

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, PORT ELIZABETH**

**Case no: 2656/2009
Date heard: 24.07.2012
Date delivered: 07.08.2012**

In the matter between:

ADUM TREVOR PLUMRIDGE

Applicant / Plaintiff

vs

ROAD ACCIDENT FUND

Respondent / Defendant

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

TSHIKI J:

A) INTRODUCTION

[1] In the trial which lasted for two (2) days, applicant (plaintiff *a quo*) sued respondent (defendant *a quo*) for damages arising out of the collision at Scribante race track at Markman in Port Elizabeth. The collision occurred on 4 November 2007. At the end of the trial I granted judgment with costs in favour of the respondent on the merits as well as on the special defence of *volenti non fit injuria* (*volenti*) which was pleaded by defendant.

[2] Applicant has now applied for leave to appeal to the Supreme Court of Appeal on the amended grounds, *inter alia*, that:

[2.1] the accident was at least partly caused by the negligence of the insured driver referred to as Dates; and

[2.2] the maxim *volenti non fit iniuria* is not applicable in the present situation.

[3] During the argument of this application, Mr TD Potgieter SC appeared for the

applicant (plaintiff) and Mr H Van der Linde SC represented the respondent (defendant).

[4] In view of the concessions made by Mr Potgieter, and correctly so in my view, that the initial grounds of application for leave to appeal regarding the Court's evaluation of the evidence were incorrect and were not to be pursued in this application, I need not herein deal exhaustively with the merits of the evidence *vis-a-vis* its evaluation. I will, therefore, only have regard to the evidence which is relevant to the two grounds specified by Mr Potgieter in paragraph 5 of his heads of argument which are:

[4.1] that there is a more than reasonable prospect that another Court will find that:

[4.1.1] the accident was at least partly caused by the negligence of the insured driver;

[4.1.2] that the maxim *volenti non fit iniuria* is not applicable in the instant situation.

[5] Firstly, the submission that applicant was not aware of Dates' presence on the track and that this was not contested does not assist the applicant herein. Overwhelming evidence which I have accepted is that drivers who used the track under the conditions specified in the main judgment which are, *inter alia*, without permission and at their own risk, should have reasonably foreseen that there could be other racers in the track at the very same time they themselves were being timed. This conclusion is borne by the fact that there was no one controlling and or manning the track. Therefore, applicant cannot have any excuse that he was not aware of Date's presence on the track. He should reasonably have foreseen that another driver could have been in the track with him and, therefore, should have been alive

to that fact and then take the necessary precautions.

[6] Secondly, I have not found that the accident was in the slightest degree, partly caused by the negligence of the insured driver. My evaluation of the evidence does not suggest anything to that effect, nor do I consider to be any acceptable evidence suggesting so.

[7] On the question of *volenti non fit iniuria* it has been suggested that no one can consent to negligent driving. In English law Pollock¹ on Torts, 15th edition Chapter 4 para 10 p 112 under the heading “Leave and licence: *Volenti non fit iniuria* –

“Harm suffered by consent is, within limits to be mentioned, not a cause of civil action. The same is true where it is met with under conditions manifesting acceptance, on the part of the person suffering it, of the risk of that kind of harm. The maxim by which the rule is commonly brought to mind is *volenti non fit iniuria*. ‘Leave and licence’ is the current English phrase for the defence raised in this class of cases. On the one hand, however, *volenti non fit iniuria* is not universally true. On the other hand, neither the Latin nor the English formula provides in terms for the state of things in which there is not specific will or assent to suffer something which, if inflicted against the party’s will, would be wrong, but only conduct showing that for one reason or another, he is content to abide the chance of it. Some learned persons would make this a distinct ground of excuse under the name of ‘assumption of risk’.”

[8] In America they use the term Assumption of risk to refer to a situation which in our law is referred to as *volenti non fit iniuria*. Voluntary exposure to danger is listed under contributory negligence and the case where “a plaintiff rides in an automobile knowing that the driver is drunk” is one of the examples given of this “type of contributory negligence”.²

1 Quoted in *Lampert v Hefer* NO 1955 (2) SA 507 AD at 512 A-B

2 See Bohem, Voluntary Assumption of Risk; *Havard Essays on Torts*, p 496 (quoted on p 512 of *Lampert v Hefer* N.O. fn 1 *supra*)

[9] *McKerrons' Law of Delict* (4th ed) says at pp 95-96 on *volenti non fit injuria*:

"No man can complain of an act which he has expressly or **impliedly** assented to. This principle, which was well known to the Roman and Roman-Dutch law, is commonly expressed by the maxim *volenti non fit injuria*. Literally interpreted, the maxim is applicable only to cases where a person has consented to suffer something which would otherwise be an intentional wrong; eg consent to undergo a surgical operation or consent to the publication of a defamatory statement. **But the maxim is used in a wide sense, and is applied to cases where a person has consented to run the risk of unintentional harm, which would otherwise be actionable as attributable to the negligence of the person who caused it.**"

[10] *McKerron* quotes *Salmond* (9th ed sec. 8, p 37) as follows:

"This maxim (*volenti non fit injuria*) has a double application? It applies, in the first place, to intentional acts which would otherwise be tortious ... in the second place, to consent to run the risk of accidental harm which would otherwise be actionable, as due to the negligence of him who caused it."

