+

THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 32/2009

MARK HARRINGTON N.O.	First Appellant
SIYAVUMA NGALEKA	Second Appellant
and	
TRANSNET LIMITED trading as METRORAIL	First Respondent
J C HUMAN	Second
Respondent	
KUFFS SECURITY SERVICES CC	Third Respondent

Neutral citation: *Harrington N.O. v Transnet* (32/09) [2009] ZASCA 146 (26 November 2009)

Coram: MPATI P, NAVSA, HEHER, MHLANTLA JJA and LEACH AJA

Heard: 9 November 2009

Delivered: 26 November 2009

Updated:

Summary: Negligence – cable patrol near railway line – duty of railway authorities to warn of despatch of unscheduled train at night – whether patrol contributorily negligent – relevance of belief founded in experience but misplaced.

Railways – unscheduled train at night – duties of service operator and driver to workers near line.

ORDER

In an appeal from the High Court, Cape Town (Van Zyl, Waglay and Ndita JJ sitting as court of appeal from a single judge (Blignault J).

The following order is made:

1. The appeal succeeds as against the first respondent.
2. The appeal is dismissed as against the second respondent.
3. The costs of the appeal including any costs incurred by the second respondent are to be borne by the first respondent.
4. The order of the court *a quo* is set aside and replaced by the following order:

'(a) The appeal of the first appellant, Metrorail, is dismissed with costs.

(b) The appeal of the second appellant, Human, is upheld with costs.

(c) The appeal of the third appellant, Kuffs, is dismissed with costs.

(d) The costs of the second appellant are to be paid by the first appellant.

(e) The order of the trial court is set aside and replaced by the following order:

"(i) The first defendant is liable to pay damages to the plaintiffs.

(ii) The first defendant is liable to pay the plaintiffs' costs to date.

(iii) The third party is obliged to indemnify the first defendant against the plaintiffs' claims.

(iv) Costs as between the first defendant and third party are to stand over for later determination.

(v) The action against the second defendant is dismissed with costs. Such costs are to be paid by the first defendant".'

JUDGMENT

HEHER JA (MPATI P, NAVSA, MHLANTLA JJA and LEACH AJA):

[1] The appellants, with the special leave of this Court, appeal against a judgment of the Full Bench of the Western Cape Division of the High Court.

[2] The appellants[1] were security guards employed by Kuffs Security Services CC ('Kuffs'), the third respondent.[2] Kuffs provided such services to Transnet Ltd, trading as Metrorail, the first respondent, on the Cape Town rail network and at train stations.

[3] At about 22h45 on Sunday, 3 February 2002, the appellants were patrolling the electric cables in the area between Cape Town Station and Woodstock station in the course of their duties.

[4] There were no scheduled trains after 22h00 and the suburban rail services did not operate until 04h00 the next morning. Metrorail sent an unscheduled train down the line from Cape Town to Salt River for repairs.[3] No warning was given to the appellants. The train was driven by Metrorail's employee, Mr Human, the second respondent.

[5] Human apparently saw two figures, (the appellants) walking on the line. He sounded the train's siren and looked for a reaction. When it did not come he applied the brakes. By that time it was too late for the train to come to a halt before it reached the appellants who were struck from behind by the train.

[6] The appellants suffered serious injuries. The first appellant's brain damage required the appointment of a curator *ad litem*.

[7] The appellants instituted action against Metrorail and Human in the Cape High Court. Metrorail joined Kuffs as a third party, contending that if it was held liable to the appellants, then Kuffs was similarly liable to it in terms of an indemnity contained in the contract between them.

[8] At the commencement of the trial, at the request of the parties, Blignault J

1 The first appellant is represented by a curator *ad litem*.
2 The third respondent did not participate in the present appeal.
3 The nature of the repairs was unspecified. There was no suggestion that any of the critical mechanisms were faulty.

ordered that the issues relating to liability and quantum be separated. The trial proceeded only in respect of the liability of the respondents and the existence and extent of contributory

negligence on the part of the appellants.

[9] On 22 August 2006 Blignault J handed down a judgment in which he analysed the evidence in detail.[4] He ordered that:

'(a) First defendant (Metrorail) and third defendant (Human) are jointly and severally liable to pay damages to plaintiffs.

(b) The damages to be recovered by each of the plaintiffs are subject to a reduction by one third in terms of section 1(1)(a) of the Act.[5]

(c) First and third defendants are jointly and severally liable for the costs incurred by plaintiffs to date.

(d) The third party (Kuffs) is obliged to indemnify first defendant (Metrorail) against plaintiffs' claims.

(e) All questions of costs as between first defendant and the third party stand over for later determination.'

Blignault J granted the present respondents leave to appeal to the Full Bench and the present appellants leave to cross-appeal against the apportionment.

[10] The appeal and cross-appeal were heard in January 2008. On 20 October 2008 Van Zyl J (Waglay and Ndita JJ concurring) made the following order:

'1. The appeal is upheld with costs, including the costs of the application for leave to appeal.

