

SOUTH AFRICA / JUDGMENT

Naude v City of Johannesburg Metropolitan (2020/22584) [2024] ZAGPJHC 769 (22 July 2024)

[2024] ZAGPJHC 769

COURT

South Gauteng High Court, Johannesburg

BEFORE

Pullinger

CASE / FILE NUMBER

2020/22584

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Case

number: 2020/22584

1.

REPORTABLE: NO

2.

OF INTEREST TO OTHER JUDGES: NO

3.REVISED:

NO

22

July 2024

In

the matter between:

NAUDE,
YOLNADIE GERALDINE
Plaintiff
and
CITY
OF JOHANNESBURG METROPOLITAN
MUNICIPALITY
Defendant

JUDGMENT

PULLINGER AJ

INTRODUCTION

- [1] This is an action for loss of support. The plaintiff sues in delict in her personal capacity and in her capacity as the mother and legal guardian of the three minor children borne from the marriage between her and Stephanus Egmont Naude ("the deceased").
- [2] On 8 September 2017 and at approximately 21h35 and on Louis Botha Avenue, between Jan Smuts Drive and Hattingh Street, Florida, Roodepoort, the deceased, then riding a motorcycle, lost control of that motorcycle and was fatally injured.
- [3] This action originally commenced before my late brother Meyer AJ who died before handing down judgment. It commenced de novo before me.
- [4] The dispute is whether there was a danger in the road upon which the deceased was travelling, and, if so, whether there was adequate warning of such danger to him.
- [5] These are the uncontroversial facts:
- [5.1] the night of 8 September 2017 was clear and dry;
- [5.2] the deceased was travelling together with one Mr Danielson and another motorcyclist from North to South on Louis Botha Avenue;
- [5.3] Louis Botha Avenue comprises two lanes in each direction. Between Jan Smuts Drive and Hattingh Road, Louis Both Avenue curves from left to right;
- [5.4] at the entry to the curve there are three warning chevrons on the lefthand side of the street in the vicinity of the light post and, on the exit of the curve a single warning chevron in the vicinity of a telephone pole;
- [5.5] traversing the curve on Louis Botha Avenue is what, at one time, was a trench across the street. The trench has been reinstated but, the extent of that reinstatement and whether it is level with the street surface is a central issue in this action. Throughout the trial, this feature of the road surface was referred to as a "trench";
- [5.6] on the righthand side of the street, entering the curve, there is a single warning chevron and a sign warning the road user to keep left;
- [5.7] there are no warning signs advising the road user of the curve in the road on the approach thereto whereas, on curves in the road prior to the point where the deceased lost control of his motorcycle there are such warning signs.

THE PLAINTIFF'S CASE

Mr Danielson

- [6] The first witness called by the plaintiff was the aforesaid Mr Danielson. Mr Danielson testified that he was an old friend of the deceased. They were members of the same motorcycle club for many years and both experienced motorcyclists. On the night in question, his motorcycle was not performing properly making it difficult to keep up with the deceased.
- [7] On approaching the curve on Louis Botha Avenue, he caught up with the deceased who had slowed down to wait for him.
- [8] Mr Danielson moved to the righthand side of the road because he was familiar therewith, knew of the existence of the trench, and knew that it was less profound on the righthand side of the street. He explained that he had injured his groin passing over the trench previously and was accordingly cautious at that point in the street. He explained, further, that he was uncertain whether the deceased had previously travelled that road on his motorcycle and whether he knew of the existence of the trench.
- [9] The evidence was that Mr Danielson passed the deceased in the curve and, upon looking around, a few moments later, discovered that the deceased was not riding with him. Upon returning to the curve, he expected to find the deceased alive, well and annoyed with himself for having lost control of his motorcycle when traversing the trench but, to his shock, discovered that the deceased had been fatally injured.
- [10] Mr Danielson opined that the deceased, having encountered the trench unexpectedly, lost control of his motorcycle causing him to grab the brakes leading to the motorcycle going into a skid, hitting the pavement on the lefthand side of the road and throwing the deceased off the motorcycle. The motorcycle continued some distance from where the deceased's body was found. He identified the skid marks, the impact on the pavement and the position of the deceased's body and his motorcycle on a sketch plan.
- [11] In cross examination, it was suggested to Mr Danielson that he and the deceased had been travelling in excess of the 60km per hour speed limit on the road. This was quickly shutdown by Mr Danielson with reference to the performance of his motorcycle and that of the third rider, who was riding on what was described as a Chinese scooter, the inference being, that had the deceased being speeding neither he nor the third rider would have been able to keep up, much less, would he and the deceased had been able to enter the curve in the road together.

