THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No:
517/2007

TRANSNET LIMITED t/a METRORAIL
1st Appellant
THE SOUTH AFRICAN RAIL COMMUTER
CORPORATION LIMITED
2nd Appellant

and

DAVID WITTER
Respondent

Neutral citation: *Transnet Ltd v Witter*(517/2007) [2008] ZASCA 95 (16 September 2008).

Coram: HARMS ADP, BRAND, CLOETE, PONNAN JJA and LEACH AJA
Heard: 15 AUGUST 2008
Delivered: 16 SEPTEMBER 2008
Corrected:

Summary: **Delict**: negligence of railway operator; passenger boarding moving train with open door. **Contributory negligence**: Apportionment of Damages Act 34 of 1956; approach of a court of appeal to an apportionment made by a trial court. **Costs: Expert witnesses**: when preparation (qualifying) fees of an expert, and allowances prescribed under s 42 Supreme Court Act 59 of 1959 (and s 51 *bis* of the Magistrates' Courts Act 32 of 1944), should be allowed on taxation; order declaring a witness a necessary witness, discussed.

ORDER

On appeal from: High Court, Cape Town (Veldhuizen J sitting as court of first instance).

The following order is made:

1. The order of the court a quo declaring Messrs Myatt and Taute necessary witnesses is deleted and that part of the order is amended to read: 'The preparation fees of Messrs Myatt and Taute shall be allowed on taxation'.

2. Save as set out in 1, the appeal is dismissed.

3. The appellants are ordered, jointly and severally, to pay the respondent's costs of appeal, including the costs of two counsel.

JUDGMENT

CLOETE JA (HARMS ADP, BRAND, PONNAN JJA and LEACH AJA concurring):

[1] At approximately 06:40 on 7 February 2002 the plaintiff attempted to board a commuter train at the Witteboom railway station in the Western Cape. The train had just started to move slowly when the plaintiff emerged onto the platform. Although the other doors were closed, the doors of the carriage where the plaintiff attempted to board were open. The plaintiff took three quick steps across the platform and grasped the pillar in the middle of the open doors, lost his footing and fell between the platform and the train. The wheels of the train severed his right foot above the ankle.

[2] Transnet Limited (trading as Metrorail) operated the train, the railway station and the platform on behalf of the South African Rail Commuter Corporation Limited. The latter owned, controlled and regulated the train. The plaintiff sued them both as, respectively, the first and second defendants, for damages in delict. The court a quo (Veldhuizen J) was asked to determine the question of liability first. The learned judge found

that the guard on the train was negligent in failing to ensure that the doors of the carriage where the plaintiff attempted to board were closed before signalling to the driver that the train could depart from the station, for which negligence the defendants were vicariously liable; and in the alternative, that the defendants were themselves negligent in failing to put the necessary procedures in place to prevent this happening. The trial court also found that the plaintiff had been negligent — indeed, contributory negligence had (correctly) been conceded — and ordered that his damages be reduced by 50 per cent. Finally, the trial court declared the two experts that had been called on behalf of the plaintiff necessary witnesses and ordered that their qualifying fees should be allowed on taxation.

[3] This court granted the defendants leave to appeal. It would be convenient to continue to refer to the parties as they were in the court a quo.

[4] There are three issues on appeal. The defendants contend:

(a) that neither they nor the guard were negligent as all reasonable steps had been taken to prevent the occurrence of injuries to persons in the position of the plaintiff;
(b) that the apportionment of damages made by the court a quo was not just and equitable; and
(c) that the costs order in respect of the plaintiff's expert witnesses should not have been made.

I shall deal with each issue in turn.

Negligence

[5] The test for negligence was formulated in *Kruger v Coetzee* as follows:[1]

'For the purposes of liability *culpa* arises if —

(a) a *diligens paterfamilias* in the position of the defendant—

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps.'

