

IN THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1)	REPORTABLE: NO						
(2)	OF INTEREST TO OTHER JUDGES: NO						
(3)	REVISED.						
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CASE NO: 37477/2011

THABO LEONARD NKOSI

PLAINTIFF

and

PASSENGER RAILWAY OF SOUTH AFRICA

DEFENDANT

JUDGMENT

KHUMALO J

[1] The Plaintiff, Thabo Leonard Nkosi ("Nkosi"), a double amputee, instituted an action against the defendant, the Passenger Rail Agency of South Africa (PRASA) for damages that arose from injuries he sustained when he allegedly fell from a PRASA train at a platform in Skraamsdam near Kliprivier, Johannesburg that resulted in him losing both his limbs.

[2] The parties have agreed to the separation of merits from the quantum. The matter consequently proceeded only with the aspect of merits that of quantum postponed for later adjudication.

[3] Nkosi summarily in his particulars of claim avers that when the accident occurred on or about 29 January 2011, at 5H10 he was a passenger in the Prasa train which was at the time travelling between Kliprivier and Skraamsdam Train Stations. He was in possession of a valid train ticket that allowed him to travel between Vereeniging and Germiston and

return. **The other passengers pushed him out of the open doors of the moving train which led to his fall.** He sustained multiple injuries from the fall, that included the severance of his left leg and the fracture of his right leg. He was treated at Chris Hani Baragwanath and Ntshongweni Hospitals where his fractured right leg was amputated.

[4] Nkosi accordingly alleges the sole cause of the accident to have been the negligence of PRASA and its employees whom he says, inter alia, failed to take any or any reasonable precautions to ensure the safety of commuters in general and the Plaintiff in particular, more particularly having failed:

[4.1] to maintain adequate crowd control in and around the station, train and coach;

[4.2] to ensure that the station, train and coach did not become overcrowded;

[4.3] ensure that the doors of the coach remained closed while the train was in motion;

[4.4] ensure that commuters in general and the Plaintiff in particular did not fall from the moving train. .

[4.5] to prevent the incident from occurring when, by the exercise of reasonable care, they could have done so.

[5] He in the alternative pleaded that 1st and 2nd Defendant owed him a duty of care to ensure that:

[5.1] the condition and state of the train and/or the coach and /or the infra structure, stations, land and property supporting the operation of the train and/or the coach did not pose any danger to him;

[5.2] reasonable precautions were taken to ensure his safety and; more particularly, to ensure that;

[5.2.1] adequate crowd controls was maintained in and around the station, train and coach;

[5.2.2] the doors of the coach remained closed while the train was in motion;

[5.2.3] the incident did not occur.

[6] Nkosi is therefore claiming an amount of R8 400.000.00 for the damages he alleges to have suffered which includes, loss of earnings, past and future medical expenses and general damages.

[7] PRASA in its Plea denies the allegations of negligence as alleged by Nkosi, denying any knowledge of the accident or liability to his damages.

[8] In his further particulars that he furnished on request from PRASA, he stated that he was travelling alone and **was indeed pushed from behind whilst standing inside the train near the door whereupon he fell on his front stomach.** He was airlifted to Baragwanath

Hospital in the presence of the **security personnel** at the accident scene. The doors of the train were open when he boarded the train and remained constantly open whilst the train was in motion.

[9] This is a delictual action. According to the minutes of the parties pre-trial conference held not long before the trial, the parties had agreed that Nkosi bears the onus of proof, satisfying the court on all the material elements and the duty to begin. In this particular case, it is the first delictual element that is material to a determination of the dispute: viz. the *actus reus*, or the commission or omission of the particular act on the part of PRASA employees that Nkosi avers was wrongful, negligent and caused him harm.

EVIDENCE LED

[10] Nkosi, who was the only witness to his case, during the trial however testified to a slightly different story. He said on that day he boarded the train at about 5h05 in the morning at the railway station at Skraamsdam Train Station, Kliprivier. The train was crowded, he therefore took a position inside the train, standing and holding onto one of the straps that was hanging down from the roof of the train. The train doors had remained open since the time that he boarded the train and when the train was in motion. **As the train started moving, it swayed from one rail to the other. Whilst swaying and swerving, he fell out of the train on to the ground.** He fell forward and landed out on his stomach. His legs were trapped under the rails of the train. He stayed on the ground laid on his stomach. The train rode over his legs severing his left leg. He tried to move the right one and realised that it was fractured.

