



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

JUDGMENT

Reportable

Case no: **9394/2019**

HAROLD COETZEE

Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA ("PRASA")

Defendant

Neutral citation: *Harold Coetzee v Passenger Rail Agency of South Africa*
(Case no 9394/2019) [2025] ZAWCHC (08-08-2025)

Coram: P D ANDREWS AJ

Heard on: 9 - 10 October, 13 - 14 November 2024, 3 December 2024,
3 - 4 February 2025 and 6 May 2025.

Delivered: 8 August 2025

Summary: Duty to ensure that reasonable measures are in place to provide for the safety of rail commuters to prevent foreseeable harm by ensuring that the coach doors remain closed when a train is in motion - A train leaving with open doors constitutes negligence.

ORDER

1. The Plaintiff's claim on the merits is upheld.
 2. The Defendant is liable for 100% of the Plaintiff's proven or agreed damages.
 3. 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.
 4. The trial on quantum is postponed *sine die*.
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JUDGMENT

Introduction

[1] The Plaintiff instituted an action against the Defendant for damages suffered as a result of an incident that occurred on 26 November 2018, pursuant to allegations that the Plaintiff fell out of an open door of a moving train near Eerste River station, operated by the Defendant. In consequence of the incident, the Plaintiff sustained injuries to his left foot which was partially amputated as well as blunt trauma injuries to his upper and lower body.

[2] The parties agreed to a separation of issues. The matter proceeded on the issue of merits only.

Factual background and pleadings

[3] The Plaintiff's claim against the Defendant is predicated on the assertion that the Defendant and/or its employees, acting within the course and scope of their employment with the Defendant, were under a legal duty to take such steps as were reasonably necessary to ensure his safety. It is alleged that the Defendant was negligent by failing to ensure that the doors of the carriage in which the Plaintiff was travelling were closed and that they failed to avoid the incident when by the exercise of reasonable care and diligence, they could and should have done so.

[4] The Defendant in its Plea denied that an accident occurred involving the Plaintiff as alleged or at all. In the alternative, the Defendant asserted that should the court find that an incident occurred as alleged, the Defendant denied that its employees were negligent and as such, the incident was caused by the sole negligence of the Plaintiff.

The evidence

[5] The Plaintiff testified in his own case, as well as Mr. Andreas Jacobus Steenkamp, a private investigator. Four witnesses testified in the Defendant's case, to wit Ms Sisanda Maqinana, Mr. Khululi Mavume, Mr. Thando Klaas and Ms. Thumeka Ntandane.

Summation of the evidence for the Plaintiff

[6] **Harold Coetzee**, ("the Plaintiff"), testified that he had commenced work at Lafarge (Pty) Ltd ("Lafarge") near Eerste River station approximately 2 months before the incident. He narrated that on the day in question he got a lift to Parow station and arrived there at approximately 07:00. He bought a ticket and boarded the train, which was slightly late. The Plaintiff explained that there were many other commuters who boarded the train with him. He orated that after the train had already started moving, he realised how full the train really was. There was no available seating. He was unable to hold onto any handhold. The doors of the carriage that he boarded did not close throughout his commute to Eerste River station as passengers were keeping the

doors open. He described that the train filled up more during his journey and that people were hanging out of the doors of the train.

[7] The Plaintiff explained that he was positioned near the door as the train approached Eerste River station. He recounted that he was suddenly jostled out of the train close to Eerste River station in the vicinity of a pedestrian bridge. The Plaintiff indicated on Exhibit B, with a red “X”, the place where he had fallen.

[8] He orated that he was in a state of shock and it took a while for him to come to terms with what had happened. He explained that he tried to get up, and when he could not it dawned on him that something awful had happened. The Plaintiff also recalled that when he came to his senses he found himself in bushes. He decided to make his way to Lafarge. This he did by what he described as hopping and crawling in that direction. He was unable to remember whether he may have passed out in his endeavour to navigate his way to Lafarge. Eventually he reached a road where he attempted to signal the attention of a vehicle. He explained that the first vehicle did not stop. However, the driver of the second vehicle rendered assistance to him; called the ambulance, and waited there until they arrived. The Plaintiff further orated that the fire department arrived on scene before the ambulance did. He recalled a “*big*” police officer, in uniform, who asked him for his ticket. His recall memory of events that followed thereafter was as he put it “*a blank again*”. He was however able to remember that he was then taken to Tygerberg Hospital where he was given pain medication and treated. He denied that he had jumped out of the moving train.

[9] **Mr. Andeas Jacobus Steenkamp** (“Steenkamp”) testified that he is formally retired, but performed merits investigations for Plaintiffs. He confirmed having been asked to take photographs of the scene around the pedestrian bridge near Eerste River station. He confirmed that the 11 photographs in Exhibit E were taken by him on 30 October 2024 and 4 November 2024 respectively. He had no prior knowledge of, or involvement in, the matter.

[10] Mr Steenkamp explained where and how he had taken the photographs, some of which showed large gaps in the palisade fencing on the left-hand side of the tracks, with well-trodden footpaths going through the gaps.

Summation of the evidence for the Defendant

[11] **Ms. Maqinana** (“Maqinana”) testified that she was a Grade D security guard in the employ of Chuma Security Services. Her duties entailed protecting PRASA stations and assets. She recounted that she was posted to perform security work with her colleague Ms. Ntandane on the day of the incident. She explained that someone reported to them that a passenger had fallen from the train in the vicinity of the level crossing. They made their way to the level crossing where they saw a man limping on one foot toward Lafarge. She explained that they first saw the Plaintiff approximately in the middle between the level crossing and the Lafarge gates. When they reached him, the workers of Lafarge were already with him. They asked the Plaintiff for his ticket, which he produced. The ambulance, that was called in by the Lafarge workers, arrived about 5 minutes after their arrival.

[12] According to Maqinana, the Plaintiff relayed to them that he had jumped out of the train as it was closer to his workplace and that he normally did that. He stated that on that particular day, his belt or his bag hooked, which caused him to fall. On their way back to the level crossing they saw a boot on the railway tracks. People from Lafarge picked up the boot.

[13] **Mr. Khululi Mavume** (“Mavume”) testified that he was employed as a PRASA guard. His job description also entailed patrolling the Metrorail line which included identifying damage to the railway tracks and vandalism of PRASA property. He explained that he was patrolling between Kuils River and Strand stations on the day of the incident and found that “*there was nothing wrong*”. According to Mavume, there were no gaps in the fence between Melton Rose station and Eerste River station. When shown the photographs of the gaps in the palisade fencing he responded that it may have happened during Covid.

[14] **Mr. Thando Klaas** ("Klaas") testified that he is a PRASA investigator and was appointed as such during 2018 already. He stated that there was no mention of the incident in the Metrorail Faults Report for the day in question. The incident was reported in the CMOCC daily report. The occurrence book records also referred to the incident. Klaas stated that the recordal of the incident was however done at CMOCC. To his knowledge, the speed limit over the level crossing in question was 15 km/h.

[15] Klaas stated that he conducted spot checks during 2018 and never came across broken palisade fences during 2018. He stated that the current state of the palisade fencing, after Covid, is not good as there are gaps in the fencing. According to Klaas, it was rare for people to jump from trains. He referred to the incident's investigation report, which was prepared by Mr. Hendry van Reenen. Klaas testified that during 2018 there was a footpath through the bushes from the pedestrian bridge to Lafarge. In preparation of the hearing, he had walked from the bridge to Lafarge which took him not less than 10 minutes whilst also taking photographs.

