

SOUTH AFRICA / JUDGMENT

Brews v Member of the Executive Council for Public Works, Roads and Transport: North West Province (115/2020) [2023] ZANWHC 83 (20 June 2023)

[2023] ZANWHC 83

COURT

North West High Court, Mafikeng

BEFORE

A H Petersen

CASE / FILE NUMBER

115/2020

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FLYNOTES:

CIVIL LAW – Delict – Road condition – Plaintiff
lost control of his motorcycle and collided with
a ditch –
Sustained bodily injuries and suffered damages – Inspection
revealed severe undulations and surface
bumps on driving surface –
Whether maintenance responsibilities were performed in a negligent
manner – Warning
sign placement did not comply with
prescribed distance for placement – Minister found liable.
IN
THE HIGH COURT OF SOUTH AFRICA
NORTH
WEST DIVISION, MAHIKENG
CASE
NO: 115/2020

Reportable:

YES / NO
Circulate
to Judges: YES / NO
Circulate
to Magistrates: YES / NO
Circulate
to Regional Magistrates: YES / NO
In

the matter between: RYAN
LLEWELLYN BREWS
Plaintiff
and
MEMBER
OF THE EXECUTIVE COUNCIL
FOR
PUBLIC WORKS, ROADS AND

TRANSPORT: NORTH WEST PROVINCE
Defendant

Delivered: This
judgment was handed down electronically by circulation to the
parties' representatives via e-mail. A hard copy has been
placed in the pigeonholes of the instructing attorneys at the Office
of the Registrar. The date and time of the handing down of
judgment
is deemed to be 12h00PM on 20 June 2023.

ORDER

(i)

The defendant is 100%
liable for the damages sustained by the plaintiff in the accident
which occurred on 19 July 2015, as agreed
upon or proven by the
plaintiff.

(ii)

The defendant is
ordered to pay the plaintiff's reasonable costs with regard to
merits, which costs shall include the costs
of Senior Counsel and the
qualifying fees of Dr Roodt.

JUDGMENT

PETERSEN J:

Introduction

- [1] On 19 July 2015, the plaintiff was riding his motorcycle on the R512 regional road near the town of Broederstroom in the North West Province. As he left a T-junction along the R512 travelling in a westerly direction. Approximately 1.7km from the said junction whilst manoeuvring around a curve to the right in the road, he lost control of his motorcycle. Having lost control of his motorcycle, the plaintiff veered to the left side of the road surface where the motorcycle collided with a ditch. An inspection of the road by an expert after the accident revealed severe undulations, surface bumps and pumping on the driving surface on the section of the road where the accident occurred. The plaintiff as a result of the accident, sustained bodily injuries and suffered damages as a result of the said injuries.

Separation of issues in terms of Uniform Rule 33(4)

- [2] Before the commencement of the trial and pursuant to an agreement reached between the parties at the pre-trial conference, an order was granted separating the merits of the matter from quantum in terms of Rule 33(4) of the Uniform Rules of Court.

Issues

of common cause

- [3] The defendant admitted that:

- (i) it has a duty of care inherent in its responsibility to maintain the R512 road near the town of Broederstroom;
- (ii) the extent of its maintenance responsibility. In particular, the defendant admitted it had a duty to perform regular and appropriate maintenance on the road so as to ensure that the driving surface of the road and the pavement adjoining the road were safe for the use of the public.
- (iii) it had a duty to take reasonable steps to ensure that the driving surface of the road pavement does not degrade to a state which might pose a danger for the reasonable user. The aforesaid duty entailed taking steps to ensure that rutting, undulations, cracks and bumps in the road pavement do not develop on the driving surface of the road.
- (iii) in the event of rutting, undulations, cracks and bumps developing on the road pavement, reasonable steps were to be taken to maintain and rectify the development of such rutting, undulations cracks and bumps.

- [4] It is noteworthy that the defendant does not, as part of its plea or defence rely on any preconditions with regard to its maintenance responsibility. Specifically the defendant does not rely on the discharge of its maintenance responsibility within the purview of available financial and human resources. To state it simply, budgetary constraints is not in issue.

