

SOUTH AFRICA / JUDGMENT

Swart v Member of the Executive Council for Police, Roads and Transport (912/2018) [2024] ZAFSHC 200 (14 June 2024)

[2024] ZAFSHC 200

COURT

Free State High Court, Bloemfontein

BEFORE

Rantho, AJ

CASE / FILE NUMBER

912/2018

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Reportable:

YES/NO

Of

Interest to other Judges: YES/NO

Circulate

to Magistrates: YES/NO

Case

number: 912/2018

In

the matter between:

GERHARDUS

SWART

Plaintiff

and

MEC

FOR POLICE, ROADS AND

TRANSPORT

Defendant

HEARD

ON:

9 FEBRUARY 2024

JUDGMENT

BY:

RANTHO, AJ

DELIVERED ON:

14 JUNE 2024

INTRODUCTION

- [1] The plaintiff instituted a claim for delictual damages arising from the injuries he allegedly suffered as a result of the motorbike accident against the Member of the Executive Council for Police, Roads and Transport for the Free State Province (“the defendant”).
- [2] He claims the damages in the amount of R1 200 000.00 (One Million Two Hundred Thousand Rand) comprising of R100 000.00 for past medical and hospital expenses; R500 000.00 for future medical expenses; R300 000.00 for past and future loss of earnings or earning capacity and R300 000.00 for general damages.
- [3] As agreed between the parties during the pre-trial conference held before Daffue J on 25 April 2022, the trial proceeded for determination of merits only.

FACTS

- [4] It is the plaintiff’s case that he was involved in a motorcycle accident on 23 April 2016 at or near R716 Road off Ascott Road, Viljoensdrift (“R716 Road”) and suffered bodily injuries.
- [5] The essence of the plaintiff’s claim is that the defendant is vicariously liable for its employees’ failure to ensure that there were adequate warning signs in relation to prevailing potholes at R716 Road at the time. He claims that the said employees failed to properly maintain the road and take reasonable steps to avoid the occurrence of accidents in circumstances where they should have exercised reasonable care.
- [6] According to the plaintiff, there was a legal duty that rested on the defendant to take reasonable steps to ensure his safety and that of other road users travelling on the R716 at the time. On that basis, he contends that the defendant was negligent for having breached this legal duty and thus liable for the damages he allegedly suffered as a result of the accident.[1]
- [7] He alleges to have suffered a complete transverse fracture of the right fibular diaphysis with lateral displacement of the distal fragment; comminute intra-articular fracture of the right distal tibia with complete tibiotalar joint subluxation and multiple scarring resulting from the accident.

- [8] The defendant does not deny that the road in question fell under its areas of operations at the time when the alleged accident occurred.

It is further not denied by the defendant that its employees were at all material times responsible for planning, design, construction,

operation, rehabilitation and maintenance of the R716 Road.[2] However, the defendant denies any liability towards the plaintiff and pleads that the road was reasonably maintained, had adequate warning signs and not dangerous in the circumstances of this case.

- [9] The defendant further denies the occurrence of the accident and submits that, should the Court find that the accident did in fact occur, the said accident was caused by the plaintiff's own negligence in that the plaintiff:[3]
- [10] drove the motorcycle while being medically unfit to do so and injured himself when he lost control of his motorcycle;
- [11] drove at a high speed in light of the prevailing road conditions. Alternatively, the plaintiff failed to properly consider the prevailing road conditions at the time, resulting in self-injury caused by him losing control of the motorcycle;
- [12] steered the motorcycle in a manner that was unsafe under the circumstances and collided with another motorcycle, which collision was the sole cause of the plaintiff's accident and injuries;
- [13] failed to ride in a single file with other riders; to keep a proper lookout; to keep a safe following distance with regard to speed of other riders and traffic conditions and to apply brakes during the accident.
- [14] Should the Court find that the alleged accident had occurred, the defendant pleads that the injuries sustained by the plaintiff were a direct result of plaintiff's own making by failing to wear proper safety clothing for riding a motorcycle.[4]

