

SOUTH AFRICA / JUDGMENT

Markus v MEC Department of Public Works & Roads (1688/13) [2017]

ZANWHC 8 (10 February 2017)

[2017] ZANWHC 8

COURT

North West High Court, Mafikeng

BEFORE

A M Kgoele

CASE / FILE NUMBER

1688/13

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IN

**THE NORTH WEST HIGH COURT
MAHIKENG**

CASE:

1688/13

In

the matter between:

DERICK

JONATHAN

MARKUS Plaintiff

and

MEC

DEPARTMENT OF PUBLIC WORKS & ROADS Defendant

CIVIL

MATTER

DATE

OF HEARING

: 14

& 15 November 2016

DATE

OF JUDGMENT :

10 February 2017

FOR

THE PLAINTIFF :

Adv. Du Plessis

FOR

THE DEFENDANT :

Adv. Monnabela

JUDGMENT**KGOELE J:**

[1] On 20 March 2011, the plaintiff, an adult male residing at 91 Arend Road, Safaris Gardens Rustenburg, fell into a pothole when he was riding a bicycle on a public road D522/Z522 in the district of Bafokeng. He alleges that as a result of the incident he suffered bodily injuries and the total estimation of his claim is R560 232-82.

[2] In his particulars of claim plaintiff avers that the falling from the bicycle was caused by the failure of the defendant and/or his employees acting within the course and scope of their employment, to:-

- Properly maintain the said road, and/or;
- Carry-out necessary repairs on the road, more specifically to repair the aforesaid pothole; and/or
- Permitting the said pothole to grow to the size it had on the date of the incident; and/or
- Failing to warn any users of the road of the existence of potholes on the road and the danger posed thereby.

[3] In amplification of its denial, the defendant pleaded as follows:-

- The defendant erected and/or displayed clear warning signs about the existence of potholes on road D522/Z522;
- The cautionary and/or preventative warning signs at all times material hereto were visible to all reasonable road users;
- The reasonable preventative warning signs were erected prior to 20 March 2011;
- As a result of budgetary constraints, not all potholes are repaired at the same time, the ones which pose immediate danger take precedence;
- The defendant established a call centre in terms of which members of the public could and should report potholes which they encounter on the defendant's roads;
- The turnaround time between potholes being reported and the defendant fixing them was/is generally five working days;
- Notwithstanding the visible precautionary warning signs about the existence of potholes on the road, the plaintiff rode at an excessive high speed under the prevailing circumstances;
- Notwithstanding the warning signs about the existence of potholes on the road, the plaintiff rode recklessly at an unreasonable speed in total disregard of the prevailing circumstances there and then;

- The plaintiff unreasonably ignored the warning signs about the existence of potholes;
- The plaintiff failed to keep a proper lookout for potholes on the said road and rode over the pothole.

[4] Alternatively, the defendant avers that the plaintiff was the sole cause of the accident in one or more of the following respects:-

- The plaintiff, notwithstanding the existence of warning signs about the existence of potholes, rode at an unreasonable speed without

sufficient regard and care for his own safety and other road users;

- The plaintiff rode at an excessive speed which was unreasonable in the circumstances;
- The plaintiff did not keep a proper lookout in circumstances where he could and should have done so.

[5] At the beginning of the trial the parties agreed that the merits and quantum should be separated and further that the statement of Mr Steyn be admitted as Exhibit "A". The plaintiff testified on his own behalf and said that on the 20/11/2011 at around half past five in the morning, he and Mr Steyn were on the road each riding a bicycle as they were training for a marathon that was to take place in the near future. At the time of the accident they had already negotiated a T-Junction written D522 and had turned into it. About a kilometre on that road they encountered a flooded area at the lowest point of that road. He estimated the floods to be +- 50 metres long.

[6] They slowed down as a result of the fact that they knew that somewhere on the flooded area there were potholes on the left hand

side of the road where they were riding and they will not be able to see them as it was flooded. They then decided to ride on the right hand side of that part. Mr Steyn took the lead but rode on the slope / embankment of the road whilst plaintiff carried tracking on the road surface. His reasons were that it did not look safe to drive where Mr Steyn was riding as the road looked slippery. After entering into the flooded area for a distance of +- 15-20 metres, he struck a pothole and was as a result thrown off the bicycle. He landed with his left shoulder and hit the outside of the pothole with it. He found himself sitting deeply immersed in the water which was in the pothole. The level of the water was up to his waist whilst so seated. He could not use his left arm to stand up and Mr Steyn had to come back to help him.

