

**IN THE HIGH COURT OF SOUTH AFRICA  
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

Case No A57/2006

In the matter between:

**REGENT INSURANCE COMPANY**  
**(TRADING AS IMPERIAL COMMERCIAL INSURANCE)** Appellant

and

**D M J TRANSPORT CC** Respondent

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**JUDGMENT: 28 JULY 2006**

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**VAN ZYL J:**

**INTRODUCTION**

[1] This is an appeal against part of the order granted by our learned colleague, Moosa J, in an action brought by the respondent, as plaintiff, against the appellant, as defendant. Moosa J dismissed an application for leave to appeal. On petition by the appellant, however, the Supreme Court of Appeal granted it leave to appeal to this court. Mr T D Potgieter SC appeared for the appellant and Mr R W F MacWilliam SC, assisted by Mr H McLachlan, for the respondent. The court expresses its appreciation to them for their respective presentations.

[2] The action arose from an accident, on the N2 national highway in the Eastern Cape, involving a bus which was insured by the appellant in terms of a written insurance agreement. As a result of the accident a significant number of people, including the driver and co-driver, were killed and a great many injured. The bus was

damaged beyond repair and was towed to East London where it was subjected to examination with a view to establishing the cause of the accident.

[3] The respondent subsequently claimed damages from the appellant in the amount of R890 616,90. The appellant repudiated the claim on a number of bases, only two of which remain in issue. These issues arise from exclusionary clauses in the insurance agreement. The first is that the number of passengers in the bus at the time of the accident exceeded the capacity for which the bus was constructed or licensed to carry, alternatively exceeded the number of seats specified in the schedule to the agreement. The second is that, at the time of the accident, the bus was not roadworthy in that the brake linings of the left rear drive axle were excessively worn.

[4] Prior to the matter going on trial before the court *a quo*, the parties agreed, in terms of the provisions of Rule 33(4), to the separation of the merits and *quantum* on the basis that the trial would proceed on the merits while the *quantum* would, if required, stand over for later determination. Despite this arrangement the recorded evidence was voluminous, running into 1949 pages. Much of it, however, has become irrelevant for present purposes in that the remaining issues, and the evidence pertaining thereto, are limited.

[5] In his judgment Moosa J accepted that the *onus* rested on the appellant to prove that the exclusionary clauses were applicable and that it was hence entitled to repudiate the respondent's claim. On the basis that there was no direct evidence to substantiate the applicability of such clauses, the appellant would have to rely on circumstantial or inferential evidence in seeking to discharge its burden of proof. More particularly it would have to rely on expert opinion as to whether the brake linings in question were damaged prior to the accident or as a result thereof. Such

opinions could not, however, take the place of factual findings based on the probabilities arising from the evidence as a whole. In this regard Moosa J warned that inference should be carefully distinguished from conjecture or speculation.

## **BACKGROUND**

[6] It is common cause that the ill fated bus, described as a Volvo passenger coach, left Cape Town on 23 December 2000 *en route* for a destination in the Eastern Cape, where the passengers it was carrying were to spend the festive season. As it proceeded along the N2 highway between East London and Umtata, after stopping briefly in Beaufort West and King William's Town, it arrived at a steep and winding section of the highway known as the "Kei cuttings", not far from the Kei River bridge. It is not clear whether the driver of the bus attempted to change to a lower gear as he entered the Kei cuttings, but it would appear that that the bus was not in gear as it commenced its descent through the cuttings. As might be expected, it inevitably built up speed, causing the driver to lose control of it. It subsequently broke through the safety barriers before plunging down an embankment and coming to rest on its side in a deep ravine.

[7] According to the appellant the driver and co-driver, as also 18 passengers, were killed instantly and a large number of other passengers were injured, some seriously. Although the exact number of passengers on the bus was not clear from the evidence, the appellant submitted that, on the probabilities, there were well over 70, perhaps as many as 77, passengers on board. The respondent pointed out, however, that the passenger list was incomplete and the "Officer's Accident Report" (OAR), compiled by the police at the scene of the accident, inaccurate. It was in fact rejected by Moosa J on the basis that the author or authors thereof did not testify. One

Inspector Pape testified that the police reconstruction indicated a total of 54 passengers, including the deceased. On the other hand there were 64 passenger seats on the bus and it would appear that all were taken. There were also a number of infants and children who apparently sat on the laps of their parents. Moosa J, however, held against the appellant on the basis that this evidence was unreliable.