ISSUE(S) FOR DETERMINATION

- [15] The Court is required to determine if the defendant is liable for damages allegedly suffered by the plaintiff as a result of the accident that occurred on 23 April 2016.
- [16] Plaintiff's counsel submitted that the issue of contributory negligence as argued by the defendant was neither placed before the Court nor specifically pleaded by the defendant. On that basis, she argued that this matter be determined on the basis of the plaintiff's alleged sole negligence as pleaded by the defendant.[5]
- [17] The then Appellate Division held in *AA Mutual Insurance Association Ltd v Nomeka* 1976 (3) SA 45 (AD) that, provided the plaintiff's fault is put in issue, an apportionment need not be specifically pleaded or claimed. The court further held that, if the plaintiff has alleged causative negligence on the defendant's part or the driver of his/its vehicle and the

defendant has responded by pleading causative negligence on the plaintiff's part, the Court cannot consider the negligence of each separately and in isolation. One cannot disentangle the two. The one automatically involves the other and the Court must necessarily apportion. What is pleaded must of course be followed up by an appropriate prayer. That, however, is a matter of pleading. But once the parties have embarked upon the adduction of evidence on the issue as to whether plaintiff was contributorily at fault, considerations relative to pleadings are relegated to the background. [6]

[18] Consequently, I am bound to follow the approach adopted by the Appellate Division in AA Mutual Insurance Association case.

[19] Defendant's counsel on the other hand, submitted that the plaintiff's case has to be decided on the basis of 'duty of care' as opposed to 'negligence' because the plaintiff never pleaded this. He further submitted that it is important to distinguish between the two concepts because each has a distinct meaning and specific ramifications in the context of this matter. [7]

[20] It is settled law that for the purpose of liability, negligence arises if a diligens paterfamilias in the position of the defendant would foresee the reasonable possibility of his conduct injuring another in his person capacity or property and causing him patrimonial loss; and would take reasonable steps to guard against such occurrence; and the

defendant failed to take such steps.[8]

[21] The distinction between a claim founded on the 'duty of care' and the one based on 'negligence' was dealt with by the Supreme Court of Appeal ("SCA") in McIntosh v Premier of Kwazulu-Natal and another 2008 (6) SA 1 (SCA) as follows:

"[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 as 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 word '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 similarly a source of confusion. In English law '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 of care 'in English law 'straddles both elements of

wrongfulness and negligence'.”

[22] In *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd and Another* 2000 (1) SA 827 (SCA), the SCA set out the discrete nature of the enquiry into the existence of either fault or unlawfulness as follows:

“[19] In the course of the past 20 years or more this Court has repeatedly emphasised that wrongfulness is a requirement of the modern Aquilian action which is distinct from the requirement of fault and that the injury into the existence of the one is discrete from the inquiry into the existence of the other. Nonetheless, in many if not most delicts the issue of wrongfulness is uncontentious as the action is founded upon conduct which, if held to be culpable, would be prima facie wrongful. (Compare Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd 1985 (1) SA 475 (A) at 497B - C.) It is essentially in relation to liability for omissions and pure economic loss that the element of wrongfulness gains importance. Liability for omissions has been a source of judicial uncertainty since Roman times. The underlying difficulty arises from the notion that, while one must not cause harm to another, one is generally speaking entitled in law to mind one's own business. Since the decision in Minister van Polisie v Ewels 1975 (3) SA 590 (A) the Courts have employed the element of wrongfulness as a means of regulating liability in the case of omissions. If the omission which causes the damage or harm is without fault, that is the end of the matter. If there is fault, whether in the form of dolus or culpa, the question that has to be answered is whether in all the circumstances the omission can be said to have been wrongful or, as it is sometimes stated, whether there existed a legal duty to act. (The expression 'duty of care' derived from English law can be ambiguous and is less appropriate in this context. See Knop v Johannesburg City Council 1995 (2) SA 1 (A) at 27D - E.) To find the answer the Court is obliged to make what in effect is a value judgment based, inter alia, on its perceptions of the legal convictions of the community and on considerations of policy. The nature of the enquiry has been formulated in various ways. See, for instance, Minister van Polisie v Ewels (supra at 597A - B); Minister of Law and Order v Kadir [1994] ZASCA 138; 1995 (1) SA 303 (A) at 318E - H and the recent formulation, albeit in a different context, in National Media Ltd and Others v Bogoshi at 1204D. It is clear that the same facts may give rise to a claim for damages both ex delicto and ex contractu so that the plaintiff may