- [5] As to the manner in which the accident occurred as set out in paragraph 5 of the plaintiff's particulars of claim, the defendant takes no issue. The defendant therefore admits the manner in which the accident occurred, in that when the plaintiff rode his motorcycle on the left-hand side of the road surface and lost control of his motorcycle he veered over to the left side of the road and ultimately collided with a ditch on the left side of the road.

Issues

in dispute

- [6] The substantive issues in dispute between the plaintiff and the defendant are formulated as follows in its plea. In respect of paragraph 5 of the particulars of claim, save for admitting the manner in which the accident occurred:

“The defendant pleads that the plaintiff lost control of the motorbike, veered over the left-hand side of the road surface fell and collided with the ditch on the left-hand side of the road as he was driving his motorbike on a speed which was excessive under the circumstances.”

At paragraph 6.2 of the defendant’s plea:

“The defendant further pleads that the plaintiff lost control of his motorbike that he failed to obey road signs, which guides the road users including the plaintiff about the nature of the road speed required on the road on which they are travelling on.”

[7] At paragraph 7 of its plea, the defendant summarises what is captured above as follows, by disputing:

“7.1 that the accident was caused by the extreme bumping and or undulations and/or rut formations on the driving surface of the road on which the plaintiff drove;

7.2 that the condition of the road at the time of the accident was dangerous to the reasonable user;

7.3 the defendants, on the contrary, aver that the cause of the accident was:

7.3.1 excessive travelling speed by the plaintiff;

7.3.2 the failure by the rider of the motorbike i.e. the plaintiff to adhere to the road traffic signs affixed along the R512 road advising road users of the speed required and the nature of the road in question.

7.3.3 Defendants further pleaded that the particular road was properly repaired in that the road was clear of bumping, undulations and rut formations.”

[8] Contributory negligence was not placed in issue by the defendant and neither was same specifically pleaded by the defendant. In essence, the defendant’s plea is that the plaintiff’s inability to keep control of the motorcycle was as a result of his sole negligence, in failing to drive his motorcycle within the speed limit required by

road signs and by failing to take into consideration the road signs erected by the defendant on the side of the road.

[9] Inherent in the consideration of the main issues in dispute, is the question whether the defendant had performed its maintenance responsibilities at all or in the alternative, whether such maintenance responsibilities were performed in a negligent manner.

[10] As a result of agreements reached during the course of a pre-trial conference held shortly before the commencement of this trial the plaintiff was intent on only calling the plaintiff and an expert witness Dr Louis Roodt, a civil engineer, specializing in road design and safety. The defendant was intent on only calling an expert civil engineer, Mr. Willie Renier du Preez. Ultimately only the plaintiff testified and the Court was addressed on the expert reports and joint minutes filed by the plaintiff and defendant.

