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

Case No: **9794/2019**

In the matter between:

JOHN CARL DAVIDS Plaintiff

and

THE PASSENGER RAIL AGENCY OF SOUTH AFRICA Defendant

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email on **24 November 2023.**

JUDGMENT

FRANCIS, J:

[1] The plaintiff, John Carl Davids, instituted an action against the defendant, the Passenger Rail Agency of South Africa (hereinafter referred to as “the defendant” or “PRASA”), in which he claimed damages for injuries he sustained in an incident that occurred on 24 October 2017.

[2] PRASA provides rail commuter services within South Africa under the name “Metrorail” and was established as a transport utility in terms of section 22 of the Legal Succession of the South African Transport Services Act 9 of 1989.

[3] The plaintiff alleges that he fell, or was pushed, out of the open sliding doors of a moving Metrorail commuter train, owned and operated by the defendant. The plaintiff pleads in his particulars of claim that he was a passenger with a valid train ticket travelling in a train carriage between the Brackenfell and Stikland railway stations within the Cape Metropolitan Area. During the entire duration of his journey, the train carriage door adjacent to where he was standing remained open. The movement of the train, coupled with the jostling of other passengers, resulted in the plaintiff being propelled towards the open door of the train carriage. Eventually, the plaintiff was pushed, alternatively fell, out of the open carriage door.

[4] According to the plaintiff, the incident was due to the sole negligence of the defendant, alternatively the defendant’s employees, who failed to comply with the

defendant's legal duties and duty of care in that, amongst other things, they failed to put reasonable safety and security measures in place to ensure the safe passage of commuters, they failed to ensure that the train was in a safe condition, they failed to ensure that the train was not filled with passengers beyond the designated capacity, they failed to ensure that the doors on the carriages of the train were installed and functioned in such a way so as not to pose a risk to the public (including the plaintiff), and they failed to ensure that all the doors of the carriages on the train were properly closed prior to departing from the station platform. Had the defendant not been negligent and discharged its legal duties, the incident would not have occurred, and the plaintiff would not have sustained the injuries as alleged.

[5] In its initial plea, the defendant simply denied the averments as pleaded. After the evidence was concluded at the trial hearing, the defendant amended its plea without opposition. In its amended plea, the defendant essentially denied that it had negligently omitted to discharge any legal duty, either on the basis as pleaded or at all. It raised a number of discrete defences in the alternative: that the incident was caused by the sole negligence of the plaintiff; that the plaintiff voluntarily accepted (by consenting to) the risk of serious injury inherent in his attempt to board a full train when it was inopportune, unsafe, and dangerous to do so; that any purported negligence on the part of the defendant was not causally linked to the plaintiff's loss; and, that the incident was caused partly

through the negligence of the defendant and partly as a result of the plaintiff's negligence.

[6] At the commencement of the trial, and by agreement between the parties, the Court granted an order separating the issues in terms of rule 33(4) of the Uniform Rules of Court on the basis that the issues relating to liability would first be determined and the remaining issues would stand over for later determination, if necessary.

EVIDENCE

[7] The plaintiff gave evidence at the trial. In addition, he called Mr Ebrahim Koopman ("Mr Koopman") who was also a passenger in the train carriage with the plaintiff. No witnesses were called on behalf of the defendant.

[8] In summary, the evidence of the plaintiff in so far as the issue of liability is concerned, was as follows:

[8.1] Approximately two weeks prior to the train incident, the plaintiff was contracted to do refrigeration work at the Protea Spar in Brackenfell. It was a short duration contract of one to two months. On the morning of 24 October 2017, he travelled to work by train from Athlone to Maitland and thereafter to Brackenfell. The return journey would be the inverse and he would initially go to Bellville station from where he would travel back to

Athlone. He had travelled in this way to work six or seven times before the day of the train incident. He had purchased a weekly train ticket which covered his whole journey to and from work,

[8.2] On the day of the train incident, he travelled to work on the train in the morning. After he finished work, he walked back to the Brackenfell train station, arriving there after 17h00. When he arrived at Brackenfell station, he had to wait for a while for the train to arrive. He then boarded the train from Brackenfell to take the reverse route back to his home in Athlone. The train incident happened shortly thereafter, during his journey homewards, and between the Brackenfell and Stikland train stations.

