

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO.: 10026/2009

In the matter between

BONGANI SETI

Plaintiff

versus

SOUTH AFRICAN RAIL COMMUTER CORPORATION LIMITED Respondent

JUDGMENT DELIVERED ON 8 AUGUST 2013

SAMELA, J

Introduction

- [1] On the 25 February 2009 at approximately 06h50 the Plaintiff, Mr Bongani Seti, was injured when he fell while attempting to board a South African Rail Commuter Corporation train, which had left Khayelitsha station with the doors of the carriage open. As a result of the accident, the Plaintiff suffered certain injuries namely; deep laceration to right hip, fracture of left and right hip and spinal cord injury.
- [2] At the commencement of the trial the parties agreed that only the Defendant's liability be dealt with and the question of the Plaintiff's quantum claim be dealt with later. I made a ruling in terms of Rule 33(4) that merits and quantum be separated and that this court deal with the issue of whether or not the Defendant is delictually liable to compensate the Plaintiff for whatever damages he may prove to have

suffered as a result of the accident. An inspection in loco was also conducted at Khayelitsha station.

[3] The Defendant denied liability and raised the following defences: (a) Volenti non fit injuria; (b) Disclaimer and alternatively (c) contributory negligence.

[4] The Plaintiff's amended particulars of claim alleges the following at paragraphs 4,5,6,7 and 8:

para 4: "The number of the train and the driver of the train is unknown to the Plaintiff.

para 5: At all times material hereto, the aforesaid train was owned and/or operated by the Defendant. The aforesaid incident in which Plaintiff was injured was caused solely by the negligence of the driver of the train who at all times material hereto was a servant of the Defendant who was acting within the course and scope of his employment as such, the driver having been negligent . . ." [in a number of respects].

para 6: "Alternatively, the aforesaid incident was caused solely by the negligence of the guard and/or conductor and/or controllers of the train whose identities are to the Plaintiff unknown, who at all times material hereto were acting within the course and scope of their employment with the Defendant, they having been negligent . . ." [in a number of respects].

para 7: "Alternatively, the aforesaid incident was caused solely by the negligence of the Defendant and/or their employees of the Defendant who were at all times material hereto were acting

within the course and scope of their employment with the Defendant, such person (s), having been negligent” . . . [in number of respects]

para 8: “In the further alternative to paragraphs 5, 6 & 7 hereinabove, at the time of the incident.

8.1 In terms of Sections 15 and 23(1) of SATS (“the Act) it was a function of Defendants to provide transport within, to and from the Republic in the public interest.

8.2 Defendants, acting through its employees thereto appointed, in fact maintained and operated a rail commuter service as prescribed.

8.3 Defendants were under a legal duty to Plaintiff to take such steps as were reasonably necessary to ensure his safety while travelling on one of its trains.

8.4 The aforesaid legal duty arose:

8.4.1 from the statutory provisions cited in paragraph 8.1

above;

8.4.2 alternatively, and in any event, from the legal convictions of society, based upon one or more or all of the following considerations:

(i) the defendants were established in the public interest, for the very purpose of providing a rail

commuter service, which in turn had to ensure the same travelling of its commuters;

- (ii) the defendants were maintained and operated by public money;
- (iii) the vast majority of passengers are compelled to make use of trains because they cannot afford other transport;
- (iv) the defendants commanded the resources, manpower, and/or security with which to prevent any danger to its commuters; and/or
- (v) the defendants were expected to operate carriages which were safe for the purpose of conveying passengers, which in turn demanded that:

- (a) the doors to carriages were at all times closed while the carriage was in motion;
- (b) the doors to carriages could not be opened by passengers while the carriages were in motion;
- (c) a train should not be allowed to leave a station while the doors to carriages are still open”.

