

IN THE HIGH COURT OF SOUTH AFRICA

EAST LONDON CIRCUIT LOCAL DIVISION

Case no. EL 1538/13

ECD 3338/13

In the matter between:

MELISA TSHONGOYI

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

STRETCH J:

[1] The plaintiff instituted action against the defendant for the payment of R737 500 in damages arising from an incident which took place on 2 March 2008. At the trial, it transpired that the plaintiff had leapt from a moving Toyota Quantum mini bus driven by Siqhamo Yanxa (“the insured driver”), sustaining certain injuries. It is not disputed that at the time, the driver had been contracted to transport school children, and that he had been a taxi driver for 22 years before the incident.

[2] The plaintiff's original claim, which was delivered in December 2013, was amended in June 2015. The essential averments upon which her claim is founded, read as follows:

- '6. On or about 2 March 2008 at approximately 14:00 and at or near Khayelitsha Location, Reeston, East London, a motor vehicle accident occurred involving motor vehicle with registration letters and numbers [....].
7. ...
8. The accident was caused solely by the negligent driving of the insured driver, who was negligent in one or more of the following ways:-
 - 8.1 he drove at a speed that was excessive in the circumstances;
 - 8.2 he failed to keep a proper lookout;
 - 8.3 he failed to keep his vehicle under proper control;
 - 8.4 he failed to apply the brakes of his vehicle either timeously or at all;
 - 8.5 he failed to avoid the accident when by the exercise of reasonable care and skill he could and should have done so;
 - 8.6 he failed to slow down after requested to do so by the Plaintiff and/or other passengers;
 - 8.7 he failed to stop the vehicle when requested to do so by the Plaintiff and/or other passengers;
 - 8.8 he failed to stop and/or decelerate the insured vehicle when it became apparent that the Plaintiff would alight from the vehicle.
9. In the alternative to paragraph 8 above, the accident was caused solely by the wrongful driving of the insured driver who was wrongful in one or more of the following ways:
 - 9.1 he failed to stop and/or decelerate the insured vehicle when it became apparent that the Plaintiff would alight from the vehicle;

9.2 he failed to slow down after requested to do so by the Plaintiff and/or other passengers;

9.3 he failed to stop the vehicle when requested to do so by the Plaintiff and/or passengers;

9.4 he threatened the Plaintiff in such a manner that it was necessary, in the circumstances, to alight from the vehicle.

9.5 he failed to maintain the vehicle as was required, particularly the door;

9.6 he failed to ensure that the door was properly closed and secured before driving.

9A. In the alternative to paragraphs 8 and 9 above, the accident was caused solely by a combination of the negligent and/or wrongful driving of the insured driver.

10. As a result of the aforesaid collision, the Plaintiff sustained the following injuries:-

10.1 Severe brain injury;

10.2 Facial scarring...'

At the commencement of the trial it was agreed that the trial would proceed on the issue of liability only, and the claims at sub-paragraphs 9.5 and 9.6 of the amended particulars were abandoned.

[3] The plaintiff, who was 14 and in grade seven at the time of the incident and 21 when she testified, explained at the trial that she and other pupils had been making use of transport provided by the driver to get to school and back.

[4] On the day in question she was being driven home from school. When the driver stopped where he usually did for her and others to alight, they were unable to make their way to the exit door because the taxi was very full. They told the driver to do his rounds and drop them on his way back when most of the passengers had exited. He did so, but failed to stop at her usual point of exit,

despite the passengers having told him to do so. By that stage there were only three female passengers remaining in the taxi, the plaintiff having been the eldest of the three.

[5] After he had passed the drop off point, they screamed. The driver turned right in the direction of the plaintiff's home. She assumed that he would stop there. He did not, and ignored her, despite her having advised him that he was passing her home. She noticed that the driver was accelerating. They screamed again because they did not know where the driver was taking them and what he was going to do to them.

[6] The plaintiff threatened to open the door and jump out of the vehicle. The driver did not respond.

[7] The plaintiff testified that she became out of her mind with fear because she had seen children being kidnapped on television. She could not recall what happened next (whether she opened the door or whether it opened automatically). All she recalls is that she managed to get out of the taxi, and that she was injured from the fall, to the extent that she is now forgetful and had to drop out of school as she could no longer cope.

[8] She disputed certain aspects of the driver's version of the events which were put to her during cross-examination. In essence, they are the following:

- a. The passengers (including the plaintiff) were uncontrollable, unruly and disruptive, playing, throwing items around and refusing to sit down.

- b. She refused to alight with her friends when the taxi stopped for the first time at the designated point for her to get off, despite her friends having encouraged her to do so.
- c. Because she wanted to stay on the bus with her other friends, the driver said he would drop her off at the next stop, and instructed her to close the door, which she did.
- d. He was driving at a speed of about 30 to 40 kilometres per hour when he heard screaming.

[9] The plaintiff had also deposed to an affidavit on 16 March 2009 wherein she stated that:

- a. When the driver initially reached the point where he usually dropped them off he simply drove on at high speed, ignoring their protestations.
- b. The sliding door suddenly opened by itself while the vehicle was speeding.
- c. She “fell out” and was injured.

