REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 09/50133

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

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DATE SIGNATURE

In the matter between:

MABUYA, PHILLIP Plaintiff

and

SOUTH AFRICAN RAIL COMMUTER CORPORATION Defendant

J U D G M E N T

A J BESTER, AJ:

[1] In this action, launched in November 2009, the plaintiff claims damages in delict from the defendant for injuries allegedly sustained at approximately 16H30 on 15 October 2009, when he fell out of a moving rail commuter train at Inhlanzane Station, Soweto, Gauteng, as a result of an alleged negligence on the part of the defendant.

[2] At the commencement of the hearing the plaintiff, with the agreement of the defendant, applied for an order directing a separation of the issues of liability and quantum in terms of rule 33(4); an order directing that the hearing proceed only for the purposes of a determination of the alleged liability of the defendant; and for an order directing that the quantum related issues be postponed *sine die* for hearing at a later date. That order was accordingly made and the hearing proceeded only on the liability issues

[3] In its particulars of claim the defendant alleged the following grounds of negligence:-

"*6.1 The defendant failed to ensure the safety of members of the public in general and the plaintiff in particular on the coach of the train in which the plaintiff travelled;*

6.2 The defendant failed to take any or adequate steps to avoid the incident in which the plaintiff was injured, when by the exercise of reasonable care it would and should have done so;

6.3 The defendant failed to take any or adequate precautions to prevent the plaintiff from being injured;

6.4 The defendant failed to employ employees, alternatively, failed to employ an adequate number of employees to guarantee the safety of passengers in general and the plaintiff in particular on the coach in which the plaintiff intended to travel;

6.5 The defendant failed to employee employees, alternatively failed to employee and adequate number of employees to prevent passengers in general and the plaintiff in particular from being injured in the manner in which he was;

6.7 The plaintiff allowed to coach of the train in which the plaintiff was travelling to be overcrowded, which resulted in the plaintiff being pushed out of the train;

6.8 The defendant allowed the train to be set in motion without ensuring that the doors of the train and coach in which the plaintiff was travelling were closed before the train was set in motion;

6.9 The defendant took no steps to prevent the coach in which the plaintiff was travelling from becoming overcrowded;

6.10 The defendant allowed the train to move with open doors and failed to take any, alternative, adequate steps to prevent the train from moving with open doors;

6.11 The defendant failed to keep the coach safe for use by the public in general and the plaintiff in particular;

6.12 The defendant neglected to employ security staff on the platform and/or the coach in which the plaintiff was travelling to ensure the safety of the public in general and plaintiff in particular."

[4] The plaintiff further alleges, in paragraph 7 of his particulars of claim, that as a result of the alleged incident caused by the negligence of the defendant, the plaintiff sustained the following injuries:-

"*7.1 Fracture of the rip (sic, must be "rib");*

7.2 Fracture of the right femur;

7.3 Injured pelvis;

7.4 Painful right hip;

7.5 Left hip bruised."

[5] The defendant's plea constituted, in essence, a bare denial of, among others, the incident and the alleged negligence. Furthermore, apportionment of damages was not pleaded and neither was contributory negligence on the part of the plaintiff canvassed during the course of the hearing.

[6] However, at commencement of the hearing I was informed by the defendant's counsel that it is the defendant's position that the plaintiff's claim is fraudulent and that the defendant's defence will be directed at showing that deceit. The tenor of the evidence that the defendant intended to reduce, I was informed, would therefore be to show that the plaintiff was not injured in the train incident and that his injuries were not on the scale as alleged, but that he had suffered a lesser injury at home. Furthermore, I was told, the evidence would show that the medical record of the Chris Hani Baragwanath Hospital, Johannesburg (Soweto) ("Baragwanath"), Gauteng upon by the plaintiff relied was a forgery as the patient number reflected on it was that of another patient, one Ms Ntilashe Thandeka ("Thandeka").