Mr Lottering

- [12] The second witness called by the plaintiff was Mr Lottering, a sergeant in the Johannesburg Metropolitan Police Service of some 26 years' experience as an accident investigator.

- [13] Mr Lottering attended at the scene at approximately 22h00 on the night of 8 September 2017. He took a series of photographs of the scene and observed the trench. Although he did not take measurements of the trench he guessed it was approximately 5cm deep and about 30cm wide. He pointed out that there were no warning signs indicating the existence of the trench and drew the conclusion that the cause of the accident was the deceased's motorcycle hitting the trench which led to him losing control.
- [14] The cross examination centred on the defendant's hypothesis that speed played a role in the accident. Mr Lottering explained that he is not qualified to express an opinion of the deceased's speed at the time of the accident. The defendant sought to infer from the distance that the motorcycle travelled from the trench to its final resting point, of some 44 metres that the deceased lost control of the motorcycle as a result of speeding.
- [15] Mr Lottering pointed out that, in his view, that the deceased was thrown from the motorcycle at the time that it hit the pavement. He pointed out, further, that at a speed of 66km per hour, that the motorcycle was travelling at some 16.6 metres per second and that something had to have happened to cause the motorcycle to go into a way. As will appear from the summary of the defendant's evidence that follows, no one was able to present any hypothesis to explain the skid marks ahead of the point of collision with the pavement.
- [16] In his view the only conclusion to be drawn from the facts observed is that the trench played a central role therein. When questioned on the visibility of the trench, Mr Lottering attended shortly after the accident and testified that it could not be seen in those light conditions.

Mr du Preez

- [17] The third witness called for the plaintiff was Mr Du Preez, who gave expert evidence as a forensic and contracts engineer.
- [18] Mr Du Preez testified about street signs and more particularly, the sorts of warning signs that one would expect to see ahead of the curve leading up to the scene of the accident. He testified, in relation to the SA Roadside Manual of May 2012

that the chevrons on the lefthand side of the road, being W401, W402 signs (also known as danger plates) exist to warn motorists of obstacles and not of the curve in the road. On his interpretation of the Manual, a W405/W406 sign was required.

- [19] In respect of the scene of the accident, Mr Du Preez testified that he had attended at the scene on two occasions, that his observation of the scene accord with the photographs that had been handed in. In particular, he observed the trench and was of the view that it was of some 2.5 to 4cm deep.

- [20] In his view this was not uncommon where the street had been cut as it is not possible to compact to the same extent and level as before and this invariably leads to some subsistence when heavy vehicles use the road. Mr du Preez said, and it was not challenged, that after an excavation, the road should be check some 6 to 12 months later for subsistence.
- [21] In cross examination it was put to Mr Du Preez that the danger plates near the electricity and telephone poles were sufficient warning of the curve in the road. Mr Du Preez was resolute that the warning plates do not warn of a curve from left to right but warn of an obstruction.
- [22] Mr Du Preez was then examined on the trench and the photographs taken thereof. In particular it was put to him that any sagging could not be seen from the photographs. While Mr Du Preez agreed with this, the defendant did not put to him that there was no sagging.

