



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Not Reportable

CASE NO: 137/07

In the matter between:

M ABRAHAMS

APPELLANT

versus

SPRINGBOK ATLAS COMPANY (PTY) LTD

RESPONDENT

CORAM: NAVSA JA and HURT, KGOMO AJJA

Date of hearing: 21 FEBRUARY 2008

Date of delivery: 28 MARCH 2008

Summary: Claim for personal injury – negligence – fittings in bus – absolution from the instance.

Neutral citation: M Abrahams v Springbok Atlas (137/2007) [2008] ZASCA 32 (28 March 2008)

HURT AJA

[1] On the morning of Friday 14 May 1999, a group of pupils from Wynberg School, Cape Town, were being conveyed to Port Elizabeth in a bus owned by the respondent, Springbok Atlas Co. (Pty) Ltd. While the bus was travelling along the N2 freeway in the vicinity of Riversdale, one of the passengers, Riyadh van der Westhuizen, fell out of the bus through the window of a toilet which was situated at the rear of the bus. The bus was travelling at a speed of about 80 kph at the time of this incident and, not surprisingly, Riyadh sustained a number of injuries as a result of his fall. He was 14 years old at the time. It is common cause that he suffered amnesia, presumably as a result of injuries to the head and he was, and still is, unable to describe how he happened to fall through the toilet window which was fitted into a seal and was not designed to be opened.

[2] Almost 3 years after the event, Riyadh's mother, Mrs M Abrahams, instituted action against the Road Accident Fund (which she cited as the first defendant) and the respondent (as second defendant) for damages arising out of the injuries sustained by Riyadh. The claim against the first defendant was settled and the trial proceeded in the Cape Provincial Division before Allie J with the respondent as the only defendant. At the outset of the trial, counsel agreed that the court would be asked to rule separately on the issue of liability and an order to this effect was made in accordance with Rule 33 (4). After hearing the evidence, Allie J ruled that the plaintiff had failed to discharge the onus of proving negligence on the part of the defendant and made an order absolving the defendant from the instance. There was an application for leave to appeal which was refused by Allie J. The present appeal is before us with the leave of this court. I will refer to the parties by their designations in the court a quo.

[3] In her particulars of claim, the plaintiff had pleaded that Riyadh's fall and the injuries consequently sustained by him were the result of negligent conduct on the part of the servants of the defendant in one or more of the following respects: --

- '(a) the driver of the bus suddenly caused the bus to lurch forward, thereby causing Riyadh to fall backwards against the window of the toilet;
- (b) the servants of the defendant failed to ensure that the window of the toilet was properly secured and that the bus was generally in a roadworthy and safe condition;
- (c) the servants of the defendant, acting within the course and scope of their employment, failed to ensure that the carpet of the toilet was properly fitted and did not cause the door of the toilet to jam against it, thereby necessitating considerable force to be used by persons attempting to open the door from the inside.'

[4] In the course of his opening address at the trial, counsel for the plaintiff was granted an amendment to the allegation in (c) by the substitution of the word 'outside' for the word 'of'. It appears from the evidence that the misconception relating to the position of this carpet may have arisen because statements from the pupils who observed the events were incorrectly recorded. I am prepared to assume that this was so and that the reference in the statements made about a month after the event to a carpet 'in the toilet' was the result of a misunderstanding between the witnesses and the person taking their statements.

[5] During the course of the trial, the plaintiff's counsel abandoned the contention that Riyadh had fallen through the window because the bus had lurched. The result was that only two grounds of negligence were relied upon by the plaintiff at the conclusion of the evidence, namely the ground in the amended paragraph (b) and that in (c).

[6] At the time when Riyadh fell out of the bus he was alone in the toilet and the door was closed. Since he was unable to recollect what had happened, the precise sequence of events which culminated in his fall must be a matter of conjecture. Although it was the subject of (sometimes heated) debate in the course of the trial, it was now conceded, in argument on appeal on behalf of the plaintiff, that the most probable sequence of events was that Riyadh found himself unable to open the toilet door in the ordinary manner and that he 'attempted to exert more force against the door by bracing his feet against the door and his back against the . . . window. In so doing

he was able to exert sufficient force to cause the window and rubber surround to dislodge from the frame'.¹ I think this concession was wisely and justifiably made.