[7] As a precursor to what follows below, it is necessary at this juncture to record that the evidence led by the parties in this case was, to echo the lament in **Mokwena v South African Rail Commuter Corporation Ltd and Another** (14465/2010) [2012] ZAGPJHC 133 (14 June 2012), strikingly sparse, that is, for a case in which the total sum claimed exceeds R2,000,000.00. For the most part, the evidence is of very little assistance in determination of the issues in the action. Evidence vital to the claim and the defence was not presented, for example:-

a) Although Thandeka was traced and contacted, she was not called upon or subpoenaed to give evidence;

b) The relevant train driver, train guards and security officials on duty on the day of and during the alleged incident was not called upon or subpoenaed to give evidence;

c) The maintenance records of the train on which the plaintiff had allegedly travelled were not discovered or subpoenaed;

d) There was no evidence by an appropriately qualified expert on safety measures to prevent rail coach doors from opening or from being forced open by commuters while the train was in motion;

e) The doctors, nursing staff, etc., on duty at Baragwanath on the day of the incident and who had allegedly treated the plaintiff and had completed his medical records were not called upon or subpoenaed to give evidence;

f) The admissions staff, admin personnel and data processors at Baragwanath who had processed and recorded the plaintiff's patient detail, diagnoses, nature and cause of injuries and treatment were also not called upon or subpoenaed to give evidence.

[8] To further compound matters, neither of the parties sought particulars for trial nor did they employ those crucial tools afforded under Rule 37(4). The parties' attorneys did have a pre-trial meeting, but it is apparent from the minute, the body of which comprises a sparse two pages, that it was no more than a perfunctory, mechanical affair with little purpose other than to secure an enrolment for hearing. The meeting, therefore, did not even begin to aspire to achieve the objectives of Rule 37.

[9] It is furthermore necessary to say at the outset that there were sharp conflicts on topics pertinently relevant to the disputes in the action between the testimonies of the plaintiff and his own witnesses and between these and the evidence presented on behalf of the defendant. Moreover, cross-examination revealed various inconsistencies in the evidence of all of these witnesses. The paucity of the evidence before me and it's very unsatisfactory, if not completely unreliable nature, all but confounded a determination of the credibility of any particular witness. That was so, particularly because the blemishes in the evidence could entirely or partly have been caused by factors such as the lapse of time since the incident and the general fallibility of human memory as a result of which information could innocently have been forgotten, modified, added, or distorted by subsequent information; or could simply inadvertently have been reconstructed. See:

Commissioner for Inland Revenue v Pick 'n Pay Wholesalers (Pty) Ltd 1987 (3) SA 453 (A) at 469F – G:-

> "Human memory is inherently and notoriously liable to error. One knows that people are less likely to be complete and accurate in their accounts after a long interval than after a short one. It is a matter of common experience that, during the stage of retention or storage in the memory, perceived information may be forgotten or it may be modified, or added to, or distorted by subsequent information. One is aware too that there can occur a process of unconscious reconstruction."

In this regard it is also apposite to refer to the remarks of Diemont JA in **S v Nyembe** 1982 (1) SA 835 (A) at 842F – H in respect of contradictions relating to events that had occurred only some *eight months* (three years in this case) before the hearing in that case:-

> "I am always surprised that witnesses can, or think they can, after a passage of weeks and months, recollect how they were seated in a motor car, what route they travelled and at what time they reached their venue. I am not surprised, however, when they fall into contradiction. The wise trial Judge knows that human memory is only too fallible …"

[10] Perhaps, in an attempt to make up for the mentioned paucity of the evidence I was, during argument by counsel for the plaintiff, invited to take judicial notice, as done in **Mokwena**, *supra*, of a variety of matter relevant to the determination of a negligent act or omission by the defendant and the general abysmal circumstances under which it operated its trains and under which its commuters were forced by circumstances to commute. In **Mokwena** the learned judge held, at paragraph 96, that "*Judges cannot pretend they live in ivory towers*" and that they "*must have some knowledge of what is reasonable or unreasonable in particular circumstances and of particular individuals and entities*", which knowledge include rail travel. Therefore, she said,

"*Judges are entitled to rely upon some of their own experience and knowledge as to rail travel*".

[11] With deference to the learned judge (whose legal acumen and judicial experience and expertise overshadow my much more limited capabilities by a wide margin), I would decline to tap into my own experiences and knowledge in an attempt to determine the dispute in this case. As the learned trial judge, I too, am white, but as opposed to her, we were in childhood by any standards very poor. Therefore, in years now long gone, we travelled on SAR & H trains and public busses, not by choice but of necessity for that was our only means of transport (when it could be afforded). Looking back from where I am now, my recollection of the service and the conditions of those services is that they were by no means perfect, but then we knew no better, accepted it without further thought and made do with it. I have since also been privileged to have used ordinary public rail, road and water transport in cities such as Hong Kong, London, Paris, Rome, Vancouver and Toronto. I have also experienced the notorious Teutonic efficiency, punctuality and cleanliness of public transport in Austria and Germany. I have more recently also used public transport in and between South African cities.

