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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

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

Case Number: A542/2017

13/6/2019

In the matter between:

ADVOCATE SIMON MANGOLELE

(Curator *ad litem* for: P M[....])

Appellant

and

ROAD ACCIDENT FUND

Respondent

JUDGMENT

POTTERILL J

- [1] The plaintiff, the curator *ad litem* on behalf of P M[....] ("P[....]"), claimed from the defendant, the Road Accident Fund ("RAF") for bodily injuries suffered pursuant to P[....] having jumped onto the back of a bakery truck as a means

to obtain a lift back home. The RAF denied liability. At the time that the incident occurred Pretty was 12 years old, thus between the ages of 7 and 14 .

- [2] The court *a quo* erred in law in finding that: *'The argument sought to be relied upon clearly applies to minor children under the age of 7 years.'*¹ The Child Justice Act 75 of 2008 changed the accountability of children distinguishing now between the age groups 0 - 9, 10-13 and 14-18 years old. Pertaining to P[....] falling between the ages of 10 and 13 there **is a** rebuttable presumption that the child under the age of 14 (an *impubis*) lacks accountability. After the age of 9 a child may thus be accountable and held liable in delict if all the requirements for such liability are met.
- [3] In cross-examination of P[....]the RAF did not attempt at all to rebut this presumption and for purposes thereof P[....] cannot be found to be liable; i.e. being the negligent party or being contributory negligent.
- [3] In cross-examination of P[....] the RAF did not attempt at all to rebut this presumption and for purposes thereof P[....] cannot be found to be liable; i.e. being the negligent party or being contributory negligent.
- [4] This lack of accountability of the minor does not however automatically render the insured driver liable. The plaintiff must, to succeed in his claim, prove that the insured driver was negligent.
- [5] The insured driver did not testify. P[....] testified that she and a group of people went to visit her cousin in Bizani. On their return a group of more than five was next to the road when they saw a bakery truck. They asked the driver of the bakery truck to give them a lift. The older cousin climbed into the front of the truck by invitation. They were left standing next to the road. *"When we realised that the vehicle was now in motion, there was a sound of the engine running ... My cousin said we should climb at the back of the bakery vehicle so that we should reach our house."*² The truck is big in size and length. It is a closed truck i.e. they could not climb in at the back. They climbed with their

¹ Paragraph 7 of the Judgment

feet onto “a *black metal* but there were no handles to hold on so they held on by pressing their flat hands against the back of the vehicle. “*After the bakery truck drove a small distance I then fell because I was tired.*”³

- [6] On these common cause facts no negligence of the insured driver can be inferred. There is no evidence that the driver was aware, or should have been aware, that kids will jump onto the back of this truck. This is especially so when the truck has no handles or anything else to hold onto. There is no evidence that the driver did see the kids on the back of the closed truck, or could have seen them if he looked into his side mirrors. The mere fact that the group of children were not picked up does not render the insured driver negligent in presuming that he should have foreseen that they would jump onto a truck onto which they had no grip. The reasonable person in the position of the insured driver would not have acted differently and the causing of the bodily injuries were not reasonably foreseeable and preventable. No reasonable driver is expected to take reasonable steps to guard against children jumping onto a pulling away closed truck with nothing to grip onto. The court *a quo* thus correctly found that the insured driver was not negligent.
- [7] For purposes of this appeal it is thus not necessary to decide whether P[....]was a passenger in the insured driver's vehicle or not.
- [8] I accordingly make the following order:

The appeal is dismissed with costs.

S. POTTERILL
JUDGE OF THE HIGH COURT

² Page 38 lines 6-11

³ Page 41 line 10

I agree

L.M. MOLOPA-SETHOSA
JUDGE OF THE HIGH COURT

I agree

J.J. STRIJDOM
ACTING JUDGE OF THE HIGH COURT

CASE NO: A542/2017

HEARD ON: 5 June 2019

FOR THE APPELLANT: ADV. M.E. MANALA

INSTRUCTED BY: R S Tau Attorneys

FOR THE RESPONDENT: NO APPEARANCE

DATE OF JUDGMENT: 13 June 2019