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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

**CASE NO: 2561/2016
DOH: 16 - 25 MAY 2022**

REPORTABLE: YES / NO
OF INTEREST TO OTHER JUDGES: YES / NO

REVISED.
27 October 2022

In the matter between:

N[....] N P obo MINOR

PLAINTIFF

and

TRANSNET SOC LIMITED t/a FREIGHT RAIL LIMITED

DEFENDANT

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

THIRD PARTY

JUDGMENT

THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL/ UPLOADED ON CASELINES. ITS DATE OF HAND DOWN SHALL BE DEEMED TO BE 27 OCTOBER 2022

Bam J

A. Introduction

1. The plaintiff issued a summons in her representative capacity as the mother and natural guardian of S, the minor child, to recover delictual damages arising from severe bodily injuries suffered by S when the defendant's goods train struck him. It is the plaintiff's case that the defendant, and vicariously through its employee, wrongfully and negligently failed to act when the circumstances were such that a reasonable person in its position ought to have acted, with the result that the minor was injured. The defendant accepts that it has a legal duty to ensure the safety of the public. It however, denies that it was negligent in any way and it asks the court to dismiss the plaintiff's claim. In the event this court finds in favour of the plaintiff, the defendant asks that she is also held jointly liable for the minor's damages as she had wrongfully and negligently breached her duty of care towards the minor child. At the start of the trial the parties took a consensual order of separation of liability from quantum, in terms of Rule 33 (4) of the Uniform Rules. This judgement thus deals only with the questions of liability of the defendant and the existence and the extent of the plaintiff's liability as a joint wrongdoer while the question of quantum is held over for later determination. I start by introducing the parties.

2. The plaintiff is an adult unemployed mother of the minor child. At the time material hereto, she resided in Phomolong, in the south-east of Mamelodi. The defendant is Transnet SOC Limited, trading as Transnet Freight Rail, a state owned

public company duly incorporated in terms of the legal succession to the South African Transport Services Act¹. The third party played no role in these proceedings and no longer features in this case.

B. Background

3. The common cause facts reveal that on 18 April 2009, on a Saturday at about noon, between Greenview and Pienaar Stations, within the vicinity of Phase 5, Mamelodi, Pretoria, a tragic event unfolded when the defendant's empty goods train 7811 collided with the minor child, then aged about three² years, and Z[....] N[....], (Z[....]), the plaintiff's sister, then about 17 years. The train, comprising 5 locomotives and 37 wagons, was from Sentrarend heading towards Pyramid South. Z[....], it appeared, was trying to apprehend the minor as he was running towards the track in which the train was travelling. Sadly, they were both struck by the train. Z[....] was instantly killed. The minor survived and was rushed to the nearest clinic and later to hospital. The point of impact, according to the images relied on by both parties, is identified as closest to mast pole 5311. The train eventually stopped at mast pole 5306. The images further depict two rail tracks. It is not in dispute that train 7811 was travelling on the left track in a northerly direction. On the right of the train is the Witbank line, which fell into disuse some time ago. To complete the setting, and whilst keeping in mind the direction of the train, the area on the left of the train was referred to by the witnesses from both sides as the Phomolong side and the area on the right as the RDP side.

C. Merits

Plaintiff's case

¹ Act 9 of 1989.

² The minor child was born on 20 August 2006.

4. The plaintiff's case was led through the evidence of three witnesses. They are, Mr Glen Elsden, (Elsden), Mr Temba Makhubo, (Makhubo) and the plaintiff herself. The first of the plaintiff's witnesses was Elsden. Elsden, now a retiree, used to work in the forensic department of the South African Police Service, (SAPS). He confirmed he had been asked by the plaintiff to take photographs and generate google images³ (collectively referred to as 'the images') of the accident spot and its immediate surroundings so that the court could have some idea of what the area looked like at the time. Elsden visited the site in March 2022. He testified that google images do not appear every day, thus, he had to use the closest historical images he could find, which are those of September 2009. The images, the measurements and the calculations made by Elsden, for which he must be thanked, were accepted by the defendant. Elsden was excused after a brief cross examination.

5. The plaintiff's second witness was Mr Temba Makhubo, (Makhubo). Makhubo has lived on the RDP side of Mamelodi East from the age of 8 years. He is now 38. His testimony regarding the collision was limited to what he saw at the point of impact. He neither heard nor saw the train as it approached the point of impact. During mid-morning, he left home for Phomolong. The plaintiff, her late sister Z[...] and the minor were there to visit. At about 15 metres or paces from the rail tracks, he heard a loud sound of a train horn. He turned around only to witness, to his horror, the train strike the deceased and the minor. Shaken and confused, he ran back home to report what had happened. He testified that he crossed the tracks to get to Phomolong and that he and many others in the area cross the tracks regularly, at any point, because there are no safe crossing points. If a person from Phomolong wants to catch a taxi, go to the shops, to the clinic or to school, they cross the rail tracks because there are no such services on the Phomolong side and there are no safe crossings to access either side of the railway line.