[8.3] The plaintiff testified that he recalled seeing the train arriving at the Brackenfell train station. As he stood on the platform facing towards the tracks, the train entered the station travelling from his right-hand side to his left. When the train came to a standstill, he noticed that the carriage which he subsequently entered had two sets of doors facing the platform, and that both sets of doors were open while the train was still in motion and when it stopped. He described the train and carriage he boarded as the same as the train and carriage depicted in the photograph admitted into evidence as a *Metrorail South Africa Class 5M2* commuter train. The motor coach has a squarish front, the trailer carriage has two corresponding sets of sliding doors on either side of the carriage, and both

are painted grey and yellow. He stated that the interior of the carriage had seats along the two sides of the carriage and a large open area for standing passengers in between the seats.

[8.4] After the train came to a standstill, the plaintiff entered the carriage through one of the two sets of sliding doors on the platform side. He could not recall whether he entered through the left or right set of sliding doors. He situated himself approximately in the middle (or centre) of the train, between the set of sliding doors through which he had entered, and the corresponding opposite set of sliding doors on the non-platform side. He could not say whether the sliding doors on the non-platform side were also open when the train was in motion prior to it coming to a standstill at the station. However, they were open when he entered the carriage.

[8.5] The train carriage was full when he entered it but there was still space for passengers to enter. More passengers then entered after him and the carriage became full and overcrowded. He was then pushed towards the non-platform side set of sliding doors and became squashed in "*like a sardine*", with his hands down next to his sides. He was pushed to a position on the edge of the non-platform side sliding doors. There were no other passengers between him and the open door. The other passengers around him were up against him, touching him.

[8.6] When the train pulled away from the Brackenfell station (en route to his intermediate destination at Maitland station) the set of sliding doors on the non-platform side did not close. He did not know why these doors remained open. In re-examination, he added that he expected these doors to close.

[8.7] As the train approached the next station, Stikland station, there was jostling among the commuters. People were moving to the exits to get out and others were trying to get to seats. In this jostling process, he found himself being pushed to the edge of the train carriage, eventually ending up between the open sliding doors on the non-platform side. He felt that he was being pushed from the one side by passengers and was being sucked out from the other side by the wind from outside. He raised his hands above his head and held onto the top of the door frame, with his fingers in the top groove in which the sliding doors run, for what he estimated to be a second or a moment of a second.

[8.8] He was forced out of the open sliding doors of the train carriage on the non-platform side of the train.

[8.9] The next thing he recalls is seeing white. His following memory after that is waking up at the Tygerberg Hospital and being told that he had fallen out of the train. He has a brief, very vague memory in between of people

telling him to lie still and nothing else. He sustained various injuries to his head, body, and legs.

[8.10] In cross-examination, the plaintiff testified that he was not able to move elsewhere (i.e. towards the back or front of the train) as the train was full and he could not move. Just before he fell out of the carriage, and while holding on the groove of the open sliding door, he was inside the train, standing between the two open sliding doors. Initially, there were people between him and the open door, but he ended up as the last person at the open door, with his back facing towards the outside. He explained that as the train was in motion, the passengers were moving around, and he was pushed towards the open door. He stated that it was only when the train approached Stikland station that the passengers pushed more. He does not know who pushed him and he did not see any overhead straps to hold on, there were no straps where he stood, and he did not know whether there were straps elsewhere in the carriage. The plaintiff stated that he made a choice to enter the train through the train carriage doors which were open as the train arrived on the platform. He admitted that he exposed himself to risk of injury but that he accepted the risk.

[8.11] Mr Koopman's evidence was to the effect that he was travelling in the same commuter train as the plaintiff and that he had fallen out of the same open doors of the train carriage together with the plaintiff. He did not know

the plaintiff at the time but met him for the first time thereafter at Tygerberg Hospital, where he had also been hospitalised.