Facts

- [5] Mr Seti testified that he was born in Port Elizabeth in 1983. At school, he failed grade 12. In 2005 he came to Cape Town and resided with his sister in Town 2, Khayelitsha. Between 2006 and end January 2009 he was doing odd jobs, until his friend Tsepo got him a job as a labourer with Cassiem at the beginning of February 2009. He was paid an amount of R90.00 per day. To get to the station it used to take him about 20 minutes' walk, and from Bonteheuwel station to Cassiem's place, it was about 40 minutes' walk.
- [6] Mr Seti used to buy a daily train ticket as he did not have enough money to buy a weekly ticket. He never looked at what was written on his train ticket. On the day of the incident, he used his sister's monthly ticket as she was not working that day. On that fateful day his working colleagues came to his house as they used to walk together to the station. As he was still making his food, he told them that he would join them later. He put his food and working clothes into his bag and ran to the station. At the station he ran down the stairs to platform 1. At the platform, he ran to the back of the train where his co-workers usually boarded. He saw Teboho who was at the open door way. The train started moving with its doors open. He gave his bag to Teboho and tried to grab the rail on the Cape Town side to board the train. He was not sure whether he had managed to grab it.
- [7] As the train was not moving fast he thought he would be able to jump into the train. Since he worked for Cassiem he had been using the train. The reason for boarding the train was that he did not want to be late for work as Cassiem would not employ him. He testified that he had never jumped into a train before. The next thing he remembered was a security guard standing above him asking his name and also if he had a ticket. He had never seen the disclaimer board at the station nor had he read his ticket, but confirmed seeing the sign written inside the train.

[8] Under cross-examination the Plaintiff denied that:

- (a) he saw signs like the disclaimer board to the left and right of the ticket windows at the Khayelitsha station;
- (b) he knew that when riding in a train there were certain rules that were applicable;
- (c) he was not allowed to smoke nor to get into the train if it was moving;
- (d) that he knew when riding in a train there were certain things which he was not allowed to do;
- (e) he knew the reason for not keeping the train doors open while the train was in motion;
- (f) he ever saw the train guard blowing the whistle, even on the day of the incident, he never heard the guard blowing his whistle;
- (g) he knew that boarding a train with its doors open was lawful or unlawful;
- (h) he knew that jumping between the coaches of moving trains was dangerous;
- (i) he knew that there was another train that would leave within few minutes after the train he attempted to board.

He conceded having seen some signs inside the railway coach. He testified that he had seen people jumping into the moving trains with open doors and also between the coaches and never thought that it was safe. He did not know that he could be badly injured if he failed to succeed in jumping into a moving train with its doors open.

- [9] Mr Teboho Tsalau was a co-worker with the Plaintiff. He was the one who got a job for the Plaintiff with his employer Cassiem. At the time of the incident he was working as a tiler. Other Plaintiff's co-workers were Tsepo, Loza, Songezo and Mvenya. He confirmed that the Plaintiff worked as a labourer. The practise was that they all would take the morning train and alight at Bonteheuwel station, where Cassiem would either pick them up or they would walk for 30 to 40 minutes to Cassiem's premises. On the day of the incident, Cassiem was to pick them at the station. They would get into the second or third train coach from the back.
- [10] On the day of the incident, the train was full. He stood at the door as the Plaintiff ran down the stairs. When the Plaintiff was on the platform the train started moving. At that stage the doors were open. He confirmed that the Plaintiff gave him his bag, turned and ran with the train towards Cape Town. He attempted to board the train by holding on to a rail on the Cape Town side of the doorway. The Plaintiff failed and fell. He attempted to grab the Plaintiff but did not succeed. He testified that the Plaintiff was running next to the train in a "jogging" fashion. He did not see the Plaintiff falling as he looked away. The train stopped near the next station, and they came back to where the Plaintiff fell. He had jumped into moving trains before the incident and conceded that it was a dangerous practice. He had been travelling by train then over five years. Under cross-examination he confirmed his evidence in chief.
- [11] Mr Songezo Mvenya was born in 1986. In 1996 his family left Willowvale and relocated to Cape Town. He resides in Khayelitsha at Town 2. He confirmed that he was working for Cassiem at the time of the incident. He also confirmed that the Plaintiff was his co-worker. He confirmed further that the Plaintiff came running down the steps. He testified that the train started to move when the Plaintiff was 4 to 5 metres away from the door, and the train left with doors open when the Plaintiff gave Teboho his bag, and turned to run alongside the train. He

testified that the Plaintiff fell when he tried to board the train. He confirmed that the train was not running fast and estimated the speed as jogging. He testified that he thought that the Plaintiff could make it. He told the court that he had jumped into moving trains before the incident. He denied that there was a pole in the middle of the door. He told the court that he did not hear the guard's whistle before the train started moving. He pointed out that after the Plaintiff fell the train doors remained open.

Under cross-examination, he confirmed his evidence in chief. He told the court that on the day of the incident the train was not full. He testified that he had never seen the disclaimer board, all what he saw at the ticket office were warning signs that commuters should not carry weapons. That was the Plaintiff's case.