[7] Counsel for the plaintiff contended that if it is found on the evidence that the window collapsed because it was badly fitted (or some other defect had rendered it insecure) or that the toilet door jammed because of the nature of the carpet or the way that the carpet was placed, then the plaintiff will have established the negligence requisite to render the defendant liable for such damages as the plaintiff may be able to prove. (I am ignoring, for the purposes of deciding this appeal, the Third Party Notice in which the defendant seeks an apportionment of damages as a result of alleged contributory negligence on the part of Riyadh.) While one is inclined to accept that use of a vehicle such as the bus with an insecurely fitted window would probably amount to negligence, there must be substantial doubt as to whether the mere presence of an ill-fitted or loose carpet would give rise to an inference that the bus owner or operator should have foreseen the possibility that it might cause injury.² For the purposes of this judgment, however, I am prepared to assume, in the plaintiff's favour, that proof of either of these allegations would constitute a *prima facie* case of negligence. As already indicated, Allie J absolved the defendant from the instance after hearing both parties' evidence. She did so on the basis that the evidence of the plaintiff's witnesses to the effect that the window was insecurely fitted and that the toilet door had become jammed against the carpet was not sufficiently convincing to discharge the onus upon the plaintiff. It is this finding, in particular, which is challenged on appeal.

[8] In the course of argument before us, counsel for the plaintiff narrowed the issues still further by conceding that if the operation of the toilet door was hampered by one of the pupils outside the toilet interfering with, or manipulating, the door handle so as to make it difficult to open from inside the toilet, then the plaintiff's claim must fail.

¹ I quote from plaintiff's counsel's Heads of Argument.

² *Kruger v Coetzee* 1966 (2) SA 428 (A) at p 430 E to F

[9] Four of the witnesses called by the plaintiff were Riyadh's fellow pupils who were in the bus at the time of the unfortunate occurrence. In keeping with other complicating factors arising out of the delay in bringing this matter before court, this evidence required to be viewed through a benign eye. They were testifying about a sudden and horrifying sequence of events which had taken place over a very short period some six years previously. They were all about 14 years old at the time of the occurrence and the temptation to indulge in reconstructive analysis, at least during the remainder of their journey to Port Elizabeth and on their return to school in the following week, must plainly have been irresistible. They had made statements to the police about a month after the event. They were not prepared to concede that those statements had been taken down entirely accurately by the policemen concerned, although, by and large, they were inclined to the view (a perfectly understandable one) that their memory of events after the lapse of a month would be more reliable than it was at the time of entering the witness-box. A further complication was that there had been no steps taken, either at the time of the unfortunate occurrence or within a reasonable time thereafter, to carry out an inspection of the bus as a whole or the toilet door and window in particular. This occurred although it must have been apparent from very shortly after the event that the question of responsibility for it would ultimately become important. As a consequence of there having been no drawings, data or photographs depicting the scene and the layout of the relevant items, the witnesses had no tangible points of reference to which they could relate their descriptions of the scene, and the court was left to try to estimate or imagine such crucial matters as the dimensions and location of various items and features. Counsel for the plaintiff urged us to have regard to these factors and view the various contradictions between the witness' respective versions more as corroboration that there had been no collusion between them to put up a falsified version, than as a source of doubt as to the reliability of their evidence. Although there is substance in the suggestion, sight must not be lost of the fact that the presiding judge made an explicit finding as to the credibility of these four witnesses and this finding must be accorded its customary weight on appeal unless we can conclude, on the contents of the record alone, that it was misguided.

[10] Because of its crucial nature, it will be convenient to deal with the evidence given by each of these four eyewitnesses separately.

[11] **Kyle Nash** told the court that he had been sitting at the back of the bus, in the last row of seats, with two companions. They were looking out of the rear window. He suddenly saw 'something blue' rolling on the road surface and recognized it as a school tracksuit. He then realised that one of the pupils had fallen out of the bus. It was only when, a second or two later, someone opened the toilet door and saw that the toilet was empty and the window was missing, that it was realised that it was Riyadh who had fallen out. A number of pupils alighted from the bus to go and see whether they could assist Riyadh but they were instructed to resume their seats. When he went back to his seat, Kyle opened the toilet door. He found the door ajar but difficult to open because it was catching on the carpet, or carpets, outside the toilet.³ He said he had inspected the opening where the window had been and, around the rim of the frame, he had seen what he took to be blue putty, with a slightly wet appearance as if it had been newly installed. There were small fragments of glass stuck in it. He mentioned that earlier in the day he had specially noticed that the window was vibrating violently and making a 'rattling noise'.