[8.12] Mr Koopman finished work at approximately 17h00 on the day in question and had taken a five-to-ten-minute walk/jog to the Brackenfell station. He had a ticket to travel from Brackenfell station to Bellville station. He waited for the train and it arrived before 18h00. The doors of the carriage he entered were open while the train was still in motion, and before it stopped. He has seen Metrorail trains travelling with open doors before and this did not surprise him. He identified the type of train as being the same as that identified and described by the plaintiff.

[8.13] The two sets of sliding doors on the platform side were open. He entered the carriage through one of the sliding doors and went into the middle (centre of the train carriage). Before the train departed, other commuters entered the train and pushed Mr Koopman towards the open sliding doors on the non-platform side of the train carriage. When the train departed, he was moved further towards the sliding doors on the non-platform side which remained open when the train departed. He does not know why they remained open.

[8.14] As the train approached Stikland station, people in the carriage started moving towards the exits and bumping and pushing one another. In the

process, they bumped him, and he was pushed closer and closer to the non-platform side open doors of the carriage. He held on the person in front of him, who he identified as the plaintiff, although he did not know the plaintiff at the time. The train was quite full, and there was no place to grab on or to hold, so he clung to the plaintiff. He is not tall (he stated he is 150cm in height) and most people are taller than him. He was carrying a shoulder bag on one side.

[8.15] The plaintiff was standing closer to the doors on the non-platform side than Mr Koopman. As the passengers were bumping into him, the plaintiff was the only thing he had to hold on and they were pushed closer and closer to the open doors on the non-platform side. He felt the wind blowing and knew that they were close to the open door. As the passengers bumped him, he fell out, grabbing on the plaintiff. They then both fell out of the train carriage together and ended up between the train tracks. They lay there waiting for help. A person came to help moments afterwards and helped Mr Koopman to get up. The plaintiff lay where he had fallen, moaning. He waited for help to arrive. An ambulance later arrived and took both him and the plaintiff to Tygerberg Hospital.

[9] During cross-examination, Mr Koopman testified that the train carriage was equipped with overhead straps which could be used to secure oneself in the carriage, and that the plaintiff was tall enough to reach and hold on the straps.

According to Mr Koopman, the plaintiff should have known and felt that Mr Koopman was holding on him while they were still inside the carriage.

[10] After Mr Koopman testified, Mr Crowe SC, who appeared on behalf of the plaintiff, placed on record that the defendant had made admissions in respect of two items in the trial bundle, namely: *(i)* "*Relevant Excerpts from the Metrorail Train Working Rules*" (the Working Rules"), and *(ii)* "*Relevant Excerpts from the Metrorail General Operating Instructions*" (the "Operating Instructions"). The defendant had admitted that these documents were its documents and that they were applicable on the date of the train incident. Plaintiff's counsel then informed the court that, by virtue of these admissions, the plaintiff would not call his expert witness, Mr Louis Holtzhausen, to prove these documents.

[11] The Court requested the parties to place some sort of pictorial evidence before it of the interior of the train carriage in question and/or a sketch plan containing the dimensions of the said carriage. In response to this request from the Court, the defendant's attorneys sent the plaintiff photographs of a train as well as the internal configuration and dimensions of a carriage which it described as being similar to, but not the same as, the train and carriage on which the plaintiff was travelling at the time of the incident. While consenting to these photographs being handed in, the plaintiff did not accept that these photographs accurately depicted the train and the dimensions and internal configuration of the carriage on which the plaintiff was travelling. For the purpose of this judgment, the Court accepts

that the plaintiff was travelling in the carriage and on the train identified by both the plaintiff and Mr Koopman during their testimony; indeed, this aspect of their evidence was not challenged.

DISCUSSION

[12] The plaintiff was a good witness. I found him to be honest and reliable and his version of events credible. He gave satisfactory evidence about what happened to him on the day of the train incident and in relation to how he fell out of the open doors of the moving commuter train. His evidence was corroborated in all material respects by Mr Koopman who I also found to be honest and reliable. As noted, the defendant called no witnesses in its defence. Both witnesses' evidence was not seriously tested on the facts and, as discussed below, the defendant largely relied on inferences sought to be drawn from the factual testimony of the plaintiff and his witness.

