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**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

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

\_\_\_\_\_  
DATE

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SIGNATURE

CASE NUMBER: 20662/2016

In the matter of

**M T OBO M M**

**PLAINTIFF**

and

**ROAD ACCIDENT FUND**

**DEFENDANT**

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**JUDGMENT**

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**DOSIO AJ:**

**INTRODUCTION**

- [1] This is an action instituted by T M (“the plaintiff”) in her representative capacity of her minor child, M M (“M”), against the defendant, namely, the Road Accident Fund (“RAF”), as a result of bodily injuries sustained by M.

- [2] At the commencement of the trial and by request of leave of the court by the plaintiff's counsel , an order was granted in terms of Rule 33 (4) of the Uniform Rules of Court, separating the issues of liability from those of quantum. In terms of the separation order, the only issue for determination in this trial is that of liability arising out of an accident that occurred on the 25<sup>th</sup> of April 2014.
- [3] The action was set down for hearing on the 12<sup>th</sup> of May 2020 via video conference. The notice of set down was served on the defendant's attorney on the 18<sup>th</sup> of November 2018. The defendant's attorneys were aware that the matter was on the roll as an e-mail was sent on the 11<sup>th</sup> of May 2020 to my secretary, informing her that the defendant was not ready to proceed on the 12<sup>th</sup> of May 2020. The reason given by the defendant's attorney was that a communication was received on the 8<sup>th</sup> of May 2020 from the RAF informing the defendant's attorneys that RAF matters on the trial roll would be postponed and that accordingly the defendant's counsel's brief was withdrawn. The defendant's attorney was been invited to partake in the video conference on the 12<sup>th</sup> of May but failed to participate.
- [4] On the basis of a communication from the Judge President of this division, to the Judges, dated the 11<sup>th</sup> of May 2020, stating that this division did not see its way clear "*to acceding to the request of the RAF to remove all RAF matters from the roll*" I proceeded to hear this trial.
- [5] When the matter was called at 10h00, no one was present from the RAF to request a postponement. The plaintiff's counsel requested the matter to stand down to 11h00 to ascertain if they could get some direction from their instructing attorneys whether they would seek a separation of the merits and quantum. When the matter was recalled, the plaintiff's counsel informed me that the attorneys for the defendant were liaising with the RAF to ascertain if the RAF would concede the merits. I was asked to let the matter stand down to after 12h00. The matter was recalled after lunch and I was informed that the attorneys of the defendant had not communicated with the plaintiff's counsel and that accordingly the plaintiff wanted to proceed with the matter solely on the merits.
- [6] Due to the non-appearance of the defendant, the matter was heard by default.

## BACKGROUND

- [7] It is common cause that M was involved in a pedestrian motor vehicle accident on the 25<sup>th</sup> of April 2014 at approximately 17h15. This occurred at or near Luvuvhu street in Dhlamini extension 2. M was nine (9) years old at the time of the accident. It is further common cause that the driver of the vehicle with registration number [...] GP was Charlotte Khumalo.
- [8] In terms of paragraph 15.1 of minutes of the pre-trial conference held on the 4<sup>th</sup> of March 2020, the defendant admitted the following, namely;  
 “The defendant binds itself to the contents of the Officer’s Accident Report in so far as the occurrence of the accident is concerned and limits its admission about the occurrence of the accident to the information contained in the accident report, without admitting liability.”
- [9] The plaintiff contended that the insured driver had been the sole cause of the accident in that;
1. The insured driver failed to avoid a collision when by the exercise of reasonable care the insured driver should have done so;
  2. The insured driver drove at an excessive speed in the circumstances;
  3. The insured driver failed to keep a proper lookout;
  4. The insured driver failed to keep the vehicle under proper control;
  5. The insured driver failed to apply the brakes of a motor vehicle driven by him at all and/or timeously

## EVIDENCE

- [10] The plaintiff called two witnesses, namely M and his mother, T M.

### M M

- [11] M testified that he was born on the 2<sup>nd</sup> of April 2005 and that he was currently fifteen (15) years old. He stated he understood the import and nature of the oath and was duly sworn in. He stated that on the 25<sup>th</sup> of April 2014, around 17h00 he was crossing the road when he was hit by a car. It was a Friday and there were a lot of cars on the road.
- [12] Prior to crossing the road he had been playing with his friends at Eco Park. When he crossed the road he moved from Eco Park to the opposite side of the road where his home is situated. He testified that he was alone when he crossed the road and that

prior to being hit by the car, there wasn't time to move out of the way as the car came towards him at a very high speed.

