IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NO: 315/90

In the appeal of:

GENERAL ACCIDENT INSURANCE COMPANY SOUTH AFRICA LIMITED — APPELLANT

and

MACDONALD XHEGO — FIRST RESPONDENT

NOMBULELO XHEGO — SECOND RESPONDENT

EFFIE NOBETHU MANANA — THIRD RESPONDENT

Coram: JOUBERT, VAN HEERDEN, SMALBERGER, F H GROSSKOPF JJA et VAN COLLER AJA.

Date heard: 18 November 1991

Date delivered: 29 November 1991

J U D G M E N T

VAN COLLER AJA:

On 11 October 1986 and in Nyanga, Cape Town, two petrol bombs were thrown at a passenger bus belonging to City Tramways. Passengers on the bus sustained injuries and actions for damages were instituted in the Cape Provincial Division against appellant (as appointed agent of the Motor Vehicle Accident Fund) in terms of the Motor Vehicle Accidents Act 84 of 1986. First respondent, as first plaintiff, claimed damages in his personal capacity and in his capacity as father and natural guardian of his minor daughter, Tantaswa, in respect of the injuries she sustained. Besides burns, she also sustained a fracture of the left tibia, when she and her mother, second respondent,

jumped from the bus while it was still in motion. Second respondent, as second plaintiff in the Court a quo, is the wife of first respondent and she claimed damages in respect of fire burns she sustained to the upper part of her body. Third respondent was also a passenger on the bus. She suffered fire burns to her legs and hands. She claimed damages as third plaintiff in respect of these injuries.

The quantum of the claims was settled before the commencement of the trial. It was also not disputed by appellant that all the injuries sustained by second and third respondents, as well as the fire burns suffered by Tantaswa, were caused by one of the petrol bombs. The fact that Tantaswa sustained a fractured leg in jumping from the bus was also not disputed. It was agreed that the general damage suffered by Tantaswa was R 5000 and that R 4000 of this amount was attributable to the leg injury.

It was common cause at the trial that Melvyn Douglas

Samuels, an employee of City Tramways, was the driver of the bus at the time of the attack. It was also common cause that the attack took place while the bus was travelling along Terminus Road on its way to the Nyanga terminus.

The Court a quo found that the injuries sustained by Tantaswa and second and third respondents arose out of the driving of the bus. It was also found that the fractured leg sustained by Tantaswa was caused by the negligence of the driver of the bus and that the fire burns sustained by Tantaswa and second and third respondents were caused by the negligence of the owner of the bus. Judgment was accordingly granted in favour of the respondents in the amounts agreed upon. The appellant comes on appeal to this Court with leave of the trial Court.

Before dealing with the evidence about the attack, it is necessary to set out in some detail the route which the bus followed on 11 October 1986. The significance of the route

taken will become evident later in the judgment.

The bus on which Tantaswa and second and third respondents were fare-paying passengers left Claremont just after midday. Its destination was a terminus in Nyanga referred to as the Nyanga terminus. The bus drove along Lansdowne Road and, when it reached Nyanga, turned into a road referred to as NY1. This road took the bus into Nyanga and to the Guguletu terminus. From this terminus the bus went back along NY1 for a short distance and then turned into NY3, which becomes Terminus Road. Terminus Road is about 3km long. Nyanga terminus, which is the last terminus on this route, is on this road. The petrol bombs were thrown at the bus while it was moving along Terminus Road. One of the bombs landed inside the bus and the interior was set alight. It is common cause that, in addition to the petrol bombs, stones were also thrown at the bus. When the attack on the bus took place, it was, according to the driver's evidence, about 600m from the Nyanga terminus. He was

driving at a speed of about 50 - 60km per hour. It is also common cause that, besides the route just described, the bus company also used two other routes from Claremont to the Nyanga terminus. These routes are known as the Claremont-Nyanga route via Emms Drive, and the Claremont-Nyanga route via Guguletu and NY108. During 1985 and 1986 when unrest was prevalent in the area, none of these routes was used. According to the evidence a squatter camp, known as K.T.C Camp, is situated just to the north of Terminus Road. Immediately to the south of Terminus Road is a settlement known as New Crossroads. It appears from the evidence that it was often unsafe for buses to use Terminus Road owing to unrest-related incidents in the immediate vicinity of these two settlements. During 1985-1986 the City Tramways buses had in fact not used Terminus Road for a period that could have been as long as twelve months. It was only from 22 September 1986 that buses again began using Terminus Road to get to the Nyanga terminus. Evidence was adduced on behalf of respondents about discussions between

City Tramways and a delegation of the residents of Nyanga. These meetings took place prior and subsequent to 22 September 1986. Routes proposed by the residents were discussed, but City Tramways did not follow the suggestions made by the residents. The residents were concerned about the fact that the route along Terminus Road was reinstated.

