REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER : 2018/6687

DELETE WHICHEVER IS NOT APPLICABLE

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

_____ _____
DATE SIGNATURE

In the matter between:

TUMEKA SWEETNESS MACATSHA **Plaintiff**

and

THE ROAD ACCIDENT FUND **Defendant**

J U D G M E N T

VAN DER BERG AJ

[1] The plaintiff instituted a claim against the Road Accident Fund for compensation for damages as a result of injuries she had sustained. At a pre-trial hearing an order was made separating the merits and the quantum in terms of rule 33(4), and the trial only proceeded on the merits.

[2] The plaintiff was the only witness at the trial, and her evidence was as follows:

[3] The plaintiff and a friend boarded a taxi in Vosloorus to drive them home after work. Two unknown males (I shall refer to them as "the hijackers") also boarded the taxi. One of the hijackers asked the driver to stop so that they could alight, but after the driver stopped one of the hijackers took out a firearm and pointed it at the taxi driver. The driver was dragged out of the vehicle, and one of the hijackers then drove the vehicle off. The other hijacker sat at the back next to the plaintiff and pointed a firearm at her. The plaintiff's friend sat in the front passenger seat. The plaintiff started crying and the hijacker, who sat next to her, told her to stop crying and then shot her in the left upper leg. He then opened the right-hand back door and pushed the plaintiff out of the vehicle whilst it was in motion. She fell and rolled outside. The vehicle proceeded with the plaintiff's friend still in the vehicle. The plaintiff sustained injuries to her left leg, right leg, left arm and head. The injuries were sustained as a result of the gunshot and from the fall when the plaintiff was pushed out the vehicle.

[4] The plaintiff's evidence was undisputed, and she was a good witness. The

plaintiff's evidence is accepted *in toto*.

[5] In paragraphs 5 and 6 of the plaintiff's particulars of claim the following is alleged:

> "*5. On 2nd December 2015 at approximately 19h15 and at Vosloorus, the Plaintiff was injured when she was ejected from a motor vehicle bearing registration letters and numbers […] GP.*
>
> *6. The sole cause of the collision aforesaid was the negligent driving of the unknown driver of the insured vehicle, he having been negligent in one or more or all of the following respects:*
>
> *6.1 He failed to keep a lookout, alternatively, any proper lookout; and/or*
>
> *6.2 He failed to keep the motor vehicle of which he was the driver under any, alternatively, any proper control; and/or*
>
> *6.3 He failed to avoid the collision when, by the exercise of reasonable care, he could and should have do so; and/or*
>
> *6.4 He failed to apply the brakes of the motor vehicle of which he was the driver timeously or at all; and/or*
>
> *6.5 He failed to pay due regard to the rights of any passengers and in particular the rights of the Plaintiff; and/or*
>
> *6.6 He failed to exercise the care a reasonable person would and could have exercised under the circumstances.*
>
> *7. As a result of the negligent driving of the insured motor vehicle, as aforesaid, the Plaintiff sustained the following injuries ("the injuries"):…."*

[6] The defendant's amended plea to these allegations reads as follows:

*"4 **AD PARAGRAPHS 5 AND 6***

4.1 The Defendant denies each and every allegation contained in these paragraphs as if specifically traversed and puts the Plaintiff to the proof thereof;

4.2 The Defendant specifically denies that the motor vehicle bearing registration letters and numbers […] GP was involved in a collision as alleged or at all and that the Plaintiff was ejected from the aforesaid motor vehicle as alleged or at all;

4.3 In this regard, the Defendant specifically pleads that, on the date and at the time as pleaded by the Plaintiff, she was injured when she was assaulted and subsequently shot in a hijacking of the aforesaid motor vehicle;

4.4 the Defendant pleads further that at the time of the occurrence of the incident and the injuries to the Plaintiff, the insured motor vehicle was stationary and the driver thereof (the Defendant's Insured Driver) was outside of the motor vehicle;

4.5 Wherefore the Defendant pleads that the injuries sustained by the Plaintiff on the date and at the time as pleaded by the Plaintiff did not arise from the negligent driving of a motor vehicle."