Mrs Naude

- [23] Next to testify was the plaintiff. She and the deceased were married in 2008 and that marriage subsisted until the death of the deceased. There are three minor children born of the marriage, born in 2008, 2010 and 2012.
- [24] The plaintiff left school at Grade 8 and worked until she married the deceased as a bar lady. Pursuant to her marriage to the deceased she stopped working and the family was entirely dependent on the deceased's income.
- [25] Mrs Naudé testified that the deceased was self-employed doing construction maintenance and steelwork. Although he was not qualified as a plumber it was his speciality and he could do all the other work relating to construction too. He carried on business as a sole proprietor under the name and style of "Rodeo Maintenance" earning between R20,000.00 and R25,000.00 per month.
- [26] The plaintiff was generally paid in cash although some payments were made into their banking account.
- [27] In terms of living arrangements, the plaintiff and the deceased lived together in the deceased's mother's house in Florida. They paid the bond over the property in lieu of rent in an amount of between R3,000.00 and R4,000.00 per month as well as municipal rates and utilities in an amount of approximately R1,000.00 per month. Monies would be paid in this regard to the deceased's mother's as it came in so that there was money in her account to cover the debit order.
- [28] Luxury items such as DSTV and wi-fi cost approximately R1.700.00 per month which was also paid from the deceased's earnings.
- [29] The plaintiff and the deceased has three children of school going age. Prior to the deceased's death they were paying R1,000.00 per month for each child. This was paid in cash at the school.

- [30] Since the deceased's death the plaintiff has been unable to afford the school fees and has applied for exemption. Notwithstanding the application for an exemption certain amounts are still required to be made, particularly for the high school going children of R1,000.00 per month. As would be expected, there are additional costs occasioned by attending at school including stationary and school clothes. This is in an amount of approximately R2,400.00 per month and groceries of approximately R3,000.00 to R4,000.00 per month.
- [31] The deceased and the plaintiff do not own a motor vehicle but used the deceased's mother's vehicle which they maintained. The fuel bill was between R1,800.00 and R2,200.00 per month.
- [32] The deceased was also paying for a motorcycle which he had bought from a neighbour in an amount of approximately R 1600.00 per month.
- [33] In short, the deceased's earnings paid for the whole family's expenses.
- [34] The plaintiff has now been constrained to start working again. She is now a manager at Palace Pub & Grill earning approximately R7,000.00 per month.
- [35] The cross examination of the plaintiff surrounded, substantially, around the bank statements the plaintiff discovered. During cross examination it was determined that the costs of living had increased substantially since the time of the deceased's death.

Mrs Naude (senior)

- [36] The next witness called on behalf of the plaintiff was the deceased's mother, Mrs Naude (senior). She testified that the deceased was her eldest son who attained Standard 8 schooling and then spend two years in the army before becoming an apprentice welder at the South African Railways Services. Thereafter he worked as a fireman in Roodepoort and by the time he was married he had gone into business with a friend carrying on the business of Rodeo Construction. Mrs Naudé (senior) testified that Rodeo Construction did all kinds of construction work including plumbing and welding.
- [37] Mrs Naudé (senior) moved to Mossel Bay in 2015 and offered her house in Florida to the deceased and his family. As a quid pro quo they would pay the bond and municipal rates.
- [38] Mrs Naudé (senior) moved back to Johannesburg in January 2018 to support the plaintiff and the children. She drops them off at school and collects them from school every day. They are fully in her care as the plaintiff has to work.
- [39] Mrs Naudé (senior) confirmed that the bond payments were made by the deceased and the plaintiff in lieu of rent and this ran off a debit order on her bank account. She confirmed, further, that she would receive deposits into her bank account from periodically during the month. She testified further, that in the months after the deceased's death, the bond account fell into arrears.

Mr Williams

- [40] Next to testify was Mr Willem Williams, the plaintiff's brother. He testified that he had known the deceased since approximately 2005 being about two years before they were married. Mr Williams and the deceased started the plumbing and maintenance business together in 2007. He explained that during the time the deceased was alive and they were working together the deceased would do the quoting and invoicing whilst Mr Williams was on site. He explained that the income from the business had good and bad months and fluctuated from time to time. That the deceased handled all of the finances.
- [41] In approximately 2015 Mr Williams left the business being carried on by him and the deceased and started his own business. From time to time the deceased sub-contracted work to him.
- [42] In cross examination, Mr Williams explained that he went on his own for better prospects and wanted a salary.