6. His testimony was not upset during cross examination in any way. He denied hearing a continuous sound of a horn. His observation that the train was running very

³ Found from Caselines 014:77 onwards.

fast was not disturbed. He was asked to imitate the sound he heard on that day and he made the sound of a train horn. He testified that ever since he arrived in the area, at the age of 8, he has never seen a fence or warning signs. When asked, he said he knew of the Solomon Mahlangu bridge which, it was common cause, is about 779 metres from the point of impact. The bridge is not accessible for people from the informal settlement areas as they must climb a steep embankment because there are no stairs. He denied the suggestion made by the defence that his failure and that of Jack Mandlazi Sengwana, (Sengwana) to mention the plaintiff in their statements meant that the plaintiff was not there. He said the plaintiff was very upset and shocked at the time, hence Sengwana carried the minor to the clinic. When asked about Transnet's education campaigns while still at school, he said he could not recall anything up until the time he left school in grade 11, but he remembered hearing about Transnet's safety campaigns on television. Makhubo testified satisfactorily. He did not appear to be making up details as he went along. When he did not remember or did not know something, he simply said so. For that reason, I have no hesitation in accepting his evidence.

7. The third witness to testify was the plaintiff, Ms Percy N[....]. She testified that she had been living near the tracks in Phomolong since about 2007. She confirmed visiting Makhubo's home in the morning with her late sister and the minor on that day. After Makhubo had left the house she remained with the minor, her sister, Makhubo's sister Gugu, and her husband, Sengwana. Z[....] left the house with the minor. Whilst sitting outside with others, she testified about hearing a distant sound of a train horn. Shortly after the noise, Makhubo came back running, looking upset, and simply mentioned the names of the deceased and the minor, pointing towards the direction of the train. She and others wasted no time and raced towards the tracks. Upon arrival at the scene, she saw her sister's lifeless body lying between the tracks. She ran towards Makhubo's home to find a payphone or some means of calling the police. It was at that point that she saw a police van and informed the police of the collision. There was no one accompanying her and she alone spoke to the police. She ran back to the scene and noticed someone standing near the front of the train waving and pointing

underneath the locomotive. At that point many people had already gathered at the scene. Upon arriving at that spot, they saw the minor underneath the locomotive. Sengwana picked up the child and placed him on the ground. They could tell that the child was still alive because he coughed white foam. With Sengwana holding the baby, they both raced to the clinic. The clinic referred them to hospital. She continued the journey to hospital without Sengwana.

8. During cross examination, she was asked about her and her sister's ages at the time; she replied she was 21 and her sister about 17⁴. She denied the defendant's suggestion that she had not asked Z[...] where she was going with the minor nor warned her not to take the minor towards the rail tracks because she did not care. She repeated her statement that the tracks represent the road to them. Z[...], according to the plaintiff, was a capable and responsible person who often bathed, fed and took care of the minor when she visited and enjoyed a good relationship with him. She accepted that, as the mother of the boy, she was responsible for his safety but that Z[...] was just as capable of taking care of him. Z[...], after all, sacrificed her life to save the minor, said the plaintiff. When confronted with a statement made by a member of the South African Police Service (SAPS), Bongani Magagula, which states that he was informed by a crowd about the train collision. Upon arrival at the scene, the crowd informed him that a child had been involved in the collision but that a family member had taken the child to hospital, the plaintiff reiterated that she personally spoke to Magagula and she was alone at the time. She said Magagula had no idea that she was related to the child. Finally, the plaintiff was asked whether she remembers any education campaigns by Transnet while she was still at school. She said she could not remember. Like Makhubo, she confirmed that there are no safe points to cross the rail, no warning signs and there is no fence isolating the rail tracks from the homes. I was impressed by Ms N[...]s candidness. She did not flinch or hesitate when confronted with difficult questions. I have no reason not to accept her evidence. After this witness, the plaintiff closed her case.

⁴ According to Zanele's date of birth, she would have turned 17 within two months.

Defendant's case

9. The defendant's case was led through the testimony of five witnesses. They are, Mr Martinus Teessen (Teessen), Mr William Howard (Howard), Mr Philemon Mdaka (Mdaka), Ms Faith Mohapi and Mr James Molefe (Molefe). By the evidence of Ms Mohapi, which was brief and limited to Transnet's campaigns on safety, most of the defendant's case was marred in controversy as witnesses contradicted one another on certain key issues. It did not help the defendant's case that the original statements of the train crew concerning the accident were missing. Instead, the defendant made use of statements reproduced almost seven years later, with uncanny similarities to each other in some instances. Virtually every witness for the defendant contradicted their written statement on key issues. I revert to these issues later in this judgment.