2. The cross-appeal is dismissed with costs, including the costs of the application for leave to cross-appeal.

3. The orders of the court *a quo* are set aside and replaced by the following:

"The claims of the appellants are dismissed with costs".

4. The respondents are ordered, jointly and severally, to pay such costs, the one paying the other to be absolved.'

[11] The facts set out in the preceding paragraphs are common cause. I will, in the course of this judgment, examine the evidence more closely where that is necessary to resolve disputes.

[12] The case for the appellants, both as pleaded and subsequently maintained, was

4 *Harrington NO and Another v Transnet Ltd* 2007 (2) SA 228 (C).

5 ie the Appointment of Damages Act 34 of 1956.

that Metrorail acted negligently and unlawfully in the following respects:

(1) In failing to take any or reasonable measures to ensure that the appellants

(a) received adequate safety training; and

(b) completed Metrorail's in-house test and induction training before commencing their duties.

(2) In failing to warn the appellants of either the unscheduled train journey or the approach of the train, notwithstanding its awareness that the railway line was patrolled after 22h00 by security guards such as the appellants.

(3) On a vicarious basis, arising from the failure of its employee Human to apply the brakes timeously.

[13] The appellants contend that the court *a quo* should have found that both Metrorail and Human acted negligently and unlawfully and that their conduct individually and cumulatively was the cause of the accident.

[14] In addition to the facts recited earlier in this judgment, certain other matters were either common cause or not subject to serious dispute. Metrorail conducts suburban rail services in the Cape Peninsula. One of its tracks is the down-line from Cape Town to Simonstown. It was on this line between Cape Town and Woodstock that the incident, the subject of this appeal, occurred. In that area the line was one of a complex of tracks laid out across a yard or reserve several hundred metres in breadth. The movement of trains on suburban routes (as this was) after 22h00, although unscheduled, was not entirely unusual and was necessitated by a variety of operating constraints including the need to move trains to yards where they can be repaired, as in this instance. The train in question consisted of eight empty passenger coaches. The driver was seated in an enclosed compartment at its head with an unimpeded view of the line in front of him. On the front of the train was a head lamp which cast a concentrated beam ahead of the train to a distance of about a hundred and sixty metres. On the night of the incident the lamp was burning. The train was equipped with a warning siren activated by foot pressure, hand-operated brakes and a 'deadman's handle' which takes effect when the driver no longer depresses a button on the accelerator.

[15] The night was dark and the track unlit, save for the ambient light and the beam of the headlamp. There was a strong south-easter beating in the faces of the appellants as they walked towards Woodstock station. It is common cause that the force of the wind would probably have nullified the effectiveness of a siren blown from the train approaching them from behind.

[16] The train in question was driven by an electric engine. Such trains are relatively silent. Standing with one's back to an oncoming train, its approach is not apparent until a very late stage. Here too the strength and direction of the wind must have played a role in the events.

[17] The business of the appellants was to keep a lookout for suspicious activity, which might involve theft of or interference with the electric cables next to and above the railway tracks. For this purpose it was not generally necessary for them to walk between the lines or on the sleepers which protruded beyond the lines. (In either event a person so proceeding was liable to be struck by a moving train.)[6]

[18] There were however occasions when the configuration of the lines and the topography would have required the cable patrol to encroach on the tracks. One such instance was in the vicinity where the incident took place; the down-line diverged from the up line and proceeded over a narrow bridge under which passes a branch line. In addition the nature of the appellants' duties were such as might from time to time require them to cross the tracks in order to pursue their investigations.

[19] Human saw two dark figures walking between the tracks. Expert evidence in the trial, taking account of the degree of curve in the track as the train neared the plaintiffs and the impediment to a driver's vision caused by two palm trees planted on either side of the lines, fixed the earliest point at which Human could have made this observation at some eighty-four metres from the calculated point of impact. The reliability of this calculation is a

6 The evidence of the second appellant was that he and the first appellant were walking on the sleepers on either side of the track. Human claimed to have observed them between the lines, springing aside only when it was too late. There was no particular reason to prefer one version above another, but appellants' counsel was content to argue on the assumption that Human's evidence was correct in this regard.

matter which I shall consider in due course.

[20] From the moment Human saw the figures he sounded the siren of the train continuously. When, after ‘’n paar sekondes’, the people concerned did not respond, he braked to the maximum extent and released the deadman’s handle. At the last moment both turned their heads and jumped, one to the left, the other to the right. Human heard the train strike them.

The liability of Metrorail

[21] The principles of delictual liability are not in dispute in this appeal[7]. In addition, of course, because the conduct of Metrorail which is impugned is an omission, the existence of a legal duty to act depends upon questions of policy and what should reasonably be expected of it[8].

