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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)

CASE NO: 496/2023

In the matter between:

L[...] Q[...] M[...]

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

RUSI J

[1] In an action for damages, the plaintiff sued the Road Accident Fund (the Fund), for the sum of R5 000 000.00 (five million rands) under several heads of damages. Those damages resulted from a motor vehicle accident which occurred on 22 June 2020 at Phase 1, Scenery Park, in East London, in which he sustained

bodily injury while he was a pedestrian. He was 13 years of age when the accident occurred.

[2] Since the plaintiff was a minor at the time of issue of summons commencing action, his mother, Ms N[...] M[...], instituted the action on his behalf. On the date of hearing of the case, two applications were made. The first, was the substitution of Ms N[...] M[...], for Mr L[...] Q[...] M[...] who has since attained the age of majority. The second, was that the merits of the plaintiff's claim be separated from quantum of damages as envisaged in Rule 33(4) of the Uniform Rules of Court. Both applications were granted by consent between the parties. All reference to the plaintiff shall, henceforth, be to Mr L[...] Q[...] M[...] in his personal capacity.

The pleadings

[3] Chief among the facts that the plaintiff pleaded in his particulars of claim is that he was walking on the sidewalk of the road in Phase 1, Scenery Park, in East London, when the unknown insured vehicle knocked him down from behind. The accident was caused by the sole negligence of the insured driver on several grounds which do not need to be repeated for the present purposes.¹ As a result of the accident, he sustained a right radial fracture.

[4] In denying liability for the plaintiff's claim, the Fund pleaded, inter alia, that the accident occurred as a result of his sole negligence in one or more of the following respects:

- (a) He failed to avoid the accident when, by exercise of reasonable care and skill, he could and should have done so.
- (b) He failed to ensure his safety whilst the motor vehicle was still in motion.

¹ Those grounds appear at paragraph 6 of the plaintiff's particulars of claim.

(c) He failed to keep a proper lookout.

(d) He suddenly moved to the inside of the road at an unfortunate time.

[5] Alongside this defence, the Fund claimed the apportionment of the plaintiff's damages in terms of the Apportionment of Damages Act 34 of 1956 (the Act).²

[6] The matter was set down for trial on 05 August 2025. On the morning of the trial, I was informed by Ms *Van Vuuren*, who represented the plaintiff, and Mr *Mlinganiso*, who represented the Fund, that the settlement of the claim that the parties contemplated had collapsed. They also indicated that the point of contention between the plaintiff and the Fund was the Fund's stance of apportioning the plaintiff's claim by 5%, supposedly, due to contributory negligence on his part at the time of the accident.

[7] Whether the Fund was entitled to claim the apportionment of the plaintiff's damages became the only point of controversy between the parties. Ms *Van Vuuren* and Mr *Mlinganiso* further indicated that they would seek an opportunity to present a stated case, as envisaged in Uniform Rule 33(1), for the determination of the question of law that they would present. This, as it appeared from their further submissions, that the fact of the accident and the events that unfolded thereafter; and the issue of negligence on the part of the unknown insured driver were no longer contentious issues as between the parties. I stood the case down at the request of the parties until 06 August 2025.

² Section 1(a) of this Act provides: Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.

[8] On 06 August 2025, the parties submitted a stated case duly signed on their behalf by their respective legal representatives. Below I set out, in brief terms, their statement of agreed facts.

The statement of agreed facts

[9] On 22 June 2020, a motor vehicle accident occurred at Phase 1, Scenery Park, in East London, in which the plaintiff was knocked down from behind, by a speeding motor vehicle, whilst walking on the sidewalk of the tarred road. At the time of the accident, he was 13 years old. The details of the insured motor vehicle and those of the insured driver are unknown. Following the accident, the plaintiff was immediately taken to the John Dube Clinic by his father. From there, he was referred to Empilweni Gompo Community Health Centre.

[10] The plaintiff sustained a fracture of the right distal radius and received treatment for his injury at Empilweni Gompo Community Health Centre on 22 June 2020; 29 June 2020; and on 03 August 2020. On 22 June 2020, his father, M[...] M[...] reported the accident at the Scenery Park Police Station. A case of reckless driving was opened under CAS 112/06/2020. On 13 July 2020, the case docket was closed. The investigation reached a stage where all existing leads had been followed up, but without any results.