[12] Mr Johan Ferreira is employed by Metrorail as a driver. He has been in the employment of the Defendant for more than 34 years, 31 years as a driver. On the day of the incident, he arrived with his train on platform 2 at Khayelitsha station. On his arrival at the Khayelitsha station, the train on platform 1 was already there. Khayelitsha station was then the end station. He had to leave his cabin, walk to the other side of the station, as the train had to leave for Cape Town in a return trip in about 10 minutes time.

[13] As he walked to the other side of his train, he heard the guard blowing his whistle on platform 1. Shortly thereafter there was a second whistle blown. The doors of the train closed, and the train started moving. He saw the Plaintiff running down stairs very fast onto platform 1. As the Plaintiff ran fast past him, he turned and looked to see where he was running to. He noticed that there was a carriage door which was held open by two school children. He assumed that they were school children because they were clothed in white and grey pants. The train was picking up the speed and the mistake the Plaintiff made was to jump into the train from the opposite direction in which it was travelling.

The train at that time was travelling at about 20 km/h. The Plaintiff jumped and managed to grab the middle pole. He missed his footing and slipped between the train and platform. The Plaintiff was pulled in the opposite direction by the people inside the train, he was dragged between train and the platform. Two people in the train managed to pull the Plaintiff up and threw him out onto the platform near the bridge. The Plaintiff landed up between his legs. He had informed the Plaintiff that he was lucky to be alive.

Under cross-examination he confirmed his evidence in chief. Mr Ferreira pointed out that Metrorail employees in terms of working rules must at all times consider the safety of the public. He testified that according to the rules, a train must not leave the station before the doors are closed. He testified that in Khayelitsha lane, he used to see people getting in and out while the trains were moving. He confirmed that it was the guard's responsibility to ensure that the train does not leave the station with its doors open. In *casu*, he confirmed that the train left with its door open.

- [14] Mr Christian Edson was a station supervisor at the time of the incident working for the Defendant. He had more than 25 years experience working for the Defendant. His duties were inter alia, overseeing the operations on the station including rostering staff working at the gates, managing the cleaners, security, safety on the station, overseeing application customer service, that posters were up, announcements were made regularly and looking at the income of the company. He testified that at the time of the incident both disclaimer boards were up. He also told the court that there were more boards now than before. He confirmed that in the trains there were various safety signs put up and in places where commuters would see them. He mentioned that there were no platform marshals at Khayelitsha station except Bonteheuwel station. Under cross-examination, he confirmed his evidence in chief. He testified that he did not know what was written at the back of the train ticket because he never look at the back of it.

Issues to be decided.

[15] Firstly, the court is to decide whether the Plaintiff was negligent in attempting to board a moving train with its doors open; Secondly, whether the Defendant was negligent in allowing the train to depart the station with its doors open; Thirdly, to decide whether Defendant's defences of volent non fit injuria and disclaimer are to be regarded as complete justification; Fourthly, whether there is contributory negligence between the Plaintiff and the Defendant.

Applicable Law.

[16] The following legal principles and cases are relevant and applicable in this matter and are mentioned here below.

Section 1 of the Constitution (Act 108 of 1996) provides:

"The Republic of South Africa is one sovereign democratic state founded on the following values:

(c) Supremacy of the constitution and the rule of law".

Section 8 of the Constitution provide:

(1) "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state".

Section 12 of the Constitution provides:

(2) "Everyone has the right to bodily and psychological integrity, which includes the right –

(b) to security in and control over their body;"

Section 41 of the Constitution provides:

(1)“ All spheres of government and all organs of state within each sphere must –

(c) provide effective, transparent, accountable and coherent government for the Republic as a whole”. (see also section 195 1(f) of the Constitution.

Section 239 of the Constitution provides:

“In the Constitution, unless the context indicates otherwise –

“organ of state” means

(b) any other functionary or institution –

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution, or

(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer”.

[17] The well-known test for negligence was formulated by Holmes JA in **Kruger v Coetzee** 1966 (2) SA 428 (A) at 430 D-F as follows:

“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”.

[18] Boberg “The Law of Defamation” Volume 1, Juta 1984 at page 274” clearly summarised the test of reasonableness in a very simple and understandable manner when he provided:

“A person is negligent if he did not act as a reasonable man (diligens paterfamilias) would have done in the same circumstances.

Negligence is a question of fact, and must be proved by the party alleging it.

