FMT

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED ✓
15.6.2012
DATE SIGNATURE

18/6/2012

CASE NO: A512/2010

In the matter between

MFANAFUTHI LUCAS SHONGWE	**APPELANT**
And	
PASSENGER RAIL AGENCY OF SOUTH AFRICA	**DEFENDANT**

JUDGMENT

MSIMEKI, J

INTRODUCTION

[1] The Appellant instituted an action against the Respondent for damages which he suffered when he was injured attempting to board a moving train

belonging to the Respondent at the Kopanong Station near Pretoria on 28 October 2006.

[2] For ease of reference I shall refer to the parties as the Plaintiff and the Defendant.

[3] The Plaintiff, in the court *a quo,* was represented by Advocate E. Seima ("Mr. Seima") while Advocate J. G. Cilliers SC ("Mr. Cilliers") represented the Defendant. The Plaintiff, before us, was represented by Mr. B. P. Geach and Mr. E. Seima while Mr. J. G. Cilliers represented the Defendant.

[4] The parties, in the court *a quo,* at the commencement of the trial, agreed that the issue of quantum be separated from the issue of the merits in terms of Rule 33(4) of the Uniform rules of Court. The trial court, accordingly, made such an order.

BRIEF FACTS

[5] The Plaintiff had found himself a job. To go to work he needed to use a train from Mabopane and he purchased a monthly train ticket which was valid between Pretoria and Mabopane. On 28 November 2006, which was his 28th day using the train, he again was to use the train from Kopanong railway station on his way home. He arrived at the station at approximately 20H00. It appears that the train was on the platform when he entered the main entrance gate called the access control. The train pulled off before he could board it. He testified that he ran to the moving train and attempted to board it but failed as he slipped and fell between the moving train and the platform. He sustained some injuries on his left leg which unfortunately had to be amputated. This culminated in the action he instituted against the Defendant for the damages that he alleged he had suffered arising from the

incident. The Plaintiff based his claim on the negligence of the Defendant whose employees were said to have left the doors of the train open while the train was in motion. The Defendant defended the action and raised the defence of *volenti non fit injuria*. On 20 February 2009 the court below dismissed the Plaintiff's claim with costs. On 23 April 2009 leave to appeal to this court was granted to the Plaintiff.

[6] The Plaintiff in the particulars of claim, as alluded to above, alleged three grounds of negligence by the Defendant's employees, namely that:

"6.1 They allowed the train to depart without ensuring that all intending passengers were safely on board.

6.2 They allowed the train to depart whilst the door(s) thereof were not closed.

6.3 They failed to keep a proper look-out."

The Plaintiff, during the trial, only relied on the second ground.

THE ISSUES TO BE DETERMINED

[7] These are:

1. Whether the doors of the train were open or closed when the Plaintiff attempted to board the train.
2. Whether the employees of the Defendant acted negligently in the causation of the relevant incident.
3. If so, whether the Plaintiff negligently contributed to such causation.

COMMON CAUSE FACTS

[8] These are that:

1. The Plaintiff was a train commuter.

2. He was a bearer of a monthly train ticket en route Pretoria – Mabopane.
3. He intended to board the train at Kopanong station near Pretoria on 28 November 2006 on his way home.
4. The train, at the time the Plaintiff attempted to board it, had been in motion.
5. The Plaintiff slipped and fell ending up on the railway line next to the lines.
6. The Plaintiff's left leg was injured necessitating an amputation.

[9] The Plaintiff bore the onus to prove the negligence of the Defendant's employees.

[10] To prove his case, the Plaintiff alone testified while the Defendant called three witnesses. These are the witnesses who had to assist the court below in deciding whether the Plaintiff had discharged the onus and whether the Plaintiff's conduct on 28

November 2006 excluded fault on the part of the Defendant.

[11] The Plaintiff's evidence which is worth noting is as follows:

"1. Whilst I was approaching the gateway (as he calls it) where the train guards are located, at that stage the train was pulling in." The gateway is the main gate or the access control. (Vol. 1 page 29 lines 20 - 22).

2. The train pulled off when he was on the last step leading to the platform (Vol. 1 page 30 lines 1 – 2 and Vol. 1 page 43 lines 6 - 9). That is when he was at the distance of 6 – 7 metres from the train.

3. He ***"wanted to board the train to go home because the train was being boarded"*** (Vol. 1 page 45 lines 11 - 12).

4. He knew at all times and on 28 November 2006 in particular, that to board a moving

train may injure himself and/or even cause his death himself. (Vol. 1 Page 46 lines 6 - 10).

5. ***"With that full knowledge"*** he ***"decided to take the risk and board the moving train".*** (Vol. 1 page 46 lines 11 - 12).

6. He ***"knew that it was extremely dangerous to board a moving train"*** (Vol. 1 page 43 lines 15 - 18).

7. Notwithstanding that it was extremely dangerous, he decided to take the risk and jump onto the train whilst it was moving because he felt unsafe on the platform. It was, as he put it, ***"a 22 catch - 21 catch situation."*** (Vol. 1 page 44 lines 4 - 7).

