

SOUTH AFRICA / JUDGMENT

Ferreira v The MEC for the Department of Roads and Transport, Limpopo Provincial Government (20077/2013) [2017] ZAGPPHC 1173 (29 June 2017)

[2017] ZAGPPHC 1173

COURT

North Gauteng High Court, Pretoria

BEFORE

Thobane

CASE / FILE NUMBER

20077/2013

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IN THE HIGH COURT OF SOUTH
AFRICA

GAUTENG DIVISION, PRETORIA

(1)

NOT REPORTABLE.

(2)

NOT OF INTEREST TO OTHER JUDGES

(3)

REVISED

CASE NO:20077/2013

29/6/2017

In

the matter between:

ADRIE
FERREIRA
PLAINTIFF
and
THE
MEC FOR THE DEPARTMENT OF
ROADS
AND TRANSPORT, LIMPOPO
PROVINCIAL
GOVERNMENT
DEFENDANT

JUDGMENT

THOBANE, AJ

Introduction

- [1] The plaintiff commenced actions proceedings in this court for damages following the death of her husband in a motor vehicle accident on 30 May 2010.
- [2] When proceedings began it was agreed that for convenience merits and quantum be separated in terms of Rule 33 (4) of the Uniform Rules of Court. The matter was therefore proceeding on merits only.
- [3] The plaintiff is the surviving spouse of Hendrik Petrus Ferreira (the deceased), whom it is alleged while traveling alone at night drove into or tried to avoid a pothole, lost control of his motor vehicle, hit a fence and the vehicle he was driving overturned. The deceased perished in the collision.
- [4] In the pleadings, the plaintiff pleads that the road was not kept to the required standard. There were potholes, severe edge breaks and eroded gravel shoulder. Further that there was a legal duty on the defendant to ensure the safety of road users by inter alia ensuring that the road was routinely inspected, maintained and repaired to avoid further deterioration. In the alternative, that the defendant had a duty to warn road users about the unsafe and dangerous nature of the road.
- [5] Initially the defendant had offered a bare denial in its plea. The pleas was however amended to reflect, to the extent pleaded the basis for denying any liability. It was denied that the accident was caused as a result of collision with a pothole or an attempt to avoid colliding with one. The defendant pleaded that the deceased failed to negotiate a curve as he had been driving at an excessive speed. The defendant admitted the duty of care it had with regards to the maintenance of the road but denied that it failed in such a duty, pleading that the road was properly maintained and that road users were adequately warned, whenever the road was not maintained, through the placement of warning signs.

Plaintiff's case

- [6] Ignatius Ferreira testified that he is a farmer and also doing professional hunting. The deceased was his son and lived with him on the farm. On the day of the incident he was at Skukuza hosting American clients. He received a call from Mr. Van der Walt who stated that there was a fatal accident and he thought that it was his son. He proceeded to the scene and arrived there at about 13h00. At that time the scene had been cleared but he could see that the road had bad potholes and the tracks showed that the deceased left the road on the left, came back on the road but crossed over to the right. He stated that in 2010 the road was in a

bad state. It was full of potholes and did not have an emergency lane. At some point the road was repaired, after his son's death however it deteriorated once again. The speed limit of the road as he recalls it is 120 km/h. His son, he stated, was never in an accident before and was a good driver. He knows that because he is the one who trained him to drive and the two of them had gone on an advance driving course and obtained advanced driving licenses. After the accident, he took a video showing inter alia the skid marks, the road markings and potholes and gave it to his lawyers.

- [7] During cross examination he stated that in his observation the deceased may have been trying to avoid a pothole. It was put to him that there were no potholes in the area of travel and that the police officer who will be called will say so. He was made to comment about what was depicted on the photos taken a day after the collision and was invited to comment about his observation of what was depicted thereon. From the tracks on and outside the road it would seem, so he testified, that the deceased exited the road on the left, travelled a short distance on the gravel part of the road returned to the road but crossed over to the other side where the vehicle eventually became stationary. He debated with counsel for the defendant about whether or not the road was in a good state. He indicated that the road was in a bad state and that the video he took way back in 2010 showed all the potholes in the vicinity of the accident. The road was not illuminated save by moonlight. The area is a bushveld with no villages nearby.
- [8] Jan Abraham Fourie Bester testified that he is a Warrant Officer stationed at Lephalale for 8 years. He is a video cam operator, draftsman, photographer and responsible for preparation of accident reports. He knew the stretch of road where the collision occurred very well as it was still part of the area he was servicing. Personally he found the road to be poorly maintained requiring a driver to drive around potholes. He received a call about a culpable homicide and proceeded to the scene. On arrival the vehicle was still there lying on its roof. The deceased was still inside. He compiled a video and took pictures. He started from the resting place of the vehicle and back tracked to where there were signs that it had left the road. He also prepared a sketch plan and key thereto. The road surface as well as the grass was still wet and some pothole had stagnant water. The various distances he measured was through the use of a measuring wheel. In his experience the road is a busy road as it is the main road from Swartwater to Alldays.
- [9] Adrie Ferreira, the plaintiff and wife to the deceased, testified that the deceased had been away watching rugby with friends. He telephoned her at about 21h00 and told her he was coming home. He had been some 60km away. She stated that she used the road daily on her way to school and that it was not in a good condition. At the time when her husband called, it was raining.
- [10] Johannes Petrus Strydom testified that he was an accident reconstruction expert and has been doing analysis and preparation of reports for over 39 years, in South Africa, Zimbabwe and Namibia. He prepared a report and an addendum containing his analysis, findings and opinion. He stated that he together with his counterpart prepared a joint minute and that he