Kyle had not been looking in the direction of the toilet door at the time Riyadh must have entered it, nor at the time when Riyadh fell out. But he had, a short time before this, seen his friend, Chad Riffle approach the door and he noticed that Chad had had to apply force, using two hands, to overcome the resistance by the carpet and open the door sufficiently to enter the toilet.

He was asked in cross-examination to describe the carpet and his answers were somewhat vague. It was put to him that the toilet floor was separated from the aisle by a 'lip' or 'ridge' which formed the bottom of the door frame. It was suggested that this was about 5 cm high, so that the bottom of the door would have been 5 cm above the floor level. On this basis it was suggested that the carpet could hardly have caused the door to stick, but that, if this was happening, it could very simply be remedied by pulling the

³ He said: 'The door itself got jammed there was a carpet situated outside the door that had a rubber lining around it and it had carpet on top of it in the middle and that when opening the door towards you, [it] would get jammed and you had to have quite a big heave to open this door to be able to fit through it.'

carpet flat, away from the ridge. His answers to these suggestions were unsatisfactorily vague, and the impression that was left was that he accepted them as valid. Be that as it may, there seems to be no particular reason why Kyle's vagueness in relation to the carpet should count against him as a credibility factor. I do have the impression from his evidence about the window, however, that he was making an effort to link his observations of the window frame to a suggestion that the window must have recently been replaced (and might therefore be suspect from a safety point of view).

[12] **Justin Smit** was sitting on the left side of the aisle, one or two rows in front of where the toilet was situated. He was kneeling on his seat, facing the rear of the bus and talking to his companions who were seated toward the rear. He saw Riyadh enter the toilet. A short while after Riyadh had entered and shut the door behind him, Justin saw the door open and close briefly. He ascribed this to Riyadh 'battling to open the door'. He indicated that the door had not opened more than about 5 to 10 cm. He turned his gaze from the toilet door to talk to his companion in the rear seat and the next thing he knew was that the alarm went up because Riyadh had fallen out of the bus. He said he had gone into the toilet a short while before Riyadh and had had to use force to pull the door open. He had to 'jerk' the door three times to get it open wide enough to slide through the gap. The door was not as difficult to close as to open, but it nevertheless had to be 'yanked' to close it properly. In order to get out of the toilet he had found it necessary to 'shoulder barge' the door. He ascribed these difficulties to the carpet which was outside the toilet door, placed loose on top of the 'runner carpet' that ran the length of the aisle. He estimated that this carpet was between 5 and 8 cm thick. From the moment he had entered the toilet he had noticed that the window was rattling and 'looked dodgy'. He said the rattling noise was so loud 'you couldn't even hear the engine of the bus' and he could see the glass moving in its frame as it rattled. He said that no one had been holding the door closed while Riyadh was in the toilet and that he hadn't seen anyone standing at the toilet door when Riyadh fell. After the accident, when he and others were sent back into the bus, he had opened the toilet door and entered the toilet 'to see what had happened'. He saw Riyadh's 'Walkman' earphones hanging over the rim of the window frame.

I regret to have to say that this witness' evidence reads poorly on the record. His versions about where he was facing while Riyadh was in the toilet and why he would not have seen anyone standing at the toilet door⁴ were as numerous as they were unconvincing. His description of the carpet being '5 to 8 cm thick' also seemed to be contrived to deal with the point which had risen during the cross-examination of Kyle, namely that there was a ridge approximately 5 cm high between the floor of the bus and the bottom of the toilet door. Finally his explanation as to why, when he saw Riyadh was struggling to open the door, he did not assist him by simply pulling the carpet away from under the door, was unsatisfactory.

[13] **Mark Raubenheimer** said he could not remember where he had been sitting before the accident occurred. He had been standing for some time, facing the rear of the bus with the toilet door about 10 cm away on his left hand side. He saw Riyadh enter the door and close it after him. While Riyadh was still in the toilet with the door shut, he had opened it a short way and saw Riyadh washing his hands. He had then immediately closed the door again. When he heard his companions screaming that someone had fallen out of the bus, he opened the toilet door to find that Riyadh was no longer there.