[7] He identified a pothole on the photos that were eventually admitted as evidence and also estimated its size to be 2 metres as they measured it afterwards. This is after the water had subsided because at the time of the accident the pothole was totally submerged in the water and not visible. According to him there were no road sign to warn road users of flooding or potholes at that particular area. The only warning sign that was there which is also depicted in the pictures is a sign that warns road users of a speed hump. He was travelling at the time of the incident at a speed of about 10-12km per hour as they had slowed down because of the

water. He denied riding his bicycle recklessly and remarked that they were riding carefully as the place was flooded and avoiding potholes at the same time. He also indicated that as a result of the fact that their bicycles were too expensive they could not ride them recklessly.

- [8] He lastly indicated that he had cycled for +- 25 years. Further that the defendant had a duty to maintain the road properly and warn road users if there were potholes. It emerged during cross-examination that he had last used the road two weeks prior the incident. He also admitted that he did not know when that pothole was formed as he normally cycled in that area on the left hand side and not on the side where the pothole was. He furthermore denied that the pothole could have been caused by the rain that occurred two days ago and said that given the size thereof it is highly unlikely.
- [9] The second witness that was called by the plaintiff was his wife Shirley Markus. Mrs Markus mainly testified about the photos that she took which depicts the area and the potholes where the incident happened. She indicated that the first set of photos which depicts the arm of his husband were taken on the 21/03/2011, the second set that depicts the potholes on the 24/03/2011, the third set on the 1/04/2011 and lastly on the 8/06/2011 they again took pictures as to check whether there was any repairs done on that part of the road.
- [10] She corroborated her husband to the effect that there were no warning signs on that road and further that the only road sign visible there was for a speed bump. She indicated during cross-examination that she did not take photos on the day of the incident because they were busy taking the plaintiff to hospital and the road was still flooded.
- [11] The plaintiff closed its case. The defendant applied for absolution from the instance which application was refused. The reasons thereof are encapsulated in this judgment. The matter was rolled over to the next day for defendant to call his witness. When the trial resumed, the defendant's Counsel, Adv. Monnahela indicated that the defendant had re-considered its stance and closed their case without calling any witnesses.
- [12] It is also important to mention that during cross examination and during the submissions at the end of the plaintiff's case when the defendant applied for absolution, it emerged that the defendant have changed their tune and are now relying on the fact that the defendant could not have reasonably been aware of the pothole in issue as there is no evidence as to when it was formed and according to the plaintiff, two weeks before the incident it was not there. The defendant's Counsel argued that as a result no negligence can be attributed to the defendant at all. The defendant's Counsel submitted that because the plaintiff did not prove any fault on the part of the defendant, the defendant should be absolved.
- [13] It is trite law that if a Court is asked to decide a case at the close of the plaintiff's case, the test to be applied is whether there is evidence on which a Court could or might find for the plaintiff. See: *Gascoyne v Paul and Hunter* 1917 TPD 170 and *Claude Neon Hights v Daniel* 1976 (4) SA 403 (A).

- [14] I refused the application for absolution by the defendant simply because I was of the view at the end of the plaintiff's case that there is a prima-facie case which the Court might find for the plaintiff. The existence of the potholes on the right hand side of the road was not disputed. Similarly the existence of a pothole on the left hand side that caused the accident was not denied by the defendant. Nothing was pleaded by the defendant to the fact that the said pothole developed over the two days raining period prior to the accident and therefore the defendant could not have been expected to have repaired it at that time. This was not the case of the defendant at all. The case of the defendant was simply that the plaintiff ignored the road signs warning him of these potholes and drove recklessly at a high speed and further that, as a result of budgetary constraints, not all potholes are repaired at the same time. The ones which pose immediate danger take precedence. In my view, there was evidence from which this Court could draw an inference in favour of the plaintiff.
- [15] In a civil trial, the onus of proof is discharged on a balance of probabilities. What a Court does is to draw inferences from the proven facts. The inference drawn is the most probable, though not necessarily the only inference to be drawn. See: *Cooper and Another v Merchant Trade Finances* 2000 (3) SA 1009 (SCA) at pages 1027F to 1028D.
- [16] In the case of *Minister of Safety and Security v Slabbert* (668/2008) [2009] ZASCA (30 November 2009) the Supreme Court of Appeal stated:-

"The purpose of the pleadings is to define the issues for the other party and the Court. A party has a duty to allege in the pleadings the material facts upon which he/she relies. It is impermissible for a plaintiff to plea a particulars case and seeks to establish a different case at the trial. It is equally not permissible for the trial Court to have recourse to issue falling outside the pleadings when deciding a case."

