IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 41334/2007

DATE: 20 FEBRUARY 2009

In the matter between:
MFANAFUTHI LUCAS SHONGWE **PLAINTIFF**

and

SOUTH AFRICAN RAIL COMMUTER CORPORATION **DEFENDANT**

JUDGMENT

PHATUDI J

[1] The Plaintiff instituted an action on persona! injury claim against the Defendant. The Plaintiff claims payment of a global estimated amount of R573 000, 00 as damages he allegedly will suffer as a result of injuries he sustained on the 28 November 2006 at Kopanong Railway Station. The Plaintiff sustained the said injuries when he fell in between the moving train that had gained speed and the platform.

[2] At the commencent of the trial, both Counsel for the parties informed me that the parties had agreed to separate the merits and the quantum as envisaged in terms of the Rule 33(4). I then made an order to that effect. In their opening statements, Counsel for the Plaintiff submitted that the Defendant negligently contributed to Plaintiff's injurie while, on the other hand, the Defendant raised *volenti non fit iuria* as their defence.

[3] The Plaintiff testified in Zulu and Mr Buda, (the Interpreter) interpreted to English. His testimony was, in short, that he was commuting by train on daily basis from home to work. At the time of the accident, he was almost in his 28th day commuting home to work by train. He was a bearer of monthly train ticket en route Pretoria- Mabopane. He, on the 28 November 2006 at about 20h00 went to Kopanong railway station with intent to board a train home (Mabopane). The train was on the platform on his entering the station's main entrance gate (access control).

[4] He said that the train had already pulled off when he was at the last two (2) steps up the last set of stairs on the platform. He was 6-7 metres from the stairs to the train. He, at that moment, saw the first two (2) train doors open followed by the third that was closed pass by. He then ran towards the forth door, which he alleged to have been opened. He ran parallel with the train for a distance of about 2-3 meters trying to board the train through that forth train door. He then slipped, fell under the train and sustained injuries on his left leg, which had to be amputated, as a result thereof. The security guards assisted him later by removing him from the rails onto the platform.

[5] He, under cross examination, conceded that the train was already in motion at the time he intended to board the train. He further conceded that it was dangerous to board a train that was in motion.

[6] When questioned on the procedures on the part of the train guards before the train depart the station, he said that he observed that one of the following would happen:

(i) Train guard would blow the whistle indicating to the train driver to pull off, or

(ii) The train driver would stick his head out from the front prior to pulling off from station.

[7] He further said that they do that to ensure that the commuters have cleared from the train doors. He then conceded that he knew that no one is allowed to board a moving train. He said although he knew that it was dangerous to board a train in motion, he did try to board that' train because the door was open. He acknowledged that he took a risk as it was late at night. He, however, blamed himself for what had happened and for the open door.

[8] The Plaintiff stated under re-examination that he neither heard any blown whistle nor saw the train guard on the day in question. He further said that he slipped when boarding the train in motion. The Plaintiff then closed his case.

[9] The Defendant called 3 witnesses to testified. The first to testify was Robert Mokgotho. He was a security guard employed by Hlanganani Protection Services and deployed as such at Kopanong Railway Station. He, on the 28 November 2006, was on duty at access control (gate).

[10] Robert said that the Plaintiff ran passed the access control around 20H30. He shouted and told him not to run as he may get injured. He was downstairs and did not see what had actually happened. He was later called by his colleague who requested some assistance.

[11] He under cross examination estimated the distance from the access control to the staircase entrance to be 15 meters. He further estimated the time spent by Plaintiff to reach the platform to have been 45 seconds. The second witness Justice Maigo, a security guard, as well employed by Hlanganai Protection Service, was, on the 28 November 2006, on duty at Kopanong Railway Station when the accident occurred. He stated that he was deployed to guard platform 1. He said on the said day, he saw a man running parallel with the train that was already in motion with its doors closed. The train had picked up speed, he said. He, however, did not see what had happened to the running man as he disappeared.

[12] Once the train had totally left the station he heard a voice of a man somewhere beneath the platform. He then asked his colleague to come and help remove the man from the rails. On inspection of the man, he realised that the man was the Plaintiff. He identified the Plaintiff by his dreadlocks hairstyle. He noted that his (plaintiff) left leg was seriously injured and his cavella (type of an expensive fashion shoe) was badly torn out. He, however, did not see him fall and did not see how the accident occurred. All that he saw was that the man (plaintiff) ran quite a while parallel with the train that had picked up speed. He saw that all doors were closed.

[13] When questioned of the procedure that was followed by the train guard or drivers, he indicated that:

a) He saw the train stop and later pulled off

b) At the time of the train was stationary, some commuters alighted while others boarded.

c) Prior to the train puling off, he saw the train guard from the back of the train blow his whistle.

He was asked if he ever had seen any person boarding a moving train. Mr Maigo said that commutes sometimes board the train while in motion with doors open or closed. He referred to that as "sparapara." Counsel for the Plaintiff referred to that as "stuff riding". He further stated to that as "Stuff rider" would cling on the gutter of the closed door and board the train.

[13] Counsel for the Plaintiff, Mr Seima, questioned his failure to write that in the statement he made shortly after the accident. Mr Miago's response was that he lacked a better word for "sparapara" (stuff riding) at the time of reducing his statement to writing. He further alluded to the challenge he had in the language English at the time of making the statement.

[14] The third witness, Lawrence Thamsanqa Jaffa, an artisan employed by the Defendant, was on duty on the morning of 28 November 2006. He inspected the train as set out on page 42 of the bundle. He testified that on inspection, all doors were in good working condition. He stated that the next inspection was done on the 12 December 2006.

[15] Mr Seima, Counsel for the Plaintiff, submitted that the Plaintiff was a bearer of a valid ticket on the day in time. He said that the Plaintiff, in trying to board the train that had gained speed, thought that he was going to make it because the door was open. He, however, slipped and fell in between the train and the platform, which made him sustain the said injuries. He further submitted that the Plaintiff partly blames himself. He said that the Defendant is, however, 50 % negligent by letting the train doors open while it was in motion. He contested the Defendant's defence of *volenti non fit injuria*. He referred me to the requirement set out in Law of Delict by Neethling, Potgieter and Visser as:

a) Consent must be given *freely or voluntarily.* Should the prejudiced person be forced in some way or another to "consent" to the prejudice, valid consent is absent.

b) The person giving the consent must be *capable of volition.* This does not mean that he must have full legal capacity to act, but that he must be intellectually mature enough to appreciate the implications of his acts and that he must not be mentally iii or under the influence of drugs hampering the functioning of his brain.

c) The consenting person must have *full knowledge* of the extent of the (possible) prejudice. !t is important that the requisite knowledge is present especially where consent to the risk of harm is concerned. In such cases the consenting person must have full knowledge of the nature and extent of the risk in order to consent such risk.

d) The consenting party must *realise or appreciate fully* what the nature and extent of the harm will be. Mere knowledge of the risk or harm concerned is therefore not sufficient; the plaintiff must also *comprehend* and *understand the* nature and extent of the harm or risk.

e) The person consenting must in *fact subjectively* consent to the prejudicial act. (the three last mentioned requirements are expressed as follows by Innes CJ in an often quoted dictum:

> [l]t must be clearly shown that the risk (of injury) was known, that it was realised, and that it was voluntarily undertaken. Knowledge, appreciation, consent -these are the essential elements; but knowledge does not invariably imply appreciation, and both together are not necessarily equivalent to consent).

[16] He said that the Plaintiff's conduct does not comply with the requirements as set out. Mr Seima submitted further that due to that'

day being "Month End," the Plaintiff was afraid that if he was to wait at the station, he would be mugged of robbed should the train leave him.

[17] He contested the evidence led by the defence witness, to wit, Mr Mokgotho. He said that Mr Mokgotho admitted not to have seen how the accident occurred. Mr Seima further said that the second witness, Mr Maigo, being the key witness, did as well, not see how the accident occurred. He only saw the Plaintiff running parallel with the train. Counsel for the Plaintiff referred me to ***Transnet Ltd t\a Metro rail and another v Witter 2008(6) SA 549 SCA,*** where, he said, " the Respondent cost his foot when he slipped and fell after attempting to board a moving train whose carriage doors were open", He submitted that the court held that the train guard had been negligent in failing to ensure that the doors were closed before signalling to the driver that the train could start moving.

[18] He submitted further that the court found that there was 50 % contributory negligence on the part of the respondent. He lastly submitted that the Plaintiff has proved its case against the Defendant and prayed that an order holding the Defendant liable on merits be made.

[19] In rebuttal thereto, Mr Cilliers, counsel for the Defendant, submitted that the Plaintiff bear the onus to proof the negligence on the part of the Defendant. He submitted further that the Plaintiff must have proved that the doors were open. Mr Cilliers submitted that the Plaintiff was, during testimony, obsessed with the open doors. He said that the Plaintiff understood from somewhere to insist that the doors were open.

[20] Counsel submitted that Mr Maigo was, amongst the witnesses, absolutely good and credible. The witness was consistent on his testimony. He said that the witness could have lied as to how the accident occurred. All the witness remembered was that the Plaintiff ran parallel with the train and later disappeared. He does not know how he board the train, whether through the window or between the carriage. He further submitted that Mr Jafta checked the doors in the morning of the accident. He found the doors to have functioned properly.

[21] Mr Cilliers referred me to an unreported case of **LL MOEPYA V TRANSNET LTD AND ANOTHER CASE NUMBER 2475\2Q05 (TPD)** delivered by Mynhardt J. He submitted that his (Mr Cilliers) argument was found to be correct that there are serious risks of injury and perhaps even death, inherent in someone trying to board a moving train. Further thereto, he submitted that the Plaintiff knew, as he (Plaintiff) conceded, that it was extremely dangerous to board the train while in motion. He lastly submitted that Plaintiff took an extremely dangerous risk, knowing fully that injury or even death was inherent. He thus submitted that the Plaintiff's claim on the merits be dismissed. He in fact, finally submitted that absolution from instant be granted with costs.

[22] In my evaluation of the evidence tendered by the witnesses and submissions made by both counsel for Plaintiff and Defendant, I find that the train was already on the platform at the time of his entry at the main gate (access control) of the railway station. He ran ±15 meters before entering the staircase leading to platform 1 where the train was.

[23] He again had to negotiate two (2) sets of stair cases which I noted from the photo annexed on page 75 of the bundle, that another ±15 meters could be estimated. While on the last 2 of the second set of stairs, Plaintiff saw the train, which he estimated to have been 7 meters away from him, to have been in motion. He then saw, as he testified, the first 2 (two) doors open followed by the closed. He

then spotted the 4th door being open. He ran after the open door for approximately 3 meters. This means that he ran ±10 meters from the second last step to the train. He unfortunately slipped and fell in between the train and the platform.

[24] It is in my view, that the train had already gained speed at the time the Plaintiff saw the moving train. Three (3) doors had already gone past his vision. He, however, decided to run after the 4th door. He took a risk by giving chase to a train that has gained speed.

[25] The question to determine is whether the door was open or not. Counsel for the Plaintiff, intended to apply for inspection in *loco,* with a view to inspect that the Metrorail trains, almost always, depart the platform with some of its doors open. The Defendant conceded that some trains depart the platform station with some doors open.

[26] I, having been a train commuter some years back, took judicial notice that trains, more often than not, depart the platform with some of its doors open. I even took.judicial notice that the train commuters themselves are the ones who cause these doors not to close by disturbing its mechanism.

[27] In the present case the Plaintiff alleged that the door of the train in motion he ran after, was opened while, on the other hand, Mr Maigo, the security guard, who was on duty and deployed at the platform, stated without hesitation, that all doors of that train were closed at the time when the Plaintiff was running parallel with the motion train that had gained speed. He said he was not surprised by his running parallel in that he had seen commuters board the moving train with or without doors open. He said that they normally cling on the gutters of the door, if closed. Though Mr Maigo lacked a better word for

"sparapara" (stuff riding); he said that that' conduct or act of boarding a train in motion in that fashion, is *"sparapara".*

[28] It must be borne in mind that the term Sparapara is used for boarding a train already in motion, either as a "sport" (as contended by Mr Seima) or boarding it once. What surprised Mr Miago is the disappearance of the man who was running parallel with the train. When asked what could have happened to the man, he with confidently, stated that he could have board the train either through the window or between the carriage. I found him to have been the most credible witness.

[29] Though counsel for the Plaintiff intended to challenge his version, no one questioned Mr Maigo of the visibility of the scene on the day in question. As the accident occurred at about 20H30, I find it probable for Mr Maigo not to have seen how the Plaintiff could have board the train (if he did). He was ±25-30 meters away from where the Plaintiff was running parallel with the train in motion. No one questioned any witness of the lighting of the platform at the time.

[30] The Plaintiff's version that he was scared he would be mugged or robbed should the train leave him, find no place in my mind. The Plaintiff noted the security guard at the access control gate when entering the railway station. A reasonable train commuter would have let go of the train and ask for protection from the security guard(s). They, security guards, are employed and deployed at such railway stations to protect the commuters from being mugged and robbed or even assaulted. I, thus reject his version of fear from being mugged.

[31]I indeed, align myself with the decision of the SCA in **TRANSNET LTD T\A METRORAIL AND ANOTHER V WITTER 2008 (6) SA 549 SCA** that the Metrorail's General Operating Instructions impose a duty on the (train) guard to ensure that the train doors were closed before he gave the signal to the driver to proceed. On the perusal of the facts of the said case, it appears that the Respondent (Witter) lost his foot when he slipped and fell while attempting to board a moving train through an open carriage door. I again noted at page 552 para E\F that:

"The train had just started to move, slowly when the Plaintiff emerged onto the platform" (my underlining)

[32]The facts of that' case, as compared with this one, are not similar, in my view, the Witter case, the train had **Just** started to move (My Emphasis) as opposed to the one *(in casu)* that had gained speed. I, *in casu,* infer that the train guard must have given the signal to the driver to proceed. The Plaintiff did not dispute that that' could have been done at the time of his landing on the platform. I find that the reasonable train commuter in the position of the Plaintiff would (and should) have foreseen that his conduct might cause damage to himself or even causing death.

[33] The onus is indeed on the Plaintiff to prove on a preponderance of probalibilities that the Defendant was negligent. In my view, the Plaintiff failed to prove that the Defendant was negligent. I, as a result, am persuaded to accept the Defendant's defence of *volenti non fit injuria*. The Defendant cannot, in my view, be held liable where the injured person has consented to the risk thereof. The Plaintiff accepted to have been negligent by trying to board a train that has gained speed. He, however, submitted that his negligence was 50% and that the other 50% be attributed to the Defendant's failure to keep the train doors closed when departing the platform. I, in fact, find the Plaintiff to be 100% negligent. He consented to the injury and his conduct fit like a hand in a glove to the requirements for a valid consent, i.e;

1) The Plaintiff consented freely and voluntarily by attempting to board the train while in speedy motion.

2) He was capable of volition. He was intellectually mature enough to appreciate the implication of his act. He knew that he might get injured or even get killed.

3) He realised and appreciated fully what the nature and extent of the harm would be.

[34] I, in my final analysis, find that the Plaintiff's claim on his "self inflicting injuries", stand to be dismissed. It is trite that costs follow the event. The Defendant is thus entitled to costs, i, as a result, make the following order

THE PLAINTIFF'S CLAIM IS DISMISSED WITH COSTS.

AML PHATUDI
JUDGE OF THE HIGH COURT

Date of Hearing: 4 2-2009
For the Plaintiff: ADV E SEIMA

Instituted By: LEPULE, MOKOKA &PARTNERS

For the Defendant: ADV JG CILLIERS, (SC)

Instituted By: STONE ATTORNEYS

Date of the judgment: 20 February 2009