[8] In regard to the issue of roadworthiness it was common cause that the bus had passed a roadworthy test, and had been issued with a roadworthy certificate, on 28 October 2000, a few weeks before the accident. The person or persons responsible for the test and the issue of the certificate did not, however, testify. There was hence no evidence as to the condition of the impugned brake linings at the time of the test or at any time prior to the accident. Interestingly Mr D Magerman, a person described as an examiner of vehicles for roadworthiness, testified that a bus with brake linings in the post-accident condition attributed thereto would not have passed a roadworthy test.

[9] Of some significance in evaluating the evidence is the fact that, during the course of the accident, the bus was involved in a number of violent impacts. It appears to have collided with safety barriers on either side of the road before crashing through a safety barrier and plunging along uneven terrain before coming to rest on its side in the ravine. In the process its undercarriage was wrecked and the bus as a whole was irreparably damaged.

[10] It is common cause that, during the salvage operation, the bus was rolled onto its wheels and winched up the steep embankment to the road level, from where it was moved to an arrestor bed approximately half a kilometre away. There certain work, concerning which there was no evidence, was done on it before it was towed a distance of some 71 kilometres to East London. On arrival it was placed on stop

blocks for inspection. A few days later Mr R Supra, an insurance assessor, who became the appellant's primary witness, inspected it there. It was also inspected by Mr C R Boshoff, a mechanical engineer in the employ of the police, with a view to determining whether criminal proceedings should be instituted. A noteworthy aspect of Mr Supra's evidence was that the overall condition of the bus prior to the accident was good, while five of the six braking systems of the bus were in a good condition.

[11] It must be noted that none of the other experts physically inspected the bus after the accident. Their evidence was, to a large extent, theoretical, being based on photographs and other documentation relating to the accident. Much of their testimony was inferential, if not hypothetical, conjectural or even speculative. In considering this evidence Moosa J pointed out that the appellant had sought to establish its case on the inferential reasoning of experts based on the post-collision condition of the impugned parts. None of them, however, had examined the vehicle at the scene of the accident and none could testify as to the condition of the bus, or its impugned parts, prior thereto. There was, furthermore, an indication that the bus had been serviced by Volvo dealers immediately prior to its fateful journey and that the brakes had been serviced and tested for roadworthiness by Airtech. No person involved in these activities, however, had been called upon to testify.

[12] In his evaluation of the specific witnesses Moosa J pointed out that the experts had clearly been partial to the party which had called them to testify. They were, generally speaking, extremely reluctant to make concessions. With the exception of Mr Supra, for the appellant, and Mr Malusi, for the respondent, they had to be "prodded" into conceding even the obvious. This led the learned judge to find that the probability could not be excluded that the damage to the brake linings could have

been caused during the collision or at the time when the bus was removed from its resting place and towed to East London. It might even have occurred when Mr Malusi was prising the lining loose from the drum.

[13] Against this background I propose to deal briefly with the relevant legal principles and then with the issues relating to the number of passengers on the bus and whether or not the post-accident condition of the impugned brake linings rendered the bus unroadworthy at the time of the accident.

### **THE RELEVANT LEGAL PRINCIPLES**

[14] An agreement of insurance is no different from any other contract and the ordinary rules of contractual interpretation apply to it. See *Fedgen Insurance Ltd v Leyds* 1995 (3) SA 33 (A) at 38A-E (*per* Smalberger JA):

The ordinary rules relating to the interpretation of contracts must be applied in construing a policy of insurance. A court must therefore endeavour to ascertain the intention of the parties. Such intention is, in the first instance, to be gathered from the language used which, if clear, must be given effect to. This involves giving the words used their plain, ordinary and popular meaning unless the context indicates otherwise (*Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd* 1934 AD 458 at 464-5). Any provision which purports to place a limitation upon a clearly expressed obligation to indemnify must be restrictively interpreted (*Auto Protection Insurance Co Ltd v Hammer-Strudwick* 1964(1) SA 349 (A) at 354C-D); for it is the insurer's duty to make clear what particular risks it wishes to exclude (*French Hairdressing Saloons Ltd v National Employers Mutual General Insurance Association Ltd* 1931 AD 60 at 65; *Auto Protection Insurance Co Ltd v Hammer-Strudwick* (*supra* at 354D-E). A policy normally evidences the contract and an insured's obligation, and the extent to which an insurer's liability is limited, must be plainly spelt out. In the event of a real ambiguity the *contra proferentem* rule, which requires a written document to be construed against the person who drew it up, would operate against Fedgen as drafter of the policy (*Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Co of SA Ltd* 1961 (1) SA 103 (A) at 108C).