The first two requirements contained in para (a) were — correctly — not placed in issue by the defendants. All of the experts were agreed. Mr Myatt, an electrical engineer and specialist in train door control systems, who testified on behalf of the plaintiff, expressed the view that it was a basic fundamental requirement for the safe operation of a passenger train in any country that a train should not depart with a door open. Mr Taute, a mechanical engineer and retired General Manager (Operations and Technical) of the second defendant, who had gained experience over many years on inter alia the safe running of trains and commuter safety and who was also called as an expert on behalf of the plaintiff, said:

'As an operator you must have clear guidelines and proper staff to make sure that you safely convey your passengers. One of the prime issues, prime things to do is to make sure that the doors are closed. In other words you must lay down proper procedures, have staff to do it . . . I'll never accept the fact that you can, accept running a train with doors open, I can't accept that that is an acceptable situation to operate a suburban service on.'

The evidence of the defendants' expert, Mr Carver, a mechanical engineer previously employed by the second defendant, was that a responsible train operator should do 'everything in his power' to prevent trains departing with doors open.

[6] So far as the requirement contained in para (b) of *Kruger*

[1] 1966 (2) SA 428 (A) at 430E-G.

v Coetzee is concerned, it was the defendants' case that they had indeed taken all reasonable steps to guard against the possibility that commuter trains, and in particular, the train which the plaintiff attempted to board, would depart with doors open. The submissions made by the defendants' counsel on appeal in this regard are conveniently tabulated in the heads of argument as follows:

'We submit that the Appellants did exercise reasonable care in carrying out their duties by reason of the following:

1. The regular maintenance that was undertaken on the train set;
2. The checking of the doors at the commencement of shift and the unlikelihood of a defect occurring in the day subsequent thereto;
3. The employment of the guard;
4. The guard ensuring that the platform was clear prior to the door close button having been pressed;
5. The guard generally observing (in the course of his duties) whether the doors were closing properly;
6. The present and ongoing replacement of the 5M coaches with 10M coaches;
7. The impossibility of having the guard ensure that all the doors are closed prior to departure of the train in that it would add at least a further 15 minutes to the train schedules, thereby resulting in fewer trains and greater overcrowding, posing an even greater risk to passengers;
8. The impossibility of employing further personnel given that all trains do not have a second compartment within which such a person may be located. He/she would accordingly have to sit in the driver's compartment and the time-consuming process described above would have to be followed at every station, thereby also resulting in further delays and fewer trains running.'

[7] Regular maintenance and checking of doors at the commencement of each shift would lessen, but not obviate, the possibility of a malfunction. As Mr Taute said (and his view accords with common sense):

'You see with mechanical equipment you can never expect or accept that things are

going to work, something could happen, something could happen between Retreat [where the guard and driver had checked the operation of the doors at the beginning of the shift] and [the Witteboom] station which causes the door not to work, with very fatal results to passengers, so that is why you can't assume, you can never assume that if a thing is working now it will still be working within 24 hours or whatever, or ten hours or two hours, whatever.'

[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 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.'

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 whilst 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.

[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 hardly significant. Nor would such a delay have led to congestion or less 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.

[11] The fact that the defendants were (and probably still are) replacing the old 5M coaches with new 10M coaches does not assist their case. If anything, greater precautions should have been taken to guard against malfunctioning doors on the older coaches.

Contributory negligence

[12] I therefore consider that causative negligence was established and I turn to consider the second issue on appeal,

namely, the apportionment made by the court a quo in respect of the plaintiff's contributory negligence. Section 1(1)(a) of the Apportionment of Damages Act[2] enjoins a court to reduce damages suffered by a claimant 'to such extent as the court may deem just and equitable' having regard to the degree to which the claimant was also at fault. In *South British Insurance Co Ltd v Smit*[3] Ogilvie Thompson JA said:

'From the very nature of the enquiry, apportionment of damages imports a considerable measure of individual judgment: the assessment of "the degree in which the claimant was at fault in relation to the damage" is necessarily a matter upon which opinions may vary. In the words of LORD WRIGHT in *British Fame (Owners) v MacGregor (Owners)*, 1943 (1) A.E.R. 33 at p. 35 (a maritime case; but the principle appears to be equally followed in England in relation to the Contributory Negligence Act):
"It is a question of the degree of fault, depending on a trained and expert judgment considering all the circumstances, and it is different in essence from a mere finding of fact in the ordinary sense. It is a question, not of principle, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be difference of opinion by different minds."
Were this Court readily to interfere with a trial Court's apportionment of damages, dissatisfied litigants would be encouraged to appeal in well nigh every case. Where, therefore, the trial Court has correctly found the facts and has made no error in principle, this Court . . . will not lightly disturb the apportionment decided upon by the trial Court.'