10. The first witness called to the stand was Teessen. He commenced employment with the defendant in 1977 under the then South African Railways. He retired as a Section Manager in 2021. He had worked as a train driver for many years and as a train assistant. He knew the Sentrarand / Pyramid South line well. The Sentrarand line was completed during or about 1979. At the time the area was a bush and there were no houses. Whatever houses were there were about 150 metres from the railway tracks. Transnet erected a fence in the area during 1984. The fence began disappearing during or about 1990 when it was stolen by unknown people. Between 2001 and 2006 more houses were built as close as 20 and 30 metres to the rail tracks on both sides of the rail. On the day of the collision he went to the scene to investigate and look after the welfare of the train crew. He spoke to, *inter alia*, the train crew, the police and other officials at the scene. He confirmed that there was another official, William Howard, from the defendant's security division. Howard reported to Teessen. He and Howard spoke to the train crew at different times. He withdrew some documents from the train and also breathalysed the crew. On the same day, he prepared the Section Manager report⁵ for his manager, which is a short version of the incident. He had also prepared a longer

⁵ Caseines 002:112.

version which he referred to as the RIC report for the Safety Officer. He could not recall what had happened to the RIC report.

11. During cross examination, Teessen confirmed he qualified as a train driver in 1984. He also confirmed that since the fence was stolen in the 1990s, it was never replaced. As to the type of fence, he confirmed that it was 1.2 metres in height, with two or three horizontal lines. He conceded that the fence was designed to keep livestock off the tracks, not people. Transnet had considered erecting a fence after the first one was stolen but it proved to be too expensive. In response to questions about the Solomon Mahlangu bridge, he confirmed that there is a steep embankment with no stairs for people to access the bridge. He also conceded that it is human nature to take short cuts instead of walking the approximate 779 metres to access the bridge. On the question of warning signs, Teessen confirmed there had never been any warning signs in the area. Transnet had put signs at the level crossing, thus it would not make economic sense to put signs throughout the area.

12. As to how the accident had occurred, he stated that he was informed that when the train driver saw the three young girls and the minor, they were still busy crossing the tracks. One of the girls was holding the minor's hand. The driver blew his whistle until the party of four had cleared the tracks. At some point, the girl that was holding the minor's hand let go of the minor. Suddenly, the minor turned back and ran towards the direction of the train. The driver blew his whistle again but the minor continued. They measured the distance the train ran to the point where it stopped to be about 142 metres. It was pointed out to Teessen that his report made no mention of the speed at which the train was traveling; the fact that the party of four were still crossing the tracks when the driver first saw them is not in the report; and the fact that the driver blew his horn upon seeing the party cross the tracks. Teessen said the report was a short version of the incident but that the RIC report would have contained all the relevant details. When referred to the report⁶ prepared by William Howard and his version of how the collision had unfolded, he said he had no idea where Howard got his version.

⁶ Caselines 005:56.

Briefly, Howard's description of how the collision had unfolded is that a mother and child were running towards each other. They stumbled over one another and that is when the train collided with them. He was also referred to the statements⁷ of the train crew dated 5 February 2016. It is sufficient for now to record that in direct contradiction to Teessen's testimony, the statements make no mention that the party of four was still crossing the rails when the crew first saw them; they do not mention anything about the driver blowing the whistle or applying emergency breaks. Teessen denied that the statements were the same as those furnished to him by the crew in April 2009. Although it was a long time ago, Teessen did his best to remember the details. I had no complaint about his testimony. His evidence was credible. Teessen was excused after a brief re-examination.

13. The second witness to testify for the defendant was William Howard. Howard has been with Transnet for 31 years. On the day of the incident, he went to the scene of the collision. He spoke to different groups of people including the train driver and members of SAPS. He compiled his report⁸ based on the information he had obtained. I should interpose that the train driver, Mr Molefe, as will be apparent when I deal with his testimony, denied ever speaking to Howard about the details of the accident. He said, in terms of the defendant's rules, the train crew is not allowed to speak to anyone about the details of the accident other than their line manager. At the time, that was Teessen. In contrast to what Teessen had said about the fence, Howard testified that the fence had been replaced. Transnet had also contemplated putting up a wall fence at a projected cost of R37 million but, because of their experiences of vandalism in other areas, they decided against it. As for the warning signs, he said the theft of warning signs is an ongoing problem. Transnet replaces the warning signs during annual maintenance.

14. When asked during cross examination, he could not tell when the fence was last replaced. Similarly, he could not tell when last the warning signs were replaced. When it

⁷ Caselines 005:61.

⁸ Refer to paragraph 16 of this judgement.

was put to him that according to the plaintiff there were never any signs in the area, he simply said that he noted the statement. I had difficulty believing most of Howard's testimony. My doubts start with the unique version he provided in his report of how the accident had unfolded. He appeared unbothered when challenged with the plaintiff's version that there had never been any signs there. Also, the probability that his line manager at the time, Teessen, would not have had information about the replacement of the fence and the warning signs, if that information was true, is zero.

