Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No.: **16718/2008**

In the matter between:

TULILE TUNGATA **Plaintiff**

versus

THE ROAD ACCIDENT FUND **Defendant**

JUDGMENT: 8 MARCH 2012

BOZALEK, J:

1. The plaintiff in this matter sued the Road Accident Fund for damages arising out of an accident which took place on 4 November 2007 in Khayelitsha, Cape Town. By agreement the court was asked to deal initially with the merits of the claim.

2. By further agreement amendments were effected to the plaintiff's particulars of claim and the defendant's plea on the eve of the trial. During argument Mr Roux asked for a further amendment to the plaintiff's particulars of claim which was unopposed and was duly granted. In the result the plaintiff's claim was that she was a passenger in a minibus which was travelling with its sliding door open when she was then pitched out through the open door of the moving vehicle and sustained various injuries. The plaintiff ascribed her fall from the vehicle and the injuries which she sustained to the negligence of the driver in that:

1. he drove the vehicle with the sliding door open;
2. he knew or ought reasonably to have known that she had consumed alcohol;
3. he knew or ought to have known that the plaintiff could fall from the vehicle but none the less continued to drive it at an excessive speed;
4. he failed to have regard to her position in the vehicle in relation to the open door;
5. he failed to notice the plaintiff's state of intoxication, taking into account the fact that he must have known that she had positioned herself next to the open door;
6. he proceeded to drive without at least requesting the plaintiff to fasten her seat-belt, or in the event of there being no seat-belt he should have refused to convey her;
7. he failed to keep a watchful eye on the plaintiff having regard to her position next to the open sliding door;

3. The defences raised by the defendant were a general denial and, in the alternative, should it be found that the plaintiff was indeed a passenger in the micro-bus, that she had been warned by the driver that the sliding door could not close and, being fully aware of the risks involved, the plaintiff was subject to the maxim *volenti non fit injuria*.

4. The plaintiff testified and called two witnesses whilst the defendant led no evidence.

5. Much of the evidence and the cross-examination of the witnesses was devoted to the questionable circumstances in which the plaintiff's claim was first lodged. It was common cause that when the claim was lodged with the defendant in November 2007 it was presented on the basis that the plaintiff was a pedestrian who had been knocked down by an unidentified vehicle. This was the basis upon which the matter was reported to the police and affidavits to this affect were made by the plaintiff and her cousin Ms Amanda Tungata.

6. The latter was the plaintiff's first witness. She testified that she, the plaintiff and a friend, Ms Andiswa October, had attended a party in Khayelitsha on the day in question where all three had consumed alcohol and, by the time they left the party at approximately 10:00 pm, were in differing states of intoxication. They stood at the bus stop and hailed a passing micro-bus. The driver explained that he was not a taxi driver but

someone who transported staff. Evidently as a favour he offered the party a lift and all three of them climbed in. The driver explained that the sliding door through which they entered was stuck and could not be moved from the open position.

7. Amanda Tungata seated herself in the row behind the driver (the second row) whilst October went to sit in the third row of seats together with an existing passenger. The plaintiff also moved into the second row of seats but in the seat closest to the sliding door, clearly the most dangerous position having regard to the proximity of the sliding door of the vehicle. The driver of the kombi vehicle then turned on or turned up the music and the vehicle pulled off.

8. The plaintiff and Ms Tungata proceeded to stand up in the vehicle and to dance to the music. It is uncertain for what distance the vehicle travelled or at what speed but the evidence is that as or shortly after the vehicle drove over a speed bump the plaintiff was thrown out of the vehicle. Ms October saw this and called upon the driver to stop. Everyone climbed out and the plaintiff was found lying in the middle of the road behind the vehicle, seriously injured. Another car was halted behind the kombi. From a discussion with the driver of that vehicle Ms Tungata and Ms October gained the impression that that vehicle had collided with the plaintiff after she was thrown onto the road. There was however no direct evidence to this effect. The plaintiff was loaded back into the kombi and taken to hospital. The second vehicle drove

off without any particulars being taken of that driver or the vehicle's registration. Similarly no particulars were taken of the kombi or its driver.

