

SOUTH AFRICA / JUDGMENT

Riet obo Riet v Road Accident Fund (RAF285/2016) [2017] ZANWHC 51 (29 June 2017) [2017] ZANWHC 51

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks

CASE / FILE NUMBER

RAF285/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION,

MAHIKENG

CASE

NO: RAF 285/2016

Reportable

Circulate

to judges

In

the matter between:

BR

RIET obo VM

RIET Plaintiff

and

ROAD

ACCIDENT

FUND Defendant

DATE

OF HEARING :	15 JUNE 2017 DATE
OF JUDGMENT :	29 JUNE 2017 COUNSEL
FOR THE APPLICANT :	ADV. SESHOKA COUNSEL
FOR THE RESPONDENT :	ADV. MOTHIBI

JUDGMENT

HENDRICKS J

Introduction

[1] On the 31st October 2015 at approximately 19H20 an accident occurred on the public road leading to Ganyesa between a motor vehicle bearing registration

numbers and letters [...] GP driven by an insured driver and a donkey cart. Ms. Virginia Mapule who was a thirteen (13) year old minor, was a “passenger” in the donkey cart. As a result of the accident Ms. Mapule sustained injuries. The plaintiff, in her representative capacity as the mother and natural guardian of Ms Mapule, instituted an action for damages against the defendant the Road Accident Fund (RAF).

[2] In the particulars of claim attached to the summons, it is alleged that the accident was caused as a result of the sole negligence of the driver of the insured motor vehicle. In reply thereto, the defendant pleaded and denied that the accident was caused by the sole negligent driving of the insured driver. Alternatively, it was pleaded that the plaintiff, as the mother and natural guardian of Ms Mapule, was contributory negligent by not prohibiting her to be on a donkey cart when it was dark. Liability is therefore disputed. Counsel

agreed that the merits and quantum be separated and that the question relating to liability be argued separately and only the papers filed.

[3] Mr. Seshoka on behalf of the plaintiff contended that because Ms. Mapule, was a “passenger” on the donkey cart, she should be regarded as a passenger in a motor vehicle for purposes of the Road Accident Fund Act 56 of 1996, as amended (“the Act”) and that there was no question of contributory negligence because Ms. Mapule was not in control of the donkey cart. Mr. Mothibi on behalf of the defendant submitted that a donkey cart does not qualify as a motor vehicle in terms of the Act and Ms. Mapule can therefore not be regarded to have been a passenger in a motor vehicle for the purposes of the Act. Furthermore, was it contended

that there was contributory negligence on the part of the plaintiff, as the mother and natural guardian of Ms. Mapule.

[4] The relevant portions of the pleadings are quoted for the sake of convenience. Paragraph [7] of the particulars of claim attached to the summons of the Plaintiff, reads thus:

“7. The aforesaid sole collision was caused by the negligence and/or wrongful act of the insured driver who was negligent in one or more or all of the following respects:

7.1 He failed to keep a proper lookout;

7.2 He failed to pay due regard to the rights of road users, including those of other drivers;

7.3 He travelled at a speed that was excessive in the circumstances;

7.4 He failed to take reasonable steps to prevent the occurrence of harm to the Plaintiff, when he was capable of doing so;

7.5 He was negligent in exercising a manoeuvre on a road without taking that a reasonable person would have ensured that same was safe and would not endanger others;

7.6 He failed to give reasonable indication of the nature of the actions he was attempting;

7.7 He failed to apply brakes of the insured vehicle timeously or to apply brakes at all;

7.8 He failed to avoid a collision when by the exercise of reasonable care he could and should have done so;

7.9 He failed to maintain his vehicle in good and proper condition;

7.10 He failed to keep control over his vehicle.”

Paragraph

[6] of the Defendants plea to Plaintiffs particulars of claim reads thus:-

“Ad paragraph 7 thereof:

7.1 The Defendant denies each and every allegation therein contained as if specifically traversed and puts the Plaintiff to the proof thereof. In particular it is denied that the insured driver of the vehicle bearing registration letters and number [...] GP (insured vehicle) was negligent either as alleged or at all

7.2 Alternatively, and in the event of it being found that

(a) a collision occurred as alleged by the Plaintiff; and

(b) the driver of the insured vehicle was negligent in one or more or all of the respects alleged by the Plaintiff,

all of which is still denied, then the Defendant pleads that the negligent driving of the driver of the insured vehicle did not contribute to the collision as alleged by the Plaintiff.

7.3 In the further alternative to paragraph 7.1 above and only in the event of it being found that:

- (b) the driver of the insured vehicle was negligent in one or more or all of the respects alleged by the Plaintiff; and
- (c) the negligent driving of the driver of the insured vehicle did contribute to the collision as alleged by the Plaintiff,

7.4 all of which is still denied, then the Defendant pleads that the Plaintiff negligently contributed to the collision in one or more or all of the following respects:

- (a) She failed to keep her minor child under proper care and control while on the road
- (b) She failed to take any, alternatively sufficient cognisance of the presence, the actions and the visibly intended and/or probable

further actions of the driver of the insured vehicle;

- (c) She allowed the minor child to venture onto the road surface when it was unsafe to do so;
- (d) She failed to have reasonable control over the movements of the minor child.”

