

FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ NO: 74

PARTIES:

- Registrar CASE NO: **1071/05**
- Magistrate:
- Supreme Court of Appeal/Constitutional Court: ECD OF THE HIGH COURT

DATE HEARD: 09 and 10 November 2006

DATE DELIVERED: **12 December 2006**

JUDGE(S): **DAMBUZA J**

LEGAL REPRESENTATIVES -

Appearances:

- **for the State/Plaintiff(s)/Applicant(s)/Appellant(s): Adv Frost**
- for the accused/defendant(s)/respondent(s): **Adv Schubart**

Instructing attorneys:

- Plaintiff(s)/Applicant(s)/Appellant(s): **Le Roux Inc**
- Respondent(s)/Defendant(s): **Joubert Galpin Searle**

CASE INFORMATION -

- *Nature of proceedings* : **DAMAGES**
- *Topic:*

**IN THE HIGH COURT OF SOUTH AFRICA
(SOUTH EASTERN CAPE LOCAL DIVISION)**

CASE NO: 1071/05

In the matter between:
REPORTABLE

“NOT

NOZINTOMBI FELICIA MTSHWANE *obo*

A.M.

PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

DAMBUZA J:

1. This is a claim for damages arising out of a motor vehicle accident which occurred on 6 March 2004 along Koyana Street, Zwide Township, Port Elizabeth. The plaintiff is the mother to A.M., the child who collided with the insured vehicle.
2. At the start of the proceedings I ordered, in terms of Rule 33 (4) of the Rules of this Court, pursuant to an agreement between the

parties, that the matter would only proceed on merits and that the issue of quantum would be determined at a later stage.

3. The parties had also agreed that:

3.1 the evidence of a neurosurgeon on A.'s inability to testify, would be dispensed with;

3.2 A.'s date of birth was [day/month] 1995; and

3.3 the collision had occurred on the date and location stated in the summons.

4. **On the morning of the trial, the defendant's amended plea was filed. In the amended plea the defendant denies that the insured driver was the sole cause of the collision and pleads that A. was contributorily negligent in respect thereof.**

5. The issues before me were therefore the following:

5.1 Whether, at the time of collision, A. was *culpa capax*; and if so

5.2 Whether he was contributorily negligent to the collision.

6. **Koyana Street is a busy road with a single lane each way, running in an east-westerly direction along Zwide Township. The road runs straight for about 500 metres in an easterly direction leading to the point of collision (as pointed out by Loyiso Zitho, the plaintiff's witness). At about 12 metres beyond the point of collision towards the east, the road curves gently to the right, up**

to a robot controlled intersection where it meets Johnson Road. There is no pedestrian crossing along this stretch of the road. As the road starts to curve towards the right, a side street, Mahomana Street, joins the east bound lane from a southerly direction.

7. The road is 8 metres wide in the immediate vicinity of the point of collision, with the east bound lane being 4.4 metres wide and the west bound lane 3.6 metres wide. The pavement on the east bound side of the road is 6 metres wide.
8. The 14 year old Loyiso Zitho testified that on the Saturday morning of the collision he and A. were on their way to play cricket at the Mount Road Cricket Grounds (or the cricket grounds near Mount Road) in Port Elizabeth. At the time, Loyiso was 11 years old and A. was 9 years old. They were walking to a bus stop on the west bound side of Koyana Street. Before reaching the bus stop, they crossed the road to a shop on the east bound side of the road to get loose change for the bus. From the shop, they were going to cross Koyana Street again to get to the bus stop. Prior to crossing the road, they stood side by side on the pavement on the verge of east bound lane. A. stood to Loyiso's left.
9. Loyiso looked to his right and saw the insured vehicle at a distance of about 90 metres from where he stood. He then looked to his left and observed a kombi (taxi) at the robots at the intersection of Koyana Street and Johnson Road. The Kombi was stationary. Loyiso told A. that it was safe to cross the street. As they started crossing the street, Loyiso looked to his right again

and realised that the insured vehicle was now very close to them. He stepped back on to the pavement and looked left, in A.'s direction. By the time he saw A., the insured vehicle had already collided with him. The point of collision was about 3 metres into the tarmac, diagonally across from where Loyiso stood on the pavement. Apart from the insured vehicle and the kombi, there had been no other vehicles in their immediate vicinity.

10. After the collision, the insured vehicle stopped at a distance of about 44 metres from the point of collision. Loyiso went home to report what had happened. A while later, an ambulance came and took A. to hospital.
11. Police Inspector Ken David Tait, the investigating officer in the criminal case relating to the collision, testified that he took the investigation over subsequent to the death of the previous investigating officer, Inspector Khawulela. His evidence was that he knows the area in which the collision occurred fairly well, having been stationed at KwaZakhele Police Station during the last three years preceding the trial. There had been no change along Koyana Street in those three years. The speed limit in Zwide, at the time of the collision, was 50 km/hr.
12. The plaintiff testified that A. was born on 25 February 1995. She and A.'s father got married on 23 November 1996 and thereafter A. changed his surname to "*Salamntu*" (his father's surname). A. is their only child. Both she and A.'s father are teachers. The family resides at 18 Florence Peter Street, KwaMagxaki, Port Elizabeth.
13. At the time of the accident A. was doing Grade 3 at Willow

Academy in Port Elizabeth. She described A. as a child of average intelligence. In the township, A. never went to the shops alone. He went to school by pre-arranged transport that picked him up from his home. On Saturdays, the transport would take him to Loyiso's home. On Saturdays he would go with Loyiso to the Mount Road Cricket Grounds to play cricket. She had not taught A. much about road safety. A. would not walk alone on a busy street such as Koyana Street and Johnson Road. He used to go and play with the neighbour's children across the street. Her mother would supervise him when crossing the street and an older child from the neighbour's house would accompany him back home.