choose which to pursue. But a breach of a contractual duty is not per se wrongful for the purposes of Aquilian liability. (See the Lillicrap case supra at 496D–I and 499D-G.) Whether the requirement of wrongfulness has been fulfilled or not will be

determined in each case by the proper application of the test referred to above.”

[23] In casu, the plaintiff pleads in his particulars of claim that the defendant wrongfully and negligently breached its duty of care.[9] It is therefore clear from the particulars of claim that for all intends and purpose, the plaintiff relies on the alleged breach of the duty of care by the defendant. I am therefore in agreement with the defendant’s counsel that the case before me as pleaded should be determined on the basis of alleged ‘duty of care’ as opposed to ‘negligence’.

EVIDENCE

- [24] The plaintiff presented his own testimony and that of Barend van der Merwe (“van der Merwe”) in support of his case.
- [25] Defendant presented the evidence of 4 (four) witnesses, namely, Nicholas van der Walt (“van der Walt”), Rudolph Adrian Opperman (“Opperman”), Matshidiso Benediction Nakedi (“Nakedi”) and Johan Adam Enslin Swanepoel (“Swanepoel”).
- [26] Opperman and Swanepoel testified respectively in the capacity of expert witnesses in support of the defendant’s case. The plaintiff did not take any issue with the two witnesses being confirmed as experts and elected not to call his own expert witnesses in that regard.

PLAINTIFF’S EVIDENCE

Plaintiff’s own testimony

- [27] The plaintiff testified that he is a pensioner and was previously employed as a member of the SAPS for a period of ten years.

- [28] He was involved in the accident with his motorcycle on 23 April 2016 at R716 Road whilst being part of a pack of motorcyclists (“bikers”)

who had attended a church function at Viljoensdrift. He was in the company of a ‘pillion rider’ at the time when the

accident occurred.

- [29] The bikers rode their motorcycles in such a manner that there were little gaps left in between them so as to prevent the other vehicles from driving in between them. Among the riders were those he referred to as novices.

- [30] He could not tell as to what the speed limit was on the road because there were no signs available to indicate as such but estimated that they had travelled at a speed not exceeding 80 kilometres per hour.

- [31] While riding behind the pack of bikers, the leader of the pack (referred to as President) signalled them by way of what he called ‘Harley Aerobics’ to indicate that there was a problem ahead and the bikers started scattering around the road. He explained that, once there was a signal by the President, the bikers had to stay on one side of the road due to oncoming trucks and to further avoid colliding with each other.

- [32] As the bikers scattered around pursuant to the President’s signal, he had to find the best way of getting out of the situation without hitting somebody on his side and ended up falling. He then ended up on a portion of the road that had a pothole and lost balance after his motorcycle hit the pothole. This caused the front wheel of his motorcycle to go through the pothole whilst the rear wheel dropped into the pothole because of its low suspension clearance from the ground.