[10] When this version was put to her during cross-examination the plaintiff said that it could have happened like that. All she could remember was what had happened before the incident (in particular her fear when the driver sped past her home), and thereafter waking up in hospital.

[11] On 23 July 2013 the plaintiff was examined by neurosurgeon Dr L. Lankester. According to the doctor’s report, the plaintiff had told him that on the day in question, she and her two friends had formed an opinion that the driver was

driving too fast, so she asked him to stop so that she could alight, but he was reluctant to do so. He did however reduce speed to about 20 kilometres per hour, at which stage she clearly remembers having opened the door and having jumped out, whereafter she lost consciousness.

[12] When the relevant portions of the report were put to the plaintiff during cross-examination she said that perhaps the doctor had not heard her properly as she had told the doctor that the speed was reduced to 120 kilometres per hour, and not 20 as reflected in the report. She also said that she could not recall having opened the door, even if she may have said this to the doctor.

[13] After the long adjournment the plaintiff became even more vague and appeared to be experiencing serious difficulty recalling the events.

[14] Sinovuyo Maqubelo testified that she was a passenger (12 years old) when the plaintiff jumped from the vehicle, which was moving very fast. She corroborated the plaintiff's evidence in chief in most respects, adding that they had to tell the driver that the plaintiff had jumped from the vehicle, whereafter he stopped and rendered assistance.

[15] The insured driver testified. He repeated most of what had already been put to the plaintiff and her witness. He also mentioned that:

- a. He had heard the plaintiff's friends screaming and warning her not to jump.
- b. He could in any event, not have driven fast as the road surface was gravel and had potholes.

- c. The plaintiff had been given two opportunities (at her usual bus stop) to alight from the vehicle but did not do so. After she and her friends failed to alight on the second occasion, he told them that they were wasting time and that he would drop them at a turn which he was approaching, and which was a short distance past the plaintiff's house, as it was not convenient to stop directly in front of the plaintiff's house. It was when he was on his way to this point that the plaintiff jumped from the vehicle.
- d. There was nothing he could do to prevent this. He applied brakes as soon as he heard the children screaming "Melisa, do not jump!" but it was too late as she was already in the process of jumping.

Object of the Road Accident Fund

[16] The object of the defendant is set forth at section 3 of the Road Accident Fund Act 56 of 1996 ("the Act") which reads as follows:

'The object of the Fund shall be the payment of compensation in accordance with this Act for loss or damage wrongfully caused by the driving of motor vehicles.'

Liability of the Fund

[17] Section 17(1) of the Act provides that:

'The Fund or an agent shall - ... 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 ... caused by or arising from the driving of a motor vehicle ... if the injury ... is due to the negligence or other wrongful act of the driver ...'

[18] The application of the test for negligence was considered by Maya J (as she then was) in *Totobayo v Road Accident Fund* 2002 JDR 0795 (Tkh).

[19] In this matter an accident had occurred at Tabankulu on 2 August 1998. The plaintiff testified that he and a group of about 17 people were riding on the back of a truck. As they were about to cross a stream the driver ordered them to alight and to wait on the other side of the stream as there was a problem with the truck. Eventually they set off again and were ascending a steep incline bordered on the one side by an embankment and on the other by a deep gorge, when the engine stalled. Anticipating that the truck would roll back and career down the incline and into the deep gorge below, the plaintiff made a quick judgment call and jumped off the vehicle. As he was scrambling away from the truck, it in fact did capsize as he had anticipated, but unfortunately onto one of his legs, crushing it. Others, who did not jump from the vehicle, were also injured. The plaintiff's two witnesses testified that although they did not jump they were aware of the fact that they were in imminent and serious danger and they also anticipated that the truck was going to plunge into the gorge. One of the witnesses didn't jump however, because she had a child on her lap. The other did not, because he was too confused by the chaotic events of the stalling, the reversing and the capsizing.

[20] In order to determine whether the insured driver was negligent (as I am constrained to do) the learned judge applied the test set out in *Kruger v Coetzee* 1966 (2) SA 428 (AD) where Holmes JA said the following (at 430E-G):

‘For the purposes of liability *culpa* arises if-

(a) a *diligens paterfamilias* in the position of the defendant-

- (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence.

(b) The defendant failed to take such steps.

This has been constantly stated by this Court for some 50 years. Requirement (a) (ii) is sometimes overlooked. Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend on the particular circumstances of each case.'

[21] In applying this test Miya J found it reasonable to infer that because the truck had, even before the incident, stalled and had to be inspected, the driver was well aware of the defect, and had nevertheless persisted with the journey. In the premises the judge was of the view that the further defect which had caused the truck to stall on the steep incline was not a defect that was sudden and/or unforeseeable. The learned judge inferred negligence on the driver's part for at least failing to take reasonable care and for failing to ensure that the truck was in a roadworthy condition before venturing further on the trip on the hilly and difficult terrain described by the witnesses and with a large number of passengers weighing the vehicle down.