To aid in determining whether a person has been negligent, the court generally divides the inquiry into the following stages: (a) would a reasonable man in the position of the defendant have foreseen harm; (b) would he have taken steps to guard against it; (c) what were those steps; and (d) did the defendant take them?---In this sense negligence depends on the foresight of a reasonable man: but it does not depend only on what he would have foreseen; it also depends on what he would have done about it--- our courts sometimes formulate the inquiry as to negligence in terms of a duty of care. The questions then posed are: (a) did the defendant owe the Plaintiff a duty of care; (b) what was the content of the duty; and (c) did the defendant discharge it? In as much as a duty of care arises when a reasonable man in the position of the defendant would have foreseen harm and taken steps to guard against it.”

- [19] Metrorail as the provider of a transportation service to the public bears an obligation to ensure that reasonable measures are taken to provide for the safety and security of rail commuters on the rail commuter service they provide (***Rail Commuters Action Group v Transnet t/a Metrorail 2005*** (1) SA 301 (CC). It has now become well-established that a commuter train departing from a station with open coach door consist an open invitation to commuters to board an already moving train, was approved in *Transnet Ltd t/a Metro Rail v Tshabalala* (2006) 2 ALL SA 583 (SCA) para 9 where it was held:

“A reasonable man in the position of the defendant would not have allowed the train to operate with the doors of the coaches open as he would have foreseen that to leave the doors of the railway coaches open would constitute an invitation to prospective passengers to board the train while moving and that it would be dangerous for them to do so”.

[20] The Supreme Court of Appeal in ***Transnet Ltd v Witter*** (517/2007) [2008] ZASCA 95 (517/2007) (16 September 2008) it was again held that a train leaving with open doors constitutes negligence. In both these cases the open doors were as a result of the malfunctioning thereof. *In casu* as I have pointed out, malfunctioning does not arise, I however do not think that the difference is of any significance: it remains the duty of Metrorail to ensure that the train does not depart from the station with open doors. That brings to the fore the question whether Metrorail could and should have taken reasonable steps to guard such possibility.

[21] In the *Transnet v Witter*-case *supra* the essential issue the Court dealt with was whether Metrorail had taken all reasonable steps to guard against the possibility that the train would depart with doors open (*ie* the third requirement in the test for negligence enunciated in ***Kruger v Coetzee*** 1966 (2) SA 428 (A) at 430E-G). In confirming the finding of the Court *a quo* against Metrorail Cloete JA writing for the Court, held that the duties of the train guard were such that he should have ensured that the train doors were closed before he gave the signal to the driver of the train to proceed, which he had failed to do. The duties of train guards are set out in para 12001.2 of the General Operating Instructions of Metrorail and read as follows:

12001.2 Operation of sliding doors on arrival at and before starting from stations or other stopping places.

12001.2.1 Immediately after stopping at a station or halt where the train is required to stop for commuters, the metro guard must release the sliding doors on the platform side so that they can be opened manually.

12001.2.2 When the train is ready to depart the metro guard has announced it orally, he must blow the whistle as warning that the

sliding doors are going to be closed. Thereafter he must press the “Door-CLOSING” button and give the right-away bell signal to the train driver.

12001.2.3 While performing their duties, metro guards must observe whether or not sliding doors are closing properly. If any sliding doors are not operating correctly the instructions in subclause 12001.4 must be complied with. They must also warn commuters against the undesirable practice of keeping sliding doors open when the train is about to depart or en route.

[22] Apportionment of Damages Act 34 of 1956

The relevant portion of s 1 of the Apportionment of Damages Act provides:

‘(1) (a) Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.

(b) Damage shall for the purpose of paragraph (a) be regarded as having been caused by a person’s fault notwithstanding the fact that another person had an opportunity of avoiding the consequences thereof and negligently failed to do so’.

[23] Volenti non fit injuria (Consent and assumption of risk) (see Boberg at 724 supra and Lawsa Vol 8 Part 1, Lexis Nexis Butterworths 2005 par 96)

Volent non fit injuria (A willing person who consents to the defendant’s act, in the form of either a specific harmful act or an activity involving a risk or harm, cannot be wronged). *Volent non fit injuria*, whether in the

form of consent or voluntary assumption of risk, is a complete ground of justification. The requirements for establishing consent or voluntary assumption of risk as a ground for justification are the following:

- (a) The plaintiff must have had knowledge of the harm or risk involved in the defendant's conduct, as well as the nature and full extent thereof. This is also referred to as "informed consent".
- (b) Knowledge of the harm or risk involved is not sufficient. The Plaintiff must also have *appreciated* the nature and extent of the harm and the risk involved.
- (c) Knowledge and appreciation will not suffice. The maxim is not *scienti non fit iniuria* but *volenti not fit inuria*. The plaintiff must also have consented to the infliction of the harm or assumed the risk implicit in the defendant's conduct. Consent and assumption of risk imply that the plaintiff intended his or her rights to be limited, for the purpose of infliction of the specific harm or exposure to the hazardous conduct of the defendant. The plaintiff must therefore not only have consented to or assumed the physical harm and risk involved, but also the legal risk of injury.
- (d) The defendant's conduct must have fallen within the limits of the consent. Should the conduct violate the terms of the consent, the defence falls away.
- (e) The consent must extend to all the consequences which may arise out of the conduct. However, it is possible to give conditional consent, for example, that a manuscript be shown to someone for approval prior to publication.
- (f) The consent must have been *freely* given and the risk *voluntarily* assumed. Whether consent has been freely given, and a risk voluntarily assumed, depends entirely on the particular circumstances of the case and, in particular, on the moral, economic pressures restricting the plaintiff's freedom of choice.
- (g) Consent or voluntary assumption or risk is, of course, a defence only in respect of injuries and harm caused by the materialisation of a risk which was subjectively foreseen,

appreciated and assumed by the plaintiff. If one exposes oneself to dangerous or negligent conduct, one does not necessarily assume all the risks attached to it. In ***Vorster v SANTAM Insurance Co Ltd*** Marais J observed: “The *volens* may relate to specific, separable parts of the risk or danger and not to others.” He continued: “If it were proved that the plaintiff was fully *volens* in respect of one of these factors of danger but the cause of the injury arose from an element not covered by the *volens*, the defence or *volenti non fit iniuria* would not succeed, in other words the required legal consent must have been directed to that particular danger factor which in the even caused the damage; if not, the *volens* defence fails.”

- (h) The requirements for the defence of *volenti non fit iniuria* are not restricted to the subjective requisites of knowledge, appreciation and consent or assumption of risk. One's freedom of will and capacity to regulate unilaterally the extent of one's rights are not absolute.
- (i) Consent or assumption of risk is a unilateral legal act whereby a plaintiff waives or restricts his or her rights in respect of certain harmful conduct by the defendant. In order to constitute a legal act, the will and intention of the consenting party must be manifested by external conduct.
- (j) Consent or assumption of a risk is a legal act. The execution of a legal act requires in principle that the actor must have the legal capacity to perform a juristic act.
- (k) Because consent is a unilateral act, one may revoke it at any reasonable time. See ***Santam v Vorster*** 1973 (4) SA 764 (A).

[24] Metrorail General Operating Instructions

Sub paragraph 12017.12.1 (deals with Metrorail guard's duties on arrival at and before departing from stations or other stopping places) provides:

“Immediately after stopping at a station or halt where the train is required to stop for commuters the Metro guard must release the sliding doors on the platform side so that it can be opened by commuters.”

Sub paragraph 12017.12.2 provides:

“Metro guard must position him/herself in such a manner to observe the ins and detraining of commuters”.

Sub paragraph 12017.12.4 provides:

“Prior to the departure of the train the Metro guard must

- Observe commuters entraining/detraining
- Blow the whistle
- Close the train doors
- Where platform marshals are deployed the metro guard must obtain the “train may depart” hand signal from the platform marshal nearest to him/her before giving the “right away” bell signal to the train driver
- Give the train driver a once bell code “right away” signal.

Sub paragraph 12017.12.6 provides:

“After transmitting the “right away” signal the Metro guard must observe the train until the last vehicle is clear of the platform and transmit a “stop” signal to the train driver should the necessity arise”.

[25] ***Rail Commuters Action Group and Others v Transnet Limited*** t/a Metrorail and Others 2005 (2) SA 359 CC especially para 82, 83, 84 and 88.

[26] ***Transnet Limited trading as Metrorail and Another v Witter*** 2008 (6) SA 549 (SCA) at 555 D-G.

- [27] ***Transnet Limited t/a Metrorail v Lazarus Tshabalala*** [2006] 2 ALL SA 583 (SCA) para 9.
- [28] ***Sonwabo Mafa v South African Rail Commuter Corporation*** – unreported judgment of the Louw J (Western Cape High Court) delivered on the 17 September 2012.

Analysis of the evidence.

