



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

CASE NO.: 18015/2019

In the matter between:

GAVIN CLOETE

Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA ("PRASA")

Defendant

JUDGMENT

ANDREWS, AJ

Introduction

[1] The Plaintiff instituted an action against the Defendant for damages suffered as a result of an accident that occurred on 14 November 2018, pursuant to allegations that the Plaintiff was pushed from a moving train carriage, the doors of which remained open while the train was in motion. In consequence of the incident, the Plaintiff sustained injuries to his left tibia and fibula and various bruises and abrasions.

[2] The Plaintiff's claim against the Defendant is predicated on the assertion that the Defendant was under a legal duty to take such steps as were reasonably necessary to ensure his safety. The Plaintiff pleaded that the Defendant wrongfully and negligently caused the injuries and damages to the Plaintiff and ought to have reasonably taken steps which it omitted to take.

[3] The Defendant in its Plea denied that an accident occurred involving the Plaintiff as alleged or at all. The Defendant contended that the Plaintiff has failed to discharge the onus that the incident occurred within the environment of the Defendant; furthermore, that the Defendant acted negligently and wrongfully and that such negligent and wrongful conduct caused the Plaintiff's alleged injury.

Preliminary procedural aspects

[4] The matter proceeded on the issue of merits only. The parties agreed that the issue of quantum would stand over for later determination.

[5] In terms of the pre-trial minutes, the parties agreed that the documents are what they purport to be as recorded in the Notices filed in terms of Rule 35(9), which included the Plaintiff's hospital medical and ambulance records, as well as the Defendant's documentation discovered, inclusive of various registers and incident reports. It was further recorded that the content of the documents filed in terms of Rule 35(9), neither party lodged any objection to such documents. It was further agreed that the parties did not have to prove the contents of the documents filed in terms of Rule 35(9) and that the documents could be used to contest the veracity of any witnesses' version.

The evidence

[6] Three witnesses testified in the Plaintiff's case namely, Dr Almero Hendrick Oosthuizen, Mr Chad Daniels and Mr Gavin Cloete. The evidence of two witnesses were led in the Defendant's case, namely Ms Phumza Moni and Mr Thando Klaas.

Summation of the evidence

Evidence led in the Plaintiff's case

[7] **Mr Gavin Cloete** ("the Plaintiff"), testified that he boarded a train on 14 November 2018, at Kuils River station. He was on his way to attend a job interview in Woodstock or Salt River. He explicated that he commuted from where his previous girlfriend resided in Sarepta, Kuils River; although his place of residence was Bishop Lavis. He used his girlfriend's monthly train ticket as she was off from work on that particular day. The Plaintiff could not recall the exact time when he boarded the train, but stated that it was approximately 14h00.

[8] He orated that the carriage he entered was not completely full, carrying about half the normal capacity of passengers. He described the carriage as having a number of broken seats. The seats closest to the broken windows were unoccupied. The Plaintiff stated that many of the commuters stood in the carriage. He also noticed that there were some unsavoury people that he likened to being what he referred to as "gangsters", in the carriage. He qualified his suspicions through what he observed, namely that they had tattoos as well as the manner in which they spoke. He decided to keep his distance from them and ended up standing close to the door adjacent to a pole. The Plaintiff explained that he was leaning against the partition and held onto the pole in front of him with his right hand.

[9] The Plaintiff further narrated that he observed that the doors of the train operated with a hydraulic mechanism seemed to be malfunctioning as the door repeatedly only closed approximately 20% of the way and then opened up fully again. He described that it made a hissing-type sound, that sounded like airbrakes. The Plaintiff orated that during the commute, the train stopped and remained stationary for approximately 2 to 4 minutes and another train passed. When the train pulled away he observed that the doors continued to malfunction. He noticed that seated passengers got up from their seats and started moving closer to the exit as the train was approaching Bellville station.

[10] He speculated that the passengers may have been nervous about the presence of the "gangers" or that they were preparing to alight from the carriage as the upcoming train station was approaching. The Plaintiff described that passengers started pushing against him. He yelled at the passengers screaming at them that they were going to push him out of the train. The Plaintiff explained that in his efforts to push back, he lost his grip on the pole onto which he was holding. He described that the train also jerked while braking and in this process the Plaintiff was pushed out of the moving train. He explained, using the photo exhibits, where he ended up falling, namely on the ballast rocks between the railway lines.

[11] The Plaintiff further orated that he must have lost consciousness during the fall, because when he regained consciousness, he initially thought that he was fine. However, when he tried getting up, he experienced excruciating pain and realised his leg was injured. He recalled one or two trains passing by while he was lying between

the tracks. The Plaintiff couldn't remember much else save for recalling that he was placed on a stretcher and carried to an ambulance. He was unable to remember how long he was lying there and estimated that it could have been at least an hour or more.

[12] The Plaintiff stated that he was given medication to relieve the pain. According to the Plaintiff he regained consciousness when he was at Karl Bremmer Hospital where he received treatment. He confirmed informing Dr d'Offay that he was pushed from the train. He also confirmed being transferred to Tygerberg Hospital on 16 November 2018. The Plaintiff testified that he ambulated on crutches when he was discharged. The Plaintiff confirmed that he did not report the incident to PRASA nor to the South African Police Services, indicating that he was unaware that he had to do so.

[13] The Plaintiff was challenged during cross-examination about the train ticket purportedly belonging to his ex-girlfriend. Firstly, on the basis that the Plaintiff retained the ticket for some time and handed it to his lawyers' months after the incident occurred. Secondly, his ex-girlfriend would still have needed the ticket to be able to commute to work. Thirdly, if his ex-girlfriend was indeed staying in Kuils River, she wouldn't have bought a monthly ticket from Cape Town to Blackheath. The Plaintiff was unable to offer an explanation but indicated that he is not in contact with this girlfriend and his only concern at the time was for him to recover.

[14] The Plaintiff was further challenged on the veracity of his narrative that he was on his way to attend an interview because he could not remember:

- (a) Whether the interview he was going to was in Salt River or Woodstock;
- (b) The time of the interview;
- (c) The company that he was going to for the interview or

(d) Who invited him to the interview.

[15] The Plaintiff was confronted about contradictions on the details of the carriage he was allegedly in. This, in reference to what was stated in the pleadings. The Plaintiff was unable to comment on many questions and propositions put to him during cross-examination.

[16] **Mr Chad Daniels** ("Mr Daniels"), testified that he is employed as a paramedic at the Western Cape Medical Emergency Services Department. He placed his qualifications and experience on record. Mr Daniels confirmed that he completed a "patient report form" in respect of an incident relating to the Plaintiff in this matter. He testified that on 14 November 2018, the ambulance staff consisted of himself and Ms Melissa McDillion. Mr Daniels stated that they were dispatched at 16h17 and arrived at the scene address at 16h28. The additional note which reads "Close to Sarepta Station" assisted them with a more precise location of where the patient could be found. This address is provided to them by the Call Center, who would have received it from the caller who reported the incident.

[17] The patient, according to Mr Daniels, was not found at this location. When Mr Daniels and his colleague arrived, there was a Fire and Rescue vehicle parked on the side of the road. They were approached by a member of the Fire and Rescue personnel at the incident address, namely Otto Meyer Drive, Glenhaven, Bellville. Mr Daniels explained that the Plaintiff was located "further down the tracks". To navigate their way to where he could be found, they had to negotiate their way through fencing next to the railway line. They followed the Fire and Rescue personnel walking on the ballast stones alongside the tracks to where the Plaintiff was. According

to Mr Daniels, it was a 10 to 15-minute walk before they reached the Plaintiff between the railway tracks. When he looked around, there was no train station in sight.

[18] Mr Daniels testified that upon arriving at the scene of the incident, the patient was already being attended to by Fire and Rescue Services. The Plaintiff was not lying on the railway line, but to the side, hence they could safely treat the patient, without the imminent danger from passing trains. There were no other bystanders. According to the information received, the patient had jumped from a moving train. Mr Daniels was unsure of the source of this information and had no independent recollection of who provided him with the information.

[19] The diagnosis was suggestive of a fracture of the left tibia / fibular. Mr Daniels stated that the patient experienced severe pain, for which pain medication was administered. The fracture was stabilised and splinted. Due to the nature of his injury to the lower limb, the patient was immobile and had to be placed on a scoop stretcher. Mr Daniels confirmed that they left the scene at 17h06 and arrived at Karl Bremmer Hospital at 17h23, where the patient was handed over to Dr d'Offay at the Emergency Center.

[20] Mr Daniels was confronted, during cross-examination about the veracity of his evidence *vis a vis* the ambulance records that recorded the incident address as "Otto Meyer Drive, Glenhaven, Bellville, City of Cape Town". The navigation notes the address is recorded as "... Close to Sarepta Station". The chief complaint was noted as "jumping from a moving train". It was suggested that his recall memory 6 years after the incident is not as reliable as the recordal thereof on the ambulance records.