[12] **WHETHER THE DOORS OF THE TRAIN WERE OPEN OR CLOSED**

The Plaintiff testified that the door that he targeted was open while the others were closed. His further

testimony was that he slipped and fell between the platform and the train. What bothered Mr. Cilliers regarding this evidence was that the legal teams had measured the distance between the platform and the train that the Plaintiff was attempting to board and the distance was found to be approximately 23 centimetres which meant that the Plaintiff could never have fallen through. Besides, the injuries that he could have sustained, had it so happened, would have been terrible. There is, indeed, merit in this argument. This argument rules out the Plaintiff's contention that the door that he had targeted had been open. Mr. Cilliers referred the Plaintiff to page 247 of the court record which is page 80 of Exhibit "A". The photograph appearing there shows coaches of the train. The distance between two coaches is approximately a metre and a half and it allows a person to stand and to fall through and land on either the railway lines or next to them. Falling through here is possible and

probable and not as contended for by the Plaintiff. This again gives credence to the Defendant's version that the doors were closed. Mr. Justice Maigo ("Maigo") testified that the doors of the train, indeed, were closed. They, on the day of the incident, according to Mr. Lawrence Thamsanqa Jafta ("Jafta"), had been operating properly. The court *a quo* therefore cannot be faulted for accepting Maigo's evidence and finding that the doors of the train had been closed.

A photograph appearing on page 325 of the court record bears the message ... ***"Stay clear of all doors whilst the train is in motion. Do not ride in between coaches. Metrorail will not be held responsible for injuries sustained."***

It appears there is consensus that should the court find that the doors of the train were closed, as Mr. Cilliers contended, then that would bring an end to

the Plaintiff's claim which, in that event, will have failed.

Mr. Geach's submission that the doors of the train could have been opened from inside the train was not only dealing with an issue which had not been covered by the pleadings but also with an issue which was also not supported by evidence. This was nothing but speculation which in no way advanced the Plaintiff's case.

VOLENTI NON FIT INIURIA

[13] This simply means that he who consents cannot receive an injury. It is voluntary assumption of the risk of being injured which is a ground of justification which excludes the element of unlawfulness. ***(Neethling, Potgieter, Visser: Law of Delict 6th ed. Page 106: 7.5.3)***

This defence has properly been dealt with in the well known case of ***Santam Insurance Company Ltd v Vorster 1973 (4) SA 764 (A)*** which gives a summary of the approach which the court should follow when dealing with the defence. To render the claimant *volens,* it must be established that he or she had the knowledge and appreciation of the danger and foresaw the risk of injury to himself. The risk which culminates in the injuries must fall within the ambit of the thus foreseen risk. The court, it was said, must ***"resort first to an objective assessment of the relevant facts in order to determine what, in the premises, may fairly be said to have been the inherent risks of the particular hazardous activity under consideration. Thereafter the court must proceed to make a factual finding upon the vital question as to whether or not the claimant must, despite his probable protestations to the contrary, have foreseen the particular risk***

which later eventuated and caused his injuries, and is accordingly to be held to have consented thereto". (Santam Insurance Co. Ltd v Vorster (supra) at 781 B – E).

In ***Moepya v Transnet Limited and Another Case Number 2475/05 delivered on 12 July 2007*** Mynhardt J said that there are serious risks of injury and perhaps even death, inherent in someone trying to board a moving train. It was to any person obvious, he said, that if one tried to board a moving train, especially one that is picking up speed, that the risk of injury, and possibly also death, is not a farfetched risk and the possibility of injury is not a farfetched possibility.

[14] It was submitted on behalf of the Plaintiff that the Defendant owed the Plaintiff a duty of care which was bourne out by its rules and regulations. The doors of the train had to be closed when the train

was operated. Failure to operate the train with its doors closed and to ensure that all passengers had safely boarded or alighted and cleared the vicinity or demarcated area of the railway or train before it started moving, it was further submitted, was the proximate cause of the Plaintiff's fall. This, in the light of the Plaintiff's evidence under cross examination, cannot be correct. The Plaintiff's evidence and the concessions he made during cross examination namely that the train had been in motion when he intended to board it and that it was extremely dangerous to board a train that was in motion reveal that he had the necessary knowledge of the risks involved in what he was trying to do. He appreciated the danger and the consequences of his action. He nevertheless persisted in doing what he knew was wrong and dangerous and that persistence brought about the injuries for him. The court below, correctly in my view, arrived at no other conclusion but that he consented or assumed

the risk of being seriously injured in attempting to board a moving train.

[15] That the court below found that the train was already on the platform at the time that the Plaintiff entered the main gate cannot help the Plaintiff who testified that whilst he approached the access gate where the train guards are located the train was pulling into the station. The Plaintiff was clearly still a distance from the platform while the train had pulled into the station. In any event the train started moving before he was on the platform. On his own version he was at a distance of 6 – 7 metres from the train when it pulled off from the platform. In answer to a statement by Mr Cilliers that he had been solely responsible for what happened and that he had deliberately taken the risk of boarding the train that was in motion fully aware and knowing the risks involved and still decided and consented to take the risk, the Plaintiff answered that there was

hardly a day going by without him blaming himself for what transpired. He testified that he, because of his action, had lost a limb. What better truth can one look for than this.