[14] **Ashley Wells** was sitting in the back row of seats, looking out through the rear window. He had not observed anything specific before the accident but he was one of the first to see Riyadh rolling along the road surface. He had seen Mark Raubenheimer standing immediately outside the toilet door just before Riyadh fell out. He had also, earlier, seen pupils struggling to open the toilet door and had noted that it appeared to be sticking against the carpet beneath it.

[15] There appears to me to be a decisive feature in this evidence, which is not dependent on issues of credibility. It relates to the operation of the toilet door on a number of occasions both before and after the accident. It will be noted that the door

⁴ The evidence of Mark Raubenheimer, dealt with below, was that he was actually standing at the door, waiting for Riyadh to come out when the accident happened.

was opened at least ten and possibly eleven times around the time when the accident occurred.⁵ It is also accepted that the door was fully shut at the moment when Riyadh fell out of the window. Two questions must be asked:

- (a) Why would the door have proved to be impossible to move, even to create a small gap, on the one occasion when Riyadh found it necessary to brace himself against the window to try to get it open?
- (b) Why did Riyadh not adopt the simple and obvious procedure of calling for assistance?

If one accepts the pupils' denial that anyone was holding the door handle closed from the outside, the picture which emerges is a confused and illogical one indeed. In my view it is so confused that the inference must be drawn that this aspect of the evidence was probably not accurate. On the one hand there is a version which is shrouded by irrationality, on the other, the simple proposition that the pupils were playing pranks on each other by trapping each other in the toilet, clears the mists of uncertainty and affords one a rational explanation for everything that happened. I may say that this rationality is not adversely affected by the circumstance that each of the witnesses was probably lying when he denied that the door was being held. They had every reason to lie about this. First, the person holding the door and probably his companions who were enjoying the joke with him would obviously have been in serious trouble if this had been disclosed to anyone. The person concerned would also have been liable in delict to Riyadh. Those who observed but did not participate in the prank would, in all probability have been sworn to secrecy or have voluntarily decided to protect their fellows. I do not think that judicial nescience goes so far as to preclude me from observing that such pacts are by no means uncommon amongst school pupils and perhaps a very common feature of rugby teams travelling on tour together. Furthermore, it is common cause that, at some stage earlier in the morning, when the bus had been stopped at a service station, the driver had found it necessary to walk down the aisle to the back of the bus and admonish the pupils seated there for their unruly behavior. I must reluctantly

⁵ Twice by Chad Riffle, twice by Justin Smit (once before and once shortly after the accident), once by Riyadh to enter the toilet and (possibly) once just before he fell out, once by Mark Raubenheimer (before the accident) and once immediately afterwards and once by Kyle Nash shortly afterwards.

conclude that the most reasonable and probable inference⁶ which must be drawn from the various accounts given by the witnesses is that when Riyadh tried to leave the toilet some one was holding the door closed from the outside. The defendant called a Mr Bell as an expert witness, who testified that the toilet door catch was so constructed that if a person held the handle from outside the toilet door it could not be opened from the inside. This adds credence to my conclusion.

[16] As far as the allegations about the ill-fitting window were concerned, it will suffice to say that the defendant's witnesses testified that the 'wet putty' material observed by Kyle Nash was a waterproofing seal that was applied to the outside of all the windows and that there was nothing sinister about its presence in the window frame. The vague suspicions voiced by Kyle Nash and Ashley Wells about the rattling of the window were also explained by the fact that the engine of the bus was situate at the rear of the bus and immediately below the toilet. It was denied by the defendant's witnesses that the window could possibly have been 'rattling' at all, given that it was housed in a rubber lining. There was nothing in the allegations or denials in this connection to which the court could refer for the purposes of deciding where the truth lay on this aspect, save its views on the performance of the pupils as witnesses.

[17] In the result, the evidence tendered on the whole for the plaintiff fell far short of proving any of the grounds of negligence on which the plaintiff relied. The order for absolution from the instance made in the court a quo was accordingly correct.

⁶ *Govan v Skidmore* 1952 (1) SA 732 (N) at p 734, followed and approved e.g. in *Kruger v Carlton Paper of SA (Pty)Ltd* 2002 (2) SA 335 SCA) at p 334.

[18] The appeal is dismissed with costs.

N V HURT
JUDGE OF APPEAL

CONCUR:)
) NAVSA JA
 KGOMO AJA