- [33] Due to his weight and that of his 'pillion rider', the motorcycle dropped and fell on his right-hand side whereupon he sustained injurie.
- [34] When asked under cross-examination to explain as to what driving in a pack entailed, he explained that they rode in a 'V-shape formation' and not necessarily in a straight line such as how motor vehicles are normally driven. This was to ensure that no vehicle could come in between the bikers.
- [35] He admitted under cross-examination that it was required of them as riders to drive in a straight line in order to be able to see the vehicles driving in front of them. However, he stated that the manner of riding they adopted (i.e. 'V-shape formation') was a strategy to protect themselves from potential danger posed by other vehicles on the road.
- [36] He reported the accident that occurred on 23 April 2016 to the police on 2 July 2016, after his discharge from the hospital. He further referred to the sketch plan forming part of the 'Police Accident Report' to depict the potholes that were prevailing on the road when the accident occurred. He stated under cross-examination that he prepared the sketch plan contained in the accident report wherein the 'BRIEF DESCRIPTION OF THE ACCIDENT' is recorded as follows: [10]

"I was driving in the left lane travelling east on Ascot Road. Pothole appeared and there was no way to swerve with oncoming traffic. I went through pothole and left the road."

- [37] I need to make a mention of the fact that the plaintiff's version as contained in the accident report differed from the version, he gave during examination in chief to the effect that he went through a pothole, whereafter he fell and got injured when his motorcycle dropped to the surface due to its weight bearing.
- [38] In the affidavit deposed to by the plaintiff on 23 September 2016, the following is stated: [11]
- "...My front wheel struck a pothole causing my motorcycle to veer out of control. We were thrown off the motorcycle...."*

- [39] Once again, the plaintiff's version as set out above differed from the version he put forward earlier that he got injured when the rear wheel of the motorcycle got stuck in a pothole whereby, he fell on his right-hand side. Under cross-examination, he admitted that the contents of his affidavit differed from the version he presented earlier in his earlier testimony about how the accident occurred.
- [40] The plaintiff was further referred, under cross-examination, to the inconsistency of his factual account of the accident as contained in the report of his Occupational Therapist. [12] It is recorded in the said report that the plaintiff 'went over a hump that had a large pothole behind it, which he hit at relatively low speed. His pillion rider fell off the motorcycle and sustained a head injury, and he lost his balance while trying to get out of the hole and fell off, with the motorcycle falling on him'. In response thereto, the plaintiff maintained that the report contained the same version he gave but put in different words.

- [41] The plaintiff further led evidence at length in relation to the potholes as depicted in the photographs he alleged were taken from the scene of the accident. During cross-examination, the plaintiff informed the Court that the photographs being relied upon to depict the areas of the road that had potholes were taken by one of the bikers named Pieter Koekemoer (“Koekemoer”). Sadly, Koekemoer was not called in to give evidence in support of the plaintiff’s version in this regard. I therefore find the plaintiff’s evidence in relation to the photographs not credible in the circumstances of this matter.
- [42] The plaintiff also testified under cross-examination that the information given to the emergency personnel that attended to him at the scene of accident came from him. On being asked about the entry made in the handover report completed by the emergency personnel to the effect that the accident resulted from collision between the motorbikes[13], he expressed his disagreement that such represented the factual account he gave about the accident. Nevertheless, he elected not to place any evidence in rebuttal thereof.

Van der Merwe’s testimony

- [43] Van der Merwe testified that he was part of the bikers on the day of the accident and rode behind the plaintiff as a road Captain of the pack. He stated that they were travelling at a low speed next to each other when he suddenly noticed that the plaintiff fell and stopped to assist him (plaintiff).
- [44] He did not see the President signalling the bikers of the danger because he could not see what was happening in the front. He stated that although it was possible for a person who was not paying attention on the road to have missed the President’s signal, he was paying attention on the road and saw that the plaintiff had fallen. He then realised later that the plaintiff had hit a pothole.
- [45] He further testified that there were plenty of potholes on the road but stated that he could not remember well. He indicated that he did not witness how the accident occurred but remembered that the plaintiff did not collide with anyone.
- [46] Under cross-examination, he was asked if he knew the person who took the photographs of the accident scene but stated that he did not see who that person was. He further stated that he did not know about Koekemoer.
- [47] He also testified under cross-examination that he understood that the motorcycles, like other motor vehicles, were required to drive behind each other. He stated that in their case, they were riding in a staggered formation as a safety mechanism but did not know that riding in that way was deemed illegal.
- [48] Similar to the plaintiff’s testimony, Van der Merwe’s evidence did not take the plaintiff’s case any further because he admitted that he did not witness how the accident happened.