[13] Mr Crowe submitted on behalf of the plaintiff that the defendant had breached its legal duty and its own operating standards by failing to ensure that the train operated safely and, more particularly, that the train did not depart from the station with its carriage doors open and while in motion. Consequently, the defendant's conduct was unlawful, negligent, and caused the harm suffered by the plaintiff.

[14] The defendant was represented by Mr Jacobs SC who argued that the plaintiff had in fact voluntarily assumed the risk of injury to himself and was solely responsible for any damages that he may have suffered. The plaintiff had knowledge and appreciation of the risk which was presented by the train entering and leaving the station with open carriage doors. The plaintiff consented to that risk by boarding the train. In addition, so argued Mr Jacobs, the plaintiff's conduct, while he was inside the carriage, was also indicative of him consenting to the risk. The plaintiff failed to secure himself by moving out of the way and by holding on the overhead straps. Mr Jacobs further argued that even if the defendant was negligent, it was not the cause of the harm suffered by the plaintiff because it was Mr Koopman who pulled the plaintiff out of the train carriage. Finally, Mr Jacobs submitted that even if the defendant was adjudged to be culpable, the conduct of the plaintiff was such that he ought to bear some responsibility because he contributed to damages that he had suffered.

[15] In order to establish a claim in delict against the defendant, the plaintiff must prove that the defendant's conduct was wrongful, negligent, and caused the loss suffered by him. It is apparent from the evidence that the plaintiff suffered various injuries, although the precise nature and extent of his injuries will have to be determined at a later stage, if necessary. The issues before this Court, then, is whether there was a legal duty on the defendant to ensure that the train carriage doors were closed while the train was in motion, whether its omission to do so

was negligent, and whether the defendant was the direct or proximate cause of the injuries sustained by the plaintiff. I now turn to consider each of these issues in turn.

[16] One of the functions of the defendant is to provide rail commuter transport within South Africa. The defendant was established to act in the public interest and many of its passengers are compelled to make use of trains because they cannot afford other transport (see, ***Rail Commuters Action Group v Transnet t/a Metrorail* 2005(2) SA 359 (CC)**). Being a public carrier operating in the public interest, the defendant is expected to operate trains which are safe for the purpose of conveying passengers, and it has a legal duty to the public at large to take such steps that are reasonably necessary to ensure the safety of commuters whilst travelling on any of its trains. This much was conceded by the defendant in its amended plea.

[17] In ***Mashongwa v PRASA [2015] ZACC 36***, the Constitutional Court confirmed that the defendant owed a public duty to rail commuters and described this duty as follows:

> *"[26] Safeguarding the physical and well-being 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."

[18] The public law duty described by the court in ***Mashongwa*** was earlier recognised by the Constitutional Court in ***Rail Commuters Action Group (****at paras 82-84)* where, after commenting that commuters used the rail system daily in their thousands and find themselves in a vulnerable position once they board a train, the court held that the defendant owed a positive duty to rail commuters to ensure that reasonable measures were in place to cater for their safety and security. In my view, this public law duty is buttressed by PRASA's status as an organ of state. As such, it is enjoined, in terms of section 7(2) of the Constitution, to respect, protect, promote, and fulfil the rights accorded to individuals under the Constitution. For commuters travelling on PRASA's trains, the rights that ought to be protected at a minimum would include the commuters' rights to life, to freedom from all forms of violence from private sources, human dignity, and freedom of movement. In fulfilling its legal duty and constitutional obligations, PRASA is duty-bound to take all such steps as are reasonably necessary to put proper and adequate safety and security measures in place (cf. ***Shabalala v Metro Rail*** **[2007] ZASCA 157** at para [7]). These would include, but not limited to, steps to properly control access to and egress from all trains and facilities used by rail commuters wherever PRASA provides such services.

[19] The public law duty to provide transport that is safe and secure for commuters manifests itself in the private-law legal duty to prevent harm to commuters; this requires PRASA to take reasonable steps to ensure the safe passage of commuters (including the plaintiff) and any failure to take such steps may render it liable in delict. This leads to the question whether or not, in this case, PRASA complied with its legal obligations; in other words, whether or not, it was negligent in relation to the plaintiff.