[11] There were no personnel or security at the station taking any measures on crowd control. He remained there alone for a long time as the place is not frequented by people. After some time he saw paramedics arriving at about 7h00. They attended to him. There must have been security personnel there because the paramedics called them to come and assist in lifting him from the place where he landed. He thereafter heard one of the paramedics saying that he was seriously injured and must be lifted so maybe they should call the helicopter emergency services. He was airlifted from there to Baragwanath Hospital.

[12] **He denied that he was crossing the railway line during the accident. He said he had a ticket but the paramedics took his clothes off so he does not know what happened to it or his clothes.** The train was packed/full when it left the station. **It was normally full at that time and the doors always open.** There were no measures to control the crowd. There are trains that they call right train. When they arrive on the platform the doors will be closed, such a train cannot be opened from outside. After such a train has stopped completely the doors will open. He said the train is not safe but one just boards it to reach one's destination.

[13] Under cross examination his testimony was that he stays in Daleside in Midvaal, Kliprivier, near the station. He had boarded the train at Skraamsdam train station at 4h55 in the morning, **coming back from work. He boarded the train from Skraamsdram.** He was employed at Blockhouse in Daleside. Skraamsdam is the name of the station in Daleside. He was asked if the area where he works and lives are close by the station why he would use the train to go to work. He said on that day after work he was going to see his girlfriend in Natalspruit. He said from work he went straight to the station. **He said his ticket was for**

travelling from Daleside to Natalspuit (contrary to what is said in the particulars of claim), and a monthly ticket. He was asked why he would buy a monthly ticket to go and see a girlfriend. His response was that even though he lives in Daleside, his girlfriend is in Natalspuit so when he ever decides he then travels to Natalspuit. So he bought the ticket so he can be able to go to her as and when he decides to visit her. He used to stay in his room only on Mondays and go and see her everyday. **He said he bought the ticket at Kliprivier station.**

[14] **He indicated that Skromdram is a small station. When he boarded the train there was not a big crowd because the train was coming from Vereeniging going to Germiston.** He did not agree that skraamsdram is the last station and a holding station. Also that the houses are far from the station as this is a farm area. It was agreed there is a garage and there is only a farm not farms. He then again said there was a crowd on the platform because there are shelters near the station and a number of people from there would board the train at the station. **It was put to him that it was 5h00 in the morning on a Saturday,** and asked whether all those people came from the shelters. He said others would be farmworkers coming from work and there were other people at a distance so he would not be able to say how many people were there on the platform. **There were 2 other people he saw who got into the train as he also did. The train was full and he could not get any further than at the point of the overhead strip that was dangling from the ceiling.** The other strips that were dangling from the roof were already being used by the other people. The coach had 4 doors 2 from each side. **The train had started moving, changing tracks as it was doing so. It was when the train was in motion and swerving that he fell out to the ground. He was the only one who fell from the train.** There were no people standing at the door but there were people behind him who lost their balance and stumbled against him and he fell out.

[15] It was pointed out to him that the Railway line at Skraamsdam station does not criss-cross, but it is in a straight line. His version then was that it was criss crossing and he fell out and was not pushed. He repeated his denial of being pushed. He said it happened almost when the train was leaving the station, hardly 5 meters, he was pushed and he fell. His head came out first like flying or flung out. He had a stone lodged on his elbow on impact when he was landing. It was not fractured but severely bruised. **He laid next to the train in the same direction to where it was going. He only saw that his left leg is no longer there after the train has passed.** He then tried to position himself and lift the right leg only to discover that it was fractured. It all happened in a split second and cannot tell how exactly and slowly. He denied crossing the railway line that day and also being arrested for that incident. He pointed out that the train did not stop after the incident and does not know what the other passengers did after the accident. **He also changed and said nobody came to the paramedics' assistance. He said the paramedics were the first people he saw and denied that he ever said there were security personnel who came to help the paramedics.**

[16] That was the Plaintiff's case.

[17] The Defendants' evidence was led by Mr Mokoena, a PRASA employee. He is a Claims Investigating Officer tasked with investigating the root causes of any incident or an injury of a person within their system. According to Mokoena his investigation entailed

consulting first with the joint operation centre, then perusing the Occurrence Book (OB) and thereafter following any existing lead. If there is no lead he said he will proceed to the train operators, make enquiries from the department or customer service. He would then consult the hospitals to which the third party claims to have gone after the incident. There he will interview the hospital and emergency services personnel.

