

**REPUBLIC OF SOUTH AFRICA**

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**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**(Functioning as LIMPOPO LOCAL DIVISION, THOHOYANDOU)**

**CASE NO: 289/14**

In the matter between:

**[T.....] [P.....] [P.....]**

**Plaintiff**

And

**THE ROAD ACCIDENT FUND**

**Defendant**

**JUDGMENT**

**TEFFOJ:**

[1] The plaintiff, Ms [T.....] [P.....] [P.....], born on 2 May 1996, instituted an action against the defendant for damages suffered as a result of bodily injuries sustained by her in a motor vehicle collision which occurred on 29 October 2013 at approximately 10:00 at Tshivhulani next to Nthetsheleseni bus stop.

[2] The collision occurred between a motor vehicle with registration letters and numbers [C.....L] there and then driven by one Nekhavhambe Tshifhiwa Rodney ("the insured vehicle") and the plaintiff who was a pedestrian at the time.

[3] At the commencement of the trial the issues of quantum and merits were separated in terms of the provisions of Rule 33(4) of the Uniform Rules of Court, with

the trial proceeding on the issue of liability only and the issue of quantum being postponed for later determination.

[4] The basis of the plaintiffs claim is that the sole cause of the collision was the negligent driving of the insured driver of the defendant. She specifically pleaded that the insured driver of the defendant, Mr Nekhavhambe Tshifhiwa Rodney, was negligent in one or more or all of the following respects:

4.1 He failed to keep a proper look-out;

4.2 He failed to keep the vehicle he was driving under proper control;

4.3 He failed to apply the brakes of his vehicle timeously, adequately or at all;

4.4 He drove at an excessive speed under the circumstances;

4.5 He failed to avoid the accident when by the exercise of due and reasonable care,

he should or could have done so;

4.6 He drove negligently on the public road;

4.7 He failed to keep the vehicle he was driving in a roadworthy condition.

[5] The defendant admits that a collision occurred at the place, time and on the

date alleged but denies that its insured driver was the sole cause of the collision. It

pleaded that the negligent conduct of the plaintiff was the sole cause of the collision.

[6] The defendant further pleaded in the alternative that in the event the Court finds that its insured driver was negligent (which is denied) then and in that event such negligence did not in any way contribute to the said collision, the collision was caused solely by the negligence of the plaintiff who was negligent in one or more or all of the following respects:

6.1 She failed to keep a proper look-out;

6.2 She entered the road at the time when it was inopportune for her to do so;

6.3 She failed to avoid the collision when by the exercise of due and reasonable care she could and should have done so;

6.4 She failed to take cognisance of the insured driver's action or intended actions:

6.5 She failed to take into consideration the presence of other road users and in particular the insured vehicle.

[7] The defendant also pleaded that in the event the Court finds that its insured driver was negligent (which is denied) and that such negligence contributed to the collision (which is also denied), then and in that event the negligence of the plaintiff contributed to the collision and any damages awarded to her should be reduced in accordance with the Apportionment of Damages Act 34 of 1956 ("the Apportionment of Damages Act").

[8] The issues for determination in this matter are the following:

8.1 Whether the insured vehicle collided with the plaintiff on the date alleged;

8.2 if so, whether by so doing the insured driver was negligent;

8.3 Should it be found that the insured driver of the defendant was negligent, what was the extent or degree of his negligence in so driving the insured vehicle;

8.4 Whether the negligent driving of the defendant's insured vehicle contributed to the collision and ultimately to the damages suffered by the plaintiff.

[9] The essence of the plaintiffs evidence is the following: On or about 29 October 2013 at about 10:30 she was walking in the company of her friend, Ms Phumudzo Masakona, on the gravel road next to Nthetsheieseni School in the direction East to West when a white sedan motor vehicle (the insured vehicle) approached them from the opposite direction and turned to the South where she was. The motor vehicle collided with her on her left shoulder. When it collided with her it had just left the tarred road and was on the gravel road where she was walking. She then sustained injuries on her left leg. She did not manage to see the insured driver. After the collision the insured driver did not stop. Nthetsheieseni School is along Dzingahe road.

[10] After the collision, her friend assisted her to go to the clinic. She staggered and leaned against her until they reached the clinic where she was told that she was not injured but was given tablets. Her friend also assisted in taking her home.

[11] The tablets did not assist her. She could not walk properly. Her left leg became swollen. The next day she went to the school to sit for examinations. After writing her examinations her mother took her to the hospital as she was

in pain. She was not admitted at the hospital. A plaster was put on her left leg and she was given tablets as well as crutches.