[16] **Ms. Thumeka Ntandane** ("Ntandane"), testified that she is a Chuma Security guard, working under PRASA. On the day in question she was stationed at Eerste River station with Maqinana. She recounted that they patrolled up to the pedestrian bridge, and then went to stand on point. According to Ntandane, she did not see any broken fence. She stated that the holes shown on the recent photographs happened after Covid.

[17] Ntandane narrated that the Strand train passed whereafter they were called by someone saying there was somebody who had fallen from the train. They went to attend to the person who had fallen, but he was not at the level crossing. They noticed him running "*with one leg*". They proceeded to walk up to the person and asked him what had happened, to which he responded that he "*fell from the train because that is what he is used to do.*"

[18] They then asked him why "*was he jumping from the train*", to which he responded that is where he normally jumps from. Ntandane stated that she noticed that the Plaintiff was not wearing a shoe, and that he had a problem with his foot. He

had no other marks or blood on him. The ambulance arrived whereafter they proceeded back to the station the same way they traversed. Whilst on their way, they came across the Plaintiff's boot at the level crossing which were taken by the people from Lafarge. She stated that they went to the ticket manager to explain what had happened.

Common cause issues

[19] The following issues are not in dispute:

- (a) The identities of the parties.
- (b) The jurisdiction of the court.
- (c) That the Plaintiff was a passenger with a ticket in a PRASA commuter train on 26 November 2018.
- (d) That the Plaintiff embarked on the train at Parow station on the aforesaid day and was *en route* to Eerste River station on the Cape Town-Strand line.
- (e) The Plaintiff was standing in the carriage and he did not make use of or hold onto any of the safety bars inside the carriage.
- (f) That the Plaintiff was employed at Lafarge and was due to commence work at 08h00 on the aforesaid day.
- (g) That the Plaintiff had his mobile phone with him at the time of the incident on the aforesaid date.
- (h) That the Plaintiff, was ejected from the train, after which the train went over his left foot causing a partial amputation of his foot.
- (i) The distance between where the Plaintiff says he was ejected from the train, to where he was found close to the Lafarge gates, was approximately 550 metres.

- (j) That the premises of Lafarge, specifically the gates thereto, is situated to the north of the level crossing with a gravel road from the level crossing to the gates.
- (k) That the speed limit of the train leaving the station and passing through the level crossing is 15km/h.
- (l) That Maqinana and Ntandane were on duty as security officers at the Eerste River station on the aforesaid day and;
- (m) That there was palisade fencing between Melton Rose station and Eerste River station.

Issues in dispute

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

- (a) Whether the Plaintiff fell from the open doors of the train at or near the footbridge as alleged, or whether the Plaintiff jumped from the train at the level crossing;
- (b) Where he was ejected from the train, namely; whether in the proximity of the pedestrian footbridge before the station or in the level crossing after the station;
- (c) Whether the Plaintiff traversed the distance of approximately 550m from where he alleged he fell out of the train to the Lafarge gates;
- (d) Whether the palisade fencing between Melton Rose station and Eerste River station was continuous with no gaps, or whether there were gaps in the fencing in particular where the Plaintiff alleged he fell out of the train, at the time of the incident;
- (e) Whether the Defendant and/or its employees were negligent as alleged;

- (f) If the incident occurred as alleged, whether the Plaintiff was the sole cause of the incident and thus his injuries, alternatively whether he contributed thereto.

Plaintiff's principal submissions

[21] It was contended that there is only one version of the incident itself as delineated by the Plaintiff. This it was argued, forms the essence of negligence and was not placed in dispute nor was any gainsaying evidence led. It was further mooted that the evidence raised against the Plaintiff's case is based solely on circumstantial evidence as well as some hearsay allegations. Additionally, it was argued that the evidence of Maqinana and Ntandane contained multiple serious and weighty discrepancies and inconsistencies, both internally and between each other, thus compromising the reliability of their evidence. The Plaintiff submitted that if regard were to be had to the conspectus of the evidence, the Plaintiff has proven its case on a balance of probabilities that the Defendant's wrongful and negligent conduct caused the Plaintiff's injuries.

Defendant's principal submissions

[22] The Defendant denied that the incident occurred as alleged, more specifically that the Plaintiff fell out of the train because of the jostling of passengers or that he fell out at or near the footbridge before the station. The Defendant submitted that the Plaintiff had failed to discharge the onus that the incident occurred in the manner and at the place as alleged. Furthermore, the Defendant contended that the Plaintiff failed to prove that it acted negligently and wrongfully and that such negligent and wrongful conduct caused the Plaintiffs alleged injury. The Defendant asserted that the Plaintiff voluntarily jumped out of the slow-moving train at the level crossing, causing the injuries and damages complained of.

The onus

[23] 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.¹ 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.”*

[24] The claim in *casu* is delictual in nature and accordingly the Plaintiff bore the onus to prove, on a balance of probabilities, all the elements necessary to sustain a finding that the Defendant is liable in delict for the damages the Plaintiff suffered. Conversely, the defendant bears a burden of rebuttal in respect of its defence.

Applicable legal principles

[25] It is trite law that in order for a party to succeed with a claim in delict, the party must prove the existence of the below mentioned elements at the time of the alleged delict, namely:

- (a) an act or omission (conduct);
- (b) wrongfulness;
- (c) fault (either intentionally or negligently);
- (d) causality and
- (e) patrimonial loss.

Duty of care

[26] The Plaintiff relied on two omissions in his Particulars of Claim namely that the Defendant failed to ensure that the doors of the carriage in which the Plaintiff was travelling were closed and that they failed to avoid the incident when, by the exercise of reasonable care and diligence, they could and should have done so. The

¹ *Pillay v Krishna And Another* 1946 AD 946 952- 953.

Plaintiff in his Reply to the Defendant's Request for Further Particulars pleaded that the Defendant allowed the train to be in motion while the doors of the carriage were open.

[27] In ***Mashongwa vs PRASA*** (Mashongwa)² the Constitutional court aptly distilled the duty and obligation placed on a public carrier in safeguarding and securing 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.'*³

² 2016 (3) SA 528 (CC).

³ At paras 18, 20 and 26.

[28] The Constitutional Court in **Rail Commuters Action Group v Transnet Ltd t/a Metrorail And Others** (Metrorail)⁴, recognised the vulnerability of commuters when they board a train. In this regard the following was remarked:

‘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...’

[29] 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*)⁵:

‘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 step further to pronounce that the duty concerned, together with constitutional values, have mutated to a private law duty to prevent harm to commuters.’⁶

[30] 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. It was correctly pointed out by Counsel for the Plaintiff that normally an omission does not attract delictual liability⁷, but where a legal duty to take reasonable precautions exists, it may lead to a finding that the omission was wrongful for purposes of the law of delict. The court in **Maphela**, in dealing with the legal duty in reference to **Shabalala v Metrorail**⁸ 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.’⁹*

⁴ 2005 (2) SA 359 (CC) para 84.

⁵ At para 29.

⁶ See also *Maphela v Passenger Rail Agency of South Africa* (Maphela) (834/021) [2023] ZAWCHC 137 (9 June 2023).

⁷ *ABSA Bank Ltd v Fouché* [2002] 4 All SA 245 (SCA).

