IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: A341/07

In the matter between:

TRANSNET LIMITED t/a METRORAIL	First Appellant
JOHANNES CHRISTOFFEL HUMAN	Second Appellant
KUFF'S SECURITY SERVICES	Third Appellant

and

MARK HARRINGTON N O	First Respondent
SIYAVUMA NGLALEKA	Second Respondent

FULL BENCH APPEAL JJ	**:**	**VAN ZYL, WAGLAY et NDITA**
JUDGMENT	**:**	**JUDGE D H VAN ZYL**
ON BEHALF OF 1st & 2nd APPELLANTS:	**:**	**ADV. A. de v le GRANGE (SC)**
	:	**ADV. J C MARAIS**
INSTRUCTED BY	**:**	**SMITH TABATA BUCHANAN BOYES - Mr R Lagardien**
ON BEHALF OF RESPONDENTS	**:**	**ADV. G. BUDLENDER**
INSTRUCTED BY INC.	**:**	**MALCOLM LYONS & BRIVIK**
		Mr Tzvi Brivik
DAY(S) IN COURT	**:**	**25 JANUARY 2008**
JUDGMENT DELIVERED	**:**	**20 OCTOBER 2008**

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MARK HARRINGTON N O	First Respondent
SIYAVUMA NGALEKA	Second Respondent

JUDGMENT

VAN ZYL J:

INTRODUCTION

[1] This is an appeal against the judgment of Blignault J in an action for damages arising from a collision, at approximately 22h45 on the night of 3 February 2002, between the respondents, employees of the third appellant, and a train on the railway line between Cape Town and Woodstock. The train was operated by the first appellant but driven by the second appellant. For purposes of convenience I shall refer to the appellants as "Metrorail", "Human" and "Kuffs" respectively, and to the respondents as the plaintiffs or as first and second plaintiffs respectively. The first plaintiff was represented at the trial by a *curator ad litem*, namely Mr M Harrington, an advocate of this court. The parties agreed that the trial court would be called upon to adjudicate only on the issue of negligence and that the question of damages would stand over for later adjudication.

[2] As a result of the collision the plaintiffs suffered serious injuries which were attributed to the negligence of Metrorail and Human. In his judgment Blignault J held that Metrorail had been negligent in failing to warn Kuffs that the train in question was to traverse a section of the railway line where the plaintiffs were on security patrol at a time when no scheduled trains were passing that way. The learned judge likewise held that Human had been negligent in that he had failed to take reasonable steps to avoid the accident. On the other hand he held that the plaintiffs had also been negligent in that they had failed to avoid the collision by keeping a proper lookout. The damages to be recovered by them should therefore, in view of the relative blameworthiness of the parties, be reduced by one third. Inasmuch as Kuffs had contractually indemnified Metrorail against claims by the plaintiffs, such indemnity should take effect.

[3] Blignault J subsequently granted leave to Metrorail, Human and Kuffs to appeal against his findings of negligence on the part of Metrorail and Human. He likewise granted leave to the plaintiffs to lodge a cross-appeal against his finding of contributory negligence on their part and against his order that their recoverable damages should be reduced by one third.

[4] Mr A de V Le Grange SC appeared for Metrorail and Human and Mr J C Marais for Kuffs. Mr G Budlender appeared on behalf of the plaintiffs (respondents). The court expresses its appreciation to them for their respective presentations.

THE PLEADINGS

[5] The claim of the plaintiffs was initially directed against Metrorail and Human as first and third defendants, and against the South African Rail Commuter Corporation Limited as second defendant. No relief was, however, sought against the second

defendant. Kuffs was subsequently joined by Metrorail as a third party on the basis that it was the employer of the plaintiffs who, at the time of the collision, were performing their duties pursuant to an agreement in terms of which Kuffs would provide security services to Metrorail.

[6] According to the amended particulars of claim, in so far as they are relevant to the present proceedings, the collision was caused by the negligence of Metrorail and Human. In this regard it was alleged that, although Metrorail was aware of the fact that scheduled trains ran only until 22h00, it failed to warn the plaintiffs or their employer, Kuffs, of the approach of the train. In addition it was alleged that Human, acting within the course and scope of his duties as an employee of Metrorail, failed, while driving the train, to keep a proper lookout, to apply the brakes of the train adequately or at all and to warn the plaintiffs of the approach of the train by flashing its lights. Furthermore Metrorail had failed to take any, or reasonable, measures to ensure that security personnel, such as the plaintiffs, receive adequate safety training or complete the prescribed in-house test and induction training prior to commencing their duties on the premises.

[7] In their plea Metrorail and Human denied having been negligent as alleged or at all and averred that the negligence of the plaintiffs themselves was in fact the sole cause of the collision. In their third party notice, however, they averred that, in the event that the claim of the plaintiffs should be successful, they would be entitled to indemnification by Kuffs in any amount which a court might order them to pay the plaintiffs.