[11] It seems to me that to equate *volenti non fit injuria* with contributory negligence is misplaced in our law³. It is a concept that was originally not part of our law but which appears to have been borrowed from other jurisdictions presumably from American law. If one has regard to the interpretation particularly the translation to English of the maxim in the South African context anyone who voluntarily assumes the risk cannot later be held to complain if the assumed risk results in harm occurring, therefore, the defence of voluntary assumption of risk should be upheld. This can, however, be the case if the injury or harm resulted from a cause falling within the scope of the risk so assumed⁴.

3 However, to the extent that our law on contributory negligence has been statutorily amended, the same view has now become part of our law.

4 Quoted from *Lampert v Hefer* NO p 514 para D-E as follows:

"*Nulla injuria est quae in volentem fiat*" says Dig. 47.10.1.5 and Schoer (in note 11 to Grot 3.34.4):
"*Damnum ex lege Aquilia cessat, si culpa agentis interveniat, et concurrant cum culpa*"

[12] When a person is well aware of the danger but nevertheless wilfully exposes himself to it, he acts intentionally in respect of the prejudice he or she suffers.

*Neethling et al*⁵ put it succinctly as follows:

“Where a plaintiff does act with contributory intent, the fault of the defendant (in the form of negligence) is eliminated by the contributory intent of the plaintiff. Although the defendant is also at fault, he is not held liable towards the plaintiff because of the fact that the plaintiff himself acts intentionally. The contributory intent (at least *dolus eventualis*) or assumption of risk by the plaintiff therefore cancels the defendant’s fault. (In what follows, the term ‘contributory intent’ is used in this sense.)

[13] In ***Santam Insurance Co Ltd v Vorster***⁶ (hereinafter referred to as ***Vorster***) the then Appellate Division (now Supreme Court of Appeal) refused to uphold the defendant’s defence of *volenti non fit injuria* on the grounds that whilst the plaintiff had been volens in relation to the risks ordinarily inherent in “dicing for instance, a burst tyre, he could not be held to have assumed the risk of injury resulting from grossly negligent behaviour on the part of the driver”. Whilst I am of the view that the correctness of the above finding is open to doubt I do not propose to deal with the matter further in view of the difference in the facts of the two cases. However, had the facts been identical I would have been bound to follow superior precedent.

[14] For the purposes of the application for leave to appeal and in view of the submissions made, I have to explain further the marked difference in the facts of the present case and those of ***Vorster supra***. Firstly, in the present case, the assumed risk starts from the fact that the race track in issue was neither manned nor

patientis; in jure enim ex culpa sua damnum sentiens, non intellegitur sentire damnum.”

5 Law of Delict 6th edition, page 171 para 5.4.1

6 1973 (4) SA 764 (A)

controlled before and on the date in question. Secondly, the plaintiff and others, including the insured driver, were never given permission to use the race track and neither did they seek permission from the owner(s). They were in fact unlawfully using the race track at their own risk. Thirdly, the applicant and other drivers were not professional race track drivers and applicant was in fact aware of the risk inherent in the unlawful use of the race track. Fourthly, it also does not appear to me that this race track was a public road, as was the case in **Vorster's** case. The applicant's witnesses' evidence was rejected and the Court accepted the version of the respondent's witnesses as correct. The accepted version, when one considers the probabilities of the case, proved the success if not the correctness of the defence proffered by the respondent, including that of *volenti non fit in iniuria*.

[15] As I indicated in the main judgment, in view of the circumstances which presented in Scribante race track, that is, the speeds in which the motorcycles in question were driven, applicant must, in law, be seen as having consented to the high speeds which were achieved on that track. The high speeds, in my view, were a potential danger to the applicant as well as the insured driver and this was known by them even before they entered the track and they were live to such eventuality. It is, therefore, needless to say that a speed of +/-240 km/h in those circumstances could not save a person from death when confronted with sudden emergency as was the position in the applicant and the insured driver herein. Consequently, they both consented to reckless driving and therefore the respondent's defence of *volenti non fit iniuria* ought to have succeeded.

[16] It is common cause, therefore, that such a defence (*volenti*) cancels fault on

the part of the respondent even if it were to be found that the respondent was more negligent than the applicant. It is in fact one of the reasons that I decided to deal with this defence at length notwithstanding that on the merits I have already found in favour of the respondent.

[17] Having said the above, I am of the view that it is not reasonably possible that another Court may find in favour of the applicant in this case. This is so in respect of all the grounds of appeal.

[18] Consequently, the application for leave to appeal is hereby dismissed with costs.

P.W. TSHIKI
JUDGE OF THE HIGH COURT

Counsel for the applicant	:	Adv. TD Potgieter SC
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