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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

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

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DATE

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SIGNATURE

CASE NO: 34136/13

In the matter between
C. M. J. W.

DATE: 17/4/2014
PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MOLEFE J:

[1] On 22 August 2006, at approximately 15h15, at or near Fairlands, a collision occurred involving a Route 71 metro bus for Fairlands, then and there being driven by Mr Johannes Ratau ("the insured driver"). The plaintiff was a fare-paying passenger in the aforementioned vehicle at the time of the accident.

[2] As a result of the aforesaid collision, the plaintiff sustained bodily injuries for which she had to receive medical treatment. The plaintiff instituted an action against the defendant in terms of the Road Accident Fund Act No 56 of 1996 ("the Act") for damages suffered, as a result of the injuries so sustained. The plaintiff's action is based on negligence of the insured driver.

[3] At the commencement of the trial, the parties agreed to separate the issues of liability (merits) and quantum in terms of Rule 33 (4). The trial proceeded with the issue of merits and the issue of quantum was postponed *sine die*.

[4] Three witnesses testified on behalf of the plaintiff and the defendant called the insured driver as the only witness.

[5] The plaintiff's evidence can be summarised as follows:

5.1 On 22 August 2006, the plaintiff was [...] years old and was a student at N. High School. At approximately 15h15, she and a number of other students were standing at the bus stop, waiting for a bus to go home. The bus stop was just opposite the school. When the bus arrived it was fifteen (15) minutes late and the students rushed into the bus in order to occupy the back seats.

5.2 The plaintiff was the last person to board the bus. Whilst in the process of boarding, with her one foot on the first step of the bus and her other foot on the ground, the bus started moving. She quickly put her other foot inside the

bus and the bus door closed on her. The bar on the door hit her on the back of her head, causing her to fall forward and to hit her head on the backpack of a student in front of her.

5.3 The plaintiff started screaming at the insured driver telling him that he hit the back of her head with the door. The insured driver screamed back at her and the plaintiff swore at the insured driver who in turn swore back at her. After the plaintiff had paid the bus fare, the insured driver slapped her on the side of her face and on her chest. The plaintiff sat down and when the bus stopped at her stop, she got off the bus and informed the insured driver that she was going to report him for assault.

5.4 Plaintiff's mother took her to the police station on the same day to lay a charge of assault against the driver. They were given a J88 medico-legal form to be completed by a medical practitioner. They went to Sandton Medic-Clinic on the same day where after examination and X-rays, the Doctor informed her that she had sustained a concussion on the back of her head. Plaintiff testified that after the accident, she now suffers from violent migraine headaches.

5.5 The plaintiff testified that the insured driver caused the accident because he failed to wait for her to enter the bus she was being conveyed and caused the bus to move whilst she was still in the process of mounting the bus. Under cross-examination, the plaintiff testified that she did not show the injuries she sustained to the insured driver.

[6] Ms L. A. M. W. testified that she was the plaintiff's mother and her evidence can be summarised as follows;

6.1 On the 22 August 2006 when she arrived home from work, she found the plaintiff crying and very upset. The plaintiff informed her that she had been attacked by a Metro bus driver on her way from school. She had a visible lump behind her head and was in pain. Ms W. took the plaintiff to Fairlands Police Station to lay a charge of assault against the bus driver.

6.2 At the police station they were given a medico-legal (J88) form and were advised to take it to a District Surgeon to complete it. They went to Sandton Medi-Clinic where the plaintiff was examined and X-rays taken and the prognosis was that she had sustained a concussion from the bus door which hit her at the back of her head.

6.3 Ms Williams testified that ever since the accident the plaintiff suffers from stiffness of the neck and migraine headaches. She was later informed that the criminal case against the insured driver has been thrown out of court.

[7] Constable Cynthia Boniswa Moilwa testified that she was employed at the South African Police Services, Commercial Unit. On 6 September 2006, she was a student constable at Fairlands Police Station. Plaintiff's Counsel referred her to the Index to Merits Bundle, marked Exhibit "A" and in particular to the "statement by suspect" which was made by Mr Johannes Ratau. Captain Moilwa verified the

statement and testified that she wrote the statement after Mr Ratau had told him what happened. She then read the statement to him and Mr Ratau confirmed that he was satisfied with the contents of the statement and signed it.

The plaintiff closed its case.

