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

CASE NO: 25598/2016

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

8 September 2017

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In the matter between:

L. E. Y.

Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Defendant

JUDGMENT

STRYDOM AJ:

Background

- [1] On 30 April 2016 Plaintiff and two of his friends, S. L. M. ('S.') and T. were travelling on train 0411 from Oberholzer to Johannesburg which was operated by the Defendant. At Midway, T. got off the train and the train departed without out him. Plaintiff and S. travelled to the next station, Tshiawelo, where the Plaintiff whilst alighting from the moving train fell, went under the train and was dragged by the train for a distance. He sustained serious injuries *inter alia* an amputated left lower leg.
- [2] It is common cause between the parties that the incident happened on 30 April 2016 at the Tshiawelo station at 7:50. The Plaintiff was travelling from Oberholzer to Johannesburg on train 0411. It was further agreed that when the Plaintiff alighted from the train it was in motion and the doors of the coach in which the Plaintiff was travelling were open. The Defendant did not concede that the open doors contributed to the damages that the Plaintiff suffered. It was however in dispute as to what caused the coach doors to be open. It was further agreed that the train driver and Metro security guard were at the time of the incident in the employ of the Defendant and acted within the cause and scope of their employment with the Defendant on that day.
- [3] The issues to be decided as set out in the Defendant's plea are the defence of *volenti non fit iniuria* or also called voluntary assumption of risk, alternatively that the Plaintiff was the sole cause of the incident due to his negligence, further alternatively that the negligent conduct of the Plaintiff contributed to his injuries and damages. The Defendant in line with the authorities accepted it has the onus to proof its special defence of *volenti non fit iniuria*.
- [4] At the beginning of the trial the Plaintiff applied for a separation of the issues of liability from that of quantum. This application was supported by the Defendant and as the balance of convenience supported such a separation I granted it. The trial therefore proceeded on the issues of liability only.

Volenti non fit iniuria

[5] The defence of *volenti non fit iniuria* is an absolute defence and ‘*the rule that no injury is committed against one who consents is as old as digest, 47.10.1.5...¹*. It cancels out fault and is not a ground of justification.² In the matter of Vorster supra the *volenti non fit iniuria* defence was discussed in detail. This defence has arisen on various occasions in matters where PRASA is the Defendant as in this case or MetroRail. In all the matters that I had regard to this defence was linked to instances where commuters alighted or disembarked from a moving train through open train doors.

[6] The essential elements that the Defendant must prove are expressed in the well-known *dictum* of Innes CJ in Waring and Gillow Ltd v Sherborne³:

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

[7] The prejudiced person should be intellectually mature enough to appreciate the effect of his actions. The test to establish *volenti* is a subjective one.⁴ I am of the view that where a defendant embarks on a superficial enquiry into what the plaintiff’s knowledge was, his appreciation of the risk/s and to what he consented to that it would not satisfy the requirements of *volenti*.

[8] The Plaintiff at the time of the incident was 17 years old and a learner. He was accompanied by his two friends and from the statement of S. it is apparent that he was 19 years old at that time. The age of T. is not known but is not that relevant as he was not with them from Midway to

¹ SANTAM INSURANCE CO LTD v VORSTER 1973(4) SA 764 (A)

² Neethling Law of Delict 7th Edition. Page 177

³ 1904 TS 340 at 344

⁴ SANTAM INSURANCE supra at 778, 781

Tshiawelo Station. Plaintiff could be described as a teenager and S. as a young adult. They were inexperienced commuters and from a smallish town, Carltonville.

- [9] During cross examination Plaintiff indicated that he studies tourism at school and that he knew and appreciated the danger of standing in an open door of the train and understood that he may fall out. He further indicated that he appreciated that it was very dangerous to jump out of a moving train. The Plaintiff testified that the doors of the coach did not work and were on each occasion closed and opened by the passengers. The reason for closing it was that they would get cold and therefore closed it. This is in my view a clear indication of how ignorant the Plaintiff was as to safety issues on the train. The reason I would have expected of a person that is aware of the dangers associated with open train doors is ... that due to the overcrowded train and the severe shaking of the train when pulling off, the passengers could fall out.
- [10] The enquiry into the subjective knowledge, appreciation and consent of the dangers of jumping from a moving train was not taken further by the Defendant. The Defendant has the *onus* to show that the Plaintiff had sufficient knowledge and appreciation of the inherent dangers of jumping from a moving train and that this appreciation goes so far as to include the extent of the harm that may befall him should he jump from a moving train.
- [11] The enquiry by the Defendant was not sufficient and I am not convinced that Plaintiff had a sufficient appreciation of the dangers and extend of the injuries that may befall him. I am not convinced that I can draw an inference from the Plaintiff's conduct that he had consented to the harm that befell him. The plea of *volenti non fit injuria* thus stand to be rejected.