14. That was the evidence led on behalf of the plaintiff.
15. No evidence was led on behalf of the defendant.
16. At the close of the plaintiff's case, the defendant sought to further amend its plea by deleting the word "*contributorily*" therefrom, thus placing the issue of negligence in dispute. I refused the amendment as I was of the view that it would result in prejudice to the plaintiff who had conducted her case on the basis that all that was in issue was A.'s contributory negligence. In any event it was my view, after all the evidence had been led, that the insured driver had been negligent in the manner in which he drove the insured vehicle and that his negligence had caused in the collision.
17. Mr Frost submitted that the defendant had failed to rebut the presumption that A. was *culpaе incapax* at the time of the

collision. Therefore the defendant was wholly liable for the collision.

18. In this regard Mr Frost relied on several cases, including Weber v Santam Versekeringsmaatskappy Bpk 1983 (1) 381D; Ndlovu v AA Mutual Insurance Association Ltd 1991 (3) SA 645 and Seti v Motor Vehicle Accidents Fund 1999 (4) SA 1063.

19. The above cases espouse the principle that the question of the accountability of a child whose age is between the ages of 7 and 14 years, must be approached subjectively, by determining whether the child's emotional and intellectual capacity had, at the relevant stage, developed to such a degree that he could distinguish between permissible and impossible conduct and act accordingly.

20. The onus is on the defendant to rebut the presumption that a particular child was *culpa incapa* at the relevant time.

21. Loyiso was, in my view, a good witness. Despite his youth and the fact that he was only 11 years old when the collision occurred, he related the incident in a straight forward manner. I found him to be a reliable witness. No evidence was led to gainsay his evidence.

22. According to the evidence, nothing would have obstructed the insured driver's view of Loyiso and A. as they stood on the pavement. Loyiso was able to see the insured vehicle at a distance of 90 metres as he stood on the pavement, preparing to cross the road. Both Loyiso and A. were wearing white (cricket) clothes. The weather was clear and the road surface was dry. I

find no reason why the insured driver would not have observed the two young boys from the distance of 90 metres, either going towards the edge of the pavement or standing on the edge thereof. At the time of giving evidence, two years after the accident, Loyiso looked like an average 14 year old boy. In my view, one could even estimate his age at younger than 14 years because of his small built. I find no reason why, at the time of the collision, the insured driver would have not have realized that both Loyiso and A. fell within the group of children whose observation and assessment ability placed a strict duty on motorists to keep a proper look out. Loyiso testified that at the time of the collision A. was shorter than him. I agree with Mr Frost's submission that a prudent driver in the position of the insured driver, would have anticipated that the children might cross the road and would have regulated his speed such that, should they cross the street, he would be able to avoid colliding with them, by, for example, giving them a wide berth from the edge of the pavement. The only oncoming vehicle (the kombi) was more than 50 metres from the point of collision. The evidence is that the insured driver tried to swerve to the right but could not avoid the collision. From this, I can only conclude that he did not maintain a proper look out until it was too late for him to avoid the collision. He did not sound the hooter. There is also no evidence that he applied brakes.

23. A. was under Loyiso's supervision on the day of the collision. The evidence is that at all times that he left his home and ventured into the streets, he did so under supervision of an older person. There is no evidence that he had reached such level of maturity that it could be reasonably expected of him to regulate his

conduct and impulses, on a street as busy as Koyana Street, in accordance with the flow of the traffic moving along that street. The fact that he generally knew the difference between right and wrong and did relatively well at school does not mean that he was sufficiently mature to assess the flow of traffic along Koyana Street to decide as to whether it was safe to cross the road.

24. The defendant has failed to prove that at the time of the collision A. had the maturity to control his impulses and the intellectual capacity to properly judge the appropriate moment to cross the street. The presumption therefore remains that A. lacked the legal capacity in relation to the act of crossing the road when the insured vehicle was approaching. He was therefore not at fault in the sense envisaged in Section 1 of the Apportionment of Damages Act 34 of 1956.

Accordingly, the plaintiff's claim must succeed and the following order shall issue.

- (a) The collision referred to in the pleadings was solely caused by the negligence of the driver of the insured vehicle, **A Makwane**;
- (b) The defendant shall pay the plaintiff's costs of the hearing; and
- (c) The matter is postponed *sine die* for determination of the *quantum* of damages.

N DAMBUZA

JUDGE OF THE HIGH COURT