[18] **On 29 January 2011** he used the joint operation centre offices that operated within the railway sector where he perused the OB for the 3 days, starting from a day prior to a day post the incident. They could not find anything relating to this matter or indicating that there was a person injured in their premises. He went to Vereening and called the segment responsible for Skraamsdam. There he perused their OB for the 3 days. **The incident is described in the OB as of an injured person that was hit by a train.** According to their investigation nothing else was recorded for the 3 days except for an incident of robbery and minor incidents. After the discovery he went through to train operations department to find out if there were other reports. No information was found. He proceeded to customer services where he found that there were other incidents reported but no incident reported on this matter.

[19] He then proceeded to hospital. He visited Johannesburg hospital where he **was informed that there was a 3rd party brought to Hospital by helicopter.** He then visited Baragwanath and Natalspruit Hospitals. **He found out that Nkosi was transferred there for day to day medication.** No other hospital was consulted. He however did enquire from the neighbours of the Plaintiff in Skraamsdam. Skraamsdam Station is used by PRASA for Goods Train. **Nkosi lives in an old dilapidated house near the station. There are shacks that are built around the dilapidated houses, maybe 10 or 12 shacks.** A lady he found there told him that Plaintiff was injured in a train related incident. None of them could give him any further information. **He went to Kliprivier station which is 2km from the scene of accident** to ask about the helicopter. The SAPS said they don't know of any incident there.

[20] There was nothing that came up and nothing could be done. **He denied that at the Kraamsdam station there are changing lanes when the train departs. The railway tracks are straight. He said it is a holding station and empty. There are no security guards stationed there, no ticket examiner in the vicinity in that area.** As a holding station every ticket officer knows that there are no ticket personnel. If he boarded the train at Skraamsdam next station is Kliprivier. They will charge him a normal fee ticket. He can get inside a train and board the train at Kliprivier. Skraasdam will be 500 meters on the left it is settlement on the right hand side is the old Vereening road. There are two platforms one to Germiston over to Vereeniging. **The only way to come to the platforms would be through the railwayline.** The incident could not be traced. He also cannot say it did not happen. Maybe it could be the Spoornet train or another train. **He indicated that there are footpaths that are for crossing where people walk through the railway line.** There is no bridge. People cannot just walk from one side to the other. He said he has been working there for a long time. **That being a halt station there is no interchanging tracks or section that cross over where the train can move from one side of the tracks to the other.** He said he was sure and adamant that it is so as he has been working in that area for a long time.

[21] He confirmed that he did not interview Nkosi and the fact that he could not trace the accident it did not exclude the possibility that it happened. Skraamsdam Station does not

have ticket examiners or security personnel otherwise the latter could have picked it up. He did manage to trace the train that passes at that time. He interviewed the lady who works there and she said she did not see anything. He could not agree or deny the statement that there was no security person or people to deal with crowd control. Their version is in accordance with the summons and they work from there so they cannot interview him. It was put to him that his story about the investigation is uncorroborated how can it be trusted that it is not fabricated if there is no record of the investigation. **According to the regulation they received from PRASA they are not allowed to interview the Plaintiff.** He said he believed the police when they said they did not see a chopper, but it does not mean Plaintiff was not airlifted to Hospital. **He confirmed that the police denied that there was a chopper, even though there was a report at the hospital that Nkosi was brought by helicopter.**

[22] Dr Pretorius, a trauma surgeon at Baragwanath Hospital testified that Nkosi was admitted at the hospital. He confirmed that a discharge note that was part of the hospital records contains a summary of the treatment Nkosi received, and written when a patient is discharged. It was prepared by Dr Segobodi who was one of the interns he oversaw his in service training at the time. He made sure that everything they do was correct. He also confirmed that the signature on the report was not his signature but that of Dr Sebogodi. He explained the kind of information that is written on a discharge form, that it is a summary of the whole initial history received from the patient and the treatment the patient received. It would entail recording the date of admission, history of the treatment received, when received and whether surgery performed or just medical treatment. Treatment that he will be taking at home (TTO) or thereafter as an outpatient at the hospital. The information on the note is therefore a summary of what happened to the patient and the treatment the patient received.