[11] The accident was caused by the negligent driving of the insured motor vehicle. The plaintiff has complied with all the necessary prescripts and statutory provisions of the Road Accident Fund Act 56 of 1996 (“the Act”) in instituting the claim against the Fund. The whole cause of action arose within this Court’s jurisdiction.

The question of law

[12] The parties formulated the question of law for the court's determination as being whether, based on the agreed facts, the plaintiff was '*doli capax*' at the time of the accident.

[13] Since *dolus* is a state of mind, and differs from *culpa* which entails conduct that falls short of a particular standard (the reasonable man standard), and since the issue to be determined relates to fault on the part of the plaintiff in the form of negligence,³ it must be accepted that for the present purposes, the parties intended that this Court determines whether the plaintiff was *culpa capax* at the time of the incident.

The parties' contentions

[14] The plaintiff contends that the Fund bears the onus to prove that he was *culpa capax* at the time of the accident. He further contends that on the agreed facts, there is no support for a finding that he had the capacity to neglect when the accident occurred. It is the plaintiff's contention further, that in law, as a minor at the time, he lacked capacity to appreciate danger to be avoided. Hence, so the contention continues, the Fund should be held 100% liable for his damages as may be proven, which resulted from the accident that took place on 22 June 2020.

[15] The Fund contends that although the plaintiff was a minor, he was not *culpa incapax* at the time of the accident, and a 5% reduction of his damages is appropriate.

³ The distinction was drawn in *S v Ngubane* 1985 (3) SA 677 (A) at 686, and in *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA), at para 12. See also the discussion by learned authors JC Van Der Walt & JR Midgley in *Principles of Delict*, 4th edition (Lexis Nexis) 2016, para 135 at page 225.

The parties' submissions

[16] Ms Van Vuuren submitted that as a minor of 13 years of age, the plaintiff was presumed to lack capacity until the contrary was proved by the party alleging negligence. In making this submission, she relied on *Weber v SANTAM Versekeringsmaatskappy Bpk*,⁴ where it was held that children under 7 years of age are *culpa incapax*, whilst children between the ages of 7 and puberty (12 in the case of girls and 14 in the case of boys), are rebuttably presumed to lack capacity to neglect. Ms Van Vurren further submitted that the Fund bears the burden of rebutting this presumption by proving that the plaintiff was *culpa capax* – he was aware of his responsibilities (in crossing a street) and could have been negligent. In this regard, so the submission went, the capacity to neglect is a question of fact in a particular case.

[17] It was further submitted on behalf of the plaintiff that in the absence of facts supporting a finding that he appreciated the danger of a speeding vehicle, it cannot be said that the Fund has succeeded in rebutting the presumption that operated in favour of the plaintiff at the time of the accident.

[18] In submitting that the plaintiff's own negligence contributed to the occurrence of the accident, Mr Mlinganiso relied on *Jones NO v SANTAM Bpk*,⁵ where it was held that once it is established that a child over the age of 7 but under the age of 14 has conducted itself in such a manner that its conduct would ordinarily amount to culpa or negligence, then there arises the necessity of determining whether that child is *culpa capax*; and that, once the conduct was held to be negligent, the child could be held accountable.

The legal principles

⁴ 1983 (1) SA 381 (A).

⁵ 1965 (2) SA 542 (A).

[19] In order to succeed in his claim, the plaintiff had to establish on a balance of probabilities that her injury arose out of the negligent driving of a motor vehicle and that there is some connection between the driving of that motor vehicle and his injury.⁶ Where the defendant alleges that the plaintiff's own negligence contributed to the occurrence of the injury causing accident, the onus is on the defendant to prove such contributory negligence.⁷ The test is whether the plaintiff's act or omission deviated from the norm of the *bonus paterfamilias*,⁸ and whether that fault contributed to (is causally linked to) the injury.⁹

[20] Something needs to be said about the manner in which the Fund placed the plaintiff's negligence in issue. In its plea, it pleaded the plaintiff's negligence as the sole cause of the accident on the grounds afore mentioned. It averred nothing about contributory negligence on the part of the plaintiff, yet it claimed apportionment of his damages in terms of the Act. The assertion that the plaintiff's negligence was the sole cause of the accident, and a claim for apportionment of damages where no contributory negligence is specifically pleaded in the alternative, are diametrically opposed.