[20] The classic test for establishing the existence or otherwise of negligence is that formulated by Holmes JA in ***Kruger v Coetzee*** **1966 (2) SA 428 (A) at 430E-G**: whether a person in the position of the defendant would foresee the reasonable possibility of its conduct injuring another in his person or property causing him patrimonial loss, would take reasonable steps to guard against such an occurrence, and failed to take such steps.

[21] With regard to the facts of this matter, the defendant's conduct complained of was that it had operated a moving train while the carriage doors of the train were open. It is obvious, as many courts have found, that an open train door is a potential danger while the train is in motion and that potential danger exists in relation to every commuter on board the train (see, for example, ***Passenger Rail Agency of South Africa vn Moabelo*** **[2017] 4 All SA 648 (SCA)**). Indeed, in ***Mashongwa***, Mogoeng CJ (at para [60]) emphasised that the defendant's duty to

keep the train doors closed while the train was moving existed to prevent passengers falling out of the train. In ***Transnet Ltd v Witter*** **[2008] (6) SA 549 (SCA)**, the SCA also held that a train leaving a station with open doors constitutes negligence.

[22] For the defendant to meet the minimum safety standards required of it as a commuter rail operator, it must ensure that a commuter train does not depart from the station with a carriage door open, and that the doors thereof remain closed while the train is in motion. PRASA itself has recognized the danger inherent in trains travelling with carriage doors open and has sought to address this in its Working Rules and Operating Instructions. Thus:

[22.1] Working Rule 112 provides that carriage doors "*must not be opened to allow passengers to alight from or board a train before it has stopped or after it has started*".

[22.2] Operating Instruction 12017.12.4 provides that the train doors should be closed "*prior to the departure of the train*", i.e., before the train is set into motion; and

[22.3] Operating Instruction 12017.12.1 provides that the Metro Guard (who is stationed at the back of the train) should only release the sliding doors on the platform side so that it can be opened by commuters "*immediately*

after stopping at a station or halt where the train is required to stop for commuters".

[23] The evidence in this matter, which was unchallenged, is that the train arrived at the station with its doors open and continued its journey with its doors remaining open. In my view, by allowing the train carriage doors to be, and remain, open while the train was in motion, the defendant failed to ensure that a safety precaution (closing the train carriage door) was complied with and this failure amounts to negligence on its part. A reasonable organ of state in the defendant's position would have foreseen the reasonable possibility of the plaintiff falling from a crowded moving train while the doors were open. The defendant should have taken steps to guard against this eventuality but failed to take any steps, reasonable or otherwise, to prevent the harm which befell the plaintiff when he involuntarily existed the train carriage.

[24] The defendant conceded that the train doors were open. This being the case, factual causation was established on the basis that but-for the fact that the train left the station with open doors, the plaintiff would not have been injured. However, Mr Jacobs submitted that legal causation had not been established. The plaintiff had not held on the overhead straps which he could have done, had not moved to a safer position in the compartment, and Mr Koopman pulling the plaintiff out of the train constituted a *novus actus interveniens* which broke the causal chain between the defendant's negligence and the plaintiff's loss. It was

argued that the injuries suffered by the plaintiff, in the circumstances, was not a reasonable or foreseeable consequence of the defendant's behaviour.

[25] It is indeed so that a causal *nexus* must exist between the defendant's conduct and the damage or harm suffered by the plaintiff. The fact that the plaintiff may have been pushed and jostled by passengers and ultimately pulled out of the train by Mr Koopman does not, in my view, excuse the defendant as the harm suffered by the plaintiff was not too remote. The issue of remoteness must be determined with reference to the facts of each case. As the court observed in ***Van Der Spuy v Minister of Correctional Services*** **[2003] JOL 11726 (SE)** at pg 19:

> "*Although a new intervening cause, such as the negligent or intentional wrongful conduct of a third party, may often result in the harm suffered being too remote, each case must be decided in light of its own particular facts and circumstances and depending on the facts, an intervening cause may also not break the chain of causation*".