[16] In the light of the Plaintiff's evidence, it cannot be correct that the court below erred when it found that the train had already gained speed at the time that the Plaintiff saw it; that the three doors had already moved past and that he had decided to run after the fourth door. The coaches were moving past according to his evidence. It must also be borne in mind that the train was in motion. He, on his own version, did not target all the doors but the one door that he had intended to use to access the train. Resulting from what I say in paragraph 12 above we now know that he could not have targeted any door.

[17] The Plaintiff's evidence clearly reveals that this case and ***Transnet Ltd t/a Metrorail and Another v***

Witter 2008 (6) SA 549 (SCA) are distinguishable. First, in the Transnet case the train indeed had just started to move slowly when the Plaintiff emerged onto the platform whereas the train in this case gathered speed before the Plaintiff reached it. It is not correct that the Plaintiff tried to board the train when it was pulling off because on his own version he was at a distance of 6 – 7 metres when he saw it pulling off. The train was in motion when he got to it and by then the danger and the risks existed. Second, the door in the Transnet case was open while the doors in this case, as demonstrated above, were closed.

[18] The evidence of Justice Maigo and Lawrence Thamsanqa Jafta, the Defendant's witnesses, on the question of negligence is noteworthy. The court below found Maigo to be a satisfactory witness. In fact the court below found that the Defendant's witnesses were credible and rejected the version of

the Plaintiff. Maigo testified that he had personally checked that all the doors of the train had been closed before the train departed. He maintained this evidence when cross examined by Mr. Siema. He explained how he would stop the train in the event that he saw something which obliged him to stop the train. He saw the Plaintiff running parallel with the train and later disappeared from his sight. He did not see the Plaintiff fall between the train and the platform. This, indeed, shows his honesty.

[19] Robert Makgoto who was employed together with Maigo by Hlanganani Protection Services and also deployed at Kopanong Railway Station on 28 November 2006 was at the main gate i.e. the access control. He testified that the Plaintiff ran past him at 20H30. He told him not to run as he might injure himself. A colleague later called him and asked him to go and render assistance at the platform as he had been working downstairs. There he found the

Plaintiff whom he identified and who at the time had been injured. The Plaintiff himself confirms this evidence. Maigo's testimony is that he screamed at the Plaintiff telling him not to board the moving train.

[20] Lawrence Thamsanqa Jafta was an artisan employed by the Defendant on 28 November 2006. He inspected the relevant train on 28 November 2006 and 12 December 2006 and found the doors of the train to be operating properly.

[21] The three defence witnesses were indeed honest, reliable, credible and satisfactory witnesses. Accepting Maigo's evidence means that the doors of the train were closed when it departed. The court below, in my view, was correct when it found that the Plaintiff indeed should have waited for the next train while under the protection of the guards. The court below was also correct in finding that the

reason that the Plaintiff furnished for attempting to board the train on 28 November 2006 was unacceptable.

[22] A consideration of the evidence as a whole reveals that:

1. The Plaintiff consented to the risk of injury and to the injury.
2. He was capable of volition.
3. He had full knowledge of the nature and the extent of the (possible) prejudice.
4. He realised and appreciated fully what the nature and extent of the harm would be.
5. He subjectively consented to the prejudicial act.
6. The doors of the train were closed.
7. The Plaintiff could not have targeted the door when he attempted to board the train but the area between the coaches.

The requirements for valid consent as set out in the work of ***Neethling, Potgieter, Visser*** (supra) are indeed met. The Plaintiff's evidence in cross examination reveals that the question of contributory negligence on the part of the Defendant or its employees does not even come into the equation. The Plaintiff himself and alone created what transpired and he does not seem to forgive himself for that. Indeed he verbalises it. The suggestion that the Plaintiff was 50% negligent with the other 50% being attributed to the Defendant, therefore, has no merit. The court below, in my view, was correct in finding that the Plaintiff was 100% negligent. No basis exists to upset the court below's factual and credibility findings. The Plaintiff's injuries were indeed, self created and he only has himself to blame for that and he is indeed correct when he verbalises it. The Plaintiff's claim, in my view, was correctly dismissed. The appeal therefore stands to be dismissed.

[23] I would in the result propose that the appeal be dismissed with costs.

M. W. MSIMEKI

JUDGE OF THE HIGH COURT

I agree.

R. G. TOLMAY

JUDGE OF THE HIGH COURT

I agree.

And it is so ordered.

C. P. RABIE

JUDGE OF THE HIGH COURT

Heard on: 18 April 2012
For the Appellant: Adv. B. P. Geach (S.C.) with Adv. E. Seima
Instructed by: Lepule, Mokoka Inc
For the Defendants: Adv. J. G. Cilliers (S.C.)
Instructed by: Stone Attorneys
Judgment delivered on: