



**GAUTENG LOCAL DIVISION, JOHANNESBURG**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES /NO

(3) REVISED.

DATE

SIGNATURE

**14/06/2023**

**CASE NO: 12273/2017**

**DATES OF HEARING: 14<sup>th</sup> to 17<sup>th</sup> Feb 2023  
and 13<sup>th</sup> March 2023**

In the matter between:

**NCHABELENG: LBOGANG**

Plaintiff

and

**PASSENGER RAIL AGENCY OF SOUTH AFRICA**

Defendant

**JUDGMENT**

## CAJEE AJ:

1. This is a personal injury trial in which the parties have agreed to separate the issues of liability and quantum, and only deal with the issue of liability. The issue of quantum, including the nature and extent of the injuries suffered by the Plaintiff, is to be postponed sine die. In essence, the court is asked to determine if the injuries sustained by the Plaintiff are due to the negligence of the Defendant and/or those for whom it is vicariously liable.
  
2. On the morning of the 24<sup>th</sup> of January 2017 the Plaintiff sustained what appear to be fairly serious injuries mostly to his lower limbs when he fell off a train operated by the Defendant just before it stopped at the platform at Kaserne West<sup>1</sup> Station. It is the Plaintiff's case that he was pushed out of the moving train while the doors were open before the train could stop at the platform at Kaserne West station. It is the Defendant's case that he fell off while illegally trying to hang on to the outside of one of the coaches as it went past the platform next to which it eventually stopped a few meters away.
  
3. It was common cause between the parties, alternatively not disputed, that:
  - 3.1. The Plaintiff is Lebogang Nchabeleng, an adult male security officer born on the 5<sup>th</sup> of May 1981.

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<sup>1</sup> The witnesses called this station just Kaserne or even Gazerne. All these terms refer to the same station.

- 3.2. On the 24<sup>th</sup> of January 2017 the Plaintiff was a lawful monthly Metrorail train ticket holder. This aspect was only conceded by the Defendant at the start of the trial.
  - 3.3. The Plaintiff boarded a train number 1710 operated by the Plaintiff at President train station at around 04h45. This train began its journey at Germiston train station, which is the station just before President train station. The journey was meant to terminate at New Canada Train Station. It was meant to stop at various stations along the way including Kaserne West Station, where the Plaintiff was meant to get off.
  - 3.4. Train number 1710 was a four coach train with a driver/train guard carriage at each end. The entire train was between 80 to 100 meters long.
  - 3.5. The Defendant was the lawful owner and operator of the train in question and provided passenger rail services to members of the public.
4. At the start of the trial, the following indexed bundles were marked and handed up:
    - 4.1. Index to Pleadings – Bundle A
    - 4.2. Index to Discovered Documents – Bundle B
    - 4.3. Index to Discovery – Bundle C
    - 4.4. Index to Notices – Bundle D.
5. Apart from himself, the Plaintiff called one witness, Mr. Simon Matla, to testify on his behalf. The Defendant called only one witness, Mr. Frederick Maponya Mbatha,

who was the train guard/operator employed by the Defendant. Their evidence will be dealt with below.

### The Testimony of the Plaintiff

6. The Plaintiff is Sepedi speaking and testified with the assistance of a Sepedi interpreter. He testified that he resides at 290 Tsanela Street, Phoko Section, in Katlehong. He is 42 years old. He is a security guard at Fidelity Security Company.
  
7. He was involved in a train accident on the 24<sup>th</sup> of January 2017 just before 06h00, at or near the Kaserne West Train Station. He however could not remember the exact time that it occurred. He boarded the train at President train station, which was destined for the New Canada station. However, he was to get off at Kaserne West train station, one of the stations on the way.
  
8. He testified that the train had four coaches and was fully packed<sup>2</sup>. According to him, when he got into the train the passenger carriage doors were open and remained open throughout the journey.

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<sup>2</sup> There was much debate during the trial whether the Plaintiff testified that the train was fully packed or overcrowded. This in my opinion is a matter of semantics. Further all the witnesses testified through the medium of an interpreter. It is entirely conceivable that what one person would describe or interpret as fully packed another would describe or interpret as overcrowded.

9. As the train was approaching Kaserne West Station, a pushing and shoving started taking place inside the coach he was in, as people who were intending to disembark there, including himself, tried to make their way towards the doors. He was pushed from behind and ended up falling on the platform while the train was still in motion. He ended up sustaining injuries to his legs, mostly to his right leg.
  
10. He testified that he was in the second coach from the front. He testified further that no guards were deployed by the Defendant to control the number of people in the train. There were also no guards deployed in the coaches during the journey. This was not contested by the Defendant.
  
11. He had a monthly train ticket at the time, which was handed in as evidence. After the incident he was taken to Charlotte Maxeke Hospital where he was hospitalised. According to him the Defendant was liable for his injuries as the train was packed and the doors were not working.
  
12. He disputed the defence of the Defendant as contained in paragraph 6.2 of the amended plea. The Defendant denied that the Plaintiff was ejected out of a moving train but alleged that he travelled by hanging onto the outside of the train.
  
13. The Plaintiff also denied paragraphs 8.2 to 8.5 of the plea which read as follows:

*“8.2 Defendant avers further that the Plaintiff was injured in an incident on 24 January 2017 as a result of the Plaintiff having travelled on the outside of the train.*

*8.3 Immediately prior to the incident and at the time of the incident the Plaintiff was at all times aware that it was dangerous to travel on the outside of a commuter train and that he risked injury or death in doing so.*

*8.4. Despite this knowledge and whilst appreciating the risk the Plaintiff nevertheless persisted to act as aforementioned and whilst doing so was injured.*

*8.5 The Defendant therefore pleads that the Plaintiff consented to alternatively voluntarily assumed the risk of injury and that in the premises the Defendant is not liable for any loss or damage suffered by the Plaintiff.”*

14. During cross examination the Plaintiff testified that on the 24<sup>th</sup> of January 2017 he travelled by taxi from his home in Katlehong to President train station. This ride took approximately 10 minutes. However, there were other occasions when he travelled by train from Katlehong to President train station.

15. He arrived at President train station at around 04h30 in the morning. He testified that the train arrived at around 04h40 and departed at 04h45. However, when his attention was drawn to the train schedule, he conceded that the 1710 train departed Germiston Train Station at 04h45 and departed President at 04h47. It was meant to arrive at Kaserne West at 05h04, approximately 17 minutes later. The Plaintiff stated that he had been taking this train number 1710 for about 3 to 4 months, but not on a daily basis even though he had a monthly ticket. Sometimes he used a taxi or got a lift with a colleague.

16. He testified that he was a reasonably experienced train user, and agreed that commuters were not allowed to travel on the outside of a train, or to hang outside, failing which they were at risk of injury or death. He also accepted that commuters must remain inside the train until it stopped. He further accepted the proposition that if someone hung on the outside of a train and got injured, he would only have himself to blame, as he would not have boarded in a proper way.
  
17. He testified that at the time of the incident he had been employed as a Fidelity Security Guard for approximately nine years and was still employed in this capacity at the time of the trial. At the time of the incident in 2017 he was stationed at MSC Mediterranean Shipping Company, which was situated at 14 Rosherville Street, City Deep. It is about 10 minutes walking distance from the Kaserne West train station, and he was supposed to be there at 05h45 when the handover from the previous shift would take place. He was meant to start his duties at 06h00.
  
18. The Plaintiff accepted the proposition put to him that if the train was running on time he would arrive at his workplace approximately 30 minutes before the handover, however if the train was delayed he might be late. The next train, the 1712, was only scheduled to arrive at Kaserne West station at 05h49, and hence it would not have been feasible for him to take that train. He also accepted the proposition that if he was late for any reason he would be liable to possible discipline by his employer and hence it was important for him to be at work on time.

19. The Plaintiff further testified that the most number of people would have embarked on the train at Germiston Station, while even more would have gotten on at President Station but not as many as at Germiston. Germiston Station is the first station on the route and President the second. This would make sense, as these appear to be the two biggest stations on the route. According to the Plaintiff, by the time the train arrived at President Station it was already full and even more people, including himself, got on.
  
20. The Plaintiff was asked by counsel for the Defendant, Adv. Karelse, why he got onto the train when it was, according to him, already full and getting fuller. He answered that he had no choice, as otherwise he would have been late for work, even though he saw that it was not safe. He added that he wouldn't have gotten in if he couldn't do so successfully. He further testified that it never occurred to him that someone would get injured.
  
21. The Plaintiff testified that he stood throughout the journey, between the seats, and held onto a rail above the seats where luggage can be placed. There were other people between him and the doors during the journey. He was some 4 to 5 meters from the doors in front, which space was occupied by other passengers. There were also passengers behind him.
  
22. The station after President train station was India train station. He testified that at this station not many people embarked onto the train, and not many disembarked, but conceded that during this process there was pushing and shoving. He said this



was always the case with a full train as people pushed or shoved to get in and out. He couldn't say if anyone got injured at this train station. According to the Plaintiff the same thing happened at the next three stations, which are Refinery, Hillview and Jupiter train stations respectively.

23. The next station after Jupiter was Kaserne West. As the train approached the station, according to the Plaintiff, he prepared to disembark. Passengers were pushing him from behind and he was pushing those in front. Unfortunately, according to him, those behind pushed harder and he got pushed out of the train while it was still in motion.
  
24. He conceded that at this time the train was travelling slowly as it was about to stop. He stated that other people also got pushed out in front of him but only he got injured. It was put to him by counsel for the Defendant that it was strange that only he got injured. He said that he was surprised too, but that he lost his balance, fell backwards and landed in a sitting position.
  
25. The Plaintiff was asked how he ended up falling backwards instead of forwards. He testified that as he lost his balance, this resulted in him having to turn around and face the interior of the coach. He testified that his buttocks hit the platform first. He said he was slightly injured on his buttocks, and had a little hole on the flesh.

26. The Plaintiff was asked how his leg got injured. He stated that as he fell, his right leg was between the platform and the train while the other one was on the platform. The train struck his leg in a dragging fashion. He stated further that he never informed his attorneys of the injury to his buttock as it was not serious and healed quickly.
27. When asked whether he was still able to communicate after the accident, the Plaintiff stated that he wasn't feeling fine anymore. He further testified that he was only conscious for about a minute or so and only regained consciousness in theatre. He didn't recall how he got to hospital. He has no recollection of speaking to any medical personnel at the station or upon admission. He doesn't know where the hospital got his personal details from. He was asked if there were other people on the train who knew his details. He said he was in the company of someone, but that they wouldn't know all his details.
28. Court adjourned for the day. Upon resumption it was put to the Plaintiff by Adv. Karelse that from President Station to Kaserne Station he had every opportunity to get off the full train. The Plaintiff stated that he couldn't get off before he got to his destination. It was also put to the Plaintiff by Adv. Karelse that despite having the opportunity to get off the train earlier he didn't take it because he didn't want to be late for work. The Plaintiff reiterated that he didn't get off because he had not arrived at his destination. Plaintiff did concede that there was no one preventing him from getting off the train before Kaserne Station.

29. It was put to the Plaintiff that according to the hospital records discovered by him, his Glasgow Coma Scale (GCS) level of consciousness upon admission was 15/15, which is a normal level of consciousness. The Plaintiff stated that he couldn't remember the time or date when he went to theatre. He just saw himself on a hospital bed. He could not tell whether he regained consciousness on the same day or the next day.
30. It was put to the Plaintiff that if he was unconscious as he testified, this would have been recorded in the hospital notes. He stated that he didn't know why this was not done.
31. It was put to the Plaintiff that the reason why he claimed to be unconscious is because he had read a statement of a witness for the Defendant to whom he had given a version of events after the accident. The Plaintiff said that he didn't remember this. The statement appears at pages 007 to 008 of Bundle B, being the bundle of discovered documents which was handed up at the start of the trial. It is a statement by one Frederick Mapone Mbatha, who was the train guard on Train 1710.
32. According to this statement, the train was stopped before Kaserne West station waiting for some signals. It was still dark outside and the commuters jumped off the short four coach train. The signal was operated and the train went inside platform 1 instead of platform 2. After the train stopped at Kaserne West station he heard a commotion of the commuters, whom he saw grouping at the platform. He states

further therein that he went to the commuters and saw them lifting up an injured person from the rails next to the platform. At paragraph 6 of the statement it is recorded that he (Mbatha) spoke to the injured person, who was the Plaintiff, in Sotho. He asked the Plaintiff what had happened, who told him that when the train started to depart (presumably from the signal stop), he climbed onto the train and when the train entered the station he was hit by the platform and he fell from the train. The Plaintiff stated that he doesn't remember this conversation and that he doesn't speak Sotho at all.

33. It was put to the Plaintiff that his version was improbable as others who disembarked from the train before him would have been injured too. The Plaintiff stated that he was the only one who was injured.
  
34. It was put to the Plaintiff that, on his own version, he got onto a train with open doors. The Plaintiff confirmed this. It was put to him that the train doors were working properly, which he denied.
  
35. It was put to the Plaintiff that the train guard (presumably Mr. Mbatha) opened and closed the train doors as he was required to do at every station. The Plaintiff denied this, maintaining that the doors were never closed.

36. It was put to the Plaintiff that the train stopped at a Signal Stop before Kaserne West station, for about 15 minutes. He stated that he couldn't remember this incident.
37. It was further put to the Plaintiff that after departing from the signal stop the train proceeded to Platform 1 at Kaserne Station instead of the usual Platform 2. The Plaintiff agreed that the train proceeded to Platform 1, as it was on the right hand side.
38. It was thereafter put to the Plaintiff that after the train stopped at Platform 1, the witnesses to be called by the Defendant saw people lifting someone, who later transpired to be the Plaintiff, from the tracks onto the Platform. The Plaintiff maintained that he fell onto the platform itself, and not the tracks. He again denied that anyone spoke to him in Sotho, as he doesn't understand Sotho. He denied telling anyone that he tried to climb onto the train after it departed from the Signal Stop or that he was hit by the Platform as the train went past it.
39. The Plaintiff could not remember speaking to Mr. Mbatha, nor could he remember speaking to anyone else during the brief period he claimed to be conscious.
40. It was also put to the Plaintiff that when the train stopped at the Signal Stop before Kaserne West train station, he was anxious that he was going to be late for work, and that he and other passengers disembarked by forcing the doors open, and that

he then jumped onto the outside of the train once it started to move again. The Plaintiff denied these allegations.

41. The Plaintiff was asked why there was no indication in the hospital records that he was pushed from the train. The Plaintiff stated that didn't know why this was the case.

42. The Plaintiff was asked what his relationship with the witness he intended to call was, he answered that they often met up and traveled together on the train. However, they were not friends. They had known each other for about 6 to 8 months at the time of the incident.

43. He was asked where this witness was in the coach during the journey. The Plaintiff testified that he was standing behind him on the left hand side. He denied discussing what evidence he was going to give with this witness.

44. During re-examination the Plaintiff stated that the Defendant was to blame for the accident because they failed to deploy guards outside the various stations or inside the train coaches. He further stated even at Kaserne West station the train was very full.

The Testimony of Mr. Simon Matla

45. Mr. Matla testified that he is 63 years old, lives in Katlehong and works in City Deep Fruit Market. He has a standard four level of education. Mr. Matla also testified through the medium of a Sepedi interpreter.
46. He confirmed that the Plaintiff was injured on the 24<sup>th</sup> of January 2017, and that he was a passenger on the train when it happened. It was just before 6am, but he wasn't sure of the exact time. The incident happened at Kaserne West station.
47. He stated that as the train was slowing down as it entered the station but before it could actually come to a stop, passengers on the train were already pushing each other to get off.
48. After the train stopped and he disembarked he saw the Plaintiff had fallen on the platform. However, he could not say how the Plaintiff had fallen as he was at the back.
49. He together with the Plaintiff boarded the train at President train station. They were both in the second coach from the front. He stated that visibility was clear and that there were no security guards at the station, nor inside the train. The doors were wide open throughout the journey according to him.

50. He was asked if the train guard made any announcements throughout the journey, and he answered that at each station the guard would come out and check, and thereafter whistle.
51. He testified that the train was already full as it arrived from Germiston station to President station. He however stated that both he and the Plaintiff, among many other passengers, managed to get onto the train.
52. He testified that the Plaintiff was injured before the train came to a standstill at Kaserne West station. He stated that if the doors had been closed before the train came to a standstill the Plaintiff wouldn't have been injured.
53. He testified further that there were no security guards inside Kaserne West station, but were outside at the gates. He further testified that as the train made a number of unscheduled signal stops throughout the journey, the passengers became angry because of the resultant delay as they were getting late for work. He blamed the delays on the signals not working.
54. During cross examination Mr. Matla stated that he knew the Plaintiff for about two weeks before the incident. They were travelling together, but were not friends. He didn't know the Plaintiff's personal details, like his identity number. At the time of the incident he didn't even have the Plaintiff's cell number. In fact, he only knew the Plaintiff by his surname, not his first name. When it was put to Mr. Matla that the



Plaintiff had testified that they had known each other for between 6 to 8 months, he replied that the Plaintiff might have known him, but that they didn't have a relationship.

55. He says after alighting from the train, he recognised the Plaintiff by his clothing. He was lying on the platform, face down. He was at the back of the Platform, as the train enters the station.
56. Mr. Matla denied that he and the Plaintiff ever discussed the case. He testified that he was only informed to come and testify in court by the Plaintiff and his lawyers. None of them knew what his testimony would be before he took the stand in court. In fact, the first time he met the lawyers was in court that morning. However, he was not subpoenaed but called to testify the day before. Nobody told him what the Defendant's case would be. He testified that the Plaintiff got his cell phone details when they met at a bus stop after the incident and they exchanged phone numbers. However, they never discussed the case.
57. It was put to Mr. Matla by Mr. Karelse that it was improbable that he never discussed the version he put to court with the Plaintiff's attorneys, as they would not put anyone on the stand without knowing what they were going to say. Mr. Matla replied that the incident happened while he was present.

58. Mr. Matla was asked why he testified that the signals were not working. He answered that it was because the train stopped time and again during the journey. He was asked if it was “because the robots were red”, to which he answered in the affirmative. He was asked if he meant that the robots were going green and red. He stated that if they were working they would be green throughout. He explained that there were many robots from President Station to Kaserne West Station.
59. Mr. Matla confirmed that the train stopped at a signal stop just before Kaserne West station. He was asked if when the train stopped close to a station, people would be eager to get off. He stated that it would depend, as they all worked for different companies. On the day of the incident he was asked if any passengers got off at the signal stop before Kaserne West Station and walked to the station, to which he replied that he couldn't remember, but that he himself was late for work.
60. Mr. Matla was asked if the train was full at President Station, to which he replied that it was overcrowded. He was asked why he said that. He said he meant the train was full. However, both he and the Plaintiff were able to get onto the train at President Station. He confirmed that at each station the train stopped at, passengers would both embark and disembark from the train. These stations were mostly in industrial areas.
61. He explained under cross examination that there were two sets of doors on each side of each coach. He testified that when the train arrived at President station he was able to see the doors of the other coaches as well, and that they were all open.

He acknowledged that this was a very dangerous situation, but that there was nothing the passengers could do. He explained that passengers would rather get onto the train rather than wait for the next one, as there was no way of knowing when the next train would come.

62. It was put to Mr. Matla that when the train stopped at the signal stop just before Kaserne West Station, it was not more than 100m from the platform. He agreed. It was further put to him that after taking off from the signal stop the train was not moving fast. He said it was not slow, as it was already late. He didn't want to talk about the speed, but that it would need to slow down as it prepared to stop at Kaserne West station.

63. Mr. Matla was asked when the pushing started, and he explained that it was when the train was slowing down but was still in motion, as people were trying to get out. He testified that the passengers at the back were pushing those in front. He confirmed that this was the same at other stations too, but that no incident took place at these. Mr. Matla was asked if he agreed that as an experienced train passenger this is a normal occurrence. He stated that it depended on how many people were on the train and if it was on time or not. He described this pushing action as fighting or shoving.

64. Mr. Matla testified that from President station to Kaserne West station he stood in the centre of the coach and that the Plaintiff was in front of him, closer to the door. When asked if this was throughout the journey he explained he could not see the

Plaintiff as there were other passengers in between them. The last time he saw the Plaintiff was at President station. However, after the train stopped he saw the Plaintiff on the Platform. He didn't see the Plaintiff actually fall from the train.

65. Mr. Matla testified further that he wouldn't have seen the Plaintiff had he got off the train at the signal stop before Kaserne West station.

66. Mr. Matla further testified that he didn't speak to the Plaintiff while he was lying on the platform. He was asked if the security guard and driver were with the Plaintiff when he saw him. He stated that he does not know what they were saying among themselves but that the Plaintiff was not saying anything as he was lying face down. Mr. Matla was however able to see that the Plaintiff was injured. He (Mr. Matla) was only there for about two minutes or so.

67. Mr. Matla conceded that he couldn't see if the doors of the other coaches were open or not. When it was put to him that Mr. Mbatha would testify that all the doors were in working order, he stated that they were open. From his experience, the doors mostly remained open. It was put to him that would be because passengers would prevent them from closing. He once again stated that the doors would not close when the train was full.

68. It was once again put to Mr. Matla that the train stopped at a signal just before Kaserne West Station for 15 minutes, and he testified that he couldn't say for how

long. He also couldn't remember what platform the train stopped at, whether it was Platform 1 or Platform 2.

69. When asked if he ever noticed the train guard after he got off the train, Mr. Matla stated that he couldn't say if the person with the Plaintiff was the guard or not. According to him, he saw one security guard, the driver and some commuters with the Plaintiff.

70. It was put to Mr. Matla that Mr. Mbatha would testify that the security guards only came later. Mr. Matla testified that a security guard was already there.

71. Upon questioning by the court Mr. Matla testified that he next saw the Plaintiff only once years after the incident. He testified that the train arrived at Kaserne West about an hour late, and that it stopped many times on route.

72. Mr. Matla testified, upon further questioning by the court, that the distance from the last signal stop before Kaserne West Station to the station itself was about 25 minutes walking distance and that it took the train about 5 minutes to traverse this distance.

73. Mr. Matla was asked by Adv. Karelse at the conclusion of his cross examination if he recognised the train driver and the train guard, who were pointed out to him

sitting in court. He stated that he didn't. It only became clear to the court at this stage that they were sitting in court throughout the testimony of the Plaintiff and Mr. Matla. I asked both counsel if this was proper and prudent, and asked them to address me on the issue at the resumption of court the following day.

74. Upon resumption of trial the following morning I was handed a communication by Adv. Karelse emanating from the Professional and Fees Committee of the Johannesburg Society of Advocates. According to the communication, titled "Request For Guidance",

*"2. It is a long standing practice in this division that a litigating party's witnesses may be present at the hearing when evidence is being lead for the other side. This permits counsel to take instructions from those witnesses in regard to the evidence presented by the other side in order to enable counsel to conduct his or her cross examination.*

*3. There is no prohibition on the presence of such witnesses when evidence is being lead for the other side.*

*4. This practice also dictates that a party's factual witnesses should absent themselves from the hearing when other factual witnesses for that party are giving evidence.*

*5. I must point out, however, that this convention does not, in any way, impact on the effect which the presence of such witnesses may have on their credibility or the credibility or cogency of the evidence which they may lead. The decision on whether or not those witnesses should absent*

*themselves from the proceedings, notwithstanding the existence of any convention, must be based on the particular circumstances of each case”*

75. The communication is signed by Adv. Don Mahon SC, a long standing member of the Professional and Fees committee of the JSA. I will revert to this communication later on. At this stage I only wish to state that I wasn't expecting Adv. Karelse to get a formal ruling from his professional body. I was not casting any negative aspersions on his conduct. I merely required some authority that a lay witness who is still to testify may sit in court while testimony is being lead of other witnesses. That being said I am grateful for the formal ruling itself. It will no doubt be of great assistance going forward to both practitioners and the judiciary.

#### The Testimony of Frederick Maponya Mbatha

76. The Plaintiff closed its case and thereafter the Defendant called its only witness, Mr. Frederick Maponya Mbatha. He testified with the assistance of a Tsonga interpreter.

77. According to Mr. Mbatha on the 24<sup>th</sup> of January 2017 he was employed as a Metro Guard at the Germiston Depot of the Defendant. In total, he was employed by the Defendant in this capacity for five years, for the first two years in Vereeniging and the next three in Germiston.

78. According to Mr. Mbatha, his primary duty was to give assistance to the driver of the train. He was also tasked with the opening and closing of the train doors, that all passengers embark and disembark in a safe manner and that it is safe for the train to move after stopping at a station.
79. Mr. Mbatha explained that he opened and closed the doors when the train was stationary at a station. He explained he did so by pressing a button which can be found in a designated place in the carriage where he was stationed at the back of the train. It was in a compartment at the back of the train. This would normally be on the side where the platform would be. This carriage is normally found at both ends of the train. On the return journey he would swop places with the driver. The control panel would be next to the rear end door of the coach, next to the window. If the train was travelling in a northerly direction this carriage would be on the western end of the carriage.
80. He explained that from this position in the carriage he would be able to see if the doors are open or closed. There are three buttons fixed on the wall, and are marked. The one was for opening the doors, the other for closing the doors, and the last was a bell button for him and the driver.
81. Mr. Mbatha was asked how he ensured that passengers embarked or disembarked safely. He explained that his duty was to ensure that this only happened while the train was stationary at a platform. After the train came to a halt at the platform, he would open his door to observe that everyone who wished to do so had



disembarked and embarked. Thereafter he would blow his whistle, get back inside the train and ring his bell once. This would be a signal to the driver that it was safe to proceed

82. He once again explained the procedure he followed:

82.1. The train stops

82.2. He opens the window

82.3. He presses the button to open the doors of the train.

82.4. After ensuring that the doors are open, he would open his own door and step outside onto the platform.

82.5. He would ensure that all those disembarking were out, and all those embarking were inside.

82.6. He would then blow his whistle to indicate that the train was about to leave.

82.7. He would step back inside his carriage and press the button to close the doors.

82.8. He would look outside that everything was still in order.

82.9. He would then press the button to close the doors.

82.10. He would then press the bell to indicate to the driver that all was fine.

82.11. The train would then leave.

83. Mr. Mbatha was asked what would happen when he pressed the button to open the doors. He explained that the doors worked on an air compression system. They made a swishing sound to indicate that they were in the process of opening or closing.

84. He explained that he followed the same procedure at every station where the train stopped, that this was the standard operating procedure.

85. Mr. Mbatha confirmed that he was on duty on the 24<sup>th</sup> of January 2017. He was referred to a document that appears at page 021 of Bundle B. He recognised this document as the Defendant's daily journal. The purpose thereof was for him to record events of the day when on duty. He confirmed that his name and signature appeared at the bottom thereof, and that it was in his hand writing.

86. According to the document, Mr. Mbatha reported for duty at 04h08 on the morning of the 24<sup>th</sup> of January 2017. He further testified:

86.1. Until 04h30 he spent the time inspecting the train. This took about 22 minutes.

86.2. Thereafter he, together with the driver tested the brakes and the doors. They were in working order. Had the doors not been working properly he would have made a report to the driver.

- 86.3. The train was supposed to start its journey from Germiston Station at 04h45 and complete it at New Canada Station at 05h23, in other words a journey of 38 minutes. He also recorded that the train left on time as indicated by the letter "T" as indicated in the 5<sup>th</sup> column of the 2<sup>nd</sup> row.
- 86.4. He recorded a note that the train was delayed due to a commuter hanging on the train, as a result was hurt by the Platform at Kaserne West station. He indicated that the train only completed its journey at 06h06 instead of the anticipated 05h23. He explained that the train was delayed as it stopped at a signal stop along the way.
- 86.5. He explained that while the train was on its journey, the driver received a signal to stop. It stopped for about 10 to 15 minutes. The driver rang his bell twice to indicate that he was being stopped by a signal in the form of a robot.
- 86.6. He explained that this stop happened about 100 metres from the Platform at Kaserne West Station. He testified that this would constitute a walking distance of about 10 to 20 minutes.
- 86.7. He testified that as the train was stopped at the signal stop he could tell that there was a commotion outside. People were walking on the sides outside the train.
- 86.8. A signal was thereafter sent to him by the driver that it was safe to proceed to the station. He returned the communication that they could proceed. However, the driver had received a communication from the traffic control officers that while it was safe to proceed, the train should stop outside Platform 1 instead of Platform 2, which was the usual Platform where this train stopped.

- 86.9. He testified that it didn't take long for the train to get from the signal stop to the platform.
- 86.10. He testified that after the train stopped at Platform 1, he opened the windows and doors of the coaches following his usual procedure. He noticed that people were hurrying out of the train due to, according to him, the slight delay at the signal stop.
- 86.11. He then noticed people witness something on the side of the train towards the rear end. He opened his own door, and as he stepped out he saw two men helping each other place another onto the platform. He saw that this person was injured because he noticed that his trouser was torn.
- 86.12. He then went back into the train and rang his bell three times, signaling to the driver that he should not proceed to drive the train. He also called the driver on his phone and invited him to come and see what had happened.
- 86.13. He then went to the injured person, and he heard this person telling those around him that they should go tell his employers what had happened to him. According to Mr. Mbatha, the injured person was using a Sesotho dialect. He testified that he could not distinguish what dialect it was, but that he was able to understand what was being said.
- 86.14. He then spoke to the injured person, who explained to him that when the train had stopped at the signal stop, he got out of the train. As the train took off, he (the injured) tried to climb onto the moving train.
- 86.15. According to Mr. Mbatha, he then asked the injured person why he didn't get off. According to Mr. Mbatha the injured told him he thought the train would use its normal route and stop outside Platform 2 instead of Platform 1. He

testified further that the injured said he was in a hurry to get to work and asked for forgiveness.

86.16. He explained that this conversation took place in the absence of the driver who only got there afterwards as he was preoccupied with following procedures.

86.17. According to Mr. Mbatha, he did not ask the name of the injured person, but recognised him as the Plaintiff when he saw him in court. He recognised the Plaintiff while he was seated in the gallery while the Plaintiff was testifying.

86.18. Mr. Mbatha denied that there were other security guards around while he was talking to the Plaintiff at the platform. They only arrived a long time afterwards. By this time the driver was already there. He testified that the security guards only arrived after he and the driver had escalated the incident to the operating centre.

86.19. Mr. Mbatha was asked if he followed the standard operating procedure at Jupiter Station, which was the station before Kaserne West Station. He testified that he did, and the doors were in a good condition, and their usual working state.

86.20. Mr. Mbatha further testified that while the train was full, the doors could close without incident. He confirmed that the doors were in a working order at all the stations between President Station and Jupiter Station. He explained that the train would be at its fullest at President Station and that after that would start to reduce.

87. Under cross examination Mr. Mbatha confirmed that his primary duty was to help the driver and anybody else who uses the train, but only if they did so in the right way. It was not his duty to ensure that the Plaintiff was not injured.
88. It was put to Mr. Mbatha that his duty was to ensure that passengers embarked and disembarked in a safe way. He testified that there are limits to this duty, and that it only applied on the platforms, not at the signal stops.
89. Mr. Mbatha further testified that he only learnt in court that the Plaintiff was a valid ticket holder. He accepted that he was one, and that he got on at President station.
90. Mr. Mbatha was referred to the daily journal at Bundle B, Page 023. He confirmed that the empty form was printed the day before by a roster compiler whose name was unknown to him. According to him, he completed it on the day of the incident. He was asked why he left the accident/incident remark blank. He testified that because the space was small, he made a note on the top. It was pointed out to Mr. Mbatha that he was required to provide a time when he signed the journal, but that he didn't. He conceded that he hadn't done this. He testified that as a guard he wasn't required to complete the bottom part if this was the drivers journal. Adv. Matika pointed out to him that this was his journal which he conceded. Mr. Mbatha further testified that he would have signed the journal at the end of his shift, at around 18h06.

91. Mr. Mbatha was asked if the driver would fill in his own journal. He testified that he would do so in a form called the T403. He testified further that he conducted the door tests, and explained how this was done. It was pointed out to him that the Daily Journal made no specific mention of the door test nor did it mention the Plaintiff's name.
92. Mr. Mbatha was referred to a statement appearing at page 007 to 008 of Bundle B. He confirmed that this was in his hand writing. It was pointed out to him that the statement made no mention of any delay, while according to the daily journal it was delayed due to a passenger hanging from the train. Mr. Mbatha testified that when he was asked to make the statement he was only asked to state what happened. It was put to him that the daily journal contradicted the statement. He disagreed. It was put to him that in the daily journal he failed to mention a platform while in his statement he did.
93. It was pointed out to Mr. Mbatha that in his testimony he had stated that the train had stopped for 10 to 15 minutes at the signal stop before Kaserne West station but this was omitted from his statement. He testified that he could remember some of what happened on that day now only.
94. It was suggested to Mr. Mbatha by Adv. Matika that he made the statement when his mind was still fresh. He testified that he made the statement about a year or so after the incident. It should be noted that there is no indication on the statement itself when it was made.

95. It was suggested to Mr. Mbatha that he was changing his testimony because he had listened to the Plaintiff's witness testimony while seated in court. He denied this.
96. It was further pointed out to Mr. Mbatha that he had testified that the train stopped at the signal stop about 90 to 100 metres from Kaserne West Station, but had later stated that this constituted a walking distance of 10 to 20 minutes, in line with what Mr. Matla had testified. He agreed.
97. Mr. Mbatha once again confirmed that his standard operating procedures were only carried out at the station platforms and not at signal stops, where all he was required to do was make observations.
98. It was put to Mr. Mbatha that he was scared to come out of the train at the signal stop before Kaserne West Station, and would sometimes fear for his own safety. He conceded this point. He also accepted that the Defendant had not stationed any security guards any of the stations or on the train. It was also put to him that there were no lights in any of the stations. Mr. Mbatha testified that this made his job as a train guard difficult.



99. Mr. Mbatha testified once more that he witnessed two men lift the Plaintiff from the tracks and put him onto the platform at the beginning of the platform. However, he never saw the Plaintiff on the tracks themselves.

100. Mr. Mbatha confirmed that he did not see how the Plaintiff got injured, and that he wasn't an eye witness. He only got the Plaintiff's side of the story after he approached him while he was lying on the platform.

101. Mr. Mbatha was referred to yet another statement he made which appears at page 011 of Bundle B. He stated that it was in his own hand writing. The statement reads as follows:

"On 24.01.2017 I was working shift (GMR14) starting at 4.08. We went to New Canada, on our way to Gaseine (sic) West the train stop before the platform with the red signal.

"Some of the commuter decided to detrain before the platform. When the signal opened the (sic) departed to platform 1 instead of going to platform 2. When we reached the platform I opened the doors for commuters to detrain. I just realized some guys were lifting some (sic) from the rail to platform. I opened my door to go and check whats wrong only to find the (sic) there was a commuter that very (sic) badly on his legs, male early 30 yrs to 40 yrs.

"I gave my driver 3 bells and I gave him a buzz to come and see what was wrong. We confronted the man he said he was hanging on the door and

he was thinking the train will go in usually platform but, it changed to platform 1.

My driver called operating they said we must wait for security personal, as soon as they arrived they took our personal detail thereafter we proceeded with our journey to New Canada.”

102. According to Mr. Mbatha this statement was made long after the incident, but he couldn't recall if it was made at the same time as the statement appearing at pages 007 to 008 of Bundle B. He testified that the statements were made in response to requests made by investigators employed by the Defendant. During later cross examination he testified that the two statements were not made at the same time.

103. Mr. Mbatha testified that he only opened the doors of the train at Kaserne West station, and not when it was stopped at the signal stop before the station. According to him the passengers had forced the doors open at the signal stop and blocked them from closing. According to him, passengers also used the doors between the coaches to alight. He suggested that this is what the Plaintiff did to get off the train at the signal stop before Kaserne West station.

104. It was pointed out to Mr. Mbatha that paragraph 3 of his statement at page 011 of bundle B differed from his testimony in court. In his testimony he stated that he interviewed the Plaintiff alone, while according to the statement both he and the driver were present.

105. It was also pointed out to Mr. Mbatha that the statement at pages 007 to 008 of bundle B did not make mention of him opening any doors at Kaserne West station while the one at page 011 did. He testified that the two statements were made some time apart from each other. In the one he wrote more legibly while in the other he wrote more hurriedly. It was also pointed out to him that according to his entry in the daily journal the only reason given for the train being delayed was the incident resulting in the injury to the Plaintiff while the train was already delayed at the due to the earlier signal stop. He explained that the driver would have his own journal and would have recorded the reasons for the delay.

106. It was further pointed out to Mr. Mbatha that the drivers cabin would be at the front of the train while his would be at the rear. However, at page 014 of bundle A, being a minute of the pretrial conference between the legal representatives on the 18<sup>th</sup> of march 2022, and at paragraph 6.1, it is stated that according to the Defendant the Plaintiff placed himself in a dangerous position on the outside of the train and on the steps of the drivers cabin and was struck by the platform at Kaserne West station. According to Mr. Mbatha the person who recorded this did not appreciate that there is no difference between the two cabins. He did not give this version to anyone.

107. Mr. Mbatha conceded that Pedi and Sotho are different languages, but testified that they both contained similar words. However, he could not distinguish between the two.

108. Mr. Mbatha testified further that he never asked the Plaintiff his particulars as he was in pain, and didn't want to make it worse for him. He said he knew the security guards would take his details. He didn't ask the Plaintiff if he had a valid ticket as this was not his duty. He testified once more that the Plaintiff was apologetic and thinks he did so because he realised that what he did was wrong.

109. Mr. Mbatha was referred to paragraph 8 of the judgment of the SCA in *Transnet v Witter*<sup>3</sup> regarding a train guard's duties at a station. The relevant part reads as follows:

*"[8] The duties of the guard, set out in para 12001.2 of the General Operating Instructions of the first defendant, were the subject-matter of much debate. The paragraph reads:*

*12001.2 Operation of sliding doors on arrival at and before starting from stations or other stopping places.*

*12001.2.1 Immediately after stopping at a station or halt where the train is required to stop for commuters, the metro guard must release the sliding doors on the platform side so that they can be opened manually.*

*12001.2.2 When the train is ready to depart and after the metro guard has announced it orally, he must blow his whistle as warning that the sliding doors are going to be closed. Thereafter he must*

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<sup>3</sup> *Transnet Ltd t/a Metrorail v Witter* 2008 (6) SA 549 (SCA)

*press the 'Door-Closing' button and give the right-away bell signal to the train driver.*

*12001.2.3 While performing their duties, metro guards must observe whether or not sliding doors are closing properly. If any sliding doors are not operating correctly the instructions in subclause 12001.4 must be complied with. They must also warn commuters against the undesirable practice of keeping sliding doors open when the train is about to depart or en route.”*

110. It was put to Mr. Mbatha that he had failed to comply with these duties, which he disputed. According to him at Germiston and President stations, he did not carry out these duties as there are special announcers at these stations. At the other stations he was expected to open and close the doors and blow a whistle only, but not make any oral announcements.

111. It was put to Mr. Mbatha that he had a duty to warn passengers about the undesirable practice of keeping the doors open, but that he had not testified to this effect. He answered that “We do that. We do warn commuters.”. He explained that by “we” he meant himself and the train driver. He conceded that this was not done at the signal stops.

112. Mr. Mbatha was asked whether from where he was seated in his carriage at the back of the train, he could see the second coach from the front. He testified that

while he could see the doors he could not see inside the coaches, and could not see if the coaches were fully packed or not. He once again denied that the doors were wide open throughout the journey as his buttons were functional. He stated that if passengers forced the doors open they would go back to their original position.

113. In re-examination Mr. Mbatha was asked where he saw the injured Plaintiff for the first time. He testified that it was on the platform near where the train enters the station. His carriage would be closer to where he saw the Plaintiff than the driver's carriage. He maintained that when he spoke to the Plaintiff they were able to understand each other.

114. Mr. Mbatha was asked if commuters are allowed to open the doors while the train was in motion. He answered that they weren't, but that they often did. He also had no recollection of seeing Mr. Matla on the day of the incident.

115. Upon questioning by the court, Mr. Mbatha testified that the signal stop between Jupiter station and Kaserne West station was closer to the latter than the former. In his estimation it was roughly 90 meters from the station. He was asked how and when he was informed that the train must proceed to Platform 1 instead of Platform 2. He stated that it was via a signal from the driver as well as the turn he saw the train take. However, the driver did not call him to inform of the change.

116. Mr. Mbatha, on further questioning by the court, stated that the train did not travel more than a distance of 200 meters from where it was stopped at the signal stop to where it stopped at Kaserne West Station. He testified further that the train stopped at several signal stops during the journey, but that the longest one was just before Kaserne West station.

117. Mr. Mbatha conceded that if someone forced the door open at a signal stop, he would not know if they ever closed again.

118. According to Mr. Mbatha he spoke to the injured Plaintiff for about a minute at the platform.

#### Assessment of the Evidence of the Witnesses

119. Even making allowance for the fact that he suffered a very traumatic injury, I find the Plaintiff's recall of events to be rather selective. For instance, he seemed to recall in fair detail how he was pushed from the train, but had no recall of the signal stops causing delays along the way, especially the one before Kaserne West station.

120. I found Mr. Matla to be a credible witness. There is nothing to suggest that he colluded with the Plaintiff beforehand to tailor his testimony, or that he wasn't on the train on the day in question, as suggested to him by Plaintiff's counsel. In some

respects his evidence even corroborated that of the train guard Mr. Mbatha, especially as regards the several delays during the signal stops on route.

121. Had Mr. Matla indeed tried to tailor his testimony to match that of the Plaintiff, one would have expected him to at least confirm that he had witnessed the Plaintiff being pushed out of the train before it came to a stop. He didn't do this.

122. I find the Plaintiff's evidence, as corroborated by Mr. Matla, that the train doors were open throughout the journey, to be credible. Mr. Mbatha himself could not say with certainty that the doors were closed throughout the journey. He could only rely on the alleged swishing sound they made as they opened or closed to conclude that they had indeed closed before departing from each station.

123. Even at the train stations, I find that the procedure adopted by Mr. Mbatha, on his own version, to ensure that the doors were closed before the train departed to be inadequate. There is no evidence that after he had allegedly pressed the button to close the doors, he or anyone else employed by the Defendant ensured that the doors were indeed closed before the train departed. I find that Mr. Mbatha, in the absence of other staff employed by the Defendant at those stations after President station, was required and under a duty to complete a final check that the doors were indeed closed before giving the driver the go-ahead to proceed.



124. I find that in essence Mr. Mbatha didn't do anything different to what the train guard in the *Transnet v Witter*<sup>4</sup> matter did. In that matter at paragraphs [9] and [10] it was held as follows:

*"[9] It was the guard's own evidence that after the train stopped at a station, he would get out of his cab at the back of the train, step about two metres away from the train and wait for persons to embark and disembark. The fact that the guard ensures that the platform is clear prior to pressing the door-close button does not cater for the eventuality of a passenger suddenly emerging onto the platform intent on boarding the train and attempting to do so when he or she sees a door open - which is precisely what the plaintiff did in this case. The guard readily conceded that if he had been instructed to ensure that the doors were closed, it would have been a simple matter for him to have moved away from his cab to do just that. And had he seen that a door was malfunctioning, it was his obligation in terms of the Instructions to inform the driver and isolate the door - as he said he would have done on the day in question had he noticed that the doors through which the plaintiff attempted to board the train were open.*

*[10] There would, of course, be a slight delay if the guard were to inspect the doors each time a train was about to leave a station. Mr Taute agreed with counsel for the defendants that the delay would be of the order of 40 seconds, and as there were 18 stations on the route, a total delay of 15 minutes would have resulted. That is*

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<sup>4</sup> See footnote 3 above

*hardly significant. Nor would such a delay have led to congestion or fewer trains, as suggested in argument, because if each conductor of each train inspected the doors at each station the interval between the trains and the number of trains would remain the same; and the timetable shows that the trains left more than 15 minutes apart even at peak times.”*

125. In *Transnet v Witter*, at the conclusion of paragraph [8] it was held as follows:

*“The plaintiff contended that the Instructions imposed a duty on the guard to observe whether the sliding doors were closing properly after he had pressed the door-closing button and before he gave the right-away bell signal to the driver. The defendants contended that the guard was only obliged to look at the sides of the train from time to time while it was running between stations to see whether doors were closed. For the purposes of liability in this case, it matters not which interpretation is correct. Either the Instructions imposed a duty on the guard to ensure that the train doors were closed before he gave the signal to the driver to proceed, or they did not. If the Instructions did impose such a duty, it was (correctly) conceded on behalf of the defendants that the guard was negligent in not carrying it out and it was not disputed that the defendants would be vicariously liable for that negligence. If the Instructions did not impose such a duty, the defendants were themselves negligent in not issuing such an instruction for the reasons which follow.*

These comments are applicable and apposite to the present case.

126. I find the suggestion by Mr. Mbatha that there was no duty on him at a signal stop to ensure that the train doors were indeed closed before it departed again, to be unconvincing. On his own version, he had reason to believe that the doors at the signal stop before Kaserne West Station had been forced open. On his own version, he heard a commotion outside the train indicating that passengers had forced open the doors and had disembarked from the train. Under these circumstances Mr. Mbatha had a duty, or the Defendant had the duty to employ staff, to ensure that the doors were indeed closed before allowing the train to proceed. The fact that Mr. Mbatha feared for his safety is no justification to avoid this duty. If for no other reason, Mr. Mbatha could not say with any degree of confidence that the train doors were not open by the time it drove into Kaserne West Station.

127. In *Mashongwa v Passenger Rail Agency of South Africa*<sup>5</sup> Mogoeng CJ in penning the unanimous decision of the court stated the following:

*“That Prasa is under a public-law duty to protect its commuters cannot be disputed. This much was declared by this court in *Metrorail*<sup>6</sup>. But here this court goes a step further to pronounce that the duty concerned, together with constitutional values, has mutated to a private-law duty to prevent harm to commuters.”*

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<sup>5</sup> ? 2016 (3) SA 528 (CC) at [29]

<sup>6</sup> Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC) at [82]

128. At paragraph [46] of the judgment the it was stated:

*“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.”*

129. In the light of these pronouncements, I find that there was a duty on the Defendant to ensure that all the doors of the train were closed at all times during its journey, including before it took off from the various signal stops where it may have stopped.

130. In the light of the finding that the train doors were open throughout the journey, or at least at the time the train drove into Kaserne West station after the signal stop, I find the version of the Defendant as to how the Plaintiff came to be injured to be unconvincing. If the doors were open, there would have been no reason for him to hang onto the outside of the train as alleged by the Defendant even if he had gotten out at the signal stop and tried to board the train again as it started to move again.

131. It is unclear where the Defendant and its legal practitioners got the version as contained in Bundle A page 034 paragraph 6.1 of the pre-trial meeting held between the parties on the 18<sup>th</sup> of March 2022. According to this version the Plaintiff hung onto the door of the driver's carriage as it entered Kaserne West station.

Whoever gave this version to the Defendant and its legal representatives did not testify at the trial and this version stands to be rejected.

132. I find the suggestion by Mr. Mbatha that he had a meaningful discussion for about one minute with the Plaintiff on the platform after the incident wherein the Plaintiff allegedly gave him such a comprehensive version of how he got injured to be improbable. This is especially so given the serious injuries the Plaintiff had sustained, the considerable pain he would have been in and the fact that this conversation allegedly took place in a language neither was familiar or comfortable with.

133. When Mr. Matla says he saw the Plaintiff in the company of the driver and a security guard, he may have meant the train guard, Mr. Mbatha. If so, this would be consistent with the statement made by Mr. Mbatha appearing at that page 011 of Bundle B, wherein he states that he confronted the Plaintiff in the company of the train driver. This version stands in contrast to what he testified in court.

134. One would have expected from the fact that Mr. Mbatha sat in court throughout the testimony of the Plaintiff and Mr. Matla, that a more comprehensive version of what he would testify would have been put to these witnesses. Important aspects of what he eventually testified, including that the Plaintiff allegedly apologised for his actions, were never put to the witnesses. If Mr. Mbatha had conversed with the Plaintiff in Pedi, which was the language in which the Plaintiff testified in, even if he

didn't recognise the dialect, this fact too should have been put to the witnesses, especially the Plaintiff.

135. As to whether a witness for one party may be present in court while witnesses for the other party testify was also the subject of an interesting article by Adv. Johan Moorcroft which appears at pages 37 and 38 of the De Rebus Magazine of August 2011. The article is aptly titled "Presence of Witnesses in Court". In the article Adv. Moorcroft states, based on judicial authority, that the evidence of a witness does not become inadmissible when he is called to testify after listening to earlier evidence, but a court may in the exercise of its discretion make allowance for the fact that the witness testified after listening to others. While the cases cited in the article relate to criminal cases, I find no reason why the same principle should not apply to civil cases as well. In the article it is also mentioned that the learned authors of the fourth edition of Morris: Techniques in Litigation are of the contrary view that the opposing parties witnesses may not be in court when the other party's witnesses testify and that an application for their exclusion should be made when the first witness is called.

136. I express no firm opinion on whether the presence of witnesses for one party may be present in court while the opposing party's witnesses are testifying. The facts and circumstances of each case should determine whether this should be allowed by the judicial officer presiding in the matter. However, as stated above, when it does happen, in my opinion, a judicial officer is entitled to draw any inferences it justifiably may. It may also be prudent practice for the legal representatives to make

known to the judicial officer presiding at the start of a trial that their potential witnesses intend to be present while witnesses for the other side are testifying.

137. Coming back to the present case, according to Mr. Mbatha when the train stopped at the signal stop before Kaserne West station, it was not more than 200 meters from the station. He however echoed Mr. Matla's testimony, given in his presence in court, that this was about 10 to 20 minutes walking distance. It is highly improbable that it would take a relatively fit person 10 to 20 minutes to walk a distance of 200 meters. It would probably take no more than 2 minutes. If the train was stopped no more than 200 meters away from the station and the Plaintiff had indeed gotten out, it is likely that he would have just walked the relatively small distance to the station and not try and get back onto a moving train. It is also improbable that only the Plaintiff would have undertaken this dangerous manoeuvre and none of the other passengers who according to Mr. Mbatha allegedly got off the train at the signal stop. Mr. Matla would probably have also not waited for the train to stop at Kaserne West Station and gotten off at the signal stop.

138. The fact that both Mr. Mbatha and Mr. Matla testified that the Plaintiff was lying close to the start of the platform behind where the train eventually stopped is a neutral fact. It is consistent with both versions.

139. Mr. Matla's version that when he first saw the Plaintiff he was lying on his stomach would appear to contradict the version of the Plaintiff that he landed up lying on his back. However, the Plaintiff's counsel did not take this matter further and there may

be any number of explanations of when and how this could have happened. In any event, one must also make allowance that witnesses are testifying many years later and some reconstruction inevitably takes place in the interim.

140. The fact that on all accounts the train journey took place in the small hours of the morning while it was still dark, including at the various stations along the way makes it difficult to accept Mr. Mbatha's version that he could see from where he sat that the train doors were closed even in the coaches furthest away from him. Besides, on his own version, his attention would have been focussed on the window where his control panel was situated next to the platform he was expecting the train to stop at and not on the opposite end where there were also doors. It would appear that the decision to drive the train to a different platform other than the one planned for also took Mr. Mbatha by surprise.

141. However, the enquiry does not end there. I find that the Plaintiff could have stayed inside the coach and waited for the train to stop before disembarking, the same way Mr. Matla did, or any reasonable commuter would have done. He had managed to stay inside the coach at all the other stops between President station and Kaserne West station despite a similar pushing and shoving taking place at each of these stations as passengers tried to disembark. There was no reason for him to try and disembark while the train was still in motion. I find that he was clearly late for work and this would explain his eagerness to get off before the train actually stopped.



However, I do not place his negligence higher than that of the plaintiff in *Transnet v Witter*, but lower. He was, unlike the plaintiff in *Witter*, being pushed from behind by other passengers. I find that his negligence contributed 30% to his injuries.

142. In the premises I make the following order:

142.1. The Defendant is liable for 70% of the agreed or proven damages of the Plaintiff.

142.2. The Defendant shall pay the Plaintiff's party and party costs in relation to the trial

143. I hand down the judgment.

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CAJEE AJ  
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION  
JOHANNESBURG

APPEARANCES:

COUNSEL FOR THE PLAINTIFF: Adv. Matika  
INSTRUCTED BY: Z & Z Ngogodo Inc  
COUNSEL FOR THE DEFENDANT: Adv. Karelse  
INSTRUCTED BY: Norton Rose Fulbright South Africa Inc  
DATES OF HEARING: 14<sup>th</sup> to 17<sup>th</sup> February 2023 and 13 March 2023  
DATE OF JUDGMENT: 14<sup>th</sup> June 2023