- [13] The car hit him on his left hip and he ended up on the floor. The car made a u-turn and some people picked him up and he was taken to Baragwanath hospital by the person who was driving the car that collided with him. His back and head was bruised and his hip hurt.
- [14] He testified that he no longer has any injuries from the accident and he does not have any scars on his back, head or hip. He did state that he experiences headaches three (3) to four (4) times a week which occur in the day. He stated he is currently in grade ten (10) and the headaches occur while he is at school. The headaches cause his eyes to turn red and become sore. This started at the age of nine (9) years old after the accident occurred.
- [15] He testified that his memory worsened after the accident. His recollection of the accident makes him feel very uncomfortable and sad. He stated that he requires assistance to overcome these feelings of sadness.
- [16] M placed various marks on the sketch plan, namely X1, X 2 and X3. X1 is the position where the car was coming from. X2 is the position in Eco Park where he was, prior to crossing the road and X3 is where the car collided with him.

#### **T M**

- [17] This witness testified that she is the mother of M and that she lives with him at the same address. She stated that Luvuvhu Street is a busy street and that there is a park directly across from her home called Eco Park. She testified that people often cross the road from Eco Park to the side of the road where her house is situated.
- [18] On the 25<sup>th</sup> of April 2014 she became aware of the accident as she heard a car bumping someone. She ran outside where she met her daughter who informed her that M had been bumped by a car. She found M lying on the ground and he was quiet. When he was touched he cried. The person who knocked M made a u-turn and came back. The driver of the car was a female. They then put M on a plank and it was agreed that the lady who knocked him down would take this witness and M to Baragwanath hospital.

- [19] This witness testified that M was at Baragwanath hospital for five days. He was unconscious at the hospital and his head kept swelling. After the five days in hospital, M was discharged and he returned home. The driver came to visit M sometime after the accident to apologise for having bumped him and to ask for forgiveness.
- [20] This witness stated that after being discharged, M couldn't walk properly as he had been bumped on the side and he complained of headaches. His eyes would also often be red. She has also noticed that his school marks have gone down.

## THE LAW

- [21] The onus rests on the plaintiff to prove negligence on the part of the defendant's driver. (see in this regard the decision of the learned EIs J in the matter of *Ntsala and Others v Mutual and Federal Insurance Co Ltd* 1996(2) SA 184 (T) ).
- [22] In the matter of *Davies v Grossling* 1935 WLD 107, although the driver hooted to the pedestrian, the driver was still found to be negligent as he did not take extra caution.
- [23] The learned author W.E Cooper in *Delictual Liability in Motor Law*, states at page 134 that the duty to keep a proper look-out entails;  
 "a continuous scanning of the road ahead, from side to side, for obstructions or potential obstructions."
- [24] In the matter of *Manual v SA Eagle Insurance Co Ltd* 1982(4) SA 352(c) at page 357, paragraph A, the honourable court stated that:  
 "A motorist who sees a pedestrian on the roadway or about to venture thereon should regulate his driving so as to avoid an accident The pedestrian may by his conduct convey to the motorist the impression that he recognises, and intends to respect, the motorist's right of way. When such an impression is conveyed by the pedestrian, the motorist may proceed on his way accordingly. Whether the motorist is reasonably entitled to assume or infer, from the conduct of the pedestrian, that his right of way is being recognised and respected, is a question of fact to be decided in each case...When the assumption is not justified, the motorist must regulate his driving to allow for the possibility or probability, that his vehicle may not enjoy an unobstructed passage. Where a pedestrian reacts appropriately to the presence of an approaching vehicle, the critical enquiry is whether a reasonable motorist would foresee the reasonable possibility that the pedestrian might nonetheless act irrationally by moving, perhaps suddenly, into the

vehicle or its path. That possibility exists for young children, for adults who are plainly drunk, and may arise in other cases.”