The evidence for the plaintiff

- [11] The evidence of the plaintiff may be succinctly summarized as follows. On Saturday, 19 July 2015 he was riding his motorcycle in Broederstroom area in a westerly direction on R512, from a T-junction at route R104 and R512 near Broederstroom. The plaintiff, a 43-year-old male was an experienced motorcycle rider and although it was the first time to ride on that particular stretch of the road, he had experience of riding on tar roads and as a rule drove within the limitations of his ability as a motorcycle rider.
- [12] At the time of the accident at approximately 11AM on the same morning, the plaintiff was on his way home, after having embarked on a joyride. It was a clear day. The sun was shining. The road surface was dry. The traffic on the road was particularly heavy. The plaintiff did not try to embellish his evidence and where he could not recall aspects of what transpired he was very clear in that regard. In particular, the plaintiff readily conceded that he could not remember whether there was a road sign indicating the speed limit, but he accepted that the general speed limit would in all probability have been 80 km/h. Further thereto he was led by the approximate speed of the motor vehicles travelling ahead of them. The area was not built up but there were commercial properties along the road in question.
- [13] The plaintiff did not try to venture a specific speed when he entered the curve where the accident occurred. He testified that about half way from the T-junction into the curb, he did check on his speedometer and recalls that it indicated a speed of approximately 85 km/h. The plaintiff could not recall whether he had accelerated or decelerated after seeing the speed of 85 km/h, but he remained adamant in his resolve that the traffic did not allow for a dramatic increase in speed. The plaintiff does recall if the road was in a good condition as he approached the curve. He saw a hazard sign before the point where the accident occurred indicating undulations. Whilst he remains adamant that he never saw a sign indicating a recommended speed of 40 km/h, he does not dispute the presence of such a sign.
- [14] However, being accustomed to his motorcycle and being acutely aware of road conditions when using his motorcycle, he is able to anticipate any danger which may be occasioned by any poor conditions in the road surface. According to the plaintiff, as he approached the curve in the road, he immediately lost control. Immediately following the observation of the undulations sign the plaintiff felt his motorcycle starting to shake, the handle shaking from side to side. He, however, did not see the undulations in the road at the stage when his motorcycle shook from side to side. As an experienced motorcycle rider he tried to close the throttle on the motorcycle but he could not recover from the oscillation of the motorcycle. Within a fraction of seconds from the time the plaintiff felt the oscillation of the motorcycle he completely lost control of the motorcycle. Being on a motorcycle out of control, the plaintiff crashed into the ditch on the side of the road. According to the plaintiff when he regained some consciousness, he found himself lying in the ditch next to the road in the presence of an elderly man who was trying to speak to him. That is the gist of the evidence of the plaintiff.

- [15] By agreement an affidavit deposed to by a Mrs Bezuidenhout, who was a passenger in a motor vehicle with her husband Mr Bezuidenhout was adduced as evidence. The contents and the correctness of the affidavit of Mrs Bezuidenhout was admitted. Mrs Bezuidenhout confirms that she saw the motorcycle of the plaintiff approaching from the front and as the motorcycle entered the curve, where the collision occurred, the motorcycle started shaking and started jumping to such an extent that the motorcycle rider lost control and left the road. According to Mrs Bezuidenhout she saw the rider of the motorcycle going over the handlebars and falling off the motorcycle. Mrs Bezuidenhout's husband was the only motorist who stopped at the scene of the accident and waited until an ambulance arrived to remove the plaintiff to hospital.
- [16] As a result of agreements reached between Counsel for the plaintiff and the defendant, the expert for the plaintiff was not called. Similarly the expert for the defendant was not called. Counsel thereupon addressed the Court on the merits of the plaintiff's claim with reference to the plaintiff's evidence, the evidence of Mrs Bezuidenhout and the expert reports.

Discussion

- [17] The issues in this matter, save for those predicated on the evidence of the plaintiff and Mrs Bezuidenhout turns on the expert evidence. It is a basic premise that whilst each party will ordinarily call its own expert to testify in its case, ultimately the role of the expert is to assist the court in coming to a fair decision.
- [18] The main issues which engaged the experts is whether or not the road was in a fairly good condition and where relevant road signs were placed as warnings to road users. The road signs include the road sign indicating the undulations in the road and any road sign indicating a reduction in speed by road users, so as to traverse safely across any hazards which might be identified on the road.
- [19] The plaintiff at paragraph 5.1 of the particulars of claim makes the allegation that the area where the accident occurred had severe undulations, surface bumps, pumping and rutting. The defendant on the contrary, in its plea, denied the allegation and put the plaintiff to the proof thereof. Specifically, the defendant maintained that the particular area on the R512 where the accident occurred was properly repaired to the extent that the road was clear of pumping and/or undulations and rut formation. This denial by the defendant must however be placed in context when one has regard to the factual evidence which is set out in the expert reports of both the plaintiff and the defendant, that is, Dr Louis Roodt, and Mr

Ignatius du Preez.

- [20] In a nutshell, the evidence extracted from reports of the two experts as amplified by the joint minute in this regard is as follows:
1. That at the time of the accident in question, a temporary warning sign with code TW331- Uneven road was erected 100 m before the area in the road where the accident occurred.