[15] On the application of this rule reference may be made to *Aegis Assuransie Bpk v Van der Merwe* 2001 (1) SA 1274 (T) at 1283I-1284D. There Kirk-Cohen J cited the above-quoted passage from the *Fedgen* case with approval, adding that the

relevant exclusionary clause should be read subject to the dominant provision contained in the indemnity clause. This approach may, in my respectful view, justifiably be described as “consumer friendly”. See also *Van Zyl NO v Kiln Non-Marine Syndicate No 510 of Lloyds of London* 2003 (2) SA 440 (SCA) at 445H-446E.

[16] It is generally accepted that exclusionary clauses in an insurance policy fall to be restrictively interpreted. A court will hence incline to upholding rather than nullifying a policy. See *Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Co of S A Ltd* 1961 (1) SA 103 (A) at 106G-107D; *Pereira v Marine and Trade Insurance Co Ltd* 1975 (4) SA 745 (A) at 752G-753A. See also *LAWSA* 12 (1<sup>st</sup> reissue 2002) par 233 at 177-178.

[17] When seeking to rely on a defence arising from provisions contained in an exclusionary clause, as the appellant seeks to do in the present matter, a defendant insurance company must prove, on a balance of probabilities, all the facts necessary to sustain such defence. When reliance is placed on an inference arising from circumstantial evidence, care must be taken not to base such inference on conjecture or speculation, as pointed out by Moosa J in his consideration of the evidence in the present matter (see par [5] above). In *S v Essack and Another* 1974 (1) SA 1 (A) at 16D the court quoted with approval the following observations of Lord Wright in *Caswell v Powell Duffryn Associated Collieries Ltd* [1939] 3 All ER 722 at 733:

Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

See also *S v Mtsweni* 1985 (1) SA 590 (A) at 593E-G.

[18] As was stated authoritatively in *Rex v Blom* 1939 AD 188 at 202-203, the inference sought to be drawn must be consistent with all the proved facts, failing which it cannot be made. In addition, at least in criminal matters, the proved facts must exclude every other reasonable inference save the one sought to be drawn. If not, there must be doubt whether the inference sought to be drawn is correct. On the other hand in civil matters, such as the present, the court must balance the probabilities and select the most natural, obvious or plausible conclusion, even though it may not be the only reasonable one. See *Govan v Skidmore* 1952 (1) SA 732 (N) at 734C-G; *A A Onderlinge Assuransie-Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A) at 614H-615B. See also *Skilya Property Investments (Pty) Ltd v Lloyds of London Underwriting Syndicate Nos 960, 48, 1183 and 2183* 2002 (3) SA 765 (T) at 781A-D.

[19] When use is made of expert evidence, it must be remembered that an expert, however impressive his expertise and experience may be, cannot, in expressing however strong an opinion, elevate conjecture or speculation to justifiable inference, unless it is borne out by the objectively ascertainable facts. As Ramsbottom J said in *Rex v Jacobs* 1940 TPD 142 at 146, expert witnesses “are not the judges of fact in relation to which they express an opinion”. See also *Holtzhauzen v Roodt* 1997 (4) SA 766 (W) at 771H-773C; *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA) par [36]-[40] at 1200I-1201H.

[20] When expert eyewitnesses are available, their direct evidence would generally be of more value than the opinions of experts based on circumstantial evidence. See *Abdo NO v Senator Insurance Co Ltd and Another* 1983 (4) SA 721 (E) at 725E-726F. Thus when the roadworthiness of a vehicle prior to a collision is in issue, one would expect a witness or witnesses to testify as to the mechanical condition of

such vehicle in the relevant preceding period. See *Stacey v Kent* 1992 (4) SA 495 (C) at 497D-F; *Van Eck v Santam Insurance Co Ltd* 1996 (4) SA 1226 (C) at 1229H-1230B.