9. I pause at this point to note that the plaintiff initially sought also to rely on the negligence of the driver of the second vehicle but on the most benevolent interpretation of the evidence, she has made no case out at all in that regard.

10. Reverting to the conduct of the plaintiff in the micro-bus, there was unchallenged evidence from Ms October that upon entering the vehicle she had urged or suggested to the plaintiff that she sit in the rear row of seats i.e. away from the open sliding door but that the plaintiff had ignored this advice. Ms October also testified that when the plaintiff began to stand up she had told her not to do so but, once again, the plaintiff had disregarded her. The evidence of both of the plaintiff's two witnesses was that she was in the most intoxicated state of all three of them, had been obstreperous and had been walking in a zig-zag fashion.

11. The plaintiff herself testified that she remembered climbing into the taxi and danced but nothing thereafter until she woke up in hospital. In effect she did not dispute the evidence of her witnesses regarding her conduct prior to and whilst in the micro-bus.

12. The plaintiff was treated in hospital for some six weeks. A few days after being discharged she was contacted by one Pedro who presented himself

as a lawyer and who proceeded to investigate and formulate her third party claim. He accompanied her to the scene of the accident, took photographs, took affidavits from her and Tungata, filled in an accident report claim and lodged certain information with the police. When the plaintiff and Amanda Tungata told Pedro that they did not know the registration number of either vehicle involved in the accident he advised them that they should state that the plaintiff had been struck by an unidentified vehicle which had sped off. This, he told them, would speed up the processing of the claim. The plaintiff and Ms Tungata duly went along with this scheme and attended a consultation at the office of the plaintiff's attorney, Mr Alfred Shörn Webster.

13. More than a year later the plaintiff was approached by one Thami, someone she knew from the Eastern Cape, who asked her what had happened to her in the accident. She told him that she was thrown out of a taxi. Some time later Ms Tungata was approached by Thami and one or more investigator and she too disclosed the true manner in which the accident took place. These investigators appeared to have been working on behalf of the defendant. By March 2009 Ms Tungata and the plaintiff had sworn to fresh affidavits in which the "true" version of the accident was given and these documents were lodged *via* the plaintiff's attorney with the Road Accident Fund.

14. Mr Liddell, on behalf of the defendant, subjected the plaintiff and her witnesses to a rigorous cross-examination. He was, however, in my evaluation, unable to make any material dent in their evidence. In all material respects the evidence given by the witnesses corroborated each other and Ms Tungata readily admitted to having subscribed to a false account of the accident in the circumstances described above. Both Ms Tungata and Ms October's evidence painted the plaintiff's conduct, whilst she was in the micro-bus and before entering it, in unfavourable terms. The plaintiff and Ms Tungata admitted that had their false version not been uncovered they would in all probability have continued asserting this version through subsequent proceedings.

15. In argument Mr Liddell submitted that in the light of the false version of the accident first given by the plaintiff and Tungata the court should reject their later version which could equally be a fabrication. However, as I have mentioned, the defendant produced no countervailing evidence as to how the plaintiff could have sustained her injuries. Furthermore, both the plaintiff and her witnesses gave entirely credible evidence. Their account of how they came to lodge a claim based on an untruthful version of the accident is entirely credible and is borne out by the fact that when approached by someone they believed was unconnected with the case they gave a true account, one which they have had adhered to ever since. Furthermore, the evidence of how the accident in fact took place is so detailed and bizarre that it is most improbable that it is fictitious.

16. Further argument advanced by Mr Liddell was that by reason of fraudulent or false provenance of the claim, as it was originally presented, the plaintiff must be non-suited. He was unable to provide any authority for this proposition and I am certainly aware of none. A distinction must also be made between a claim tainted by fraud and one where the plaintiff has confessed to its initial false basis and thereafter pursued and presented the claim on what the court finds to be a true basis.