Second respondent's evidence with regard to what happened on 11 October 1986 stands virtually uncontradicted. She testified that she and her child, Tantaswa, boarded the bus at Claremont. Their destination was the Nyanga terminus which is not far from their home. When the bus turned into NY3 the passengers shouted at the driver not to take that route. It is not disputed that the bus could also have reached the Nyanga terminus from the Guguletu terminus along NY1 to NY108 or by returning to Lansdowne Road and then proceeding along Emms Drive. The driver did not heed the protests of the passengers and continued along NY3 into

Terminus Road. Second respondent stated that she heard the bus being stoned; she then saw flames and realised that she was on fire. The passengers screamed and rushed forward to the door of the bus, shouting to the driver to stop and to open the door. He did not stop, however, and when the door was eventually forced open second respondent jumped from the bus with the child in her arms. At the time when she jumped the bus had only slowed down slightly.

Third respondent did not give evidence. It was admitted by appellant that, as a result of the events testified to by second respondent, third respondent suffered the injuries set out in the particulars of claim.

Of vital importance in this case is the evidence about attacks on buses in the vicinity of and along Terminus Road during the week immediately preceeding 11 October 1986. The facts relating to these incidents were recorded by City Tramways and are common cause. On 7 October 1986 three

buses were stoned near K.T.C Camp on the Terminus Road route. On the same day a bus was petrol-bombed in Miller Road, one stop away from the Nyanga terminus. On 8 October five buses, and on 9 October two buses, were stoned in Terminus Road. On 10 October a bus was petrol-bombed in the vicinity of the Guguletu terminus, which is only a short distance from NY3. On Saturday 11 October at 13h42 a bus was petrol-bombed on the NY3-Terminus Road. Not long afterwards, and at approximately 14h10, the bus on which respondents were travelling was petrol-bombed.

During October 1986 Mr M J Schneider was the assistant general manager of City Tramways. He gave evidence on behalf of the appellant and he testified that the Nyanga terminus was reopened on 22 September 1986. It had not been used for a considerable time prior to September 1986. During the unrest period City Tramways stationed an inspector equipped with a two-way radio at each of the two entrances into Nyanga. The one entrance is where the bus

driven by Samuels left Lansdowne Road and the other entrance is to the north of Nyanga from the Klipfontein Road, also known as NY108, into NY1. As soon as City Tramways, at its control tower at a place called Arrowgate, received information about a serious unrest-related incident, the inspectors were instructed by radio to stop the buses and to prevent them from going into the danger area. Radio control vehicles were also employed to report incidents of unrest in the various areas, and to escort the first bus to enter the area after an incident. In reply to a question as to why the bus driven by Samuels had not been stopped after the petrol-bombing of the earlier bus on the same route, Schneider explained that it was possible that the bus driven by Samuels had already gone past the entrance by the time that the inspector received the instruction to stop the buses. In reply to a question whether the inspectors were stationed at the entrances at all times, Schneider said under cross-examination that they had been there during the period of unrest. He had no documentation to corroborate

his statement but that, according to him, was the procedure. A perusal of his evidence does not show that he had personal knowledge that the inspectors were present at the entrances on 11 October 1986.

Samuels was the only other witness called by the appellant. He received instructions at the Claremont terminus about the route he had to follow. As instructed, he followed the route along Terminus Road. He testified that he did not know that it might be dangerous to travel along Terminus Road on that day. He could not remember whether the passengers had warned him not to use the NY3-Terminus Road. He would, in any event, not have deviated from the route unless he had been instructed by his superiors to do so. According to Samuels, two petrol bombs were thrown at the bus. He saw flames on one of the passengers. He did not think that it would be safe to stop the bus. The passengers surged forward; they were panic-stricken and asked him to open the door of the bus. He was not prepared to do so.