[8] In its plea to the third party notice, Kuffs denied liability for the damages suffered by the plaintiffs and in any event denied that the collision had been caused by negligence on the part of Metrorail or Human. Alternatively it pleaded that, even should they be held

to have been negligent, their negligence was not the sole cause of the collision. It should in fact be partially attributed to the negligence of the plaintiffs, who had failed to keep a proper lookout and failed to avoid a collision when, by the exercise of reasonable care, they could and should have done so. There should hence be an apportionment of damages in terms of section 1(1)(a) of the *Apportionment of Damages Act* 34 of 1956.

THE EVIDENCE

[9] Three witnesses testified on behalf of the plaintiffs, namely Mr J E Gounder, operations manager of Kuffs at the relevant time, Mr B Bidli, who had likewise been in the employ of Kuffs at such time, and the second plaintiff. The main witnesses on behalf of the defendants were Mr J C Human, the third defendant and driver of the train involved in the collision with the plaintiffs, and Mr B A Carver, a mechanical engineer who gave expert testimony on the safety and braking systems of the said train. Supplementary evidence was given by Mr H van Reenen and Mr G M Apollis, security officers in the employ of Metrorail.

[10] Mr Gounder testified that there was an agreement between Metrorail and Kuffs in terms of which Kuffs would render certain security services to Metrorail. He was responsible for overseeing Kuff's compliance with this agreement. More specifically he was required to supervise the security guards when they were on duty, be it by day or night. Communication with the guards took place by way of two-way radios and their movements were monitored by means of a closed circuit television camera installed in Metrorail's operations room, where a member of Kuffs would be present whenever the guards were on duty. The guards were to patrol the railway line between Cape Town and Woodstock with a view to preventing the theft of signal or overhead cables. No specific

training was required for this patrol, which was to commence after the last scheduled train had passed at approximately 22h00 and be completed before the first scheduled train passed at approximately 04h00 next morning.

[11] According to Mr Gounder his understanding was that Metrorail's area chief, Mr Appollis, was supposed to inform Kuffs of any train making use of the line outside of the scheduled times, so that Kuffs could bring it to the intention of the guards by means of their two-way radios. The guards would carry out their patrol by walking on or alongside the railway tracks, whichever they found most comfortable.

[12] On the night of the collision Mr Gounder received a telephone call informing him that the plaintiffs, who had been on cable patrol, had been knocked over by a train and were seriously injured. When he arrived on the scene they were unconscious and lying on opposite sides of the railway line. The second plaintiff regained consciousness while he was on the scene. They were attired in full security uniform and were wearing reflective orange vests over their clothes. There was a strong south-easterly wind blowing that night but the skies were clear. The plaintiffs had been walking into the wind, which had apparently blocked out the sound of the train when it hit them from behind. Mr Gounder managed to speak to the train driver, Mr Human, who told him that he had been taking the train to the Salt River yard for repairs and had not seen the plaintiffs on the track. According to him there had been nothing he could do to avoid the collision.

[13] In cross-examination by Mr La Grange on behalf of Metrorail, SARCC and Human, Mr Gounder suggested that the plaintiffs had been walking between the rail tracks because it was more comfortable than walking on uneven terrain beside the tracks. He agreed, however, as a general proposition that it was dangerous to walk on a railway

line, be it by day or night. When cross-examined by Mr Marais for Kuffs, Mr Gounder conceded that there was an "understanding" that Metrorail would apprise Kuffs of unscheduled trains making use of the railway line after 22h00. As for the security guards, they received no training from Metrorail except in the use of firearms.

[14] Mr B Bidli testified that he had worked for Kuffs as a security guard and was posted to Metrorail where he underwent basic training in the form of an orientation course. He did not, however, receive any specific cable patrol training before being assigned to do such patrol work. He was likewise never told that he should not walk on the railway tracks. In any event he preferred to walk on the pathway alongside the tracks because it was more comfortable there. From time to time he would cross the tracks, however, when the pathway he was on came to an end. In this regard he pointed out that it was unusual for trains to move on the railway lines after 22h00 at night. In cross-examination, however, he conceded that it was inherently dangerous to cross a railway line or to walk between the tracks without first establishing that it was safe to do so. He was furthermore aware of the fact that unscheduled trains could run after 22h00 and had in fact observed trains running late at night.

[15] The second plaintiff (Mr S Ngaleka) testified that he had commenced working as a security guard for Kuffs during February 2001. He had been in the same group as Mr Bidli and had received the same basic training. This was in the form of orientation and it excluded any cable patrol training. His instructor did not tell him not to walk on the tracks, but he and the other guards in any event walked on the pathways next to the tracks. What he was told was that there were no trains running at night. The only train he had seen at night was the Shosholoza Rail, which made use of the main railway line.

[16] On the Sunday night in question he and the first plaintiff, who was holding the two-way radio ("walkie-talkie"), had gone out on cable patrol in their uniforms and reflective vests which they were required to wear over their clothing. They commenced their patrol from platform 19 at Cape Town station into the strong wind in the direction of Woodstock station. They were walking on the footpaths, apparently constructed from cement sleepers, situated to the right and left respectively of the railway track and protruding slightly above the gravel formation alongside the track. The second plaintiff did not hear the train or its siren, nor did he see its headlight before the train struck each of them a glancing blow, causing them to be propelled forwards on either side of the track. He had believed that there were no moving trains at that time. Had he known, or been given warning, that this was not so, he would not have walked where he did.