The section requires the court of first instance to exercise a narrow discretion.[4] Accordingly, an appeal court will not decide the question afresh; it will interfere with the exercise of the discretion exercised by the trial court only where it is shown

[2] 34 of 1956.

[3] 1962 (3) SA 826 (A) at 837F-838A.

[4] *Media Workers Association of South Africa v Press Corporation of South Africa Ltd ('Perskor')* 1992 (4) SA 791 (A) at 800C-G; *Wijker v Wijker* 1993 (4) SA 720 (A) at 727J-728B; *Ganes v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) para 21; *Naylor v Jansen* 2007 (1) SA 16 (SCA) para 21; *Giddey NO v J C Barnard and Partners* 2007 (5) SA 525 (CC) para 19 at 534A-B and n 17.

that:

'. . . the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.'[5]

An appeal court is therefore entitled to interfere (as it can in respect of sentences imposed in criminal matters ─ another example of the exercise of a narrow discretion) where its assessment differs so markedly from that of the

[5] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 11. See also *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 781I-782B and cases there cited; *Giddey NO v J C Barnard and Partners* above n 4 para 19; *Naylor v Jansen* above, n 4; *Malan v The Law Society of the Northern Provinces* [2008] ZASCA 90 para 13.

court a quo as to warrant interference: *Shield Insurance Co Ltd v Theron NO*[6]

[13] The defendants' counsel submitted that the apportionment of 50 per cent was not fair and reasonable, particularly because the plaintiff boarded a moving train and the defendants had adopted measures aimed at preventing trains from departing with open doors. But I cannot fault the determination by the court a quo. It did not misdirect itself and its assessment does not warrant interference particularly in view of the following remarks made by this court in *Transnet Ltd t/a Metro Rail v Tshabalala*:[7]

'A reasonable man in the position of the defendant would not have allowed the train to operate with the doors of the coaches open as he would have foreseen that to leave the doors of the railway coaches open would constitute an invitation to prospective passengers to board the train while moving and that it would be dangerous for them to do so. Similarly, a reasonable man in the position of a prospective passenger would have foreseen the danger of boarding a train after it had started to move and would have refrained from doing so. Both the defendant and the plaintiff were therefore negligent. *Had the plaintiff been sober and had he attempted to board the train shortly after it started moving the degree to which he was at fault may well have been the same as that of the defendant.* That is however not what happened. The plaintiff was at least somewhat intoxicated at the time and he tried to board the train after it had moved a considerable distance and had probably gathered some speed. The court *a quo* summarised the evidence of Emmanuel, whose evidence it accepted, as follows:
"The train started to leave the station. When the plaintiff realised that the train was leaving he started to run after it. He was running in the direction of the first class coaches. He ran past the coach in which he had been travelling and two further third class coaches. The next coach was a first class coach. Mr Emmanuel could see that the plaintiff was not going to make it. He was staggering as he ran. Eventually he managed to reach the first class coach. He grabbed onto the rail in the middle of the entrance to the coach and ran for approximately three metres alongside the train whilst

[6] 1973 (3) SA 515 (A) at 518B-D.
[7] [2006] 2 All SA 583 (SCA) para 9.

holding onto the rail. Then he lost his footing and disappeared from sight."

In the light of this evidence the conduct of the plaintiff deviated from the norm, being that of a reasonable man, to a substantially greater degree than that of the defendant. In the circumstances it would, in my view, be equitable to reduce the damages suffered by the plaintiff by two thirds.' (Emphasis supplied.)

The appeal on this ground must therefore also fail.

Costs of expert witnesses

[14] The final question to be determined is the correctness of the order made by the trial court in relation to the two experts that testified on behalf of the plaintiff. It was submitted that neither could be regarded as a necessary witness, in view of the following passage in the judgment of the court a quo:

'Both the plaintiff and the defendants presented a great deal of expert testimony. In my opinion these experts do not contribute to a resolution of this matter.'