[12] Measured by criteria such as overcrowding, crowd control, security, signage, safety measures, etc., I have witnessed appalling conditions and failures, abject overcrowding and total lack of supervision and crowd control, for example, in Hong Kong, Rome, London and Paris that equal the worst of what I have seen and experienced in South Africa. And there, despite much greater resources and readily available, competitively priced, advanced technology, rail commuter injuries and fatalities are also not unusual. I have there also witnessed the forcing or wedging open of rail coach doors by impatient and even felonious commuters, particularly when a train slows at a platform; rivers of humanity rushing to embark and disembark before a train is

quite stationary; inconsiderate shoving, jostling; etc. My personal experiences are therefore quite different to that experienced by the learned judge in **Mokwena**.

[13] I am also embarrassed to disagree with the learned judge on another point - judges (and acting judges), drawn mostly from the ranks of the well-educated, financially comfortable professional classes, do live in ivory towers - privileged conditions that are more often than not worlds apart from that of the ordinary commuter. Accordingly, we will not readily accept what the ordinary commuter considers reasonable; we demand and take for granted much higher standards than the average commuter. How then can we, from that lofty perspective, realistically judge the reasonableness or otherwise of the actions of ordinary rail commuter plaintiffs and the difficulties faced by the rail services defendants to keep affordably priced wheels of transport rolling within the limits of their often meagre resources?

[14] I am accordingly reluctant to conclude that, when sitting in judgement, I may rely on my own personal knowledge and experiences (which would inevitably be coloured and shaded by factors such as culture, personality, sensitivities, etc.) to place the issue of negligence in this case in context. The mere notion of doing so leaves me with the uncomfortable realisation that I might very well, if not inevitably, descend into the arena and permit the issues to be clouded by my own perceptions, idealisms and even prejudices.

[15] I would therefor endeavour to decide the negligence issue this case bearing in mind that the simple question in issue is whether the plaintiff had discharged the burden of establishing, on a balance of probabilities, that the alleged incident in which he was injured would not have occurred but for the negligence of the defendant. The plaintiff therefore had to place at least some evidence before the court that gives rise to an inference of negligence on the part of the defendant, including a showing that such negligence was causally connected to

the alleged harm suffered. It is only then that the defendant would be called upon to adduce evidence to rebut that inference, or to face the prospect of having judgment entered against it: **Shabalala v Metrorail** 2008 (3) SA 142 (SCA) paragraphs 7-11. A plaintiff can hardly expect of me to supplement the deficiencies in his or her case with my own experience and knowledge, the accuracy of which a defendant can hardly seek to measure, test or contest.

[16] I re-emphasise this basic requirement restated in **Shabalala** because it appeared to me that the plaintiff in this case, perhaps seduced by the accommodating approach in certain other cases of a similar nature, was somehow of the view that, if a commuter is injured when embarking or disembarking a rail coach, particularly if the coach is in movement while the door is open, then *cadit quastio*, for *res ipsa loquitur* – the mere fact of an open door on a moving rail coach equals a *prima facie* case of negligence on the part of the defendant. Hence, perhaps, the sparse evidence on behalf of the plaintiff. As pointed out in **Ngubane v South African Transport Services** 1991 (1) SA 756 (A), the mere fact of an open door does not automatically equate negligence – *the open door is not the cause of the injury*. The cause of the injury could be the opening of the door by a rail services official before the train had come to a complete standstill. Therefore, if railway officials had ordered or allowed the train to proceed with an open door, or if they opened the door prematurely, that failure *could* be the real cause of the injury. Similarly, if there were reasonable means available to a defendant to prevent a door from being forced open by a commuter while a train is in motion, then the failure to install those means *could* also be a cause of the injury.