[22] The Full Bench found against the appellants fundamentally on three grounds: first they were entirely responsible for their own predicament because, instead of keeping a proper lookout for obvious dangers, they relied on their own subjective belief that there would be no train activity on the line at night; second, the attempt to impose a duty on Metrorail to warn Kuffs regarding the impending movement relied on ‘hindsight and knowledge and insights retrospectively acquired’; and third, that Kuffs had access to Metrorail’s control room and hence to the unscheduled movement of trains after hours and impliedly assumed the responsibility for responding to such movements. In any event, so the court *a quo* concluded, an omission of the nature relied on by the plaintiffs had not been such as to give rise to a legal duty to act. Finally, the court held, even had a wrongful and negligent omission been proved, there was no evidence that appropriate action would have avoided the accident.

[23] I am unable to subscribe to any of these findings. The evidence does not bear them

---

7 See particularly *Herschel v Mrupe* 1954 (3) SA 464 (A) at 477; *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-G; *Ngubane v South African Transport Services* 1991 (1) SA 756 (A) at 776D-J; *Pretoria City Council v De Jager* 1997 (2) SA 46 (A) at 55H-56C.
8 *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) at 395I-396E.

out.

[24] The two courts below held divergent views on the merits of the first ground of negligence relied on by the appellants. For the reasons which follow it is unnecessary to resolve the differences.

[25] The appellants' second ground related to the failure to warn them on the night in question, of the dispatch from Cape Town of an unscheduled train on the Simonstown down line. Once again, the facts are beyond dispute. Each Kuffs cable patrol was equipped with a two-way radio for contact with Kuffs office on Cape Town station. That office was in turn connected to Metrorail control at the station and a member of Kuffs security staff was stationed in the control room.[9] Human explained the procedure which is followed when a train was to be sent down the line: when the driver is ready to proceed, he informs Metrorail's Windermere control room that he is ready to leave; the signals are controlled by Windermere and the driver may not leave until Windermere has given him the green light; Windermere is in communication with the control room at Cape Town station. As Mr Appolis, who testified on behalf of Metrorail confirmed, it would have been a simple matter for Metrorail to ensure that the guards were alerted to the imminent dispatch of a train.

[26] Metrorail possessed peculiar knowledge of the departure of unscheduled trains and their routes. It was aware of the incidence of collisions between trains and persons on the line[10]. It cannot but have been alive to the enormity of the consequences of such collisions.

[27] Fatal accidents on railway lines are a notorious consequence of the operation of rolling stock. So there is no doubt that when Metrorail agreed with Kuffs that the security duties specified in their December 2000 agreement would be extended to

---

9 Precisely what his function there was, was not explained in evidence. Factually there was no basis for reasoning, as counsel for Metrorail did, that his presence represented an assumption of responsibility for informing the Kuffs office of the impending departure of trains.

10 Human, for example, had been involved in eighteen such occurrences in his twenty-five year career as a Metrorail driver, several resulting in fatalities. There was no suggestion that he contributed culpably to these calamities. Equally there is no reason to think that his experience was materially different from those of his colleagues.

include cable patrols in close proximity to the railway tracks, its officials must have been aware of the potential threat to Kuffs employees. The fact that such patrols were, to the knowledge of Metrorail, to be and were carried out not simply after dark, but after the scheduled train service ended each night, is also evidence of a state of mind on the part of the persons requiring the service. Metrorail was moreover privy to relevant information where Kuffs was not: it had access and insight into the nature, frequency and location of unscheduled train movements; it also had knowledge of the lay-out of its tracks, and obstructions to the vision of drivers; it ought to have known that cable patrol duties would sometimes bring the men on patrol into dangerous proximity of the tracks (on the occasions referred to earlier in this judgment). In general, the evidence fairly leads to the conclusion that Metrorail knew or should have known that throughout the course of such cable patrol between Cape Town and Woodstock, the guards, if not actually moving in or across the path of a train, were likely to be in close proximity to its line of travel. A guard concentrating unduly on his duties was, in colloquial parlance, ‘a sitting duck’.

[28] The existing contract between Metrorail and Kuffs stipulated that Kuffs personnel would not be permitted to commence their duties until they had completed Metrorail’s in-house test and induction training. If Metrorail was dissatisfied with the results of the tests
and training, it would notify Kuffs, which would then not deploy the staff member concerned in the service area and would provide a competent substitute. But it was clear
from the evidence of the second appellant and his colleague Mr Bidli, that they were not trained in any aspect involving the dangers facing them in consequence of trespassing on or near the railway tracks during the course of their duties. Metrorail had no reason to believe that the members of the cable patrols possessed any knowledge of such matters beyond what they might acquire by their own observation or enquiries.

[29] In summary therefore, seen from Metrorail’s standpoint, the potential for serious harm to the cable patrol as a result of a collision with a train, even if unlikely, was easily predictable. It possessed particular knowledge of the incidence of unscheduled

train movements and could therefore reasonably be expected to take more than ordinary precautions.[11] Neither the cost nor the difficulty involved in avoiding the reasonable possibility of a collision represented a material obstacle. If the elementary precaution of notifying Kuffs control room of the imminent departure of an unscheduled train were followed there was every likelihood that the message would be acted upon by both Kuffs and their cable patrols.