[7] The differences between the plaintiff's evidence and the pleaded case are dealt with later in this judgment.

THE LAW

[8] Section 17(1) of the Road Accidents Fund, Act 56 of 1966 ("*the RAF Act*") provides as follows:

"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: Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum."

[9] In *Wells and Another v Shield Insurance Co Ltd and Others* 1965 (2) SA 865 (C) Corbett J (as he then was) said the following about one of the precursors of section 17(1) of the RAF Act:[1]

"Two pre-requisites of liability upon the part of the registered insurance company for loss or damage suffered by a third party as a result of bodily injury are thus laid down. They are (i) that the bodily injury was caused by or arose out of the driving of the insured motor vehicle; and (ii) that the bodily injury was due to the negligence or other unlawful act of the driver of the insured vehicle or the owner thereof or his servant. The decision as to whether, in a particular case, these prerequisites have been satisfied involves two separate enquiries. Broadly speaking, the first pre-requisite is concerned basically with the physical or mechanical cause of the bodily injury, whereas the second is concerned with

[1] At 867 H – 868 A

legally blameworthy conduct on the part of certain persons as being the cause of the bodily injury ('due to' having the same meaning as 'caused by' - Workmen's Compensation Commissioner v S.A.N.T.A.M. Beperk, 1949 (4) SA 732 (C) at pp. 736 - 7). Accordingly, these enquiries may follow wholly distinct lines."

FIRST REQUIREMENT: WHETHER INJURIES AROSE OUT OF DRIVING OF MOTOR VEHICLE

[10] In *Philander*[2] the plaintiff alleged in her declaration that she was pushed from a moving bus by the conductor, and that as a consequence she fell and the rear wheels of the vehicle ran over her legs. The court held (on exception against the declaration) that the conductor's conduct was unconnected with the driving of the bus and the injuries were neither caused by nor arose out of the driving of the bus.

[11] However, in *Pillay*[3] the court disagreed with the finding in *Philander.*[4] In *Pillay* the plaintiff alleged in his summons that the conductor of a bus "*forced the plaintiff's hand free from the handrail to which he was holding in consequence whereof the plaintiff fell from the bus*." The defendant delivered an exception contending that the summons did not disclose a cause of action. Broome J (as he then was) held:

"*It seems to me that to fall from or be pushed off a bus is manifestly more dangerous when the bus is in motion than when it is stationary. In the first place the initial contact with the ground would be more violent in the case of a fall from a moving bus, and the forward momentum in the direction of travel of the bus*

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2 *Philander v Alliance Assurance Co Ltd* 1963 (1) SA 561 (C)

3 *Pillay v Santam Insurance Co Ltd* 1978 (3) SA 43 (D)

4 At 46F

would make it more difficult, or, depending on the speed of the bus, impossible for the person concerned to remain on his feet. It could, again depending on the speed, even causing to roll 'head over heels' for some distance."[5]

[12] Counsel referred me to the unreported judgment handed down by Snyders J (as she then was) in the matter of *Erika Steyn v Road Accident Fund*, Witwatersrand Local Division, case number 00/16330 (10 June 2004) ("*Steyn*"), which was also a claim against the Road Accident Fund where the plaintiff was a victim of a hijacking. The facts were briefly: after armed men motioned the plaintiff out of her vehicle, she opened the rear door to remove a carrycot with her baby from the back seat. The motor vehicle started moving whilst the plaintiff held onto the carrycot. One of the assailants (not the driver) shot the plaintiff in the arm but she still held on and tried to pull the carrycot from the vehicle. She was dragged by the motor vehicle until she fell onto the tarmac.

