

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

CASE NO.: 4242/2014

In the matter between:

PETRONELLA JOHANNA CLAASEN

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

JUDGMENT

BESHE J:

[1] This is an action for damages suffered by the plaintiff on the 7 January 2010. The basis of the claim according to the plaintiff is that she was not knocked over by the door of a vehicle insured by the defendant as a result of which she sustained severe bodily injuries.

[2] At the commencement of the proceedings and by agreement between the parties, a separation of issues was ordered in terms of *Rule 33 (4) of the Uniform Rules* of this court. In particular the issue that was to be separated and disposed of first was the following:

“Did the incident arise out of the driving of the insured vehicle?”

The answer to this question will be determinant of whether the defendant is liable for the damages suffered by the plaintiff or not.

[3] Plaintiff was the only witness who testified during the trial. The following emerged from the particulars of her claim as well as her evidence:

Plaintiff, who was seventy two (72) years old at the time she testified in June 2017, had gone to Green Acres to collect her granddaughter, **Wendy** who was travelling from Pretoria to Port Elizabeth aboard the Intercape Sleepliner Coach / Bus. The arrival of the bus was scheduled for 7h45. It however only arrived at 9h45. Having stopped, the door of the bus remained closed. About five minutes after the bus had arrived and with the door still closed, plaintiff moved towards the bus with a view of putting **Wendy** at ease. This was in view of the fact that **Wendy** is cerebral palsied. Her intention was to knock on the window next to **Wendy's** seat. **Wendy** did not see her though. As she was walking back to the bench where she had been waiting to continue waiting for the bus to open and for passengers to alight, she heard a noise, looked back, saw the door of the bus open and strike her on her chest. She fell and lost consciousness. She later regained consciousness and was helped to the bench where she had waited for the bus to arrive. A person who introduced himself as the driver of the bus confirmed that the door was faulty and that they had been having a problem with the door and hence the late arrival of the bus.

[4] In paragraph 3.3 of plaintiff's particulars of claim the following is averred:

"The sliding side door of the insured vehicle was stuck and did not initially open."

In response thereto, defendant pleads as follows:

"Save to admit that there was a mechanical fault with the sliding door mechanism. Defendant does not admit the content and puts plaintiff to the proof thereof."

[5] At paragraph 3.5 of the particulars of claim it is alleged that “the driver and / or assistant of the insured vehicle, acting within the course and scope of his employment with the owner thereof, caused the door to suddenly and unexpectedly open rapidly, with the result that it knocked the plaintiff over”. In response to this allegation defendant pleaded as follows:

“Defendant pleads that the sliding door opened as a result of a mechanical fault and not due to the negligence and/or actions of the alleged driver and/or alleged assistant of the Intercap Sleepliner.”

During cross examination, plaintiff stated that she does not know what caused the door to open. It also transpired that she had been walking away from the bus when she heard a sound, turned around to see where the noise came from. It was at that stage that she was struck by the door. She could not say whether the door operated mechanically or not. She was not able to say whether the driver was behind the steering wheel of the bus at the time of the accident.

[6] In her particulars of claim, plaintiff alleges “that the sole cause of the incident was due to the negligence of the driver and or owner of the insured vehicle, or his assistant, being an employee of the owner of the insured vehicle, both the driver and the assistant acting within the course and scope of their employment with the owner of the insured vehicle, at all material times, he being negligent in one or more of the following respects:”

(various grounds of negligence are then enumerated)

[7] Plaintiff also alleges that the incident arose from the driving of the insured vehicle.

[8] *Section 17 of the Road Accident Fund Act 56 of 1996* provides that:

“(1) The Fund or an agent shall-

(a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;

(b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established,

be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee: Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum.”

[9] As indicated earlier on in this judgment, I am required to determine whether the incident occurred out of the driving of the insured motor vehicle.

[10] It is trite that for a person to be delictually liable the following elements must be present:

- (a) Conduct.
- (b) Wrongfulness.
- (c) Fault in the form of intention or negligence.
- (d) Causation and
- (e) Harm.

It is also trite that these elements must be established by the plaintiff on a balance of probabilities.