[30] The simple fact is that Metrorail was in a dominant position in relation to both the performance of the cable patrol and the operation of its trains. Given the facts and inferences to which I have alluded in the preceding paragraphs, right-thinking members of the community would, I have no doubt, regard Metrorail's failure to inform and warn Kuffs and hence, its cable patrol, as a matter for censure.

[31] None of this is the result of *ex post facto* insight. Metrorail was operating a service with enormous potential for damage and harm, and had been doing so for many years, occasionally with disastrous consequences. Having required security personnel to operate within the field of its hazardous activities it imposed no undue burden on Metrorail to exercise appropriate oversight in relation to their safety, even if Metrorail could reasonably expect such persons to look to their own interest as far as was practicable.

[32] It is convenient in the present context to consider and dispose of a contention that Metrorail was entitled to assume that the guards on a Kuffs security patrol would look after themselves, as could reasonably be expected of qualified security personnel. Metrorail adduced no evidence to justify that conclusion. It was argued as a given but the answer depends on the evidence. The real question is whether such personnel (and the appellants in particular) ought to have been aware of the movement of trains on that section of the line after scheduled hours. If they should, then albeit that they regarded the movement as irregular or unlikely, the direness of the potential harm demanded the exercise of reasonable care. *Sed contra*, if the guards had no reason to foresee (and therefore could not have foreseen) the presence of a moving train, there

11 Cf *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd [1968] 1 WLR 1776 at 1783E.*

was no hazard against which a reasonable man would have protected himself.[12]

[33] One is here intruding upon the territory of the contributory negligence of the appellants. Because of the view taken by the court *a quo* (and adopted by Metrorail's counsel in argument) it is convenient to address that issue in the context of Metrorail's own duty (or lack thereof) towards the plaintiffs, bearing in mind that the onus on the first-mentioned burdened Metrorail while the onus of proving the extent of Metrorail's duty rested on the appellants.

[34] By what evidence should the presence or absence of fault on the part of the appellants be judged? Counsel for the respondents submitted that the subjective 'knowledge' (or rather misplaced assurance) and belief of the second appellant relating to the non-movement of trains was irrelevant in judging the reasonableness of his conduct. It is true that the law

'does not attempt to see men as God sees them, for more than one sufficient reason . . . If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbours, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbours than if they sprang from guilty neglect'[13]

Thus the reasonable man is not deemed to be possessed of the personal idiosyncrasies, superstitions and intelligence of the actor.[14] But the state of mind of the person whose conduct is under scrutiny is

'not quite irrelevant. For the standard of care represents the degree of care which should be used in the circumstances, and his knowledge or lack of knowledge, may be relevant in assessing what the circumstances were. The question may then be whether a reasonable man, knowing only what the defendant knew, would have acted as did the defendant. But his state of mind is not conclusive. In certain circumstances it may be held in law that a reasonable man would know things that the defendant did not know, and the defendant will be blamed for not knowing and held liable because he ought to know: In such cases the law relating to negligence requires the defendant at his peril to come up to an objective standard and declines

12 In support of the submission that reasonable guards would have kept a proper lookout and not entered on the immediate area of the tracks without first ensuring that it was safe to do so, reference was made to the duty of persons at level crossings. The circumstances of this case are however entirely distinguishable.

13 Holmes, *The Common Law*, as quoted in *Salmond and Heuston on the Law of Torts*, 19ed 250. The authors add 'The foolish and forgetful are judged by the same external standard as other defendants'.

14 *R v Mbombela* 1933 AD 269 at 273-4.

"to take his personal equation into account".'[15]

[35] There is a general consensus in the authorities to which I have referred that the knowledge possessed by the actor is a relevant consideration in the make-up of his counterpart, the hypothetical reasonable man. The status of his subjective beliefs and the knowledge (or supposed knowledge) which gave rise to those beliefs does not appear to have attracted attention. But belief imperceptibly acquires the dignity of knowledge when fortified by experience, whether one's own or acquired vicariously. The reasonable man is presumed to inhabit the real world. He may therefore be similarly influenced by experience into possessing a particular state of mind in certain circumstances. Whether the beliefs which motivated the actor at the critical juncture are those which would be held by the reasonable man, and, if so, whether he would have placed the reliance on them that the actor did, are questions which, it seems to me, are a proper subject for objective determination. In so far as a subjective element of the actor can properly be attributed to the reasonable man as 'a concession to the underlying moral basis of negligence'[16] it is logical to take into account beliefs, although misplaced, which have a foundation in experience.

[36] The second appellant stated under oath that he did not know that there were unscheduled trains running after 22h00. He had been under the impression that there were no trains running at those hours. He had never seen an unscheduled train running on the tracks after hours, and no one had told him that they did so. He had previously walked on the rails when he was undertaking cable patrol, and no one had told him that that was the wrong way to do it. He had patrolled in this manner because he had been shown to do so by the colleague who accompanied him on his first cable duty. That person, Mr Mkhabe, had said that there were no trains running at night. It was not put to the second appellant that any part of this evidence was untrue. Metrorail and Kuffs did not produce any evidence which contradicted his evidence in this regard.

