crossing is for the attention of vehicles, not pedestrians. There is nothing in place solely directed towards the pedestrians crossing the railway safely.

[61] Mr Makhubo confirmed that the fish grade area, the block road area, the vacuum yard and the sorting yard are not fenced. To date there is still no fence and Mr Makhubo stated that it would be too expensive for the defendant to erect a fence. As stated by the case of *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* (*supra*) an organ

of state will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints. The defendant relied on the case of *Soobramoney v Minister of Health* (*Supra*) which stated should insufficient financial resources of the State prevail, the State cannot be forced to supply services. The distinguishing factor between the case of *Soobramoney* (*supra*) and the matter *in casu*, is that the former case dealt with lack of financial resources for a single patient who sought renal dialysis from the Addington Hospital, however in the matter *in casu*, failing to erect a fence affects a whole community.

[62] Even though Mr Makhubo made the comment there is no money to put up a fence for two kilometres, no mention was made why there is no money and why other alternatives like a pedestrian bridge crossing over the railway was not erected.

[63] It is simply not sufficient for the defendant to rely on the fact that the plaintiff was never invited into the premises and that she should have used the level crossing. Both the plaintiff and Ms Khanyile were unaware of the existence of the level crossings as being there for their benefit. In addition the photo depicting a footpath showing regular usage by the public clearly would have alerted any *diligens paterfamilias* to see the dangers of the public taking short cuts and would have taken steps to ameliorate the situation. The defendant's contention that it had provided safe alternatives to assist members of the public to cross the railway, were patently ineffective as shown by the defendant's own version that the public resorted to the taking of short cuts through its premises, and had been doing so for many years.

[64] The station yard is not cordoned off by a fence, and owing to inadequate signage, which fails to clearly and unambiguously explain to both children and adults alike that they are not allowed to cross the railway, I find that no adequate or reasonable steps have been taken by the defendant to safeguard the well-being of pedestrians who need to cross the railway.

[65] In line with the case of *Kruger v Coetzee*, (*supra*) I find that the defendant who was operating dangerous equipment, was under a legal duty to take reasonable steps to prevent or at least minimise the risk to third parties. The movement of heavy freight trains on a railway line is a dangerous activity. Further, in line with the authority of *Ngubane v The SA Transport Services* 1991 (1) SALR p 756 AD, if the defendant

foresaw the possibility of harm, it should have taken reasonable steps to prevent such harm from occurring.

[66] The facts of this case show that the defendant indeed foresaw the possibility of its failure to fence its premises could result in injury to members of the public. Regarding the steps taken to guard against such an occurrence, namely the employment of four security guards on foot and a single patrol vehicle, the presence of two traffic signs, the presence of three bridges (used by vehicles) and two level crossings (used by vehicles), are measures which are so inadequate that I find they are unreasonable.

[67] Section 20 of the Fencing Act 31 of 1963 imposes a legal duty on the defendant to fence off its premises. Section 20 states;

> "(1) The owner of any railway line which traverses any holding shall, at his own expense, erect and maintain on either side of such line a sufficient fence with adequate crossing facilities at every place where a public road traverses such line and at any other place where such facilities are reasonable necessary..."

[68] Considering whether there is a causal link between the defendant's omissions, and the harm suffered by the plaintiff, I find on a balance of probabilities that the failure to erect a fence, proper pedestrian bridges and to erect clear signs explaining and prohibiting pedestrians from crossing the railway is causally connected to the reason why the plaintiff suffered this injury on the night in question. In applying the *causa sine qua non* test, "but for" the lack of a fence, proper pedestrian bridges located at the frequently used pathways, and proper signage, would this plaintiff still have entered the station premises and been injured? I find the answer to this question would be "no". Accordingly I find the defendant's omission and failure to take reasonable steps to erect a fence, to erect proper pedestrian bridges, and to erect proper signage, is closely related to the plaintiff's injury and that the defendant's omissions legally and factually caused the plaintiff's injury.

Contributory negligence

[69] The onus is on the defendant to prove the contributory negligence on the part of the plaintiff.

[70] I find that the plaintiff was negligent in climbing onto the coupling links. These coupling links are a least a meter above the ground, they are rusty and the possibility of slipping and injuring oneself is high. The plaintiff would have had to jump up onto the train and jump off on the other side. Although the plaintiff denies there was a potential risk, or that she was negligent, I find she was indeed negligent.

[71] Apportionment of negligence is not an easy task for a court. In my view reference to past decisions may assist as a guide to decide what is fair in the circumstances.

[72] In the case of *Khupa v South African Transport Services* 1990 (2) SA 627 (W) the plaintiff disembarked from a train while he was carrying a number of parcels and whilst the train was still in motion. The court held that there was contributory negligence on the part of the plaintiff and the court attributed a percentage of the negligence to him in the amount of 25% twenty-five percent. In the case of *Transnet Ltd t/a Metro Rail v Tshabalala* [2006] 2 All SA 583 (SCA) the plaintiff was in a state of intoxication when he ran alongside a moving train trying to board same and fell. The court reduced his damages by two thirds. In the case of *Yende v Passenger Rail Agency of South Africa* (39/2014 [2015] ZASCA 49 (27 March 2015), the plaintiff boarded a train which was already in motion and fell backwards onto the platform and later on the railway tracks. He sustained injuries to his head, shoulder and arm. His arm was later amputated. The majority judgment upheld the dismissal of the plaintiff's claim in the court *a quo*, however, the minority judgment of the learned Bosielo JA found equal negligence on the part of PRASA and the plaintiff. Bosielo JA found that the plaintiff negligently boarded a train which was in motion, however the train guard failed to see that all the doors of the train were closed before the train moved off. The learned Bosielo JA found both the plaintiff and the defendant equally responsible and ordered that the respondent pay 50% fifty percent of the proven damages. Although all of these cases refer to commuters that were travelling on commuter trains, the principles are still of assistance in determining the contributory negligence of the plaintiff *in casu*.

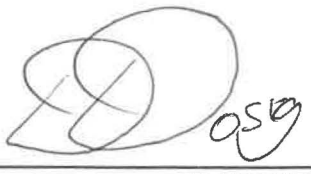
[73] I am not in agreement with the defendant's counsel that 80% eight percent of the negligence should be ascribed to the plaintiff. The plaintiff has been using this route her entire life. She was aware that when trains are about to depart the sound of a horn is activated. She stated that had she heard the sound of a horn she would not have climbed over the coupling link. In light of the above authorities mentioned in paragraph

[72] and the facts of the matter *in casu* I attribute equal negligence on the part of the plaintiff and the defendant.

ORDER

[74] In the premises the following order is made;

1. The defendant is liable 50% fifty percent of the plaintiff's proven or agreed damages;
2. The defendant is ordered to pay the costs;
3. The determination of quantum is postponed *sine die*.



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ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the Plaintiff	**Adv D.J Combrink**
On behalf of the Defendant	**Adv S Mgiba**

Heard on the 4th of July 2019
Judgment handed down on the 25th of September 2019