THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
CASE NO 151/2005

In the matter between

TRANSNET LTD t/a METRO RAIL — Appellant

and

LAZARUS TSHABALALA — Respondent

Coram: Streicher, Brand and Jafta JJA
Heard: 27 February 2006
Delivered: 22 March 2006

Summary: Contributory negligence – apportionment of fault – Appeal court's assessment differing substantially with that of the trial court.

Neutral citation: This judgment may be referred to as Transnet Ltd v Tshabalala [2006] SCA 25 (RSA)

JUDGMENT

JAFTA JA

[1] The respondent (the plaintiff) sued the appellant (the defendant) in the High Court, Johannesburg for payment of the sum of R762 650 as damages arising out of an accident involving a train operated by the defendant. The court *a* quo (Berger AJ) was asked to determine the issue of liability separately from the other issues. It held that both parties were equally negligent and that such negligence had contributed to the injuries sustained by the plaintiff. Consequently it reduced damages to which the plaintiff was entitled by half and ordered the defendant to pay costs of the trial. This court granted leave to the defendant to appeal on the following limited issues:

'Whether, on the facts found by the trial court together with any other facts on the record that are consistent with those findings, the trial court correctly found that the defendant is liable for the consequences of the injuries sustained by the plaintiff in the accident, and if so, whether the trial court's apportionment of fault was correct.'

[2] The facts found by the trial court were the following. On 21 September 2001 the plaintiff, a resident of Soweto, Johannesburg had visited his sister at

Soshanguve, north of Pretoria. He had travelled by taxi from Johannesburg to Soshanguve. On his return he decided to travel by train but did not know where he could catch a train to Johannesburg. He boarded a train which travelled from Mabopane (also north of Pretoria) to Bosman station in Pretoria. The train had to pass through Soshanguve. From Soshanguve station it stopped at Akasia Boom station before it proceeded to Winternest station.

[3] At Winternest the plaintiff alighted from the train with another passenger, Mr Gavin Emmanuel. He then asked for directions as to where he could catch a train to Johannesburg whereupon Emmanuel told him to return to the train and alight at Bosman station, where he could get a train to Johannesburg. As he was talking to Emmanuel the train started to move. He gave chase, running past three coaches from the rear. When he reached the fourth coach, he held on to a vertical hand rail which was inside the coach near the door. Unfortunately he lost his footing and fell onto the rail tracks, where he was found shortly after the accident. His right foot was completely severed from the leg. An ambulance was

summoned and paramedics treated him on the scene before conveying him to hospital.

[4] The doors were open when the train arrived at Soshanguve station and remained open until the accident occurred. The plaintiff's version of the accident which differed from that of the defendant was correctly rejected by the court *a quo*. It held that the plaintiff was negligent in attempting to board a moving train. The defendant was also found to have been negligent in operating a train whilst the doors were open.

[5] In argument before us, counsel for the defendant submitted that the plaintiff was not entitled to any compensation because he had intentionally contributed to the injuries sustained by him. He argued that the plaintiff had acted with *dolus eventualis* in attempting to board the moving train. For this contention reliance was placed on *Minster van Wet en Orde & 'n Ander v Ntsane* 1993 (1) SA 560. In that case the second defendant (a policeman) had intentionally shot and injured the plaintiff who was escaping from lawful

custody. The plaintiff sued the minister and the policeman for damages. The defendants sought apportionment of damages on the basis that the plaintiff's negligence contributed to his injuries. This court held that a defendant who has intentionally injured a plaintiff was not entitled to an apportionment of damages in terms of the relevant statute.

[6] The contention that the plaintiff had acted intentionally was based on an inference sought to be drawn from the fact that he was under the influence of liquor; he chased a moving train and held on to the hand rail in an attempt to board it. These facts do not support the inference which counsel sought to draw but clearly show that the plaintiff was negligent.

[7] It was also submitted on behalf of the defendant that its negligence did not contribute to the injuries sustained by the plaintiff. Dealing with the issue of causation the trial court relied on *Road Accident Fund v Russel* 2001 (2) SA 34 (SCA) and held that had the defendant ensured that the doors of the train were closed before it left the station, the plaintiff could not have attempted to board it

in the manner described in evidence. The court *a* quo held further that the defendant's failure to close the doors was sufficiently linked to the plaintiff's loss for legal liability to ensue. I cannot find fault with these conclusions. In rejecting a similar argument in *Marine & Trade Insurance Co Ltd v Singh* 1980 (1) SA 5 (A) Rumpff CJ said at 12H-13A:

'On behalf of the appellant it was argued that the omission to close the door was a *causa sine qua non* and not a *causa causans*. This simple argument shows a lack of appreciation of the problem of causation. In the present case, the omission to close the door, in the circumstances described in the evidence, is sufficiently linked to the injury of the plaintiff so as to establish legal liability.'

(See also *Ngubane v South African Transport Services* 1991 (1) SA 756 (A)).

[8] With regard to the apportionment of fault, the defendant's counsel argued that the court *a quo* incorrectly assessed the degree to which each party was at fault. He submitted that the plaintiff's fault should have been fixed at 90 per cent and his claim reduced by that percentage. Section (1) (a) of the Apportionment of Damages Act 34 of 1956 confers a discretion on the trial court to reduce

damages to an extent it deems equitable having regard to the degree to which the claimant was also at fault. In the absence of an irregularity or misdirection the appeal court will not interfere with such apportionment unless its own assessment differs substantially with that of the trial court (*Shield Insurance Co Ltd v Theron NO* 1973 (3) SA 515 (A) at 518B-D).

[9] In this case my assessment of the relative degree of negligence of the defendant on the one hand and the plaintiff on the other does differ substantially from that of the trial court. 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 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.

[10] The appeal is upheld with costs and the order of the court a quo is replaced with the following order:

'1. Whatever damages the plaintiff may prove to have suffered are to be reduced by two thirds in terms of section 1 of the Apportionment of Damages Act 34 of 1956.

2. The defendant is ordered to pay the costs incurred by the plaintiff excluding the costs of Tuesday 30 March 2004 and half of Wednesday 31 March for which a separate costs order has been made.'

C N JAFTA
JUDGE OF APPEAL

CONCUR:) STREICHER JA
) BRAND JA