## **THE NUMBER OF PASSENGERS ON THE BUS**

[21] The relevant exclusionary clause appears in memorandum 3 of the insurance agreement and reads thus:

We shall not be liable for any claim for loss, damage or liability if the number of passengers in the insured vehicle exceeds the capacity for which such vehicle is constructed or licensed to carry and/or exceeds the number of seats specified in the schedule.

[22] It is common cause that the bus was constructed with 64 seats but was registered (hence licensed) for only 60 passengers, while the number of seats specified in the relevant schedule was 63. Inasmuch as these capacities appear to be expressed as alternatives, there would be a breach of this clause if the bus were, at the time of the accident, carrying more than 60 persons, including the driver or drivers.

[23] In his argument on behalf of the respondent Mr MacWilliam pointed out that the cited exclusionary clause was the subject of an extremely late application for amendment brought by the appellant after the close of the case and during the course of argument before Moosa J. The learned judge allowed the amendment on the basis that the issue relating to the number of passengers on the bus directly prior to the accident had been in existence from the outset, so that the respondent would not be prejudiced should the amendment be granted. Furthermore regulation 233, read with regulation 231, of the *National Road Traffic Regulations*, 2000, which prescribes a formula for determining how many passengers may lawfully board a bus, had been in issue during the trial. The evidence was in fact, Mr MacWilliam submitted, directed at

establishing the number of passengers as calculated in accordance with the said regulation and not at determining “the physical number of persons” on the bus at the relevant time.

[24] On this basis Mr MacWilliam argued that the appellant was entitled to refer only to the narrow issues canvassed at the trial for purposes of establishing whether it had proved the facts required to bring the exclusionary clause into effect. The interpretation of such clause and the capacity of the bus were not issues raised in the pleadings or in the evidence presented by the appellant.

[25] The appellant expressed the view (see par [7] above) that there were more than 70, perhaps as many as 77, passengers on the bus at the time of the accident. If it were accepted that all 64 seats were occupied, the presence of any additional passengers, be they standing or sitting on the laps of others, would constitute a breach of the exclusionary clause. Mr Potgieter argued that, on the undisputed evidence of Ms L Mahlatshana, one of the surviving passengers on the bus, the numbers appearing on the tickets issued to passengers, prior to the departure of the bus from Cape Town, exceeded 70. Both she and another passenger, Mr T Ndabisukile, testified that there were no empty seats, while there were a few babies and some ten children sitting on the laps of their mothers.

[26] Mr Potgieter placed strong reliance on Inspector Pape, whom he described as an excellent witness whose testimony was logical, clear, factual and reasoned. He had arrived at the scene of the accident shortly after its occurrence and had instructed a colleague or colleagues to take down the names of passengers and to keep members of the public away from the scene. This had given rise to a total of 75 passengers (20 dead, 15 seriously injured and 40 slightly injured), as reflected in the summary

contained in the Officer's Accident Report ("OAR"). While conceding that this was not conclusive proof of the exact number of passengers on the bus at the time, Mr Potgieter submitted that it was strong support for a finding that there were, on the probabilities, more than 60 passengers on board.

[27] This figure, he argued, should not be confused with the count of 54 passengers appearing in the OAR and which related to the names of 22 identified passengers, 19 deceased and 16 persons (including 3 who appeared in the OAR) from whom statements were obtained. Such information was incomplete in that the police did not obtain a complete list of the passengers on the bus, while uninjured passengers would not have been counted. Inasmuch as the respondent failed to call any witness to gainsay the appellant's witnesses on this score, the court *a quo* should have held that there were more than 60 passengers on the bus at the relevant time.

[28] In his judgment Moosa J dealt with the carrying capacity of the bus in some detail, outlining the evidence and weighing up its merits and demerits. He rejected the OAR form as inadmissible in that changes had been made to it and the person who had completed or amended it had not been called to testify. He also had difficulty with the computation giving rise to a figure of 54 persons on the bus at the time of the accident, since no complete list of persons who boarded in Cape Town, or who were on the bus at the time of the accident, was ever made available. All in all the evidence relating to the number of adults, children and babies on the bus when the accident occurred was unreliable and insufficient for purposes of discharging the relevant burden of proof resting on the appellant.

