REPUBLIC OF SOUTH AFRICA

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 NO: 48139/17

8/8/2019

In the matter between:

H T MADONSELA obo L **C M** Plaintiff

And

THE ROAD ACCIDENT FUND Defendant

JUDGMENT

TEFFO, J:

[1] The plaintiff, Ms Hlobisile Tilly Madonsela, instituted an action against the defendant tile Road Accident Fund, claiming damages for bodily injuries sustained by her minor child, L[….] C[….] M[….] "L[….]" in **a** motor vehicle accident.

[2] The accident took place on 22 October 2016 along Matsulu road in Mpumalanga, when Undo fell out of a moving motor vehicle with registration letters and numbers [….] *("the insured vehicle")* which was driven by Mr Thomas Jim Khoza.

[3] L[....] was 14 (fourteen) years old at the time of the accident. The plaintiff sue the defendant herein in her capacity as the mother and natural guardian of L[....].

[4] At the commencement of the trial. the parties agreed to separate the merits from *quantum.* I accordingly granted an order thereof separating the issues in terms of Rule 33(4) of the Uniform Rules of Court. The matter therefore proceeded on merits only.

The pleadings

[5] The plaintiff alleged in her particulars of claim that the collision was caused by the negligence of the insured driver of the defendant.

[6] The allegations have been denied by the defendant. It was specifically pleaded that the collision did not occur as alleged or at all and that should the court find that the collision occurred as alleged or at all, and that the insured driver was negligent. it denies that such negligence was the cause of the collision and/or the plaintiff's damage:;. The defendant further pleaded that the plaintiff contributed to the injuries and that the damages alleged, if any, should be apportioned in terms of the provisions of the Apportionment of Damages Act, 34 of 1956, as amended.

Common cause facts

[7] L[....] was walking with friends on 22 October 2016 along Matsulu road.

[8] The Insured driver who was driving a bakkie at the time, stopped the motor vehicle and offered them a lift.

[9] They all climbed onto the back of an open bakkie

[10] L[....]'s friends sat on the floor of the bakkie and she sat on the edge.

[11] The accident happened during the day. It was a sunny day.

[12] The insured vehicle travelled for some distance and L[....] fell when it was In motion. The insured driver was alerted of the incident by L[....]'s friends and he stopped the vehicle.

Facts in dispute

[13] Where exactly did the accident happen?

[14] The speed at which the insured vehicle was driven at the time.

[15] Circumstances that led to the collision

The evidence

[16] Ms L[….] C[….] M[….]testified in support of the plaintiff's case and Mr Thomas Jim Khoza testified in defence of the defendant's case.

The plaintiff's version

[17] Ms L[….] C[….] M[….], L[....], testified that on 22 October 2016 she was walking with friends on Matsulu road when a bakkie stopped, and its driver offered them a lift They climbed onto the back of the bakkie. They travelled for a long distance The bakkie was travelling very fast It went over the speed bump fast and she fell She hit the ground with her head and lost consciousness which she regained at the hospital.

[18] Under cross examination she testified that they were travelling in a residential area. There is a church in the area. They got a lift before they reached the church and she fell from the bakkie 10 metres away from the church. She sat on the edge of the bakkie while her two friends sat on the floor It was put to her that sitting on the edge of the bakkie is dangerous because there is no support structure. She replied that she had a grip to hold on at the time. She later conceded that had she sat on the floor of the bakkie, she would not have been injured. She denied the insured driver's version.

The defendant's version

[19] Mr Thomas Jim Khoza (the insured driver) testified that on the day in question he was from the direction of town He was driving at a slow speed. He noticed the three girls, and he stopped and offered them a lift with the intention to drop them off next to the police station They climbed onto the back of the bakkie. L[....] sat on the edge of the bakkie while the others sat on the floor. He drove until he reached a speed bump next to a church. In the vicinity of Chillas, L[....]'s cap fell. Al that time the car was in motion. One of the girls banged the bakkie's roof hard. He got frightened and stopped. He alighted from the car and noticed L[....] on the ground.

[20] He asked her friends as to what happened. They made a report to him.