It was therefore submitted that the court a quo should not have declared the plaintiff's two experts necessary witnesses, nor allowed their qualifying fees.

[15] There appears to be some confusion underlying the order made by the court a quo and counsel's submission. An expert witness's qualifying fees (now more appropriately termed 'preparation fees' in the Uniform Rules) will only be allowed on taxation if authorised by the court or with the consent of all interested parties. The proviso to item 5 of section D of the schedule to Uniform Rule 70 makes this clear:

'Provided that the preparation fees of a witness shall not be allowed without an order of the court or the consent of all interested parties.'

This proviso takes qualifying fees out of the concluding part of rule 70(3) (*Köhne v Union and National Insurance Co Ltd*)[8] which sets out the general duties of the taxing master as follows:

'With a view to affording the party who has been awarded an order for costs a full indemnity for all costs reasonably incurred by him in relation to his claim or defence and to ensure that all such costs shall be borne by the party against whom such order has been awarded, the taxing master shall, on every taxation, allow all such costs, charges and expenses as appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the

[8] 1968 (2) SA 499 (N) at 504E-F.

party who incurred the same, no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence or mistake, or by payment of a special fee to an advocate, or special charges and expenses to witnesses or to other persons or by other unusual expenses.'

[16] The allowances paid to witnesses and which are prescribed pursuant to s 42 of the Supreme Court Act[9] may be claimed on taxation in respect of any witness, lay or expert. The current tariff, published this year,[10] repealed the long outdated tariff which had been in force for 16 years.[11] The tariff provides for a subsistence allowance, transport and travelling expenses, and an allowance up to a maximum of R1 500 for income lost in consequence of attendance at a civil case; and it no longer distinguishes between expert and other witnesses.

[17] No special charges or expenses paid to witnesses can be taxed because of the latter part of Uniform Rule 70(3), quoted above. Indeed, an agreement by a party to remunerate a witness for testifying in his cause (as opposed to an undertaking to pay to a witness the statutory allowances) is against public morals and unenforceable: *Van Aswegen v Lombard*.[12] This applies also to an expert witness (although an expert witness can charge for preparation); as Innes CJ (Wessels and Curlewis JJ concurring) said in *Marais v*

[9] 59 of 1959; the corresponding section in the Magistrates' Courts Act 32 of 1944, is s 51 *bis*.
[10] Under GN R394 in *Government Gazette* 30953 of 11 April 2008.
[11] GN R2597 in *Government Gazette* 13604 of 1 November 1991.
[12] 1965 (3) SA 613 (A) and cased there quoted.

Pilkington:[13]

'The provisions of the Roman-Dutch law with regard to the obligation of all persons to give evidence who are able to do so were very strict; and the law went far in compelling evidence and in discountenancing any special payment in connection therewith. It is a fundamental rule that a person who is in a position to aid the administration of justice by giving evidence as to facts within his knowledge is bound to appear in court and do so. And there is a scale of remuneration fixed in all such cases. Now, though an expert witness differs from an ordinary witness in this respect, that he is a volunteer and must qualify himself by ascertaining the facts upon which he then proceeds to bring his opinion to bear, yet when he has once done so I cannot see any real distinction between his position and that of a man who happens to have seen certain things take place and has to depose regarding the particulars of what he saw. A man who has gone out of his way to qualify himself, who has put himself in possession of the facts, and has formed his opinion as an expert, is, it seems to me, as much bound to impart his opinion to the Court as an ordinary man is to state what he knows about facts in dispute.'

Therefore although an expert is free to stipulate for whatever rate he considers appropriate for preparation, those fees cannot include remuneration for time spent in the witness box: *Pakes v Moseley*.[14]

[18] If the court allows the preparation fees of an expert, it does not follow that the allowances prescribed under the Supreme Court Act should also be

claimable on taxation ─ for example, if the issue on which the expert was to testify fell away after the preparation fees were incurred and his attendance at court became unnecessary, any allowances subsequently paid for this purpose might not be claimable on taxation. Whether preparation fees or allowances should be claimable on taxation depends on whether they were reasonably necessary and that question is to be answered not with the benefit of hindsight, but when the fees or expenses were incurred: *Stauffer Chemical Co v Safsan Marketing and Distribution Co (Pty) Ltd*.[15] If, therefore, it appears to the court

[13] 1905 TS 650 at 651-2 quoted with approval by this court in *Van Aswegen v Lombard*, above, n 12, at 618D-G.