[21] Mr Daniels was also challenged as to the differences in his version pertaining to where the Plaintiff was found. His evidence in this regard was that the Plaintiff was found on the side of the railway and then in re-examination, Mr Daniels testified that the Plaintiff was found between the tracks and that they had to cross at least one of the tracks.

[22] It was further put to Mr Daniels that if they had treated the Plaintiff in the Defendant's environment, trains would have stopped for their own safety. It was also put to Mr Daniels there were no disruptions to the train schedules on that particular day, thereby calling into question that the incident, if it happened, did not happen in the environment of the Defendant. It was also put to Mr Daniels, that they would not have been able to access the Defendant's environment without the Defendant's security opening for them. According to Mr Daniels, he did not see any security.

[23] **Hendrick Oosthuizen** ("Dr Oosthuizen"), placed his qualifications and experience on record. Dr Oosthuizen explained that in November 2018, he was employed at Karl Bremer Hospital as a specialist emergency physician. He placed on record what his functions entailed. Dr Oosthuizen was referred to the Emergency Center Notes in respect of the Plaintiff in this matter. He confirmed that the Plaintiff arrived at Karl Bremmer Hospital at 17h23 on 14 November 2018 and was triaged at 17h45 by Nurse Dube.

[24] The medical records reflected that Dr B d'Offay treated the Plaintiff at 18h20. The medical history recorded was that the Plaintiff was pushed out of a train, which information would typically be sourced from the patient himself. The clinical diagnosis confirmed a fracture of the left closed tibia/fibula. Dr Oosthuizen explained

the extent of the treatment administered to the Plaintiff. In this regard, the fracture was manipulated twice. According to Dr Oosthuizen, the second manipulation was necessary because the position of the bones was not satisfactory.

[25] The Plaintiff was transferred to Tygerberg Hospital Emergency Center at around 03h00 on 16 November 2018 for further treatment and because the hospital is closer in proximity to the Plaintiff's residential address being Bishop Lavis. From the Tygerberg Hospital records, no further surgical procedures were performed and the Plaintiff was discharged on 20 November 2018.

[26] Dr Oosthuizen opined that the nature of the injury sustained by the Plaintiff was compatible with being pushed out of a train and falling, which required significant energy transfer. Dr Oosthuizen conceded under cross-examination that as much as it was his opinion that the fracture suffered by the Plaintiff would be from high transitional energy, consistent with falling from a moving train, he could not exclude the possibility that the fracture may have been caused by any other high heights such as falling from the roof of a house or from a ladder.

Evidence led in the Defendant's case

[27] **Ms Phumza Moni** ("Ms Moni") testified that she was a Security Officer in the employ of Chuma Security Services, which is subcontracted to PRASA, the Defendant. She stated that on the day of the incident she was performing duties at Kuils River Station. Ms Moni explicated that her duties were to protect and check on the general well-being of PRASA customers and all those present on PRASA premises. In addition, she was required to check that train doors are closed before

trains depart the station. In the event of train doors not closing, trains would be stopped to check if it could be attended to.

[28] Ms Moni explained the reporting protocol which included a recordal of any incident in an Occurrence Book. In this regard, even if there was nothing to report, same would be recorded. Ms Moni testified that there was no incident reported to her on the day in question. The methods of reporting incidents in the Occurrence Book was explicated by Ms Moni to include *inter alia*:

- (a) Where she or her colleague would observe it themselves;
- (b) Commuters would report an incident they may have witnessed to them;
- (c) The train driver would report an incident that they may have observed to them en route and
- (d) The train guard would report an incident that he may have witnessed en route.

[29] The circumstances under which Fire and Rescue Services and the Ambulance Services in *casu* accessed the premises to attend to the injured Plaintiff was put to Ms Moni, to which she responded that the correct procedure to follow for them to access the Defendant's environment would have been for them to call their Controller to request permission, which would be recorded in the Occurrence Book. In certain instances, they would even take pictures of them.

[30] During cross-examination Ms Moni maintained that on 14 November 2018, no incident had occurred. If an incident had occurred, she or her colleague whom she was on duty with, would have recorded it in the Occurrence Book. She however, conceded that if an incident had happened between stations *en route* to Bellville, such

as the matter in *casu*, it would not be reported to Kuils River station. She also conceded that she could not comment on why the Fire and Rescue Services and the Ambulance Services would attend a scene on the railway line, given that it did not fall within the premises where she was employed on the day. Ms Moni also conceded that the possibility existed that even where no incident was reported at the Kuils River station and/or recorded in the Occurrence Book, it did not mean that the said incident did not occur.

[31] **Mr Thando Klaas** ("Mr Klaas") stated that he is an Investigating Officer in the employ of the Defendant, PRASA since 2013. He explained that he had investigated this incident, which was triggered after summons was received in this matter, which was served in 2019. Pursuant thereto, he compiled a report which was concluded on 27 March 2024.

[32] He explained the methodology he had used in conducting the investigation. In this regard, he stated that he consulted the Cape Metrorail Operation Control Center ("CMOCC") Occurrence Book, which is compiled by a Controller at the Control Center, comprising of hand-written entries. Mr Klaas, indicated that he is alive to the possibility of human error and therefore perused the CMOCC Occurrence Book's entries recorded two days prior to the alleged incident date. In other words, for the period 12 November 2018 to 16 November 2018, and did not find any entry related to the incident as alleged by the Plaintiff.

[33] He explained the sources of the entries in the CMOCC Occurrence Book would be received from security personnel, train drivers and train guards. Mr Klaas further orated that other stakeholders would also report incidents to them which

included the South African Police Services, Community, Commuters, Private Security Companies, Ambulance Services, Fire Fighters and Transnet.

[34] In addition, Mr Klaas perused the CMOCC Daily Report and no incident as alleged by the Plaintiff was reported. Mr Klaas stated that if an incident such as the one alleged by the Plaintiff had happened, then it would have been recorded under the sub-heading "Train Casualties" in the CMOCC Daily Report. In response to the averments made in the Plaintiff's case, Mr Klaas indicated as follows:

- (a) The Defendant's environment is dangerous;
- (b) The protocol or usual procedure when someone accesses the Defendant's environment was not followed, namely reporting to the Defendant's Control Center to get clearance that it is safe for them to be in-between the railway tracks;
- (c) The Defendant's Control Center would be able to direct the Fire and Rescue personnel and Ambulance personnel to the exact location of the incident using mast pole numbers as they are not familiar with the Defendant's environment;
- (d) The Defendant's controller will stop the trains travelling on that route to ensure the safety of the Fire and Rescue personnel and the Ambulance personnel whilst in their environment.

[35] In considering these factors, Mr Klaas concluded that the version of Mr Daniels was not true. Furthermore, according to Mr Klaas, had the incident occurred, it would have caused train delays on the Bellville – Kuils River route. The "Faults/Flimsy Report" did not have any record of any train delay in Bellville – Kuils River route, which supported his conclusion that the incident as alleged by the Plaintiff did not occur in the environment of the Defendant. The probabilities on the Plaintiff's

version that he spent approximately 2 hours on the railway tracks before he was assisted, was challenged for the following reasons:

- (a) That there would have been around 8 trains that would have passed the Plaintiff;
- (b) The commuters travelling on those trains would have seen him and reported it to security personnel when they arrived at their respective train stations;
- (c) The Defendant's security personnel who patrol within the railway lines would have seen him and reported the incident;
- (d) The train driver and train guards of trains passing where the Plaintiff alleges he was lying, would have been in a position to observe the tracks in both directions and see the Plaintiff.

[36] The conclusion reached by Mr Klaas, absent a report from the sources mentioned above, is that it would be impossible for no-one to have seen the Plaintiff lying where the Plaintiff claimed he was incapacitated. Mr Klaas also perused the Big 5 Report which is a weekly Report to Management in the Western Cape Region on track incidents within the region. There was no report of the Plaintiff's incident recorded in the report. Mr Klaas also indicated that it would be impossible for a person who boards a train at Kuils River station to be in Sarepta station without first going to Bellville station.

[37] During cross-examination Mr Klaas conceded that he did not interview the train drivers who drove trains on the 14th of November 2018. The reason for this is because the train drivers would have reported such an event and because there was no report from them, he saw no logical reason to interview them.

Principal submissions on behalf of the Plaintiff

[38] Counsel for the Plaintiff submitted that the Plaintiff had succeeded in discharging the onus on a balance of probabilities that the incident occurred, as the Plaintiff's version was corroborated by independent evidence. Furthermore, it was contended that the Defendant has a legal duty to ensure that train commuters travel safely. In failing to do so, PRASA had negligently and wrongfully breached its said legal duty, as the carriage doors remained open. In addition, it was also contended that the Defendant failed to make out a case of contributory negligence.