[29] In this regard the learned judge held that the testimony of Ms Mahlatshana and Mr Ndabisukile (par [25] above) was "vague and unconvincing", being based on a

reconstruction of events dating back to more than three years previously. Without information as to the number of children under 3 years of age, or between the ages of 3 and 6 and 6 and 13, the formula set forth in Regulation 231 could not apply. This led Moosa J to hold that the appellant had failed, on a balance of probabilities, to prove that, at the time of the accident, the number of passengers on the bus exceeded the capacity for which it was constructed or licensed to carry, or exceeded the number of seats specified in the schedule. In the circumstances the respondent was not required to tender evidence in rebuttal.

[30] In regard to the numbering appearing on the tickets, as testified by Ms Mahlatshana (par [25] above), Mr MacWilliam argued that, without evidence as to the purpose and effect of such numbering, it was meaningless and irrelevant. In any event there was no evidence as to how many numbered tickets had been issued for that particular bus and what such numbers indicated. One may add that there was no indication whether or not tickets with consecutive numbers, beginning from one and continuing to 70 or more, were issued for the bus in question. And if the tickets had been issued by the driver or co-driver, both had died in the accident and no better evidence could have been adduced by the respondent if it had been called upon to rebut the appellant's evidence. See *Galante v Dickinson* 1950 (2) SA 460 (A) at 465; *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 39A-40C and 49F-H; *Titus v Shield Insurance Co Ltd* 1980 (3) SA 119 (A) at 133D-134B.

[31] On consideration of the evidence, the arguments and the reasons given by Moosa J for his findings relating to the issue in question, I am in respectful agreement with the learned trial judge that the evidence tendered by the appellant was quite insufficient for purposes of discharging the *onus* resting on it. Although the honesty

and credibility of Ms Mahlatshana and Mr Ndabisukile were not brought into question, their recollection of events they had experienced some three years previously was, quite understandably, sketchy and superficial. At best for the appellant they remembered that, at the time the bus departed from Langa, all the seats were taken and that there were a number of children and babies on board. They were clearly unable, however, to give any detail regarding whether all the seats were physically occupied by passengers. Nor were they able to assess the number of adults, children and babies. Even less could they be expected to estimate the ages of the children or to remember how many of the children, if any, occupied, or shared, seats and how many were sitting on the laps of adults. Moreover, although they testified that no further passengers came on board after the bus left Cape Town, they did not testify as to whether or not any passengers left the bus in Beaufort West or King William's Town. Their evidence was, therefore, of little or no assistance in establishing whether or not, at the time of the accident, every seat on the bus was occupied by a passenger.

[32] In regard to the numbering appearing on tickets issued to passengers, I agree with Mr MacWilliam that the absence of evidence explaining the meaning and significance, if any, of such numbering, rendered it meaningless and irrelevant. It could not be regarded as *prima facie* proof that there were in excess of 70 passengers on board at the time of the accident.

[33] As for the OAR report Moosa J, in my respectful view, quite correctly found it to be inadmissible in the absence of any evidence relating to its completion and the amendments contained therein. In any event the presence of curious bystanders milling around at the scene of the accident at the time the police were attempting to

count the number of deceased and injured, must necessarily have impeded any accurate assessment. However impressive Inspector Pape might have been as a witness, he would clearly have been unable to assist in determining the number of passengers on the bus with any degree of accuracy. It may be accepted that the police were doing all in their power to keep members of the public away. It is highly probable, however, that the survivors who were able to leave the scene of the accident would have done so post haste, particularly if they were concerned about whether or not their babies or children had sustained injuries or, worse still, had died in the accident. To distinguish survivors from bystanders under such circumstances would probably have been a difficult, if not an impossible, task.

[34] In view of these considerations I am in respectful agreement with Moosa J that the appellant's reliance on the exclusionary clause relating to an excessive number of passengers on board the bus at the time of the accident should be rejected.

### **THE CONDITION OF THE IMPUGNED BRAKE LININGS**

[35] The relevant exclusionary clause relating to the roadworthiness of the bus appears in paragraph 1(i) of the insurance agreement and reads thus:

The company shall not be liable for loss or liability:

- i) where it is found that at the time of any incident giving rise to a claim the insured vehicle was not in a roadworthy condition or was being used in contravention of any legislation relating to such use.