---

15 Salmond on *Jurisprudence*, 12ed 99 quoting Holmes, *loc cit*. The passage is largely in accord with the not always consistent statements by our own authorities: cf PQR Boberg, *The Law of Delict*, Vol 1, 269, 271; *S v Manamela (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC) at paras 74-76; *S v Van As* 1976 (2) SA 921 (A) at 928; *AA Mutual Insurance Association Ltd v Manjani* 1982 (1) SA 790 (A) at 796H; *S v Zoko* 1983 (1) SA 871 (N) at 887G; *Mutual and Federal Ins Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A) at 444F. See also Fleming, *The Law of Torts* 9ed 119.
16 Boberg, *op cit*, 270,272.

[37] The evidence adduced by Metrorail established that the second appellant had probably been on cable patrol more than twenty times. If the evidence of the second appellant is accepted at face value (and there was no reason not to do so) it establishes that the real possibility of unscheduled train movements was not such as to come to the attention of guards in the position of the appellants unless first drawn to their notice. It also established that Metrorail was not entitled to rely on the cable guards finding that out for themselves. On the contrary the experience of the second appellant was such that repeated patrols merely demonstrated that walking on or near the rails held no danger for him. Whatever may be said of the risk inherent in his initial reliance on what he had been told, once the absence of train movements had been confirmed again and again in his own experience it was not unreasonable for him to place reliance on both the report and the evidence of his own eyes.

[38] Mr Gounder, the Kuffs operations manager at the time, said that cable patrols would take place only after the last train at night, and would end before the first train of the morning. This was for the safety of the guards. His understanding was that Metrorail was supposed to inform Kuffs if they were going to operate a train after hours, so that the guards could be warned of this. While the correctness of this understanding was disputed, it was not disputed that this was his state of mind. It is not unreasonable to assume that if the person in charge of the operation was of that state of mind, his subordinates responsible for carrying out the work were likewise influenced.

[39] Mr Bidli, a former Kuffs security guard who was called by the appellants, stated that there were no scheduled trains running at night. He had seen unscheduled trains running after hours, but *"it was not something usual"*. He did not walk on the lines – plainly because he knew that there might be some trains moving. To some extent this corroborates the evidence of the second appellant: it shows that it was only if a security guard had been fortunate enough to have seen an unscheduled train operating after hours would he know that that was a real threat.

[40] Metrorail kept records of all of the trains sent on unscheduled trips after hours.

Kuffs held records of when each of the appellants had been on cable patrol. Nevertheless neither adduced any evidence to show how frequently unscheduled trains were sent down the line after hours, or that this had ever happened when the appellants were on cable patrol. Nor was it put to the second appellant that unscheduled trains were in fact moving in his vicinity at any of the times when he was on duty.

[41] Blignault J found that the onus of proving knowledge rested on the defendants, as it was an element of their defence of contributory negligence. He found further that in the absence of any precise evidence as to the frequency of the movement of unscheduled trains in the area where the cable patrollers were operating, the inference could not be drawn that the appellants probably observed such trains. I respectfully agree.

[42] For all these reasons it follows that there was no foreseeable obstacle to the appellants encroaching on the tracks if they found that this was a convenient way of proceeding.

[43] One further aspect: as far as Metrorail knew or was concerned, on any given patrol, at least one of the Kuffs guards might be carrying out the duty for the first time and had neither seen nor had the opportunity to see the movement of unscheduled trains after hours. The fact that one witness may have been aware of the possibility because of his own observation means very little in relation to the putative awareness of any other employee, including both of the appellants.

[44] I conclude, therefore, that the omission to inform and warn the appellants was both wrongful and negligent. By contrast, the failure of the appellants to keep a look-out for such trains cannot be regarded as unreasonable in the light of their understanding and experience of Metrorail's operational policies.

[45] The evidence of the second appellant was unequivocal (and unchallenged) that if he had been told not to walk on the lines because trains used them after hours or had been warned that a train was being sent down the line, he would have kept out of the danger zone. There was, therefore, a strong probability that the tragedy would

have been avoided by the adoption of simple measures which would barely have inconvenienced Metrorail.

[46] I conclude, in all the circumstances, that the appellants' cause of action against Metrorail was amply sustained by the evidence.

The liability of the train driver

[47] The liability of Human depends on an assessment of his acts and omissions according to the standard of the reasonable train driver in the circumstances prevailing at the time of the incident.