[17] In cross-examination the second plaintiff was unable to recall that he and the first plaintiff attempted to jump out of the way of the approaching train moments before it hit them. He likewise did not remember speaking to Mr Gounder. He did, however, remember that, when he crossed the track from one side to the other, he did not look left or right to see whether it was safe to cross. In this regard he had made no prior enquiries as to whether or not there were unscheduled moving trains traversing the railway line at that time. He hence did not expect any trains and did not believe that it was dangerous.

[18] The second appellant (Human) testified that he was employed by Metrorail as a train driver and was in control of the train which collided with the plaintiffs. At that stage he had more than twenty years of experience. According to him it was not unusual for unscheduled trains to run after 22h00 for purposes of shunting them from one platform to another or removing them to the Salt River yard for repairs. At the time of the collision

he was taking the train from platform 3 at Cape Town station to the Salt River repair yard at a speed of less than 60 kph. Before leaving he tested the siren, which is operated by foot, and thereafter the headlight, brakes and accelerator lever, which were operated manually. As he came out of a bend on the line to Woodstock with the headlight of the train on bright, he saw two black figures walking between the tracks. He sounded the siren and, when that did not elicit a reaction, he applied the brake handle fully while continuing to sound the siren. At the same time he released the accelerator and disengaged the so-called "dead man's handle" ("dooiemanseienskap") which would cause the train to stop automatically.

[19] At this stage Human noticed that the men were looking up at the train just before they attempted to jump out of the way, one on either side of the track. Only after he had alighted from the train did he realise that they were security guards and that he had collided with them. They were both in uniform but did not have reflective vests on. He was able to speak to the second plaintiff, who was sitting on the ground with his head between his knees and was apparently not too seriously injured. The first plaintiff could only mumble, however, and was clearly more seriously injured than his companion. According to Human there was nothing more he could have done to avoid the collision.

[20] In cross-examination Human testified that the plaintiffs had been walking next to each other between the tracks when he first saw them. With reference to the relatively limited space between the tracks he conceded, however, that the one might have been walking behind the other. When asked how long after he had sounded the siren he applied the brakes, his answer was that it was a matter of seconds. Immediately thereafter he released the accelerator and disengaged the "dead man's handle."

[21] The next witness on behalf of the defendants was Mr B A Carver, a mechanical engineer who had been in the railway industry for some 36 years, during which time he had done a fair amount of work as an accident investigator and had built up expertise in train braking systems. He testified that a train driver would normally act instinctively in an emergency situation. When required to stop suddenly he would, within a fraction of a second, shut the accelerator down and apply the brake handle fully. In doing so he would effectively cut off the electric power supply to the train's motors. The brakes would take about three seconds to build up sufficient pressure in the brake cylinders after which the train would take a further three seconds to come to a stop. Disengaging the "dead man's handle" would, when used alone, bring the train to a stop, but not as effectively as applying it in concert with the brake handle.

[22] To assist the court Carver attended the inspection *in loco*, after which he prepared a number of sketches and made certain calculations on the basis of measurements taken and observations made by him in the proximity of the scene of the collision. In the main it related to the stopping distance of a train with reference to its speed and the reaction time of the driver. It also concerned the strength of the train headlight and the distance from which persons on the track ahead would become visible to the train driver and from which it could be observed by such persons. In the present case it had to be taken into account that the train would have to negotiate a curve or bend in the track before the light beam would directly illuminate the persons on the track. On the aspect of audibility of the train Carver pointed out that an electric train did not make a noise and in fact ran relatively silently. Furthermore the train's electric siren was not as loud as the air horns previously used on trains but which were discontinued because of the noise factor.

[23] It goes without saying that the various possibilities depicted in the sketches and calculations could not be established with pin-point accuracy inasmuch as Carver was obliged to rely on a number of assumptions and estimates relating to factors such as visibility, audibility and human reaction time. In this way he was able to create a number of alternative scenarios, all of which were, to a greater or lesser extent, feasible. One thing, however, appears to have emerged with relative clarity, namely that a train cannot, like a motor vehicle, be stopped within a very short distance, however pressing the emergency and however competent the driver. The higher the speed of the train at the time the braking system is applied the longer the stopping distance will inevitably be. By the same token, the quicker the driver's reaction in an emergency situation the shorter the stopping distance of the train will be.

[24] Mr H van Reenen, a senior security officer in the employ of Metrorail, testified that he had been on duty on the night in question when he was called upon to visit the scene of the accident. Also on the scene were the second plaintiff and Carver, to whom he pointed out certain locations which he (Carver) measured and recorded. Thereafter Van Reenen completed and signed a form relating to the collision between the train and the plaintiffs. He remembered that the plaintiffs were dressed in blue uniforms but could not recall whether they had reflective vests on. He testified further that it was not exceptional for unscheduled trains to be running after 22h00. This was in fact a regular occurrence.