Dr de Beer

- [43] The final witness called by the plaintiff was Doctor De Beer ("Dr De Beer"), an industrial phycologist of approximately 30 years' experience.
- [44] Dr De Beer has been doing psycho-legal work for the last ten to 12 years.
- [45] Dr De Beer has presented two reports the first being 19 January 2023 and the second being 3 February 2023.
- [46] The reports were compiled from telephonic interviews with Mrs Naudé (senior), Ms Fransman (a former client of the deceased), and a physical interview with the plaintiff.
- [47] Dr De Beer ascertained that the deceased performed maintenance work including renovations and improvements and that the was a self-taught skilled tradesman. He opined that, but for the accident, the deceased would have continued to do the same work, wouldn't have employed more people nor grown his business into a large undertaking. He would have continued to work in this way until approximately 70 years old, this opinion formed on the basis that self-employed people don't generally retire at 65 and virtue of medical advances and an increased life expectancy people were working for longer and well beyond the normal retirement age of 65.
- [48] In relation to the expenses being incurred by the plaintiff, Dr De Beer considered the figures to be reasonable but conservative and that they could easily have been afforded by the deceased whilst alive.

- [49] In regard to earning capacity, Dr De Beer benchmarked three categories as the deceased was performing work across those three categories. The estimated income from those three categories is in an amount of R22,500.00. He considered that an adjustment as at 2023 of approximately R27,773.75 per month/R333,285.00 per annum is an accurate representation of the amount the deceased would be earning now and that if he were to work for another 20 years a contingency of a half percent per annum should be applied.
- [50] Dr de Beer calculated the household expenses incurred by the Mrs Naude were in the region of R17,023.33 per month. Additional expenses such as transport and a domestic worker were not included in this calculation as they are subsidised by Mrs Naude (senior) because the plaintiff cannot afford them.
- [51] In relation to the minor children Dr De Beer opined that they would stay dependent on the plaintiff for some three to four years after leaving school in 2025, 2028 and 2020 respectively before they could enter the labour market. The projected dates for the minor children attaining a measure of financial independence was projected as being 2030, 2033 and 2025 respectively.
- [52] In cross examination, the quality of the information upon which Dr De Beer's opinions were formed were tested. It was pertinently put to Dr De Beer that the only information he received and upon which his opinion was based was obtained from the plaintiff. Dr De Beer explained that not only had he interviewed the plaintiff, he had also interviewed Mrs Naudé (senior), researched the industry and had cognisance of the living circumstances.
- [53] Dr de Beer's testimony accords with the facts established by Mrs Naude, Mrs Naude (senior) and Mr Williams.
- [54] A report from an actuarial scientist, Namir Waisberg was handed in. By agreement, he was not called by the plaintiff.

THE DEFENDANT'S CASE

- [55] The defendant called two witnesses being a Ms Ester Smit and a Mr Nicolas Vermaak, both employees of the Johannesburg Roads Agency ("JRA").

Ms Smit

- [56] Ms Smit testified in chief that she is the Operations Manager Engineering Services of the JRA and has held that position since
2009. Ms Smit explained that her job comprised two main functions being the implementation of engineering techniques to reduce congestion and the improvement of safety for road users.

[57] Ms Smit identified the warning signs on the photographs that were handed in. She pointed out that the first warning sign was approximately 200 metres away from the intersection where the accident took place and, on the left hand side of the road where the accident took place there are four W401 danger plates signs. Her evidence in this regard was that the blue sign on the right hand side of the road is a command sign advising motorists to keep left and that the signs on the right hand side were danger plates/hazard signs.

[58] The purpose of danger plates, Ms Smit said, is to warn of obstructions on the verge or shoulder of the road to warn motorists

thereof. Ms Smit indicated that the command sign is not there to show that the road is bending but rather direction to the motorist or road user to keep to the left of the sign.

[59] Ms Smit, having attended at the site on 2 August 2023 suggested that the sharp curve signs for motorists travelling in the opposite direction were used to indicate a sudden change in direction however there were no signs on the side of the street on which the deceased was travelling because the curve had a radius of 60 to 600 metres and this was not considered a sharp curve where a reduction in speed was necessary to navigate the corner.

[60] During cross-examination Ms Smit advised that she did not have safety data to determine whether signage must be improved as the road was constructed prior to the JRA coming into existence, that this intersection had not been reported to her for a safety investigation and that no trial runs have been done at this intersection since then. Ms Smit testified that she was only aware of one accident that had taken place at this corner.