[21] After considering several authorities on the issue of contributory negligence and a claim for apportionment of damages, Laing J, in *Abdul Isaac Mjadhu v Road Accident Fund*,¹⁰ said:

‘The correct time and place for the defendant to place in issue the plaintiff's fault is at the stage of pleading. In doing so, as the court found in *Roma v Road Accident Fund*, the defendant sets out the basis for his or her (or its) case and shapes the nature of the trial proceedings that follow.

⁶ *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A) at 399, *Grove v The Road Accident Fund* (74/10) [2011] ZASCA 55 (31 March 2011), at para 7; *Van Wyk v Lewis* 1924 AD 438 at 444.

⁷ *Damba v AA Mutual Insurance Association Ltd* 1981 (3) SA 740 (E) at 742 -743.

⁸ *Vorster v; AA Mutual Insurance Association Ltd* 1982 (1) SA 145 (T) at 151H

⁹ *Bowkers Park Komga Co-operative Ltd v SAR & H*, 1980 (1) SA 91 (E), at 95B-E.

¹⁰ *Mjadhu v Road Accident Fund* (2425/2021) [2024] ZAECMKHC 112 (8 October 2024).

If the defendant has not placed in issue any fault on the part of the plaintiff, specifically his or her (or its) contributory negligence in relation to the event that gave rise to a delictual claim, then the defendant cannot claim, later, the apportionment of damages.’¹¹ (Emphasis added. Footnotes omitted)

[22] Be that as it may, the parties, in their stated case, appear to have ventilated this issue with some clarity. I will revert to this aspect in a different context when time is opportune in this judgment.

Discussion

[23] At the centre of the enquiry is the conduct of the plaintiff which, as alleged, contributed to the harm he suffered. The question to be asked is whether, based on the facts agreed to by the parties, the plaintiff had the mental capacity to apprehend intelligently the danger presented by walking on the sidewalk of the tarred road where the accident took place. In the first instance, this Court must determine the plaintiff’s capacity at the time, to appreciate the difference between right and wrong, and whether he had the ability to act in accordance with that capacity.¹² Thereafter, and if it is found that the plaintiff had the capacity, a determination must be made as to fault on his part, that is, whether he was negligent or not. Such negligence will be determined in accordance with the standard of the ordinary (adult) reasonable person.

[24] The legal position regarding the capacity as stated in *Weber*,¹³ is that there is a rebuttable presumption that a child below the age of 12 years (in the case of girls)

¹¹ Ibid, at para 16.

¹² JC Van Der Walt & JR Midgley in Principles of Delict, footnote 3 supra, para 173, page 272.

¹³ Supra, footnote 4.

and 14 years in the case of boys, lacks the capacity to neglect until proven otherwise by the party alleging negligence of the child's part. In that case, the court further held that the inquiry was one of fact, and that in each case what must be determined is whether the child in question had developed the emotional and intellectual maturity to appreciate the danger to be avoided and, if so, to act accordingly.

[25] The Supreme Court of Appeal in *Eskom Holding v Jaques Justin Hendriks*,¹⁴ confirmed the existence of the presumption but did away with the gender-based distinction that the court had made in *Weber*; and held that a child below the age of 14 years of, regardless of its gender, is presumed *culpa incapax*, until proven otherwise.¹⁵ The Fund had to rebut this presumption.

[26] It is an agreed fact between the parties that when the accident happened, the plaintiff was walking on the sidewalk of the road, and he was hit from behind by a speeding vehicle. This connotes that the plaintiff (then, a minor below the age of 13 years) was walking in the direction of travel of the vehicles approaching him from behind. In order to rebut the presumption of lack of capacity, the Fund had to prove that the plaintiff appreciated the danger to which he was exposing himself or its possible consequence, when he walked in the direction of travel of motor vehicles that approached behind him. It had to thereafter prove that the plaintiff neglected to act in the manner that a reasonable person would act in order to avoid the accident in such an instance.