[25] The last witness for the defendants was Mr G M Apollis, chief security officer of the Metrorail security services. According to him there was no contractual obligation, or any existing practice or policy, requiring Metrorail to inform Kuffs of the movement of unscheduled trains after 22h00. In any event he denied emphatically that Metrorail had

informed Kuffs that there would be no trains in operation after 22h00 so that they could safely deploy their security guards after that hour. There was likewise no contractual requirement that the security guards should wear reflective vests. He was hence not concerned when he arrived at the scene of the accident and noticed that the plaintiffs were not wearing reflective vests.

[26] Kuffs closed its case without adducing any evidence, subject thereto that the evidence of Mr J Stander, a meteorologist, in regard to the weather conditions at the time of the accident, would be admitted in writing. From this it appears that, at such time, the so-called "Deep South-Easter" wind averaged 45 kph, with occasional gusts of up to 72 kph. This would also have been representative of the railway area between Cape Town and Woodstock. The visibility under such conditions would have been good.

[27] In regard to the inspection *in loco* held during the course of the trial, Blignault J set forth the recorded observations in his judgment. This included that it was not "generally uncomfortable" to walk on the sleepers between the tracks as opposed to the discomfort of walking on the slopes adjacent to the rails as one approached the scene of the accident. After the collision the first plaintiff was lying on the left hand side of the track some ten metres from the second plaintiff, who was lying on the right hand side.

THE RELEVANT LEGAL PRINCIPLES

[28] In order to found a delictual claim for damages, the defendant's conduct, in the form of a voluntary act or omission, must be negligent and wrongful and there must be a causative link between such conduct and the harm, in the sense of damage, loss or injury, suffered by the plaintiff. This means that, for liability in delict to be established, the defendant must reasonably foresee that his conduct would cause the plaintiff harm unless

appropriate avoiding action be taken to avoid such consequence. What would be reasonably foreseeable and what would constitute appropriate avoiding action will, of course, depend entirely on the facts and circumstances of the case.

[29] For purposes of delictual liability the conduct must take the form of a positive, voluntary act (*commissio*) or an omission (*omissio*) in the sense of a failure to act or to take precautionary measures with a view to avoiding or preventing harm to another. An omission is regarded somewhat more leniently or benevolently than a commission inasmuch as liability for an omission is generally more restricted than liability arising from a commission. See J C van der Walt and J R Midgley *Principles of Delict* 3rd ed (2005) 65-66 (also in *LAWSA* 2nd ed (2005) 79), cited by J Neethling, J M Potgieter and P J Visser *Law of Delict* 5th ed (2006) 28. On conduct as a requirement for delictual liability see also J Burchell *Principles of Delict* (1993) 6-37.

[30] The classic formulation of negligence (*culpa*) in delict is that of Holmes JA in the case of *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-G:

> For the purposes of liability *culpa* arises if –
> (a) a *diligens paterfamilias* in the position of the defendant –
> (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
> (ii) would take reasonable steps to guard against such occurrence; and
> (b) the defendant failed to take such steps.
> This has been constantly stated by this Court for some 50 years. Requirement (a)(ii) is sometimes overlooked. 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 depend upon the particular circumstances of each case.

[31] In *Ngubane v South African Transport Services* 1991 (1) SA 756 (A) at 776D-777J, Kumleben JA adopted and applied this *dictum* on the basis that the "reasonable steps" envisaged in paragraph (a)(ii) were "not necessarily those which would ensure that foreseeable harm of any kind does not in any circumstances

eventuate". The learned judge relied in this regard on a passage from the first edition of *LAWSA* vol 8 par 43 at 78, where Professor J C van der Walt stated that, once it was established that a reasonable man would have foreseen the possibility of harm, the question arose whether he would have taken measures to prevent the occurrence of the foreseeable harm. This would depend on the circumstances of the case, subject to four basic considerations which might be relevant to the response of a reasonable man to a situation creating a foreseeable risk of harm to others. They are the degree or extent of the risk created by the conduct in question, the gravity of the possible consequences if the risk of harm should materialise, the utility of the conduct and the burden of eliminating the risk of harm.

[32] These considerations have been repeated, with some amendment and elucidation, in Van der Walt and Midgley *Principles of Delict* (3rd ed) 179 (also in *LAWSA* (2nd ed) 213 under the heading "The preventability issue"). In *Pretoria City Council v De Jager* 1997 (2) SA 46 (A) at 55H-56C Scott JA referred to such considerations as constituting a "value judgment". See also *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA) at 213H-214D, where Van Heerden ACJ opined that there was an interaction between the elements of foreseeability and preventability. The decision of a reasonable man to take precautions or not would of necessity be influenced by, amongst other considerations, the degree of probability that a particular consequence would eventuate should precautionary measures not be taken. This did not, however, mean that an improbable risk of harm would render it unforeseeable unless, of course, the risk was far-fetched or fanciful. The *locus classicus* in this regard is *Herschel v Mrupe* 1954 (3) SA 464 (A) at 477 (*per* Schreiner JA):

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.