15. The defendant's third witness was Mr Philemon Mdaka. Mdaka began working for Transnet in 2006. He was a train assistant at the time of the incident. Since 2010, he has been a train driver. He was familiar with the Sentrarrand / Pyramid South line. As they were approaching the area of the incident on that day, the driver began reducing the speed and blew his horn intermittently. Unlike his colleague, Mr Molefe, Mr Mdaka referred to seeing one group of people and not two, prior to seeing the three teenage girls with the minor. Nonetheless, I do not consider this inconsistency as material. The driver, upon seeing the first group of people, blew his horn. As they were about 300 metres away, he saw three teenage girls with a minor with one girl holding the minor's hand. The party of four were crossing the rails at that stage. The driver blew his horn until they had cleared the rails. At some point as the party was walking towards the RDP homes, the minor turned back and began running towards the direction of the train. The driver blew his horn and applied the emergency breaks. The teenager who was holding the minor gave chase. They tripped and by then he could not see anymore. The last he heard was a faint knock. The train continued to run until it came to a stop. After the train had come to a stand-still, they remained in the locomotive until Teessen arrived.

16. During cross examination, Mdaka confirmed that the first thing the driver did as they approached the area was to reduce speed but he could not say at what speed the train had been travelling before it was reduced. His reason for the reduction of speed has to do with the down gradient at which trains travel from Johannesburg to Pyramid South and the curve that is close to the point of impact. He spoke about a section speed of 80 km/h. The train driver kept the speed below 80 and blew his whistle intermittently.

When asked to estimate how far the teenagers were in relation to the tracks when the minor suddenly turned back, he said they were about one metre from the Witbank track. He confirmed that the driver applied the emergency breaks when the minor and the teenager were in the middle of the two tracks. The teenager gave chase until they tripped, and that was the last thing he saw. In response to a question about speed restriction, he said there was no speed restriction applicable in that area in 2009. At present, there is a speed restriction of 15 km/h. He could not tell when it was instated, but he remembers that when he came back to work on the same line between December 2020, the speed restriction was already applicable. He confirmed that he and the train driver made statements on the day of the accident and again on 5 February 2016. When his attention was drawn to the fact that his statement makes no mention of the train blowing its whistle and the emergency breaks, he said the statement he had made on the day of the accident was similar to the present one. Mdaka testified well. I have no reason not to accept his evidence.

17. The defendant's fourth witness, Ms Mohapi, testified on Transnet's Safety campaigns. She was with Transnet for 11 years. She left Transnet during March/April 2009. She could not give an exact date. The campaigns covered the two settlements, taxi ranks and schools in the Pretoria townships. Ms Mohapi was excused after a brief cross examination.

18. The final witness for the defendant was the train driver, Mr JS Molefe. Mr Molefe retired from Transnet in December 2019, having worked as a train driver since 1999. He knew the Sentrarend / Pyramid South line well. Coming to the events of the day of the collision, Mr Molefe testified that he reduced his speed to 50 and began blowing his whistle from the Metro bridge. The Metro bridge is about 400 metres before Phomolong. He reduced his speed because he knew that there would be people crossing the tracks in the informal settlement area. With regard to how the collision had unfolded, he estimated that at about 240 metres from the point of impact, he saw the three teenagers with a minor crossing the tracks from Phomolong to the RDP side. One of the teenagers was holding the minor's hand. He blew his horn continuously and kept his bright light

on. After they had crossed the tracks, he realised that the minor had turned back and was running towards the train. One of the girls was behind him, trying to apprehend the minor. He blew his horn continuously. When he realised they were coming in front of the him, he engaged the emergency breaks.

19. During cross examination, Mr Molefe confirmed he was travelling at a speed between 75 and 80km/h before he reduced it. He confirmed the section speed as 80 and that it covered the whole area. He denied the idea that he reduced the train speed because of the curve or the down gradient stating that he reduced the speed to 50, blew his horn continually and kept his bright light on because he knew that in Leeuwfontein area, people walk across the tracks anywhere. Notwithstanding Transnet's policy that train drivers should not blow the horn when there are no people on the tracks, he said he used his discretion and blew the horn. He recalled seeing two groups of people before he saw the teenagers. He confirmed his testimony in chief that when he first saw the teenagers and the minor they were crossing both tracks. He blew his horn and the group increased their pace. From the increased pace, he could tell the girls were aware of the train. In response to a question whether he had been watching the party of four, he said he had been watching them all the time. He could not tell how far the party was from the tracks when the boy began running back towards the train. Unlike his colleague, he was loathe to make an estimate of their distance from the tracks when the boy turned back. He also could not tell how far the train was before the boy began running towards it but he accepted when it was suggested it was between 80 to 100 metres before the point of impact. While the boy was running towards the train, he said he blew his whistle but the boy continued to run, with the teenager trying to apprehend him, until the boy fell on the track on which the train was travelling.