[21] He was driving at a speed of± 20 km per hour. The incident happened before the speed bump There are many houses and a church. The speed bump is opposite

the church entrance He had travelled for about 300 metres after giving L[....] and her friends a lift to where L[....] fell. The accident occurred about 100 to 200 metres before the speed bump.

[22] Under cross-examination he testified that he did not witness L[....] falling from the bakkie to fetch a cap He did not know L[....] and her friends when he gave them a lift. He also did not know their ages. When asked why he did not allow them to sit with him in front, he replied that as he was talking to them, they climbed onto the back of the bakkie on their own. He further said that he never thought of telling them to sit in front with him. When asked why when he saw that L[....] was sitting on the edge of the bakkie, he did not stop and ask her to sit down, he replied that because of the speed he was driving, and L[....] holding on, he did not anticipate the accident He was asked as to how possible it was that L[....] could have jumped out of the motor vehicle to fetch the cap and then climbed back into the motor vehicle while he was driving the motor vehicle at a speed of between 20 to 30 km/h. His reply was that it had happened and that it was on a tarred road.

[23] It was put to him that his counsel had put it to L[....] that his version was that at the time of the accident. the speed bump did not exist. His reply was that there was a trench on the ground at the time to show that in future there will be a speed bump When confronted with his evidence that they had reached the speed bump next to the church when L[....] fell, he replied that he meant the trench. He was asked to explain his evidence that L[....] fell 300 metres thereafter and that she fell 100 to 200 metres before the speed bump. He testified that the 100 metres he had established. was after they had come on board. He drove past the trench ± 300 metres thereafter, he heard a hard bang on the roof of the bakkie.

[24] He denied that he was driving fast at the time of the accident. He testified that he had travelled for about 15 metres from where L[....] and her friends had come on board when he heard the bang on the roof of the bakkie He stopped the motor vehicle. He did not notice how L[....]'s friends alighted from the bakkie.

The legal position

[25] In *Transvaal Provincial Administration v Coley*[1], a case that dealt with negligence relating to children in a school yard, de Villiers JA stated:

[1] 1925 AD 24 at page 27

> *"The care which* is *exacted by our law* is *that which the diligens paterfamilias would have taken in the circumstances. It is not the care which the man takes in his own affairs. nor that which the ordinary or average man would take It 1s higher than that. The law sets up as* a *standard ta which everybody* has *to conform that degree of care which would be observed by* a *careful and prudent man, the father of a family and of substance, who would have to pay in case he fails in his duty It will be observed that the standard of conduct is a high one The test is not the diligence of the supine man, but of the man who is alive to probable dangers and takes the necessary steps to guard against them."*

[26] In *Road Accident Fund v Landman*[2] a 14 year old school girl was knocked down on the road in front of her school by a motor vehicle driving between 40 and 50 kilometres par hour The child had been hidden from the view of the driver by a stationary bus and had crossed the road from behind the bus to meet a friend on the opposite side. At the time there were numerous school children of various ages milling about 1n the vicinity. The road on which the accident occurred was approximately 6,5 metres wide The motorist proceeded along the street for some 80 metres without reducing her speed and did not sound her hooter. At page 616H Thring J stated·

> *" In the circumstances of this* case, *;or Feris to proceed at an unabated speed of as much as even 40 km/h, the lower end of the range found by the court* a *quo and conceded by the appellant, was in my view, negligent She knew, or ought to have known, that at that speed, there* was *no hope of braking to c1n emergency stop in four or five metres."*

[27] In the Jones *NO v Santarn Beperk*[3] matter, a child was held by the court to be negligent and therefore her claim was subject to an apportionment Williamson JA held that once it is established that a child over the age of 7 but under the age of 14, has conducted itself in such a manner that its conduct would ordinary amount to

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[2] 2003 (1) SA 610 (C).

culpa or negligence, then there arises the necessity of determining whether that child is *culpae capax.* This question involves an enquiry in relation to the capacity for *culpa* of the particular child.