- [49] Consequently, I find the plaintiff's evidence with regard to the circumstances under which the accident occurred to be of little assistance this Court and quite contradictory in many respects. Moreover, his case seems to be heavily reliant on the fact that the accident was caused by the potholes as depicted from the photographs whose probative value remains untested.

DEFENDANTS' EVIDENCE

Van der Walt's evidence

- [50] Van der Walt testified that he is currently employed at Vaal Park Hospital in the Free State but worked for Netcare 911 in Vanderbijlpark as Advance Life Support Paramedic at the time of the accident.
- [51] In the normal course of his duties, he attends to both traumatic and medical emergencies relating to gunshots, road accidents and chronic medical conditions among others. Whenever called to the accident scene(s), he normally starts by establishing what 'mechanism of injuries' is in order to determine the patient's cause(s) of injuries. This in turn informs the kind of treatment that should be administered on the patient.
- [52] He testified that he was the first person to arrive at the accident scene on the date of the accident and rendered advanced life support to the plaintiff. He further testified that he also accompanied the plaintiff to the hospital by ambulance following the accident.
- [53] He confirmed the handwriting on the 'patient report' handed to the hospital when the plaintiff was admitted to be his. The said report recorded the mechanism of the injury as the accident caused by collision between the two bikes. [14] He further explained that the said document was normally completed from the time the patient was transported from the accident scene or otherwise the hospital would not admit a patient without it.
- [54] He further stated that the information recorded in the report indicating that the plaintiff was riding a bike and bumped into another bike, thus sustaining injury to the right ankle could have been obtained from one of his crew members or the plaintiff himself.
- [55] He testified that on arrival at the hospital, he handed over a document presenting a complaint[15] to a nurse in the presence of the patient (i.e. plaintiff). As recorded in the said document, the plaintiff bumped into another bike and sustained an injury to the right ankle. He stated that if the plaintiff was not happy with the contents of the document, he could have objected to the contents thereof.
- [56] He was asked under cross-examination as to how he remembered to have been the first one to arrive at the scene of the accident other than his crew members, namely, Erasmus and Sibanyoni. He testified in response thereto that, the fact that the hospital records indicated that there was administration of 'morphine' on the plaintiff, constituted sufficient proof that he was the first one to arrive at the scene. Such was informed by the fact that administration of 'morphine' did not fall within the scope of Erasmus and Sibanyoni's duties.

- [57] When further asked under cross-examination of the possibility that the mistake could have occurred during the plaintiff's admission, he testified that the paper trail kept by the hospital served as evidence about the events of the day of the accident.
- [58] Defendant submitted that Van der Walt's version was consistent with the plaintiff's own evidence that the bikers rode negligently in a staggered formation, which situation led to his (plaintiff) inability to see what lied ahead on the road and ended up failing to apply the brakes upon receiving signal of the danger ahead from the President.
- [59] He further referred to the plaintiff's evidence about the moment of chaos that ensued when they scattered after receiving the President's signal about potential danger ahead. This was more so because the plaintiff himself informed the Court of the fact that there were novices riding among the pack.
- [60] I am therefore in agreement with the defendant's submission that the only probable version that was placed before the Court was that the accident resulted from motorcycles colliding with each other as opposed to potholes as the plaintiff claims. More so, the plaintiff placed no evidence in rebuttal of Van der Walt's version.