[33] The question inevitably arises, when the aspect of negligence is considered, who exactly qualifies as a reasonable man. The *bonus et diligens paterfamilias* ("good and diligent father of a family") was, in Roman times, a person who exhibited the utmost care (*exactissima diligentia*) in performing his duties. See *Digesta* 44.7.1.4. This was clearly a fictional person created by law for purposes of establishing a pragmatic and objective norm for acceptable conduct within a community. Such person was not superhuman or endowed with extraordinary talent and ability, nor was he or she an incompetent or undeveloped person lacking in insight. In *Herschel v Mrupe* (*supra*) at 490F Van den Heever JA put it thus:

The concept of the *bonus paterfamilias* is not that of a timorous faintheart always in trepidation lest he or others suffer some injury; on the contrary he ventures out into the world, engages in affairs and takes reasonable chances. He takes reasonable precautions to protect his person and property and expects others to do likewise.

[34] If the person whose conduct is being assessed is endowed with special expertise, experience or skills, one must, of course, make the relevant assessment in terms thereof. Thus a medical specialist or highly qualified engineer would be gauged in accordance with higher demands of reasonableness than an unqualified labourer with limited education and skills. The reasonableness criterion must hence be applied to a person in

the position of the defendant, as clearly stipulated in *Kruger v Coetzee* (*supra*) at 430E. It follows that, in the present case, Human's conduct would have to be assessed in the context of the skill and expertise which may reasonably be expected of a train driver in the circumstances in which he found himself. This means that the driver should be given a reasonable reaction time from the moment he becomes aware of an obstruction or danger in his path and commences taking avoiding action by sounding the train's whistle or siren and applying its brakes. See *Smart and Others v South African Railways and Harbours* 1928 NPD 129 at 147-148; *Masureik and Another (t/a Lotus Corporation) v Welkom Municipality and Another* 1995 (4) SA 745 (O) at 764E-H.

[35] The train driver is, of course, entitled to assume that persons moving on or in the close vicinity of railway lines will not recklessly expose themselves to danger without reasonable regard for their personal safety. Thus, in the present case, the plaintiffs were required to conduct themselves as reasonable security guards carrying out a nocturnal security patrol on or near a railway line. See *Worthington and Others v Central South African Railways* 1905 TH 149 at 151; *Hammerstrand v Pretoria Municipality* 1913 TPD 374 at 377; *Sand and Company Limited v SA Railways & Harbours* 1948 (1) SA 230 (W) at 241; *South African Railways and Harbours v Reed* 1965 (3) SA 439 (A) at 442; *Haine v The South African Railways and Harbours* PH 1966 (2) 107 (N) at 110.

[36] Conduct which is found to be negligent in accordance with the criterion of reasonableness will not give rise to delictual liability unless it is also wrongful. This will be the case if it infringes a legally recognised right of the plaintiff or breaches a legal duty owed by the defendant to the plaintiff. Such infringement or breach is usually determined with reference to the criterion of reasonableness, which is indissolubly linked

with the values of justice, equity, good faith (*bona fides*) and good morals (*boni mores*) (also referred to as "public policy" or "the legal convictions of the community"). See *Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd* 1990 (2) SA 520 (W) at 528-529; *Aucamp v University of Stellenbosch* 2002 (4) SA 544 (C) par [68]; Van der Walt and Midgley *Principles of Delict* 68-74.

[37] The relationship between wrongfulness and negligence, as prerequisites for delictual liability, was recently set forth in *Gouda Boerdery BK v Transnet* 2005 (5) SA 490 (SCA) par [12] at 498G-499E. There Scott JA emphasised that negligent conduct causing harm would not give rise to liability unless it was also wrongful. When the conduct complained of was an omission, the inquiry as to wrongfulness would involve determining the existence or otherwise of a legal duty owed by the defendant to the plaintiff to avoid negligently causing the plaintiff harm. This would be done by applying the criteria of reasonableness, public policy and, where appropriate, constitutional norms. If the issue of negligence should be considered first, it might be convenient to assume the existence of a legal duty. On the other hand if wrongfulness should first be considered, negligence could be assumed. Whatever approach was followed it was important not to overlook the distinction between negligence and wrongfulness.

[38] It follows that negligent conduct in the form of an omission is wrongful if the defendant is under a legal duty to act positively in order to prevent harm being caused to the plaintiff. The measures he adopts to do so must be reasonable and consistent with public policy and the legal convictions of the community. See *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) at 320; *Minister of Safety and Security v Duivenboden* 2002

(6) SA 421 (SCA) par [12]; *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 SCA par [9]-[10] at 395I-396E; Van der Walt and Midgley *Principles of Delict* 84-85.

[39] Once it is established that the defendant's conduct was wrongful and negligent, the question is whether or not such conduct has caused harm to the plaintiff. This is clearly a factual matter which requires a full investigation of all the relevant facts in order to determine the causative link between the conduct and the harm in question. See Van der Walt and Midgley *Principles of Delict* 196-211. It may indeed involve hypothetical considerations, as appears from the following *dictum* of Corbett CJ in *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700E-701A:

> The first [enquiry] 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. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; *aliter*, if it would not so have ensued. 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 non* of the loss does not necessarily result in legal liability.

