HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO:40814/ 2017

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(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.
DATE 01/04/2020
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In the matter between:

OLIVIA JACKSON Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

DAVIS, J

[1] Introduction and history of litigation

1.1 On 5 September 2016 and during the filming of the movie "Resident Evil 6", the Plaintiff was involved in a collision between herself, riding

a motorcycle at the time and a camera attached to a boom extended from a motor vehicle. As a result of the collision, she sustained serious injuries and also lost her one arm.

1.2 The Plaintiff instituted action against the South African film company, the stunt coordinator, her employer, the driver of the vehicle and the camera boom operator under case no 45865/2016.

1.3 The Plaintiff also instituted a separate action against the Road Accident Fund (the "RAF") in this action.

1.4 On 5 March 2019 the abovementioned two actions were consolidated and proceeded under the current case number.

1.5 At the commencement of the consolidated trial, the issues relating to a special plea in case no 45865/2016 were separated from the remainder of the trial.

1.6 After hearing evidence of the Plaintiff, the camera boom operator and the driver of the vehicle, the RAF conceded the merits of the special plea of the other defendants which was upheld in the following terms:

> "*1 It is declared that the camera vehicle to which the "freedom arm" was attached was designed and adapted for propulsion on the read by means of fuel and was a motor vehicle as contemplated in the Road Accident Fund Act, 56 of 1996.*
>
> *2 It is declared that the incident which occurred on 5 September 2015 referred to in the Plaintiff's particulars of claim arose out of the driving of the motor vehicle in question or was caused*

thereby as envisaged by section 17(1) read with section 21 of the Road Accident Fund Act, 56 of 1996.

3 *Consequently the first defendant's special plea is upheld*". (Certain costs orders then followed).

1.7 Exactly a year later the matter came before me again. By agreement, the issues of merits and quantum were separated.

1.8 The RAF denied that the insured driver was negligent and, if he was, it pleaded that the Plaintiff was contributory negligent. In addition, in terms of a belated amendment, the RAF pleaded, that the Plaintiff, as a stunt rider, had consented to the risk of damage.

1.9 After an unsuccessful application for postponement by the RAF, the trial proceeded and, save for its expert, the RAF's witnesses eventually arrived and testified. So did the Plaintiff and an expert.

[2] <u>How the "incident" occurred</u>:

2.1 The scene of the "incident" (as the witnesses referred thereto) was on a disused stretch of dual carriageway to the west of Pretoria. For purposed of the scene to be filmed, there were various motor vehicle wrecks strewn alongside the tarred section of the highway along which the Plaintiff and the insured driver were to travel.

2.2 On the parallel section of the dual carriageway another vehicle with a camera would "track" the Plaintiff's progress.

2.3 The Plaintiff was on a motorcycle and wore no crash-helmet for purposes of the scene. She rode from a bridge at the far and of the

stretch of highway and the insured driver from the opposite direction of the same stretch of highway. There was no other traffic.

2.4 The vehicle in which the insured driver was travelling was a Mercedes Benz ML 555 AMG registered in the name of Bikers Film Action CC. A mobile boom was fitted to the vehicle, called the "Freedom arm" which can extend and protrude to the side of the vehicle. A camera was attached to this boom and the boom is operated by the "CEO" of the close corporation, one Marais, from inside the vehicle. In his words "my actual job is an arm operator of the Freedom arm".

2.5 The intention was that the camera would start out extended at a right angle from the insured vehicle just above the road surface. It would film the Plaintiff as she and the insured driver approached each other and then the boom would lift so that the camera can rotate and film the Plaintiff passing underneath the boom as she and the insured driver passed each other.

2.6 In total, three "runs" were done. The first was a "dry run" where the Plaintiff and the insured driver passed each other, but with the camera boom uplifted above the height of the Plaintiff's head for the entire run. The second run, the "rehearsal run", was where the boom was depressed at the start of the run and the camera allowed to take a "low level shot" whereafter the boom was lifted as the Plaintiff approached, allowing her to be filmed passing underneath the boom and the camera. In the third run, the boom was lifted too late and the camera hit the Plaintiff in her face and on her shoulder. In all these runs, the Plaintiff and the insured driver were travelling in straight lines.

2.7 The last two of the three "runs" were also referred to as the "successful run" and the "incident run" respectively, distinguishing between when the boom was successfully lifted over the Plaintiff and when not, resulting in the "incident".

[3] Who was to blame?

3.1 The parties each employed an expert, both of whom viewed the footage of all the runs, both taken by the Freedom arm camera and from the camera on the "tracking" vehicle. The experts' expertise in accident reconstructions were undisputed.