[26] The question as to whether an intervening cause has broken a chain of causation was considered by Nugent JA in ***OK Bazaars [1929] Ltd Versus Standard Bank of South Africa Ltd*** **[2002] ZASCA 5** at para [33] where the learned judge stated:

"*I have already called attention to the fact that the test for legal causation in general is a flexible one. When directed specifically to whether a new intervening cause should be regarded as having interrupted the chain of causation (at least as a matter of law if not as a matter of fact) the foreseeability of the new acts occurring will clearly play a prominent role … If the new intervening cause is neither unusual nor unexpected, and it was reasonably foreseeable that it might occur, the original actor can have no reason to complain if it does not relieve him of liability*". (footnotes omitted)

[27] In any event, the precise nature of the harm to plaintiff need not be foreseen. As stated in ***Kruger v Van Der Merwe and Another*** **1966 (2) SA 362 (A)**, the doctrine of foreseeability in relation to the remoteness of damage does not require foresight as to the exact nature and extent of the damage. It is sufficient that the person sought to be held liable should reasonably have foreseen the general nature of the harm that might, because of his conduct, befall some person exposed to a risk of harm by such conduct.

[28] In the matter before this Court, the general manner of the harm suffered by the plaintiff was, in my view, reasonably foreseeable and not too remote. The plaintiff's evidence was that he was standing in the middle of the carriage and was pushed towards the open carriage door. He did not have any control whatsoever in his onward movement. Mr Koopman, being a short person, had

nowhere to hold and his only source of stability was the plaintiff on whom he clung on for dear life. Given that the carriage door was open, and passengers were being pushed towards the door on the non-platform side, it is inevitable that harm would have occurred to those who ended up at the opening of the carriage door. Conversely, if the train carriage door on the non-platform side was properly closed, the plaintiff and Mr Koopman would not have fallen out even if they were pushed by passengers and landed up at this carriage door with Mr Koopman holding on the plaintiff for support. Given this factual matrix, it is difficult not to conclude that the plaintiff has satisfied the element of both factual and legal causation.

[29] I now turn to the defences pleaded by the defendant. In addition to arguing that there was no causal connection between any purported negligence on the part of the defendant and the plaintiff's loss, the defendant submitted that it had a complete defence to the plaintiff's claim. Any injuries sustained by the plaintiff was due solely to his own negligence and, by his conduct, he had voluntarily assumed the risk of injury. The plaintiff boarded the train carriage in circumstances where he knew it was unsafe and inopportune to do so. Once inside the train carriage, he could have been safe if had he remained in the middle of the carriage, away from the door area, and had held onto the overhead straps. This was the highwater mark of the pleaded defences. An alternative defence was that the plaintiff, at the very least, contributed to his own injuries. The defendant did not lead any evidence of its own in substantiation of its

defences. Instead, it relied on certain common cause facts and sought to draw inferences therefrom.

[30] The defence of voluntary assumption of risk, also known as *volenti non fit injuria*, is a well-known defence and is a ground of justification which excludes unlawfulness. If proved, it is a complete defence. The onus is on the defendant to prove that the plaintiff had knowledge of the risk, appreciated the ambit of the risk, consented to the risk, and the consent must be comprehensive and extend to the entire transaction, inclusive of its consequences (see, ***Castell v De Greef 1994(4) SA 408 (C*) at 425 G-I**).

[31] With regard to the defence of *volenti non fit iniuria*, the plaintiff did indeed acknowledge the risk posed by him boarding a train where the carriage door was open. However, this is as far as one can take the matter. The plaintiff was not aware of the risk that the non-platform door posed because he was unaware that it was open when the train arrived at the station. Once he boarded the train, he noticed that the non-platform doors were open, but he testified that he expected these doors to close and only discovered that they did not close after the train commenced moving. Thus, the risk of harm arising from falling out of the non-platform side of the carriage was not within his contemplation when he boarded the train. He cannot, therefore, be said to have had knowledge of the risk. If he had no knowledge of the risk, it is axiomatic that he could not have appreciated

or consented to the risk of falling out on the non-platform side. Accordingly, the defence of *volenti non fit iniuria* must fail.