[23] Dr Kabelo Sebogodi then an intern and at the time of testifying a medical doctor still stationed at Baragwanath Hospital, confirmed that it is his handwriting on Nkosi's discharge note signed on 10 February 2011. He read the diagnosis, history for work and further management written on the note. He also confirmed that at the time he was still an intern as a result accompanied by a consultant Dr Pretorius when he was seeing patients. The consultant gave him instructions on what to write. On the day of Nkosi's discharge he was doing the ward rounds with Dr Pretorius. He wrote the summary of what happened to the patient since admission. The admission history he wrote on Nkosi was what was related by the patient. The note he wrote on 10 February 2011 states on the heading "*as per Dr Pretorius*" and reads:

"The patient's date of admission is 29 January 2011, Date of Discharge that is 10 February. The final diagnosis was bilateral traumatic below the knee amputation/. **The history states that he is a 36 years old male hit by a train while crossing the train tracks.** On the clinical findings it states that there is an abrasion involving both legs and abdomen. There is laceration, plus minus three centimetres below the left eye lid. The right foot amputated exposing the tendance and broken fibular. The management was a below the knee amputation, the BKA on 29 January 2011. The TTO, that is the medication the patient takes home, it is number (1) Spectropain, 2 tablets to be taken three times daily, that is the TDS for one month. Then there is the dressing at the local clinic or alternative days, that is the dressing that he will apply

and then number, the third point, he must follow up at Natalspruit Physio OPD for wheelchair as well as for further management and number (4) it is the removal of stitches, and removal of clips.”

[24] He did the discharge as per instruction of Dr Pretorius. The procedure was that they will examine together and then after that Dr Pretorius will dictate or give them the instructions of what to do next, and then they will then write what the consultant requests or wanted them to do. As it stated there, on 10 February 2010 he was doing the rounds with Dr Pretorius who then would have instructed him to discharge a patient and write the discharge summary which he did. The discharge summary is what happened to the patient throughout his stay at the hospital. They will write the date of admission, of discharge that they can get from the whole file thereafter it is the history that was given upon admission and the clinical findings which he wrote according to what was written initially. So he wrote the history, the clinical findings, the management that was given to the patient, and the final diagnosis. All the information basically retrieved from earlier notes from the file.

[25] The information about a 36 year old male that was hit by a train whilst crossing the train tracks would have been in the admission notes when the patient left the hospital. **He explained that when the patient arrives at casualty the receiving doctor will have to ask what happened and that would be the history that would be recorded as per written hospital records, being the story the receiving doctor at admission was told.** He says that is why he wrote where the history starts that the patient was injured in that manner. Apart from the note there is nothing else he wrote about the patient. He confirmed that what he has written on the history is what was gleaned over and stipulated in the admission documents at casualty. All the information notes were retrieved from earlier notes from the file.

[26] He again confirmed under cross examination that he wrote the summary note from what he gleaned over from the admission documents at casualty. He said he never questioned Nkosi about what happened and all he can say to be fair is that all he wrote was stipulated upon admission and this was done.

[27] At that time when the Defendant was to close its case, and the parties to present their arguments in closing, the Plaintiff applied to amend its particulars of claim. He sought to add to the particulars that the information could have been sourced from the paramedics. Agreed to severity of injuries, post sedated and prior sedation. The parties also agreed on an inspection *in loco* to be conducted at SKraamsdam Station where the accident took place.

[28] An inspection *in loco* of the SKraamsdam Station took place on 16 April 2018 before the trial resumed before me. In attendance where the parties’ representatives, the Plaintiff led by Mr Mkhambeni and the Defendant by Mr and an official from PRASA. It was noted that the station is deserted there are two railway lines, one to the south and the other to the opposite direction which is the North. There is no platform per se. The line to the South is referred to as number 2 Up main, it goes up to Johannesburg. The one that goes to the opposite direction is referred to as number 1 back to Cape Town. That is the one that goes towards Daleside Station. The Station is not manned and there is no ticket office or officer. After the station there is a level crossing for motor vehicles.

[29] From the station we were shown a 12 Halt mark on the Number 2 line that goes to Johannesburg (where the train would stop).

