REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: A 3092 / 11

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

2/11/2012 .....
DATE SIGNATURE

In the matter between:

ADRI VAN ZYL **Appellant**

and

METRO BUS **First Respondent**

CITY OF JOHANNESBURG **Second Respondent**

J U D G M E N T

SAWMA, AJ

1. During or about May 2010 the appellant commenced action against the first and second respondents in the Magistrates Court for the district of Johannesburg.

2. The appellant's cause of action was premised upon an incident that occurred on the 6th May 2008, at a time when the appellant was boarding a Metro bus, it being the appellants allegation that the door mechanism malfunctioned as a result of which her hand was caught in the door, causing her to sustain a cracked bone in her left wrist. The driver of the bus was one Gift, but at the time of the incident the bus was stationary.

3. The appellant has enumerated the grounds of negligence relied upon in paragraph 5 of the particulars of claim. Therein she asserts that the incident was caused, not by the negligence of the driver of the bus, but by the negligence of other employees of the first respondent. The pleaded grounds of negligence were conceded by the respondent for the purpose of the determination of the stated case referred to below. Inasmuch as this appeal turns on a question of causation, the pleaded grounds of negligence, however, are of no further interest.

4. The matter proceeded to trial on a stated case between the appellant and the first respondent only, it being agreed between the parties that the claim against the second respondent would be postponed *sine die*.

5. In terms of the stated case it was agreed between the appellant and first respondent that:

5.1 the only issue that required determination was the question of whether or not the appellant was excluded from claiming any damages that she may have suffered, by reason of the provisions of the **Road Accident Fund Act**, Act 56 of 1996 (**"the Act"**), in that any liability in respect of any such injury lay, not against the first respondent, but against the fund (the first respondent having pleaded that the provisions of Section 21 of "**the Act**" precluded the appellant from the pursuit of the action);

5.2 should the c*ourt a quo* find in favour of the first respondent, the appellant's claim stood to be dismissed with costs;

5.3 if the court found in favour of the appellant It was then agreed that the first respondent would be liable to the appellant in the sum of R 20 000,00 together with costs of suit;

6. The agreed factual matrix was identified as follows:

"(1) On the 6th May 2008 the [appellant] was boarding a bus owned by the [first respondent] as defined by Section 18 (2) of the Road Accident Fund Act 56 of

96, and the definitions as set out in Section 1 of the aforesaid Act;

(2) The aforesaid bus was stationary and idling at the time the [appellant] boarded the bus;

(3) As the [appellant] started boarding the bus she put out her left hand in order to hold onto the door of the bus to pull herself into the bus; and

(4) Without warning the door of the bus malfunctioned and slammed open catching the plaintiffs left wrist between the door and the side of the bus, thereby injuring the plaintiffs wrist";

7. In argument this Court was advised by Counsel representing both the appellant and the first respondent that the involvement of the second respondent had come to an end and that, as a result, no further mention need be made in regard to the second respondent.

8. The *court a quo* found in favour of the first respondent and accordingly dismissed the appellant's claim with costs. In making such determination the *court a quo* made reference to the fact that there was nothing before it to explain how the injury had occurred and whether or not the injury was as a result of any act on the part of the driver that could have led to the incident, such as the driver depressing a button causing the doors to open. As a result the *court a quo* concluded that the allegations advanced by the

Appellant could not be sustained.

9. The relevant provisions of "**the Act**", for present purposes, are sections 17 and 21 respectively.

10. Section 17 of "**the Act**" provides as follows;

> *"17* ***Liability of Fund and agents***
>
> *(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"

11. Section 21 of **"the Act"** provides as follows;

"21 ***Abolition of certain common law claims***

(1) No claim for compensation in respect for loss or damage resulting from bodily injury to or the death of any person caused by or arising from the driving of a motor vehicle shall lie –

(a) against the owner or driver of a motor vehicle; or

(b) against the employer of the driver...."