[17] Turning then to the evidence in this case, the plaintiff, an unemployed former security guard, narrated an, at occasion, somewhat incredible tale that went, in summary, as follows:-

a) On the morning of the incident, at approximately 05H00 AM, he had left his house for Inhlanzane Station to catch a train to Park Station, Johannesburg. He went on that journey to drop off, at any security company that he came across, two pre-prepared CV's for a job as a security guard.

b) He initially testified under cross-examination that he went "*to a lot of security companies around Park station*", but stated that he could not recall which companies exactly he had visited. Pressed further, he changed his story and testified that, upon his arrival at Park Station, he went into the street where he gave his CV's to two random security guards in uniform that he had met on the street. When pushed further, he made an about-turn and denied that he had gone into the street, but nevertheless maintained that he had given the CV's to such guards.

c) He testified that he again boarded a train at Park Station for Inhlanzane Station, where he arrived at shortly after 08H00 AM

d) As the train pulled into Inhlanzane Station, but before it had come to a complete stop, the doors of the coach had opened. He was pushed out and fell onto the ground on the platform. Under cross-examination he testified that, before the train had pulled into the station, he got up from where he was seated in preparation to disembark. He walked to, and held onto a pole some meters away from the door. There were other commuters between him and the door, but he could not recall how many. He initially said that he did not let go of the pole while the train was in motion, but then stated that he let go of the pole when it was safe to disembark, but while the train was still moving slowly. The door opened and commuters started pushing in and out through the door before the train had quite stopped. He got entangled in the flow of commuters, was pushed out of the door and fell to the ground on the platform. In his recollection, he was only a commuter who had fallen.

e) He testified that the incident had occurred at approximately 08H10 AM. When it was put to him that he alleged in his particulars of claim that the incident had occurred at 16H30, not at 08H10; he contended that he did not know where his attorneys got that time.

f) He said that no guard or rail official had come to his assistance - he had noticed some in the far distance, but they were busy and did not notice the incident.

g) After the fall, he was essentially immediately assisted by an unknown male. As he demonstrated in court, he placed his arm over the shoulder of that male and together they walked to his home which was approximately 10 to 15 minutes of walking time from the station.

h) He testified that he had hurt his right thigh in the fall and that he was limping while walking home. He was unaware that he had fractured his right femur.

i) After spending some time at home, his leg became painful and he told his brother Altos Mabuya ("Altos") that he needed to go to the hospital. He was then taken to the Baragwanath by Altos and his girlfriend where he was received at between 10:H00 and 11H00AM, and was X-rayed and treated. He further testified that he had spent approximately 6 to 7 days in hospital; his leg was operated on; metal plates were used to fix the fractured femur; and that the operation wound was joined with staples.

j) The plaintiff said that he did not report the injury to the defendant. Under cross-examination, when asked why it was not reported, he said that he had left the station without reporting it to anyone because he thought that the injury was minor.

k) The plaintiff testified that the above-mentioned Baragwanath medical report was, after his discharge, given to him. He confirmed

that it related to him. It was put to him under cross-examination that the patient number on that report was in fact not his, but that of Thandeka. He denied all knowledge of that apparent discrepancy. It was further put to him that the injury to his thigh was sustained when he had fallen off the roof of a carport at his home on the afternoon of the day of the incident, after a drinking session with two friends, namely Happy Malokwane ("Malokwane") and Christopher ("Makgomo") Makgomo, and his brother Altos. The plaintiff persisted with his version and denied the drinking session.

l) In response to clarification sought by the court, the plaintiff insisted that the only injury suffered by him was that to his right thigh. When referred to the Baragwanath medical report, which also listed, among others, pain in the hip; fractured ribs; tenderness of the pelvis; the removal of sutures; etc., the plaintiff was adamant that his only injury was that to his right thigh and that he had metal staples to secure the operation wound, not "*stitching*".

[18] That claimed injury to the thigh only, of course also stands in stark contradiction not only to the Baragwanath medical report, but also to the injuries alleged in paragraph 7 of the plaintiff's particulars of claim.

[19] Two supporting witnesses were called by the plaintiff, namely his brother, Altos, and his friend and neighbour, Malokwane. The evidence of these two witnesses, ignoring the numerous contradictions and inconsistencies in their evidence highlighted during the course of their cross-examination, contributed little of value to the case. Their evidence was apparently presented to corroborate the plaintiff's version that the injury was sustained during a fall at Inhlanzane Station. However, they could do no more than to confirm that they were informed by the plaintiff that he was injured during a fall at the station, because they were not witnesses to the alleged fall at the station. On the other hand, their evidence was also tendered to lend support for the plaintiff's evidence that he was transported to Baragwanath at about

midday on the day of the incident and to corroborate the treatment that he had received there for a fractured femur.