2. Both experts, Dr Roodt and Mr du Preez visited the scene of the accident. Dr Roodt visited the scene of the accident on 22 October 2015 and Mr du Preez visited the scene on 10 October 2019. Notably there is a difference of four years in the time when the experts visited the scene. The plaintiff's expert visited the scene shortly after the incident occurred in 2015 whilst the defendant's expert visited the scene some four years later.
3. The experts, however, reached an agreement in the joint minute that when Dr Roodt inspected the road surface on 22 October 2015 with the plaintiff, it was virtually or practically in the same condition as it was at the time of the alleged accident on 19 July 2015.
4. At paragraph 3.4 of the joint minutes, the experts agreed that the specific section of the road, including the area where the plaintiff allegedly lost control, is in a poor structural condition and is beyond the stage where routine maintenance alone can render the driving surface safe and in a functional condition. Both experts relied on a plethora of photographs confirming the rut formation, the undulations, the ridges and the bumps in the particular stretch of the road.
5. In amplification of this agreement by the experts, they agreed that at the date of the accident on 19 July 2015, the defendant had already erected a temporary warning sign TW331 "bumpy road" on the approach to the road section where the accident occurred.

[21] In the joint minute prepared by the experts, they agree as follows:

"1. That the stretch of road where the Plaintiff lost control is in a poor structural condition.

2. That the road is beyond the stage where routine maintenance alone can render the driving surface safe and in a functional condition.

[22] From the aforesaid, this Court can safely reject the defendant's plea that the road had been properly repaired to the extent that the road was clear of pumping and undulations and rut formation as alleged in paragraph 14.3 of the its plea. That having been said, this Court accepts from evidence where the experts are ad idem that the stretch of road where the accident occurred on 19 July 2015 was in fact, in a poor structural condition, was beyond the stage where routine maintenance alone could render the driving surface safe. The question remains whether the failure to properly maintain the road and the fact that the road surface in any event was beyond normal routine maintenance presented as being unsafe and a danger to road users.

[23] Dr Roodt embarks on a theoretical reconstruction of the accident premised on his own experience as a motorcyclist against his expertise. Mr Du Preez elects not to comment on this exposition by Dr Roodt and specifically says at paragraph 20 of his report that: "I will not comment on the accident reconstruction portion as well as the engineering analysis. However, there was no simulation done to determine the riding quality of the particular road section, where the alleged accident occurred, therefore no concrete conclusions can be made by Mr Roodt regarding the riding quality, of the particular section, except for theoretical discussion." In the joint minute of the experts dated 25 October 2021 at

paragraph 4 column 4, Mr du Preez's submission and Dr Roodt's opinion in this regard is stated as follows:

"1. Mr du Preez submits: "Absence of simulation exercise - Although du Preez does not comment on Roodt's accident reconstruction submissions in Roodt's report, du Preez asserts that Roodt should have tested and simulated the scene of the scene of the accident by having an experienced motorcyclist check the riding quality of the road at the time of his investigation in October 2015 (paragraph 20).

Dr Roodt disagrees and says: "Although Roodt is an experienced motorcyclist, he assessed the uneven, bumpy road surface in

accordance with the Industry Accepted Publication TMH9, Pavement Management Systems: Standard Visual Assessment Manual for Flexible

Pavements and found the pavement surface in poor repair and unsafe. Roodt remains of the opinion that the condition of the road a simulation will put the simulation motorcyclist at risk."

[24] It is apposite to note that the evidence of Dr Roodt with regard to the reconstruction of the manner in which the accident had likely occurred therefore remains unchallenged by countervailing evidence. I accept that even in the absence of the simulation exercise, which, as Dr Roodt put it could put a motorcyclist at risk, that Roodt's evidence is predicated specifically on a publication accepted within the industry for purposes of the assessment which he conducted. In this regard, the opinion expressed in respect of the reconstruction in any event, accords with the evidence of the plaintiff as to what had transpired at the time he encountered the undulations which subsequently led to the loss of control of the motorcycle and the plaintiff ending up in a ditch.

