

REPUBLIC OF SOUTH AFRICA



GAUTENG HIGH COURT, PRETORIA

11/11/13

CASE NO: 19022/2010

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

11/11/2013
DATE

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SIGNATURE

In the matter between:

AARON ZITHA

Plaintiff

and

BUSCOR (PTY) LTD

Defendant

J U D G M E N T

MNGQIBISA-THUSI J:

1. The plaintiff has instituted an action for damages against the defendant as a result of injuries he allegedly sustained when he

allegedly fell off a moving bus owned by the defendant and driven by one of its drivers, Obed Nkosi ("Nkosi").

2. From the hospital records it appears that the plaintiff presented the following injuries: 'rotator cuff soft tissue injury to the right shoulder, pain in the left hip and soft tissue injury to the left knee'. It appears that the plaintiff went to hospital on 20 August 2007.

3. In his particulars of claim, the plaintiff is seeking damages in the amount of R490 163.27 calculated as follows:

2.1	Past medical expenses	R6 643.27
2.2	Future medical expenses	R87 785.00
2.3	Loss of earning capacity/ loss of employability	R193 500.00
2.4	General damages	R200 000.00

4. In its plea the defendant denied that the accident ever happened. In the event that it is found that the accident did happen, the defendant denies that its driver was negligent, alternatively, that the plaintiff had contributed to the loss he suffered. Furthermore, the defendant is relying on an indemnity notice posted inside its busses which it claims is written in eSiswati and English.

5. An order in terms of Rule 33 (1) was granted, separating the merits from quantum.
6. The plaintiff testified and also called Elias Madolo as his witness.
7. The plaintiff testified that on 7 August 2007 he boarded a bus belonging to the defendant on his way home from work. When the bus reached Likazi township, extension 5, Kanyamazane, next to the Gaza church, he was in the process of alighting from the rear door of the bus, with his right foot on the stairs of the bus, when suddenly the door closed and the bus started moving slowly. His left foot was caught just above the ankle between the two folds of the double door of the bus. The bus then dragged him for approximately 12 metres. The plaintiff further testified that the bus dragged him on the gravel shoulder of the tarred road which had little stones. He managed to get his foot loose and fell to the ground, injuring his left knee, hip, shoulder and had a headache. He admitted that he had no injuries on his hands or ankle even though he testified that he was dragged next to the tarred surface of the road where there were little stones.
8. Plaintiff denied that he suffered from TB of the hip even though
9. In cross examination the plaintiff testified that when the bus reached a curve of the road, on the corner of Chris Hani and

Liphayini streets, his leg came loose, and he was thrown off the bus and rolled on the tarred until he landed on the grassy pavement. Further that he hit the ground with his left knee.

10. Further under cross examination, the plaintiff testified that as he was trying to get his leg loose, he was hopping alongside the bus with his right leg, screaming.
11. The plaintiff admitted that he made a statement to his lawyers, that his lawyers wrote the statement and admitted that the signature on the statement was his. However, he testified that he could not recall if the statement was read back to him. He denied that he had told his lawyers that the accident occurred at the Way Inn bus stop which is further from the place where he alleges the accident occurred. He testified that he had told his lawyers that the accident happened near the Way Inn but next to the Gaza church. He further denied that he told his lawyers, as reflected in his affidavit that his right hand was caught in the door.
12. On being shown the statement he made to the police, the plaintiff denied that he told the police officer who was writing his statement that his arm was caught in the door. He testified that he merely answered to questions put to him by the police officer and was later asked to sign.

13. With regard to the indemnity notices placed allegedly in the defendant's busses at its terminals and allegedly written in English and eSiswati, the plaintiff testified that he was not aware of what was written on what appeared to be a notice in the bus nor that he ever saw the alleged notices at the bus terminal where he usually bought his ticket.
14. The version put to the plaintiff in cross examination was that the driver of the bus would deny that there is a bus stop where the plaintiff alleges the bus stopped and he alighted. Further that the bus stop is about 200m from where the plaintiff alleges the bus stop and that the driver of the bus would deny that he allows passengers to alight at the place the plaintiff alleges he alighted. Furthermore, that the driver would testify that he did not hear any people screaming. The plaintiff insisted that the same bus always stops to allow passengers to disembark.
15. The plaintiff called Mr Elias Madolo ("Mr Madolo") as a witness. Mr Madolo testified that he lives next to the Gaza church where the defendant's busses normally stop to let passengers off. On the day in question he was busy tending his garden when he heard people screaming. On investigating he saw the plaintiff lying on the ground next to his yard. He went to him to assist the plaintiff who told him he had fallen from the bus. He testified that he did not see how the plaintiff fell from the bus.