[13] The learned judge held:[6]

"*A common sense approach to these facts in my view gives rise to the conclusion that the injuries that the plaintiff sustained as a result of her moving along with the vehicle whilst hanging on to the carrycot inside the car, i.e. falling down and being dragged, are injuries that arose from the driving of the relevant motor vehicle."*

[14] The learned judge agreed with the conclusion in *Pillay*, and disagreed with

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5 At 45 H – 46A

6 At paragraph [20]

the conclusion in *Philander*.[7]

[15] Both in *Steyn* and in *Pillay* the courts relied on *Matinise*[8] where the Appellate Division held:[9]

> "*…that the lorry was in motion when the plaintiff fell from it, even though it was not travelling fast and was proceeding in a straight line, must have contributed to his fall. In my opinion there were two contributory factors. The first was that plaintiff attempted to walk to the rear of the lorry while he was under the influence of liquor and the second was that the vehicle was in motion when the attempt was made. In addition thereto I am of the view that the momentum of the lorry must have contributed to the severity of the injuries suffered by the plaintiff.*
>
> *For the reasons stated I have come to the conclusion that there was a causal connection between the driving of the lorry and the injuries sustained by the plaintiff…"*

[16] In my view, based on *Steyn* (a judgment in this division), *Pillay* and *Matinise*, the injuries sustained by the plaintiff when she was pushed out of the moving car arose from the driving of a motor vehicle as required in terms of section 17(1) of the RAF Act.

[17] The injuries sustained by the gunshot is however a different matter. Due to the similarities to the *Steyn* case I quote extensively from this judgment:

> "*[21] More complicated, however, is the question of the gunshot wound that she sustained.*

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7 Paragraph [26]

8 *Protea Assurance Co Ltd v Matinise* 1978 (1) SA 963 (AD)

9 At 972C-D

[22] *On behalf of the plaintiff reliance was placed n the matter of Khumalo v Multilateral Motor Vehicle Accidents Funds 1997 (4) SA 384 (N). Counsel conceded that the facts in that matter was substantially different to the present one however want to place reliance on the principle that was adopted in that case. In the Khumalo matter a Cressida vehicle was driven alongside a taxi in such a manner that a gunman who was a passage in the Cressida was able to fire a gun into the taxi and at the occupants, particularly the driver of the taxi, who was struck by a bullet on the back of his head, causing him to lose control of the vehicle and to hit a tree. The plaintiff, a passenger in the taxi was injured in the accident. BROOME DJP in that matter came to the following conclusion at 388H:*

> *'On any reckoning there was a causal connection between the driving of the Cressida and the injury to the taxi driver. Furthermore, the driver was acting in concert with and deliberately facilitating the gunman's objectives. I am satisfied that the injury to the taxi driver and the subsequent injuries to the plaintiff arose out of the driving of the Cressida ands were due to the negligence or unlawful act of its driver.'*

[23] *In the present case the driver of the hijacked did nothing to assist the gunman to fire a shot at the plaintiff.*

[24] *Both the driver of the plaintiff's vehicle as well as the gunman were acting in the furtherance of their common, overall unlawful goal, to dispossess the plaintiff of her vehicle and to successfully drive it away from her. On behalf of the plaintiff it was argued, that once that is accepted, the conclusion is inevitable that the driver was furthering his own and the gunman's objective and that the gunman was furthering his own and the driver's objective,. Those facts are, in my view, not relevant to the enquiry whether the injury was caused by or arose out of the driving of the vehicle but to the enquiry whether they were negligent or both busy with an unlawful act. The argument would have been apposite if the enquiry was to ascertain whether the injuries arose out of the robbing of the vehicle and not out of the driving of the vehicle."*

[18] In my view, those findings are equally applicable to the facts in this matter whereas *Khumalo*[10] is distinguishable on the facts.

[19] Accordingly, the injuries sustained by the plaintiff from the gunshot fall outside the ambit of section 17(1) of the RAF Act.

SECOND REQUIREMENT: WHETHER INJURIES DUE TO NEGLIGENCE OR OTHER UNLAWFUL ACT OF DRIVER

[20] This requirement is concerned with the "*legally blameworthy conduct on the part of certain persons as being the cause of the bodily injury."*[11]

[21] Adopting a common-sense approach[12] there was a causal connection between the unlawful driving of the motor vehicle (being part of a hijacking or robbery) and the injuries sustained by the plaintiff when pushed out of the vehicle.[13] It is not necessary to decide whether the injuries were also due to the negligence of the driver.