Principal submissions on behalf of the Defendant

[39] The Defendant submitted that the version of the Plaintiff is not probable for the following reasons:

- (a) No credible independent documentary evidence places the Plaintiff at the environment of the Defendant as there was no incident reported in the CMOCC Daily report, CMOCC Occurrence Book, Faults/Flimsy Report and Big 5 Report;
- (b) The oral evidence of Mr Daniels, 6 years after the alleged incident, contradicts entries made in the Ambulance records on the day of the alleged incident and should be rejected as the most probable version should be the one that was recorded in real time. There is no onus on the Defendant to prove the probable place in which the incident might have occurred, however, the onus is on the Plaintiff to prove on a balance of probabilities that the incident occurred in the environment of the Defendant, which onus, it was submitted, the Plaintiff failed to discharge;
- (c) The credibility of Mr Daniels was brought into question. In this regard, under cross-examination the issue of crossing over electric live railway tracks was put

to Mr Daniels as his version was that he did not cross over the electric live railway tracks, only to change that version on re-examination;

- (d) The chain of evidence of the Plaintiff is not complete by the failure to disclose prior to the trial and to call the Fire and Rescue team, who were the first responders to the alleged scene of the incident. It was argued that that missing piece of the puzzle cast more doubt on the probabilities of Mr Daniels' evidence, more especially because it is not corroborated by the Plaintiff.

[40] It was further contended that the Plaintiff had selective amnesia. He forgot simple things like the name of the company he was going to for the interview, the time of the interview and the place of the interview. Yet, he was able to remember finer details of the alleged "gangsters" such as their tattoos. It was argued that when this was raised then the Plaintiff went into a state of not remembering things, even the things he was previously clear on like the position of the tattoos of the alleged "gangsters". It was contended that the behaviour of the Plaintiff could be likened to that of a witness who had forgotten to abide by the script of "I do not remember". Counsel for the Defendant submitted that the Plaintiff was not a reliable witness.

[41] In addition, it was highlighted that there are contradicting versions as to the location of the Plaintiff after the incident. The version of the Plaintiff is that he was pushed out of the train as it was approaching Bellville Station, almost one minute (on train time) away from Bellville Station as per the photo exhibit in the trial bundle.¹ The version of Mr Daniels is that he entered through the gate, and walked along the tracks

¹ Trial Bundle, page 54.

to a location one minute away (on train time) to Bellville Station.² It was suggested that the most obvious probable thing to have done was to go to Bellville station and then navigate their way from there to the place of the alleged incident.

[42] It was argued that the location indicated on the navigation note raises doubts on the veracity of Mr Daniels and Plaintiff's version regarding where the Plaintiff was found. It was submitted that for this court to find the evidence of Mr Daniels is probable, the court would have to accept the version that an incident occurred one minute away from Bellville station on train time and was given a navigation note that was almost 5 kilometres away from the actual alleged incident.

[43] It was further contended that the most probable version is the following:

- (a) it is most likely that if the incident happened, the commuters, the train drivers, the train guards or the patrolling securities would have seen the Plaintiff lying on the side of the railway tracks and reported it as per the standard protocols. What mitigates against the human error is that approximately 8 trains would have passed over the period the Plaintiff claims he spent on the side of the railway tracks. It was contended that it is unlikely that all these trains would not have seen the Plaintiff;
- (b) it is unlikely that no train driver, train guard or security saw the Fire and Rescue team and ambulance personnel on the railway tracks without reporting it;
- (c) it is unlikely that the Fire and Rescue team and ambulance personnel, knowing the protocol as stakeholders of the Defendant, entered the dangerous environment of the Defendant, risked their own lives to rescue the Plaintiff in

² Trial Bundle, page 55.

the presence of the moving trains on the railway tracks and live electric cables of the railway;

(d) that it is highly unlikely that an incident in which the Fire and Rescue team and the Ambulance personnel would be in the environment of the Defendant without any supervision of the Defendant's personnel;

(e) It is highly unlikely that if the incident as alleged by the Plaintiff occurred, it would not cause train delays in the Bellville – Kuils River route.

[44] It was argued that on the totality of the evidence, the version of the Defendant is the most probable version. In this regard, it was mooted that the evidence of Mr Klaas is to be preferred in that his evidence was clear, logical and not exaggerated.

Issues in dispute

[45] The identified issues in dispute included *inter alia*:

- (a) Whether the incident occurred as alleged or at all;
- (b) Whether the Defendant had a legal duty as pleaded;
- (c) Whether the Fire and Rescue Team reported to the Defendant's environment as first responders to the scene;
- (d) Whether the Ambulance Team found the Plaintiff at the Defendant's environment;
- (e) If the incident occurred, whether the Defendant wrongfully and/or negligently caused the Plaintiff's injuries and
- (f) Whether the Plaintiff was contributorily negligent.

The onus

[46] The standard of proof is well established in civil cases. It is trite that the party on whom the onus lies is required to satisfy the court that he is entitled to succeed on his claim or defence.³ According to Voet (22.3.10), the legal position is: *"He who asserts, proves, and not he who denies, since a denial of a fact cannot naturally be proved, provided that it is a fact that is denied and that the denial is absolute."*

[47] It is trite that the onus rests on the Plaintiff to establish on a balance of probabilities the case it presents.⁴ Therefore, in order to satisfy the onus of proof, the Plaintiff is required to adduce sufficient evidence to establish a *prima facie* case. The learned authors, **Zeffert & Paizes**⁵ confirm that a failure to do so will result in a Court not accepting a Plaintiff's version, even in the absence of evidence in rebuttal from a Defendant.⁶

Legal framework

[48] It is settled law that in instances where there are two diametrically opposing versions the court must be satisfied upon adequate grounds that the story of the litigant upon whom the onus rests is true and the other false or mistaken. In this regard, the court is to be satisfied that the version of the litigant upon whom the onus rests is the true version and that absolute reliance can be placed upon the story as told by the party on whom the onus rests.⁷

³ *Pillay v Krishna* 1946 AD 946 952- 953.

⁴ *The National Employers' General Insurance v Jagers* 1984 (4) SA 437 (ECD) at 440 – 441 A.

⁵ Zeffert & Paizes, *The South African Law of Evidence* (2009) at 132.

⁶ See also P J Schwikkard, S E Van Der Merwe – Principles of Evidence, 4th Edition, at 627.

⁷ *National Employers Mutual General Insurance Association v Gany* 1931 AD 187 at 199.

[49] The correct approach to be adopted when dealing with mutually destructive was briefly set out in **National Employers General Insurance Company v Jagers**⁸ which was approved in **Stellenbosch Famer's Winery Group LTD and another v Martell et Cie and Others**⁹ where Nienaber JA stated the following:

'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. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as –

- (i) the witnesses; candour and demeanour in the witness-box,*
- (ii) his bias, latent and blatant,*
- (iii) internal contradictions in his evidence,*
- (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions,*
- (v) the probability or improbability of particular aspects of his version,*
- (vi) the caliber and cogency of his performance compared to that of other witnesses testifying about the same incident or events.*

As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on

- (i) the opportunities he had to experience or observe the event in question; and*
- (ii) the quality, integrity and independence of his recall thereof.*

As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one

⁸ 1984 (4) SA 437 (E) at 440E-G, *'Where there are two mutually destructive versions the party can only succeed if he satisfies the court on a balance of probabilities that his version is true and accurate and therefore acceptable, and the other version advanced is therefore false or mistaken and falls to be rejected. In deciding whether the evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with the consideration of the probabilities of the case, and if the balance of probabilities favours the plaintiff, then the court will accept his version as probably true.'*

⁹ 2003 (1) SA 11 (SCA).

direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the later. But when all factors are equipoised probabilities prevail'.

[50] The considerations articulated in this matter have been quoted with approval in a plethora of subsequent judicial authorities.¹⁰ It is therefore incumbent on this court to consider the aforementioned principles in evaluating the evidence.

Evaluation of evidence

[51] The Defendant highlighted that there were inconsistencies in the Plaintiff's pleaded case to his *viva voce* testimony insofar as to how the Plaintiff allegedly got injured. The purpose of pleadings was aptly dealt with in ***Imprefed (Pty) Ltd v National Transport Commissioner***¹¹ where it was stated that:

'At the outset it need hardly be stressed that: the whole purpose of pleadings is to bring clearly to the notice of the court and the parties to an action the issues upon which reliance is to be placed. This fundamental principle is similarly stressed in Odgers' Principles of Pleadings and Practice in Civil Action in the High Court of Justice 22nd ed at 113: The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be attained when each party states his case with precision,'¹²

[52] In ***Minister of Safety & Security v Slabbert***¹³, the Supreme Court of Appeal held:

'A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different

¹⁰ *Santam Beperk v Biddulph* 2004 (5) SA 586 (SCA) at para 5 and 20; *De Beer v Road Accident Fund* ZAGPJHC 124 (28 March 2019). *Nisele v Road Accident Fund* (2017) ZAGPHC (1 March 2017) at paras 13-14.