Sole cause of the incident

- [12] It is common cause that the doors of the coach in which the Plaintiff was travelling were open at the time when the train pulled off from Tshiawelo Station. The issue around open train doors and the resulting negligence of the Defendant were dealt with in a series of matters which culminated in the ConCourt judgment of Mashongwa v Prasa⁵.

⁵ [2016] JOL 34753 (CC)

[13] The ConCourt stated the following:

It must be emphasised that harm was reasonably foreseeable and PRASA had an actionable legal duty to keep the doors closed while the train was in motion. Not only has it expressly imposed this duty on itself, its importance was also alluded to in Metrorail.

[14] The fact that the Defendant was negligent does not mean that this negligence contributed to the injuries and resulting damages suffered by the Plaintiff. Is there thus a causal link between the Defendant's failure to close the coach doors and the injuries sustained by the Plaintiff? In this instance on the version of the Defendant's witness, Mentoer, the coach doors were slow to close and only once the train picked up speed the doors were completely closed. The evidence of Mr Diphoko, the train driver, is that the train picks up speed once it's out of the station. Thus, the coach doors would have been completely closed only when the train was out of the station. It was testified by Mentoer, that the Plaintiff and S. were keeping the doors open. It was the duty of the person sitting at the back of the train – I am informed that it is the Metro guard - to make sure that the doors of all coaches were closed before the train depart from the station. If the Plaintiff and S. were keeping the doors open then it was his/her duty to make sure that they do not do that.

[15] This on the Defendant's version did not take place as the Plaintiff was able to get exit the coach whilst the train was in motion. Had the Metro guard done his/her work the Plaintiff would not have been able to exit the coach when the train pulled off. I thus find that the Defendant was negligent and that this negligence contributed to the Plaintiff's damages. The plea that the Plaintiff was the sole cause of the incident is thus dismissed.

Contributory negligence of the Plaintiff

[16] The only issue remaining is to establish whether the Plaintiff has contributed to the damages he suffered and if, to what degree. There are two mutually destructive versions before me. On the version of the Plaintiff, the Defendant was solely to be blamed for the injuries he sustained, whilst on the Defendant's version the Plaintiff contributed to his injuries and his claim for damages stands to be reduced in terms of the Apportionment of Damages Act, Act 34 of 1956.

- [17] In the matter of Stellenbosch Farmers' Winery Group Ltd⁶ the principles were set out where there are two irreconcilable versions.

The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.

The evidence

- [18] The Plaintiff and S. testified. The Plaintiff from the start set the scene that the train had problems and had to return and this caused the train to be late. Due to the train being late it only allowed the passengers a short time to get on and off as it was trying to make up time and it was driving fast. The train doors did not automatically close and had to be closed by the passengers. He further indicated that the train was over crowded as some of the passengers had to stand. They were under the impression that train 0411 was an 'all change' train at Midway Station and they had to disembark at Midway. At Midway, they became unsure whether it was indeed an 'all change' at Midway. Tshepo out of his own jumped up and went to ask at the platform from the security or hawkers about the 'all change'.
- [19] Tshepo was unable to get back onto the train and was left behind. He and S. decided to get off at Tshiawelo Station and wait for Tshepo at Tshiawelo Station. He didn't phone Tshepo as he feared he may be robbed of his cellphone but would phone Tshepo once they disembarked at Tshiawelo Station. At Tshiawelo Station the passengers getting in and getting out were jostling to as to try and get off or on. He and S. stood aside at the door waiting for the rush of commuters to disembark and embark.
- [20] When he got the opportunity to disembark he placed his right foot on the platform with his weight on this leg. The train was higher than the platform and he stepped onto the platform with his right foot; as he started to lift his left foot the train started to pull off. He then lost his balance due to a violent shaking of the train and fell face forward on the platform and was dragged under the train.

⁶ Stellenbosch Farmers' Winery Group Ltd aa v Martell et cie & others 2003(1) SA 11 SCA at par 5.