20. He confirmed he did not reduce his speed when he saw the first, the second group and the group of teenagers with the minor. He said he was already on 50, he had his bright light on and he blew his whistle. In contrast Howard's testimony, he said he never spoke to Howard about the accident at all and confirmed Transnet's rules in this regard. On the question of the statement he made in February 2016, he confirmed he

was informed that his original statement could not be found and was asked to make another one. He conceded that his statement lacked details such as sounding the horn, the application of emergency breaks, and the fact that the girls were still crossing the rails with the minor when he first saw them. When it was pointed out that his words, that is, that the sound of the locomotive must have scared the boy, were exactly the same as those of his colleague, Mr Mdaka's, statement, he said by locomotive, he meant the sound of a horn. Although Mr Molefe remembered some details, there were many instances where he said he could not remember. At times, I had doubts whether it was because he could not remember or he did not want to answer certain questions. I had difficulty believing some parts of his evidence. After Mr Molefe's testimony, the defendant closed its case.

D. Issues

21. It seems to me that the real issues in this case are negligence and causation. As I understand it, wrongfulness is not an issue. This is so because Transnet, in its plea⁹, conceded the existence of a legal duty or wrongfulness. They set out in detail the steps they have taken to uphold their legal duty to the public. Wrongfulness is explained in the Constitutional Court case of *Country Cloud Trading cc v MEC, Department of Infrastructure Development, Gauteng* as:

'Wrongfulness is an element of delictual liability. It functions to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether "the social, economic and others costs are just too high to justify the use of the law of delict for the resolution of the particular issue". Wrongfulness typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirable or overly burdensome to impose liability.'¹⁰

⁹ Caselines 001:60, paragraph 6.

¹⁰ *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* (CCT 185/13) [2014] ZACC 28; 2015 (1) SA 1 (CC); 2014 (12) BCLR 1397 (CC) (3 October 2014), at paragraph 20.

22. In *Le Roux and others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)*:

“In the more recent past our courts have come to recognise, however, that in the context of the law of delict: (a) the criterion of wrongfulness ultimately depends on a judicial determination of whether – assuming all the other elements of delictual liability to be present – it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and (b) that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant’s conduct, but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.’¹¹

23. What the concession of wrongfulness by Transnet means, is that in the event I conclude, as I do in this case, that the omissions complained of by the plaintiff negligently caused the boy’s injuries, then Transnet, on the basis of the existence of the legal duty, must be held liable. My reasoning is fortified by the comments I have extracted below from *Hawekwa Youth Camp v Byrne*:

‘The principles regarding wrongful omissions have been formulated by this court on a number of occasions in the recent past. These principles proceed from the premise that negligent conduct which manifests itself in the form of a positive act causing physical harm to the property or person of another is prima facie wrongful. By contrast, negligent conduct in the form of an omission is not regarded as prima facie wrongful. Its wrongfulness depends on the existence of a legal duty. The imposition of this legal duty is a matter for judicial determination involving criteria of public and legal policy consistent with constitutional norms. In the result, a negligent omission causing loss will

¹¹ *Le Roux and others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC) at paragraph 122.

only be regarded as wrongful and therefore actionable if public or legal policy considerations require that such omission, if negligent, should attract legal liability for the resulting damages...'¹²

24. Whatever the case, on my reckoning of the circumstances of this case, legal and policy consideration, as constitutionally informed, demand that liability be imposed for the negligence of Transnet. My reasoning for these conclusions follow.

Negligence

25. The test for negligence can be traced back to the classic case of *Kruger v Coetzee*¹³. The test was adapted by the court in *Ngubane v South African Transport Service* and it proceeds thus:

'Once it is established that a reasonable man would have foreseen the possibility of harm, the question arises whether he would have taken measures to prevent the occurrence of the foreseeable harm. The answer depends on the circumstances of the case. There are, however, four basic considerations in each case which influence the reaction of the reasonable man in a situation posing a foreseeable risk of harm to others:

- (a) the degree or extent of the risk created by the actor's conduct;
- (b) the gravity of the possible consequences if the risk of harm materialises;
- (c) the utility of the actor's conduct; and

¹² *Hawekwa Youth Camp v Byrn* (615/2008) [2009] ZASCA 156 (27 November 2009) at paragraph 22; *Trustees for the Time Being of Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* (545/2004) [2005] ZASCA 109; [2007] 1 All SA 240 (SCA) (25 November 2005).

¹³ *Kruger v Coetzee* 1966(2) SA 428 (A) 430 The test asks: whether (a) a reasonable man 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.

(d) the burden of eliminating the risk of harm.

The first two considerations are recognised and discussed in the well-known and oft-quoted passage in *Herschel v. Mrupe* 1954(3) SA 464 (A) 477 A - C, which is as follows:

"No doubt there are many cases where once harm is foreseen it must be obvious to the reasonable man that he ought to take appropriate avoiding action. But the circumstances may be such that a reasonable man would foresee the possibility of harm but would nevertheless consider that the slightness of the chance that the risk would turn into actual harm, correlated with the probable lack of seriousness if it did, would require no precautionary action on his part. Apart from the cost or difficulty of taking precautions, which may be a factor to be considered by the reasonable man, there are two variables, the seriousness of the harm and the chances of its happening. If the harm would probably be serious if it happened the reasonable man would guard against it unless the chances of its happening were very slight. If, on the other hand, the harm, if it happened, would probably be trivial the reasonable man might not guard against it even if the chances of its happening were fair or substantial. An extensive gradation from remote possibility to near certainty and from insignificant inconvenience to deadly harm can, by way of illustration, be envisaged in relation to uneven patches and excavations in or near ways used by other persons."¹⁴ (own underline)

(i) Foreseeability of harm

26. The foreseeability of harm given the straddling of the two railway tracks by the residential areas with homes built as close as 20 and 30 metres from the rail tracks with no fencing, is unquestionable.