[30] We were shown where the train's locomotive can change from line Number 2 to 1. It could be a 9 locomotive goods train. But the rule is that the train stays on the same line unless there is an indicator from TCT (Train Control Ticket)]. The Halt Signal Points/Indicators are where the train can cross from line 1 to 2. If it indicates green the locomotive will stay on the same line. The route/line splits into three. The green light on the indicator signals that the train is moving straight. The red signals that the train is to cross over and the yellow signals that it is to go back to the right. If abnormal or route not planned, following another goods train to clear over, TCT clears over and directs the train. Number 1 could only cross over before Daleside. Yellow spec to go back. It can also be told it will stop on yellow or cross over back to Number 1. When there are special events it will be closed and personnel provided. From the station it is about 1km to a bearing to the cross over. Beyond the signal to the point it is 100 meters before cross over and 5 minutes from Kliprivier.

[31] The defendant then called a witness to give more evidence on function of the station, namely, Jimmy Roger, an employee of PRASA. He was the safety specialist at PRASA at the time overseeing the running of trains. He used that portion of the corridor as a train driver going to and fro for years. He testified that there is a section manager who specifically makes sure that the corridor trains are running smoothly with specifics to its destination without delay. They were divided into teams in corresponding order "CBA 3", that is Vereeniging – Germiston, Germiston – Vereeniging. The manager comes on duty at one of the corridors and makes sure there are no challenges on their specific corridor. Figure out how are they going to fix the number of challenges that come to the depot, plan in advance during the day, note the number of trains running from point A to point B, make sure personnel available for train to be run.

[32] It was put to him that on 29 January 2011, the Plaintiff says he bought a ticket for 6h00. The train was overcrowded, it changed lanes whilst the doors were open. As a result he fell out of the train and landed on his stomach. His legs were caught under the train. He explained the process of changing lanes that. At the specific station a train if it needed to change lines from line 2 to line 1. If it comes up it will be Daleside and Skaamsdam normal CTC Clerk, where it would happen on an unplanned route set up. If there is a train in front on route to Kliprivier and given a CTC to cross over the train from number 2 to number 1 line. As to how it is known if there was a change over, unless they go back to their report that they draw daily, it will appear if there was a deviation and a reason why. A Flimsy report indicates if there is a fault. They will know that everything runs normal, train running on a straightline. They have what they call Flimsy deviations report incidents where faults on the trains are reported. All that was reflected on the incident report for that day was according to him was about RDR Rand water –Nataalspruit block that signal defective or Randwater on the other side of Kliprivier.

[33] In his record on changing lines incident, it will not say the train changed from this line, and the reason it switched lines will not be indicated. The reason for changing lines that would be if CTC Clerk has worked his route, planned in advance knows which train is travelling to which section. If also train is from 0704. The train can be a goods or Metro

Trolley that delays the train, the CTC will decide to cross the train from number 1 to number 2 line to fastback which will result in a delay. The delay will then be noted with regard to what was observed with the two lanes deviating from no 2 to no 1. The 2 lines worked from 1 point being timed out from no 1 to 2. It would be usually for goods train moving to the central round. No metros will run there only goods trains. **On a Saturday the trains do not run on a full service.** The first train is from Vereeniging during that time and as corridor manager up to Aungen Station, that is a 3rd train towards Germiston'. There are not a lot of people, therefore it will never be overcrowded from Augus Station. There will not be more than 12 people up to Augus.

[34] If the Plaintiff fell at change over he would have landed between the fields further on to no 1. The intervals between trains on Saturday is 30 minutes. If he had fallen in between the trains the other driver of the other train would have seen him and reported the incident. It does not make sense that the train then drove over the Appellant. He should have fallen to a different direction to the train for another meter, not directly underneath but away from the train. He denied that he could have fallen off at the change-over, arguing that it is a smooth change over and not rough that it could result to a passenger falling off. He said also if such an incident happened, it would have been in the Flimsy Report. There is nothing mentioned. To find out which train might have been involved they took the date he was injured on the train and look at the number. He confirmed that the Halt station in Skraamsdam is not manned and that there is no ticket office or gate for passenger to buy tickets. It is not the main station and not operational to sell tickets. There are also no security personnel.

[35] Under cross examination he confirmed that he is relying on his experience in giving evidence about the incident and what was likely to have happened. Also his knowledge about the working of a flimsy report in relation to the incident. With regard to the change-over he will know about it if recorded in the report, if not, he will assume that the train went straight. Assumption means that as an experienced person he will know that everything went well and there will be no report suggesting that the train went straight that day. On the delays it will not show change over unless there were signals indicating why the train was so late. Even if there was a change over, if it was planned like that there will not be a delay report. If change-over is not mentioned it means that everything went well. Any other thing will be reflected in the flimsy report. It is irrelevant to delays that did not result in a cross over.