⁸ [2007] ZASCA 157 par 7

⁹ At para 47.

Negligence

[31] Holmes JA, in the *locus classicus* **Kruger v Coetzee**,¹⁰ 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.’

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

‘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?’

[33] 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.’

¹⁰ 1966 (2) SA 428 (A) at 430E-F.

[34] **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]

[35] 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 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.'¹¹ [Emphasis added]

[36] The Plaintiff in his evidence recounted that the doors did not close because other passengers were keeping the doors open. There is nothing on record to gainsay the Plaintiff's evidence that the train doors were open. In fact, Maqinana admitted that she was unable to dispute the Plaintiff's version that the doors of the coach he was in were open. According to Klaas, incidence had previously occurred of people being jostled out of coaches of moving trains through doors that had been left open, or through doors that were being kept open.

[37] The existence of PRASA's legal duty has unequivocally been demonstrated through the myriads of decided cases referenced. It therefore behoves this court to contemplate whether the harm caused to the Plaintiff is closely connected to the omission of the Defendant who carries the duty to prevent the harm.

¹¹ At para 52.

Causation

[38] It is trite that causation arises whether the harm would have nevertheless ensued, even if the omission had not occurred. The Constitutional Court in **Lee v Minister for Correctional Services**¹² aptly distils the test for causation as follows:

‘Although different theories have developed on causation, the one frequently employed by courts in determining factual causation, is the conditio sine qua non theory or but-for test. 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.”

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.”

[39] It has been held that the application of the “but-for” test is a matter of common sense based on the practical way in which the minds of ordinary people work against the background of everyday life experiences.¹³ The Plaintiff would therefore have to establish that it is more likely than not, but for the Defendant’s wrongful and negligent conduct, his harm would not have ensued.

¹² [2012] ZACC 30; 2013 (2) SA 144 (CC); 2013 (2) BCLR 129 at para 40.

¹³ *International Shipping Co (Pty) Ltd v Bently* 1990 (1) SA 680 (A) at 700 E – H; *Za v Smith and Another* 2015 (4) SA 574 (SCA); In *Za v Smith* 2015 4 SA 574 (SCA) at paragraph 30 the SCA reiterated what the enquiry entails by stating as follows: “What [the but-for test] essentially lays down is the enquiry – in the case of an omission – as to whether, but for the defendant’s wrongful and negligent failure to take reasonable steps, the plaintiff’s loss would not have ensued. In this regard this court has said on more than one occasion that the application of the “but-for test” is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the minds of ordinary people work, against the background of everyday-life experiences. In applying this common sense, practical test, a plaintiff therefore has to establish that it is more likely than not that, but for the defendant’s wrongful and negligent conduct, his or her harm would not have ensued. The plaintiff is not required to establish the causal link with certainty (see eg *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) para 25; *Minister of Finance & others v Gore* NO 2007 1 SA 111 (SCA) para 33. See also *Lee v Minister of Correctional Services* 2013 2 SA 144 (CC) para 41.) The Constitutional Court has recently reaffirmed the continued relevance of this approach to causation. (See *Mashongwa v PRASA* 2016 3 SA 528 (CC)).”

[40] 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.¹⁴

Was the Plaintiff negligent?

[41] The Defendant pleaded in the alternative that the Plaintiff was negligent in one or more of the following respects, namely that he:

- (a) failed to keep a proper lookout;
- (b) 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) knowingly and voluntarily exposed himself to the risk of being injured;
- (d) entered into an already full train.

[42] The Defendant pleaded in the further alternative, that should the court find that an incident occurred as alleged in that the Plaintiff fell from the open doors of the train, and that the Defendant employees were negligent as alleged or at all, then the Defendant pleads that the Plaintiff negligently contributed thereto.

[43] The Plaintiff testified that the train was “full” when he embarked on the train at Parow station. During cross-examination he expounded by saying that the carriage became “very, very full”, “chock-a-block”, “shoulder to shoulder” and “propvol” as it was Black Friday.

[44] The Plaintiff was specifically asked why, when passengers were disembarking, he did not position himself in a better space where he would be able to hold onto the guard rails or poles, he responded that he was comfortable where he

¹⁴ *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.”

was standing. This therefore beckons the question whether he would have been ejected from the moving train if he had been holding onto the guard rails or poles.

[45] Exhibit “C”, pages 3, 4, 8 and 9 depicts what appears to be steel stanchions (vertical poles) and hand rails. These are strategically placed throughout the train carriages in the aisle and near the doors, uniquely designed for different models of the train. These mechanisms are to provide support and stability with the purpose of preventing falls and injuries particularly on moving trains for passengers standing in the aisles or near doors.

[46] The Plaintiff’s own evidence was that he stood very near to the door and wasn’t holding onto any of the rails inside the train. This in circumstances where on his own version the train was full. In fact, the Plaintiff explicated that the train got fuller while he was already inside and would not have boarded the train had he known that the train would get so full. When challenged about why he did not disembark at the next station he orated that it was not a problem for him and did not think of his safety at the time. The question therefore arises whether the Plaintiff’s failure to either hold onto a safety rail or pole or move away from the door amounts to negligence as in so doing, he failed to avoid the incident when by the exercise of reasonable care, he could have and should have done so.

[47] The Defendant contended that the Plaintiff should have held onto the handholds in the coach in question, and would, had he done so, not have fallen out. However, the Plaintiff’s evidence that the train was overcrowded, that people were standing “*shoulder to shoulder*” and that he was unable as a result to get to a handhold was not in any manner impugned in cross examination, or by way of testimony as to the condition of the train coach on the day in question. I am therefore in agreement with Counsel for the Plaintiff that there is no merit in this defence more particularly as it was held in ***Cloete v Passenger Rail Agency of South Africa***¹⁵ 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

¹⁵ (18015/2019) [2024] ZAWCHC 262; [2024] 4 All SA 391 (WCC) (10 September 2024) at para 103.

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.'

[48] It follows from the uncontroverted evidence that even in circumstances such as was described by the Plaintiff *in casu*, that the Defendant was enjoined to take measures to prevent foreseeable harm by ensuring that the coach doors remain closed when a train is in motion.

Voluntary assumption of risk

[49] In ***Waring and Gillow Ltd v Sherborne***¹⁶ it was held "*He who, knowing and realising a danger, voluntarily agrees to undergo it has only himself to thank for the consequences.*"

[50] 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. It has been established that there are safety rails close to the door which presupposes that commuters are allowed to stand in the vicinity of the door of the train. To my mind, based on the Plaintiff's version, that more persons boarded the train after he was already inside of the train, is a situation which PRASA permitted to happen by failing to control the permitted number of passengers allowed in a carriage. It is my view, that if the number of passengers allowed per carriage was properly monitored, then overcrowding would be curtailed, thus preventing incidence which could cause a danger to passengers.

[51] *In casu*, the evidence of the Plaintiff was that he was on his way to work. In considering whether the Plaintiff, by entering a full carriage voluntarily exposed himself to the risk of being injured, the Plaintiff had to have appreciated the extent of

¹⁶ 1904 TS 340 at 344.

that risk and consented to the risk.¹⁷ The Plaintiff clearly, on his version did not appreciate the extent of the risk and neither did he consent to the risk as he explained that he thought that it was an accepted occurrence where passengers hang out of the train doors. Commuting by train was a novel experience for the Plaintiff as he testified that he does not hail from Cape Town and only travelled by train to work on three previous occasions. Evident from his testimony was that the commute was markedly different than on the other occasions. These differences included that previously the train, it was not as full and the train doors were not open. On the day in question the train was overcrowded and the doors were being kept open.