[48] The observations of Wessels CJ[17] uttered seventy-five years ago still have force:

'In judging whether there is *culpa*, the Court must, as nearly as it can, place itself in the position of the engine driver at the time when the accident occurred and judge whether he showed that ordinary care which can reasonably be expected from a reasonable man under all the circumstances. The Court must not in any way be affected by the tragic consequences of the accident, nor, on the other hand, must it excuse any carelessness on the part of engine drivers. It must not expect superhuman powers of observation or an impeccable discretion on the part of engine drivers, nor must it say to him after the event - "if you had done this or that more quickly or more accurately," or "if you had perceived this or that more readily, you might possibly have avoided the accident." It is so easy to be wise after the event.'

[49] Counsel for the appellants disavowed reliance on any failure by Human to keep a proper lookout. He confined his case to the driver's decision to sound the siren and await a reaction before applying the brakes of the train. By making this choice, so counsel submitted, Human disabled himself from using the only other option available to him: by the time he applied the brakes it was too late because he could no longer stop the train before it reached the appellants; that conduct fell short of the standard expected of a skilled train driver and was accordingly negligent.

[50] The night of the collision was dark with a high wind blowing. In moving the train the driver was carrying out what was, for him, a routine task. He had no reason to expect any happening out of the ordinary. The railway tracks curved towards the point of collision and the headlight of the train probably did not illuminate the appellants until after the driver had picked up the dark figures ahead of him. The transcript of his evidence reads as follows:

'. . . Ek het die twee swart figure gesien, volgens my, wat beweeg het na Soutrivier, het tussen

17 In *South African Railways and Harbours v Bardeleben* 1934 AD 473 at 480.

die twee spore geloop op die draai van die pad.

U is nou in aantog en daar is ‘n draai? - - - Dit is korrek, ja, hulle het tussen die twee spore geloop. Ek het my sirene aanhoudend geblaas.

Ja? - - - Ek het geen reaksie gekry nie. Ek het my remhandvatsel bedien, my remhandvatsel vol aangeslaan en my voete op my sirene gehou.

En die ander hand met die accelerator, wat het u met hom gedoen? - - - My accelerator het ek afgesluit.

Afgesluit? - - - Het ek afgesluit en terwyl ek nader beweeg aan hulle, het ek my dooiemanseienskap gelos met my remhandvatsel nog vol aan en ek het hulle gestamp.'

[51] In cross-examination on behalf of the appellants and Kuffs, Mr Human consistently said that there were a few seconds (‘’n paar sekondes’or ‘’n kwessie van sekondes’) between the time when he first saw the appellants and sounded the siren and the time when he applied the brakes and took other measures to bring the train to a halt. Metrorail’s expert witness, Mr Carver, made his calculations and measurements on the assumption that ‘’n paar sekondes’ was three seconds. This was accepted by all parties as a reasonable premise.

[52] At the *in loco* inspection, the witness Van Reenen pointed out the approximate places at which he had found the first and second appellants lying after the collision. The necessary measurements were taken. On the basis of the evidence given at the trial, the pointing out at the inspection, and his own measurements, Carver determined fixed points, which were adopted by all of the parties, *viz* the point at which the train probably came to a halt after striking the appellants, and the probable point of impact with the appellants. From these points, Carver concluded that the train had travelled for 29 metres from the first point of impact to the point where it came to a halt. Using this information, Carver was able to calculate the point at which the brakes would have been applied, depending upon the speed at which the train was travelling at the time. He could do this because the rate of deceleration is constant from any given speed. This evidence too was undisputed. Carver then applied this information together with his analysis of the visibility of the appellants, to reach a conclusion as to the speed at

which the train was travelling at the time when the driver first saw the appellants. He estimated that it was in the region of 40 km per hour. At any speed below 32.5 km per hour there would not have been an accident, because the train would have stopped before it reached the appellants.

[53] This was Metrorail's case: it was the evidence adduced by Metrorail in Carver's evidence-in-chief. None of it was contested by appellants' counsel.

[54] Under cross-examination, Carver was asked to calculate what would have happened if the driver had applied the brakes immediately on seeing the appellants on the tracks, instead of first sounding the siren and waiting for some seconds before doing so. His conclusions were:

(a) If the train was travelling at 35 km per hour when Human saw the appellants on the track, and he had immediately applied the brakes, the train would have come to a standstill 29 to 30 metres before the point where in fact it did stop, in other words, almost exactly at the point of impact. Because the train would have been travelling more slowly (the brakes having been applied earlier), the appellants would have moved on a metre or two beyond the point of impact. He therefore concluded that if the train was travelling at 35 km per hour, and if the driver had immediately applied the brakes on seeing the appellants on the tracks, the accident would not have happened.

(b) If the train was travelling at 40 km per hour when Human saw the appellants on the tracks, and he had immediately applied the brakes, the train would have come to a halt 33.3 metres short of the point at which it did in fact come to a halt, some four metres before the probable point of impact - the accident would not have happened.