- [29] Mr Dane on behalf of the Plaintiff submitted that the Defendant failed to establish that the Plaintiff voluntarily assumed the risk of injury and that in attempting to board the train with its doors open, did so with “knowledge, appreciation and consent”. He pointed out that on the facts the open door was an invitation to the Plaintiff to board the train. He submitted further having regard to the shortness of time between the departure of the train and the Plaintiff’s endeavour to board the carriage, there was insufficient time for the Plaintiff to have appreciated the risk and consented thereto.
- [30] Mr Potgieter SC on behalf of the Defendant submitted that it may be taken as axiomatic that an adult person (in *casu*, the Plaintiff) who had been to high school and who had used trains before, should know that it is extremely dangerous to attempt to jump into a moving train. He submitted further that such person would most certainly have appreciated that should such endeavour fail he might be seriously hurt or even be killed. He pointed out that the Plaintiff’s argument that he had insufficient time to appreciate the risk and consent thereto is not borne out by the evidence.
- [31] It is trite that a train that leaves a station with its doors or door in one of the coaches open amounts to negligence on the part of the Defendant. Also attempting to board a moving train while its doors are open as the Plaintiff had conceded amount to negligence. I agree with Mr Dave

that a train leaving the station with its doors open undoubtedly constituted an invitation to the Plaintiff to attempt to board it.

- [32] It is common cause that the door of the train was held open by some passengers on the train. According to Mr Ferreira (the Defendant's witness), some school children held the doors open. I have no doubt in my mind that Metrorail as the provider of public transport has a duty to provide reasonable measures to ensure the safety and security of all the train users.
- [33] It is regrettable in this case that neither the guard nor the security personnel on duty on the day of the incident were not called to give evidence. Nonetheless, the general operating and instructions of the Defendant which tabulate the guard's duties are specific (see sub para 12017.12.4 at page 17 above) that the guard must ensure that the doors of the train are closed before the departure. Similarly the platform marshal's functions clearly states inter alia "the duty to ensure that the train doors are closed before departure". In this case we do not know what the guard did before the train departed because there is a duty on the guard's part to ensure that the door was closed before the train departed.
- [34] The Defendant mechanism of ensuring that all doors are closed before the train departs left much to be desired in Khayelitsha station as there were no platform marshals. There is no evidence before the court what reasonable safety measures the guard did before allowing the train to depart the station. Surely in this case as one of the reasonable safety measures the guard could have leaned out of the right side at the end of the back of the train and could have seen the door of the second or third coach which was open and could have signalled to the train driver to stop. Where there are no platform marshals the guard's duties should be that the guard must ensure that all doors are closed, before the guard signals to the train driver to depart. As I stated earlier this was not the case here. Looking at the evidence

wholistically, I am of the view that the guard failed to observe that all doors were closed before he signalled to the driver that it was safe for the train to depart. It goes without saying that had the guard kept a proper lookout before the train departed, he would have observed that the second or third coach door was open and would have taken reasonable steps to guard against the harm/injury that followed.

[35] The Plaintiff had knowledge but not an appreciation of the danger ahead. According to his evidence, the train was travelling at a jogging pace and he was confident that he could make it (that is, would be able to board). He did not foresee the injury to himself. It would be incorrect to say that the Plaintiff consented to be injured by the train. I disagree with Mr Potgieter SC's submissions that the defence of *volenti non fit injuria* is a complete defence to the Plaintiff's claim. I agree with Mr Dane that the evaluation of knowledge, appreciation and risk occurred when the train started to depart. However, I disagree with Mr Dane that common law regarding consent should be developed as I am of the view that there are no compelling reasons or grounds to do so.

[36] The next issue is the disclaimer defence.

[37] Mr Potgieter SC submitted the following regarding the disclaimer in paragraph 39 of his heads:

"39.1 The disclaimer notice (Exh1) was positioned next to the entrance to the platform, where the Plaintiff would have passed every time he used a train at Khayelitsha station. The notices would have been visible to the Plaintiff.

39.2 As testified by Edson, at the time of the incident a similar disclaimer board was also positioned next to the ticket offices at Khayelitsha station. No gainsaying evidence was in any event led by the Plaintiff.

39.3 The Plaintiff, although Xhosa-speaking, would have been able to read and understand the disclaimer notices aforesaid. In fact, his first witness, Tsalau, readily testified that he had in fact seen and read both of those notices.

39.4 The language use on the disclaimer board is clear, straightforward and unambiguous: Just above the actual disclaimer, it reads “*Stay clear of all doors whilst the train is in motion*”. The actual disclaimer can also not be more concise and easy to understand, reading “*Metrorail will not be held responsible for injuries sustained*”.