was happy with its contents. In his opinion the vehicle the deceased was driving was traveling towards Alldays when it was confronted with a pothole in its lane of travel. This pothole was reflected on the photos taken as well as the video. The deceased in all probability then moved to the right in the lane of travel of oncoming traffic where he was confronted by a set or cluster of potholes. When confronted with the cluster of potholes, he is unable to say whether the deceased went through them or whether tried to avoid them. In his opinion however he then moved back to his lane but at this stage his vehicle was out of control. He then left the road and entered the grass edge on the left.

- [11] In his experience when a driver is faced with a dangerous situation he takes evasive action. The incident happened at night therefore the only source of light would have been the vehicle's headlamps. Depending on how far the vehicle was from the potholes there may have been very limited time to slam brakes. He stated that it was impossible on the available evidence to calculate the speed the vehicle was traveling at prior to leaving the road. The speed limit on that stretch of road was 120 km/h.
- [12] In his opinion when the vehicle exited on the left the deceased would have regained control of it in that it traveled for approximately 194m whereafter it re-entered the road. This is confirmed by tyre tracks on photos. It would have then skidded over the road at which time it was out of control, exited on the right, sidetracked until it collided with a steel pole, overturned and ended up on its roof. He indicated further that his analysis was premised on the assumption that the road surface was dry. If it was wet, as testified to by the deceased's wife and approaching a pothole, in all probabilities when it exited the road for the first time the vehicle would have been out of control and on wet grass would probably have rolled down an embankment. An experienced driver, would not in those circumstances apply brakes. He would agree with a calculation that the vehicle was traveling at 109km/h when it left the road for the first time on the left and 101km/h when it exited on the right.
- [13] He stated during cross examination that it was impossible to calculate speed without tyre marks. In this instance the tyres were rotating making it impossible to determine speed the vehicle was traveling at, also because there were no break marks. The police photos showed that the wheels were flattened. If a vehicle skids sideways as appears to have been the case when the deceased left the road for the second time, even with an advanced driving license control can not be regained. He disagreed with the proposition that the deceased left the road because he could not negotiate a curve. He stated that it was difficult to say why the deceased left the road, however the presence of a pothole leads to the conclusion that the accident was caused by it.

Defendant's case

- [14] Joseph Matjila testified that in 2010 he was in the employ of the defendant and that his duties included the inspection and repair of roads. He was familiar with the Swartwater - Alldays road on which the accident occurred. It is a busy road used by trucks that travel between Felicia Mine and Lephalale. He stated that in determining if the road needed to be repaired

he would drive on it and note potholes as well as damage to the fence. He would then send a team to the affected area to do the repair work. This happens, depending on circumstances twice a month. He recalls that in May of 2010 they did repair work at the 52nd km mark as well as potholes in the 97km mark. He stated that they did not do any repair work between the 123 and 124k mark because there were no potholes there. He visited the scene some five days after the accident and there were no potholes in the vicinity of the accident. He also did not see any edge breaks. He stated that whenever they did repairs they filed daily reports setting out the work carried out.