[52] Maqinana testified that the Plaintiff informed her and Ntandane that he had jumped out of the train which is what he normally does as it was closer to his place of work. According to Maqinana the Plaintiff reported to her that his belt or backpack got hooked. The Plaintiff could however not recall speaking to anyone from PRASA where he was found. He emphatically denied the proposition that he jumped from the train.

[53] Because of these conflicting versions, this court is enjoined to consider whether the Plaintiff was jostled out of the train as he claims he was or whether he jumped from the train which is the report which he had purportedly made to Maqinana and Ntandane.

[54] 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.¹⁸ It therefore follows that the acceptance of one version must lead to the rejection of the other.

¹⁷ *Lampert v Hefer* 1955 (2) SA 507 (A).

¹⁸ *National Employers Mutual General Insurance Association v Gany* 1931 AD 187 at 199.

[55] The correct approach to be adopted when dealing with mutually destructive versions was briefly set out in **National Employers General Insurance Company v Jagers**¹⁹ which was approved in **Stellenbosch Farmers' Winery Group LTD and another v Martell et Cie and Others**²⁰ 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

¹⁹ 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.'

²⁰ 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’.

[56] The considerations articulated in this matter have been quoted with approval in a plethora of subsequent judicial authorities.²¹ It is therefore incumbent on this court to consider the aforementioned principles in evaluating the evidence.

Did the Plaintiff fall from the train or did he jump?

[57] The question arises whether the utterance allegedly made to Maqinana and Ntandane by the Plaintiff that he normally jumps from the train at the level crossing is sufficient to challenge the Plaintiff’s assertion that he was jostled out of the train by other commuters at or near the footbridge. Klaas testified that the train in question was not in-bound towards Cape Town and for this reason he would not expect it to be overcrowded. This explanation is based on speculation as he cannot with any certainty gainsay the Plaintiff’s version as to how full the train was on this particular day. Even if it is not expected to be crowded, the fact that it was Black Friday, could on the probabilities be a plausible explanation for the overcrowding.

[58] The only version before this court is that the version of the Plaintiff. His version is that the doors of the coach in which he was travelling remained open for the entire journey. According to him, the train was overcrowded and just before the train reached the Eerste River station he was jostled from the train. The Plaintiff’s evidence in this regard was not placed in dispute, nor was any gainsaying evidence led. Of seminal importance is the fact that none of the Defendant’s four witnesses observed the incident, or had first-hand knowledge as to where the incident occurred.

[59] The Plaintiff testified that after he fell out of the train it took a while for him to come to the realisation of what had happened. He explained that he tried to

²¹ *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); *Ntsele v Road Accident Fund* (2017) ZAGPHC (1 March 2017) at paras 13-14.

stand up but could not and collapsed. He was unable to recollect whether he passed out but remembered that he crawled and screamed. He described the difficulties with which he had to navigate the terrain which comprised of veld and bushes. He likened the experience to being like hell.

[60] The Defendant argued, that it is improbable for the Plaintiff to have fallen from the train with none of the fellow commuters witnessing it and reporting it to the PRASA personnel at the Eerste River Station, as the Plaintiff's own evidence was that the carriage he was travelling in was "chock-a-block" and "propvol". In answer to the Defendant's Request for Further Particulars, the Plaintiff indicated that he had witnesses to substantiate his version of how the incident occurred. However, no corroboratory evidence was led. The Defendant submitted that the Plaintiff did not lead evidence as to the reasons therefor. The Plaintiff's response to what he purportedly said to Maqinana that he had jumped from the train because it was close to his place of work, was one of shock and disbelief.

Whether the Plaintiff fell out at the level crossing or near the footbridge

[61] Much of the evidence centred around where the Plaintiff claims he had fallen from the train. The Plaintiff's evidence was that he traversed from where he had ostensibly fallen from the train, through rough terrain with bushes. He described how he ultimately managed to flag down a vehicle by jumping in front of it. The Defendant argued that the court is to take cognisance of the fact that it is improbable that at no point, while crawling through 550 metres of rough terrain, did the Plaintiff think of using his cellphone for help.

[62] The Defendant argued that the probabilities favour the Defendant as to its version that the incident occurred at the level crossing. This is because the commuter approached Maqinana and Ntandane from the direction of the level crossing. They then proceeded to the level crossing and then to the Lafarge gate where they spoke with the Plaintiff.

[63] The Defendant's witnesses, none of whom had actually witnessed the incident, provided the court with testimony insofar as it primarily related to their job functions, incident reporting procedure, information received after the fact and the environment of PRASA in the proximity of the station. This, in an effort to show the court that the Plaintiff could not have fallen where he claims the incident happened and that the Plaintiff's claims in this regard are improbable. Ntandane testified that it would not have been possible for the Plaintiff to make his way from the place he alleged he fell out of the train to where she saw him as according to her it was a long distance.

[64] The Plaintiff was extensively questioned regarding the bridge he should have taken to get to Lafarge. To this, the Plaintiff responded that he had only made it to the station successfully on three occasions, and that he did not know where the bridge was that he should have crossed. He responded further that crossing where he should, have crossed the footbridge, would have meant walking back from the station, away from his workplace, to get to a bridge to cross the tracks, and that it made no sense.

[65] It was suggested that there was a continuous palisade fence from Melton Rose station to Eerste River Station, making it impossible for the Plaintiff to have gone over the top of the said fence. It therefore beckons the question whether the Defendant's contention that the Plaintiff's version is implausible insofar as it related to the place he said he had fallen and the route he said he traversed would be sustained by proving that there were no gaps in the fence for him to have done so.

Palisade fencing

[66] Steenkamp was unable to comment on the state of the palisade fencing or the footbridge at the time of the incident in 2018 and as such, his evidence pertaining to the state of the palisade fencing at the time when he had taken the photographs does not assist the court. Part of Maqinana's duties entailed *inter alia*, patrols to the level crossing and checking the track box. She also patrolled as far as the footbridge and checked the palisade fencing for any gaps. These patrols were

ordinarily conducted with a colleague. According to Maqinana and Ntandane, there were no gaps in the palisade fence in 2018. Maqinana stated that the palisade fencing was cut in places during the COVID pandemic due to vandalism. This was confirmed by Mavume who was tasked with inspecting the palisade fence from Melton Rose station to Eerste River station at the time of the incident. According to Mavume, vandalism was kept under control before COVID. He testified that the records reflected that there was no vandalism reported on the day of the incident. It was highlighted that the Defendant failed to discover, and file of record, Mavume's diary, which he had alleged consulted to establish whether there was a problem with the palisade fencing.

[67] Mavume explained, during the court's questions for clarification, that when once he had reported vandalism at a specific point, he did not again report it every day he passed the same spot. Klaas testified that vandalism did occur during 2018 also, but he personally never reported broken fences in that area. When asked as to how he could recall this, he stated that he knows the area and did not even have to refer to his records.

[68] It was submitted that the Defendant's four witnesses remained steadfast in their evidence regarding the palisade fence. The Defendant argued that there was no evidence to gainsay or disprove the Defendant's evidence in this regard. It was furthermore contended that the version of the Plaintiff insofar as it pertained to where he says he fell from the train is improbable as it would have been impossible for him to have passed through the fence into the veld or bushes where he alleged he crawled to get to Lafarge.