There are, however, circumstances in which a party may be allowed to rely on an issue which was not covered by the pleadings. This occurs where the issue in question has been canvassed fully by both sides at the trial. In *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd*, this court said:-

"However, the absence of such an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence. This means fully canvassed by both sides in the sense that the Court was expected to pronounce upon it as an issue".

The issue in which the court below relied as a basis for liability was not fully canvassed at the trial presumably because it was not pleaded and the parties' attention was not drawn to it. It was fleetingly touched upon during Magoxo's cross-examination. The response elicited was that the plaintiff was still drunk at the time his wife made the request. The issue was not pursued and furthermore the plaintiff's wife did not testify to support the contention".

- [17] Analysing the whole evidence after the defendant closed its case without calling any witness. I must at the onset indicate that the issue of credibility of the plaintiff's witnesses was not challenged. There is corroboration on the issue of the fact that there were no road signs

warning road users of floods and potholes on that road. Both of them also corroborated each other on the fact that the only road sign that was along that road was for a speed hump. The defendant did not lead any evidence to this effect and this Court can safely accept that the evidence of the plaintiff and his witness is reliable. The defendant did not proffer any evidence to gainsay what the plaintiff and his witness said.

[18] The defendant at the close of its case resorted to poking holes into the plaintiff's case and used the plaintiff's case to defend their actions. But even if they can be allowed to do that, one should not lose sight of the fact that in their plea they indicated that they fixed potholes within five working days of being aware of them. This flies against the fact that they did not even do anything in regard to the potholes on the left hand side of the road which according to plaintiff were there for some time even before the accident. These potholes are the ones which forced plaintiff to drive on the right hand side of the road. In addition to this, I found that negligence was established also on the part of the defendant because of the fact that there was nothing on record to gainsay the evidence that was adduced by the plaintiff to the effect that there were no road signs warning road users of the dangers on the road that relates to flooding and potholes, except the mere factual allegations in their plea.

[19] In the case of *Mc Intosh v Premier Kwazulu Natal and Another* 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 144I, 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’.

[20] It was always the plaintiff’s case that the defendant’s negligence lay in its failure to properly maintain the said road and or carry out necessary repairs to the road, more particularly to repair the aforesaid potholes and or failing to warn users of existence of potholes on the roads. It therefore becomes necessary to consider whether plaintiff succeeded in establishing negligence on the part of the defendant.

[21] It is also evident from their plea as indicated above that they have onus to prove that they had maintained the road and put warning signs as they alleged. As already indicated above, the defendant cannot now at this stage rely on the fact that because they did not know about the existence of a pothole in issue on the right hand side, they could not have fixed it and furthermore could not reasonably have foresaw that it will cause dangers to road users in particular, the plaintiff. Unfortunately this was not the case the plaintiff was expected to meet. This clearly show that this belated version of the defendant was created when the Counsel saw a gap after the plaintiff admitted in his evidence and his affidavit that the

pothole was not there two weeks prior the incident. In cross-examination the plaintiff clarified this fact by saying he did not have any knowledge of the pothole on the side where the incident took place because he does not frequently use that side when cycling. According to him they normally use the left hand side, that is why they had to avoid that side and swerved to the right, unbeknown to them that there is a pothole.

- [22] The evidence on record is that the plaintiff was not reckless and rode on a low speed as, he had slowed down. There was also what we can term old potholes on the road that warranted him to move to the wrong side of the road he was travelling in. This old potholes had not been repaired for some time as and when the plaintiff and his friend were training on this road that is why they knew very well where those potholes were even when they were covered by a flood of water. On the other hand the defendant did not lead any evidence that it maintained the said road. Advocate Monnahela tried to salvage the defendant by referring this Court to the documents that were attached to the unsigned discovery affidavit of the defendant labelled “Daily Plant and Work Return” found in paginated pages 62 and 63 of the Bundle Index – Notices. These two documents do not at all also assist the defendant because they contain the statistics of the repairs that were allegedly done on the 23/11/2010 and 29/11/2010 which is four months prior to the incident, when in their plea they claim to repair potholes in five working days of being reported.
- [23] No evidence was led to establish that by reason of the lack of funds the repair of the said potholes including the one that caused the accident was neglected in favour of some other priorities. Nor was there evidence led where one can deduce that the existence of a policy to select some potholes for repair ahead of others was in place, and if so, the basis upon which such a selection was made. No rational reasons were present why the said potholes were left unrepaired for so long, nor were one advanced.
- [24] We do not have any evidence as to when the pothole that caused the accident was formed. There was no evidence that it was formed during the two days when it was raining. Of importance is that we have the size of the pothole and a clear picture of how it looked like. Although the size of the pothole and the pictures thereof were taken after some days of the occurrence of the incidents, the plaintiff testified that after falling from the bicycle he found himself sitting in the pothole, waist deep. This was also not disputed by the defendant. This clearly demonstrated that it was not a small pothole at that time. The probabilities points heavily towards the fact that it is highly impossible that it could have been formed in the two days prior to this incident. But above all, no one from the defendant suggested that it was not there before it rained and also that it had attained that size because of the rain. In any event, its very existence and the fact that it had attained the size depicted by the plaintiff as he was seated in and its location demonstrate that the vehicles also drove over it. The submission that the old potholes on the left are irrelevant is misplaced. It is because of these potholes that were on the left and which were left unattended by the defendant that led the plaintiff to fall in this one on the right hand side.