[22] The learned judge rejected the defendant's contention that the plaintiff had jumped off the truck as a result of an error of judgment and would probably not have been injured had he remained on the truck. It would seem that this argument was rejected primarily because others, who did not fling themselves from the stationary truck, were in any event injured when the truck capsized. The judge accordingly entered judgment in the plaintiff's favour.

[23] During argument before me it was contended, with apparent reliance on this judgment, that I should likewise find in the plaintiff's favour.

[24] I am not inclined to do so for a number of reasons, the most obvious of which is that *Totobayo's* facts are clearly distinguishable from those before me. For one, in the matter before me, the 14 year old plaintiff threw herself out of a perfectly functioning vehicle, without the slightest suggestion that the motoring safety of the passengers was at risk. Indeed, and unlike the position in *Totobayo*, it is abundantly clear that the plaintiff was the sole cause of her misfortune, and that she was at no risk of sustaining any injuries by remaining in the vehicle. At best for the plaintiff, there was some suggestion that the vehicle was speeding. However the plaintiff's own versions in this regard are diametrically opposed and totally unreliable. It is in any event highly improbable that the driver was driving faster than 120 kilometres per hour on a gravel road pitted with potholes when he reduced speed, which is one of the plaintiff's versions. Indeed, to throw oneself out of a vehicle travelling at that speed and in those circumstances simply because the driver of this public transport did not stop forthwith on demand, would be an extremely foolish and risky thing to do.

[25] On a conspectus of the evidence as a whole, considered in the light of the probabilities, it seems to me that the driver was travelling at a normal speed in the circumstances, and that there was no cause for frantic panic. Not only is this his evidence, but it is corroborated by the plaintiff's report to the doctor. That is undoubtedly the reason why the other passengers (who were younger than her), not only warned her not to jump but did not jump themselves. Even if the plaintiff and her friends were afraid of being kidnapped or thought that they were being kidnapped (a version which was raised for the first time in her evidence and which, in my view, ought to have been pleaded), the plaintiff may well have had recourse elsewhere, but not at the expense of the defendant, which was established as a juristic person for the purpose of dealing with loss or damage caused by the driving

of motor vehicles, which, by the very description of the present legislation and the Act preceding it, deals with motor vehicle accidents and not apprehensions of abduction or some other form of harm unrelated to the manner and the consequences of driving.

[26] Having said this, it is in any event so that the plaintiff has not even begun to touch on establishing negligence or any other wrongful act for that matter, on the part of the driver. In order to do so, and applying the principles in *Kruger v Coetzee*, it is incumbent on the plaintiff to show that a reasonable person in the position of the driver –

- a. would foresee the reasonable possibility that driving past the plaintiff's house and not stopping immediately and in response to a demand from a school girl at a point where it was not convenient to do so, would result in her opening the sliding door of the mini bus, flinging herself from the moving vehicle, and sustaining injuries; and
- b. would take reasonable steps to guard against her opening the door and jumping from the moving vehicle; and
- c. that the insured driver failed to take reasonable steps to guard against this eventuality.

[27] There is nothing before me to suggest that a reasonable person in the position of the driver would have foreseen the possibility of this type of impulsive, inexplicable, irrational and possibly even reckless conduct ensuing. Even if a reasonable bus driver would have foreseen this rather unusual conduct (which to my mind is highly improbable), it is difficult to imagine what reasonable steps he would have taken to prevent it.

[28] This is not the only problem I have with the plaintiff's claim. It is trite law that a party stands or falls by its pleadings. As I mentioned at the hearing of this matter, the plaintiff's pleadings and her evidence are like chalk and cheese. The fact that she voluntarily threw herself from the vehicle, and her reasons for having done so, are to my mind, essential aspects of her case which ought to have been pleaded at least in an attempt to establish a cause of action. In fact her pleadings, her affidavit, her report to the neurosurgeon and the various versions presented in evidence simply do not dovetail. Having said that, and even if they did, and even if *culpa* had been established on the part of the driver, for this court to allow the plaintiff to claim from the defendant on these facts would make a mockery of the entire purpose for which the Fund was established.

[29] The cases which have attracted liability on the part of the Fund, where passengers have alighted from vehicles and have injured themselves, are all cases where the plaintiffs anticipated the vehicles being involved in accidents or collisions of some description or another. In those matters which the plaintiff's counsel referred me to, the vehicles all ended up in some form of accident or collision.

[30] In the circumstances it seems to me that the reason why the word "collision" was incorporated in the particulars of claim (when there was no collision or even a prospect of one), was in an attempt to bring the claim within the purview of standard claims in matters against the Fund.

[31] In short, had the defendant applied for absolution from the instance at the close of the plaintiff's case, I would have been constrained to have given such application serious consideration.

[32] The plaintiff's claim is dismissed with costs.

I.T. STRETCH

13 October 2015

JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the plaintiff:

Ms Watt

Instructed by:

Matyeshana Moodley Inc

East London

(Ms Townley)

Counsel for the defendant:

Mr P.H. Mouton

Instructed by:

Ketse Nonkwelo Inc

c/o Bate Chubb & Dickson

East London

(Mr Kretzmann)