[27] It can be accepted that a child of 13 years of age, would have been taught at some level, the basic rules of traffic safety as a pedestrian. Based on the agreed facts, a probability that emerges is that the plaintiff did not appreciate the danger to

¹⁴ 2005 (5) SA 503 (SCA).

¹⁵ *Id.*, para 16.

which he was exposing himself or its possible consequence, when he walked in the direction of travel of motor vehicles that approached behind him. Another probability is that he lacked an appreciation of the full import of the danger and became occupied by his travel that he did not think of the danger of speeding motor vehicles of which he may have been aware when he walked on the sidewalk of the road.

[28] In concluding that an 11 years and eight months old child was *culpa* *incapax* at the time of his injury, the Court, in *Eskom Holdings*¹⁶ held the following:

‘Experience tells one that the fear of falling from a height is one that develops early in childhood and the risk of such a fall is unlikely to be one that would be taken impulsively and without regard to the possible consequences. . . Fascinated by the insulators and disregarding the race, he then proceeded to traverse out along the cross-arm in order to touch one of the insulators for no better reason than to feel its texture. It was this conduct that resulted in his injuries and it follows that it is in relation to this conduct that his emotional and intellectual maturity must be assessed. . . His conduct gives rise to two possible inferences: either he did not appreciate the danger to which he was exposing himself or its possible consequence, or his curiosity was so overwhelming that he became oblivious of the danger and succumbed to an impulse to touch one of the insulators. The only other possibility is that he was fully aware of the danger but was unconcerned by it. This is highly unlikely; it would amount to a conscious disregard for his own life. . . The most likely inference arising from his conduct would seem to be that he lacked an appreciation of the full import of the danger and became so engrossed in his fascination for the insulators that he forgot all about the danger of which he may have been aware. . . In my view, the very conduct in question is indicative of an inability on the part of J. to act in accordance with any appreciation he may have had of the danger involved.’¹⁷

¹⁶ Supra, footnote 14.

¹⁷ At 512H-513B-F; see also *N Obo N v Road Accident Fund* (17439/2013) [2015] ZAGPJHC 77 (27 April 2015), paras 13, 14 and 15.

[29] Even though the facts in *Eskom Holdings* are distinguishable from those in the present case, the Cour's approach in assessing the child's capacity to neglect is, with respect, instructive in the present case.

[30] The Fund's contention is that the plaintiff was *culpa capax* at the time of the accident, notwithstanding that he was a minor below the age of 14 years at the time he suffered harm. Indeed, Williamson JA, in *Jones v SANTAM Bpk*,¹⁸ held:

‘[I]f it be decided in any particular case that a child under puberty is old enough to have and does have the intelligence to appreciate a particular danger to be avoided, that he has a knowledge of how to avoid it or of the precautions to be taken against it, and further that he is sufficiently matured or developed so as to be able to control irrational or impulsive acts, then it would be proper to hold that a failure to control himself or to take the ordinary precautions against the danger in question is negligent conduct on his part; in other words, that child, in relation to the particular acts or omissions complained of in the particular circumstances, was *culpa capax*.’

[31] However, the case of *Jones*, which Mr *Mlinganiso* relied on, is no authority for the proposition that a child above 7 years of age but below 14, is *culpa capax*. As the Supreme Court of Appeal observed in *Eskom Holdings*, the court in *Jones*, did not determine the question of the rebuttable presumption of absence of capacity for culpa for a child under 14 years of age.¹⁹

[32] I come to the conclusion that the facts agreed to by the parties do not support the finding that the plaintiff was *culpa capax* at the time he suffered harm. The only question that remains is that of costs.

Costs

[33] Ms *Van Vuuren* submitted that a punitive cost order against the Fund is warranted, in that, it failed to conduct litigation in this case expeditiously. It

¹⁸ 1965(2) SA 542 (A) at 554A-B.