[20] The defendant called three witnesses in its case, namely a Mr Jan Paul Jordaan ("Jordaan"), a Metro Rail investigator; Mr Siphiwe Zachariah Nkosi ("Nkosi"), and accident investigator; and Malokwane, a nearby neighbour of the plaintiff.

[21] Jordaan's evidence in chief comprised, in the main, generalities about security systems employed by the defendant, reporting procedures, etc., that had little direct relevance. More specifically, he testified that he had inspected the posting sheets and occurrence books relevant to incidents that occurred at Inhlanzane Station for the period around 15 October 2009. He testified that no incidents such as described by the plaintiff had been reported.

[22] Jordaan's cross-examination on behalf of the plaintiff, however, solicited information that did not serve to advance the plaintiff's case on the alleged negligence; it advanced the case of the defendant. In particular, he testified that coach doors are operated by means of a vacuum system that ensured that, while the train is in motion, the doors remain closed. When closed, he said, the doors can only be opened by the use of force, much in the way as is the case with elevator doors. He further testified that, in his experience, commuters at times tend to put a foot between the doors to prevent them from closing fully, or that they forced the doors open and that it was basically impossible to police and prevent all such occurrences as guards can simply not be placed on each and every coach. When the version of the plaintiff that the door had opened as the train had slowed down to stop at the station was put to him, he testified that it could only have happened if the doors had been forced open by a commuter; a train guard will only activate the door release mechanism when the train is stationary. He further testified that all coach doors in any event also had prominent notices in

various languages warning commuters not to approach the doors while the train is in motion.

[23] The evidence of Nkosi, whose abject inertia as an investigator was amply demonstrated under cross-examination on behalf of the plaintiff, simply served to highlight the failures in the preparation and the presentation of the defendant's case on the alleged fraud:-

a) He testified, among others, that he had searched for the plaintiff's medical records at Baragwanath.

b) He established that the patient files for the plaintiff and Thandeka were missing, but that the patient number on the record that purports to be that of the plaintiff, was in fact the patient number for Thandeka.

c) Nevertheless, no consultations were conducted by him with medical, nursing or admin personnel to verify the recordals in the medical report for the plaintiff, and no statements were taken from any of them.

d) However, he succeeded in tracing Thandeka and was in telephone contact with her. Again, he did not bother to enquire about, or to obtain her own hospital records from her, and apparently also did not bother investigate, for example, the date of, and the nature of her injuries or ailments treated at Baragwanath. Neither did he attempt to have her at the hearing to give evidence on behalf of the defendant.

e) He further testified that, among others, he had made enquiries with the plaintiff's neighbours about the plaintiff, his injury and the cause of it. During the course of that investigation, he was told by Malokwane that the injury to the plaintiff's right thigh was sustained when he had fallen off a car port roof after a drinking session with Malokwane, Makgomo and Altos. He secured a sworn statement

from Makgomo in which Makgomo stated, among others, that the plaintiff was not injured in a train incident, but in a fall at home.

[24] Makgome's evidence, tendered in an endeavour to establish a fraud on the part of the plaintiff requires no more than a passing mention. His testimony permeated inconsistency and contradiction and hardly rises to meet acceptability on any standard. Numerous glaring contradictions between his evidence in court and his sworn statement given to Nkosi were casually dismissed by him with the excuse that he just wanted Nkosi to go away because he, Makgome, had no interest in the matter and that, when the matter came to court, he would set the statement straight.

[25] Turning then to a determination of the alleged fraud, and despite the plaintiff's fantastic tale about his job search and 10 to 15 minute (assisted) walk home from Inhlanzane Station on a leg with a femur so badly fractured that it required surgery and metal plates to repair, there is nothing before me to gainsay the plaintiff's evidence that he did sustain an injury on 15 October 2009, and that he was on that day admitted for treatment Baragwanath. Furthermore, incredible as the plaintiff's version might be, there is also no evidence to gainsay his statement that he was injured in a fall at Inhlanzane Station. Undeniably, on a conspectus of the evidence before me, various indicators point to the possibility of a fraudulent claim. Moreover, although I have serious doubt as to whether the plaintiff was in fact injured in the train incident described by him, the suspicion of a fraud created by these indicators simply does not gel into probability.