[40] In evaluating the facts on which the alleged wrongful and negligent conduct is based, one must avoid adopting an *ex post facto* "armchair" approach. A reasonable man is not expected to have the knowledge and insight that a subsequent adjudicator of the facts may have. This is particularly so when he is confronted with an emergency situation and has to make a decision or exercise an option almost immediately. In retrospect a different decision or option might have been justified, but the ordinary man is not

endowed with powers of hindsight. It is the reasonableness of his conduct that must be assessed. See *South African Railways v Symington* 1935 AD 37 at 45 (*per* Wessels CJ):

> Where men have to make up their minds how to act in a second or a fraction of a second, one may think this course the better, whilst another may prefer that. It is undoubtedly the duty of every person to avoid an accident, but if he acts reasonably, even if by a justifiable error of judgment he does not choose the very best course to avoid the accident as events afterwards show, then he is not on that account to be held liable for *culpa*.

This *dictum* was cited with approval in *Road Accident Fund v Grobler* 2007 (6) SA 230 (SCA) par [11] at 234C. See also *Sierborger v South African Railways and Harbours* 1961 (1) SA 498 (A) at 506D-G; *Samson v Winn* 1977 (1) SA 761 (C) at 766D-F; *Rodrigues v SA Mutual and General Insurance Co Ltd* 1981 (2) SA 274 (A) at 280H-281A; *Ntsala and Others v Mutual & Federal Insurance Co Ltd* 1996 (2) SA 184 (T) at 192G-H; Van der Walt and Midgley *Principles of Delict* 188-190.

APPLICATION OF THE LAW TO THE FACTS

[41] The first ground of negligence raised by the plaintiffs in respect of Metrorail was flimsy, to say the least. The suggestion that Metrorail was negligent in not taking reasonable measures to ensure that the plaintiffs receive proper safety training for cable patrol work, or to ensure that they, as employees of Kuffs, completed Metrorail's in-house test and induction training before commencing their duties, confuses the contractual relationship between Metrorail and Kuffs with the negligence issue. In any event, as Blignault J quite correctly found, the original agreement between them did not provide for cable patrol duties and the evidence relating thereto was extremely vague. If there was a tacit or implied term requiring training of security personnel this would have been to the effect that Kuffs was obliged to ensure that its security guards were properly trained to carry out security guard duties. Unless the agreement specifically required

Metrorail to provide the training for cable patrol duties or to oversee training provided by Kuffs, there could, in my view, have been no duty on Metrorail in this regard.

[42] In view of these considerations I am in respectful agreement with the finding of Blignault J that Metrorail had no obligation to ensure that the plaintiffs receive training for cable patrol work or complete Metrorail's in-house training and induction training. There was simply no evidence to this effect. And even if the evidence did demonstrate that Metrorail was obliged to ensure that the plaintiffs receive and complete such training, there was not the slightest indication of the nature and content of such training or to what extent the failure to receive or complete it caused or contributed to the accident. Metrorail might have been aware of the importance of training for an inherently dangerous function, as quite correctly submitted by Mr Budlender for the plaintiffs, and might justifiably have expected Kuffs to do the necessary in this regard. At no stage, however, did it have a duty of care to the plaintiffs in respect of training for cable patrols and no negligence or delictual liability was established in this regard.

[43] The second ground of negligence relied on by the plaintiffs, namely that Metrorail had failed to apprise the plaintiffs or Kuffs that an unscheduled train would be moving on the railway line between Cape Town and Woodstock after 22h00 on the day of the collision, was not much more persuasive than the first. Blignault J accepted it on the basis that Metrorail would have been in possession of precise information relating to the movement of unscheduled trains, whereas Kuffs would have been dependent on Metrorail to convey to it such information so that it could warn security guards of an approaching train. The evidence relating to the frequency of such trains was, however, so vague that it could not be held that all security guards must have been aware thereof. Yet the dangers

created by these trains, the learned judge held, were significant and clearly foreseeable. Warnings could have been issued with little difficulty and at hardly any cost. From this it could be fairly inferred that, had such a warning been issued in the present case, the accident would probably have been avoided. Metrorail was hence negligent in failing to issue a specific warning to Kuffs that a train would be passing through the area where the plaintiffs were performing cable patrol. This negligence, it was held, was causally connected to the accident in which the plaintiffs were injured.

[44] In his argument on behalf of Metrorail and Human, Mr La Grange submitted that this finding was erroneous inasmuch as the plaintiffs were both adults (25 and 26 years old respectively) who had passed matric and were qualified as grade C security officers. It could hence be assumed that they had basic life skills and knowledge, could make informed decisions and would not act recklessly in carrying out their responsibilities as security guards. They could indeed be reasonably expected to discharge their duties with the necessary care and skill. This involved keeping their eyes and ears open in the process of looking out for trespassers and miscreants, while at the same time keeping a proper lookout for any other danger which might befall them. The mere fact that they subjectively believed that there would be no train activity on the line they were patrolling that night did not, Mr La Grange argued, release them from their duty to conduct themselves as might be expected of reasonable security guards under the circumstances.