[69] The Plaintiff on the other hand strongly disagreed with the proposition made to him that the palisade fencing on the left side of the track, facing Eerste River station, was continuous in nature. His retort in this regard was that if it was continuous, how did he then get to the point where he was helped. It can be deduced from the evidence that the Plaintiff could not have gone over the top of the fence leaving the possibility open, on the probabilities that there were gaps in the palisade fence.

[70] The procedure as explained by Mavume entailed that he would report problems orally to a controller, who would make a note of the report. None of the witnesses called by the Defendant bore any personal knowledge of the incident itself and much reliance was placed on reports. For example, Klaas testified on an investigation report prepared by another official. To cement this court's conclusion that the system is not full-proof, it is evident from the testimony given by Klaas that the CMOCC record was only compiled 3 hours after the incident. This is not in keeping with the standard procedure which called for Maqinana and Ntandane to immediately report the incident to Area North control whereafter the Area North control had to then report to CMOCC, he was unable to explain. There is no explanation why this procedure was not followed. The CMOCC occurrence book record did not in this instance have the usual initial report and then a later feedback inscription. There was only the one inscription of the incident.

[71] Klaas was unable to explain why the CMOCC OB entry said that the Plaintiff was found between two mast poles at the level crossing. This is clearly incorrect if regard is had to the account by Maqinana and Ntandane. It is noteworthy that he admitted that incidences of track speed not being adhered to by drivers do occur.

[72] Whilst this court is mindful that the onus rests on the Plaintiff, the challenge put up by the Defendant is based primarily on the assumption that PRASA's protocols and procedures were strictly adhered to and that the functions of its employees were diligently performed. The reporting procedure and protocols are therefore to my mind, not an absolute guarantee as the possibility exists that damage can occur between inspections. The stark reality is that the *de facto* condition of the fencing as at the time of the incident has to my mind not been clearly established, based on the available evidence before this court.

The report

[73] Maqinana and Ntandane testified that they were standing on guard at the point and performing patrols when a commuter approached them from the direction of the level crossing and informed them that someone fell off the train at the level crossing. This report was made shortly after the train had left the station, which according to Maqinana was after less than 10 minutes. To my mind, the report from the unknown person does not necessarily imply that the commuter had seen the Plaintiff fall from the train. The identity of the commuter is unknown and was not called to testify.

[74] Following the report, Maqinana and Ntandane walked to the level crossing, presumably to investigate this report. It must further be borne in mind that if the report was made on a time estimation of less than 10 minutes after the train had left the station, in circumstances where the admitted common cause facts are that the speed limit of the train leaving the station and passing through the level crossing is 15 km/hour then the timing of this report must be viewed through the lens of caution as Klaas explained that when the train leaves the Eerste River station, the nose of the train reaches the level crossing the tail is still at the end of the platform.

[75] There were a number of inconsistencies exposed during cross-examination. In this regard, the initial impression based on Maqinana's evidence was that she and her colleague saw the Plaintiff from the position where they were standing on the platform, but later she was adamant that they first saw the Plaintiff only when they reached the level crossing. In this regard, her testimony was that once at the level crossing, she saw a man limping on one foot going in the direction towards Lafarge, which is half way between the level crossing and Lafarge.

[76] In cross-examination Maqinana confirmed that she did not see the incident take place. She also did not know where the incident took place, nor did she see the Plaintiff anywhere close to the level crossing. However, Ntandane testified that when she looked out from the point after a person had called them saying that a

person had fallen at the level crossing, she saw the Plaintiff getting up at the level crossing.

[77] It is clear that although the unknown person came from the direction of the level crossing, Maqinana and Ntandane did not see anything at the level crossing when they arrived there. When they arrived at the level crossing, they observed a person walking on one foot approximately halfway between the level crossing and the Lafarge entrance.

[78] I interpose to deal with the challenge during cross-examination pertaining to Maqinana's statement. In this regard, she was unable to explain why she did not, in her statement, say that the person reporting to them the Plaintiff's fall had said the incident had happened at the level crossing. The statement simply said that persons had reported that another person had fallen.

[79] Furthermore, Maqinana was unable to explain why she had not said in the statement that they had followed the Plaintiff, and what his condition was when they first saw him. Her *viva voce* evidence in this regard is that the condition of the Plaintiff's overalls was fine and that he had no scratches or bruises on his face or elsewhere. She stated that the Plaintiff looked "normal" and was able to speak. During her testimony, Maqinana could not recall whether there was a vehicle close to the Plaintiff or not when they eventually got to the Plaintiff. Thus, she could not dispute the Plaintiff's evidence that he had flagged down a vehicle to assist him when he reached the road.

[80] Maqinana and Ntandane, left the area of the Lafarge gate to return to the station using the same route. Ntandane testified that they went to the level crossing to get the mast pole numbers. At the level crossing, they came across the boot of the Plaintiff, which were taken by his work colleagues. It is noteworthy that the Defendant submitted in argument that "it is indeed probable that when the train wheels rode over the Plaintiff's foot that his boot came off – and further that it was at the level crossing

being the scene of the incident according to Defendant's version."²² This conclusion, in my view, fails to take into account the possibility that the boot found at the level crossing was not that of the Plaintiff.

[81] Maqinana and Ntandane on their own evidence, allowed the boot that was said to be found in the level crossing to be taken by the people from Lafarge, without talking to them despite the thinking that the boot "*was going to be very good evidence*". The boot was found in the environment of PRASA, namely at the level crossing. There was therefore nothing that precluded Maqinana and Ntandane insisting on retaining the boot as evidence as the level crossing is their jurisdiction after all. It is unfathomable that they simply allowed the staff of Lafarge to walk off with vital evidence without establishing the identity and the details of those who were there.

[82] It is notable that Ntandane did not testify during her evidence in chief that she and Maqinana had seen the boot when they arrived at the level crossing. It was only when probed about when she saw the safety boot during cross-examination that she stated that it was when they came back and that people of Lafarge had taken it.

[83] I pause here to contemplate whether the boot was indeed that of the Plaintiff as it could very well have been a random boot lying on the tracks. The evidence of Maqinana that she knew it was the Plaintiff's boot as he was only wearing one boot and that it was exactly the same, must to my mind be viewed with circumspection. From the evidence on record it is unlikely that the boot would have been undamaged given that the Plaintiff's foot was partially amputated. The Plaintiff's evidence on being asked whether he still had his left safety boot on when he was found, responded that he still had a part of it on. He emphatically testified that it was "impossible" that the left boot could have been found at the level crossing.

²² Defendant's Heads of Argument, para 107, page 29.

[84] Interestingly, when Ntandane was asked why she and Maqinana did not take the more direct route back to the station, she said they went back to the level crossing because the Plaintiff didn't have one of his shoes. Of significance is her testimony that they went back because they wanted proof."²³ When confronted as to why they did not ask the people who took the boot to give it to them, and allowed them to take away the good proof, she said that the proof they wanted was "*from the mast poles where this incident took place.*"

[85] When asked whether they reported the taking away of the boot to the ticket manager, to whom they immediately reported the incident, she said they did not inform him thereof. This also reinforces the court's earlier conclusion that the accuracy of PRASA's reporting protocols is not above reproach.

