

**IN THE HIGH COURT OF SOUTH AFRICA
(BISHO)**

CASE NO: 404/2008

**DATE HEARD:30/10/2008
3/11/2008**

DATE DELIVERED: 29/01/2009

In the matter between:

NOMTHANDAZO LUCY MGUZULWA

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

KEMP AJ

[1] The plaintiff sued the Defendant in her representative capacity as the mother and natural guardian of her son, Phumlani, who was born on 6 February 1993 and was accordingly 11 years old on the 1 May 2004 when he was injured in a motor vehicle accident.

[2] Phumlani was a cyclist on the R67 road near Whittlesea when a vehicle driven by the insured driver collided with him. As a result of the collision Phumlani suffered what was described in the Particulars of Claim as a significant head injury and fractures of the left tibia and fibula. The parties agreed to separate the merits from the quantum and the matter proceeded only in respect of the merits.

[3] From photos handed in by the Plaintiff it appeared that the road was straight for at least a few hundred metres on either side of the point of impact. It was a tarred road, with a 3.5 metre wide single lane on either side of the broken centre line, with no

emergency lanes on either side. It ran approximately from East to West and there was a broad gravel shoulder on the southern side of the road, probably between 5 to 10 metres wide and a narrower gravel shoulder on the northern side, approximately half that width. Also on the southern side of the road was a shop and a few other buildings behind it, to the south. A minor gravel road intersected the R67 from north to south next to the shop, on the eastern side.

[4] Phumlani and his young friend who was approximately the same age as Phumlani, both testified that Phumlani had been driving his bicycle on the southern gravel shoulder off the trafficable surface of the road when the insured driver, who had been driving from East to West, collided with him. Both witnesses contradicted themselves and each other on numerous occasions and also disputed the evidence relating to the location of the point of impact as observed by the police official who drew the police plan, and the resting place of Phumlani after the collision. The insured driver and the police official both testified that the point of impact and Phumlani's resting place was on the tarred surface of the road and I can find no reason to reject their evidence. It seems clear that both Phumlani and his friend's versions are incorrect and probably fabricated in order to try to advance his case.

[5] According to the insured driver, he had pulled off to drop off a hitchhiker a hundred metres or so before the point of impact. Whilst stationary, he observed Phumlani cycling in an erratic fashion on the tarred surface of the road. Phumlani was moving from the one lane to the other, across the centre line, in a zigzag manner. Notwithstanding this, the insured driver proceeded on his way, presuming that somehow Phumlani would become aware of his presence and give way to him. At the critical moment when action on his part could still have avoided the collision, the insured driver decided that Phumlani would remain on the right hand side of the road and that it would be safe to pass him on the left hand side of the road. The insured driver conceded that he never hooted to alert Phumlani and that he never saw Phumlani look around. He saw that Phumlani was wearing a top with a hood on, and that the hood was up over his head.

[6] Although not canvassed in cross examination, the insured driver could not have known what age the cyclist was. His decision to continue regardless of whether the cyclist was aware of his presence or not was clearly reckless. He must have been aware that the cyclist was unaware of his presence but continued nonetheless. It is possible that he thought that because he was on a main road that one would not

expect a cyclist to act irrationally on such a road. The problem was though, that he had just observed the cyclist behaving in a dangerous manner and by not warning the cyclist of his presence he should have appreciated the risk of the behaviour continuing but accepted that risk. This was especially true in view of the fact that he would not have been able to estimate the cyclist's age yet should have concluded by his behaviour that he was either very young or very inexperienced, or both.

[7] The behaviour did indeed continue, and just before passing Phumlani, Phumlani again veered onto the left hand side of the road, just as he had done shortly before, except that this time, the insured driver's car was so close that a collision was unavoidable. Despite trying to swerve, the insured driver was unable to avoid the collision.

[8] Although Mr Maseti, for the Defendant, conceded that the insured driver was negligent to a large degree, he argued that Phumlani should also shoulder some blame. Mr Bloem, for the Plaintiff, argued that the insured driver had been the sole cause of the collision, but that in any event, the Defendant had failed to discharge the rebuttable presumption that Phumlani was *doli incapax*.

[9] Mr Maseti argued that because Phumlani's uncle had sent him to deliver the bicycle, that this proved that his uncle, at least, had faith in Phumlani's ability to act in a responsible fashion. In proof of this ability to drive in a responsible manner, Phumlani had in fact successfully given his friend a lift for some kilometres, on the bicycle, along the R67 main road. Mr Maseti argued that Phumlani's uncle would not have sent him if he did not think that Phumlani was capable of acting in a responsible way in traffic. The uncle was never called as a witness and the cross examination of Phumlani never really explored his understanding of the traffic rules and his relative maturity at the time of the accident. There is accordingly very little evidence before me on which to consider whether or not Phumlani was capable of acting in a responsible fashion despite his age, other than the fact that his uncle may have thought that he was capable of successfully delivering a bicycle by driving it along a busy main road, and the fact that he indeed drove for some two or three kilometres along the main road without being involved in an accident. I have for instance no idea of whether Phumlani's uncle understood the rules of the road and whether he really thought that Phumlani did.

[10] Phumlani was clearly acting in an irresponsible manner at the time of the accident and this lends support to the view that he was in fact oblivious to the dangers and that this was probably due to his tender age. The Defendant bears an onus to prove that Phumlani was *doli capax*. I am of the view that the Defendant has failed to discharge the onus resting on it and that I must accordingly find that Phumlani was *doli incapax*. The question of whether any apportionment can apply thus does not arise. It is appropriate at this stage to point out that the duty of care of a motorist passing a young child is higher than normal and it seems to me to be axiomatic that in a case where the motorist can not observe what the age of a cyclist is that he must take extra care when he sees that cyclist behaving in an erratic manner. The same would be true of an adult on a cycle who is behaving in an erratic manner but when a motorist is not sure of whether the cyclist is a young child or not, but sees him or her acting strangely, then he cannot assume that the cyclist will suddenly start acting in a responsible manner as he draws near. The fact that Phumlani's hood of his jersey was up and probably partially impeded his hearing should also have alerted the insured driver in this case.

[11] In the event, judgment is granted as follows:

- a) The negligence of the insured driver Lindile Lennox Skweyiya is found to have been the sole cause of the collision in which Phumlani Mguzulwa was injured on the 1st May 2004.
- b) Costs are awarded against the Defendant, such costs to include the costs of an inspection in loco and the photographs, Exhibit A.

L. D KEMP

ACTING JUDGE OF THE HIGH COURT

MATTER HEARD ON : 30 October 2008, 3 November 2008

Judgment delivered on : 5 February 2009

Counsel for the Plaintiff **Adv Bloem**

Attorneys for the Applicants : Mpambaniso Attorneys
c/o Sigabi & Associates
5 Arthur Street
KING WILLIAM'S TOWN

Counsel for the Defendant **Adv Maseti**

Attorneys for the Respondent

Mlonyeni & Lesele Ince
1 Grey Street
KING WILLIAMS TOWN