

**REPUBLIC OF SOUTH AFRICA**

**NORTH GAUTENG HIGH COURT, PRETORIA**

Case No: 10516/2013

DATE: 7 November 2014

In the matter between:

**THULANI MJALISWA NGCONGO**

**Plaintiff**

AND

**ROAD ACCIDENT FUND**

**Respondent**

**JUDGMENT**

Beatson AJ

1. The Plaintiff, an adult male born on [...], instituted a claim against the Defendant claiming for damages in terms of section 17(1)(b) of the Road Accident Fund Act 56 of 1996 that were allegedly suffered as a result of a collision with an unknown insured motor vehicle on 5 August 2010, at approximately 15h30.
2. The collision occurred between a bicycle driven by the Plaintiff and an unknown motor vehicle insured by the Defendant. The owner and driver of the unknown vehicle were unidentified.
3. At the commencement of the trial the issue of *quantum* and the merits were separated in terms of the provisions of Rule 33(4) of the Uniform Rules of court. With the trial proceeding on the merits and thus the issue of liability only and the issue in respect of *quantum* being postponed for later determination.
4. In the Particulars of claim the Plaintiff alleged that the sole cause of the collision was the negligence of the driver of the unknown vehicle. The Plaintiff specifically pleaded that the driver of the insured vehicle was negligent in one or more of the following respects:

- 1) He failed to keep a proper lookout;

- 2) He drove at a speed that was excessive having regard to the circumstances prevailing at the time of the collision;
- 3) He failed to apply brakes timeously or at all or at the stage he could or should have done so;
- 4) He failed to take evasive action or to keep his vehicle under proper control at a stage when he could or should have done so;
- 5) He failed to avoid a collision by exercising reasonable care.

5. The Defendant pleaded that the collision was as a result of the sole negligence of the Plaintiff and, should it be found that the insured driver was negligent, and then the Plaintiff contributed to the negligence in one or more of the following respects:

- 1) He failed to keep a proper lookout;
- 2) He failed to apply brakes of his bicycle timeously;
- 3) He failed to keep his bicycle under proper control;
- 4) He cycled at excessive speeding in the circumstances;
- 5) He entered the road at a time when it was inopportune for him to do so.

6. The issue to be determined is whether the accident was solely caused by the unidentified insured driver and if there was contributory negligence on the part of the plaintiff. The Plaintiff testified and closed his case without calling any witnesses. The Defendant closed its case without calling any witnesses.

The summary of the Plaintiffs evidence is that on or about the 5<sup>th</sup> of August 2010 at about 15h30 in the afternoon at Mabhelani Location, Isipofu he was driving his bicycle in an easterly direction on the left side of a gravel road towards a school where he was attending ABET classes. The weather was clear.

7. The Plaintiff was wearing a helmet and confirmed that he was driving in straight line on the left side of the road in an easterly direction.

8. The Plaintiff saw no oncoming traffic and also heard no traffic, oncoming or otherwise, while he was travelling along the gravel road. He heard and felt a large bump from the back and he fell and fainted as a result of the collision with the insured unidentified motor vehicle.

9. Under cross-examination, the Plaintiff said that he was driving his bicycle approximately one and a half

(1%) metres from the left side of the road. He further testified that there was no rain and it was a clear day.

10. On the evidence presented I must now determine if the accident was caused by the sole negligence of the insured driver and if there was any contributory negligence on the part of the Plaintiff.

14. In *Kruger V Coetzee* 1966 (2) SA 428 (A) the following remarks were made in respect of the test for negligence:

“When a person is negligent he or she is approached for his or her conduct or attitude of carelessness and his or her inattentiveness because the conduct does not comply with the standard of care legally required of him or her. The standard used to judge the conduct of a person is that of the reasonable person. If the principle of negligence is applied to a motor vehicle accident, the court places itself as far as possible in the place of a driver at the time of the accident. The conduct of the driver is then compared to that of a reasonable person under the prevailing circumstances. A driver of a motor vehicle is negligent if he or she is capable of reasonably foreseeing that his or her conduct will cause damage and such driver does not take reasonable steps to prevent such damages from occurring.”

15. *Klopper* postulates the following general principles in respect of cyclists:

“A driver is expected to keep a proper lookout for cyclists. It is difficult to ride a bicycle in such a manner that it remains precisely and securely on a fixed course. There is always a degree of sideways movement. If a cyclist is a young child and in addition there is a strong wind blowing, the possibility that a bicycle may deviate considerably more than normal from its course is greater. For the aforementioned reasons a driver in such a case is expected to give a cyclist timely warning of his or her approach and in his or her judgment will in addition leave sufficient space between him/her and the bicycle in order to overtake with reasonable safety.”

The duty to allow for lateral movement is particularly important in overtaking an inherently unstable vehicle such as a bicycle.

18. In *Oosthuizen v Standard General Versekerings Maatskappy Bpk* 1981 (1) SA 1032 Trengrove JA pointed out what was expected of a reasonable approaching driver when approaching a cyclist. The driver must ensure that there is sufficient space between the cyclists and the passing vehicle and cognisance taken of the possibility that a cyclist could be pushed off course with resultant lateral movement.

19. I now turn to this matter after referring to the above as well as *Ndayiragije v RAF* (16547/ 2009 ) [2013] ZAWCHC 10 (13 February 2013) where a cyclist was badly injured in a motor vehicle collision.

I am satisfied that cyclists have the right to be on the roadway, whether cycling for pleasure or on their way to school. The Plaintiff in this matter took due care on the road, observing the general rules of being properly attired with a helmet, keeping to the left of the gravel road, while driving in a straight line and being aware of oncoming traffic, if any. There was no way that the Plaintiff could have anticipated the motor vehicle hitting him from behind thus enabling him to either brake or swerve to avoid such vehicle. The Plaintiff was driving at an average speed on his bicycle on a gravel road on his way to school for ABET training. There was a clear visibility.

20. It can only be inferred that the insured driver on the other hand did not take due care in approaching and avoiding the cyclist on the gravel road ahead of him. The insured driver should have reasonably made an attempt to avoid the cyclist driving ahead.

21. The Defendant's counsel argued that the Plaintiff had ridden his bicycle recklessly by driving a distance of approximately 1.5 metres from the left verge of the road and therefore contended that there was contributory negligence of the Plaintiff cyclist.

22. No witnesses were called to testify in respect of the contributory negligence that was argued by the Defendants counsel and I therefore find that the Plaintiff has succeeded in proving on a balance of probabilities that the insured driver was the sole cause of the motor vehicle collision in which the Plaintiff was involved and as a result of which he sustained injuries.

23. Plaintiff and Defendants counsel agreed that in respect of the costs incurred by each party during the postponement of this matter on the 17<sup>th</sup> October 2014, in anticipation of settlement, each party would carry its own costs.

24. In the circumstances it is ordered that:

- 1) The accident was solely caused by the negligent driving of the insured unidentified driver.
- 2) The Defendant is liable to pay 100% of the proven or agreed damages incurred by the Plaintiff in the above collision.
- 3) The Defendant is to pay the Plaintiff's costs of suit; such costs exclude the costs incurred in the postponement of the matter for settlement on 17/10/2014.

**M BEATSON (Ms)**

**ACTING JUDGE OF THE HIGH COURT**