(ii) Whether a reasonable person would take steps

¹⁴ *Ngubane v South African Transport Services* (92/89) [1990] ZASCA 148; 1991 (1) SA 756 (AD); [1991] 4 All SA 22 (AD) 28 November 1990 at paragraphs 35-37.

27. With regard to consideration (a), the degree or the extent of the risk created by the defendant and its operations, it was not in dispute that the residential areas of Phomolong and the RDP side straddle the two rail tracks on which the defendant's trains run. Indeed, it was established from the defendant's own witnesses, Teessen and Mdaka, that homes on both sides of the rail can be found as close as 20 and 30 metres from the rail, and it was not contested that residents on both areas cross the tracks as a matter of not just habit but of necessity, as there are no roads or safe walkways. At least one of the residential areas, Phomolong, is said to be without basic services such as shops, schools, clinics and transport. The defendant's presentation to the Parliamentary Portfolio as early as 2006, about which I shall say more in the course of this judgement, makes plain the extent of risk to human life. As to the gravity and the seriousness of the consequences were the harm to materialise, as has been seen in many cases involving rail, human collision results in fatalities, if not in life altering injuries. A reasonable person would have taken steps to guard against the harm. Matters (c) and (d), as the court said in *Ngubane*, need not be determined in every case. And, in the view I take of this case, they need not.

(iii) Reasonable steps

28. The question is what reasonable steps the defendant should have taken to avert the harm. I do not repeat the defendant's plea to the plaintiff's allegations. In the next paragraphs I deal with the points it raised as reasonable steps that it and its driver had taken to avoid the harm on that day. In so doing, I separate the question of Mr Molefe's negligent omission/s on that day and discuss it as the final topic, including what would have been a reasonable step to avert the harm.

(a) Failure to provide pedestrians with means to safely cross the rail tracks

29. Against the testimony of the plaintiff's witnesses, the defendant denied that it had failed to provide safe means for pedestrians to cross the rails. It referred to the existence of the Solomon Mahlangu bridge, the Tsamaya bridge and the subway. It transpired from the evidence and it was common cause that the Tsamaya bridge is

approximately 2 km from the Solomon Mahlangu bridge. As for the subway, it was common cause that it too was not accessible to residents of the informal settlement area. It was also common cause that the Solomon Mahlangu bridge was built by the City of Tshwane. It accommodates both vehicles and pedestrians. Holding back for a moment the fact that the defendant had no role in providing this bridge as means to cross the rails, it was established during the trial that the bridge firstly, is about 800 metres from the point of impact. Apart from the impracticality of the residents having to walk 800 metres to the bridge, it was common cause that it is of no use for residents from the informal settlement because there is a steep embankment and there are no stairs to access the bridge from the informal settlement area. The impracticalities associated with the Solomon Mahlangu bridge were confirmed by Teessen.

30. During argument Mr Bruinders, counsel for the respondent, argued with reference to Howard's testimony that even if the defendant were to build a bridge close by, it would be rendered useless because, the real problem with people from those settlements is lawlessness. In *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*, the Constitutional Court cautioned that state organs will not be allowed to shun their legal duty, especially where the obligation to take reasonable measures is aimed at protecting life and limb:

'What constitutes reasonable measures will depend on the circumstances of each case.... The more grave is the threat to fundamental rights, the greater is the responsibility on the duty-bearer. Thus, an obligation to take measures to discourage pickpocketing may not be as intense as an obligation to take measures to provide protection against serious threats to life and limb. 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. Details of the precise

character of the resource constraints, whether human or financial, in the context of the overall resourcing of the organ of state will need to be provided...'¹⁵.

31. To conclude on this issue, the fact that the defendant was not even aware that the Solomon Mahlangu bridge, the Tsamaya over-bridge and the subway were not accessible to the residents in that area, simply suggests that the defendant never even investigated the issue of safe means for the residents in that area. This points to negligence on the part of the defendant.

(b) Failure to fence off the rails from the residential homes and provide warning signs

32. The plaintiff, Makhubo and Teessen of the defendant testified that there was no fence and no warning signs in that area. Teessen made three important points about the fence. He said: (i) that it was removed or began disappearing as the informal settlements began forming in the 90s; (ii) that the defendant had never replaced the fence since that time; (iii) the type of fence was the sort used on farms to prevent livestock from entering fields. He conceded that the fence would not have prevented people from crossing the rail. On questions about signs, Teessen confirmed that there were never any signs in that area. Only one of the defendant's witnesses testified otherwise in respect of the fence and signs. I have already expressed my difficulties in finding Howard credible.