[26] Accordingly, the defendant failed to prove the alleged fraud on the part of the plaintiff.

[27] That finding having been made, it is necessary to consider whether the evidence of the plaintiff establishes negligence on the part of the defendant that is causally connected to the injury sustained by him.

[28] On the plaintiff's version it is established only that shortly before the train had stopped at Inhlanzane Station, and while it was still slowly moving, the door of the coach had opened and that commuters had immediately commenced embarkation and disembarkation. Irrespective of whether or not the plaintiff had let go of the pole used by him for support after the train had stopped or whether or not he had released it when the train was still in motion (his evidence in this regard was contradictory), the plaintiff also established that he was caught up in a tangle caused by commuters pushing into, and those pushing out of the coach. In consequence, he was jostled out through the open door of the coach and fell to the ground on the station platform, fracturing his femur.

[29] On the plaintiff's evidence, therefore, the door of the coach was in fact operational - it was not at all times open; it had only opened when the train was about to stop. However, no evidence whatsoever was placed before me to show, or that would permit the inference, that the coach doors were prematurely and precipitously opened by a train guard, the train driver or some other functionary of the defendant. The mere fact that the doors had opened shortly before the train had come to a standstill, does not warrant an inference of negligent conduct on the part of an employee of the defendant. It is equally probable, as testified by Jordaan, that the doors might have been forced open prematurely by commuters anxious to get out and to be on the way. It is similarly equally probable that the plaintiff's injury was occasioned by the mere fact that he was pushed out of the coach by such impatient fellow commuters. The latter two scenarios would be happenstances over which the defendant was not shown to have had control; or that it was in default of an obligation to take reasonable measures to avoid them; or that it was reasonably possible to avoid them at all. In essence, therefore, the plaintiff has not shown that the most plausible probable conclusion to be drawn from the proven facts and circumstances of this case is that the doors of the coach had opened as a result of a

negligent conduct or omission on the part of the defendant. There are a variety of other conclusions that are equally probable.

[30] As for unacceptable overcrowding, no evidence was led on behalf of the plaintiff, for example, on the seated and standing commuter capacity of a coach; the maximum number of seated and standing commuters that can be accommodated in a coach; and that the number of standing and/or commuters in his coach was permitted to exceed the permitted maximum. At best for the plaintiff, he contended that the coach in which he had travelled, was full and maybe even crowded, but it was not said to have been overcrowded. On the basis of the evidence before the court, therefore, it cannot simply be assumed or inferred that an impermissible or even unreasonably unacceptable number of commuters were permitted in the coach (or on the platform) and that the defendant was therefore remiss in not exercising control over those numbers or over their potential behaviour.

[31] Moreover, other than the plaintiff's evidence that during disembarkation and embarkation, there was a rush of many commuters, there is no evidence of an out-of-control type of stampede that ought to have been anticipated and prevented by the defendant by means of the application of adequate and effective crowd control. On the contrary, the evidence of the plaintiff showed no more than that the behaviour and flow of commuters at the time of his fall was that which can reasonably be expected in a morning rush hour period: see **South African Rail Commuter Corporation Ltd v Thwala** (661/2010) [2011] ZASCA 170 (29 September 2011) paragraph 14.

[32] In the premises I find that the plaintiff has not discharged the onus that it bore to show that the defendant was negligent in any way.

[33] In respect of the costs of the action, it is necessary to record that the greatest part of the hearing was consumed by the defence of fraud belatedly put up by the defendant. During argument I therefore

enquired from counsel for the defendant, if the defendant's defence was dismissed and if I were to hold that the plaintiff had not discharged his onus, whether it would be appropriate to make any order of costs. Counsel for the defendant fairly submitted that an appropriate order in that event would be to make no order as to costs. I agree.

I accordingly make the following order:-

(a) the defendant's defence of fraud on the part of the plaintiff is dismissed;

(b) the plaintiff's claim is dismissed;

(c) there shall be no order as to costs.

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A J BESTER
ACTING JUDGE OF THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

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INSTRUCTED BY	:	DUDULA ATTORNEYS
COUNSEL FOR THE DEFENDANT	:	ADV NGUTSHANE
INSTRUCTED BY	:	MAJAVU INC
DATES OF HEARING	:	10, 11, 12 OCTOBER 2012
DATE OF JUDGMENT	:	15 OCTOBER 2012