He submitted further that the “Plaintiff argues, firstly, that the *contra proferens* rule should be applied insofar as the wording is not express enough. In this regard, it is respectfully submitted that the wording is as clear as can be. The specific action warned against staying clear of doors whilst the train is in motion. To expect of the Defendant in these circumstances to spell out more exactly what is being warned against would be superfluous and in fact amount to an absurdity. Every person reasonable intelligence would know and understand that the warning means that it is dangerous to place yourself in the vicinity of the doors of the train whilst it is in motion, whether the commuter is on the train or approaching the train”.

[38] Mr Dane countered Mr Potgieter SC’s argument by pointing out that it was not correct that Exhibit 1 was positioned where Plaintiff would have passed every time he used the train at Khayelitsha station. This was wrong. At the inspection *in loco* it was manifestly clear that where the one board was to the right of the entrance to the stalls, people approaching from the eastern side of Khayelitsha would never see that board as they would not walk past it. He submitted that as to the Defendant’s submission in paragraph 39.2 (see par 37 above) that no gainsaying evidence was led in relation to Mr Edson’s testimony that a similar board was also positioned next to the ticket office, this was

simply not correct. It was clear under cross-examination of the witness that even if such a board had been positioned ‘there’, there were four ticket windows and if a commuter bought a ticket at one window, she or he might not have seen the so – called disclaimer board. In any event, Mr Edson could not say with any clarity, precisely, where this board had been positioned.

[39] The Plaintiff testified that he did not read nor see the disclaimer boards. I am of the view that at 6:50am on working days, is usually during the peak hour rush and the station would be full of people who are rushing to work, it is possible that the Plaintiff might not have seen the disclaimer board. We must remember that the Plaintiff according to him had been using trains for only 3 weeks then. Whilst I agree with Mr Potgieter SC’s submission that the language used on the board is clear and unambiguous. Equally the disclaimer board in my view is not referring to circumstances where the Defendant (in this case) did not take reasonable measures to safe guard its commuters, that is, ensuring that the doors of the train are closed before it departs the station. In my view, the disclaimer defence comes only into operation in circumstances where the Defendant has done everything right. In this matter it is common cause that the train left the station with its doors open. Therefore, the Defendant as I indicated above failed to take reasonable steps to ensure that the doors of the train were closed, and therefore the Defendant’s defence fails the test as the Defendant was also at fault.

[40] The next issue is whether factual causation has been established in this matter.

[41] Mr Potgieter SC submitted that the Defendant accepted that factual causation has been established on the basis of the “but for” test: “but for” the fact that the train left the station with open doors, the Plaintiff

would not have been injured. However, he submitted that legal causation has not been established for the following reasons:

41.1 Defendant's negligence consist in effect in its failure to guard against the consequences of what can only be described as the deliberate unlawful and reprehensible conduct of passengers on the train;

41.2 Plaintiff acted recklessly in attempting to board the moving train;

41.3 There was no evidence that the guard would have or should have known or seen the doors were being held open;

41.4 Plaintiff's attempt to board constituted a *novus actus intervenies*, breaking the causal chain between Defendant's negligence and the Plaintiff's loss;

41.5 There was no behaviour of the Defendant directly linked to the injuries suffered by the Plaintiff;

41.6 The actual harm suffered by Plaintiff was, in the circumstances, not a reasonable foreseeable consequence of Defendant's negligence;

41.7 Most right-minded people would regard the imposition of liability in a case like the instant one as unacceptable.

[42] Mr Dane countered Mr Potgieter argument by submitting that there is no merit in Defendant's contention. He supported his arguments by quoting the decision in ***Transnet Limited t/a Metrorail v Tshabalala*** (referred to above). He pointed out that the Defendant was at all material times fully aware of the problem of people endeavouring to board trains when the doors were open and the incident occurred at the second or third coach from where the guard was standing. On all

probabilities this was clearly visible to the guard. It was not as if the incident happened in front of the train where he was unlikely to have seen whether the doors were open or closed before he gave the right of way whistle. The guard was deliberately not called to give evidence because the inference is overwhelming that he failed in his duty. He submitted further that the type of act was clearly foreseeable to Metrorail and that is why procedures were put in place for marshals to assist guards to see whether the doors were closed on a train before departing, Metrorail failed dismally in its duty to commuters in regard to their safety.