12. In terms of the agreed facts forming the subject matter of the stated case, the injury sustained by the appellant was attributable, not to the manner in which the vehicle was been driven at the time of the injury, but rather to the sudden and unexpected malfunction of the door of the bus.

13. It is to be noted that section 17(1) of **the Act** utilises the words "arising from the driving" and not the words "arising out of the driving", the latter phraseology having been utilised in the corresponding Sections of the applicable legislation preceding **the Act**.

14. Neither counsel addressed the change in phraseology, their respective arguments having, as a point of departure, an acceptance of the fact that the established test applied to the words "arising out of", is of equal application to the test to be applied to the words "arising from".

15. For the purpose of this judgment I will accept, without deciding, that the change in phraseology does not require a more restricted application of the causality test, as the issue does not affect the outcome of this judgement. It would, however, appear that the factors enumerated in the matter of Wells and Another v Shield Insurance Company Ltd[1], are as applicable to interpreting section 17(1) of **the Act**, as was the case with the wording of the corresponding sections of the Motor Vehicle Insurance Act, Act 29 of 1942, and the Compulsory Motor Vehicle Insurance Act, 56 of 1972 .

16. The meaning of the words "caused by" and "arising out of" have received much judicial consideration. It has been held that the words "caused by" refer to the direct cause of the injury, whereas the words "arising out of" refer to the case where the injury, although not directly caused by the driving, is nevertheless causally connected therewith, the driving being a *sine qua non* thereof [2].

17. A consideration of 4 cases that have had occasion to grapple with the issue of causality associated with the words "arising out of", renders assistance in the determination of this appeal. The first is *Jacobs v Auto Protection Insurance Co. Ltd* [3], in which the plaintiff was injured when his foot slipped into the uncovered fly wheel compartment of a bus. The injury that the plaintiff sustained arose from contact that was made with the fly wheel which was moving at the time. The fly wheel was moving because the bus was being driven. The question that the court was required to answer was whether the injury was "caused by", or "arose out of", the driving of the insured motor vehicle as contemplated by Section 11 (1) of the *Motor Vehicle Insurance Act*, Act 29 of 1942[4].

18. The court found that the necessary causal link had been established because the injury had resulted from contact with the mechanism (the flywheel), which was in motion[5]. The flywheel was in motion because the bus was being driven. Significantly Vieyra J pertinently referred to the fact that whilst the mechanism was not running the uncovered fly wheel was not a source of danger, but once the mechanism was put into operation and the vehicle was in motion the uncovered fly wheel (as would be the case with a defective brake) became a risk which had not existed prior thereto[6].

19. The second case is *Wells and Another v Shield Insurance Co. Ltd*

and Others (*supra*) in which the facts were as follows; one Spiers manoeuvred his vehicle into a parking bay, switched off the engine and then opened the door preparatory to alighting from the vehicle. At that moment a trackless tram was proceeding on the carriageway about to pass Spiers's motor vehicle. The now opened door of Spiers's vehicle protruded into the path of the tram causing, not only a collision between the trackless tram and the door, but also between the tram and a vehicle being driven by the first plaintiff in the action, the tram having veered across the carriageway as a result of the opening of the door. As a result the first plaintiff and his wife (the second plaintiff), who was a passenger in the vehicle, sustained injuries. It was contended by the plaintiffs' that the opening of the door by Spiers constituted, or formed part of, the driving of a motor vehicle and thus the plaintiffs' injuries arose out of the driving of a motor vehicle within the meaning of Section 11 of the *Motor Vehicle Insurance Act, Act 29 of 1942* [7].