They nevertheless managed to open the door. All of them must have jumped from the bus when it was still in motion because when he arrived at the Nyanga terminus, the bus was empty. Samuels testified that he did not see the people who threw the petrol bombs, nor did he see the people who pelted the bus with stones. Samuels could give no estimate of the number of passengers who were on the bus at the time of the attack, but according to second respondent, the bus was full. Under cross-examination Samuels conceded that not only did he not see an inspector, but that there was, in fact, no inspector present at the Lansdowne Road-NY1 turn-off. He also did not see any patrol vehicle that day. When he reached the Nyanga terminus, he took the fire extinguisher, which was behind the driver's seat, and put out the flames. The bus was not badly damaged.

Respondents' claims against the appellant are based upon section 8(1) of the Motor Vehicles Accident Act 84 of 1986. The section reads as follows:

"(1) The MVA Fund or its appointed agent, as the case may be, shall, subject to the provisions of this Act and on the prescribed conditions, be obliged to compensate any person whomsoever (in this Act called the third party) for any loss or damage which the third party has suffered as a result of -

(a) any bodily injury to himself;

(b) the death of or any bodily injury to any person,

in either case caused by or arising out of the driving of a motor vehicle by any person whomsoever at any place in the Republic, if the injury or death is due to the negligence or other unlawful act of the person who drove the motor vehicle (in this Act called the driver) or of the owner of the motor vehicle or his servant in the execution of his duty."

In its plea the appellant denied that the injuries were caused by or arose out of the driving of the insured vehicle. Negligence on the part of the owner and the driver was also denied.

It has not been contended in this Court or in the Court a quo that the injuries were "caused by" the driving of the insured vehicle. The arguments advanced by both counsel were directed solely to the question whether the injuries

arose from the driving of the insured vehicle. The question whether the injuries were caused by the driving of the vehicle need therefore not be considered. In the earlier legislation, Act 29 of 1942 and Act 56 of 1972, the corresponding sections were almost identically worded, and the meaning of the words "caused by or arising out of the driving of a motor vehicle" has been considered by the courts on a number of occasions. In his discussion of the meaning of these words in Wells and Another v Shield Insurance Company Ltd and Others 1965 (2) SA 865 (C) Corbett J at 869 B - C stated that the words "caused by" referred to the direct cause of the injury whereas the words "arising out of" referred to the case where the injury, though not directly caused by the driving, is nevertheless causally connected with the driving and the driving is a sine qua non thereof. Corbett J, however, pointed out at 869 F - H that an uncontrolled application of the causa sine qua non concept could bring about consequences never contemplated or intended by the Legislature. Some limitation must therefore

be placed on the application of this concept. The Court should be guided by a consideration of the object and scope of the Act, and by notions of common sense (870 A - B). The following concluding remarks of Corbett J on this problem at 870 D - F should in my view also be applied in the present case.

> "Where the direct cause is some antecedent or ancillary act, then it could not normally be said that the death or injury was 'caused by' the driving; but it might be found to arise out of the driving. Whether this would be found would depend upon the particular facts of the case and whether, applying ordinary, common-sense standards, it could be said that the causal connection between the death or injury and the driving was sufficiently real and close to enable the Court to say that the death or injury did arise out of the driving. I do not think that it is either possible or advisable to state the position more precisely than this, save to emphasise that, generally speaking, the mere fact that the motor vehicle was being driven at the time death was caused or the injury inflicted or that it had been driven shortly prior to this would not, of itself, provide sufficient causal connection."

Mr Griesel, who appeared on behalf of the appellant, conceded that the leg injury sustained by Tantaswa arose out of the driving of the bus. With regard to the fire burns suffered by Tantaswa and second and third respondents he contended that although it cannot be said that there was no causal connection between the injuries and the driving of the bus, it was not sufficiently real and close, and that the required causal connection was therefore absent. He submitted that the mere fact that the bus was being driven at the time when the injuries were sustained does not, of itself, provide sufficient causal connection. I cannot agree with this argument. In my judgment, and applying ordinary, common-sense standards, there is a sufficiently close link between the injuries and the driving of the bus to conclude that the injuries did arise out of the driving of the bus. The bus was not merely being driven when the injuries were sustained, but it was the very driving of the bus along this particular route which elicited the petrol bombing thereof. The following illustration is of

assistance. Where passengers on a bus on a dangerous mountain road are injured as a result of a landslide or rock fall, common sense dictates that the injuries would have arisen out of the driving of the bus. This was conceded by Mr Griesel. The facts in the present case cannot, in my view, be distinguished from the facts of the given illustration. The Court a quo therefore correctly determined the first issue in favour of the respondents.