Opperman's testimony

- [61] Opperman testified that he is a Civil Engineer by profession and a Senior Researcher at the CSIR. He further stated that he received extensive training in Accident Reconstruction.
- [62] He attended to a site inspection of the accident scene on 4 October 2022 in the presence of both parties' legal representatives. In his findings, he analysed a photo taken of what was reportedly a pothole that caused the accident and compared it with what he found on the road during his inspection of the accident scene.
- [63] In his analysis of the photograph said to be depicting the pothole that caused the accident (i.e. photograph 5 in his report), he described the said photo as depicting a shallow surface failure because it was not deep and estimated it to have been between 14 and 15 millimetres. In his opinion, the shallow patch such as the one depicted on photograph 5 did not qualify as one that could have caused an accident.
- [64] He considered that the plaintiff drove in a clear day with a speed limit of 80 kilometres per hour and thus he could have reduced his speed by applying the brakes. This, he found, could have reduced the plaintiff's speed from 80 to 40 kilometres per hour within a distance of 23 meters. In a distance of 6 to 7 meters, he held the view that the plaintiff could have reduced his speed to about 20 kilometres per hour.
- [65] Opperman further testified that, to reduce his speed from 60 kilometres per hour to 30 kilometres per hour, the plaintiff only needed 13 to 14 meters to reduce the speed to 15 kilometres per hour.

- [66] He also testified that it was virtually impossible for the motorcycle to get stuck in such a shallow surface failure because same was not deep enough. That would have made it impossible for a motorcycle to stop as the momentum of it would keep it moving. He explained that if the pothole was deep, it would have damaged the wheel but even so, the motorcycle would not stop but kept on moving. In his view, the laws of physics would have been defied if a shallow surface such as the one depicted on the photograph succeeded in stopping a moving motorcycle.
- [67] In summation, Opperman's evidence was that there were no potholes on R716 Road from what is depicted on the plaintiff's sketch but a shallow road surface failure. His further view was that the plaintiff had ample opportunity to navigate himself through such surface failure(s) on the road in order to avoid the accident from happening.

Nakedi's evidence

- [68] She testified that she started her employment with the Department of Roads and Transport ("Department") in 2007 in the capacity of a 'Foreman' until 2018 when she became appointed as a Road Superintendent.
- [69] During her reign as a Foreman, she was responsible for inspection, planning and supervision. Her duties entailed among others, inspections of the roads and planning on how to address what was found to be hazardous during their inspections.
- [70] According to her, the R716 Road was properly maintained and referred to the maintenance sheets showing that there were permanent repairs done on the said road in October 2015. These records further reflected that there was permanent fixing of potholes using road-mix comprising of cold asphalt and emulsion during the said period. They also reflected regular inspections and that planning of maintenance was done once in every two weeks.
- [71] She explained that there were some temporary repairs done in November 2015 on the road using modified gravel as a safety precaution. During December 2015, they attended to permanent fixing of the road involving big and small potholes.
- [72] She testified under cross-examination that the big potholes would normally receive priority when planning on road maintenance was done because those were perceived to be dangerous. They deemed smaller potholes not to be dangerous and such would normally be attended to about two to three times a month.
- [73] When asked about the effects of what she deemed small and non-dangerous potholes on the motorcycles, she explained that the small potholes posed no danger because the cyclists ordinarily rode on the side of the road as opposed to the middle of the road where potholes were mainly prevalent. She further explained that if what was deemed to be small potholes were found adjacent to the big ones, such would also be repaired together with the big ones.