[61] Ms Smit was unable to comment on the evidence given by Mr Danielson and was unable to answer many of the questions put to her in cross-examination, save for a concession, that a warning sign was not peremptory because the curve in the road was not obstructed. She maintained that the danger plates on the left hand side of the road served as sufficient warning of the curve.

Mr Vermaak

[62] The defendant's last witness was Mr Vermaak, an employee of the JRA who had worked there for some 31 years and currently holds the position of Assistant Manager Operations. Mr Vermaak attended at the site of the accident in March 2021.

[63] Mr Vermaak contended that there is no trench traversing the intersection where the accident took place. When shown the

photographs demonstrating the parallel lines across the road, Mr Vermaak suggested that the parallel lines indicate that there

was a trench across the road that had been repaired and stated that the road surface was 100% even with the existing road and that no subsistence was visible.

[64] During cross examination Sergeant Lottering's contentions were put to Mr Vermaak. Although he disagreed with them he was unable to proffer any explanation as to why Sergeant Lottering's findings were incorrect.

[65] Mr Vermaak was also unable to undermine any of the evidence given by Mr Danielson.

EVALUATION OF THE EVIDENCE

[66] Mr Danielson gave frank and clear evidence. His conclusions are strongly supported by Sergeant Lottering.

[67] On a balance of probabilities, that which became known as the trench during the course of the matter, was not properly reinstated. The clear and unequivocal evidence was that it is very difficult in such a narrow space to properly compact the subterranean surfaces thus leading to subsistence in the reinstated trench.

[68] The defendant had nothing to proffer in this regard other than some photographs and visual inspections, none of which hold sway. The photographs show that, towards the middle of the road, the trench is more clearly visible indicating subsistence. This accords with Mr Danielson's evidence that the road was smoother on the right hand side. This stands to reason as heavy vehicles would tend towards the middle of the road on taking the curve.

[69] In relation to signage, the evidence for the defendant was quite unsatisfactory.

[70] In terms of the SA Roadside Manual, the W401 signs at or near the street light pole and the telephone pole "...should be displayed at all hazardous obstructions that occur within the shoulder or verge of a roadway such as ... posts without

guardrail protection." These signs are not signs that warn of the curve in the road as contended by both of the defendant's witnesses. The appropriate signage for a "gentle curve" in the circumstances of this case is the W202 sign. This warns the road user to reduce speed by 1/10th to 1/3rd of the operating speed on the preceding straight.

[71] No explanation could be proffered for the absence of a warning sign on the approach to the curve in circumstances where, on curves in the road further up the street, and along the path of travel of the deceased, warning signs were present.

[71.1] Ms Smit's evidence was, at times, at odds with the defendant's case. Ms Smit was unable to engage with the conclusions that Mr du Preez reached. Ms Smith was also unable to explain why the reports of two other accidents at this point on Louis Botha Avenue were not discovered nor any reason that an investigation as to the safety of this section of Louis Botha Avenue had not been conducted.

[71.2] Mr Vermaak's evidence was very high level and did not assist in determining the cause of the accident. Mr Vermaak sought refuge in splitting hairs by asserting that the once the opening in the road, which had been referred to as the trench throughout, had been reinstated, there was no longer a trench or any defect in the road surface. In light of all of the evidence, this assertion falls to be rejected.

[71.3] Neither witness addressed the lighting conditions nor whether the curve in the road and the trench could clearly be observed when travelling in a southerly direction. In the same way, neither of the witnesses opined on the speed at which the deceased was travelling, nor could they for want of expertise in this field.

[72] The photographs of the scene taken by Sergeant Lottering, and particularly the skid marks, lead to a conclusion that it was primarily the existence of the subsidence in the road surface that occasioned the deceased's loss of control of his motorcycle.

[73] None of the evidence presented by the plaintiff was seriously challenged. I accept the evidence of Dr de Beer and Namir Waisberg. I find that the conclusions they reached are supported by the facts proved by the plaintiff.

[74] I find that the absence of warning signs of both the curve and the uneven road surface caused the deceased to lose control of his motorcycle and this led to him being fatally injured.