PLEADINGS

[22] The plaintiff's evidence differs materially from the allegations contained in the particulars of claim. In the particulars it is alleged that there was a "collision" which was caused by the "negligent driving" of an unknown driver.

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10 *Khumalo v Multilateral Motor Vehicle Accidents Funds* 1997 (4) SA 384 (N), discussed in *Steyn*

11 See *Wells (supra)*

12 See *Wells (supra*) at 87- C – D/D – H,

13 See *Steyn,* paragraphs [19] and [20]; *Laas v Road Accident Fund* 2012 (1) SA 610 (GNP)

A number of standard grounds of negligence are then set out. There is no allegation that the driving was "unlawful".

[23] The defendant denied in its plea that there was a collision, and specifically pleaded that the plaintiff was "*assaulted and subsequently shot in a hijacking*".

[24] At a case management conference held before a judge the following was recorded:

> "*The principle factual dispute is whether the injuries were sustained as a result of a collision or was sustained as a result of an assault by a hijacker."*

[25] This is indeed the factual dispute on the pleadings. The plaintiff did not indicate at the case management conference that it was not in issue that there was no collision.

[26] Our courts have often emphasised the importance of pleadings.[14] In cases such as these, the Fund's option to take an exception against the particulars of claim on the basis that they do not disclose a cause of action is effectively nullified. Both *Pillay* and *Philander* were dealt with on exception. It is also not possible for the Fund to consider an appropriate settlement where the plaintiff's particulars of claim do not accord with the true facts.

[27] In *Du Toit obo Dikeni v Road Accident Fund*[15] the court quoted with approval

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14 See for example: *Atlantis property holdings CC v Atlantis Exel Service Station* CC 2019 (5) SA 443 (GP) at paragraph [35]

15 2016 (1) SA 367 (FB) at paragraph [43]

the following extract from *Erasmus Superior Court Practice*:

> *"The object of pleading is to define the issues so as to enable the other party to know what case he has to meet. The parties are, therefore, limited to their pleadings: a pleader cannot be allowed to direct the attention of the other party to one issue, and then at the trial attempt to canvas another. However, since pleadings are made for the court . . . it is the duty of the court to determine what are the real issues between the parties and, provided no possible prejudice can be caused to either party, to decide the case on these real issues. . . .The general principle is that the parties will be held to the issues pleaded unless there has been a full investigation of the matter falling outside the pleadings. . . ."*

[28] The plaintiff had made a written statement before summons was issued. Reference was made to the statement during cross-examination. This statement accords with her evidence in court. The reference to a "collision" in the particulars of claim is therefore not due to the plaintiff changing her version, and it was not suggested that it was.

[29] I am satisfied that the defendant was not prejudiced by the incorrect pleading. It was clear from the cross-examination and arguments presented on behalf of the defendant that the defendant was aware that the real issue in this matter was the interpretation of section 17 of the RAF Act. The matter is therefore adjudicated on the basis of the plaintiff's evidence, even though it differs from her particulars of claim.

COSTS

[30] It was submitted on behalf of the defendant that should the injuries arising from the gunshot be excluded, the plaintiff's claim may not exceed the

maximum jurisdiction of the Magistrate's Court, which would have a bearing on the scale of costs to be awarded. It was submitted that costs should therefore be reserved. This seems to be a sensible suggestion.

ORDER

[31] The following order is made:

1. It is declared that the defendant is liable to compensate the plaintiff for her proven or agreed damages resulting from the incident which occurred on 2 December 2015 at Vosloorus, save for injuries sustained by the plaintiff as a result of the gunshot wound.

2. Costs are reserved.

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VAN DER BERG AJ

APPEARANCES:

For the plaintiff: Adv J N W Botha
Instructed by: A Wolmarans Inc

For the respondent: Adv J Magodi
Instructed by: Lindsay Keller

Date of hearing: 24 October 2019

Date of judgment: 13 December 2019