33. I had earlier said I would return to the presentation¹⁶ delivered by the defendant to the Parliamentary Portfolio Committee on Housing during November 2006. This presentation shows that, as early as November 2006, almost three years before the collision, the defendant was aware that its fencing had been removed or vandalised. Although it did not elaborate on the nature of the fence, it made no claims that it had ever replaced the fence. It referred to the increased pressure it was facing as the settlements were too close to the rail lines, including the increased likelihood of

¹⁵ *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.

¹⁶ Caselines 005:127.

accidents as pedestrians and vehicles were using their own illegal level crossings on a daily basis. On the question of impact on inhabitants of the informal settlements, the defendant identified that children who grow up next to the rails have no natural fear for moving trains. It added that there was a challenge with lack of basic services. Yet with all this information, as at the date of the collision, the defendant appears to have taken no reasonable steps to avert the harm, notwithstanding the gravity of the consequences as illustrated in its presentation. It now claims that the problem should be seen as a behavioural problem. On this score, it says that it had taken reasonable steps to educate communities including these particular settlements. But education campaigns, as counsel for the plaintiff said, will not be effective to young children. Of its own accord, the defendant had already identified that young children who grow next to the rails have no natural fear of moving trains, notwithstanding the education campaigns.

(c) Failure to institute speed restriction

34. The plaintiff pointed out that, taking all the circumstances of this case into account, instituting a speed restriction in the area would have averted the accident and, of all the steps that the defendant failed to take, this step would have occasioned no cost whatsoever to the defendant. The defendant argued in its heads that no evidence was led to demonstrate that a speed restriction, even if it had been instituted, would have averted the collision. This is incorrect. Logic, coupled with the defendant's own testimony, demonstrates that a speed restriction, had there been one in the area at the time, coupled with the timeous application of the train's emergency breaking system, would have averted the harm. In discussing this part, I must of necessity deal with the negligent omissions of the train driver on the day.

35. It will be recalled that on Teessen's, Molefe's and Mdaka's accounts, there was no speed restriction in that area at the time, albeit Mdaka testified that a speed restriction of 15 km/h was put in place from about December 2020. Notwithstanding, Molefe, as confirmed by Mdaka, reduced the speed. On Molefe's account, he reduced the speed from about 80 to 50, because he knew that in the Leeuwfontein area there would likely be pedestrians crossing the rail at any point. At about a distance of 400

metres from the point of impact, the crew saw the first group of people. Molefe kept the speed at 50 even at the time of seeing the teenagers with the minor. Now, there are various discrepancies between the three written statements of Teessen,¹⁷ Mdaka¹⁸ and Molefe¹⁹, including the defendant's plea and the testimony that was led in court. For whatever reason, the evidence of each of the three witnesses changed in terms of the position of the three teenagers when the train crew first saw them. However one reads the three statements, the four had already left the rails and were making their way towards the RDP homes. Nonetheless, to illustrate the point, and bearing in mind the distance of 80 to 100 metres, at which the train was from the point of impact when the minor began running back towards the direction of the train, this paraphrased extract, taken from the cross examination of Mr Molefe, is useful:

Counsel for the plaintiff: ... Am I correct that by the time you pulled the emergency breaks the child was already on your track in front of your train? - **Mr Molefe:** *He was about to enter the track in which train was. When I pulled the emergency break, I could no longer see him.*

Counsel: The reason is he was too close to the train? - **M:** *Yes that is correct.....*

C: There was no reason you could not reduce your speed to less than 50. - **M:** *Well, there is the schedule, we use time. We must travel according to time.*

C: So, you had scheduled time? - **M:** *Yes, we call it running time.*

So, that is the reason you did not reduce speed? - *The rail was clear. There was no one in front of the train. There was no reason.*

¹⁷ According to Teessen, the four people were walking on the other side of the rail that branches off to Witbank.

¹⁸ Three young girls and a small boy walking away from the rail.

¹⁹ By then they had already crossed the two lines, the Witbank and Sentrarand lines.

I will argue that it was a busy Saturday. There was a lot of people crossing there. - *When I sounded the bell, the tracks were cleared.*

There was no reason you could not reduce your speed. It was easy to reduce speed from 80 to 50? - Yes.