- [21] The train would make a noise indicating that it is going to pull off, then about 2 seconds from the noise it would start to shake and simultaneously pull off. It took him about 2 seconds to disembark.
- [22] S.'s evidence was broadly along the line of the evidence of the Plaintiff, except for the following. He did not mention that the train returned to the Oberholzer Station but did mention the train was late. He further indicated that the Plaintiff phoned Tshepo whilst being on the train but could not follow the conversation due to the music being played in the coach. They both could not really say why they did not disembark at Midway.
- [23] S. further testified that he did speak to an investigator – which appeared to be Mr Liederman – who took a statement from him. He was upset at the time and didn't want to give a statement. Liederman was aggressive and accused him and the Plaintiff of jumping off the train. He confirmed that the signature was his but denied that it was read to him or that he read the statement or that he took the oath. He further confirmed that Liederman did introduce himself properly but he can't remember the full name of the investigator.
- [24] The only aspect that he does not agree with in the statement is the part where he would have said that he and the Plaintiff decided to jump off the moving train. That concluded the case for the Plaintiff.
- [25] The Defendant called Mr Liederman, the investigator for PRASA, Mr Mentoer, an off-duty security guard whose employer was contracted to do security services for PRASA and Mr Diphoko, the train driver.
- [26] Mr Liederman, is employed at the Investigation Unit of the Defendant and stationed at Krugersdorp. On the day of the incident he attended the scene in his capacity as an investigator. S. was pointed out to him as a witness. He interviewed a security officer first. It must be mentioned that he didn't indicate which security officer – I assume it to be the Metro guard.
- [27] He introduced himself to S. and removed him to the security officers' office. S. was upset in the beginning but as he started to talk to S. he calmed down. He asked S. what happened and S. told him what happened. He then wrote out a statement for S. on what S. told him, read it to him and took the oath and asked him to sign the statement.
- [28] The only aspect that S. disputed in his statement relates to the fact that he and the Plaintiff decided to jump from the moving train. He denied that he was aggressive towards S., that he did

not read the statement to him and that he did not administer the oath. He indicated that the information in the statement came from S.. They conversed in English.

- [29] Mr Mentoer is an off-duty security officer. He uses this specific route to get to work and home. He was doing night shift and boarded train 0411 at Suurbekom. He indicated that this train does not go to Johannesburg station on Saturdays and Sundays but stop at New Canada where another train must be boarded for Johannesburg.
- [30] The train was not late and there was nothing out of the ordinary about the train until the incident with the Plaintiff. The coach that he boarded was no 3 and the coach doors closed and opened automatically. The doors however closed slowly and are only fully closed once the train is at speed. Every time before the train pulls off there is a whistle that signals the departure. The train did not shake when it pulled off.
- [31] He noticed the Plaintiff and two friends in the coach and his impression was that this must be their first train ride. They all got off at Midway and as the train pulled off the Plaintiff and one of the friends jumped on. The third one got left behind at Midway. He could see that they were panicky and did not know what to do. He could hear the discussion between the two of them as he was sitting diagonally opposite them. He denied that music was played in the coach.
- [32] At Tshiawelo Station they got off and stood just outside the door of the coach, they got back onto the train and as the train pulled off the Plaintiff jumped off the train and landed under the train. Once the train came to a standstill he put his reflector clothes on and went to where the Plaintiff was lying on the train tracks. He could see that the Plaintiff sustained serious injuries.
- [33] Mr Diphoko testified that he was the train driver of train 0411 on that train. The train was not late and there was nothing wrong with the train and specifically denied that there were problems with the cables. He indicated that he looks at the signals similar to intersection robots which will show when he may go. He is not responsible for checking the passengers which it appears is the duty of the person at the back of the train to check that and neither is he responsible for the closing of the coach doors.
- [34] He will pull off only when he hears the bell, which signals to him that he may pull off right away. At Tshiawelo Station he stopped and when he heard the bell he pulled off. He indicated that the train pulled off slowly and will gradually increase the speed. He however received the stop signal and brought the train to a stop.

[35] He testified that the train is not like a car and cannot stop immediately. In cross examination, he denied that the train was shaking and indicated that there was no reason for the train to shake. He further testified that when pulling off, the train would pull off slowly and a person jogging next to it will be able to keep up with the train but not once it has left the station and has accelerated. He stated that he puts the train in motion by pressing a lever forward and that the lever has notches which is followed automatically. He denied that he increased the speed to quickly due to the notches as the lever will then follow the notches automatically.

[36] That concluded the case for the Defendant.

Assesment of Evidence

[37] The Plaintiff carries the onus to proof his case. I shall deal with is the credibility of the various witnesses that testified on the factual evidence, their veracity and then the probabilities on the evidence.

[38] The Plaintiff's case is that he lost his balance in the process of disembarking the train, fell on the platform and was pulled under the train. The events according to the Plaintiff, leading up to this fateful event unfolded as follows:

- 38.1 the train had a cable problem which caused it to turn back. This in turn caused the train to be late. The train being late is confirmed by S.;
- 38.2 the train was speeding to make up time and did not allow enough time for the passengers to get on and off at the different stations;
- 38.3 the train was overcrowded as it was month-end;
- 38.4 the above facts lead to Tshepo been left behind at Midway Station;
- 38.5 upon arrival at Tshiawelo Station there was a jostling of passengers getting on and off the train to such an extent that despite him sitting near the doors he had to wait for the passengers to get off and on;

38.6 due to the abovementioned facts there was not enough time for the Plaintiff and S. to disembark and they only got an opportunity to do so when the train was in the process of pulling off.