(c) If the train had been travelling at a speed higher than 40 km per hour when Mr Human first saw the appellants on the tracks, and he had immediately applied the brakes, then the train would have come to a halt well before the probable point of impact, and the accident would not have happened. However, the higher the speed, the closer the train would have had to have been to Cape Town in order for the train driver to bring it to a halt at the probable point identified by Carver. It was not likely that the visibility would have been good enough for the driver to see the appellants from that distance. A speed much higher than 40 km per hour was therefore improbable.

[55] Counsel for the appellants submitted that the conclusion of Metrorail's expert witness was unambiguous: if the train driver had immediately applied the brakes when he first saw the appellants on the tracks, instead of first sounding the siren and waiting to see whether the appellants responded, the accident would not have happened.

[56] Although this was, on the face of it, a persuasive argument in favour of the driver's negligence, I think that it pays insufficient regard to the context of events and the reliability of the evidence. As such it is a counsel of perfection.

[57] Expert evidence is only as sound as the factual evidence on which it is based. The less fixed (or more variable) the assumptions and the fewer hard facts available to the expert the greater the scope for alternative conclusions.[18]

[58] In this instance the variables were many: the speed of the train, the moment of first visibility of the appellants to the driver, the effect on such visibility of a palm tree close to the track, the curve of the track, the driver's reaction time, the braking force of the train, the brightness of its light, the point of impact, the relative positions of the appellants to the front of the train when they were struck, the respective points at which the appellants came to rest after being struck and the final stopping point of the train. Of all these only the penultimate aspect was established in evidence with some degree of certainty ('min of meer'[19]). Most important in influencing Mr Carver's calculations was the point at which the train came to a standstill. He adopted the evidence of Human to the effect that this occurred some 29 metres after the point of impact. This allowed him to factor in various speeds and braking distances all of which assumed the given stopping point.

[59] But the evidence of Human stood uncorroborated. It should, I consider, have been approached by the trial court with a substantial degree of caution. He testified more than four years after the incident. His original written report (made on 17 February 2002) had been extremely brief and contained no important detail. There was accordingly no means open to him to refresh his memory. After the shock of the

18 Cf the remarks of Wessels CJ in *South African Railways v Symington* 1935 AD 34 at 44-5.
19 According to Van Reenen who pointed the positions out at an inspection *in loco*.

collision, according to his

evidence, he brought his train to a halt before reaching the bridge, climbed out on the right-hand side, walked back between 15 and 20 metres to where the second plaintiff was sitting next to the train and asked if he was alright. He received an affirmative reply. He then moved around the front of the train to the other side and found the first plaintiff lying on his side, a little further to the rear of the train than his colleague. When Human spoke to him he received a mumbled answer. Human then re-entered his cabin and removed his train. He did not return on that night. By the time that the first witnesses came to the scene the train was long gone.

[60] Human's evidence as to speed was equivocal: before entering the bend he would have ensured that it was substantially below 60 km per hour because, at the end of the curve the maximum permissible speed was 30 km per hour.

[61] Not only was Human a single witness, interested in the outcome of the action, but his evidence was not entirely satisfactory. In his report of 17 February he wrote:

'Ek het vertrek uit platform 3 uit in die Kaapstasie. Net na die SSS oorstaansylyn, het ek om die draai gekom met my koplig op helder gestel en ek het twee swart figure tussen die twee spore gewaar, maar ek het te vinnig op hulle afgekom, en ek het my sirene geblaas, maar in die proses wat hulle weggespring het, het ek hulle gestamp. Ek het die trein onmiddellik tot stilstand gebring en gaan ondersoek instel. Ek het toe Bedryf en die GVB amptenaar en die GVB kantoor in kennis gestel en die trein verder bedien na Soutrivier werf.'

According to that version it would appear that he first applied brakes after the collision. As he readily conceded, the train would have come to a stop further beyond the place where the plaintiffs lay if that had been the case. Human testified that before or while pulling away after the collision, he reported by radio to Windermere on what had happened. Metrorail discovered its relevant occurrence book which contained the following entry:

'22.45 Train Casualty: M E Conradie CTC Windermere report that driver J C Human report that he had knocked down two guys at Maspole 1/17 signal box WDC 46 between Cape Town and Woodstock.'

The specific pole and box were located some 200 metres beyond the point of impact identified by Human (and relied on by Carver). Human denied in evidence that the report correctly reflected the scene of the accident. Neither Mr Conradie nor the

recipient of his communication to Windermere was called to testify. On these facts the trial court could not (and did not) find that Human did make a report in the terms quoted. Nevertheless the very existence of so specific an identification of the scene of the accident, without any attempt to explain it, raises doubts about the accuracy of the tale told in the witness box.