[14] 1909 TS 166, approved by this court in *Van Aswegen v Lombard* above, n 12 at 619A-E; and see the remarks of Mason J in *Kemp v Power* reported sv *Power v Kemp* 1911 AD 419 at 428, also quoted with approval in *Van Aswegen v Lombard*, at 619G.

[15] 1987 (2) SA 331 (A) at 354I-355H.

(in the case of preparation fees of an expert) or the taxing master (in the case of the statutory allowances) that it was reasonable for the legal representatives of the successful party to incur such expenses when they did so, the expenses should be allowed. The consequence is that qualifying fees[16] and witness allowances[17] may be allowed on taxation, even though the witness concerned did not, in the event, testify.

[19] Although allowances claimed in respect of any witness may only be claimed if they were reasonably incurred, and although preparation fees in the case of an expert have to be allowed by order of court or by consent, a declaration by a court that a witness (whether lay or expert) was a necessary witness is not required before the allowances prescribed by the Supreme Court Act can be awarded on taxation. The same applies to a litigant witness because the statutory basis for a declaration in such a case has fallen away: the Uniform Rules contain no such requirement; rule 33(15) of the magistrates' court rules of court, which originally required such a declaration, was deleted in 1977;[18] and pre-Union legislation,[19] which also required such a declaration, has been repealed.[20] In all cases therefore a declaration that a witness was a necessary witness is not necessary so a court should not usurp the function of the taxing master by making one, and the taxing master is not

[16] *Stauffer Chemical Co v Safsan Marketing and Distribution Co (Pty) Ltd* above, n 15, loc cit.
[17] Cf *Stanley Motors Ltd v Administrator, Natal* 1959 (1) SA 624 (D) at 629C-G.
[18] By GN R2221 in *Government Gazette* 5790 of 28 October 1977.
[19] Section 8 of Act 4 of 1861 (C); s 49 of Proclamation 16 of 1902 (T); s 60 of Ordinance 11 of 1902 (O).
[20] By the Pre-Union Statute Law Revision Act 36 of 1976.

entitled to require one (as we were informed is the practice in the Cape High Court). It is of course open to a court to give any indication to the taxing master it considers may be useful.

[20] I return to the facts. The two experts called on behalf of the plaintiff gave evidence which was of an expert nature. The defendants' counsel submitted that some of the evidence of Mr Taute did not fall into that category; but it is for the taxing master to decide what part of the fees payable to this witness were spent on preparing him to express the opinions which he did, and are therefore allowable on taxation. Mr Myatt's evidence was necessary in particular to rebut assertions made by the defendants' expert, Mr Carver. The fact that the trial court found itself able to determine the issues without the aid of expert evidence, does not derogate from the fact that preparation fees were reasonably incurred to enable them to give expert evidence on the issues that were before the court.

[21] The only success which will be achieved by the defendants on appeal is the deletion of the declaratory order that the plaintiff's expert witnesses were necessary witnesses. That minor success should make no difference to the amount allowed on taxation and it accordingly does not justify any costs order in their favour.

[22] The following order is made:

1. The order of the court a quo declaring Messrs Myatt and Taute necessary witnesses is deleted and that part of the order is amended to read: 'The preparation fees of Messrs Myatt and Taute shall be allowed on taxation'.
2. Save as set out in 1, the appeal is dismissed.
3. The appellants are ordered, jointly and severally, to pay the respondent's costs of appeal, including the costs of two counsel.

_____

T D CLOETE
JUDGE OF APPEAL

Appearances:

Counsel for Appellant:	N M Arendse SC Ms K Pillay
Instructed by:	Godwin Bossr, Cape Town
Correspondent:	Lovius-Block Attorneys, Bloemfontein

Counsel for Respondent:	R D McClarty SC J H Roux SC
Instructed by:	Heyns & Partners Inc, Cape Town
Correspondent:	Honey Attorneys, Bloemfontein