IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

Case no.: 03/27289

In the matter between:

MGCINA, FANKIE SAMUEL Plaintiff

and

ATTORNEYS INSURANCE INDEMNITY FUND First Defendant

ARNOLD MKHABELA Second Defendant

MR T C MALULEKE Third Defendant

JUDGMENT

[1] The plaintiff sues the first defendant, which is the insurer of an attorney, Mr. Khoza, and the second defendant, who is alleged to have practised in partnership with Mr. Khoza, for damages arising out of the alleged negligent manner in which Mr. Khoza dealt with a claim for damages that was instituted on behalf of T R M ("T") against the Road Accident Fund ("the RAF").

[2] T's claim against the RAF arose out of a collision that occurred on the 5th of June 1999, at 5:30 pm, on Mhlongo Street, Thokoza ("Mhlongo Street"), between a Citi Golf motor vehicle with registration number DMV386GP ("the insured vehicle"), which was driven by Mrs. Modikoe ("the insured driver"), and T, who was a pedestrian at the time of the accident.

[3] At the commencement of the trial, application was made on behalf of the plaintiff for the separation of issues and for the following issues to be adjudicated first:

a. whether the insured driver was negligent at the time of the collision and immediately prior thereto;
b. if so, whether the negligence of the insured driver contributed causally to the collision between the car driven by the insured driver and T;
c. whether T was at the time immediately prior to the collision *culpae capax*;
d. if so, whether T was contributorily negligent in relation to the collision;
e. if so, what apportionment this Court should make in regard to culpability in respect of the collision.
f. whether the first defendant's conditional counterclaim and third party joinder application should be upheld.

[4] Mr. Ancer S.C., who appeared for the plaintiff with Ms. Goodenough, and Ms. Mokhatla, who appeared for both the first and the second defendants, were in agreement that these issues should be adjudicated separately. The only issue

between them was whether the issue of partnership - whether the second defendant and Mr. Khoza practised in a partnership at the relevant time - should also be included in the list of issues which were sought to be adjudicated first.

[5] The plaintiff was of the view that the trial of the partnership issue will last approximately 6 or 7 days and the defendants were of the view that it would take approximately two days. The plaintiff maintained that the partnership issue was not ripe for hearing. This was disputed by the defendants. All the parties were, however, ready to proceed with the listed issues and their time estimate for the trial thereof was approximately two days. I accordingly considered it convenient to order the separation of the listed issues and to postpone all other issues *sine die*. I made such an order and reserved the issue of costs of the application until I give judgment in this matter. The second defendant's involvement in this action is based on the alleged partnership between Mr. Khoza and the second defendant. It accordingly seems to me to be appropriate that such issue should be determined before any costs order is made. The costs of the interlocutory application for separation should therefore be further reserved until the partnership issue is determined.

[6] It is alleged in paragraph 5.5 of the plaintiff's particulars of claim that the cause of the collision was due to the sole negligence of the insured driver who was negligent in one or more or all of the following respects:

a. she travelled at a speed which was excessive in the circumstances;

b. she failed to apply the brakes of the insured vehicle timeously or at all;

c. she failed to keep any or any proper look-out;

d. she failed to have any or any sufficient regard for the presence of children on or near the road and Thembi in particular;

e. she failed to avoid the collision when by the exercise of reasonable care she could and should have done so;

f. she failed to exercise the care a reasonable person would and could have exercised in the circumstances.

[7] In their respective pleas the first and second defendants denied the plaintiff's allegations relating to the negligence of the insured driver. In the alternative it was denied that the insured driver's negligence was the cause of the collision. In the further alternative it was pleaded that the child was also negligent in that she failed to keep a proper lookout, emerged from the blind side of a stationary vehicle onto the path of travel of the driver of the motor vehicle, and that she failed to avoid the collision when, by the exercise of reasonable care required of a minor child of her age and level of education, she could and should have done so. The first defendant also pleaded that the insured driver was placed in a situation of emergency in that the child suddenly emerged from the blind side of a stationary vehicle onto the path of travel of the motor vehicle.

[8] The plaintiff filed a replication wherein it was pleaded that the minor child was, at the time of the collision, *culpae incapax*.

[9] The first defendant's counterclaim is against the plaintiff in his representative capacity and is *inter alia* conditional upon a finding that the driver and the minor child were joint wrongdoers. In such event the first defendant averred that the plaintiff, in his representative capacity, is obliged to make a contribution to the first defendant in respect of any amount which the first defendant may be obliged to pay to the plaintiff in his personal capacity in respect of the said damages.

[10] In his plea to the first defendant's counterclaim, the plaintiff denied such liability and pleaded that the minor child was, at the time of the collision, *culpae incapax.*

[11] The first defendant's claim against the plaintiff, in terms of its particulars of claim annexed to its notice to a third party, is for a declaratory order that the plaintiff is liable to contribute towards any damages which the first defendant might be ordered to pay to the plaintiff and the amount of such contribution. The first defendant's claim is founded thereon that the plaintiff failed to keep the minor child in his proper care and control, he failed to take the necessary precautions that a father and natural guardian would take to warn the minor child regarding the duty of pedestrians on the road to keep a proper lookout, to make sure that they are visible to vehicular traffic prior to crossing the road, he failed to warn the minor child about the dangers of crossing the street from behind inanimate or stationary objects which restrict the view of vehicular traffic travelling from her

right side on the road, he failed to take the necessary precautions in order to avoid the minor child crossing the road at a dangerous and/or inopportune time, he failed to take the necessary steps to guard against the occurrence of such dangers, and he failed to act, under the circumstances, in such a manner that a reasonable parent and guardian would act.

[12] The plaintiff called Ms. Alice Motaung as a witness. She knew T's late mother since November 1980 and she knew T since her birth on 4 October 1990. They were neighbours in Thokoza and they were friends. T stayed with Ms. Motaung for approximately two months immediately after her mother had died in 1996. She then stayed with her uncle for approximately six months, whereafter she stayed with Ms. Motaung until September 2003. T's father put her in the care of Ms. Motaung to assume the role of mother to her and to be responsible for her health and well-being. T's father put Ms. Motlaung in his shoes and in charge of T. Ms. Motaung assumed such role. T was raped when she was five years old. That trauma caused Thembi to be emotionally scarred. She was forgetful, suffered from a lack of concentration, she seemed to become frightened, and she attended a special class at school. Ms. Motaung told T not to cross a street unless she had looked to both sides and at times she taught T the rules of the road. Ms. Motaung was not sure whether T knew when it was safe to cross a road or not. At times when Ms. Motaung accompanied T, she would say to Ms Motaung that they should stop, because there was a car coming. At times T forgot what she was taught. She was at times a forgetful child. She listened,

but took long to understand. Ms. Motaung testified that she knows Mhlongo Street and that it is a very busy street on weekend afternoons when many children play on the sides of the street where there are Spaza shops. T's uncle stayed in Mhlongo Street. He is the father of Mtemkulu who is two or three years older than T. Ms. Motaung's child was shot in his house and he died. She had to go to her deceased son's house. She left T in the care of her children, one of whom was born in 1972. T's brother, Thabo, fetched her while Ms. Motaung was away.

[13] The plaintiff also called Voyo as a witness. He is a 12 year old boy and I considered him old enough to know what it means to tell the truth. Voyo knew T and he was present when T was knocked down by a car in 1999. T and Voyo were at Mtemkulu's house at Mhlongo Street. Mtemkulu's father is T's uncle. The three children played in the garden when Mtemkulu's mother sent them to a certain Christine's house. A truck was parked outside the gate of Mtemkulu's house. The truck was on Voyo's right hand side as he was crossing the street. There were many people, adults and children, on the street and pavement when T left the yard. It was normally like that on a Saturday. Voyo crossed the street first. On the other side of the street he turned around to see whether the others were following him. He noticed a car which was travelling at *"medium speed"* approximately 20 metres away. Voyo saw T crossing and Mtemkulu behind her. T was running. By that time the car was nearby. Voyo screamed for T not to cross the street and that there was a car. She did not stop and proceeded to run

across the road. The car hit T at a time when the car was overtaking the stationery truck. It thereafter it hooted.

[14] The plaintiff's case was closed after Ms. Motlaung and Voyo had given their evidence. Counsel for the defendants' then made application for absolution from the instance. The law requires a driver of a vehicle who sees children upon or near her roadway to be specially upon the alert to the possibility of children rushing heedlessly across a street (*Neuhaus, N.O. v. Bastion Insurance Co. Ltd. 1968 (1) SA 398 (AD)* at p 406A-D). I considered there to be sufficient evidence upon which a reasonable court might give judgment against the defendants and I accordingly refused the application (See: *Oosthuizen v Standard General Versekerings Maatskappy Bpk 1981 (1) SA 1032 (A)* at pp 1035H – 1036 A).

[15] The defendants called the driver of the insured vehicle, Mrs. Modikoe, as their only witness. She, in the company of her eldest sister who subsequently passed away during 2001, was travelling from her sister's house on the 5th June 1999 after the funeral of her sister's child. It was 5:30 in the afternoon. It was a clear day and the visibility was good. They were travelling on the left hand side of Mhlongo Street. The insured driver lived in Thokoza and she knew Mhlongo Street well. She used to transport children to a creche during 1999 and she travelled Mhlongo Street two or three times per week. Mhlongo Street is a tarred road and allows traffic in both directions. To the left of Mhlongo Street, as the insured driver was travelling, was a pavement that was approximately 2 metres

wide, and to her right was a pavement that was slightly broader, approximately 2½ metres wide. There were residential houses on both sides. The street is a narrow street without a line down the middle. There was a hump in Mhlongo Street over which the insured driver travelled when she was approximately 80 – 100 metres away from the point of the collision with T. She was travelling between 35 – 40 – 45 kph when she approached the hump, she changed gears to second gear and slowed down when she passed over the hump and she then accelerated and proceeded at the same speed she had been doing before the hump. The view of the street was clear when she passed the hump and she could see right down the street for some distance. As she was proceeding along Mhlongo Street, she saw a big waste truck on the left of the street, which was stationery in her lane and it occupied the entire left lane. The truck obscured her view and she could not see behind the truck. The street speed limit was 35 kph. The street was busy. There were children playing on both sides of the street and people walking. She saw a child standing on the right hand side of the street. As she was approaching, this child was looking at her. She had not seen this child crossing the street. He was looking across the street in the direction of the pavement to the left. She did not see him shouting at somebody across the street. She also did not hear him shouting at somebody across the street, because she was inside her car. She was not aware of and she did not see children on the left side pavement at the place where her view was obstructed by the truck. She was looking to the right side, in front of her and at the truck in order not to collide with the truck. She moved to the right so as not to collide with

the truck. She was concentrating on not colliding with the truck and with the pedestrians and the child on the right hand side of the street. She overtook the truck at the same speed she had been travelling at between 35 – 45 kph. The boy was still standing on the right hand side of the road when she overtook the truck. T ran into the left front tyre of her vehicle when she had passed the truck with the left front tyre Ms Modikoe's vehicle. She did not see T before T had collided with her vehicle, because of the stationery truck on her left hand side. She applied brakes, reversed, and got out of her vehicle. T's aunt came out of her house. They put T in her vehicle and took her to hospital.

[16] In *South British Insurance Co v Smit 1962 (3) SA 826 (A)*, at p 837 A – B, Ogilvie Thompson J.A., said this: *"The propensity of children – even though well versed in road safety – to rush heedlessly across a street, is, of course, well known. It is because of that very propensity that the law requires the driver of a vehicle who sees children upon or near his roadway to be specially upon the alert."*

[17] In *Levy NO v Rondalia Assurance Corporation of SA Ltd 1971 (2) SA 598 (A)*, at pp 599H – 600C, Holmes J.A., said the following in respect of the duty on a motorist who approaches young children at the side of the road: *"As a general proposition it is well settled, and it accords with humanity and common sense, that a motorist approaching young children near the edge of the road ought to drive with a degree of special care and vigilance because of their tendency*

sometimes to dash heedlessly across the road. To hold otherwise would be to put an old head on young shoulders, and to assume that they will look before they leap. But the rule must not be applied as a fixed principle without reference to the facts. The foreseeability of reasonably possible collision, and the degree of special care required, will vary according to the particular circumstances of each case, for example, the visibility of the children; their apparent age; their proximity to the edge of the road and to the path of the vehicle; their immobility or liveliness; the indications, if any, of an intention to cross the road; the extent of their supervision by a responsible person; the apparent awareness of the latter, and of the children, of the approach of the motorist; the available width of the road; and the stopping power of the vehicle in relation to speed, brakes and road surface. Such factors (and the list is not exhaustive) are interrelated and not individually decisive. Their cumulative effect must be considered. Similarly, the particular circumstances will dictate the reasonable steps in relation to matters such as hooting, berth, swerving, slowing down or pulling up, with a view to guarding against the occurrence of collision, the reasonable possibility of which was foreseeable. The decided cases are legion."

[18] And in *Santam Insurance Co Ltd v Nkosi 1978 (2) SA 784 (A)*, Corbett JA, at pp 791F – 792E, said this: *"The true position, it seems to me, is that, depending on the circumstances, a motorist may be bound to exercise especial care and vigilance not only towards children whom he sees, or ought reasonably to see, are present in or near the street but also towards hidden children whose*

presence there he ought reasonably to foresee or anticipate. Whether this duty towards hidden children arises and, if so, what particular steps, or course of action, the motorist will be obliged to take to guard against injuring them must depend upon all the facts of the particular case. And because the children are hidden, the duty, when it arises, may demand even greater caution from the motorist by reason of the very fact that, possibly until a late stage, he cannot see them and consequently is unable to gauge such matters as their apparent age, their awareness of his approach, their future intention, etcetera."

[19] In the circumstances that prevailed at the time of the collision, a reasonable driver in the position of the insured driver would reasonably have foreseen the possibility of a child suddenly emerging from the obscured part of the stationery truck into view or into the path of travel of the insured vehicle and attempting to cross the street by running in front of the insured driver, and would reasonably have kept a proper lookout in the direction of the stationery truck and adjusted her driving accordingly so as to avoid a collision with such child or children.

[20] For the insured driver not to keep a proper lookout for a sudden emerging child, to proceed at an unabated speed of as much as even 45 kph, and not to hoot or to signal any warning of her approach, were, in my judgment, negligent. She was not entitled to proceed at a speed which rendered it impossible for her to avoid the collision with T. She should have slowed down, even to a walking

pace, until her vision was no longer obscured by the stationery truck, and she should have kept a proper lookout for a sudden emerging child from the obscured part of the stationery truck. Had she done so, the collision with T would probably not have taken place.

[21] I am accordingly of the view that the collision was caused by the negligence of the driver of the insured motor vehicle and that her negligence contributed causally to the accident between the motor vehicle driven by the insured and T.

[22] T was born on the 4th October 1990 and she was eight years old at the time of the collision. A child between the ages of seven and fourteen is rebuttably presumed to be *culpae incapax*. The question of accountability on the part of T is to be approached subjectively by determining whether T's emotional and intellectual capacity had, at the time of the collision, developed to such a degree that she had sufficient discretion to distinguish between permissible and impermissible conduct and to act accordingly (*Weber v Santam Versekeringsmaatskappy Bpk 1983 (1) SA 381 (A)* at p390H).

[23] The enquiry into T's mental, intellectual and emotional development established that she was emotionally scarred, forgetful, suffered from a lack of concentration, she seemed to become frightened, she took long to understand and she attended a special class at school. Ms. Motaung was not sure whether

T knew when it was safe to cross a road or not. It sometimes appeared so to Ms. Motaung, but at times T forgot what she had been taught. The evidence does not establish that T was sufficiently developed that she had sufficient discretion to distinguish between permissible and impermissible conduct and to control irrational or impulsive acts of the kind here under consideration. It has, in my judgment, not been shown that T was *culpae capax* at the time of the collision.

[24] The third party joinder against the plaintiff in his personal capacity must also fail. The evidence did not suggest that the plaintiff was in any way negligent in relation to the collision and the factual allegations on which the first defendant relies in its particulars of claim to establish a cause of action against the plaintiff have not been established. On the contrary, the evidence shows that for some years before the accident and at the time of the accident, T had been placed in the care of Ms. Motaung, who stepped in the shoes of T's father.

[25] Mr. Ancer submitted that it would be appropriate for me to order the first and second defendants jointly and severally to pay the plaintiff's costs, in the plaintiff's representative capacity, including the costs of two counsel should I find in the plaintiff's favour on the above issues. I disagree. The second defendant's involvement in this action is based on the alleged partnership between Mr. Khoza and the second defendant. It is accordingly appropriate that the partnership issue be determined before any costs order is made in respect of the issues before me.

[26] In the result I find as follows on the issues before me:

a. The insured driver was negligent at the time of the collision and immediately prior thereto.

b. The negligence of the insured driver contributed causally to the collision between the car driven by the insured driver and T.

c. The evidence does not establish that T was *culpae capax* at the time of the collision.

d. The first defendant's conditional counterclaim and third party joinder application are dismissed.

e. The costs of the application for separation of issues are reserved.

f. The costs of this hearing are reserved.

P.A. MEYER, A.J.
Acting Judge
24 August 2005