[62] To put the matter no higher, the detail derived from the evidence of Human concerning the material events was inherently unreliable and could not be said to reach a level of probability and, in so far as Carver relied on his evidence without any independent support for it, his calculations had to be regarded as suspect. That being so the substratum of counsel's submission was unsafe in itself. The fact that Human and Carver were, in a sense, adverse to the plaintiffs' cause and, therefore unlikely to have gilded the lily, does not assist them because theirs was the only evidence upon which the plaintiffs could found a case for the negligence of the driver. On the evidence of Human, ignoring measurements and calculations, it was at least a probable inference that he, coming unexpectedly upon an obstruction on the line, had no time to calculate the advantages and disadvantages of his actions and, while he may have committed an error of judgment in applying brakes after sounding the siren, the reliable evidence was insufficient to determine that he was negligent in the action which he took.[20] It is true that his evidence of a conscious delay of ''n paar sekondes' might suggest dilatoriness if all the facts were known, but even that turn of phrase (which does not specifically or by equivalent find a place in his original report) smacks greatly of reconstruction when uttered at so great a remove from the events of February 2002. Its value as an admission was therefore dubious. For these reasons I conclude that a finding that he was negligent could not properly be reached as a probability on the available evidence.

The apportionment issue

[63] From what I have said earlier concerning the lack of merit of Metrorail's reliance on the appellants' protection of their own self-interest (and that in the context of the onus borne by the plaintiffs) it follows that, with the burden of proof reversed, Metrorail

20 See the approach of this Court to a situation of sudden emergency in *Road Accident Fund v Grobler* 2007 (6) SA 230 (SCA) 234D-E.

had to fail in its attempt to attach even partial fault to the conduct of the appellants in walking on

the railway line with their backs to the approaching train.

[64] Counsel for Metrorail submitted that a reasonable man in the position of the appellants would have avoided the accident by reacting timeously to the sudden illumination caused by the headlight of the train as it approached him. I am not persuaded that the evidence establishes negligence in this regard. As I have discussed earlier, determination of the speed of the train is problematic. Because of the curve in the line the direct beam did not fall on the appellants at the maximum reach of the light. Their backs were to it and there is no means of knowing where their attention was directed before the change became a meaningful phenomenon for them. Being caught totally unaware, the appellants, like the driver, must be allowed a reasonable time to react.[21] In all the circumstances the court *a quo* was wrong in reaching a conclusion unfavourable to the appellants on a balance of probability. The consequence is that it should have found that Metrorail had failed to discharge the onus to establish contributory negligence on the part of the appellants.[22]

[65] Mr Budlender sought an order that Metrorail be ordered to pay Human's costs in the event of the appeal against the order in favour of the latter being unsuccessful. Such a

procedure is authorised by Uniform rule 10(4)(b)(ii) and may be applied when joinder of the successful defendant by the plaintiff was a reasonable step and if the court in its discretion deems it reasonable in all the circumstances of the case that the unsuccessful defendant should bear the burden of the whole or any part of the successful defendant's costs.[23] As to the first aspect there can be no dispute. As to the second, the interests of Metrorail and Human were largely identical and covered in substantial measure the same questions of fact. The effect of the finding in this appeal was, in substance, that Metrorail, by its failure to take reasonable precautions exposed both the plaintiffs and its own driver to a situation of emergency which inevitably led to the joinder of the latter. There is consequently no inequity in imposing on Metrorail

21 Cf *Samson v Winn* 1977 (1) SA 761 (C) at 769.
22 Counsel did not attempt to distinguish between the culpability of the two appellants, rightly, I think, since what can be said for and against the second appellant, who did testify, holds equally well for the first appellant, who could not.
23 *Parity Insurance Co Ltd v Van den Bergh* 1966 (4) SA 463 (A) at 481G.

liability for payment of his costs in so far as any were incurred.

[66] In the result the following order is made:

1. The appeal succeeds as against the first respondent.

2. The appeal is dismissed as against the second respondent.

3. The costs of the appeal including any costs incurred by the second respondent are

to be borne by the first respondent.

4. The order of the court *a quo* is set aside and replaced by the following order:

‘(a) The appeal of the first appellant, Metrorail, is dismissed with costs.

(b) The appeal of the second appellant, Human, is upheld with costs.

(c) The appeal of the third appellant, Kuffs, is dismissed with costs.

(d) The costs of the second appellant are to be paid by the first appellant.

(e) The order of the trial court is set aside and replaced by the following order:

“(i) The first defendant is liable to pay damages to the plaintiffs.

(ii) The first defendant is liable to pay the plaintiffs’ costs to date.

(iii) The third party is obliged to indemnify the first defendant against the plaintiffs’ claims.

(iv) Costs as between the first defendant and third party are to stand over for later determination.

(v) The action against the second defendant is dismissed with costs. Such costs

are to be paid by the first defendant”.’

J A HEHER
JUDGE OF APPEAL

Appearances:

For appellants:	G M Budlender SC
Instructed by:	Malcolm Lyons & Brivik Inc, Cape Town
	Matsepes Inc, Bloemfontein
For 1st and 2nd respondents:	A de V La Grange SC and J C Marais
Instructed by:	Werksmans Inc, Cape Town
	Lovius-Block Attorneys, Bloemfontein
For 3rd respondent:	-
Instructed by:	Smith Tabata Buchanan Boyes, Cape Town
	BDS Milton & Earl, Bloemfontein