[86] Furthermore, it appears logical to infer that the boot that was found would have been blood soiled, given the unrefuted evidence regarding the extent of the Plaintiff's foot injury, namely that more than half of his left foot was amputated. The evidence seems to suggest that an intact boot was found at the level crossing, bringing into question whether what was found indeed belonged to the Plaintiff. Of further significance is the fact that Maqinana was unable to explain why the admittedly important issue of the boot was not mentioned in her statement at all. Therefore, in considering the probabilities regarding the boot that was found at the level crossing, this court is not persuaded that the boot found indeed belonged to the Plaintiff.

[87] For the Defendant to suggest that the train wheels rode over his foot and that this is how the Plaintiff's boot came off, is in my view, far-fetched. This is because it is common cause that the train went over his left foot causing an amputation of part of his foot. It is therefore unlikely that the boot would have been intact when found as suggested by the Defendant's witnesses as earlier stated. There is also no evidence of any blood on the boot or at the level crossing or on the route used to where they found the Plaintiff. Admittedly, this was not canvassed during the

²³ Record page 504.

trial, however, it would have been an obvious observation given the extent of the injury which is immutable.

[88] In my view, this evidence pertaining to a boot that was found at the level crossing on its own, or lack thereof, is not enough to support the Defendant's hypothesis that the incident happened at the level crossing. Thus, the significance of the mast poles is of no moment as I am not persuaded that the mast poles identified in the trial shows the location of the incident. To my mind, it only shows that a boot was found, which boot has not been established on the probabilities to belong to the Plaintiff.

Failure to call witnesses

[89] The Defendant argued that in order to disprove the evidence that Maqinana and Ntandane saw the Plaintiff with only one boot on his right foot and the other boot at the level crossing, the Plaintiff could have called the ambulance personnel to testify. Furthermore, it was suggested that a subpoena *duces tecum* to obtain all the ambulance records so as to establish the details of the man he said called the ambulance could have testified whether the Plaintiff was wearing one or both boots. The Plaintiff, it was argued, could also have called anyone from Lafarge who was present where the ambulance fetched him to testify. The Defendant submitted that these witnesses would have been key with regard to any injuries, cuts or abrasions suffered by the Plaintiff which were relevant in the evidence.

[90] It was further suggested that the ambulance caller would have been a key witness who could have corroborated a significant part of the Plaintiff's version. To this end, the details of the said caller could have been obtained from ER24. The Defendant also argued that the Plaintiff could have called his work-colleague/housemate with whom he travelled by train on three occasions prior to the incident who could have testified whether the Plaintiff jumped off the train previously as has been contended by Maqinana and Ntandane. The Defendant contended that no explanation was proffered as to why these witnesses were not called.

[91] The matter of **Pexmart CC and Others v H. Mocke Construction (Pty) Ltd and Another**²⁴ is instructive on the aspect of a litigant's failure to call available witnesses.

'...It is true that this court in Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd 1979 (1) SA 621 (A) at 624B-F, enunciated that its earlier decision in Elgin Fireclays Ltd v Webb 1947 (4) SA 744 (A), did not lay down a general and inflexible rule to be applied without more in every case, that an adverse inference is to be drawn where a party fails to call as a witness one who is available and able to elucidate the facts. Whether such an inference is to be drawn will depend on the facts peculiar to the case in which the question arises. In Munster this court had regard to the circumstances which justified the adverse inference. During the course of the Plaintiff's case it was indicated that the witness would be called. This court held that to say that the witness was 'equally' available, was to ignore the realities, particularly if the association was taken into account. The witness not called was also clearly able to elucidate the facts. He was the most knowledgeable of the Plaintiff's representatives on a material aspect. This court also took into account that, during the course of the Plaintiff's case, contradictory evidence had been led which could have been clarified had the witness been called. It held that the probable reason for not calling him as a witness was that it was feared that his evidence would expose facts unfavourable to the Plaintiff's case.' [my emphasis]

[92] As to what is meant by available, the following was stated in **Kock v S.K.F Laboratories**²⁵

'...The pre-requisite for the drawing of an inference adverse to a party is that the witness must be available. By that I do not understand the authorities to mean available in a narrowly circumscribed and defined notion such as that he must have been present in the precinct of the Court at the time of the trial. It seems to me that a witness is available if his testimony in the case could have been procured by the party against whom it is sought to draw and adverse inference.'

²⁴ (159/2018) [2018] ZASCA 175; [2019] 1 All SA 335 (SCA); 2019 (3) SA 117 (SCA) (3 December 2018) at para 69; See also *Elgin Fireclays Ltd v Webb* 1947 AD 744 at 745 "It is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial Court, this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him..."

²⁵ 1962 (3) SA 764 (E).

[93] It is my view, that the witnesses suggested by the Defendant that could have been called, would not have witnessed the incident. At most, they would have been able to say what condition they found the Plaintiff in but for the most part, that is not in dispute. In the absence of knowing whether those witnesses were available to testify, in the sense that their respective testimonies could have been procured, the court is unable to unequivocally infer that such evidence would have exposed facts which were unfavourable to the Plaintiff. Consequently, this court is enjoined to consider the evidence holistically to arrive at an objective conclusion.

Discussion and evaluation

[94] The Defendant's defence was primarily centred around the evidence of Maqinana and Ntandane. Other witnesses, provided collateral information insofar as it related to the condition of the palisade fencing between Melton Rose station and Eerste River Station on 26 November 2025 and the incident reporting protocols of PRASA. This evidence essentially amounts to *inter alia* circumstantial evidence and hearsay allegations in respect of the report received by Maqinana and Ntandane regarding a person being injured at the level crossing.

[95] The inconsistencies, contradictions and probabilities were earlier discussed and do not require restating save to state that no application for the admission of the hearsay evidence was made. It is unclear whether the commuter actually saw the Plaintiff falling from the train as it would have meant that the commuter would have had to have been in the level crossing or close to the level crossing.

[96] In the circumstance, I place no evidentiary weight on the hearsay evidence, given that inconsistencies and discrepancies highlighted in the versions of Maqinana and Ntandane. The presence of a boot, which has not been identified as belonging to the Plaintiff is to my mind insufficient to conclusively determine that the incident took place at the level crossing.

[97] Various aspects of the Plaintiff's evidence were criticised. For instance, the Plaintiff had his cellphone on him and he did not, on his version, think about using his phone to summon assistance. It was suggested during cross-examination that the explanation provided by the Plaintiff of his experience as it related to the time when he fell from the train does not accord with the medical records. His description of his experience included for example, him crawling through the bushes, until he reached the roadway where he attempted to flag down a vehicle that did not see him. The Plaintiff explicated that he crawled in front of the second vehicle and waived his hands to signal the vehicle to stop. He described that he was "nerf af"; had bruises on his knees and scratches all over. His entire body was fully of marks.

[98] When confronted with the inconsistency during cross-examination, he responded that apart from the main injury he merely sustained scratches here and there and remembered that he had a scratch on his face. The Plaintiff's response is therefore suggestive that he may have exaggerated the extent of the other injuries.

[99] It must however be borne in mind that the Plaintiff's foot was partially amputated during this experience and when he explained that he felt like he was busy burning in hell, he was relating to the court, what it felt like for him during this time. The other injuries, to my mind, were secondary. This court observed how traumatising the recollection of the events were for the Plaintiff as he became visibly emotional when he testified about the ordeal. The fact that he could not recall how long it would have taken for him to get from the place where he fell to the place where he eventually flagged the vehicle down is therefore understandable as he testified that it felt like an eternity for him to get there. This explanation in my view is not implausible, given that he had not only fallen from the train but came to the realisation that something was drastically wrong when he was unable to get onto his feet. In the milieu of these common cause facts, I make no negative inference.