¹¹ 1993 (3) SA 94 (A) at 107C - E.

¹² See also *Kali v Incorporated General Insurances Ltd* 1976 (2) SA 179 (D) at 182A. '...a pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvas another.'

¹³ [2009] ZASCA 163; [2010] 2 All SA 474 (SCA), at para 11.

case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case. [Emphasis added]

[53] The averments pleaded in the Plaintiff's Particulars of Claim and the Plaintiff's Reply to the Defendant's Request for Further Particulars are that the carriage which the Plaintiff boarded was filled with passengers:

'4. *The Plaintiff, who was on his way to attend a job interview, boarded the train and noted, shortly after its departure, that the carriage in which he found himself, was filled with passengers and hence, was quite full, given that all the seats were taken by other passengers and a number of passengers were left standing in the carriage.*¹⁴

'13. *The carriage was full of passengers to the extent that all the seats were taken and the remaining passengers had to stand, but the carriage was not overcrowded.*¹⁵

[Emphasis added]

[54] The Plaintiff's pleaded case, it was argued, is different to his *viva voce* testimony to the effect that the carriage was 50% full or quite full. Regard is to be had to the evidence in its entirety. The scene was sketched for the court through the narration of the Plaintiff as to how it came about that he did not take up a seat and why he indicated a preference to stand. In this regard, it was placed on record that there were broken windows and vandalised chairs. It would therefore go without saying that passengers cannot sit on broken chairs and neither will it be untoward for passengers to avoid being in the vicinity of the broken windows. Whilst the carriage was technically not full, the fact that there were no seats or that passengers elected to avoid standing

¹⁴ Index to Pleadings and Notices, para 4 page 6.

¹⁵ Index to Pleadings and Notices, para 13, page 100.

in certain areas because of the broken windows, could be regarded as half full or full, depending on how one looks at it.

[55] As will be expounded on later in this judgment, the Plaintiff's election to stand where he did, may be a factor in determining whether the Plaintiff would have voluntarily assumed a risk by choosing to remain standing close to a malfunctioning door. The vandalised seats and broken windows lend credence to the Plaintiff's explanation as to why he opted to stand. In my view, the failure to plead the condition of the inside of the train is not crucial as the protagonist in the story was the non-functioning door of the train, which is material to the Plaintiff's case. In my view, nothing turns on this if regard is had to the context provided to the Court by the Plaintiff. In my view, whether the train was full or 50% full does not in and of itself, render the Plaintiff's version improbable.

[56] The Defendant argued that Mr Daniels' version is inconsistent with the pleaded case that the Plaintiff was initially assisted by the community living near the railway line which was pleaded as follows:

'7. The Plaintiff was pushed out of the left side of a train which was in motion and after the resultant fall, was initially assisted by people residing next to the railway line in the area where he has been pushed out of the train'¹⁶

[57] The presence of the Fire and Rescue team was not pleaded. They were introduced as role-players for the first time when Mr Daniels testified. In this regard, the failure to plead that the first responders to the scene of the alleged incident were

¹⁶ Index to Pleadings and Notices, para 7, page 7.

the Fire and Rescue team, was argued to be material. It was mooted that the Fire and Rescue team and their records would have been subpoenaed to explain how they got to know about the alleged incident and how they managed to enter the environment of the Defendant without first reporting at the Control Center to get clearance to allow them entrance to the dangerous environment of the Defendant.

[58] In addition, it was contended that the Plaintiff's failure to plead that the first responders at the scene were the Fire and Rescue personnel constituted litigation by surprise and prejudiced the Defendant especially because Fire and Rescue is a stakeholder of the Defendant. The Defendant argued that this creates a lacuna in the chain of evidence presented by the Plaintiff thereby creating doubt in the version of Mr Daniels.

[59] The evidence of Mr Daniels is clear that when he arrived at the location, he saw the vehicle of the Fire and Rescue Team there. He was met by one of the members who took him to where the Plaintiff was. The challenge by the Defendant pertaining to the belated mention of the Fire and Rescue Team appears to be two - fold, namely:

- (a) To bring into question the credibility of Mr Daniels' version insofar as it relates to where the Plaintiff was found and
- (b) To bring into question the credibility of the Plaintiff that he was:
 - (i) On the train and
 - (ii) Pushed off the train.

[60] Whilst it may be so that the Fire and Rescue members are trained in administering basic first aid in cases of emergency, the extent of this training has not been formally placed on record, to support the contention that the Ambulance Services were not required to administer the stabilising treatment. Regard is further to be had to the evidence of the Plaintiff to the effect that he floated in and out of consciousness. On the Plaintiff's version, he does not remember anything after the alleged incident, except when he was taken to the ambulance. Mr Daniels testified that there were no bystanders and only the Fire and Rescue team were at the scene. The details on who made the calls to the Fire and Rescue team and Ambulance Services are absent. It can safely be deduced that the Plaintiff did not make the call. In my view, the assertion regarding the initial assistance is not material as the Plaintiff ultimately received assistance.

[61] The Defendant furthermore averred that the Plaintiff's failure to plead that the train ticket was not his, is critical because the owner of the ticket was not called to testify. It was submitted that this too would constitute litigation by surprise to the prejudice of the Defendant. The Plaintiff was challenged about him holding onto the train ticket, which belonged to his ex-girlfriend as he handed it to his attorneys during the period of January to April 2019. It was suggested that the story about the Plaintiff having a valid train ticket and that the ticket that he did have belonged to his ex-girlfriend was a fabrication. This, because his ex-girlfriend would have needed her ticket to get to work for the remainder of the period for which the ticket was valid. Furthermore, it was argued that his ex-girlfriend, could have been called to verify the veracity of the Plaintiff's version that he borrowed her ticket to be able to attend his job interview.

[62] It was argued that serious doubt on the Plaintiff's case has been created that the Plaintiff was in fact on board a train as he alleges. It is also my view that it wasn't crucial for the Plaintiff to plead that the train ticket belonged to his ex-girlfriend. The important consideration was that he was in possession of a valid ticket and that he was a fare-paying passenger on the train by virtue of being in possession of a valid ticket. There is nothing to gainsay that the Plaintiff was not on board the train and to suggest that because the station indicated on the ticket was Blackheath, he fabricated the version of being pushed out of the train. It was established during the trial that Blackheath station was the next station and was on the same train line. This argument, in my view, is unsustainable if regard is had to the independent supporting evidence.

[63] It is trite that material facts upon which reliance is based is to be pleaded. The aforesaid incongruencies in the pleaded are in my view, not material if regard is had to the factual matrix and the issues that require determination. In determining whether evidence is true or not, the Court weighs up and tests the Plaintiff's allegations against the general probabilities.

[64] The credibility and reliability of the Plaintiff's evidence becomes a crucial consideration in determining whether the Plaintiff had jumped from the train or whether he was pushed from the moving train as alleged. This, because, the chief complainant was recorded as "...sustained left tib/fib fracture (closed) after jumping from a moving train...", per the records of the ambulance. This differs from the Karl Bremmer medical records where it was recorded that the Plaintiff was pushed out of the train, which is consistent with the Plaintiff's version.

[65] During the cross-examination, of Mr Daniels, it came to light that the entries that formed part of the ambulance record are in fact populated in real time. The incident address remains a pivotal bone of contention. It was argued that Mr Daniels' evidence contradicts the ambulance records in terms of the incident address, navigation note and chief complaint. It was argued that that the information encapsulated on the record is the most reliable and accurate, as compared to Mr Daniels memory almost 6 years later.

[66] Mr Daniels explained that their navigation system worked with Global Positioning Systems ("GPS") which guided them to Otto Meyer Drive. The incident address provided is generated by GPS, therefore, the explanation provided by Mr Daniels as to how they ended up at Otto Meyer Drive appears plausible. The Defendant's challenge is based on the version that an incident occurred one minute away from Bellville station on train time, but the navigation note directed them almost 5 kilometres away from the actual alleged incident. Although access to the Plaintiff could possibly have been achieved from Bellville station, Mr Daniels followed the GPS which took him to the place where he was met by Fire and Rescue Services. Mr Daniels did not know the exact location of the Plaintiff at the time and wasn't in a position to contemplate an alternative way of accessing the patient until he knew where the exact location of the patient was.

[67] The Defendant argued that there is no railway line that connects Kuils River station and Sarepta station and that it would therefore be impossible for one to board a train in Kuils River and be found near Sarepta station without first going to Bellville station. This proposition was put to Mr Daniels in order to challenge the veracity of where the Plaintiff was found as it remained the Defendant's version that

the Plaintiff was not in the Defendant's environment. The focus on "near Sarepta Station", in my view, cannot be sustained as the location was approximated. The explanation proffered by Mr Daniels is consistent with the location of where the Plaintiff was found.