[36] He said the driver will not see that there is a person who has fallen over. A metro guard at the back of the train will probably be the one who sees and reports on the incident. There are other trains that runs through that corridor so if not noticed by the Metro Guard others will and it will still be reported. There is a train driver journal or Metro Guard Plan/Roster (No train schedule/ Roster put in). He was adamant that there is no way that such an incident could have happened. He said Nkosi could have fallen at least 2 metres away from the train. He cannot say if the flimsy report is inaccurate. He confirmed to have worked for PRASA and driven the train for 35 years.

[37] On re-examination he confirmed that he wouldn't know that there would have been a planned changeover. The CTC would have planned it. It would be in the computer. The register would reflect 2011. They worked according to the train register.

ANALYSIS

[38] The Constitutional Court has made it clear that PRASA has a public duty to provide public rail transport in a safe manner (***Rail Commuters Action Group v Transnet Ltd t/a Metrorail*** 2005(2) SA 359 (CC)). The plaintiff bears the onus of proving that in the present case, that duty was not discharged and fell short of what the reasonable rail provider would have done to ensure commuter safety in the circumstances (***Kruger v Coetzee 1966 (2) SA 428*** (A)). The Plaintiff has the onus to prove his allegations of how the accident occurred on a balance of probabilities. Especially were the court is reliant only on his evidence to establish if indeed the Defendant is liable for his loss, him being the sole witness to his case. The fact that his evidence is not directly contested does not make it probable, but the circumstances that are explained to the court by the Plaintiff should carry the likelihood of having happened on a balance of probabilities.

[39] The cause that Nkosi had to prove during trial to have likely happened is what was pleaded in his summons. The critical question to determine is whether Nkosi has established that as a valid ticket holder commuter, the relevant PRASA employees, contrary to their duty of care acted so as to set an overcrowded train in motion leaving the doors open and therefore causing his injuries when he was pushed out of the open doors by the other passengers. That is the case the Defendant was to meet that was pleaded in his particulars of claim.

[40] While the duty of the Plaintiff is to allege the facts on which his claim is based, or the facts on which he seeks the relief, once such a matter reaches the trial stage his further duty is to adduce evidence in substantiation of the facts set out in the particulars of claim. It serves no purpose to plead one thing and when the witnesses testify they do so differently. When an allegation is made in the pleadings that allegation must, at the trial, be supported by credible evidence. Evidence is the most important information required to prove the facts set out in the particulars of claim.

[41] Each case will depend on its own facts but, in ***Mokwena v Passenger Rail Agency of South Africa*** 144465/2010, Satchwell was prepared to adopt a robust approach and accepted that on the basis of evidence tendered in several other matters, where there was evidence established that a plaintiff was injured when pushed out of a moving train when the doors were not closed, this *ipso facto* meant that the railway authority was negligent, it being accepted that there was a duty to care to ensure that the doors were not opened when the train was in motion, which duty was readily discharged by putting reasonable controls in place.

[42] On this basis, where it was found that the plaintiff was pushed out of the open doors of a carriage whilst the train was in motion, negligence was readily found to have been established (***Loveness Mhlongo v Passenger Rail Agency of South Africa*** (20594/2014) [2016] ZAGPJHC353 (15 December 2016); ***Maruka v Passenger Rail Agency of South Africa*** (8905/2014) [2016] ZAGPPHC213 (15 April 2016)).

[43] The version of the Plaintiff in his summons as already mentioned is that **the other passengers pushed him out of the moving train whose doors were** negligently left open whilst it was pulling out of the platform, whereupon he fell with his legs going under the

train. The train ran over him. His left leg was severed and the right one fractured. According to him PRASA was negligent because notwithstanding the crowded train there was no personnel security to exercise crowd control or otherwise. **He, for balance was holding onto a strap belt hanging from the train roof and the doors open.**

[44] In his evidence in chief during the trial he, contrary to the averments in his particulars of claim, testified that he got into the crowded train and therefore had to stand by the door. **When the train was pulling out of the platform it swerved and swayed such that he was thrown out of the train.** He was adamant that he was not pushed but had lost balance due to the swerving train. As a result he fell out and landed on his stomach with his legs under the train. **There was no personnel or security at the station taking any measures on crowd control. He remained there alone for a long time as the place is not frequented by people.**

[45] Under cross examination he had alleged that he boarded the train at Skramdam and there was not a big crowd because the train was coming from Vereeniging going to Germiston, indicating that Skraamdram is a small station. He later said the train was over crowded.