[8] The insured driver, Mr Johannes Ratau testified on behalf of the defendant and his evidence is summarised as follow:

8.1 He is a bus driver working at Milpark Depot, Braamfontein. On 22 August 2006, he was the driver of a Metro route 71 bus on his way to Fairlands. At approximately 15h15, he stopped the bus at Mountain view bus stop in Cresta next to a school and school children started boarding the bus, in a queue. One of the school children, who he identified in court as the plaintiff stood near the driver, in the middle of the bus thoroughfare after she had purchased her bus ticket. She was blocking about seven school children behind her to board the bus and was chatting to one of the children who was standing in the queue outside the bus.

8.2 Mr Ratau testified that he asked the plaintiff to move backwards into the bus, and she did. He then closed the door and whilst the bus was in motion, the plaintiff approached him and swore at him. He asked the plaintiff to go back and sit down and she did. When she alighted the bus at her bus stop, she was swearing at Mr Ratau again. Mr Ratau drove off. The plaintiff never mentioned her injuries nor show her injuries to him. Mr Ratau denied that he drove the bus whilst the plaintiff was in the process of boarding the bus and

testified that the type of bus he was driving could not be moved whilst the door was still open. He also denied that he assaulted the plaintiff by slapping her on the face and chest.

8.3 Under cross-examination, Mr Ratau changed his testimony and said that the plaintiff started swearing at him at the time when he asked her to go into the bus. When the bus was in motion, she again came from her seat to swear at him and when she alighted from the bus she again swore at him. He further testified under cross-examination that it would not have been possible for the other school children to enter the bus whilst plaintiff was standing where she was.

8.4 Plaintiff's counsel cross-examined Mr Ratau on the statement he made to the police and questioned him why he never mentioned in his statement that the cause of the plaintiff's swearing, was because he asked her to move from where she was standing. In the statement he testified that he threatened to slap the plaintiff but denied under cross-examination that he never told the police that.

Defendant closed its case.

[9] Plaintiff's counsel submitted that the plaintiff was a truthful witness and that she never contradicted herself. She also submitted that her injuries are corroborated by the medico-legal J88 form as noted by the Doctor who examined her. Plaintiff's evidence was also corroborated by her mother's testimony.

[10] Plaintiff's counsel further submitted that the insured driver's version was full of contradictions and was fabricated. It was counsel's argument that it was highly improbable that a 14 year old child would block and prevent other school children to board the bus and when asked to move, to swear at the bus driver.

[11] In a civil case, the onus is obviously not as heavy as it is in a criminal case, but nevertheless, where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive versions, the plaintiff 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 version advanced by the defendant is therefore false 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. (See ***National Employer's Mutual General Insurance Association v Gany 1931 AD 187 at 199***).

[12] The plaintiff *in casu* appeared to be an honest credible and consistent witness whose testimony can be relied upon. There is no reason for preferring the insured driver as being a better or more reliable witness than she was. I found the plaintiff to be a more reliable witness than the insured driver. On the evidence before me, the plaintiff's version is clear; she was in the process of entering or boarding the bus for the purpose of being conveyed when the insured driver moved the bus and she was hit by the bar of the door when the door closed on her. Her evidence when coupled with the corroboration of the injuries she sustained, leads me to the inevitable conclusion that her version is true.

[13] The insured driver's version, is in my opinion on a balance of probabilities not true. The insured version is flawed in that; (i) there are a number of material contradictions in his testimony and the statement he gave to the police; (ii) he was able to properly read the first paragraph of the statement into the record without any problem, but when asked to read the second paragraph which highlighted the contradictions, he conveniently could not read without his glasses; (iii) he testified that the type of bus he was driving on the day of the incident could not move with the door open. This in my view confirms the plaintiff's version that the door closed on her when the driver put the bus in motion.

I therefore find the plaintiff's version to be more probable.

[14] I am unable to find any negligence whatsoever that can be attributed to the plaintiff. The negligence of the insured driver was the sole cause of the accident. In the circumstances I find that the plaintiff has successfully discharged the onus expected of her of proving negligence on a balance of probabilities on the part of the insured driver.

[15] I therefore make the following order:

The defendant is liable to pay 100% of the plaintiff's proven or agreed damages.

The draft order marked "X" is hereby made an order of court.

D.S. MOLEFE

JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel on behalf of plaintiff : Adv. M van Antwerpen

Instructed by : Houghton Harper Inc.

Counsel on behalf of defendant: Mr. D Mogale

Instructed by : Sekati Monyane & Partners

Date Heard : 14 April 2014

Date Delivered : 17 April 2014