It remains to decide whether the injuries were caused by the negligence of the owner or driver of the bus. The injuries in the form of fire burns will first be dealt with. The fact that the Terminus Road route was a dangerous route is beyond question. During the period of unrest in 1985 and 1986 this route was not used for months. From 22 September 1986 the Terminus Road route was reinstated and it was used together with the two other routes already referred to. Buses using the Terminus Road route were, however, frequently attacked. The stoning of buses again commenced

on 7 October 1986 and on 7, 8 and 9 October buses were stoned on that route. These incidents should have alerted the owner to the danger involved in using the Terminus Road route as was demonstrated by the fact that on 10 October a bus was petrol-bombed in the vicinity of the Guguletu terminus and on 11 October the bus which entered Nyanga immediately ahead of that of Samuels was petrol-bombed on the Terminus Road route. The reasonable owner would have realised that the real possibility of a serious attack on buses on this route existed. Whether stones or petrol bombs or both were used makes no difference. Mr Griesel, relying upon the evidence of inspectors being stationed at the entrances to Nyanga and mobile patrol units being on duty, submitted that reasonable precautions had been taken. Whether or not these precautions were in operation on 11 October 1986 is open to doubt. Be that as it may, these precautionary measures were, in any event, not sufficient. Schneider admitted that the bus drivers were not equipped with two-way radios. The drivers could therefore not have

warned each other. The possibility existed that in view of the time which must necessarily have elapsed between an unrest-related incident and the reporting thereof, a bus could have entered the township without having been warned. I have already referred to Schneider's evidence that this could have been the reason why Samuels was not warned at the Lansdowne Road turn-off. It is clear that the owner should have closed the Terminus Road route. The Emms Drive route could have been used. This road does not go past the squatter camps where the incidents on 7 to 11 October occurred. It is also significant that there is no evidence of any unrest incidents along Emms Drive in this period. The Court a quo correctly found that the fire burns sustained by second and third respondents were due to the negligence of the owner of the bus.

It finally remains to deal with the question whether the leg injury sustained by Tantaswa was due to the negligence of the owner or driver of the bus. The Court a quo found that

the injury was caused as a result of the negligence of Samuels, who failed to stop before passengers jumped from the bus in their panic. The learned trial Judge concluded that the road was clear and there was no reason why Samuels could not have stopped the bus a few hundred metres from where it was petrol-bombed. The question whether or not Samuels was negligent is complicated by the fact that there is no evidence as regards the distance from where the bus was petrol-bombed to the place where second respondent and Tantaswa jumped from the bus. It must also be borne in mind that the bus was travelling at between 50 and 60km per hour when it was attacked. Even if Samuels had wanted to stop, the bus would have proceeded for some distance before he could have brought it to a standstill. It is, however, unnecessary to pursue the enquiry with regard to the driver's alleged negligence any further. Negligence on the part of the owner with regard to the leg injury suffered by Tantaswa has in any event been proved. In my view it was reasonably forseeable that passengers could sustain injuries

other than fire burns in a petrol bomb attack on a bus. Should the interior of a bus be set alight by means of a petrol bomb, it is to be expected that the passengers would rush to the door to get out. It is not difficult to visualise the confusion and havoc that would in all probability reign in a burning bus filled with smoke and petrol fumes. It is reasonable to foresee that passengers might sustain other injuries besides fire burns. It is also reasonably foreseeable that passengers might jump from a burning bus and sustain fractured limbs. Negligence on the part of the owner has been proved and appellant is therefore also liable to first respondent in respect of the leg injuries sustained by Tantaswa.

The appeal is dismissed with costs.

A.P. Van Coller

VAN COLLER AJA

JOUBERT JA)

VAN HEERDEN JA)

SMALBERGER JA)

F H GROSSKOPF JA) CONCUR