[25] An issue was taken by Mr du Preez on the methodology utilised by Dr Roodt to measure the height of the undulations on the road surface where the accident occurred. In this regard, a specific challenge was taken on the use of a bottle of no length as a gauge, which according to him is not accurate as the alignment of the road surface could play a role in the perception of 40 mm as well as the position and angle of the camera that may render the measurement incorrect. However, Mr du Preez does not pertinently deny that the extent of the unevenness could have been 40 mm, and neither has he taken the liberty to do his own measurement of the extent of the unevenness.

[26] It is further apposite to note that Mr du Preez takes no issue with appendix "D1" which is attached to Dr Roodt's report, which is extracted from Traffic Manual 9 of 1992, which describes undulations/settlements in roads as follows:

"The degree of undulation is fairly subjective. Table B-15 serves as a guide to link the degree of undulations to the riding quality of the road and therefore the safety of the road user. Although there is an overlap of this item of riding quality, the purpose of this rating is to highlight the presence of the differential settlement, consolidation or heating related deformation. Note: Unevenness caused by patches, potholes, corrugations and failures should not be rated as undulations/settlement."

[27] Dr Roodt, specifically at paragraph at 11 explains why in his opinion this Court should accept that the road was in fact unsafe for road users. Dr Roodt, relying on the guidance in the industry accepted publication TMH9: 1992 Pavement Management Systems: Standard Visual Assessment Manual for Flexible Pavements, concludes that the severity of the failure for undulations, rutting and potholes as he experienced them at the scene of the accident, qualifies as a Degree of Severity 5. What this means, Dr Roodt explains, with reference to photographic evidence “B2”, is that where scrape marks can be seen on the protrusion of the road and in photograph “B4”, using a bottle, the height of the protrusion was 227 mm whereas

next to that protrusion the height of the road is 40 mm high where the standard for rutting and shoving, in similar conditions would be 20 mm.

[28] Against the aforesaid background, Dr Roodt at paragraph 23 opines that: “A specific combination depressions and protrusions resulting from potholes, shoving and rutting confronted the rider by the time he has chosen his driving line. The ensuing frequency and amplitudes caused an unrecoverable destabilisation of the motorcycle in a manner that is commensurate with practical experience and theoretical modelling. The presence of the bumps and holes on the roadway was and still is hazardous especially for a motorcycle rider which is classified as a vulnerable road user. Mr Brews eventually fell and collided with a ditch on the left-hand side of the road.”

[29] In further amplification of Dr Roodt's evidence, he testified that when a motorcyclist is riding on the curve, the motorcyclist would lean to the inside, to balance the centrifugal force and momentum is then directed outwards with the gravitational force and that momentum is generated inwardly in the lean (or roll). At that stage the forces and momentum would be in balance. At paragraph 16 of his report, Dr Roodt then opines that the plaintiff rode into the curve in a normal way, which is starting wide on the right-hand side of the lane and riding towards the centre of the lane as the vehicle follows a transition curve from the radius of infinite to the specific radius of 345 m. Approximately 50 m into the curve whilst leaning at the appropriate angle to negotiate a curve, the motorcycle suddenly started to vibrate and became unstable, that resulted in a loss of control.

[30] Further, at paragraph 17 Dr Roodt opines that the description and reconstruction of the accident, the performance of the motorcycle starting to vibrate and shake are adequately explained by the motorcycle control dynamics and the forces that would be generated by bumps on the road, resulting in vertical acceleration on the tyres at the contact patches. The unopposed upward acceleration will cause the motorcycle to rotate in the transverse plane and lose balance. This instability will continue until the rider turns sharper into the curve with the tyres having adequate grip again. An experienced rider can cope with a single small bump by correcting the overturning moment. A series of bumps of different heights and varying spacing will however be difficult to counteract. This wobble effect has a further influence on the steering, causing the front wheel to

oscillate in what is known as a 'headshake'.