[100] In observing the demeanour of the Plaintiff at the trial, it was manifest that he was visibly traumatised by the incident, which emotion was displayed by the Plaintiff as he recounted the events of that fateful day. He endured lengthy cross-examination, which lasted for approximately 3 court days. Despite having endured

lengthy and difficult cross-examination, he did not deviate from the material aspects of his version and made a good impression on this court.

[101] Notwithstanding the Defendant's efforts to dispel the version of the Plaintiff regarding where he said the incident occurred, there were indeed aspects of the Defendant's evidence that lent credence to the Plaintiff's version, which was discussed earlier in this judgment insofar as it related to timelines and where Maqinana and Ntandane said they spoke to the Plaintiff.

[102] Interestingly, when Maqinana was asked where she had first seen the Plaintiff, she indicated same on Exhibit "B" by making a marking in close proximity to the mark where the Plaintiff said he had come onto the road from the rougher terrain he had traversed after his fall.

[103] Whilst Maqinana and Ntandane were essentially called to corroborate each other's evidence, there were numerous discrepancies and inconsistencies in their versions. The Defendant submitted that its witnesses were frank and honest and contended that the highlighted contradictions and inconsistencies, do not amount to contradictions as it is an account of what Maqinana and Ntandane observed independently. In analysing the evidence, it came to light during cross-examination that Ntandane was not listed as a witness in the PRASA investigation report. She was never consulted by PRASA, and did not depose to a statement. She could not explain why her name did not appear in the investigation report, the occurrence books or CMOCC daily report. Maqinana, did not mention Ntandane in her statement.

[104] Ntandane seemingly first consulted with the Defendant's legal team approximately 5 or 6 years after the incident. After first saying that she read Maqinana's statement when they went to consult at PRASA's offices, she shortly thereafter denied reading the statement. Later, again, she admitted having read the statement prior to the consultation, which was the first time since the accident that she had read the statement. She denied having discussed the incident with Maqinana. In my view, not much weight can be attached to Ntandane's evidence which appears to

have been introduced to bolster the evidence of Maqinana but which ended up exposing marked contradictions between their versions. Consequently, this court cannot attach much probative value to the evidence of both Maqinana and Ntandane given the numerous discrepancies elucidated.

[105] In considering the probabilities, the Plaintiff has no recollection of speaking to Maqinana and Ntandane. His evidence was that he recalled a big officer asking him for his ticket. His undisputed evidence that he only travelled by train on 3 prior occasions must therefore stand as there is nothing to gainsay his evidence in this regard. Furthermore, it would have been extremely dangerous for him to have jumped from a moving train travelling at a speed of 15 km/h from a height of approximately 1.2 meters. This because Maqinana admitted that the trains do not stop at the level crossing, and that it would be very dangerous to jump out of a moving train, especially so when the train is not on a station platform. Klaas too admitted that it would be dangerous to jump out of a train going at 15 km/h onto a tarred or cement surface, when the coach entrance was about 1.2 metres off the ground.

[106] On the evidence of Klaas the train could not have been travelling faster than the speed limit of 15km/h as the Strand line would change tracks just after the level crossing and the track takes a bend. To reiterate, the distance from the platform where Maqinana and Ntandane were standing is roughly the length of a train on the evidence of Klaas.

[107] It is common cause that the Plaintiff's workplace, at Lafarge is in close proximity to Eerste River station. In considering the time of the incident and that the Plaintiff was not late for work there would have been no plausible reason for him to jump from the train at the level crossing, thereby risking his life by doing so. The fact that Ntandane testified that people jump from the carriage to the ground even though it is dangerous must be considered in relation to the undisputed fact that the Plaintiff did not regularly commute by train and his emphatic denial that he made such utterance to Maqinana and Ntandane. His recollection of the encounter he had with people on the scene were at odds with the versions of Maqinana and Ntandane. In applying the considerations of ***Stellenbosh Farmer's Winery*** the Plaintiff's version

appears to be more likely. I am therefore not persuaded that the Plaintiff jumped from the moving train at the level crossing. The Defendant's hypothesis in this regard falls to be rejected.

[108] The Plaintiff's narrative as to where he says he had fallen to is in my view plausible given the existence of a well-worn footpath which Klaas testified was already there in 2018. I have already dealt with the issue of the palisade fencing earlier in this judgment and concluded that the state of the fencing on the day could not with certainty be established more especially as Mavume had no independent recollection of the day in question and the document he used to refresh his memory was not produced. Therefore, I am of the view that no weight can be accorded to Mavume's evidence insofar as the state of the palisade fencing on 26 November 2018 is concerned, bearing in mind that reporting would only be done once.

[109] As to Klaas's evidence, who stated that he had an independent recollection of the condition of the palisade fencing some 6 years after the incident must be viewed with circumspection as he testified that he traversed the route the Plaintiff said he had taken after falling from the train. This he did after the commencement of the trial.

[110] It does however bear mentioning that it is the Defendant's hypothesis that the Plaintiff could not have fallen where he said he had fallen. It was the Defendant who raised the purported improbability as the Plaintiff did not testify that he had to move through a gap in the fence. After falling from the train, he traversed rough terrain until he reached the road leading to Lafarge. The Defendant suggested that there may have been another way for the Plaintiff to have traversed from where he had fallen. It was proposed that had he utilised that route, he would certainly have been seen. However, this proposition stands in stark contradiction to the evidence of Maqinana and Ntandane.

[111] As to the Plaintiff's evidence, the Defendant submitted that he was evasive and at times argumentative and inconsistent. This because, he insisted that

he had suffered only minor scratches and abrasions after allegedly crawling over half a kilometre. It was contended that he contradicted his evidence under examination in chief when he testified that he was “nerf af”, and that his knees had bruises and faces had scratches over it, to the extent that he was cut up everywhere. He expressed that his whole body “is still full of marks”.

[112] This court however observed that the Plaintiff became very emotional as he recounted his experience. It was manifest that he narrated his story with tremendous difficulty, as if he was actually reliving what was evidently a traumatic experience for him. In my view, he cannot be criticised for remarking that he was “*besig om in die hel te brand*”, as he had just suffered an amputation with no-one in proximity to assist him; having to traverse the rough terrain and then flag a vehicle down for assistance.

[113] During cross-examination the Plaintiff expressed frustration at having to repeatedly speak about secondary injuries and details such as approximate times when the incident occurred. These are circumstances where the time of the incident was something that the Plaintiff was not sure of and then being pressed for a clear answer in this regard. I make no negative inference from the Plaintiff’s reaction to these questions as it was clear that the Plaintiff did not want to venture or guess. I am therefore not persuaded that the Plaintiff’s response could be regarded as evasive as per the submission by Counsel for the Defendant in this regard. More especially as it is common cause that the Plaintiff was a passenger on the train which he had taken with a view to reaching his place of employment.