[68] It must also be borne in mind, as submitted by the Plaintiff, that there is a reasonable explanation why the ambulance records did not specifically state that the Plaintiff was found next to the railway tracks; namely, that Mr Daniels was newly appointed as an emergency services member and he was not focused on the environment where the Plaintiff was found. Mr Daniels' primary focus was on treating the patient. The geographical details in my view are immaterial. Thus, whether the Plaintiff was found on the side of the tracks or whether they had to cross one set of tracks to get to the Plaintiff, does not disturb the evidence of Mr Daniels and neither does it impugn his credibility. Furthermore, it must be borne in mind, that the incident happened approximately 6 years ago and the photographs referenced during the trial did not depict the exact location of where the Plaintiff had fallen out of the train and/or was found.

[69] The Defendant maintained that the incident never happened and if it did happen it did not happen in the Defendant's environment. Ms Moni testified that if an incident was not recorded in the Occurrence Book there is a likelihood it did not happen. This does not rule out the probability that the incident happened without the incident being reported. In which case, there would be no record thereof. While there may be protocols in place, it is not always guaranteed to be 100% effective as much of it relies on an incident being observed and then reported. The ideology behind the Occurrence Book and the Security's function on the precinct of the Defendant's

environment, may envisage a system that works perfectly. However, all of this is dependent on adherence to the reporting protocols and procedures.

[70] Ms Moni's testimony could not provide any assistance to the court as her evidence was tendered in general terms. The incident did not happen at the station where she was performing duties. Although she has a colleague who is also entrusted with the task of overall security duties, it is not impossible to miss a malfunctioning train door. In any event there is no clear or concise evidence of how many doors she had inspected, and which carriages had been inspected. It is in my view, humanly impossible to have eyes everywhere, proverbially speaking. Furthermore, it was not established how busy the platform was on the day, but from the available evidence, there was at least a carriage that was half full. There are many other carriages, the capacities of which haven't been dealt with. However, it is safe to say that judicial notice can be taken that there are multiple carriages with many commuters. The conditions of the trains in general make the Plaintiff's version probable insofar as he explains the doors were not working and the overall conditions of train carriages.

[71] The probabilities as confirmed by Mr Daniels favour the conclusion that the train doors had not closed completely prior to the train departing. I interpose to mention that the acceptance of the Plaintiff's version is supported by the sound the doors made in an attempt to repeatedly close. It wasn't established which carriage the Plaintiff was in *vis a vis* where Ms Moni or her colleague would have been standing in order to make observations that the doors were not closing. On the probabilities, the likelihood that the doors did malfunction cannot be completely ruled out. The Defendant's system in my view is susceptible to human error.

[72] Mr Klaas remained steadfast that given the absence of any information regarding the incident on the records of PRASA, the conclusion reached on the probabilities was that the incident did not occur on PRASA's premises. Mr Klaas, on the probabilities, concluded that the Plaintiff could not have spent almost 2 hours in between the railway tracks as it would have been impossible for no report to have been received from either fellow commuters, patrolling securities, train drivers and train guards. Mr Klaas on the question posed by the court conceded that his view is premised on the infallibility of human observation.

[73] I am therefore not persuaded that Mr Klaas's reasoning is sustainable. In my view, it is by all accounts opportunistic to suggest that the absence of a report by fellow train drivers and/or guards and any entry into the PRASA records, that on the probabilities, no incident had occurred. It is further my view that the Defendant's proposition that the Plaintiff was not found on the Defendant's environment after being injured, cannot be sustained. This, because the evidence of the Plaintiff and Mr Daniels was that the nature of the Plaintiff's injuries was such that he had to be carried to the ambulance on a scoop stretcher.

[74] On a conspectus of the evidence, I am satisfied on a balance of probabilities, that the Plaintiff was indeed found in the vicinity of the railway tracks in the Defendant's environment. The fact that the Plaintiff was found in the vicinity of the train tracks in the Defendant's environment as per the independent evidence of Mr Daniels on a balance of probabilities, supports the Plaintiff's assertion that he was ejected from the train.

[75] The evidence of the Plaintiff was that he was pushed out of the moving train which is in sharp contradiction to what is recorded in the ambulance records, namely that he jumped out of the train. The Plaintiff could not explain why this was so recorded. The Plaintiff remembered that he was given medication for pain and could not remember much after that. Although there was a report that suggested that the Plaintiff jumped from the train, it must be noted that it was a singular entry, the origin whereof has not been established.

[76] It is important to note further that the correctness of the content of the medical and/or hospital records was accepted and not placed in dispute. Although Dr Oosthuizen testified that he could not recall the origin of the information that the Plaintiff was “pushed from the train last night”, he conceded that it is likely that he would have established that from the conversation he had with the Plaintiff when he examined him. If regard is had to the testimony of Dr Oosthuizen, on a conspectus of the evidence, the injuries are compatible with the Plaintiff's version of being pushed from a train. Dr Oosthuizen made a good impression on the court. I find him to be a credible witness.

[77] It was suggested that the explanation by the Plaintiff that he was going to attend an interview was a fabrication, because he was unable to remember the details thereof. The Plaintiff did however indicate that it was for a Call Center Agent position. The Plaintiff could also recall what he was wearing on the day of the incident. Whilst the Defendant raises the Plaintiff's demeanour as a concern; more particularly when the Plaintiff was asked about the interview, responded in a quiet and indistinct way. It is important to note that the Plaintiff was in the witness box from the afternoon

of the 8th of May 2024. The cross-examination commenced on the 9th of May 2024 just before lunch, which carried on for the remainder of the day. Further cross-examination resumed on 19 June 2024, on which day, the Plaintiff was not well and appeared slumped over. The matter proceeded after the court verified with the Plaintiff and his Counsel that he was able and fit to proceed. This court therefore draws no negative inference in respect of the drop in the Plaintiff's tone of voice as the Plaintiff was visibly tired and was frank about not being able to remember certain details. In my view, the Plaintiff's credibility has not been shaken for want of the details such as where he was on his way to, what the name of the company was or the time of his appointment.

[78] It is my view, that the finer details of where the Plaintiff was on his way to, is not material as the Plaintiff maintained he was on the train. This is supported by collateral evidence that he was in possession of a ticket and, on Mr Daniels' evidence, was found at the railway tracks. Consistency in the Plaintiff's version can be found in the report made by the Plaintiff to Dr d'Offay at Karl Bremmer Hospital that he had been pushed from the train, which in my view, is sufficient corroboration to support the version of the Plaintiff that he was pushed out of the train. In the circumstances, by way of inferential reasoning, the probabilities favour the Plaintiff's narrative that he was indeed on the train on the date in question.

[79] The Plaintiff cannot be criticised for the details that he could and /or could not remember about the unsavoury people on board the train as the incident itself happened some time back and the Plaintiff is uncertain whether they had anything to do with the surge of passengers towards the door. This was clearly a speculative assumption. For Counsel for the Defendant to expect the Plaintiff to remember which

hand the tattoos were and other details, would in my view be unreasonable to expect as the main event of the day was the falling incident and not the inconsequential detail that is, in my view, is of no moment.

[80] In considering the probabilities, the reasons provided by the Plaintiff for not having reported the incidents to PRASA and SAPS appear to be plausible. In this regard, he stated that he did not know that he had to report the incident and that he was just too grateful that he did not lose his leg.

[81] The Plaintiff was a good witness. He gave a clear, logical and chronological account of the incident. The highlighted discrepancies as earlier dealt with, in my view are not material. The Plaintiff's version of what had happened is substantially corroborated by independent sources and witnesses. The issues on which the Plaintiff was challenged, did not in any way injure the Plaintiff's credibility or reliability, if regard is to be had to the evidence in its entirety. Whilst reliance is placed on the evidence of a single witness, there are sufficient safeguards by way of collateral independent evidence. Substantial corroboration can therefore be found in the evidence of Mr Daniels which was unequivocal.

[82] Mr Daniels was a credibility witness. He made a good impression on the court and gave the court a consistent, logical and chronological exposition of the events from the time of the call out to the eventual handing over of the Plaintiff at Karl Bremmer Hospital. His objective evidence serves to support the version of the Plaintiff as to where he was located. His recollection of events is indelibly etched in his memory, despite the time lapse of 6 years, which is supported by the real time records made

by Mr Daniels. I can find no reason why Mr Daniels, would fabricate a narrative so elaborate of what transpired on the day in question as he does not know the Plaintiff and has no reason to tailor his evidence.