- [31] It is apposite to note that this evidence by Dr Roodt accords with the evidence of the plaintiff insofar as the plaintiff testified that upon hitting the undulations in the road his motorcycle suddenly started to shake, his back wheel started to oscillate from side to side and the front wheel started bumping up and down with the steering shaking uncontrollably from side to side. The uncontested, independent evidence of Mrs Bezuidenhout confirms the latter.
- [32] Dr Roodt goes on at paragraph 20 of his report to opine that: "Motorcycles, as indicated above, are especially vulnerable when negotiating curve, having only two wheels the stability of the vehicle is directly affected by the loss of contact, such as the skidding of the wheels or vertical upwards acceleration. And the road leading up to the failure area, which is indicated to have developed due to poor and lack of maintenance in the isolated area is in a fair condition with no undulations." Again, this evidence of Dr Roodt accords with the evidence of the plaintiff that he had no warning whatsoever of the ensuing danger lying ahead in the road.
- [33] At paragraph 23 Dr Roodt continues that a specific combination depressions and protrusions, resulting from potholes, shoving and rutting confronted the rider by the time he had chosen his driving line. The ensuing frequency and amplitudes caused an unrecoverable destabilisation of the motorcycle in a manner that was commensurate with practical experience in theoretical modelling. The presence of the bumps and holes on the roadway was and still is hazardous, especially for motorcycle riders, which is classified as a vulnerable road users.
- [34] Having had regard to the evidence as aforesaid, I am accordingly satisfied that the evidence of the plaintiff, along with the evidence of Mrs Bezuidenhout and Dr Roodt with due regard to the difference in opinion as expressed by Mr du Preez can safely be accepted. That evidence is such that it proves overwhelmingly the extent of the undulations, ridges, depressions, rutting and bumps of the pavement of the road R512 where the accident occurred, which further proves was in fact dangerous and significant to the extent that it could be classified as severe as testified to by Dr Roodt.
- [35] I turn to the next issue taken by the defendant, being the temporary warning sign TW33-1. In this regard, the parties are ad idem that the temporary warning sign TW33-1 UNEVEN ROAD was erected by the defendant as a measure of warning motorists of a patch of uneven road and in all probability the section of the road where the accident occurred. The defendant relies heavily on the aforesaid temporary warning sign and pleads that the plaintiff failed to take cognizance of the said warning sign. In particular, at paragraph 6.2 of the defendant's plea, the defendant alleges as follows:

"The defendant further pleads that the plaintiff lost control of his motorbike in that he failed to obey road signs which guides the road users including the plaintiff about the nature of the road and the speed required on the road which they were traveling on."

Further, paragraph 8 of the plea, the defendant alleges:

“in failing to drive his motorbike within the speed limit required by road signs and by failing to take into consideration the road signs enacted by the defendant on the sides of the road, which warns the road users about the nature of the road they are driving on”.

[36] This brings me to the expert evidence in this regard. The experts agree that any warning sign so as to serve its purpose and to bring about efficacy in respect of the placement of that sign, needs to be placed at a proper location and to be visible from a sensible distance. The undisputed evidence is that the uneven road sign TW33-1 erected by the defendant, was erected at a distance less than 100 m from the failed road surface, contrary to Chapter 3: Warning Signs of the SADC, Road Traffic Signs Manual, Volume 1, November 1997. The defendant admitted as follows in paragraph 3.1.7 of its plea with

regard to the location of warning signs:

“3. Unless indicated otherwise in the descriptive sections on the individual signs, advance warning signs should be displayed at the distance from the hazard given in table 3.1. Table 3.1 indicates for an operating speed of 100 km/h, a distance of 240 m and at 80 km/h a distance of 160 m from the hazard is prescribed. A clear visibility distance of 100 m and 80 m respectively is prescribed in table 3.2.”

At paragraph 3.1.7 it is further prescribed that:

“4. In the event that inadequate sight distance exists to the warning sign when located in accordance with table 3.1 or figure 3.1, the warning sign shall be moved further from the hazard until the clear visibility distance given in table 3.2 is realised”.

[37] Ultimately, the evidence demonstrates that the placement of the warning sign did not comply with the necessary prescribed distance for placement of warning signs. In fact, the uneven road warning sign was less than 100 m from the area where the road failed. The non-compliance with the distances outlined for the erection of warning signs could not have given sufficient warning to the plaintiff or any other road user of the impending road failure. Photographic evidence further demonstrates overwhelmingly that the warning sign was at least 80 m from where the road failure would occur.