- [25] Defendant's negligence does not end there, they did not even lead any evidence to prove that they had erected warning signs for the potholes as they alleged in their plea. This is another form of negligence on their part.
- [26] The issue regarding the absence of the drainage system need to be taken into consideration too. Advocate Du Plessis on behalf of the plaintiff submitted that the fact that there was no drainage system at the place where the road was flooding and where the potholes in question was, including the fact that there were no signs to warn road users of flooding constitute on its own negligence on the part of the defendant. The defendant's Counsel Advocate Monnahela on the other hand submitted that these averments were not pleaded by the plaintiff. The submission by the defendant's Counsel is not a correct reflection of the pleadings in this matter. Firstly, the plaintiff made it clear in his particulars of claim that he relies on the failure by the Department to maintain the road. The Routine Road Maintenance Manual compiled by the CSIR which is used throughout the Country by the different Provincial Governments and which was referred to in the *Mc Intosh v Premier* case which was quoted above and heavily relied upon by the defendant is couched as follows under the Main heading: "Drainage Maintenance" and sub-heading "Standing Water (as the road surface) Response Time":-

"Standing water on the road surface is dangerous to traffic (aquaplaning and loss of control) and can also result in wetting up of the pavement layers which normally leaves to pavement failures. As a result all areas of standing water should be treated as soon as possible and especially before start of the next wet season. Where the areas are extensive this cannot be handled under routine maintenance and SANRAL should be informed immediately and warning signs erected" "Localised problems must be addressed immediately".

- [27] It is not in dispute that maintenance of the drainage system "constitute" routine maintenance". According

to this manual it is a priority. No one from the Department came to tell us the reason why this problem of flooding in that area was not attended to before the incident. Its existence coupled with the fact that there was a big pothole underneath signifies the fact that there was a road failure there caused by a failure on the drainage system or the lack thereof. In combination with heavy wheels loads, the manual says "Even the best foundation material will fail if subject to poor drainage" It further says:-

"Heavy rain presents an ideal opportunity to make sure that the drainage system is working correctly. So don't stay in the office, go out on the road and observe. Where flooding of the road occurs detailed notes should be made of the location and SANRAL informed. This is particularly important where this occurs regularly and there is a likelihood that the drainage structure has insufficient capacity. The detailed inspection in loco of cut catchwater drains (ie. Climb up and inspect) is essential to ensure that failures in the early stages are rectified before major damage occurs.

[28] It was not disputed that the place where the incident took place was a low lying area of the road. Given the fact that in their plea they claim to be conducting routine inspection, the failure to do something about this place is indicative of a degree of negligence on the part of the defendant. Both witnesses for the plaintiff testified that even months after the incident, the pothole and the road was still the same and nothing was done to it. The photographs bear this testimony. This Court is alive to the fact that ex post facto knowledge / conduct cannot establish negligence. But in this case, the fact that the place was left for such a long time without being attended to lent credence to the averments of the plaintiff that the plaintiff does not do the maintenance of the road as required and also as pleaded by them.

[29] The plaintiff testified that he was travelling at a low-speed. They were very careful on the road. There is no evidence from the defendant to gainsay this. The issue of negligence on his part or contributory negligence does not come into the picture in the circumstances of this matter. In my view, the inference of negligence on the part of the defendant or servants responsible for the inspection and repairs of potholes, drainage system and erection of warning signs on this road is the most probable one and irresistible.

[30] The following order is therefore issued.

30.1 The defendants are liable to pay 100% of the plaintiff's proven damages or as may be agreed.

30.2 The defendant is ordered to pay the costs which costs shall include costs reserved previously if any.

A M KGOELE

JUDGE OF THE HIGH COURT

ATTORNEYS:

FOR THE PLAINTIFF : Smith Stanton Inc.

29 Warren Street

2745

FOR THE DEFENDANT : STATE ATTORNEY

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