Swanepoel's evidence

- [74] He testified that he is a Civil Engineer with over 30 years of experience. He works as a Contract Engineer for SNA Civil & Developmental Engineers (Pty) Ltd and previously worked for the Department of Public Works in Pretoria.
- [75] He considered for the purpose of a factual background to the case: the SAPS Accident Report; plaintiff's affidavit; colour photos submitted by the plaintiff; the video recording taken of the accident scene during the parties' site visit; plaintiffs particulars of claim; District Investigation Report by Regional Engineer for Fezile Dabi Region; Daily Worksheets for the road in question and a complete set of indexed notices by the plaintiff.[16]
- [76] In his view, the road was in good condition to travel at 80 kilometres per hour by Harley Davidson Motorbike. There were road signs indicating the speed limit and some triangle signs indicating potential danger on both directions of the road.
- [77] He questioned the reliability of the Police Accident Report based on the fact that such was compiled two and a half months after the accident had occurred. This was more so, given the fact that the person who compiled the said report did not take trouble of visiting the accident scene.
- [78] He testified that there were surface failures on the centre of the road by looking at the photographs but those were not potholes. He explained that the surface failures are normally found at the centre of the road caused by either 'cold joint' or 'dry joint'. According to him, this happens when the seal on the road does not perform the way it was expected and thus resulting in a surface failure.
- [79] He further stated it was difficult to determine the date and time of the surface failures depicted on the said photographs. However, in considering the depths of the said failures as appeared on the photographs, it could not have been long before the alleged accident had occurred.
- [80] He testified that in order to avoid water retention from occurring in the middle of the road, the measures put in place included the road being sealed every ten years. In this case, he found the thickness of the road in question to be around 30 millimetres, which in his view, was safe to drive through at a speed of 80 kilometres per hour.
- [81] He further testified that the maintenance worksheets showed that the defendant did what it could to keep the road in good condition. In his opinion, the defendant diligently maintained the road or otherwise there would not have been any road left given the fact that the road was constructed some years ago.
- [82] He referred to the 'skid-marks' that were visible on the left side of the surface failure depicted attached as photographs 6 and 8 to his report. In his opinion, those appeared to be typical of a lock of a motorbike wheel involving serious sudden brake. This in his view, pointed to an incident involving people riding too close to each other.

- [83] It was further his opinion that the rider of a motorcycle that was responsible for the skid marks must have lost control of it and got involved in the accident. He explained that it was dangerous for the bikers to ride too close to each other because that resulted in the height bike distance getting reduced.
- [84] He testified that it was likely that the plaintiff fell due to the bikers cycling close to each other in a staggered formation because such would limit one's ability to manoeuvre and increased the risk of accidents. In his view, the plaintiff was either riding at a high speed or lost concentration on the road or otherwise he would have foreseen a pothole.
- [85] He was referred to paragraph 5.22 of his report wherein he opined that the fact that there was a passenger riding with the plaintiff at the time of the accident made the motorcycle to be unstable and more difficult to control. According to him, this was due to the fact that the 'centre of gravity' of the motorcycle changes and becomes higher from the ground under those circumstances. This, according to Swanepoel, would have a negative effect on the balancing and handling of the motorcycle as the 'centre of gravity' becomes even higher.[17]
- [86] Although Swanepoel attempted to give testimony on his understanding of the Harley Davison Motorbike's behaviour by looking at the photographs provided, he admitted under cross-examination that the nature of his evidence in that respect was not of an expert witness.
- [87] As already indicated above, the plaintiff elected not to call any expert witnesses to rebut the defendant's expert evidence.

EVALUATION OF MERITS

- [88] The plaintiff bears the onus to prove the defendant's liability on the basis of the alleged breach of duty of care towards him.
- [89] This matter is centred around the issue as to whether the plaintiff suffered any damages as a result of the conditions of the R716 Road on the day of the accident. The Court is therefore called to evaluate as to whether, on the basis of the evidence placed before it by the parties, the plaintiff succeeded in discharging the onus that rested on him to prove his case on a balance of probabilities.
- [90] The plaintiff took the trouble of testifying about the fact that the accident was caused by the potholes on R716 Road. His only source of evidence in support of this allegation were the photographs allegedly taken of the scene by someone he did not call to come and confirm issues such as the distance and/or angles from which the photos were taken among other things.
- [91] The defendant in turn procured independence evidence of expert witnesses, both of whom found in their assessment of the facts that there were no potholes on the road in question. The plaintiff elected not to call any expert(s) in rebuttal thereof.