17. In these circumstances the court's duty must be to deal with the claim on the basis of the accepted evidence i.e. on the plaintiff's version as supported by her witnesses.

18. This leaves the defendant's defence of *volenti non fit injuria*. It is premised on the plaintiff having been warned by the driver that the sliding door of the micro-bus was stuck and would not close. The evidence diverged on this issue. Ms Tungata testified that the driver had made this known even before they climbed into the kombi. Ms October testified however that this was only made known to them once they had climbed onto the bus and it had begun to move. I find on the probabilities that the driver mentioned this fact only when the micro-bus was moving. Doing so at this stage would have made more sense since the door, being still open, it called for an explanation. Doing so earlier would have served little point but to have offered an opportunity to the plaintiff and her witnesses to decline to

climb on the bus. Had the driver evinced such a responsible attitude it is unlikely that he would have allowed the plaintiff to sit where she did and to dance in the vehicle.

19. For the *volenti* maxim to operate in favour of the defendant it must discharge the *onus* of proving that the plaintiff consented to the risk of injury posed by the open door. As is noted by the authors of the Law of Delict, 5th edition, *Neethling Potgieter and Visser,* the law applies this particular ground of justification with circumspection and the following requirements for valid consent must be proved: that it was given freely and voluntarily, that the person giving the consent must be capable of volition and that the consenting person must have full knowledge of the extent of the prejudice.

20. The *volenti* defence was considered at length in *Santam Insurance Company Limited v Vorster* 1973 (4) SA 764 (AD) where it was confirmed that the onus of establishing the defence rests upon the assertor and that the essential elements of the defence are *"knowledge, appreciation and consent"* (at page 779 A – C). None of these requirements were proved from the mouth of the plaintiff during her evidence. She was, furthermore, strongly under the influence of alcohol at the relevant time. In these circumstances the defendant has not succeeded in proving its defence of consent by the plaintiff to the risk of injury and its consequent exemption from liability.

21. In *Ndhlovu and Others v Durban City Council* 1970 (1) SA 39 (d) the following propositions were held to be established:

1. A bus driver (as indeed every driver of a vehicle) must take reasonable precautions against dangers to his passengers known or reasonably to be apprehended
2. A bus driver is entitled to regulate the manner in which he drives his bus upon the assumption that his passengers will take such steps to protect themselves against the ordinary risks and difficulties attended upon travelling in a bus as may reasonably be expected of such passengers.
3. What may reasonably be expected of a passenger of a bus will depend upon a number of circumstances, including the age, physical condition and apparent ability of the passenger to cope with such ordinary risks and difficulties.

22. In *Fredericks v Shield Insurance Company Limited* 1982 (2) SA 425 (AD) it was held that it is part of the duties of a bus driver to look after the safety of his passengers. Thus, if a passenger is standing in a dangerous place in front an open door of the bus and the bus driver is aware thereof, it is his duty to close the door before the bus moves off; if a passenger is under the influence of intoxicating liquor the bus driver must be all the more careful to see that the door is closed. Interestingly, it was further held that if the bus driver tells the passenger to go and sit down and he refuses to do so this is not sufficient to absolve the bus driver of negligence if the passenger falls out of the open door.

23. Applying these principles to the present matter, in my view the insured driver was clearly negligent in several respects; most notably in transporting passengers with the sliding door of the vehicle stuck in the open position. At the very least he should have ensured that his passengers were seated in such a manner that the risk of them being thrown out of the vehicle was eliminated or completely minimized. This could have been done by simply requiring them to either sit in the front or back row of seats and/or to secure themselves in their seats with seat belts. The driver was negligent, furthermore, in driving, irrespective of the speed at which he was travelling, whilst the plaintiff sat in the seat nearest the open door. He compounded this negligence by apparently doing nothing to stop the plaintiff from standing up and dancing to the music which he turned on or up. The fact that the plaintiff and her companions were under the influence of alcohol does not negate the driver's negligence. He should have foreseen that intoxicated passengers in their condition might well behave in a foolhardy manner in an existing dangerous situation.