[45] I must respectfully associate myself with this argument. The subjective belief of the plaintiffs bears no more weight than the "understanding" which Gounder suggested might exist between Metrorail and Kuffs regarding prior warning of unscheduled train movements after 22h00. Significantly, as pointed out by Mr La Grange, Gounder made

no mention of any implementation of this "understanding" nor did he communicate it to any representative of Metrorail. In any event Bidli, Human, Van Reenen and Apollis all testified that the movement of trains after hours and at night was a general occurrence in that the trains had to be serviced or repaired from time to time. This was not placed in dispute by the plaintiffs, who apparently relied on their being unaware of the possibility that trains might run after hours as a justification for their failure to keep any kind of lookout for such trains while they were engaged in an inherently dangerous exercise.

[46] The second plaintiff relied also on the hearsay of a colleague, one Mkhaba (who did not testify), that trains did not run at night. For this reason he regarded it as unnecessary to look around and take stock of his surroundings before crossing or walking along a railway track during his cable patrol. In the process he could conceivably have failed to observe the headlight of the train or to hear its siren as it approached. It was probably Human's application of the braking system, when he realised that the plaintiffs were not reacting to the siren, which caused the plaintiffs to look up momentarily and to attempt jumping out of the way at the last moment. The question must inevitably arise whether this was the conduct of reasonable security guards under the circumstances.

[47] In view of these considerations I am respectfully inclined to the view submitted by Mr La Grange that the trial court adopted an armchair approach in finding that Metrorail had negligently failed to issue a warning to Kuffs regarding the impending movement of the train which subsequently collided with the plaintiffs. This approach appears to rely strongly on hindsight and on knowledge and insights retrospectively acquired. It also appears to ignore the fact that Kuffs indeed had access to Metrorail's control room and hence to the unscheduled movement of trains after hours.

[48] It must hence be concluded, with great respect, that the court *a quo* erred in holding that Metrorail had a legal duty to warn Kuffs of the unscheduled movement of the train in question and negligently failed or omitted to issue such warning. But even if there had been such a legal duty and Metrorail's failure to act constituted a negligent omission, the plaintiffs failed, in my respectful view, to prove that such omission was wrongful in the sense set forth above. Furthermore, even should the plaintiffs have succeeded in proving a wrongful and negligent omission, there was no evidence that it would in fact have caused the accident. That being the case, no delictual liability for the injuries suffered by the plaintiffs could adhere to Metrorail.

[49] I turn now to the finding that Human, the driver of the train, was negligent in that he should have applied the train's brakes immediately without first sounding the siren. Blignault J held that Human had wasted valuable time – at least three seconds – by doing so. On the assumption that he was travelling at 40 kph at that stage, he could have brought the train to a stop some four metres before the point of collision. If a reaction time of one second were brought into the equation, however, the train would have stopped some seven metres beyond the point of collision. Should the speed of the train have been reduced to 14 kph directly before the collision, the plaintiffs would have had an additional second within which they could have moved about a metre, thus enabling them to avoid the accident.

[50] Blignault J accepted that Human had found himself in a situation which called for an immediate response and that, as an experienced train driver, he would have been constantly on the lookout for an emergency such as the present, namely a pedestrian on the railway line. He had no reason to be less attentive because the train was unscheduled.

Furthermore he was not confronted by various alternative courses of action that required to be weighed up against one another. The immediate braking option did not create any additional risk.

[51] In this regard the learned judge considered a further scenario, which he regarded as feasible and reasonable and in accordance with a preponderance of probabilities. It was based on the evidence of the plaintiffs and Carver and involved a train speed of 37,5 kph (translated into 10,42 metres per second) coupled with a "human reaction time" of four seconds, of which three seconds represented "wasted reaction time". This would give a stopping distance of 91,22 metres, being one metre short of where the train collided with the first plaintiff. On the assumption that the plaintiffs had not heard the siren which, as Human knew, did not make "much noise" and was unlikely to have given a proper warning of the train's approach, Human's sounding of the siren was "a time wasting and futile exercise". The situation called for "an immediate braking action". By failing to do so Human acted negligently and his negligence was causally related to the collision with both plaintiffs.

[52] In his argument on behalf of Human Mr La Grange submitted that the curve in the railway track just prior to where the collision took place made it impossible for Human to see the plaintiffs before he was approximately 84 metres away. His first reaction, namely to sound the siren as a warning, was what one would expect of a reasonable train driver under the circumstances. This is in fact a primary duty of a train driver when approaching a railway crossing, and failure to do so would constitute negligence. See *Smart and Others v South African Railways & Harbours* 1928 NPD 129 at 133 and 149; *Mancho v*

South African Railways & Harbours 1928 AD 89 at 109; *Dyer v South African Railways* 1933 AD 10 at 19; *Walker v Rhodesia Railways Ltd* 1937 SR 62 at 73.