[28] Williamson JA found that, once the conduct was held to be negligent, the child could be held accountable He referred to the judgement by Lord Justice Clerk Moncrieff in the Scottish case of *Campbell v Ord and Maddison*[4] quoted by Greenberg J in Feinberg v Zwarenstein[5]. Greenberg J held:

> *"It would be* as *unsound to say as* a *proposition in law that this child was not capable of negligence as to say he was. Negligence implies a capacity to apprehend intelligently the duty, obligation, or caution neglected, and that depends to* a *large degree on the nature of that which* ,s *neglected* as *well as on the intelligence and maturity of the person said to have neglected it The capacity to neglect is a question of fact in the particular* case. as *much as intelligence itself, which is always a question o; fact."*

[29] Corbett J in the court *a quo* found her to be *culpae capax* in relation to her conduct on the day of the collision and applied an apportionment. The SCA upheld Corbett's judgment

[30] In *Eskom Holding Ltd v Hendriks,*[6] a child of 11 years climbed a pylon supporting high voltage power lines. Negligence on the part of Eskom, for failing to take reasonable steps to prevent harm to the public, especially children, was found The question was whether or not the court was correct in finding that the child was *culpae capax* in relation to his conduct. The court referred to the case of *Weber v Sanlam Versekeringsmaatskappy Bpk*[7] where the Appellate Division confirmed the distinction previously drawn in *Jones*[8] between, on the one hand the issue of capacity on the part of a child to commit a wrong and on the other, the issue *of* fault. The court held that, whilst capacity might be subjective, fault was objective. In other words, once a child was found to have the necessary capacity. his negligence or otherwise was to be determined in accordance with the standard of the ordinary adult

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[3] 1966 (2) SA 542 (A) cit 548 H
[4] (1873) IR 149
[5] 1932 WLO 73 at 76
[6] 2005 (5) SA 503 (SCA)
[7] 1983 (1) SA 381 (A)
[8] Supra

rec1sonable person. The court affirmed in Weber, the rule that children under 7 are *culpae incapax,* whilst children between ages of 7 and puberty (12 in the case of girls and 14 in the case of boys) were presumed to lack capacity, until the contrary was proved by the party alleging negligence. In the *Eskom*[9] case, it was held that the gender-based distinction in *Weber* was unjustifiable and a cut off age would be 14 for all children irrespective of their sexes.

[31] The application of the standard applicable to adults to the negligence of child, was strongly criticised in certain academic writings. The criticisms have been referred to in *Eskom*[10] and the following was said·

> *"Nonetheless, the force of the criticism is to* some *extent overcome by the emphasis placed by (he court in Weber*[11] *on the subjective nature of the inquiry into the element of capacity. It* was *stressed that the inquiry was one of fact. In each* case *what had to be determined was whether the child in questions had developed the emotional and intellectual maturity to appreciate the particular danger to be avoided and, if* so, to *act accordingly. Jansen JA (at 390H) referred with approval to the observation by Corbett JA in Roxa v Mtshayi*[12] *that the enquiry has to be related to 'the particular acts or omissions complained of in the particular circumstances'."*

[32] In the *Eskom* case[13], Scott JA held that although it was established in evidence that the child had been taught the dangers of electricity, there was little, if any, cross examination of the child and/or his parent to determine his intellectual and emotional maturity at the time, nor was there any evidence led to rebut the inference of childish impulsive behaviour that arose from his conduct. Consequently, the court held that *Eskom* had not succeeded in rebutting the presumption that the child was *culpae in capax* at the time of the accident.

Application of the law to the facts and evaluation

[33] L[....] gave a good impression to the court. Her evidence was straight to the

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[9] Supra
[10] Supra
[11] Supra at 389H,400A
[12] 1975 (3) SA 761 (A) at 766A·B

point. She answered questions satisfactorily. When it was put to her that it was dangerous to sit on the edge of the bakkie, she replied that she had a grip to hold on at the time. She thereafter conceded that, had she sat on the floor of the bakkie like her friends, she would not have been injured. As against this evidence, the insured driver's evidence was wanting and contradictory. He did not see what had happened that led L[....] to fall from the bakkie to the ground. He testified about what he was allegedly told by L[....]'s friends. They did not testify to corroborate his version. Even though they were not called as witnesses to corroborate his version, that version is improbable He wants the court to believe that L[....]'s cap fell off while the insured vehicle was in motion and Undo decided to jump out of the moving motor vehicle to 99 and get the cap and then jump back into the motor vehicle. He contended that it had happened and it was possible because he was driving the insured motor vehicle at a speed of between 20 to 30 km/h at the time