[43] I agree with Mr Dane. It is common cause that the train left the station with the doors open. It is regrettable that the guard on duty that day was not called. The Defendant owed it to the public or its commuters that reasonable steps are to be taken to provide a safe and secure rail for all its passengers. In *casu*, it is clear that at Khayelitsha station there were no platform marshals and the guard as I indicated above was duty bound in accordance with the general operating rules of the Defendant to ensure or make certain the train doors were closed before its departure. The Defendant could have taken reasonable steps to guard against the possibility of the train departing with its doors open as discussed above. It follows that the Defendant by allowing the train to leave the station with its doors open, constituted negligence as this was an invitation to commuters to board the train. The Defendant should have taken reasonable steps to guard against such possibility. The evidence clearly show that the Defendant failed to do so. I am of the view that the Defendants failure to take reasonable measures to see that the doors were closed, is sufficiently linked to the Plaintiff's loss for legal liability to ensue.

[44] The next issue is whether or not the Plaintiff was reckless in boarding a moving train.

- [45] Mr Potgieter SC submitted that the Plaintiff recklessly attempted to board a moving train that was picking up speed, while passengers were deliberately and unlawfully preventing the doors from closing. He pointed out that the Plaintiff further attempted to do so in a particularly dangerous way: by running in the opposite direction to which the train was moving, to a coach at the back, and then trying to jump in. He submitted that against this “the negligence of Metrorail consists in effect in its failure to guard against the consequences of what can only be described as the deliberate unlawful and reprehensible conduct of passengers on the train” in keeping the door open.
- [46] Mr Dane submitted that the Defendant is liable to compensate the Plaintiff for his proven damages. He submitted that the apportionment to be applied should be two thirds in favour of the Plaintiff because the Defendant was substantially more at fault.
- [47] It is undisputed that the Plaintiff as well as the Defendant were negligent and an apportionment of degrees of negligence ought to be determined and made. Though each case is determined according to its own merits, comparative assessments of contributory negligence from other negligence train cases would be beneficial.
- [48] The Plaintiff and his two witnesses were reliable and credible witnesses. There were minor differences in their testimonies which were not material, for example, Mr Tsalau testified that on the day of the accident the train was full, whereas Mr Mvenya told the court that the train was not full.
- [49] Equally, Mr Ferreira and Mr Edson were also reliable and credible witnesses. Mr Ferreira pointed out that on the day of the accident he did witness the train leaving with its door open. He had seen people getting in and out of the moving trains in his experience as a train driver in the Khayelitsha lane.

Findings

[50] Consequently, I make the following findings:

50.1 the Plaintiff as a reasonable person in the position of a prospective passenger would have foreseen the danger of boarding a moving train. He was sober and was of the opinion that the train was running at the jogging speed and he could make it. He should have refrained from attempting to board it;

50.2 the Defendant is aware of the decisions of the Supreme Court of Appeal that state amongst others that a train may not depart a station with its doors open because that would constitute negligence;

50.3 a train that moves with its door/s open (as it happened in the present matter) constitute an invitation to prospective passengers to attempt to board it;

50.4 the Defendant's platform marshals system which operates only in one selective station (Bonteheuwel) in the Cape Town - Khayelitsha is inadequate;

50.5 the Defendant (according to Mr Ferreira's evidence) was aware that commuters board and alight the moving trains when the doors are open, has made no attempts at all to employ more platform marshals to assist the train guards on the Cape Town - Khayelitsha line since 2009 up to the hearing of this matter;

50.6 Defendant's defences of volenti non fit injuria and disclaimer cannot in this matter be regarded as complete justification and therefore must fail;

50.7 it is common cause that Defendant's own witness (Mr Ferreira) agreed with the Plaintiff's contention that it is the guard's responsibility to ensure that the train does not leave the station with its doors open. In this matter he confirmed that the train left the station with the doors in one coach open. As a result, I find that the train guard was negligent in his duties for not ensuring that the train left Khayelitsha station with all its doors closed;

50.8 Consequently a reasonable person in the position of the Defendant would not at all have allowed the train to move with the doors of the second or third train coach open as the Defendant would have foreseen that to leave a door of the railway coach open, constitute an invitation on the part of the Plaintiff to board it while moving and would be dangerous for him to do so.

Order

[51] In the result, the following order is made:

51.1 The Plaintiff is entitled to recover from the Defendant 50% (fifty per cent) of his proven damages; and

51.2 The Defendant is ordered to pay the costs incurred by the Plaintiff, such costs to include the costs of two (2) counsel.

SAMELA J