[11] What conduct, if any, can be attributed to the driver and or assistant driver of the insured vehicle in the present matter? Can such conduct qualify or amount to the driving of the insured vehicle as required in terms of *Section 17 of the Road Accident Fund Act*?

[12] It is not in dispute that the door mechanism of the insured vehicle was faulty.

[13] Plaintiff's counsel referred me to a number of decided cases in which courts previously grappled with the question whether the incident concerned in those cases arose from the driving of the insured vehicle. One such matter is the matter of ***Wells and Another v Shield Insurance Company Limited***¹. In this matter the court held that the opening of the door of the insured vehicle immediately after it was parked and its engine switched off, was not part and parcel of driving. The court concluded that plaintiff's injuries could not be said to have been caused by or even arisen out of the driving of the insured motor vehicle.

[14] In ***General Accident Insurance C. SA Ltd v Xhego and Others***² a different conclusion was reached. The court found that there was a sufficiently close link between the injuries sustained by the plaintiff and the driving of the bus and concluded that the injuries had arisen out of the driving of the bus. Further that the bus was not merely being driven when the injuries were sustained, but it was the very driving of the bus along the particular route which elicited the petrol bombing thereof.

¹ 1965 (2) SA 865.

² 1992 (1) SA 85.

[15] In another matter decided in this regard, *Van Zyl v Metro Bus and Ano*³ the facts thereof bore similarity with the facts of the present case.

The facts in the *Van Zyl* matter were as follows:

(as per the stated case)

The appellant was boarding a bus owned by the first respondent (being Metro Bus). The bus was stationary and idling when the appellant started boarding the bus. She put up her left hand in order to hold onto the door of the bus to pull herself into the bus. Without warning the door of the bus malfunctioned and slammed open and caught plaintiff's wrist between the door and the side of the bus, thereby injuring plaintiff's wrist.

[16] In answering the question whether it can be said that the malfunction of the door of the bus was a risk of the type which differed in accordance with whether the bus was being driven or not, the court in the *Van Zyl* case had this to say:

"In my view the answer to this question is dependent upon whether or not the malfunction of the nature in question could only occur if the engine of the bus was running at the time. From the agreed facts forming the subject matter of the stated case, it is clear that the bus was being "driven" at the time of the incident *albeit* that it happened to be stationery at the bus stop. Accordingly, if the malfunction was dependent upon the engine running, that in my view, and in the light of the manner in which the test for causality has been applied, would be sufficient in these circumstances to support the conclusion that the injury is one arising from the driving of the motor vehicle. If the malfunction is in fact one which would have occurred even, for example, if the engine of the bus was not running, then the driving of the vehicle would, in my view, not be causally connected with the injury that resulted from the malfunction. The agreed facts forming the subject matter of the case unfortunately shed no light on this aspect of the matter."

³ [2016] JOL 35681 (GJ).

[17] Plaintiff's case is in the same position. Whilst she testified that the engine of the bus was running at the time of the incident, she could not say, understandably so, how the door of the bus operated; whether by means of air pressure, mechanical means or manually. She could not even say where the driver was at the time of the incident - whether he was positioned behind the steering wheel. Whether he did anything in a bid to open the bus door. It is therefore difficult to determine whether any conduct can be attributed to the bus driver. What the plaintiff was purportedly told by the bus driver regarding problems experienced with the malfunctioning of the door of the bus, *albeit* that evidence being of a hearsay nature, does not take plaintiff's case any further. There is still a *lacuna* as to what caused the door to open. Did it open on its own, was an attempt made by the driver or his assistant to open the door, we do not know. Did it need the engine of the bus to run in order for the door to open? We do not know. What was the nature of the malfunction? Granted that it is common cause that the bus door had a mechanical fault, and it was as a result of that malfunction that the plaintiff was struck by the door, I am unable to find that the incident occurred out of the driving of the bus. There is no evidence to support this proposition. I therefore cannot find in favour of the plaintiff.

[18] I am of the view that there is no reason why the costs should not follow the cause.

[19] Accordingly, plaintiff's action is dismissed with costs, such costs to include the costs that were reserved on the 9 March 2017.

NG BESHE
JUDGE OF THE HIGH COURT

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