3.2 The experts compiled joint minutes. They agreed on every material of their observation and conclusions. The Plaintiff's expert confirmed the joint minutes and expanded thereon in oral evidence whilst the RAF's expert was, due to a "misunderstanding" not available to testify. The most relevant parts of the joint minutes recorded the following agreements between the experts:

> "4.1 *Mr Proctor-Parker and Mr Grobbelaar agree that the operation of the boom was not performed to any degree of operational accuracy, with the speed and timing of the boom not established scientifically, but left to the subjective judgment of the operator and/or the Freedom arm vehicle driver.*
>
> *4.2 Mr Grobbelaar indicates, and is agreed with by Mr Proctor-Packer, that the lifting of the boom on the incident run probably occurred with the motorcycle having travelled at least 3s further than the same position where the boom was lifted in the first successful run (i.e. it was lifted 3s further,*

or closer to the rider, than the marker that was used by the Freedom arm vehicle driver where the boom should have been lifted).

They agree that version of the Freedom arm vehicle driver that he called boom-up when the motorcycle was at the marker is therefore not consistent with the video evidence, where the latter indicates that the boom-up call during the incident run probably occurred with the motorcycle rider being at least 3s past the location where the boon-up call was given in the first successful run.

Furthermore, Mr Grobbelaar indicates, and is agreed with by Mr Proctor-Parker, that the first successful run and the incident run cannot even be considered to be remotely similar from a timing point of view, as a result of their considerably different starting positions and therefore the vastly different distances of travel of the Freedom arm vehicle from the position where it pulled away ...

6.1 Mr Proctor-Parker and Mr Grobbelaar agree that the collision of the motorcycle rider would probably have been avoided in the incident run, had the driver of the Freedom arm vehicle aborted the run when he saw that the motorcycle was already at the marker that he had identified for the purpose of lifting the boom but that the Freedom arm vehicle was further away from the motorcycle than on the previous runs".

3.3 At the portion of the trial dealing with the special plea, Marais testified that, as boom operator, he was under the driver's instructions. He testified so repeatedly and in so many words: "*Well, basically, I am under instruction of the driver ...*" and "*it is his duty to warn me and instruct me (to) bring the arm in, lift the arm up or, you know, make the arm safe*" and "*I have to, he is the driver. I need to obey his instruction, I cannot override his instructions*".

3.4 Regarding the taking of a "marker" from where to gauge when to lift the boom, Marais' evidence was as follows: "*Well, we take a joint marker because we all have to work to the same marker you know to be in sync ... . And you said that if he says "boom up" you have got to "boom up"? "Boom up" is the word? – Absolutely ... On the day in question did he tell you to "boom up"? – Yes, he did. Quite urgently as well. But it was too late. Did the boom work on that day? – Ja. So the arm was in the process of going up but it was obviously too late. Or something was too ... something was out of sync*".

3.5 Mr Melville, the insured driver was at the previous part of the hearing confronted with the evidence of Marais quoted in paragraph 3.3 above and confirmed it as being correct. In clarification, he answered as follows: "*So he is under your complete instruction. Is that what you say? – Well basically he is under my instruction, for safety.*"

3.6 When testifying the second time round on the issue of liability, both Melville and Marais deviated materially from their previous evidence and even contradicted each other, particularly as to the issue of markers. Melville also tried to distance himself from the analyses conducted by the experts and agreed to by them. The extent of these contradictions were so

glaring that counsel of the RAF (correctly) conceded that no reliance can be placed on their latter evidence.

3.7 What emerged from Marais' and Melville's latter evidence was a clear attempt to blame the Plaintiff. They suggested that she rode too fast, she rode faster than before, she did not keep a proper look-out and that she could have avoided the collision. Apart from the utter unreliability of their evidence, the experts had the following to say in this regard:

> "*Mr Proctor-Parker and Mr Grobbelaar agree that it would have been virtually impossible for the motorcycle rider to have avoided the boom colliding with her under the circumstances of this incident*".

3.8 In this regard, one is reminded that a trial court is entitled, if not bound, to accept the matters agreed to by the experts, particularly when opinions have been expressed within their fields of expertise. See: BEE v RAF 2018 (4) SA 366 (SCA). Whilst it is the trial court who has the sole prerogative to decide the issue of liability, I take the experts' joint opinion expressed above to mean that, on their scientific calculation of the various speeds, positions and movement of the vehicles, there was no opportunity, either time- or distance-wise for the Plaintiff to have taken evasive action. Her evidence was further that she did nothing different on the incident run from what she had done on the rehearsal run and that her speed was the same constant speed on both runs, being the 70km/h that she had been instructed to maintain.

3.9 I therefore find that the insured driver was the one who was negligent. He did not take into account that his starting point in the successful/ rehearsal run differed substantially form his starting point in the incident

run. In the latter, he stated much further back, this resulted in the Plaintiff reaching the initially determined marker long before him. This, in turn, resulted in him reaching the marker later, by which time the Plaintiff was much closer to him and dangerously so. His consequential delayed "boom-up" command was too late, resulting in the incident. He was in any event negligent in approaching the oncoming Plaintiff without any calculations having been made as to what a safe distance would be to "boom-up". Where the director had told the crew that he wanted boom-up to be on second later than in the rehearsal run to get a more exciting shot, the insured driver miscalculated the margin for error and his command.

3.10 On a conspectus of the evidence as set out earlier, I furthermore find that there is no room for finding contributory negligence on part of the Plaintiff.

[4] Voluntary assumption of risk?