- [15] During cross examination he stated that regarding repairs on the road where the accident took place they kept records which were handed over to the defendant's legal representatives. He was taken to task about his evidence in chief in terms of which he had stated that in May 2010 they worked at marker 52 and 97km. He was shown his reports in terms of which the repairs he was referring to were only done in 2009. He stated that the sketch plan, relied upon by the defendant, which depicted potholes was in fact wrong. He recalls calling his supervisor to the scene and showing him that there were no potholes.
- [16] Lesiba Alpheus Moaga testified that in 2010 he was in the employ of the defendant as a road inspector. His job entailed among other things, driving on various roads and inspecting them. At the beginning of the financial year in April 2010 he inspected the road and observed that between the 123 and 124km mark there were no potholes. He remembers because after the accident, however not immediately after, he went to inspect the scene and no potholes were there, in particular next to the 124km marker. He was referred to a google map picture downloaded by Mr. Grobbelaar, defendant's expert, suggesting that there were potholes. He stated that he did not agree with what was depicted thereon. Even when shown the sketch plan he disagreed with the depiction of potholes on it. In his recollection potholes were 250 meters ahead of the 124km marker as well as below the 90km marker. There were no edge breaks at the scene.
- [17] He stated during cross examination that he did not inspect the entire stretch of road. He inspected the road between Tom Burke and Swartwater and in April 2010 there were potholes but his team was working on them.

With regard to the potholes at the 124km marker he was told about them by other inspectors because he is based in Modimolle and the inspectors are based in Tolwe. He confirmed that he did not go between Alldays and Swartwater others did that such an inspection.

- [18] Mr. Barry Grobbelaar testified that he is an accident reconstruction expert. He relied on inter alia photos, the accident report and sketch plan. He also visited the scene on 12 October 2014. Relying on the police sketch plan which had the 124km marker as the fixed object he placed cones on the road at various points and took measurements to establish the movements of the deceased's motor vehicle on the day of the accident. As time had lapsed he relied on the police information. He then downloaded google map pictures to assist him. Initially he did not have the video but once he saw it there was consensus about the

presence and the position of potholes. It was difficult to calculate speed because the angle at which the vehicle left the road for the first time was not known. Before the video he estimated the speed of the deceased's motor vehicle to have been 147km/h. In his estimation when the vehicle left the road on the left the driver thereof was no longer in control. He then did another calculation which showed that the vehicle may have been traveling at 163km/h. He agreed with the contention that when the vehicle left the road on the right to its final resting place it was traveling at 101km/h. He stated that there were no significant edge breaks on the road and that he doubted they contributed significantly to the accident. He was of the view that there was insufficient physical evidence to explain why the deceased's motor vehicle left the road.

- [19] During cross examination he stated that he did his calculations based on dry road conditions, he therefore used conservative figures. He stated when referred to the defendant's plea to the effect that the deceased drove at high speed and therefore failed to negotiate a curve, that it was unlikely the deceased left the road because he was traveling at high speed. Whereas speed may have been a contributing factor it was however not the reason. He agreed that once the deceased had lost control it would have been impossible to regain it.

Evaluation

- [20] In the Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) at 449 E - Fit was held that:-

"A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics".

- [21] In the case of Mc Intosh v Premier Kwazulu Natal and Another [2008] ZASCA 62; 2008 (6) SA 1 the Supreme Court of Appeal summed up the legal principles involved in establishing negligence as follows:-

"[11] As repeatedly stated by this Court, a negligent omission, unless wrongful will not give rise to delictual liability More recently in Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd 2006 (3) SA 138 (SCA) ([2007] 1 All SA 240) Brand JA, at 144A-C, para 10, explained the requirement of wrongfulness as follows:-

"Negligent conduct manifesting itself in the form of a positive act causing physical damage to the property or person of another is prima facie wrongful . In those cases, wrongfulness is therefore seldom contentious. Where the element of wrongfulness becomes less straightforward is with reference to liability for negligent omissions and for negligently caused pure economic loss (see eg. Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) ([2002] 3 All SA

741) in para [12]; Gouda Boerdery BK v Transnet 2005 (5) SA 490 (SCA) ([2004] 4 All SA 500) in para [12]). In these instances, it is said, wrongfulness depends on the existence of a legal duty not to act negligently. The imposition of such a legal duty in a matter for judicial determination involving criteria of public or legal policy consistent with constitutional norms.

The learned judge continued at 1441, para 12 -

when we say that negligent conduct ... consisting of an omission is not wrongful, we intend to convey that public or legal policy consideration determined that there should be no liability; that the potential defendant should not be subjected to a claim for damages, his or her negligence notwithstanding. In such event, the question of fault does not even arise. The defendant enjoys immunity against liability of fault does not even arise. The defendant enjoys immunity against liability for such conduct, whether negligent or not....."