[36] The relevant legislation relates to section 42(1) of the *National Road Traffic Act* 93 of 1996 ("the Act"), which provides that "[n]o person shall operate a motor vehicle which is not in a roadworthy condition on a public road". Regulation 140(1) under the Act determines that the test for roadworthiness should be in accordance with the provisions of SABS 047, a document emanating from the South African Bureau of Standards and setting down minimum standards with which vehicles should

comply in order to qualify as roadworthy.

[37] It is common cause that, on examination after the accident, the brake linings in question were found to be “worn down to the brake shoe, with certain sections missing”, while “the upper lining was worn down to the rivet”. Had this condition been in existence immediately prior to the accident, it would, according to the undisputed evidence of Mr Magerman, have rendered the bus unroadworthy.

[38] The difficulty with this proposition is that, as mentioned previously (par [8] above), the bus had been issued with a roadworthy certificate shortly before the accident. It is true that Mr Magerman criticised the certificate as lacking in relevant information, while the brake force reading appearing from the relevant test sheet was in fact inadequate for the bus on the date the roadworthy test was done. Moosa J, however, had difficulty with this evidence in that the person or persons who had conducted the test were not called to testify. Mr Magerman could not verify the correctness of the readings and was unable to say how the reading would have been affected by the fact that the bus was fitted with an anti-braking system (ABS).

[39] In view of the important concessions made by Mr Supra in the course of his evidence, Mr Potgieter, in his argument for the appellant, did not rely on his testimony to the same degree as he relied on that of Mr Grobbelaar and Mr Boshoff. Their opinion was, generally speaking, that brake linings do not normally wear down to the extent the impugned brake linings did as a result of an accident such as that in which the bus was involved. No brake marks were found at the scene of the accident and they did not believe that the damage could have been done in the course of the bus being towed to East London, as confirmed by Mr Delport’s testimony.

[40] Mr Potgieter argued that the opinions of these witnesses had been well

founded, despite their having been subjected to intensive cross-examination and despite the contradictory evidence of Mr Heese and Mr Malusi. Mr Heese had in fact come up with a theory which conflicted with that propounded in his summary of expert evidence, while Mr Malusi's evidence relating to the difficulty he had experienced in removing the brake drum took the matter no further. Mr Potgieter hence submitted that Moosa J had erred in rejecting the appellant's aforesaid expert evidence and in holding that the damage had probably been caused during the collision or at the time the bus was towed to East London. At the very least the learned judge should have held that such evidence had placed an *onus* of rebuttal on the respondent, which *onus* it had failed to discharge.

[41] In considering the expert evidence relating to the worn brake linings, Moosa J set great store by the fact that there had been no evidence as to their condition immediately prior to the accident. Mr Supra had fairly conceded that the overall condition of the bus prior to the accident, including five of its six braking systems, had been good. On the other hand, although the impugned brake linings were found to be glazed and burnt, while the brake drums were discoloured and displayed heat cracks as a result of excessive overheating, he opined that the brake linings might possibly have been worn for some time even before the accident.

[42] This opinion, Moosa J held, did not accord with what appeared from photograph 57, one of the exhibits which featured prominently in the expert evidence. From this it was clear that a portion of the steel brake shoe had broken off, leaving a "V-shape" and a "shiny edge" exposed. The inevitable conclusion was that there had not only been "wear" on the impugned linings and brake shoe, but also "tear". Significantly there was no measurement of the thickness of any of the four linings

(two on the top and two on the bottom) of the axle in question, and there was no indication that, apart from the impugned lining, any of the remaining three linings had been worn before or after the accident. Furthermore none of the remaining brake systems exhibited any damage similar to that sustained by the defective brake system.

[43] Moosa J pointed out further that, despite his reluctance to make concessions, Mr Boshoff had been driven to concede that, at the highest, the braking capability of the bus was “suspicious”. Similarly Mr Grobbelaar could not avoid conceding that the damage aforesaid could have been caused by some or other external force, such as a hammer and lever or a crowbar, provided the slack adjuster had been released at the time. His theory on the cause of the damage was, Moosa J held, unacceptable in that it was based on the colouring of the damaged brake drum as it appeared from the photographs he had examined. Not only did he grudgingly concede that the photographs could be misleading inasmuch as their colouring would depend on light exposure and the angle from which the photograph had been taken, but it contradicted Mr Supra’s evidence that the brake drums had in fact all been discoloured at the time he had done his physical inspection of the bus.