4.1 The further plea of the RAF was one of *volenti non fit inuria*, that means that the Plaintiff, as a stunt rider executing a potentially dangerous maneuver, voluntarily assumed the risk of damage, should anything go wrong.

4.2 When confronted with this proposition in cross-examination, the Plaintiff explained that everyone on the movie set had an own specific job to do. Hers was to ride the motorcycle in a straight line at a constant speed. The insured driver had the job to drive the Freedom arm vehicle similarly in a straight line at a (lesser) constant speed and to lift the boom with the camera over the Plaintiff at a given point or, at least at a safe and opportune moment. She did not consent to any other risk and she was

unaware that the director had given the insured driver instructions to decrease the safety margins from the rehearsal run to the incident run. She was never given the opportunity to consider this or to consent thereto. That was her uncontroverted evidence.

4.3 In view of the evidence, it cannot be found that the Plaintiff had consented to a specific risk such as the Plaintiff did in Oosthuizen v London& Lancashire Insurance Co Ltd 1956 (2) SA 319 (CPD) when the plaintiff therein deliberately and with full knowledge climbed back onto a trailer already previously towed recklessly by an insured driver. The insured driver repeated his reckless driving and overturned the tractor and trailer subsequently. That Plaintiff did not succeed with his claim.

4.4 Our court have also held that it is only where the alleged wrong falls squarely within the risk assumed, that this defence would be applicable. See: Durban City Council v SA Board Mills 1961 (3) SA 397 (AD) at 406D – 407C.

4.5 The Plaintiff's case is much more comparable to that of the Plaintiff in Kepko v RAF 2008 JDR 1475 (D). There the insured driver, in the words of the summed-up evidence, behaved like an "idiot". In dismissing the defence of volenti, it was found that the Plaintiff, as explained by him, accepted the normal risks of what was a dangerous sport (motorcycle racing), such as collisions arising in the normal cause. So too, the Plaintiff in the present case accepted the mishaps which might happen in the normal course if everyone did his job. She did not consent to an insured driver not doing his job, not starting from where he should have started, not making any proper calculations, not adhering to his "job" and, lastly by decreasing the safety margin without telling her. She assumed

that the incident run would be a repeat of the rehearsal run when, clearly it was not.

4.6 Our courts have applied the defence of volenti (voluntary assumption of risk) with great caution and circumspection. See: Santam Insurance Co Ltd v Vorster 1973 (4) SA 764 (A) at 778 – 779.

4.7 Where the issue of contributing negligence, dealt with in paragraph 3 above, calls for an objective enquiry as to conforming with the standard of the reasonable man (in this case, the reasonable female stunt rider), the issue of voluntary assumption of risk deals with the Plaintiffs subjective state of mind, albeit it outwardly manifested through her actions.

4.8 For the RAF to succeed with this defence, it must therefore prove on a balance of probabilities that the Plaintiff had full knowledge of the extent of the risk she was consenting to during the incident run. See Santam v Vorster (supra) and Lampert v Hefer 1955 (2) SA 507 (A) as to the issue of knowledge. She, as a stunt rider on a movie set, assumed, as she was entitled to do, that others, such as the insured driver, would take reasonable precautions against injuring her, particularly when dangling a camera outside a vehicle on the "Freedom arm". See: Herschel v Mrupe 1954 (3) SA 464 (AD).

4.9 Even if the Plaintiff had voluntarily assumed the risk of harm of riding a motorcycle as a stunt rider, she on the facts of this case, did not assume the risk of a diminishing of the safety margin without her knowledge.

4.10 I find that the RAF has failed in proving this alternate defence.

[5] Costs

I find no reason why costs should not follow the event. The RAF contended that the Plaintiff had not come to South Africa for the trial alone but she has also come to consult experts for purposes of the quantum part of the trial and therefore not all her travelling costs should be awarded. While she may have consulted experts, what is clear is that she was a necessary witness in her own trial and had to travel to South Africa for that purpose, expert consultations or not. The cost saving is therefore not in respect of the trial, but in respect of the consultations. Although there were joint minutes of the experts, the Plaintiff's expert, Mr Grobbelaar assisted the court by way of explanations given in his oral evidence, making the brief joint minutes more palatable. In the context of this case I also see no reason why costs of this portion of the trial should stand over until its final conclusion.

[6] Order

1. It is declared that the Road Accident Fund is 100% liable for the Plaintiff's proven or agreed damages suffered pursuant to the collision which took place on 5 September 2015.

2. The Road Accident Fund is ordered to pay the Plaintiff's costs of this portion of the trial, such costs to include:

   2.1 The Plaintiff's travelling costs from the United Kingdom;

   2.2 The cost of the Plaintiff's expert Mr Grobbelaar, including his preparation costs, the costs of his report and the costs of the joint minutes.

   2.3 The costs of senior counsel.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 5-6 March 2020

Judgment delivered: 1 April 2020 (electronically)

APPEARANCES:

For the Plaintiff:	Adv J J Wessels SC
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For the Defendant:	Adv C H Badenhorst
Attorney for Defendant:	Moche Attorneys, Pretoria