20. In coming to the conclusion that there was an insufficient causal connection between the driving of the vehicle and the injuries sustained by the plaintiffs', Corbett J (as he then was) remarked as follows;

> *"The question remains as to whether it can be said to have arisen out of the driving, either in its ordinary or extended*

meaning. Now, I would emphasise that the opening of the door caused the injury only because it occurred precisely at the moment when it did. Had it occurred some appreciable time earlier then it is probable that it would not have caused any such collision or injury and had it occurred some appreciable time later it would almost certainly not have had those consequences. It is important to bear this in mind when asking oneself the question whether there was a causal connection between the driving and the injury sufficiently real and close for it to be said that the injury suffered by the plaintiffs arose out of such driving"[8].

21. In the result the court concluded that the case was one which fell within, or was closely analogous to, that category of case in which the only causal connection was that, at the time of the infliction of the injury, or shortly prior thereto, the insured vehicle was being driven[9].

22. The third case is *Pillay v Santam Insurance Co. Ltd*[10] in which the plaintiff had sustained injury in circumstances where the conductor of a bus had forced the plaintiffs hand free of the handrail to which the plaintiff was holding, in consequence of which the plaintiff fell from the bus. After the fall the bus wheels passed over the plaintiff[11]. The court was required to determine, on exception, whether the particulars of claim lacked the averments, either express or implied, which would support a finding that the injuries were "caused by", or "arose out of", the driving of the bus[12]. Broom

J concluded that it was probable that the movement of the bus contributed to both the plaintiff's fall and to the severity of his injuries but that those were matters to be decided by the trial court and could not be determined on exception[13].

23. The fourth matter is *Mokoele v National Employers General Insurance Co. Ltd and Another*[14] in which the plaintiff, a passenger on a bus, had suffered an injury as a result of the collapse of the floor of the bus, such having been alleged to be attributable to the negligence of the second defendant and / or the driver of the omnibus. The vehicle was stationary, with its engine running, at the time of the collapse of the floor[15]. As a result the plaintiff's leg had fallen through the floor and had come into contact with the engine. Kirk-Cohen J was required to determine, on exception, whether or not the claim was precluded in consequence of the provisions of Section 21 as read with Section 27 of the Compulsory *Motor Vehicle Insurance Act, 56 of 1972*[16].

24. Kirk-Cohen J came to the conclusion that the matter could not be determined on exception inasmuch as it was necessary to demonstrate by way of evidence whether or not the injury was caused by a moving part of the engine, irrespective of whether the omnibus was stationary. The court stated thus;

> *"On one possibility of the facts alleged by the plaintiff in casu, evidence may demonstrate that her left leg was injured by a moving part of the engine. If that is established then, in the light of Vieyra J's reasoning, the plaintiff's injury would have arisen out of the driving of the omnibus. If, however, the evidence establishes that the injury was not caused by a moving part of the engine but that it would have occurred irrespective of whether the engine was running at the bus stop and would equally have occurred had the omnibus been parked in a bus shed or in a condition where it could not have been driven, then, in light of the Vieyra J's judgement, the injury would not have arisen out of the driving of the insured vehicle. In such circumstances there would be, to use the words of Vieyra J, no "risk of a type which differed in accordance with whether the bus was been driven or not"*[17].

25. Can it be said that the malfunction of the door of the bus *in casu* is a "risk of a type which differed in accordance with whether the bus was being driven or not"? In my view the answer to that question is dependent upon whether or not a 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 stationary at the bus stop. Accordingly, if the malfunction was dependent upon the engine running, that, in my view, and in 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.

26. The agreed facts forming the subject matter of the stated case unfortunately shed no light on this aspect of the matter.

27. The reliance by the first respondent upon the provisions of "**the Act**' constitutes a special defence in the circumstances and accordingly the first respondent bore the onus of establishing that the plaintiff's injuries were "caused by", or "arose from", the driving of the bus[18]. In the circumstances the failure of the parties to deal with this cardinal aspect in the stated case must lead to the conclusion that the first respondent has failed to discharge the onus resting upon it.