LEGAL PRINCIPLES

[75] The plaintiff's case is predicated upon a breach of a legal duty the defendant owed to the deceased. In *Van Ryn Beck*[1] the Supreme Court of Appeal explained the test as follows:

"[43] The respondent's claim against the Municipality is essentially one based on omission. As pointed out by J Neethling & JM Potgieter Neethling, Potgieter & Visser: *Law of Delict* 7 ed (2014) at 58 – 9, with reference to the decision of this court in *Minister van Veiligheid en Sekuriteit v Geldenhuys* 2004 (1) SA 515 (SCA) ([2003] 4 All SA 330) at 528, as a general rule, liability follows only if the omission was in fact wrongful, and this will be the case only if (in the particular circumstances) a legal duty rested on a defendant to act positively to prevent harm from occurring, and that a defendant failed to comply with that duty.

[44] While conceptually the inquiry as to wrongfulness might be anterior to the enquiry as to negligence, it is equally so that without negligence the issue of wrongfulness does not arise, for conduct will not be wrongful if there is no negligence. Depending on the circumstances, it may be convenient to assume the existence of a legal duty and to consider, first, the issue of negligence. It may also be convenient when the issue of wrongfulness is considered first, to assume negligence. So, too, in a particular case one might assume both wrongfulness and negligence and consider causation first."

- [76] The principle in *Van Ryn Beck*, therefore, asks the question whether a municipality, such as the defendant, was under a legal duty to act positively to prevent harm from occurring. This is a value judgment made ad hoc by the courts.[2]
- [77] It is clear that the trench is not clearly visible at night under the lighting conditions the deceased encountered. There was no warning of the dangerous road surface nor of the curve in the road. The fact that there have been other accidents at the same point on Louis Botha Avenue required, in my view, that the defendant investigate that portion of the road. But the evidence from the defendant is that no investigations have taken place – most likely, because they were not prompted to do so.
- [78] Local Authorities are not required to ensure that road surfaces be kept in a billiard table like condition.[3] But, in circumstances such as this, where a local knew or ought reasonably to have known of an impairment to the road surface as a result of excavation works, the reasonable likelihood of subsistence pursuant thereto, particularly on a busy high traffic road, such as Louis Botha Avenue, and where the impediment is in a curve in the road and not clearly visible, extra care must be taken.[4]
- [79] To my mind, the defendant acted wrongfully and negligently by not posting warning signs. In failing to do so, the defendant did not adhere to the SA Roadside Manual.
- [80] This, I would think, is the minimum that a local authority is required to do especially, given that the deceased's accident was not the first accident at this intersection. As such, I find that the defendant breached its legal duty to the deceased.

CONCLUSION

- [81] In the circumstances, it is appropriate to award damages to the plaintiff arising from the defendant's failure to have adequately ensured that the reinstatement was properly carried out and, if not, to warn road users of both the impending curve and the danger in the road.
- [82] As previously indicated, the report of the actuarial scientist was accepted by both parties. I find that the report is borne out by the facts and that a 15% future contingency should be applied.
- [83] In the result, I make the following order:
1. Judgment is granted against the defendant in an amount of R2,093,717.00.
 2. The defendant is to pay interest on the aforesaid sum at the rate prescribed in the Prescribed Rate of Interest Act, 1975 from 26 September 2017 to date of final payment.
 3. The defendant is to pay the costs of this action, including the qualifying fees of the experts employed by the plaintiff.

A W PULLINGER

ACTING JUDGE OF THE HIGH COURT

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 12h00 on 22 July 2024.

DATE OF HEARING: 22 to 26 January 2024 DATE OF JUDGMENT 22 July 2024 APPEARANCES:
COUNSEL FOR THE PLAINTIFF: Adv D J Smit ATTORNEY FOR THE PLAINTIFF: Leon JJ van Rensburg Attorneys COUNSEL FOR THE DEFENDANT: Adv S Dlali ATTORNEY FOR THE DEFENDANT: K Matji & Partners Attorneys

[1] Bergrivier Municipality v Van Ryn Beck 2019 (4) SA 127 (SCA)

[2] City of Cape Town Municipality v Bakkerud 2000 (3) SA 1049 (SCA) at [27]

[3] Ibid at [31]

[4] Ibid at [32]

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