¹⁹ *Id.* at para 16.

elected to pursue an indefensible question of law that has no factual basis. For these reasons, she submitted that costs must be awarded on scale C referred to in Uniform Rule 67A. Mr *Mlinganiso* made no pertinent submissions on costs, both in his oral arguments in court and in the Fund's heads of argument.

[34] It is indeed so, that the conduct of litigation should promote speedy and cost-effective resolution of disputes. It is a collaborative effort in which the role of the legal representatives is the supervision, organization and presentation of evidence as well as the formulation and presentation of argument to arrive at a reasoned determination of the disputes.²⁰

[35] I need do no more on this score, than re-iterate that the Fund is an organ of State which exercises public power. It performs a public function which entails the administration of public funds.²¹ Its main object is the compensation of victims who have been rendered vulnerable by motor vehicle accidents on the country's public roads. It is also seized with the task of endeavouring to expeditiously settle claims where this is possible.

[36] In *Mashavha v Enaex Africa (Pty) Ltd*,²² it was held that the focus of Rule 67A is not on the conduct of the losing party. It is primarily on the nature of the case, and, secondarily, on the way that the successful party presented it. The mere fact that punitive costs were sought by the successful party does not mean that a higher scale of counsel's costs ought to be awarded on the party and party scale. It is once the court has determined that a punitive cost order is warranted that the conduct of the losing party becomes relevant.²³ The Full Court, in *Khuza and*

²⁰ *Venmop 275 ((Pty) Ltd and Another v Cleverland Projects (Pty) Ltd* 2016 (1) SA 78 (GJ) at par 7.

²¹ *Mlatsheni v Road Accident Fund* 2009 (2) SA 401(E) at paragraphs 12 to 17.

²² *Mashavha v Enaex Africa (Pty) Ltd* (2022/18404) [2024] ZAGPJHC 387; 2025 (1) SA 466 (GJ) (22 April 2024).

²³ *Ibid*, at para 19.

Another v Khanyiwe,²⁴ observed that the default position set by rule 67A is that costs will be recovered on scale A unless there is justification for the application of a higher scale. The complex nature of the case will be once such justification.

[37] It is rather perplexing, that the Fund, without any sound factual and legal basis when regard is had to the statement of agreed facts, put forward its defence as I discussed it elsewhere in this judgment. This is apart from the fact that the parties, in any event, proceeded with the statement of agreed facts from the premise that the Fund pleaded contributory negligence.

[38] How the Fund placed the plaintiff's negligence in issue is the kind of lack of precision in the pleadings that Uniform Rule 18(4) aims to avert by providing that – 'every pleading shall contain a clear and concise statement of material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.' The defendant's failure to observe this Rule, alongside presenting an untenable defence, warrants being met with disapproval marked by punitive costs.

[39] With that said, in as much as the case did not present unusually complex issues of law and fact, the question of law that this Court was invited to determine is an important one when regard is had to the trend, as observed in a plethora of cases, in this Division, and elsewhere, in which the Fund opts to litigate and raise untenable defences in circumstances where a matter, such as the present, is capable of settlement. On this basis alone, there is merit in Ms *Van Vuuren*'s submissions on the issue of costs.

[40] In the result, I make the following order:

²⁴ *Khuza and Another v Khanyiwe* (5009/2018) [2025] ZAECHC 15; [2025] 2 All SA 463 (ECM) (4 March 2025), para 27. See also, *Mashavha Enaex Africa (Pty) Ltd*, supra, at para 16.

1. The plaintiff was *culpaie incapax* at the time he sustained bodily injury as a result of the motor vehicle accident ('the accident') that took place on 22 June 2022 at Phase 1, Scenery Park, in East London.
2. The defendant is held liable for 100% of the plaintiff's damages resulting from the accident, as may be proven in due course.
3. The defendant shall pay the plaintiff's costs on scale C referred to in Rule 67A of the Uniform Rules of Court.

L. RUSI

JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff : Adv. L Van Vuuren

Instructed by : Sakhela INC, East London

For the defendant : Mr S Mlinganiso

The Office of the State Attorney, East London

Date heard : 05 & 06 August 2025

Date delivered : 16 September 2025