[44] As Moosa J observed, Mr Delport did in fact testify that, when the bus was towed, the slack adjuster had been released. He did not, however, check whether or not the wheels were able to turn. In this regard Mr Malusi’s evidence was of decisive importance. His undisputed testimony was that, when the brake drum was removed at the premises of Border Towing in East London, the brake linings in question had been hard up against the brake drum and that he and an assistant had to use a hammer and crowbar to prise it loose. According to him, if the bus had been towed with the brake linings in the position he had found them, heat would necessarily have been

generated, causing excessive wear on the linings.

[45] By the time Mr Heese commenced his expert evidence on behalf of the respondent, he had had the benefit of hearing, or taking cognisance of, the evidence tendered by Messrs Supra, Boshoff and Grobbelaar. Although Moosa J held that he could place little, if any, reliance on the theories advanced by any of the expert witnesses regarding the cause of the damage to the impugned brake linings, Mr Heese's evidence, in my respectful view, provided a relatively persuasive, though not necessarily compelling, explanation of how such damage might have occurred.

[46] His main theory, as I understand it, was that the primary dynamic braking system of the bus was not functioning immediately before the accident because the bus was not in gear. This brought the secondary function braking system into operation. In order to fulfil the function of the primary braking system, it had to be utilised to its maximum. In the process it generated excessive heat in the brake drums and caused the impugned brake linings to be subjected to abnormal wear. The difficulty with this theory was that it did not explain why the brake linings of the remaining five braking systems did not demonstrate similar wear.

[47] Mr Heese's alternative theory, which did not appear in his expert summary, attempted to address this difficulty. It was stimulated by the "V-shape" damage and "shiny edge" appearing from photograph 57 aforesaid, an aspect which was not dealt with by any of the respondent's experts in their expert summaries. According to Mr Heese this damage could be attributed to some or other object which had penetrated the brake drum. It could also have been caused by the series of violent impacts to which the bus had been subjected at the time of the accident.

[48] However persuasive this alternative theory might be, it borders on the

conjectural or speculative and cannot be regarded as sufficient for purposes of definitively determining the cause of the damage to the impugned brake linings. This does not, however, mean that the evidence tendered by the appellant's experts should be accepted. In this regard I am inclined to agree with Mr MacWilliam, in his argument on behalf of the respondent, that the paucity of evidence, which prompted the appellant to abandon a number of its defences, casts a pall over the substance, if not the credibility, of its evidence relating to the remaining defences. It certainly did not render the evidence regarding the damage to the brake linings any more compelling than that which had caused it to abandon the said defences. Accordingly I am in respectful agreement with Moosa J's finding that little if any reliance could be placed on the expert evidence advanced by either of the parties.

[49] It follows that Mr Potgieter's submission, that the nature of the appellant's evidence was sufficient for purposes of placing an *onus* of rebuttal on the respondent, must be rejected. In view of the lack of acceptable evidence it is, in my view, extremely difficult, if not impossible, to establish with any degree of precision what the cause of the damage was. The appellant simply failed to present a case calling for a response from the respondent.

[50] As for the probabilities, there is merit in the proposition that the bus was not in gear as it descended through the Kei cuttings. In all probability the driver attempted to change into a lower gear at the commencement of the cuttings but was unable to do so because the bus gained momentum before he could do so. He inevitably lost control and the rest is history. In the absence of acceptable evidence to the contrary, it cannot be discounted, as held by Moosa J, that the damage to the impugned brake linings was attributable to one or more of several events, namely: (a) the violent impacts sustained

by the bus during the accident; (b) the removal and towing of the bus from the scene of the accident to East London; and (c) the procedure of separating the linings from the brake drum by Mr Malusi at the premises in East London. The learned trial judge was not, however, required to decide which of these events should, on the probabilities, be accepted as the primary, or only, cause of such damage.

[51] It follows that I must respectfully associate myself with the finding of Moosa J that the defence based on the exclusionary clause relating to the roadworthiness of the bus at the time of the accident must be rejected. The appellant clearly failed to prove that the impugned brake linings were not in a roadworthy condition immediately prior to the accident.

## **CONCLUSION**

[52] In the event the appeal must be dismissed with costs, including the costs of two counsel.

**D H VAN ZYL**

Judge of the High Court

I agree.

**A M MOTALA**

Judge of the High Court

I agree.

**B WAGLAY**

Judge of the High Court