[83] The Defendant places reliance entirely on a system where incidents are reported and recorded manually. In my view, this defence cannot be sustained as the reporting system relies entirely on the expectation that incidents will be reported regardless. The Defendant's hypothesis is fallacious in my view, as it fails to address the legal duty of care that rests on PRASA, which I will deal with later in this judgment. Whilst I can make no adverse credibility findings, the evidence of Ms Moni and Mr Klaas was in my view, merely formal in nature and could not assist the court. The court accepts that as employees of the Defendant, their evidence was intended to provide the court with an overview of the reporting protocols of the Defendant. These protocols do not provide guaranteed and flawless reporting machinery. I cannot find the methodology of the various envisaged reporting procedures outlined, to be reliable for the purposes of this matter.

[84] Again, whether the carriage was 50% full or full or whether there were broken windows or vandalised chairs does not detract from the Plaintiff's version that he was pushed from the train. Of importance is that the Plaintiff has remained steadfast in the material aspect of the evidence and for that reason, I make no negative inference from the inconsistencies pointed out by the Defendant. Therefore, in evaluating the evidence of the Plaintiff and considering the entrenched legal principles set out in ***Stellenbosch Farmer's Winery (supra)***, the test ultimately is not whether the witness is truthful or indeed reliable in all that he says, but whether on a balance of probabilities

the essential features of the story which he tells are true. It is trite that a court will not reject a witness's evidence on account of discrepancies over minor points of detail.¹⁷

[85] In the circumstances I find the Plaintiff to be a credible witness despite the shortcomings, which in my view are not material in nature. In considering the totality of the evidence in accordance with the legal principles, the probabilities favour the Plaintiff's version that the incident did occur, namely that the Plaintiff was pushed out of the moving train because the door of the train remained open while the train was in motion.

Legal Duty

[86] The Plaintiff's claim against the Defendant is predicated on the assertion that the Defendant was under a legal duty to take such steps as were reasonably necessary to ensure his safety. In this regard, the Plaintiff avers that the Defendant breached its legal duty, which obligations included *inter alia*:

- (a) To dispatch personnel and/or security personnel to all its trains in order to ensure the safe travelling of its commuters, inclusive of ensuring that trains are not overcrowded;
- (b) To take all such steps as are reasonably necessary to put in place proper and adequate safety and security services which shall include, but not be limited to, steps to properly control access to and egress from rail commuter facilities used by rail commuters in the Western Cape in order to protect commuters' rights to life, to freedom from all forms of violence from private sources, to human dignity, freedom of movement and property;

¹⁷ *Rex v Kristusamy* 1945 AD 549 at page 555.

- (c) To implement safety and/or security measures to ensure the safe passage of commuters on any trains, more particularly, the train, on which Plaintiff was travelling;
- (d) To implement steps to control access to and egress from coaches to ensure that coaches do not carry more commuters than what is reasonable in the circumstance;
- (e) To install safe and secure door systems which will remain closed at all times whilst trains are in motion and commuters are making use of rail transport services;
- (f) To implement operating instructions which will ensure closed doors at all times when trains are in motion;
- (g) To take reasonable precautions to safeguard commuters against the occurrence of injury or death.

[87] The Plaintiff alleged in his pleadings that the Defendant omitted to discharge the legal duty by omitting to take one or more or all of the steps enumerated above. The Plaintiff furthermore pleaded that had the Defendant discharged the aforementioned legal duty, by taking the necessary steps, the incident would not have occurred and the Plaintiff would not have sustained his serious injuries. The Defendant denied that it had a legal duty take such steps as were reasonably necessary to ensure his safety for the reasons as pleaded by the Plaintiff.

[88] In ***Mashongwa vs PRASA*** (Mashongwa)¹⁸ the Constitutional court aptly distilled the duty and obligation placed on a public carrier in safeguarding and securing

¹⁸ 2016 (3) SA 528 (CC).

the well-being of commuters, more particularly, that they are to ensure that there are measures in place to provide for the safety of all rail commuters:

[18] The vulnerability of rail commuters and the precarious situation in which they often find themselves ought by now, to be self-evident. It is 10 years since Metrorail in effect highlighted the need to keep coach doors closed to secure rail commuters and the significance of failing to provide safety and security measures for them when a train is in motion. Even then it was not a new problem as there were reported decisions in other courts that dealt with it. This underpins the utmost importance of PRASA's duty "to ensure that reasonable measures are in place to provide for the safety of rail commuters"

[20] Public carriers like PRASA have always been regarded as owing a legal duty to their passengers to protect them from suffering physical harm while making use of their transport services....

[26] ...Safeguarding the physical wellbeing of passengers must be a central obligation of PRASA. It reflects the ordinary duty resting on public carriers and is reinforced by the specific constitutional obligation to protect passengers' bodily integrity that rests on PRASA, as an organ of State. The norms and values derived from the Constitution demand that a negligent breach of those duties, even by way of omission, should, absent a suitable non-judicial remedy, attract liability to compensate injured persons in damages.¹⁹

[89] It therefore follows that a breach of PRASA's duties is wrongful in the delictual sense and could attract liability. In **Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng**²⁰ the Constitutional Court defines wrongfulness as follows:

'Wrongfulness is an element of delictual liability. It functions to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether "the social, economic and others costs are just too high to justify the use of the law of delict for the resolution of the particular issue". Wrongfulness typically acts as a

¹⁹ At paras 18, 20 and 26.

²⁰ 2015 (1) SA 1 (CC) at paras 20 and 22.

brake on liability, particularly in areas of the law of delict where it is undesirable or overly burdensome to impose liability.

...Wrongfulness is generally uncontentious in cases of positive conduct that harms the person or property of another. Conduct of this kind is prima facie wrongful'

[90] The Constitutional Court in ***Rail Commuters Action Group v Transnet Ltd t/a Metrorail*** (Metrorail)²¹, recognised the vulnerability of commuters when they board a train. In this regard the following was remarked:

'Boarding a train renders commuters intensely vulnerable to violent criminals who target them. The applicants emphasised in argument the double bind in which commuters find themselves: they generally have little choice about using the train, and once on the train they are unable to protect themselves against attack by criminals.'

[91] The court held further that:

'Metrorail ...bear a positive obligation ... to ensure that reasonable measures are in place to provide for the security of rail commuters when they provide rail commuter services... It should be clear from the duty thus formulated that it is a duty to ensure that reasonable measures are in place. It does not matter who provides the measures as long as they are in place. The responsibility for ensuring that measures are in place, regardless of who may be implementing them...'

[92] It is therefore manifest that the legal duty on the Defendant arises from the existence of the relationship between carrier and passenger. It is also predicated on its public law obligations, apparent from what was also stated in ***Mashongwa*** (*supra*)²²:

'It is in this context that the legal duty that falls on PRASA's shoulders must be understood. That PRASA is under a public law duty to protect its commuters cannot be disputed. This much was declared by this court in Metrorail. But here this Court goes a

²¹ 2005 (2) SA 359 (CC) paras 82 and 84

²² At para 29

step further to pronounce that the duty concerned, together with constitutional values, have mutated to a private law duty to prevent harm to commuters.'

[93] Pangarker AJ, in this Division in ***Maphela v Passenger Rail Agency of South Africa*** (Maphela)²³ cited ***Metrorail*** to underscore the fact that rail commuters on a daily basis find themselves in a vulnerable position and are targeted by criminals on board trains. Whilst the Plaintiff in *casu* was not a direct target, he may have been a victim of the consequences of their threatened misdeeds.

[94] Therefore, it is apparent that PRASA has a public duty to protect all commuters, but as pointed out in ***Maphela***, this does not mean that it has a legal duty for the purposes of delict. The court in ***Maphela***, in dealing with the legal duty in reference to ***Shabalala v Metrorail***²⁴ emphasised that '*the defendant is required to take reasonable steps to provide for the safety of commuters and any failure to take such steps may render it liable in delict.*'²⁵

[95] The Defendant in its pleadings appears to deny the existence of a legal duty on PRASA to ensure the safe commuting of passengers. The existence of such a legal duty has unequivocally been demonstrated through the myriad of decided cases referenced. To argue to the contrary is therefore immutable as accepted legal principles in this regard are firmly entrenched. I am therefore satisfied that a case has been made out by the Plaintiff that PRASA has a legal duty to:

- (a) Ensure that passengers are safely commuted; and
- (b) That the doors of carriages should remain closed whilst the train is in motion,

²³ (834/021) [2023] ZAWCHC 137 (9 June 2023).

²⁴ [2007] ZASCA 157 par 7

²⁵ At para 47.

failing which, passengers would fall from a train, either accidentally or deliberately by, for example, being pushed.

[96] The next question for determination is whether a breach of the said duty has been proven, with specific reference to the issue of negligence.

Negligence

[97] The Plaintiff averred that the Defendant wrongfully and /or negligently caused the Plaintiff's injuries and/or damages. In the first alternative, to the extent that the court should find that an accident occurred, the Defendant denied that the Defendant's employees were negligent as alleged or at all and pleaded that the incident was caused by the sole negligence of the Plaintiff.