[38] As to the suggested speed of 40 km/h which the plaintiff maintains he had not seen and was not visible, photographic evidence demonstrates that the particular speed limit sign was not as visible as would be required to warn any road user of a reduction in the speed. The plaintiff refers this Court to the duty of any responsible authority in respect of road signs with reliance on *Minister of Transport & Another v Du Toit & Another* 2007 (1) SA 322 SCA. Save for the fact that 80% contributory negligence was found in the matter of *Du Toit*, the essence of the judgment is found at 329 H – 330B:

“The parties were agreed that the First Appellant was obliged to erect such road signs or provide such other facilities as were reasonable

in order to guard against reasonably foreseeable harm to users of the road. On behalf of both Appellants, it was contended however, that whether ... the steps taken by the First Appellant were reasonable or not had to be determined with reference to the manner of driving of a reasonably competent and cautious driver.

If by this is meant that the authority responsible for erecting road signs and other warnings is entitled to assume that a driver will read, and if necessary react, to every sign regardless of its nature, size and positioning, I cannot agree. A driver of a motor vehicle is obliged to maintain a proper lookout ... Depending on the state of the traffic, the nature of the road and the speed at which he is travelling, the opportunity which a motorist has to read and comprehend the import of each sign may be extremely limited ... For this reason it is imperative, ..., for warning and other signs to be clear, unambiguous and appropriately positioned, so that if necessary, they may be read and comprehended at a glance, This is all the more so where there is a potentially dangerous situation ahead, such as an unusually sharp bend or, for that matter, an unlit T-junction which would otherwise not be anticipated by driver who is unfamiliar with the road.”

[39] I therefore conclude in respect of the placement of the warning sign that the defendant failed to comply with its duty to ensure that the said sign had been appropriately positioned in terms of the industry standard accepted distance.

[40] I turn to the issue of the speed of the plaintiff. I reiterate that the plaintiff did not attempt to embellish his evidence that he had travelled at a specific speed. It is however imperative to note that the plaintiff mentioned that at the time of reaching the curve he looked at his speed which was approximately 85 km/h. The evidence of the plaintiff is that after leaving the T-junction and accepting that the speed limit on the road was 80 km/h, the fact that the road was particularly busy with other traffic, he had no opportunity to ride his motorcycle faster than the speed of the vehicles which were either ahead of him, behind him or to the side of him.

[41] The plaintiff denied in his evidence that he travelled at either a high speed or that his speed may have been described as ‘speeding’ as pleaded by the defendant. Whilst the plaintiff admitted not seeing the 40 km/h suggested speed sign on his version, he testified that when he saw the uneven road sign, he was for all practical purposes

into the section of the road which was in a poor condition causing him to lose control. I hasten to add that save for the evidence of the plaintiff, there is no other evidence to gainsay the fact that the plaintiff was travelling at a speed approximately 80 to 85 km/h, and more specifically, 85 km/h shortly before the accident. Accordingly, I am satisfied that there is nothing to demonstrate that the plaintiff rode his motorcycle at an excessive speed which could constitute speeding.

Onus (burden of proof)

[42] The onus of proof in a civil matter is trite. The plaintiff bears the onus to prove his case on a balance of probabilities. The onus which the plaintiff had to overcome was to prove that the breach of a legal duty on the part of the defendant to ensure that the road section where the

collision had occurred, constituted a hazard or potential hazard to the plaintiff as a user of the road section or the road or other users and that the defendant failed to take reasonable steps to warn the plaintiff or other users of such hazard or potential hazard or if such steps were taken that they did not meet the necessary industry standards.

The Law

[43] In *Van Eeden v Minister of Safety and Security* 2003

- (1) SA 389 (SCA) at para [9] the SCA restated the test of reasonableness in the event of an omission, holding that a defendant is under a legal duty to act

positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent

harm. It is accepted that an omission on the part of the defendant is wrongful if the defendant is under a duty to act positively to prevent the harm suffered by the plaintiff.