- [92] I am mindful of the fact that the Court should be cautious not to accept the evidence of expert witnesses willy-nilly.[18] However, one should take cognisance of the fact that expert witnesses serve a very useful purpose to the court by reason of their special knowledge and skills; they are better qualified to draw inferences than the trier of fact. There are some subjects upon which the court is usually quite incapable of forming an opinion unassisted, and others upon which it could come to some sort of independent conclusion, but the help of an expert would be useful.[19]
- [93] In the circumstances of this matter, I find the evidence tendered by the two experts to have been quite helpful to the Court in many respects. This is more so, considering the fact that the plaintiff only reported the accident to the police more than two months after it had happened. Moreover, there was also no evidence of an independent witness to the accident presented before the Court for evaluation.
- [94] The plaintiff submitted that the evidence presented by the defendant did not support the version that R716 Road was in a suitable condition and thus safe to use on the day of the accident. I do not seem to agree with the plaintiff in this regard simply because he failed to adduce any evidence in rebuttal of Nakedi's evidence about the regular maintenance that were conducted on the road. The fact that some of the repairs happened a few days after the accident had occurred do not convince me otherwise as the plaintiff would like this Court to find.
- [95] What also remained undisturbed was the conclusion drawn by the two experts to the effect that the road had mere surface failures and not potholes that could have caused the accident as the plaintiff claims.
- [96] Another difficulty that confronted the plaintiff was Van der Walt's evidence that pointed to the record showing the plaintiff's

injuries resulted from a collision between the motorbikes. This evidence is consistent with the two experts witnesses who found that it was highly probable that the plaintiff's accident resulted from collision between the motorcycles when regard is to the manner of riding the bikers adopted (i.e. staggered formation). This evidence was not subjected to rebuttal too.

- [97] As already pointed out above, the plaintiff has done little to assist this Court in understanding his case by placing different versions about the circumstances under which the accident occurred. More so, his second witness, van der Merwe, admitted during his testimony that he did not even witness how the accident occurred.
- [98] As explained by the Supreme Court of Appeal in *Stellenbosch Farmers' Winery Group Ltd & another v Martelli & Cie SA & others* (427/01)

[2002] ZASCA 98:

- [5] "To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses;

(b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witnessbox, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's

version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step,

determine whether the party burdened with the onus of proof has succeeded in discharging it..."

[99] Accordingly, I find that the plaintiff failed to discharge the onus that rested on him to prove on a balance of probabilities that the defendant failed to exercise reasonable care to ensure that R716 Road off Ascott Road, Viljoensdrift, was maintained and kept in a safe condition for road users.

COSTS

[100] The general rule is that the costs should follow the result, being the successful litigant. I find no reason to deviate from this general rule in the circumstances of this matter.

ORDER

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

[102] The plaintiff's claim is dismissed with costs.

M.R. RANTHO, AJ

APPEARANCES: On behalf of plaintiff: Adv I. Sanders Instructed by: A Wolmarans Inc On behalf of defendant: Adv P. Mashihleho Instructed by: State Attorney Bloemfontein

[1] Index: Bundle 1, pp 12 – 13.

[2] Index: Bundle 1 at p 46.

[3] Index: Bundle 1, pp 47 – 49.

[4] Index: Bundle 1, p 50.

[5] Plaintiff's Heads of Argument at para 29.

- [6] At 55-D and 56-A.
- [7] Defendant's Heads of Argument at paras 3 and 6.
- [8] Kruger v Coetzee 1966 (2) SA (A) at 430 E-F.
- [9] Index: Bundle 1, p 12.
- [10] Index: Bundle 6, p 6.
- [11] Index: Bundle 6, p 2: (Re-typed Version).
- [12] Index: Bundle 3, p 31.
- [13] Index: Bundle 2, p 18.
- [14] Index: Bundle 2 pg. 18.
- [15] Index: Bundle 5, p 72.
- [16] Index: Bundle 6, p 46.
- [17] Index: Bundle 6, p 58.
- [18] Twine and Another v Naidoo and Another [2018] 1 All SA 297 (GJ) at para 18.
- [19] PriceWaterhouseCoopers Inc and Others v National Potato; Co-operative Ltd and Another [2015] 2 All SA 403 (SCA) at para 97Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH 1976
- (3) SA 352 (A) at 370G-H;.

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