[98] Holmes JA, in **Kruger v Coetzee**,²⁶ elucidated the proper approach for establishing the existence or otherwise of negligence 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.'

[99] The Constitutional Court in **Mashongwa** in considering the issue of negligence approached it as follows:

²⁶ 1966 (2) SA 428 (A) at 430E-F.

'Would a reasonable person in PRASA's position have reasonably foreseen harm befalling Mr Mashongwa as a result of the absence of security guards or the open doors? If so, would she have taken reasonable steps to prevent harm to Mr Mashongwa? If she would, did PRASA take reasonable steps to avert the foreseeable harm that ultimately occurred?'

[100] It bears mentioning that the Constitutional Court in **Mashongwa** recognised that the standard of the reasonable person as set out in **Kruger v Coetzee** (*supra*), in circumstances where PRASA is an organ of state would be different:

'However, it must be emphasised that owing to the fact that PRASA is an organ of state, the standard is not that of a reasonable person but a reasonable organ of state. Organs of state are in a position that is markedly different from that of an individual. Therefore, it does not follow that what is seen to be reasonable from an individual's point of view must also be reasonable in the context of organs of state. That approach would be overlooking the fundamental differences between the State and an individual. It would also be losing sight of the fact that the standard of a reasonable person was developed in the context of private persons.'

[101] The Constitutional Court in **Mashongwa** also pertinently dealt with the potential dangers to passengers on board a train when the doors are left open; further recognising that PRASA's General Operating Instructions, which contain rules prohibiting trains travelling with open doors. The Court remarked that the very existence of these instructions, and the fact that they were an issue of note, which importance was explained in **Metrorail**, ought to have fuelled PRASA's zeal to ensure that all doors were closed before a train departs a station.

'[46] It bears yet another repetition that there is a high demand for the use of trains since they are arguably the most affordable mode of transportation for the poorest members of our society. For this reason, trains are often packed to the point where some passengers have to stand very close to or even lean against the doors. Leaving doors of a moving train open therefore poses a potential danger to passengers on board.

[47] Any passenger could deliberately or accidentally be pushed out of a moving train. Several scenarios that could result in a passenger falling out of a train come to mind. Slipping or losing one's balance before the train comes to a standstill or as it takes off or after it has taken off, falling out of the already open door and sustaining serious injuries are some of the potential risks of harm. Open doors are just as dangerous for the elderly, the infirm and small children, as they are for those who might be preoccupied with one thing or another and thus not paying adequate attention to the danger they are exposed to.

[48] Doors exist not merely to facilitate entry and exit of passengers, but also to secure those inside from danger. PRASA appreciated the importance of keeping the doors of a moving train closed as a necessary safety and security feature. This is borne out by a provision in its operating procedures requiring that doors be closed whenever the train is in motion. Leaving them open is thus an obvious and well known potential danger to passengers.

[49] PRASA's general operating instructions have rules "prohibiting trains traveling with open doors". The very existence of these instructions and the fact that they were an issue of note whose importance was explained in Metrorail, ought to have fuelled PRASA's zeal to ensure that all doors were closed when the train took off. Keeping them open rendered throwing Mr Mashongwa out of a moving train a virtually irresistible temptation to criminals. It thus facilitated his being thrown out. Importantly, it must have been known to PRASA that criminals at times throw their victims out of its moving trains. [Emphasis added]

[102] There is a plethora of case law that confirms that a train leaving with open doors constitutes negligence and reinforces that it remains the duty of the Defendant to ensure that the train does not depart from the station with open doors.²⁷ The Constitutional Court in **Mashongwa** resolutely stated as follows:

'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

²⁷ *Chauke v Passenger Rail Agency of South Africa* (8394/13) [2015] ZAGPPHC 1075 (9/12/2015); *Transnet Limited t/a Metrorail and Another v Witter* 2008 (6) SA 549 (SCA); *Lekhele v Metrorail* (A504/2007) [2008] ZAGPPHC 332 (24 October 2008).

*has it expressly imposed this duty on itself, its importance was also alluded to in Metrorail. It is also commonsensical that keeping the doors of a moving train closed is an essential safety procedure. Mr Mashongwa would probably not have sustained the injuries that culminated in the amputation of his leg had PRASA ensured that the doors of the coach in which he was, were closed while the train was in motion. It was thus negligent of PRASA not to observe a basic safety-critical practice of keeping the coach doors closed while the train was in motion and therefore reasonable to impose liability for damages on it, if other elements were proved.*²⁸ [Emphasis added]

[103] It is unquestionable that an open train door poses a real and present danger to commuters on board a train. PRASA as a reasonable organ of state is enjoined to take measures to prevent foreseeable harm even in circumstances linked to *inter alia*, falling out of the train in circumstances arising from accidental slipping, accidentally being thrown out, being pushed, losing balance, deliberately being thrown out, where there is a scuffle or an event involving criminal activity. It is therefore incontrovertible that it is the Defendant's duty to keep coach doors closed while the train is in motion in order to prevent harm or potential harm to commuters.

[104] The Plaintiff boarded the train at Kuils River station. On his version, the doors never closed, even after the train pulled out of the station, the doors remained inoperative. To this end, he explicated that the doors only partially closed, which was accompanied by a hissing sound, whereafter the doors would open again. It was only when the fellow passengers approached the doors, either in an attempt to get away from the unsavoury characters that he referred to, alternatively in anticipation of disembarking at Bellville station, that he was pushed towards the open doors and despite his attempts to push back, and scream at them to stop pushing that he nevertheless ended up being pushed out of the open carriage doors.

²⁸ At para 52.

[105] A further question arises, namely whether PRASA took any steps reasonable or otherwise from guarding against the Plaintiff *in casu*, falling out of the train. In this instance, the essence of Ms Moni, a security officer's evidence was that she did not observe anything untoward. Nothing was reported to her and had it been reported it would have been documented in the occurrence book. In the case of a malfunctioning train door, the train would not have left the station until the door was closed. I am not persuaded that the observations by Ms Moni and her colleague on duty are infallible. There is also no evidence that any reasonable steps in the circumstances of this case were taken, to prevent the Plaintiff from being pushed out of the train.

Causation

[106] The Defendant pleaded in the alternative, that should the court find that an incident occurred as alleged, that the Plaintiff was pushed out of the carriage of a moving train, and that the Defendant's employees were negligent, then any negligence which may be found on their part did not cause or contribute to the incident and/or to the Plaintiff's damages.

[107] In finding that PRASA's conduct was wrongful and negligent, the question that requires resolution is whether liability should be imputed to it. In other words:

- (a) is there a causal link between PRASA's negligent conduct or omission and the Plaintiff's injuries and

(b) whether there is a close enough connection between PRASA's negligence and the Plaintiff's injuries.

[108] The Constitutional Court in *Lee v Minister for Correctional Services*²⁹ aptly distils the test for causation as follows:

'Although different theories have developed on causation,³⁰ the one frequently employed by courts in determining factual causation, is the conditio sine qua non theory or but-for test.³¹ This test is not without problems, especially when determining whether a specific omission caused a certain consequence. According to this test the enquiry to determine a causal link, put in its simplest formulation, is whether "one fact follows from another."³² The test—

"may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; [otherwise] it would not so have ensued. If the wrongful act is shown in this way not to be a causa sine qua non of the loss suffered, then no legal liability can arise."³³

[109] PRASA as earlier stated, has a legal duty to prevent harm from happening to its commuters. In *casu*, the question to be answered is whether the harm caused to the Plaintiff is closely connected to the omission of the Defendant who carries the duty to prevent the harm. Put differently, would the harm caused to the Plaintiff nevertheless have ensued even if the omission had not occurred. It is manifest, on the Plaintiff's version, that there was a surge towards the exit which ultimately caused him to be pushed out of the moving train. Had the doors of the carriage in

²⁹ [2012] ZACC 30; 2013 (2) SA 144 (CC); 2013 (2) BCLR 129 at para 40.

³⁰ These theories include the foreseeability theory, adequacy theory and the direct consequences theory. See Neethling et al *The Law of Delict* 5 ed (LexisNexis Butterworths, Durban 2006) (Neethling) at 160.

³¹ Some authors refer to it rather as *conditio cum qua non*. See Van Oosten *De Jure* (University of Pretoria, Pretoria 1982) at 257.

³² Neethling above n 71 at 160.

³³ *International Shipping* above n 46 at 700F-H.

which the Plaintiff was travelling been closed, it is more probable than not that he would not have been thrown out of the train on a balance of probability, and would have remained unharmed. On the other hand, the Defendant argued that the Plaintiff stood in a dangerous position. In this regard, it was mooted that if the Plaintiff had not been standing so close to the door, knowing that the door wasn't closing, then the probability would be that he might not have been thrown off the train.