[44] In *Minister van Polisie v Ewels* 1975

- (3) SA 590 (AD), the Appellate Division held that an omission is regarded as unlawful conduct when the circumstances of the case are of such a nature that the omission not only incites moral indignation but also that the legal convictions of the community deemed that the omission ought to be regarded as unlawful and that the damage suffered ought to be made good by the person who neglected to do a positive act.

[45] In *Neethling v Polokwane Local Municipality* (9627/2014) [2016] ZAGPPHC 529 (24 June 2016), I had the occasion to state the following:

“[18] In Kruger v Coetzee 1966

- (2) SA 428 (A) 430E-H, the test for proving negligence was set out as follows:

“For the purposes of liability culpa arises if –

- (a) a diligens paterfamilias in the position of the defendant –
- (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
- (ii) would take reasonable steps to guard against such occurrence; and
- (b) the defendant failed to take such steps.”

[19] The test for proving negligence has withstood judicial scrutiny over the years and has been restated in numerous judicial pronouncements for the last 50 years. A careful reading of the case law demonstrates that requirement (a)(ii) is sometimes overlooked. The question to be begged on this requirement is whether a diligens paterfamilias in the position of the person concerned

(defendant in casu) would take any guarding steps at all and, if so, what steps would be reasonable. This question in my view can only be answered by having regard to the particular circumstances of each case (the peculiar facts in casu)..."

[46] It is clear from the aforesaid that the duty of care is linked to reasonable foreseeability of harm to another. In *Peri Urban Areas Health Board v Munarin* 1965 (3) SA 367 (A) at 373E-H, the Appellate Division stated as follows in this regard:

"Foreseeability of harm to a person, whether he be a specific individual or one of a category, is usually not a difficult question, but when ought I to guard against it? It depends upon the circumstances in each particular case, and it is neither necessary nor desirable to attempt a formulation which would cover all cases. For purposes of the present case it is sufficient to say, by way of general approach, that if I launch a potentially dangerous undertaking involving the foreseeable possibility of harm to another, the circumstances may be such that I cannot shrug my shoulders in unconcern but have certain responsibilities in the matter – the duty of care."

Conclusion

[47] When regard is had to the evidence and findings supra against the case law, it is clear that the defendant had not taken any reasonable or proper steps to maintain the road where the undulations occurred at the point where the accident occurred, prior to April

2015. A direct result of the lack of maintenance or proper maintenance is the road deteriorated as confirmed by both expert witnesses. The extent of the undulations is that it was dangerous. The overwhelming evidence demonstrates that as a result of the condition of the road it would impact a motorcycle rider on that portion of the road. That led to the plaintiff losing control of his motorcycle. The speed of the plaintiff played no contributory role, as the warning sign and undulation sign were not placed to give the plaintiff of any other reasonable road user fair warning.

[48] It is undisputed even on the version of the defendant that the defendant had prior positive knowledge of the nature of this road prior to the accident. To this end the defendant erected a warning sign indicating the bumpy road and a sign with a reduction in the speed limit. The erection of the signs, however fell gravely shy of what was to be expected of a reasonable authority. The warning sign indicating the bumpy road was erected far too close to the impending danger, contrary to accepted industry standards. The speed reduction sign was similarly placed too close to the impending danger, also contrary to accepted industry standards. The steps taken by the defendant fall gravely shy of the requirements in *Kruger v Coetzee*.

[49] I am satisfied that the plaintiff has satisfactorily mustered the onus by proving the negligence of the defendant. The defendant is accordingly held liable for its failure to properly maintain the road surface where the collision occurred and in respect of its placement of the undulations road sign and the speed limit sign, so as to give warning to any reasonable road user of that particular road of the impending harm. That failure occasioned harm to the plaintiff for which he should be compensated.

Order

[50] In the result the following order is made:

(iv) The defendant is 100% liable for the damages sustained by the plaintiff in the accident which occurred on 19 July 2015, as agreed upon or proven by the plaintiff.

(v) The defendant is ordered to pay the plaintiff's reasonable costs with regard to merits, which costs shall include the costs of Senior Counsel and the qualifying fees of Dr Roodt.

A H PETERSEN

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION OF THE HIGH COURT

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