24. Mr Liddell argued that there was no evidence that the driver was aware of the passengers intoxicated condition. On the probabilities, however, this was not so. He stopped his vehicle, engaged with the plaintiff and her companions before or whilst they were climbing into the micro-bus and, at the least, he must have become aware of their condition when the two passengers immediately behind him rose to their feet and commenced dancing to the music.

25. There is also a divergence of evidence as to whether the plaintiff's fall from the vehicle was precipitated by it going over the speed bump or hump. On the probabilities I find that this is what must have caused the plaintiff to lose her balance and be thrown out of the vehicle. In this regard it is significant that the vehicle came to a halt shortly after driving over the speed bump.

26. However it was not only negligence on the part of the driver which led to the plaintiff being pitched out of the vehicle. She contributed in no small measure to her fate. Firstly, when the plaintiff climbed into the vehicle and was informed that the door was stuck in the open position she nonetheless sat down in the most dangerously positioned seat i.e. that most proximate to the door. In doing so she disregarded Ms October's advice that she sit in the rear row of seats. To compound this when the music started the plaintiff rose to her feet and began dancing thus significantly increasing the risk that she could be thrown out of the door. Once again, when she was urged to sit down by her friend she disregarded this advice. All this conduct on the plaintiff's part was no doubt caused by the fact that she was in a state of intoxication but this of course does not negate her negligence.

27. Having regard to the role of the driver and the conduct of plaintiff I am of the view that the negligence should be apportioned on an equal basis

between the parties. I find then that the defendant is liable for 50% of any damages which the plaintiff is able to prove.

COSTS

28. In the normal course the plaintiff would be entitled to her costs of suit. However, this matter has certain special and disturbing features. I refer to the fact that the plaintiff, advised and guided by "Pedro", initially formulated and pursued the claim on a fraudulent basis. This was only discovered by persons who appeared to have been the defendant's investigators. There was a dearth of evidence as to who exactly Pedro was and what his role was. Clearly he worked closely with the plaintiff's attorney, Mr Alfred Webster.

29. At the conclusion of the plaintiff's case I asked counsel whether he intended to lead the evidence of Mr Webster to clarify the role of Pedro and to cast light on how a fraudulent claim was initially pursued on behalf of the plaintiff. Counsel indicated that he had advised his attorney that it was not necessary for him to testify. This leaves the Court in the invidious position of adjudicating a claim not knowing who the original miscreant was, whether he is still operating and what his links to and relationship with the plaintiff's attorney are or were, amongst other questions. This is an unsatisfactory situation and in the circumstances I have decided to refer this matter, through this judgment, to the Law Society for further investigation.

30. In addition I consider that it is appropriate that the court mark its disapproval of the conduct of the plaintiff in pursuing a fraudulent claim by way of a costs order. I do not consider that the plaintiff should be entirely deprived of her costs since I accept her evidence that the idea to formulate the claim on a fraudulent and untruthful basis emanated from Pedro who presented himself as a lawyer and whose word would have carried considerable weight with the plaintiff.

31. The fraud was uncovered by March 2009 and on 24 March 2009 the plaintiff's attorney sent the defendant affidavits made by his client and Ms Tungata setting out the true basis upon which the accident took place. For reasons which are unclear, however, the pleadings were only amended to reflect the true position on 20 January 2012. That amendment necessitated the defendant amending its plea. In the circumstance I consider that the plaintiff should be awarded her costs but excluding any costs incurred prior to 24 March 2009. In addition the plaintiff is disallowed any costs relating to the pleadings in this matter.

32. In the result the following order is made:

1. **The defendant is liable for 50% of such damages as the plaintiff may have suffered arising out of the injuries which she sustained as a result of being thrown from a vehicle in Khayelitsha on 4 November 2007.**

2. The defendant shall be liable for plaintiff's costs in this matter as taxed or agreed but limited to costs incurred after 24 March 2009 and excluding costs relating to the pleadings.

L. J. BOZALEK, J
JUDGE OF THE HIGH COURT