[34] L[....]'s evidence was that the insured motor vehicle was travelling very fast She fell after it drove over a speed bump. The insured driver gave contradictory versions about the speed bump. His counsel put it to L[....] that according to the insured driver. the speed bump did not exist at the time of the accident. The insured driver testified that the accident took place before he reached the speed bump. He further testified that after he had given L[....] and her friends a lift, he drove off until he reached the speed bump next to a church. L[….]'s cap fell in the vicinity of Chillas According to this evidence, L[....] fell after he had driven over the speed bump There are now two versions before the court by the insured driver and the court does not know which one to believe, whether L[....] fell before he drove over the speed bump or thereafter. Coupled with this evidence. there is also evidence about the trench that was on the road at the time which was an indication that a speed bump was going to be built in the future. This evidence muddled the insured driver's evidence further. His evidence in the main was illogical and not credible.

[35] It is common cause between the parties that the insured driver allowed L[....] and h r friends to sit at the back of an open bakkie unattended L[....] was 14 years old at the time. Although we ,do not know the ages of L[....]'s friends at the time, It has never been disputed that they were children. The insured driver did not know Undo and her friends and their respective ages when he gave them a lift He

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[13] Supra

conceded that he saw that L[....] sat on the edge of the bakkie. A reasonable drive; in his position. should, at that point In time have stopped the motor vehicle and instructed L[....] and her friends to sit down in a safe manner or could have invited them to sit in the front with him. He would have realised at that point that his passengers were not making safe choices

[36] Counsel for the plaintiff correctly submitted that the insured driver drove at an excessive speed in the circumstances in that if one accepts his version that he was driving the insured vehicle at a speed of 20 to 30 km/h on a road that had speed bumps and/or trenches with L[....] sitting in that precarious position, a speed of 30 km/h was unreasonably fast. Counsel for the defendant argued that the fact that the insured driver stopped immediately aft r he was stopped at a distance of between 15 to 20 metres, is an indication that he was not speeding. This submission is not supported by any evidence. A reasonable driver in the insured driver's position, would have foreseen the reasonable possibility of his conduct injuring another person and would have taken steps to guard against such occurrence. It is clear from the evidence that the insured driver failed to take such steps.

[37] Counsel for the defendant further argued that L[....] was 14 years old, she was capable and appreciated the risk of sitting on the edge of the bakkie. He conceded that an apportionment should be applied to the damage suffered by L[....] to the extent of her contributory negligence. Counsel for the plaintiff conceded that an apportionment should be applied but that the apportionment should be highly in favour of the plaintiff. I do not agree that there was evidence that L[....] had developed the emotional and intellectual maturity to appreciate the danger that was to be avoided and, if she did, to act accordingly. It therefore follows that the defendant had not succeeded in rebutting the presumption that Undo was *culpa incapax* at the time of the accident. She could not have been liable for her negligence. The defendant has not discharged the burden of proving that L[....] was negligent.

[38] I am satisfied under the circumstances that the negligent driving of the insured vehicle was a direct cause of L[....]'s bodily injuries and the insured driver of the defendant was solely to blame for the accident that resulted in L[....]'s injuries.

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

1. The defendant is 100% liable to compensate the plaintiff for any

damages which the plaintiff is found to have suffered as a result of the collision which took place on 22 October 2016.

2. The defendant is to pay the plaintiffs costs.

MJ TEFFO

JUDGE OF THE H GH COURT

APPEARANCES

For the plaintiff	J Mouton
Instructed by	Maluleka Tlhasi Inc
For the defendant	J C van den Berg
Instructed by	Lekhu Pilson Inc
Heard on	1 March 2019
Handed down on	8 August 2019