[25] The learned author W.E. Cooper in *Delictual Liability in Motor Law*, 1996 edition, at page 195 sets out the duties of a driver when faced with a pedestrian. These duties are;

“A driver is required to exercise reasonable care and vigilance not only towards a pedestrian he sees, or ought reasonable to see, on or near the road; he is obliged to exercise the same reasonable care and vigilance towards an unseen pedestrian whose presence he should reasonably foresee or anticipate because, for example, of the proximity of a school or of a passenger bus.”

## EVALUATION

[26] In my view the matter of *Manual v SA Eagle Insurance (supra)* and the passage from W.E Cooper in *Delictual Liability in Motor Law*, succinctly sets out the duties of a motorist when a pedestrian is crossing the road.

[27] From the oral evidence that has been presented it is clear to me that M was able to express himself in a clear, succinct and credible manner, despite the fact that this incident occurred when he was nine (9) years old. M made a good impression on me.

[28] The evidence of T M equally impressed me.

[29] There is no allegation(s) against M of any untoward conduct on the day of the accident, causing or contributing to the accident. In fact the officer’s accident report states that the insured driver tried to swerve but it was too late. This is suggestive of the fact that the insured driver of the vehicle with registration MHZ 447 GP was driving at a high speed. The markings on the sketch plan, with specific reference to X2 (which depicts the position in Eco Park where M was, prior to crossing the street) and X3 (which is where the accident occurred), it is clear that M first crossed the carriage way in which the insured driver was not driving in. This suggests that the insured driver must have had a clear view of M crossing the road from her right side and that although she tried to swerve she was unable to prevent colliding with M.

[30] I find that in the circumstances the insured driver, ought to have seen M crossing the road and that she should have exercised reasonable care and vigilance in

approaching the area where M was crossing. Even if I am wrong in this regard, the insured driver should reasonably have foreseen or anticipated that she was driving in a residential area, which was next to a park where children play. In addition, she should have exercised greater caution in that 17h15 on a Friday, would be regarded as peak hour traffic with many pedestrians returning home after work and children returning home after playing with friends.

- [31] A reasonable person in similar circumstances, driving during peak hour traffic in a built up residential area, next to a park where children play and where a high volume of pedestrian traffic is observed, should have kept a proper look out.
- [32] There is no evidence to dispute the evidence of M, or to suggest that he did not exercise the necessary caution that a pedestrian should take when crossing a busy road. Accordingly I am unable to find in these circumstances that there has been any contributory negligence on his part. I find that M when faced with the imminent threat of collision could not act in any way to avoid the collision which resulted in injuries.
- [33] Taking into consideration all these factors placed before me, I find on a balance of probabilities that the plaintiff has discharged the onus of showing that the insured driver was solely negligent.
- [34] I accordingly find that the defendant is liable in full for the plaintiff's proven or agreed damages consequent upon the injuries sustained by him during the accident on the 25<sup>th</sup> of April 2014, with costs up until the last day of trial on the merits.

## ORDER

- [35] In the premises the following order is made;
1. The defendant is liable for 100% (one hundred percent) of the plaintiff's proven or agreed damages pertaining to the collision which occurred on the 25<sup>th</sup> of April 2014.
  2. The defendant will provide the plaintiff with an undertaking in terms of Section 17 (4) (a) of the Road Accident Fund Act, 56 of 1996, to pay for the costs of future medical expenses of the plaintiff arising out of the injuries sustained by the minor in a motor vehicle collision on 25<sup>th</sup> of April 2014 and the *seque/ae* therefore, after such costs have been incurred and upon proof thereof.

3. The defendant shall pay the plaintiff's taxed or agreed party and party costs which costs shall include Counsel's fees, on the applicable High Court Scale as well as the qualifying fees of Experts.
4. The issue of quantum is postponed *sine die*.

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**D DOSIO**  
**ACTING JUDGE OF THE HIGH COURT**

**Appearances:**

<b>On behalf of the Plaintiff</b>	<b>:</b>	<b>Adv. K.T Mathopo</b>
<b>Instructed by</b>	<b>:</b>	<b>N.T Mdlalose Inc.</b>

<b>On behalf of the Defendant</b>	<b>:</b>	<b>Absent</b>
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**Heard on the 12<sup>th</sup> and 13<sup>th</sup> of May 2020**  
**Judgment handed down on the 13<sup>th</sup> 2020**