[39] It was already conceded, rightly so, during argument by Mr Shepstone that the train was on time. Once this concession was made the whole chain of events as set out above come under scrutiny. Certain peripheral issues of dispute which may have seemed to be of lesser importance now start to have a greater influence on the assessment.

[40] The Plaintiff was adamant that the train had cable problems and even explained how they made enquiries from the workers working next to the line. This statement is patently untrue in the light of the evidence of Mentoer, Diphoko and the concession of Mr Shepstone.

[41] The effect of the train being on time leads to certain inevitable conclusions:

41.1 There was no need to speed between the stations;

41.2 At each individual station the passengers had sufficient time to board or disembark; and

41.3 the whistle/bell warned of the departure of the train.

[42] The reasons for being in the door of the coach and disembarking at that crucial time comes under scrutiny and the question should then be asked what was the Plaintiff doing in the door of the coach at that crucial time?

[43] Mentoer correctly assessed the Plaintiff and S. as inexperienced train commuters. The Plaintiff and S. had very little knowledge of the trains' movements. This contrasts with the seasoned commuter, Mentoer who could relate the movements of the train including the number of passengers on that train during and at the end of the month, unfailingly.

[44] He has a clear memory that the train was not late as his employer would have send a car to pick him up. He used this route on a weekly basis over a period of years and indicated that this is not a busy train and every passenger on that day had a seat. He indicated that even at month-end the train is not busy.

[45] Mentoer indicated that the coach doors closed automatically albeit slowly. The evidence of Plaintiff and S. was that the passengers had to close and open the doors. The reason why the passengers closed the doors, was that they get cold and therefore closed it. This is not only an

indication of how ignorant the Plaintiff was as to safety on the train but also show his inexperience as to commuting on trains.

[46] The Plaintiff and S. both gave the impression that they were calm, collected and had decided to just wait at Tshiawelo Station for Tshepo. In this they contradicted each other on whether there was a call to Tshepo. I find the fact that S. didn't know what the discussion was between Tshepo and the Plaintiff as highly unlikely. The explanation given why only Tshepo got off at Midway is wholly unsatisfactory. I further also find it improbable that they could not find any passenger on the overcrowded coach to tell them that the train was not an 'all turn' train at Midway. This is especially so when half of the passengers remained behind.

[46] The version that the train on a Saturday morning – even if it was month end – was so overcrowded that the jostling passengers did not allow Plaintiff an opportunity to disembark is improbable. This is more so once the version of Plaintiff as discussed above are found to be improbable. The version of the Plaintiff and S. stands to be rejected. The explanation by Mentoer of the conduct of the Plaintiff and S. is more probable and provides an explanation for the almost erratic behaviour of Plaintiff. Mentoer's description of their conduct shows they were panicking and did not know how to be reunited with Tshepo. They did not know what to do or how to handle the situation which is very probable having regard that they were teenagers/young adults coming from a smallish town and being inexperienced commuters. The jumping out of the train at the last minute shows the uncertainty of Plaintiff and S. of what they wanted to do.

[47] I accept the version of Mentoer as what has happened on that fateful day. In the light of this finding I shall shortly deal with the statement made by S.. It is clear that S. was biased towards the Plaintiff's case and in certain respects blatantly embellished his evidence to fit the version of the Plaintiff. I find that S. was compelled to deny paragraph 4 of the statement as it did not fit the Plaintiff's version. His denial of providing Leiderman with this information is rejected. I find that Leiderman correctly recorded the statement of S. and administered the oath after reading it out to S. and placed no pressure on S. to make the statement.

[48] What remains now is to determine to what extent the conduct of the Plaintiff deviated from the reasonable man. Once I rejected the Plaintiff's version the facts before me are that the Plaintiff and S. stood in the doors of the coach thus preventing them from closing and that Plaintiff then jumped from the moving train.

[49] In the result, the following Order is made:

[49.1] The issues of liability are separated from the issues of quantum;

[49.2] The issues of quantum are postponed *sine die*;

[49.3] The Plaintiff is entitled to recover from the Defendant 40% of his proven damages;

[49.4] The Defendant is to pay the costs.

I STRYDOM
ACTING JUDGE OF THE HIGH COURT

Date of Hearing: 28 – 31 August 2017

Judgment Delivered: 8 September 2017

Counsel for the Plaintiff: Adv R Shepstone

Instructed by: Dudula Inc

Counsel for the Defendant: Adv A Maier- Frawley

Instructed by: Cliffe Dekker Hofmeyr Inc