[5] The question to adjudicate is whether Ms. Mapule, who was on the donkey cart and not in control thereof, can be regarded as a passenger in a motor vehicle for the purpose of the

Act.

[6] “Motor vehicle” is defined as follows in Section 1 of the Road Accident Fund Act 56 of 1996, (as amended):

“Motor vehicle means any vehicle designed or adapted for propulsion or haulage on a road by means of fuel, gas or electricity, including a trailer, a caravan, an agricultural or any other implement designed or adapted to be drawn by such motor vehicle”;

“Propulsion” means “the act to or an instance of driving or pushing forward.”

“Haulage” means “the commercial transport of goods” (“haul” means pull or drag forcibly”).

“Motor vehicle” is described as “a road vehicle powered by an internal combustion engine”.

“Combustion” means “burning; consumption by fire”.

See: Concise Oxford Dictionary.

[7] A donkey cart is pulled by animals. It is not propelled [“propulsion”] by a machine. A donkey cart therefore does not fit the description of a motor vehicle in terms of the Act. If the Legislature intended that a donkey chart should be regarded as a motor vehicle, it would have specifically mentioned it like for instance a trailer, a caravan, or an agricultural implement. These are specifically mentioned in the definition of a motor vehicle.

[8] Mr. Seshoka referred to the presumption regarding the driving of a motor vehicle as contained on Section 20 (1) of the Act. Section 20 (1) states that:-

“For the purposes of this Act a motor vehicle which is being propelled by any mechanical, animal or human power or by gravity or momentum shall be deemed to be driven by the person in control of the vehicle”.

It is quite apparent that this presumption refers to a “motor vehicle”. A donkey cart does not fit the definition of a “motor vehicle” and the presumption therefore does not find application.

“Propelled” means “to drive or push forward”.

- [9] Ms. Mapule cannot be regarded as having been a passenger in a motor vehicle. She must be treated as having been a pedestrian. By comparison as an example, a bicycle does not fit the description of a “motor vehicle” in terms of the Act. If a person is lift on a bicycle and the bicycle is invoked in an accident with a motor vehicle as a result of which the person that was lift on the bicycle sustained injuries, such a person cannot in terms of the Act, be regarded as a passenger in a motor vehicle and must be a pedestrian. So too, when two children are on a box cart, one being in control and the other one not, and the box cart is either pushed or pulled by a human being or an animal and get involved in an accident with a motor vehicle, the person who was not in control of the box cart cannot be regarded as a passenger in a motor vehicle. The same in my view apply to a person who was on a donkey cart. The examples are legio.
- [10] Upon being asked by this Court, both counsel was unable to refer me to any caselaw in this regard. My research only yielded one case in which reference is made to a donkey cart namely that of *Nel vs Road Accident Fund 2007 JDR 0579 (T)*. This case concerns a collision between a motor vehicle and a donkey cart. The plaintiff was a “passenger” on the donkey cart at the time. Murphy J did not deal with the question whether a donkey cart can be regarded as a motor vehicle in terms of the Act. The defendant in this case (RAF) before Murphy J conceded liability at 100% of the plaintiff’s proven damages. It was only compensation (quantum) that had to be decided by the court in that case. That case is therefore not on all-fours with the present matter at hand.
- [11] With regard to contributory negligence, Mr. Seshoka submitted that there is no contributory negligence on the part of the plaintiff in this matter. There is no evidence that she consented that Ms. Mapule should be on the donkey cart. Mr. Mothibi, quite correctly in my view, pointed out that a donkey cart does not have lights (infront and at the back) and makes it difficult if not impossible to be visible at night. Therefore, the donkey cart should not have been on the road at night. So too, was it incumbent upon the plaintiff to ensure that Ms. Mapule should not have been on the donkey cart at night when it was difficult, if not impossible to see the donkey cart. I agree with this submission by Mr. Mothibi.
- [12] Mr. Mothibi contended that there should be an apportionment of 90% - 10% in favour of the plaintiff with regard to contributory

negligence. Mr. Seshoka holds a different view. He submitted that the defendant should be held 100% liable. I do not agree. I fully align myself with the proposition that the plaintiff was contributory negligent and at least a 10% apportionment should be allowed. The Plaintiff should have ensured that the minor, Ms. Mapule, is not in the donkey cart seeing that it was unsafe to be on it, on a public road at night.

Order

[13] Consequently, the following order is made:

1. The defendant shall be liable to pay 90% of the plaintiff's proven and/or agreed damages.
2. The plaintiff shall, in the event that costs are not agreed, serve a Notice of Taxation on the defendant's attorneys of record.
3. The plaintiff shall allow the defendant fourteen (14) court days to make payment of the taxed costs referred to above into the plaintiff's

attorneys' trust account.

4. The issues of quantum is postponed to 29th & 30th August 2017.
5. Cost to be costs in the cause.

R D HENDRICKS

ACTING DEPUTY JUDGE PRESIDENT

NORTH WEST HIGH COURT, MAHIKENG

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