[12] Under cross-examination she testified that she saw the insured vehicle when it came from the opposite direction where it was before it knocked her down and when it turned but did not see it when it came to the gravel road where she was\* When asked what prevented her from seeing it as it was now close to her, she said she was confused because she did not know whether she was supposed to cross the road or not. She then explained that her intention was to cross the road to the North. It was put to her that that was new evidence which she did not adduce in her evidence in chief. In response thereto she said when the insured vehicle came to her, she was still standing and had not yet crossed the road while Phumudzo was walking behind her about 4 metres away from her still beating farewell to her other friends. Phumudzo was not involved in a collision.

[13] She conceded that she was not seriously injured. At the time of the collision she first looked at the motor vehicles from the East and those from the West and then noticed the insured vehicle coming. When she saw it where it was initially on the tarred road. It did not indicate its intention to turn and come towards her on the gravel road. When she saw it for the first time it was on the tarred road travelling Straight towards the East and suddenly she found herself having been knocked down.

[14] Her evidence revealed that on the very same road where she was prior to the collision, there are marked pedestrian crossing lines and two humps but where she had intended to cross there are no pedestrian crossing lines.

[15] She conceded that the insured vehicle did turn right at the speed hump and left the tarred road on to the gravel road but disputed that she was among the many scholars who were walking on the gravel road. She maintained that where she was, she was with Phumudzo and that the insured vehicle collided first with her, proceeded to where the many scholars were walking. The insured driver told the scholars while he was at the school gate where the vehicle came to a standstill that they should not play next to the road. She did not see the scholars opening the way for the insured vehicle and others blocking its way and when it finally got its way out of them. When told that that was new evidence and that in her evidence in chief she mentioned that

she did not see the insured driver because he did not stop after the accident she said what she meant was that the vehicle did not stop where it collided with her. She disputed that the insured driver drove away because according to him he did not know that his vehicle collided with anyone and said people screamed but he did not stop.

[16] Under re-examination she testified that her left shoulder was not injured but she just felt pains on its side and that the first plaster was put on her left leg for two

weeks and the second one lasted for three weeks.

[17] On further cross-examination after questioning by the Court, she testified that the mirror of the insured vehicle hit her on her shoulder and its rear tyre hit her on her left leg.

[18] Warrant Officer (W/O) Thanyani Edson Tshishonga also tendered evidence in support of the plaintiffs case. Briefly his evidence was as follows: He has been employed by the SAPS Thohoyandou since 1988. He holds the rank of Warrant Officer and he is stationed at Sibasa. On 4 November 2013 while he was at work, one Nekhavhambe approached him with a pedestrian who was walking with crutches with a bandaged left leg. He told him that he was there to report the accident. The pedestrian referred to herein is the plaintiff. He asked when did the accident happen. The plaintiff and Mr Nekhavhambe said it happened on 29 October 2013. He asked as to why the accident was not reported on 29 October 2013. Mr Nekhavhambe informed him that it was because when he looked at the plaintiff, he thought she was not injured. The plaintiffs parents told him that she was injured. He then went with Mr Nekhavhambe and the plaintiff to the scene of the accident where they told him that the vehicle was from Sibasa to Tshivhulani. Mr Nekhavhambe told him that when he arrived at Nthetsheleseni bus stop, he decided to turn to the right before he could reach the hump. As he so turned, the motor vehicle he was driving knocked down the plaintiff who was outside the road. The



motor vehicle proceeded and came to a standstill at the side road proceeding to Nthetsheleseni School. Mr Nekhavhambe showed him where the motor vehicle collided with the plaintiff. He also asked the plaintiff whether that was the correct place and they both confirmed the point of impact

[19] He then confirmed that he drew the sketch plan of the accident after the the plaintiff and Mr Nekhavhambe agreed about the points and the position of the plaintiff and the vehicle before and after the accident. Although the defendant did not object to the handing in of the sketch plan, no original was shown to the Court. The Court was furnished with a copy and certain portions of the key to plan were cut out and the sketch was not dated.

[20] He was cross-examined at length regarding the allegations he made about what the insured driver told him and he testified that when he wrote his statement about what he was told, the insured driver and the plaintiff had already left. He did not show the statement to the insured driver.

[21] He mentioned that a case was opened after he had satisfied himself about what he was told in relation to the accident and he had seen the scene of the accident.