AND

[12] "The second inquiry is whether there was fault, in this case negligence. As is apparent from the much-quoted dictum of Holmes JA in *Kruger v Coetzee* 1966

(2) SA 428 (A) at 430E-F, the issue of negligence itself involves a twofold inquiry. The first is: was the harm reasonably foreseeable? The second is: would the diligens paterfamilias take reasonable steps to guard against such occurrence and did the defendant fail to take those steps? The answer to the second inquiry is frequently expressed in terms of a duty. The foreseeability requirement is more often than not assumed and the inquiry is said to be simply whether the defendant had a duty to take one or other step, such a drive in a particular way or perform some or other positive act, and, if so, whether the failure on the part of the defendant to do so amounted to a breach of that duty. But the work 'duty', and sometimes even the expression 'legal duty', in this context, must not be confused with the concept of 'legal duty' in the context of wrongfulness which, as has been indicated, is distinct from the issue of negligence. I mention this because this confusion was not only apparent in the arguments presented to us in this case but is frequently encountered in reported cases. The use of the expression 'duty of care' is used to denote both what in South African law would be the second leg of the inquiry into negligence and legal duty in the context of wrongfulness. As Brand JA observed in *Trustees, Two Oceans Aquarium Trust* at 144F, 'duty or care' in English law 'straddles both elements of wrongfulness and negligence'."

[22] Central to the plaintiff's action is the contention that the deceased lost control over the motor vehicle whilst avoiding a pothole or potholes in the alternative, after failing to avoid such pothole or potholes. There were no eyewitnesses to the accident. The court must therefore rely on physical evidence present at the scene as well as to an extent analysis of the scene from the point of view of the two experts.

Was the road surface wet?

- [23] The best way to start is to assess the condition of the road on the day. The plaintiff testified that on the night the deceased called her to indicate that he was on his way home it had been raining. The deceased's father who arrived at the scene the following morning confirmed that the road surface was wet. He also took a video of the scene and the route. Mr Bester the police officer who was one of the first people to arrive at the scene confirmed that the grass was wet. He also took a video and as well as photos of the scene. The cumulative effect of all the above pieces of evidence points undoubtedly to the fact that on the night of the accident it had been raining and therefore that the road surface would have been wet.
- [24] Another consideration is that the area where the collision occurred was dark as there were no sources of light on the night. It was not placed in dispute that the area was not well lit and that the possible sources of light would have been the deceased's head lamps as well as possibly moonlight. If we accept that it was raining it follows that there was no moonlight. Regard being had to the testimony of the witnesses, except that if it had been raining visibility would have been somewhat impaired, not much need be said about the extent to which absence of light was a factor in the accident.

The R572 (Swaartwater-Alldays road) potholes and edge breaks

- [25] By all accounts the road on which the accident occurred is a busy road utilized by trucks who transport goods from the mines nearby. It can be taken as common cause that the road had potholes at various spots. I note that Mr Moaga and Mr Matjila were at pains to state that there were no potholes where the accident occurred. However when one assesses their evidence it is clear that their version or observation can not be correct. Both of them seem to agree that there were potholes on that road but state that the potholes were not in the area where the collision occurred. They both testified about being informed of potholes on the road. The reports shown to Mr Matjila also suggest that there were repairs to potholes during 2009.
- [26] Tendered evidence point to the fact that there were potholes. The video taken by the deceased's father showed potholes. The video taken by Mr Bester the police officer on the morning after the accident when the vehicle was still at the scene showed that there were potholes on the road surface. Photos taken also confirm the presence of potholes. Both experts agree faced with objective evidence, that there were potholes on the road. Overwhelmingly therefore the presence of potholes, it is my finding, has been established. The evidence of Mr Matjila and Mr Moaga must be rejected for it is not consistent with objective facts.
- [27] Their evidence falls to be rejected for other reasons. Mr Matjila's evidence is not credible. His insistence that he visited the scene after the accident and that there were no potholes is without rational foundation. In his

testimony he insisted that all work done on the road was recorded in reports and handed over to the defendant's legal representative. When he was confronted with the fact that discovered records showed the repairs to have been carried out during 2009, he changed tack and stated that he had no independent recollecting events save from memory. He further stands to be criticized for having chosen to refuse answering questions once the shoe pinched. A negative inference is warranted.

[28] At the tail end of Mr Moaga's cross examination he conceded that he did not inspect the road in April of 2010. In fact it came out that he only inspected a different portion of that road and had relied on what others reported to him about potholes at the scene of the accident. He did not disclose who those persons were and what exactly was reported to him. His evidence as to the condition of the road, particularly between Alldays and Swartwater, where the scene is located, can simply be discarded.

[29] The same goes for the presence of edge breaks. Whereas these were said to be absent, photos taken immediately after the collision suggested that there were edge breaks on the road. The sharpness, height and severity is not that much crucial. To deny that they were there when photos depict otherwise is simply disingenuous.