It was easy for you to have reduced it lower than 50. - *It was possible but there was no reason, the track was clear.*

Well, at the time you applied your emergency break, it was too late. - *I agree with you but at the time, it all happened very fast. It was an emergency. The way it happened, I never thought the child would end up in front of the locomotive.*

36. The defendant had not pleaded anything about an emergency. It cannot now rely on claims of emergency. It is a fact that trains have a right of way but, reasonable measures must still be put in place to avoid harm²⁰. As it is clear from the extract in paragraph 35, Molefe waited until the very last second before pulling the emergency breaks. At that point, the minor was already on his path. He admitted that by then he could not see the boy because he was too close. Bearing in mind the circumspection one must exercise when seeing small children on the road, as espoused in numerous decisions²¹ of superior courts, there was simply no reason for Mr Molefe to not further reduce his speed from the very first point of observing the teenagers with the minor. The need for Mr Molefe to further reduce speed is compelling considering the urban nature of the area, the sloppy terrain in which the train was travelling and the difficulty of stopping the train in those circumstances, as conceded by Teessen, a former driver. It becomes even more compelling on the defendant's own account during the trial - which differs markedly from the written statements of the witnesses - that the teenagers were busy crossing the rails when the train driver first saw them. Mr Molefe conceded during cross examination that children, unlike adults, act on emotions and sometimes do

²⁰ *Jacobs v Transnet Ltd t/a Metrorail* (803/13) [2014] ZASCA 113 (17 September 2014), paragraph 8.

²¹ *Jones NO v Santam Bpk* 1965 (2) SA 542 (A) at 548 H; *Levy NO v Rondalia Assurance Corporation of SA Ltd* 1971 (2) SA 598 (A) at 599 H -600 C.

unpredictable things. On the account I have just set out, there can be no doubt that a speed restriction had it been applicable at the time would have forced Molefe to further reduce speed. That coupled with the emergency breaking system, applied at the right time, not when the child was already underneath the locomotive, would have avoided the harm. The defendant was negligent in not instituting the reasonable step of a speed restriction. It must also be held liable for Mr Molefe's negligent omissions on that day as illustrated.

E. Causation

37. The test for determining causation is the but-for-test. The Supreme Court of Appeal explains the test in *Za v Smith*:

'What it essentially lays down is the enquiry – in the case of an omission – as to whether, but for the defendant's wrongful and negligent failure to take reasonable steps, the plaintiff's loss would not have ensued. In this regard this court has said on more than one occasion that the application of the 'but-for test' is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the minds of ordinary people work, against the background of everyday-life experiences. In applying this common sense, practical test, a plaintiff therefore has to establish that it is more likely than not that, but for the defendant's wrongful and negligent conduct, his or her harm would not have ensued. The plaintiff is not required to establish this causal link with certainty.'²²

38. On the facts of this case, and the reasoning set out in this judgement, but for the negligent and wrongful omissions of the defendant and that of its driver, the minor would have made it to the other side of the rail and the collision would have been avoided.

Liability of the plaintiff as a joint wrongdoer

²² *Za v Smith* (20134/2014) [2015] ZASCA 75 (27 May 2015), paragraph 30.

39. The defendant pleaded that in the event the court were to find it liable, the plaintiff should be held jointly liable as she wrongfully and negligently breached her duties towards the minor child in the following respects: (i) she failed to keep the minor under proper or adequate supervision; and or (ii) she exposed the minor to the risk of injury from a train by allowing him to be in the vicinity of the railway line without adequate adult supervision with the result that the minor was struck by the train.

40. There is no dispute that the defendant led no evidence whatsoever during the trial to establish that the plaintiff had failed to provide adequate supervision and exposed the minor to the risk of injury in entrusting him with her younger sister who was just two months shy of turning 17 years. Apart from the occasional suggestions, which were all validly disputed by the plaintiff during the trial, the defendant has placed no evidence before this court for the conclusions it seeks to draw. The defendant also sought to rely on the case of *Stedal v Aspeling*²³, but the two cases are completely distinguishable. In that case, the minor, who had arrived in the friend's home in the company of her mother was allowed to go and play in a nearby room by herself while the ladies were busy with their own things. Left completely unattended, the minor found her way outside to the pool and she drowned.

41. The plaintiff invited this court to take judicial notice of the fact that, in many families, minors are left in the care of their older siblings. One cannot conclude negligence or dereliction of duty on the basis that a toddler had been left with a 17 year old sibling. Indeed, it would set a dangerous precedent to hold that parents who leave their children with younger siblings, such as the age of Z[....], are in breach of their legal duty towards the child. The defendant has led no evidence to demonstrate that Z[....] did not have the capacity to look after the minor. What is clear from the evidence led by all the witnesses, including the defendant's is that Z[....] had hand held the minor throughout and when it was safe to release the minor's hand, after they had crossed the rail, she let go. This, after all, is what responsible people do when crossing the road with

²³ *Stedal v Aspeling* 2018 (2) SA 75 (SCA).

a minor. There is no basis to hold the plaintiff liable as a joint wrongdoer and the defendant's case must fail in this regard.

F. Order

42. The plaintiff's claim is upheld.

- (i) The defendant must pay the plaintiff's costs, such costs include the costs of two counsel.
- (ii) The defendant is liable for the plaintiff's proven or agreed damages.

N.N BAM
JUDGE OF THE HIGH COURT, PRETORIA

DATE OF JUDGEMENT:

27 October 2022

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