[22] He disputed that the insured driver was suprised to be told a few days later that he knocked down a pedestrian and maintained that he is the one who told him that he knocked down a pedestrian.

[23] He further testified that the plaintiff told him that the front part of the vehicle knocked her on her left leg. He did not inspect the insured vehicle as that would not have helped because the accident happened on 29 October 2013 while it was only reported on 4 November 2013.

[24] Under re-examination he testified that he did not know the insured driver prior to the collision and that the insured driver did not make a statement before him under oath.

[25] The defendant did not call any witnesses.

[26] The plaintiff's evidence that she collided with the insured vehicle on 29 October 2013 on the gravel road next to Nthetsheieseni School where she was walking was not contested. There was no evidence from the defendant disprove the evidence tendered by the plaintiff. All what the defendant's

Counsel did was to put the insured driver's version to the plaintiff which

version the plaintiff disputed. The same applied to the evidence of W/O Tshishoga.

His evidence that the insured driver came with the plaintiff to the police station

where he was working on 4 November 2013 and informed him that he knocked the plaintiff down on 29 October 2013 on the gravel road next to Nthetsheleseni School

was also not challenged, in the absence of any evidence to dispute the allegations I

find that on 29 October 2013 and at Tshivhuiani next to Nthetsheleseni School and or

bus stop on the gravel road a collision occurred between the insured vehicle there

and then driven by Mr Nekhavhambe and the plaintiff who was a pedestrian at the time.

[27] It is correct that as regards how the collision took place the plaintiff is a single witness. W/O Tshishonga did not witness the collision. He was only told how the accident happened. The plaintiff only has to discharge her onus on a balance of probabilities in order to establish negligence on the part of the insured driver. Her evidence was short and straight to the point. Without repeating her evidence I will briefly summarise what she said. She testified that she saw the insured vehicle while it was travelling straight in the opposite direction on the tarred road. The motor vehicle never indicated its intention to turn right on to the gravel road where she was standing in order to cross the tarred road to the north. Before she could cross the road she looked at the motor vehicles which were driven to the east and those to the west and as she was looking she saw the insured vehicle approaching. Because it did not indicate his intention to turn to the right on to the gravel road, she did not know that it was coming to where she was. She was confused and did not know what to do. Despite this overwhelming evidence against the insured vehicle of the defendant the defendant's Counsel closed his case without calling the insured driver to explain what actually happened and or disprove the allegations.

[28] The plaintiff's evidence was clear, logical and not riddled with any inconsistencies. According to this evidence the insured driver left the tarred road

without any warning to the scholars who were walking outside the public road, on the gravel road (including the plaintiff) and joined the gravel road which was utilised by pedestrians at the time and to which the scholars from Nthetsheleseni school had access. There was a more strenuous duty of care on the part of insured driver when he transversed the gravel road outside the tarred road. I find it strange that despite this damning evidence against the insured driver of the defendant, counsel for the defendant decided to close the defendant's case without calling him to testify in order to disprove the evidence against him.

[29] I also find it strange that after colliding with the plaintiff, the insured driver did not stop the vehicle but proceeded to drive it further until it came to a standstill next to the school gate. I find it improbable that he did not know or was not aware that he had knocked someone down while he drove on the gravel road where there were many scholars who were utilising the road at the time.

[30] It was submitted on behalf of the defendant that should it be found that the insured driver of the defendant was negligent, the Court should also find that the plaintiff was contributory negligent. I cannot without any evidence that the plaintiff also contributed to the collision conclude that she was contributory negligent.

[30] ] From this evidence I find that the plaintiff has discharged her onus of establishing that by so driving the insured vehicle on the gravel road and colliding with her, the insured driver of the defendant drove the insured vehicle negligently as

alleged. It is further my view that the negligent driving of the insured vehicle was the sole cause of the collision in which the plaintiff was

involved which resulted in her sustaining the injuries that she suffered. It is my

considered view that the plaintiff is entitled to judgment as prayed for,

[31] In the result I make the following order:

31.1 The plaintiff's action against the defendant succeeds;

31.2 The defendant is liable to compensate the plaintiff for her 100% proven

or agreed damages;

31.3 The defendant is to pay the costs of the action;

31.4 The issue of quantum is postponed *sine die*.

**MJTEFFO**

**JUDGE OF THE HIGH COURT**

*Heard on* 18 November 2014

*For the Plaintiff* A A Ramanyimi

*instructed by* A. Matodzi inc.

*For the defendant* T N Ramashia

*Instructed by* TM Chauke Attorneys

*Delivered on* 28 November 2014