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DENEYS REITZ
GENERAL AND INSURANCE LITIGATION
BREAKFAST SESSION
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ONLY FIRST TIME LUCKY?

(CONSIDERING THREE RECENT TRANSNET DECISIONS AND THE APPORTIONMENT OF DAMAGES ACT)

HARRINGTON N.O. AND ANOTHER V TRANSNET LIMITED AND OTHERS 2007 (2) SA 228 (C)

1. Two security guards were on cable patrol along a suburban railway line when they were struck by a train and sustained serious bodily injuries. They sued Transnet. This was the factual background in *Harrington N.O. and Another v Transnet Limited and Others 2007 (2) SA 228 (C).*

2. The train driver's evidence was that he vaguely saw the figures of the security guards, but said that they were hardly visible on the tracks in front of him. The train driver activated the siren, but the two figures did not react. He then pulled the brake handle and closed the exhilarator handle. Only at the last moment did the security guards see the train and jump away, the one to the left and the other to the right. The Court needed to decide if Transnet was negligent in

failing to warn the security guards that an unscheduled train was about to pass, particularly because they were working in an inherently dangerous situation. The Court also needed to decide if Transnet failed to take reasonable measures to ensure that security personnel working on the premises received proper safety training. The third and last ground of negligence relied upon by the security guards was that the train driver could and should have applied the brakes of the train immediately after having observed them on the railway line and if he had done so, the collision would not have occurred.

3. The Court found Transnet and the train driver jointly and severally liable to pay two thirds of the damages and costs to the security guards. The security guards' claims were subject to a one third reduction in terms of the provisions of the Apportionment of Damages Act. The Court apportioned liability on the basis that *"the plaintiffs were also causally negligent by walking on the railway line without keeping a proper lookout for trains"*.

4. The Court in *Harrington* made reference to *Walker v Rhodesian Railways Limited 1937 SR 62*, where the Court set out the various duties of a train driver and held in some cases that the sounding of a siren may be the obvious thing to do in some cases, to warn a driver or pedestrian of its approach.

5. It might not be the only thing that can reasonably be done. In *Harrington*, the Court was of the view that the situation called for an immediate braking reaction. The train driver's initial reaction (to sound the siren) unfortunately proved to be a futile exercise and the Court suggested that under the prevailing circumstances, the security guards probably did not even hear the siren because it was windy and the siren did not make much of a noise.

6. Despite these circumstances, the train driver wasted a few seconds by sounding the siren first. The Court found that he was negligent and his negligence was causally related to the collision with both security guards.

TRANSNET LTD T/A METRORAIL AND ANOTHER V WITTER 2008 (6) SA 549 (SCA)

7. Just a year later, Transnet found itself in the shoes of a defendant again, this time in an action instituted by Mr Witter.

8. In this case, Witter attempted to board a commuter train at a Western Cape railway station. As he emerged onto the platform, the train had just started moving slowly and although the doors were closed, the carriage doors where Witter attempted to board, were open. Witter grasped the pillar in the middle of the open doors after taking quick steps across the platform, but lost his footing and fell between the platform and the train which caused the wheels of the train to amputate his right foot above the ankle. Transnet operated the train and the station including the platform. The Court of first instance found Witter contributorily negligent and reduced his damages by 50%.

9. An issue that needed to be considered by the Court was the duties that were imposed on a Transnet guard in operating the sliding doors namely checking if the doors are closed properly after pressing the door closing button and giving the bell signal to the train driver that it is safe to put the train in motion. Transnet contended that the guard was only obliged to look at the sides of the train from time to time to see if the doors were closed. The Court considered the case of *South British Insurance Company Limited v Smit 1962 (3) SA 826 (A)* where the Court held that *"from the very nature of the enquiry, apportionment of damages imports a*

considerable measure of individual judgement : the assessment of the degree in which the claimant was at fault in relation to damage is necessarily a matter upon which opinions may vary … 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".

10. Transnet submitted that the apportionment of 50% was not fair and equitable, because Witter boarded a train whilst it was moving. The Court referred (in justification of its finding that 50% on equal appointment was fair) to the third Transnet case under discussion, namely *Transnet Limited t/a Metrorail v Tshabalala* 2006 [2] All SA 583 (SCA) in which the Court held that *"a reasonable person in the position of Metrorail would not have allowed the train to operate with the doors of the coaches open, as it 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"*.

OUR VIEWS

11. We agree with the *Witter* judgment. It was unlikely that an appeal Court would interfere with a trial Court's equal apportionment of damages.

12. The Court found in the *Witter* case, Transnet's conduct deviated from the norm (being that of a reasonable person) on an equal degree of negligence to Transnet. In the circumstances, we believe that it was equitable for the Court to reduce *Witter's* damages by half.

13. The Apportionment of Damages Act abolished the all or nothing approach of the common law and provides for the discretionary apportionment of damages in cases of contributory negligence. The purpose of the Act is to reduce (and not defeat) a plaintiff's claim for damages, where the loss is caused partly by its own fault and another party's fault, as highlighted in the three Transnet decisions discussed.

COSTS OF EXPERT WITNESSES

14. The Uniform Rules of Court (Rule 70) state that the preparation fees of a witness will not be allowed without an order of Court or the consent of all interested parties.

15. The current tariff provides for the following allowances:

15.1 Subsistence allowance;

15.2 Transport and travelling expenses;

15.3 An allowance up to a maximum of R 1 500 for income lost in consequence of attendance at a civil trial.

16. The tariff no longer distinguishes between expert and other witnesses.

17. The Court held that an agreement by a party to remunerate a witness for giving evidence in its case is against public morals and unenforceable (which is different to an undertaking to pay a witness the statutory allowances). This also applies to an expert witness (although an expert witness is in the position to charge for his preparation). An expert's fees may not include remuneration for time spent in the witness box, although an expert is free to stipulate whatever

rate is considered appropriate for preparation of the trial. This is likely to reduce the willingness of experts to appear in Court.

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