[110] I do not agree with this contention, as regard is to be had to the surrounding factors. The responsibility remained with PRASA to ensure the implementation of a strict safety regime of closing coach doors, when the train is in motion. I am of the view, that the Plaintiff would in all likelihood not have been thrown out of the train had the strict safety regime of closing coach doors been observed. I am therefore satisfied that the traditional but-for test is adequate to establish a causal link between the conduct by omission between the PRASA and the injuries sustained by the Plaintiff. In all likelihood, the Plaintiff would not have been thrown out of the train had the strict safety regime of closing coach doors, when the train is in motion, been observed. Consequently, I find that the Plaintiff has succeeded to establish that the negligent omission by the Defendant was closely connected to the harm suffered by the Plaintiff as a result of the incident.

Contributory Negligence

[111] The Defendant pleaded in the further alternative, that in the event that the court should find that the Plaintiff was pushed out of the carriage of a moving train, and that the Defendant's employees were negligent and that such negligence caused

or contributed to the accident and to the Plaintiff's damages, that the Plaintiff negligently contributed thereto in one or more of the following respects:

- (a) The Plaintiff failed to keep a proper look-out;
- (b) The Plaintiff failed to avoid the occurrence or incident when, with the exercise of reasonable skill and care, the Plaintiff could and should have done so;
- (c) The Plaintiff knowingly and voluntarily exposed himself to the risk of being injured;
- (d) The Plaintiff attempted to disembark from the train at a moment when it was unsafe and inopportune to do so;
- (e) The Plaintiff attempted to embark onto the train at a moment when it was unsafe and inopportune to do so;
- (f) The Plaintiff opened or attempted to open the outer door of the coach while the train was in motion;
- (g) The Plaintiff was "staff riding" and/or "train surfing" and/or hanging from the train thereby exposing herself to the risk of being injured;
- (h) The Plaintiff negligently disembarked onto the wrong side or portion of the platform;
- (i) The Plaintiff walked too fast under the circumstances;
- (j) The Plaintiff failed to negotiate the steps in such a way that a reasonable and prudent person would have done;
- (k) The Plaintiff entered into an already full train;
- (l) The Plaintiff failed to take any, alternatively sufficient cognisance of the presence, the actions and the visibility intended and alternatively probable further actions of the conductor and/or driver of the train;

(m) The Plaintiff entered the train tracks at a time when it was both dangerous and inopportune to do so.

[112] It is trite that for a defence of contributory negligence to succeed, the Defendant would have to adduce evidence on a balance of probabilities to establish negligence on the part of the Plaintiff, and that such negligence, on a balance of probabilities, was causally connected to the damage suffered.³⁴

[113] The Defendant's version throughout the trial was that the incident did not occur and that if it did occur, it did not occur in the Defendant's environment. To the extent that the court accepts the version that the Plaintiff was pushed off the moving train, the Defendant submitted that the Plaintiff voluntarily assumed the risk by standing close to a door, despite the carriage being 50% full. In this regard it was argued that the Plaintiff was aware from the time the train departed from Kuils River Station that it had a malfunctioning door, but notwithstanding, he continued to stand at the door, even after the train stopped for approximately two to four minutes. In augmentation the Defendant referenced the matter of *Waring and Gillow Ltd v Sherborne*³⁵ where it was held "*He who, knowing and realising a danger, voluntarily agrees to undergo it has only himself to thank for the consequences.*"

³⁴ *Johnson, Daniel James v Road Accident Fund* Case Number 13020/2014 GHC paragraph 17, confirming *Solomon and Another v Musset and Bright Ltd* 1926 AD 427 and 435; *Nkateko v Road Accident Fund* 73865/17) [2022] ZAGPPHC 69 (9 February 2022), referred to *FOX vs RAF* (A 548/16) [2018] ZAGPPHC 285(26 APRIL 2018) at para 13 where the full bench held that : "Where the defendant had in the alternative pleaded contributory negligence and apportionment, the defendant would have to adduce evidence to establish negligence on the part of the plaintiff on the balance of probabilities, *Johnson, Daniel James v Road Accident Fund* case Number 13020/2014 GHC paragraph 17, confirming *Solomon and Another v Musset and Bright Ltd* 1926 AD 427 and 435."

³⁵ 1904 TS 340 at 344.

[114] The Plaintiff argued that The Defendant bore the onus of proving that the Plaintiff had knowledge of the risk associated with standing in proximity to the open door of the carriage while the train was in motion.

[115] It is trite that the Plaintiff had to have appreciated the extent of that risk and consented to the risk.³⁶ If regard is had to the totality of the evidence, which includes the broken chairs, the sudden surge of passengers towards the doors possibly associated with the conduct of the unsavoury elements that were on board the train, it is my view that the Plaintiff could not have foreseen that he would be pushed out of the train. In my view, the Plaintiff's actions on the merits of this case were therefore reasonable. As pointed out by Counsel for the Plaintiff, he had to decide on which was, the proverbial, lesser of the two evils.

[116] It must be borne in mind that the purpose for setting the scene is to explain why the Plaintiff chose to stand where he did. The Plaintiff cannot be criticised for where he chose to stand. In fact, the placement of the pole in front of him which he held onto is indicative that there was no prohibition for him to stand where he did. In my view, even if theoretically there were chairs or seating available and the Plaintiff chose to stand where he did that would not make him contributorily negligent.

[117] The question of whether he would be contributorily negligent if he stood there after realising the doors were not closing, in my view is a subjective decision, which will depend on the circumstances of the case, based on reasonableness. It is evident that the Plaintiff did not foresee the surge of people towards the door. If he

³⁶ *Lampert v Hefer* 1955 (2) SA 507 (A).

had, then it follows that a reasonable person would have averted any further potential danger.

[118] In considering the probabilities, it is my view, that the Plaintiff's actions were not unreasonable. I cannot find that he was in any way contributorily negligent. Insofar as his version appears inconsistent with the pleadings, this court is mindful that the Plaintiff did not draft the pleadings. It also bears mentioning that the entire carriage is fitted with what appears to be steel poles mounted in strategic places to cater for standing passengers. The Plaintiff testified that while he was standing he held onto the steel bar. This is a safety mechanism provided by the Defendant to passengers. In the circumstances, the Plaintiff's choice to remain standing where he did, cannot be regarded as an assumption of risk when it was at all times the Defendant's legal duty to ensure that train doors are closed during the commute for the safety of the commuters.

[119] On a conspectus of the evidence in its entirety, I am not persuaded that the Defendant has proven that the Plaintiff was negligent in any of the respects asserted and neither did the Defendant prove that the Plaintiff's negligence was causally connected to the damages suffered by the Plaintiff.

Conclusion

[120] The Defendant has failed to discharge the onus, as no evidence was adduced to establish negligence on the part of the Plaintiff on a balance of probabilities. As previously stated, PRASA had an actionable legal duty to keep the doors of the carriage closed while the train was in motion, in order to prevent passengers from falling out of the train. Consequently, the Defendant's defence of

contributory negligence falls to be dismissed. In the circumstances, I find that the Defendant is solely liable for the harm suffered by the Plaintiff. The Plaintiff's claim succeeds for the reasons already stated.

Costs

[121] It is trite that costs ordinarily follow the result. Rule 67A(3) which came into effect on 12 April 2024, requires that party-and-party costs in the High Court be awarded on Scale A, B or C, respectively. This amendment applies prospectively in relation to work done on a matter after 12 April 2024.

[122] Rule 67A addressed itself only to awards of costs as between party-and-party with the purpose to exercise control over the rate at which Counsel's fees can be recovered under such an award. Counsel for the Plaintiff contended that the issues were reasonably complicated, thereby warranting Counsel's fees on Scale B.

[123] In the exercise of my discretion, I order that Counsel's fees be taxed on a Scale B given the clearly identified features of this case that were complex, important and valuable to the Plaintiff.

[124] The Defendant also required the services of an interpreter and had utilised the services of the Plaintiff's interpreter for a half day each on the last two days of trial. The parties agreed that the interpreter's costs would be split.

Order

[125] In the result, I grant the following orders:

- (a) The Plaintiff's claim on the merits is upheld.
- (b) The Defendant is liable for 100% of the Plaintiff's proven or agreed damages.
- (c) The Defendant is ordered to pay the Plaintiff's costs on a party and party scale, including the cost of Counsel to be taxed on a Scale B.
- (d) Each party to pay half the costs of the interpreter, as agreed.
- (e) The trial on quantum is postponed *sine die*.



P ANDREWS, AJ
Acting Judge of the High Court

APPEARANCES:

Counsel for the Plaintiff:	Advocate C Bisschoff
Instructed by:	Kruger & Company Inc.
Counsel for the Defendant:	Advocate S Mfeke
Instructed by:	Diale Mogashoa Attorneys

Hearing dates: 8 – 9 May 2024; 19 – 20 June 2024 and 24 July 2024

Judgment Delivered: 10 September 2024

This judgment was handed down electronically by circulation to the parties' representatives by email.