16. In cross examination, Mr Madolo reiterated that he did not see how the plaintiff fell from the bus. On being questioned about a statement he made to his lawyers in which it is stated that he saw the plaintiff alighting from the rear door of the bus and the door suddenly closing, dragging the plaintiff for some metres. He denied having told the person who wrote his affidavit that he saw the plaintiff falling from the bus and that the bus dragged him. He testified that he answered questions asked and his answers were written down and thereafter he was made to sign the statement without it being read back to him.
17. Mr Madolo further denied ever seeing any indemnity notices on the busses, as they were not there when he used the bus to work whilst still employed. Furthermore, he denied seeing the notices at the terminal building as it was a new building.
18. The plaintiff then closed its case and the defendant applied for absolution from the instance, which application was dismissed.
19. Mr Obed Nkosi ("Mr Nkosi"), the driver of the bus testified on behalf of the defendant. He testified that he had 24 years of experience as a driver and that during that period, after his initial training, he received training for two weeks in each year. He testified that the

bus stop where he usually allows passengers to get off is about 12 meters from the corner of Chris Hani and Lephayini streets. He denied that on the day in question the plaintiff had alighted from the rear of the bus as he is the only one able to open the doors of the bus with a lever from the front once they are closed. He testified that at the rear door of the bus and in front of the inside of the bus there are indemnity notices which every passenger can see. He testified that had the plaintiff fallen off the bus he would have seen him as he constantly checks the rear view and the outside mirrors of the bus.

20. The defendant called Antony Van der Westhuizen, a motor vehicle accident assessor who did an investigation at the scene of the accident. In his opinion if a person is trapped between the two folders of the door of the bus which has a rubberised lining, the pressure on the door would not be that strong, and the driver would not be able to lock and it is possible that the driver would not be aware that the door was not locked. He further testified that if the plaintiff was trapped in the door in the way he says he was, on falling, he would have fallen under the bus. However, he did concede that when the bus turned, on falling, the plaintiff would have fallen to the left of the bus as he testified.

21. In cross examination, Mr Van der Westhuizen testified as to the statement made by Mr Madolo to him on 4 January 2011. He

testified that Mr Madolo told him, contrary to his evidence, that he had seen the plaintiff alight from the bus and the bus dragging him. Further that Mr Madolo had told him that before the accident, the plaintiff was limping. Mr Van der Westhuizen also expressed his surprise as to why the plaintiff's hands were not injured if he fell the way he claims.

22. After Van der Westhuizen's testimony, the defence closed its case.
23. The onus rests on the plaintiff to prove on a balance of probabilities that the incident occurred and that it was as a result of negligence on the part of Mr Nkosi, the bus driver. If I find that the driver was negligent, then I will have to find that the plaintiff is vicariously liable for any proven loss suffered by the plaintiff as Mr Nkosi in his evidence testified that at the time the accident is alleged to have happened, he was performing his duties as the defendant's driver.
24. It is the plaintiff's version that on 7 August 2007 while alighting from a bus driven by Mr Nkosi and owned by the defendant, he fell from the bus after Mr Nkosi suddenly closed the doors whilst his left foot was still in the bus and started driving away. As a result, he testified that the bus dragged him for 12 metres but later changed said he hopped along the bus until he managed to get his leg free. The defendant's version is that the incident never occurred as Mr

Nkosi testified that he never saw the incident and never heard any screaming.

25. I have before me two conflicting versions as to what happened on the day in question. When faced with two mutually destructive versions, the test for deciding whether the plaintiff has discharged the onus he bears was set out in *National Employers' General Insurance v Jagers* 1984 (4) SA 437 (ECD) where the court stated at 440D-G that:

"... where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inexplicably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If, however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."

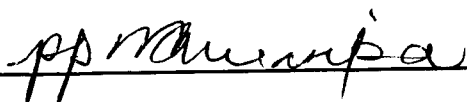
26. The plaintiff is the only witness as to what actually happened as Mr Madolo clearly testified to the fact that he did not see how the plaintiff fell from the bus as he was busy attending to his garden.

However, the plaintiff could not explain the contradictions in his testimony and what he told the police and his lawyers. Although the plaintiff's evidence is that his left foot was caught in the door, in his sworn statements he indicates that his arm or hand was trapped in the door. I find it improbable that the plaintiff would have been dragged by the bus and people screaming that the driver would not have realised that something was amiss. Furthermore, I find it difficult that the plaintiff would have hopped or been dragged alongside a moving bus for a distance of 12 metres without sustaining more severe injuries. I also find it difficult to accept that the plaintiff would have fallen from a moving bus without injuring his hands. I am therefore of the view that the version of Mr Nkosi, taking into account the evidence of Mr Van der Westhuizen as to where the plaintiff would have landed had he fallen in the manner he described, that the incident did not happen to be probable.

27. Taking into account all the evidence before me, I am satisfied that the plaintiff has not discharged his onus of proving that he fell from and was dragged by the defendant's bus. Consequently, the issues of the driver's negligence and the indemnity notices do not arise.

28. Accordingly the following order is made:

'The plaintiff's action is dismissed with costs.'


MNGQIBISA-THUSI J

Appearances:

For the Plaintiff	:	Adv B P Geach SC
Instructed by	:	Nell, Kotze & Van Dyk
For the Defendant	:	Adv R N Groenewald
Instructed by	:	Naude Attorneys