[53] Even if the sound of the siren had been drowned out, wholly or partially, by the strong wind, it was inexplicable, Mr La Grange argued, that the plaintiffs could not have been aware of the train's headlight, which was set on bright and was bearing down upon them in a relatively unlit area. This constituted a clear warning in its own right. See *Smart and Others v South African Railways & Harbours* 1928 NPD 129 at 133; *Matcheke v South African Railways and Public Utility Corporation Ltd* 1948 (1) SA 295 (T) at 307; *South African Railways and Harbours v Orford* 1963 (1) SA 672 (A) at 677; *Haffejee v South African Railways and Harbours* 1981 (3) SA 1062 (W) at 1069.

[54] Assuming that the plaintiffs were unable to hear the siren because of the wind factor and were unaware of the train's headlight until it was almost upon them, and assuming that they justifiably believed that no trains moved on the railway tracks at night, it may well be that they did not act negligently by failing to keep a proper lookout. In assessing whether or not Human acted negligently, however, the presence or absence of possible contributory negligence on the part of the plaintiffs bears little relevance. His conduct must be gauged with reference to the facts and circumstances relating specifically to him directly prior to and at the time of the collision. It is his driving skill, or lack thereof, which requires assessment in the context of the conduct of a reasonable train driver in his position.

[55] When it is borne in mind that Human saw the plaintiffs for the first time at a distance of some 84 metres as the train rounded the curve in the track, it is clear that he had very little time – in fact only a few moments – to assess the situation. Because it was

dark and the area was not well lit, he was probably unable to see whether the plaintiffs were stationary or moving and, if the latter, whether they were moving in his direction or away from him. His instinctive reaction was to sound the siren. At that stage he had no reason to believe that they would not hear the siren or see the strong light emanating from the train's headlight. He could not have been aware of the effect that the wind might have on the audibility of the siren or the visibility of the light. Within moments, however, he realised that they were not responding to this warning. His experience, training and instincts then led him to release the accelerator immediately and to apply the brake system with full force in a desperate attempt to avoid a collision. At that time he might have realised that a collision was inevitable, but it was still his fixed intention to bring the train to a stop within the shortest possible time.

[56] When these facts and circumstances are considered with reference to the legal principles set forth above, it must, in my view, be concluded that Human's conduct was eminently reasonable. At no stage did such conduct deviate from what might have been expected of a reasonable train driver confronted by what was clearly an emergency situation. It may be, with the benefit of hindsight, that he might have brought the train to a stop earlier and within a shorter distance had he applied the brakes immediately on seeing the "black figures" on the track ahead of him. I agree with Mr La Grange, however, that the failure to sound the siren as a warning under these circumstances would more readily lead to an inference of negligence than otherwise.

[57] Even if Human had sounded the siren and commenced braking simultaneously, there was no guarantee that he would have been able to bring the train to a stop before the first point of collision. The various scenarios sketched by Carver and considered by the

trial court were, in my respectful view, unhelpful, being based, as they were, on any number of assumptions. Human's unchallenged evidence was that he was travelling at a speed lower than 60 kph. It may well be that his speed was reduced as he rounded the bend in the track and it certainly was rapidly reduced once he commenced applying the brakes. There was no evidence, however, that the train was moving at any particular speed below 60 kph before the brakes were applied. It was hence not possible to determine, with any degree of accuracy, whether or not the train could have been brought to a stop before the first point of impact.

[58] It was never suggested, in the pleadings or at any stage in the proceedings, that Human had been driving the train at an unreasonably high speed directly before the collision. The only grounds of negligence specifically alleged against him in the amended particulars of claim were that he had failed to keep a proper lookout, had failed to apply the brakes of the train "timeously, adequately or at all" and had failed to warn the plaintiffs of the approach of the train "by flashing the lights of the train". The failure to flash the train's lights was never raised during the course of Human's evidence while the failure to keep a proper lookout appears to have fallen by the wayside. Eventually the plaintiffs had to stand and fall by their allegation that Human had failed to apply the brakes of the train in time or adequately. As pointed out above, they were quite unable to substantiate such allegation. The plaintiffs have, therefore, failed to prove any negligence on the part of Human.

[59] Even if some degree of negligence on the part of Human had been proved, the plaintiffs failed to prove that he had acted wrongfully in accordance with the legal principles set forth above. They likewise failed to prove any causal link between

Human's conduct and the harm caused to the plaintiffs. No delictual liability could hence be attributed to Human.

[60] In view of these findings it is unnecessary to consider the issue of contributory negligence or the cross-appeal.

CONCLUSION

[61] It follows that the appeal must succeed and the cross-appeal must be dismissed. In the event I would make the following order:

1. The appeal is upheld with costs, including the costs of the application for leave to appeal.
2. The cross-appeal is dismissed with costs, including the costs of the application for leave to cross-appeal.
3. The orders of the court *a quo* are set aside and replaced by the following: "The claims of the plaintiffs are dismissed with costs".
4. The respondents are ordered, jointly and severally, to pay such costs, the one paying the other to be absolved

D H VAN ZYL

Judge of the High Court

I agree.

B WAGLAY

Judge of the High Court

I agree.

T NDITA

Judge of the High Court