[114] It is also unrefuted that the Plaintiff had to report for duty at 08h00 on the morning and that the train was not late. To my mind, the Plaintiff’s perceived refusal to accept that the incident occurred between 7am and 8am is therefore of no moment. The Plaintiff’s answer to the Defendant’s Request for Further Particulars in this regard is not out of kilter. To my mind, nothing turns on this other than possibly establishing when exactly the incident would have happened, which timeline has been sufficiently established by the Defendant’s own witnesses albeit pursuant to a report received by an unidentified person that someone had fallen from a train.

[115] Klaas stated that he performed an exercise after the first day of trial, by walking the route the Plaintiff claims he traversed after falling. It is further noteworthy that he mentioned that it took him not less than 10 minutes. The Defendant argued that Klaas's testimony in this regard went unchallenged during cross-examination. It was furthermore contended that to argue that it would have taken the Plaintiff 10 minutes to crawl that distance, bearing in mind that the Plaintiff had to first come to the realisation of what had happened to him, and then to navigate with a severely injured foot and possibly also having fainted whilst crawling would be speculative.

[116] It was submitted that the only clear evidence by the Plaintiff was that he did not know how long it took him, but that it felt like forever. The Defendant argued that it is highly improbable that the Plaintiff in his condition, crawled through terrain of veld and bushes of 550 metres, more than a half a kilometre, in 10 minutes when Klaas took not less than 10 minutes to do so.

[117] Notably this is about the same time estimation given by Maqinana regarding how long after the train had left the station the unknown person reported that a passenger had fallen from the train. The Defendant hypothesised that the Plaintiff had to create the fabrication that he crawled that distance in 10 minutes so that it ties up with the evidence of Maqinana and Ntandane that they saw him running/limping from the direction of the level crossing towards Lafarge less than 10 minutes after the train had left the Eerste River station. This, it was argued, casts doubt on the veracity of the Plaintiff's version.

[118] It can hardly be said that Klaas's experiment can be likened to the experience of the Plaintiff on the day in question as exposited by the Plaintiff during evidence and cross-examination. The Plaintiff was unable to say what route he followed to get to the point where he flagged the motorist down, saying that it was a "blank" to him. He only had "flashes" of memory from when he fell to where he was found. He could not exactly recall the territory he traversed, but said that he struggled, and that he was bruised and abraded when he was found.

[119] The Defendant also highlighted the discrepancy regarding where the Plaintiff exited the veld/bushes onto the gravel road that leads up to Lafarge. The Plaintiff's evidence was that he exited the veld/bushes at the red "X" on the right of the map, being where the ambulance fetched him. It was suggested that the contention on behalf of the Plaintiff that he exited the veld/bushes onto the road halfway between the level crossing and where the ambulance fetched him was necessary so as to tie in with the evidence of Maqinana and Ntandane as to where they had seen the Plaintiff running and limping. This, because the evidence of Maqinana and Ntandane that they saw him running and limping when he was halfway between the level crossing and Lafarge was not disputed or challenged.

[120] The Plaintiff was unable to say whether he passed close by the station platform. To my mind, if this had indeed been the case, he would have been spotted and as he pointed out, if he had he seen someone, he may have been assisted earlier. The Plaintiff's narrative is to some measure supported by Maqinana and Ntandane as the station precinct was busy. The Plaintiff's journey, until he managed to flag the vehicle down, was that there was no-one around to assist him. His account is to my mind supported by Klaas as well. Inasmuch as considerable time had passed since the incident, Klaas did recount that there was a footpath from the footbridge outside the palisade fence to Lafarge in 2018 which path was faded at the time when he walked the route. This therefore, in my view, lends credence to the Plaintiff's version. Consequently, I make no negative inference from the fact that the Plaintiff's recall of events is not clear, given the traumatic experience he had been through.

[121] The Plaintiff was exhaustively questioned about why the ambulance and hospital records did not refer to other marks and scratches on his body, in circumstances where he was alleged to have crawled through 550 metres of veld and bush terrain. The Defendant illuminated that the Plaintiff's version regarding the extent of the scratches was inconsistent. The Plaintiff however explained that the treating personnel focussed on his foot and did not do a full body examination. He held the view that the injury to his foot was the most serious injury which explanation in my view appears to be plausible.

[122] Even if the Plaintiff exaggerated that he sustained scratches on his body, (which finding I do not make), there is no disputing that his foot was partially amputated. The scratches were in any event consequential to his falling from the train and not as a result of the fall. Therefore, whether there were scratches or no scratches are, in my view, of no moment for the purposes of considering the matter of liability. I make no adverse credibility finding.

[123] Whist it may be so that the Plaintiff was unable to respond meaningfully to a statement by the defendant's counsel that the defendant's evidence would be that "*witnesses will testify that they saw you on that road, approximately halfway between the level crossing and where you have indicated the ambulance fetched you.*", it must be borne in mind that the Plaintiff had been through an undisputed traumatic incident. His testimony was that he only had "flashes" of memory from when he fell to where he was found.

Conclusion

[124] In considering the probabilities, it is my view, that the Plaintiff's provided a plausible account of the incident on the day in question. 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.

[125] Furthermore, if regard is had to the totality of the evidence, it is my view that the Plaintiff could not have foreseen that he would be jostled out of the train. This court accepts the unrefuted evidence that he was unable to hold onto the safety mechanisms fitted into the train because of the fact that the train was overcrowded. 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. On a conspectus of the evidence in its entirety, I am not persuaded that the Defendant has proven that the Plaintiff was negligent or contributed to his negligence 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. Consequently, the Defendant's defence negligence and of contributory negligence falls to be dismissed.

[126] The golden thread flowing from all the authorities makes it emphatically clear that PRASA has a duty to ensure that reasonable measures are in place to provide for the safety of rail commuters. The undisputed evidence of the Plaintiff is that the doors of the carriage in which he was travelling were open for the entire duration of his commute from Parow station to where he was ultimately ejected from the moving train through the open door of the carriage. It therefore follows that a breach of PRASA's duties is wrongful in the delictual sense and could attract liability.²⁶ To argue to the contrary is therefore immutable as accepted legal principles pertaining to the "open door" issue is firmly entrenched.

[127] 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 unrefuted evidence of the Plaintiff is that the doors of the carriage remained open, having been allowed to remain open from Parow station must stand in the light of well-established case law that affirms that by leaving doors open the Defendant created an opportunity for passengers to jump into or out of moving trains²⁸.

²⁶ In *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 (1) SA 1 (CC) at paras 20 and 22 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 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'

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).

²⁸ See *inter alia Ngubane v South African Transport Services* 1991 (1) SA 756 (A) at 759B, *Transnet Ltd t/a Metrorail v Witter* 2008 (6) SA 549 (SCA), *Transnet Ltd t/a Metrorail v Tshabalala* 2006 2 All SA 583 (SCA), at para 9, and *Mashongwa v PRASA* 2016 3 SA 528 (CC).

[128] I am therefore satisfied that the Plaintiff has proved, on a balance of probabilities, that on 26 November 2018 he was a passenger on a Metrorail train making its way to Eerste River station; that the coach was overcrowded and that he was unable to reach a handhold; that the doors had remained open from Parow station; that he was jostled out of the train just before Eerste River station, and that he thereafter, through bushes, made his way back to the road leading to Lafarge. 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

[129] It is trite that costs ordinarily follow the result. 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.

Order

[130] 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) The trial on quantum is postponed *sine die*.




ANDREWS AJ

**Acting Judge of the High Court of
South Africa Western Cape Division,
Cape Town**

CASE NO: 9394/2019

APPEARANCES:

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