28. I have already stated that it was agreed between the parties that, in the event that this Court should uphold the appeal, the first respondent should be ordered to effect payment to the appellant in the sum of R 20 000,00, together with interest thereon. In regard to the interest, although such was not pertinently agreed to between the parties in the stated case, Counsel for both the appellant and the first respondent agreed that the sum of R 20 000,

00 ought to bear interest at the rate of 15.5% per annum from the date of the judgement of the c*ourt a quo*, (being the 11th March 2011) to date of payment.

29. In these circumstance I propose an order in the following terms namely:

29.1 the appeal is upheld;

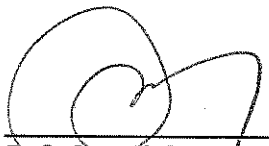
29.2 the first respondent is ordered to affect payment to the appellant of the sum of R 20 000,00;

29.3 the aforesaid sum of R 20 000,00 is to bear interest at the rate of 15.5% per annum calculated from the 4th day of March 2011 to date of payment;

29.4 the first respondent is ordered to bear the appellants costs both in respect of the action and in respect of this appeal;

AG SAWMA
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered



D.S.S. MOSHIDI
JUDGE OF THE HIGH COURT

Final date of the hearing:	2 August 2012
Date of the judgment:	2 November 2012
Counsel for the appellant:	Adv. P J Van Der Berg
Instructed by:	Corne Van De Venter Attorneys
Counsel for the first respondent:	Adv. A Vorster
Instructed by:	Savage Jooste & Adam Inc c/o Leon Kies Attorneys

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[1] 1965 (2) SA 865 (C) at page 868H-869G
[2] *General Accident Insurance Company South Africa Ltd v Xhego and Others 1992 (1) SA 580 (A) at 586 C-E*
[3] 1964 (1) SA 690 (W)
[4] See *Jacobs v Auto Protection Insurance Co. Ltd Supra* at p691 H - 692 A.
[5] See *Jacobs v Auto Protection Insurance Co. Ltd Supra* at p694 C - D
[6] *Jacobs v Auto Protection Insurance Co. Ltd Supra* at 694 A
[7] the relevant provisions of which require a registered insurance company, which has insured a vehicle, to compensate a third party in respect of loss or damage suffered as a result of bodily injury caused by, or arising out of, the driving of an insured motor vehicle by any person, *inter alia* if the injuries are due to the negligence or other unlawful act of the person who drove the motor vehicle
[8] See *Wells and another V Shield Insurance Co. Ltd* at 872 E-G
[9] See *Well and another V Shield Insurance Co. Ltd Supra* at 872 H
[10] 1978 (3) SA 43 (D)
[11] *Pillay v Santam Insurance Co. Ltd Supra* at 44 B - D
[12] *Pillay v Santam Insurance Co. Ltd Supra* at 45 A
[13] *Pillay v Santam Insurance Co. Ltd* at P 46 E - G
[14] 1984 (1) SA 27 (T)
[15] See *Mokoele the National Employers General Insurance Co. Ltd Supra* at p 29 B-E.
[16] Section 21.1 of Act 56 of 1977 provided that if a Third party suffered any loss or damage as a result of bodily injury caused by or arising out of the driving of the insured vehicle and the requisite negligence was proved, then the insurer of that motor vehicle, was liable to pay such damage to the third party. Section 27 of such act precluded the third party, entitled to claim under Section 21 thereof, from pursuing a claim against the owner of the vehicle.
[17] See *Mokoele the National Employers General Insurance co. Ltd Supra* at p 31 H-32 B - C
[18] Masuku and Another v Mdlalose and Others 1998 (1) SA 1 SCA at 11 B-C

SUMMARY

Insurance – Road Accident Fund Act 56 of 1996 – "Arising from the driving of a motor vehicle" in terms of section 17(1) of the Act – causal connection between bodily injury and driving required – test to be applied – special defence based on section 27 of the Act failing where facts on stated case not consistent only with injury arising from driving of insured vehicle".