[32] Given the undisputed facts proved in evidence, the defendant's argument that the plaintiff's negligence was the sole cause of the damage suffered by him, cannot succeed. The evidence of both the plaintiff and his corroborating witness, Mr Koopman, was that when they entered the train there was still room for more passengers to enter after they did. The carriage only became overcrowded subsequent to their entering the train, after further commuters had entered the carriage. It was only then that they were pushed towards the open sliding door on the non-platform side. Furthermore, the uncontested evidence of the plaintiff was that his hands were pinned to his side, and he became squashed "*like a* sardine": there was literally no place to hold on in order to stabilise himself and he was pushed inexorably, not of his own volition, towards the non-platform carriage door. In the circumstances, it can hardly be seriously argued that the plaintiff was negligent and the author of his own misfortune.

[33] The remaining aspect is the issue of contributory negligence. It was submitted by Mr Jacobs that the plaintiff elected not to hold on the overhead straps and place himself further inside the carriage. If he had done so, this would have prevented him from being propelled towards the open carriage door.

[34] For a defence of contributory negligence to succeed, the defendant must allege and prove that the plaintiff was negligent, and that this negligence was connected to the damages suffered (see, Amler's Precedents of Pleadings, Seventh Edition, LTC Harms, p125).

[35] As noted earlier on in this judgment, the plaintiff was not in any way negligent. He took up a position in the train carriage which he thought was safe. He was not a party to, or had any choice in, his onward and inexorable movement towards the open carriage door. The defendant led no evidence that the plaintiff had foreseen that there was a reasonable possibility that he would fall out of the non-platform carriage door and should have taken steps to avoid this possibility. In any event, it must be emphasised that it remained the defendant's legal duty, and its operational obligation, to ensure that the train doors were closed when the train left the station and when it was in motion. Accordingly, I find that the defendant has failed to discharge the onus in respect of its defence of contributory negligence.

[36] In my view, there is no merit in any of the defences raised by the defendant. In addition, it is quite apparent that there was no negligence on the part of the plaintiff and that it was the negligent conduct of the defendant's employees, in permitting the commuter train to depart from the Brackenfell Station with open doors, that was the sole and proximate cause of the plaintiff's injuries.

[37] In so far as the issue of costs is concerned, the parties were in agreement that costs should follow the cause. There was some debate, however on whether the costs of the expert witness, Mr Holtzhausen, should be allowed. A rule 36(9) notice was delivered by the plaintiff, signalling his intention to call Mr Holtzhausen as an expert witness. However, considering the defendant's admission of the Working Rules and Operating Instructions, the plaintiff chose not to call Mr Holtzhausen. Mr Jacobs argued that the costs of Mr Holtzhausen should not be allowed as the documents which were admitted, and on which Mr Holtzhausen would have been called to testify about, emanated from the defendant and the contents thereof were not disputed.

[38] In my view, the plaintiff should be entitled to the reasonable qualifying fees and expenses of Mr Holtzhausen. If one has regard to the rule 36(9) notice, it is apparent that the ambit of the opinion to be expressed by Mr Holtzhausen, a railway incident analyst, was not only in relation to the admitted documents but also on railway operations generally. In addition, the defendant's initial defence was a bare denial of all issues raised in the pleadings, including PRASA's operational obligations. The defendant only made its views known on the Working Rules and Operating Instructions immediately before the plaintiff closed its case.

ORDER

[39] In the result, it is ordered that:

[39.1] The defendant is liable to compensate the plaintiff for such damages that he may prove, or be agreed, arising out of the incident that occurred on the railway line between the Brackenfell and Stikland railway stations on 24 October 2017 when the plaintiff involuntarily existed a moving train; and

[39.2] The defendant shall be liable for payment of the plaintiff's costs, including the costs of senior counsel and the reasonable qualifying fees and expenses of the plaintiff's expert, Mr Louis Holtzhausen.

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FRANCIS, J