Road maintenance and warning signs

[30] The plaintiff pleaded in paragraph 5 of the particulars of claim that the defendant had a duty to ensure that the road was safe for used by road users alternatively to warn them that it was not in good condition. The plaintiff pleaded that the defendant failed to;

- 30.1. perform routine maintenance,
- 30.2. perform regular inspections,
- 30.3. promptly repair areas of deterioration,
- 30.4. maintain the road in a good state.

[31] The defendant asserted in its plea that the road was repaired properly and regularly. The defendant further pleaded as follows; "even if there may have been some potholes on the road, such potholes were timeously repaired and did not render the road dangerous and unsafe to be used", "there were no potholes near the area where the accident occurred", "to the extent that they (sic) may have some small potholes on any parts of the road, the defendant had warned the road users by putting up potholes warning signs".

[32] For the defendant to escape a finding of causative negligence, in light of what is said above, it was for the defendant to establish some cogent inference or acceptable alternative explanation for the occurrence of the incident. In this regard see: *Maclead v Rens* 1997 (3) SA 1039 (E) at 1052 F-H.

[33] The defendant, in the face of its negligence bears the burden of adducing evidence in rebuttal of the inference that such wrongful and negligent omission caused the loss. Negligence in casu can be inferred from the fact. See *South Cape Corporation (Pty) Ltd v Engeneering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548. This proposition was set forth by the courts at it was laid down in the case of *Salmons v Jacoby*, 1939 AD 588 wherein at page 594 the following was said:-

"the defendant, in order to succeed, had to produce evidence sufficient to displace the inference of negligence which the prima facie evidence, unless answered, justified the Court in drawing against her"

[34] The defendant offered no evidence that the road was repaired regularly and properly. The evidence presumably relied upon for this

contention, the repair reports, do not lead to such a conclusion. The defendant further failed, as the testimony of Mr Matjila and Mr Moaga was crumbling, to show that there were nevertheless sufficient systems in place for the repair of the road. The contention in the plea that there were no potholes in the vicinity of the accident is not borne out by objective evidence including that of the defendant's own expert witness.

[35] Whereas the defendant pleaded that there were warning sings put up alerting drivers about the presence of potholes on the road, such evidence was not tendered. This was therefore nothing but just paying lip service as there was no factual basis underpinning the contention as pleaded.

Was speed a factor

[36] Both experts agreed that on the available evidence it was impossible to determine the speed the deceased's motor vehicle was traveling at before the accident. They however agreed that when it entered the road after it had been on the gravel part on the left for some time, it re-entered the road at approximately 109km/h and exited on the right hand side at about 101km/h before hitting a fixed object and overturning.

[37] Whereas it was pleaded that the deceased failed to negotiate a curve, both experts agreed that speed could not have been the cause of the collision. The defendant's expert did not agree with what was pleaded. His stance was amongst others informed by the angle at which the vehicle exited the road and re-entered it as well as the distance from the the activity of the vehicle commenced to where the curvature of the road began.

[38] The experts further agree that once the deceased had left the road on the left hand side he lost control over it. Whereas plaintiff's expert testified that the cause for the deceased to drift to the left was because of potholes, the defendant's expert was not prepared to state his opinion. He simply said he does not know.

Conclusion

- [38] In my view the plaintiff has succeeded to discharge the onus resting on her. It has clearly been established that there were potholes on the road, that the road was not regularly or properly inspected and repair work done. Even if there was, no evidence of this was presented. There was further no evidence . that there were adequate measures in place to identify and repair potholes as and when they developed, with promptitude.
- [39] It was argued on behalf of the defendant that the defendant is not obliged to provide a "pothole free road" and that it was the duty of every driver to keep a proper look out. It was further argued that the size of the potholes matter. In particular that since some photos were taken a few months after the accident then it might have happened that at the time of the collision the potholes were smaller. It is impermissible to ward off facts through speculation. On the presented evidence not only do I find that there were potholes but that there were no warning signs to alert road users about the presence thereof. Failure to erect warning signs is a form of negligence.
- [40] I find that the presence of potholes caused the deceased to lose control over the motor vehicle. The deceased's death was therefore occasioned by the negligence of the defendant.
- [41] The following order is made;
1. The defendant is liable to pay 100% of the plaintiff's proven damages or as may be agreed.
 2. The defendant is ordered to pay the costs which costs shall include costs reserved previously if any.

S A THOBANE

ACTING JUDGE OF THE HIGH COURT

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