[46] Another version was that furnished by the Defendant's witnesses that he is alleged to have told the hospital personnel when he was admitted, that the accident occurred when he was crossing the railway line. All these versions are before the court for consideration. None of them can be taken out as not being a possibility. Where there are different scenarios that can be a possibility including those that indicate to the court that it was not possible should be evaluated taking all the evidence into consideration.

[47] The four incidents that have been referred to by the court if examined against Nkosi's other evidence, it is apparent that the accident is unlikely to have happened in any of the ways he had alleged either in his testimony or pleadings.

[48] As a result the evidence that he gave information on his admission at the hospital that he was crossing the railway line, seems more likely to be true.

[49] At 5h00 on a Saturday morning besides not being able to prove that he was indeed a commuter in the train at the time of the accident, he could not give a plausible explanation why he was in the train where he was coming from or where he was travelling to at the time. He did not have a ticket. Evidence has been tendered that the place is not a station per se for normal travelling by train. For that reason there was no ticket examiner for the station or security personnel or a ticket sale office. He confirmed that he stays not far from the railway line in Skramsdam and works in Daleside just nearby. So the area where he works and lives are close by the station and there is no need for him to use the train. He however averred in his summons that he had a ticket he purchased for commuting from Vereeniging to Germiston which got lost when his clothes were taken off by the paramedics. Under cross examination he said he had a monthly ticket for travelling from Daleside to Natalspruit which he purchased at Kliprivier, and since he stays in Daleside he for that reason does not need to be commuting in the train, therefore the ticket was for a daily visit to his girlfriend in Natalspruit. He was also employed at Blockhouse in Daleside. Skramsdam is the name of the station in Daleside.

[50] Further it is not certain who according to Nkosi exactly caused him to fall out of the train, whether it was due to overcrowding and the open doors which resulted in him being pushed by the crowd or was it as a result of the train that he alleges was swerving, criss-crossing out of the station. It was not clear what he blames PRASA of, whether for the overcrowding inside the train that has resulted in him being pushed out or for the train's swerving and turning with the doors open.

[51] The Court must be satisfied that that the version of the litigant upon whom the *onus* rests is the true version.

[52] Nkosi was a very poor witness, non-committal to any version he gave. He gave different versions of how the accident occurred. He changed cause as soon as he started giving evidence in chief. From alleging that the train was swerving and turning and to having been bumped or pushed out of the train. The particulars even then were not amended to that effect even though the Defendant's witness was cross examined on that evidence.

[53] He also said there was a crowd from the shelters being people that live in the farm and on the day they overcrowded the station. He however says that he was lying there for a long time because the place is deserted and has not a lot of people. During the inspection in loco, the place looked deserted and resembled a non-functioning station. Why would a crowd of people be there, especially on a Saturday between 5h00 and 6h00 in the morning?

[54] However, that is not necessarily the end of the matter, as it has been found that overcrowding may itself amount to negligence where a plaintiff is pushed out of a train by other passengers, even if it had been stationary (**Phalane v Passenger Rail Agency of South Africa** (71408/2013)[2015]ZAGPPHC804(3 December 2015) and **Makgopa v Passenger Rail Agency of South Africa**(9830/2015)[2016]ZAGPPHC506(3 June 2016).

[55] Nkosi has himself denied that the crowd pushed him and caused the accident. Therefore the court cannot arrive at a conclusion that the uncontrolled crowd that he says was in the train caused his fall and therefore no link between the train, the crowd and the injuries he sustained. There was therefore no credible evidence before the court by Nkosi. Prasa can therefore not be held liable as alleged. He has failed to prove the negligence of Prasa.

[56] In order to succeed with his claim against the Defendant, the onus rests on the Plaintiff to allege and prove that the Defendant has committed a delict. So far as it relates to the duty of the Plaintiff to allege and prove see *Pillay v Krishna and Another* 1946 SA (AD) 946, 951, which deals with the fundamental rules governing the incidents of onus in our law. The Plaintiff must prove that the Defendant has breached a duty imposed by law on it which he has failed to do.

[57] In the premises Plaintiff's claim may not succeed and the following order is made:.

1. The Plaintiff's claim is accordingly dismissed with costs.



N V KHUMALO J

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

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