IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES**
Interest to other Judges:	**YES**
Circulate to Magistrates:	**YES**

Case No: 4617/2010

In the matter between:

JILLIAN-JOAN VAN DER MERWE **Plaintiff**

and

MEC PUBLIC WORKS, ROADS AND TRANSPORT **First Defendant**

PREMIER OF THE FREE STATE **Second Defendant**

JUDGMENT

CORAM: NAIDOO J

HEARD ON: 4-7 DECEMBER 2018

DELIVERED ON: 28 FEBRUARY 2019

INTRODUCTION

[1] In July 2009, the plaintiff, Jillian-Joan Van der Merwe, was a healthy, active thirty seven year old woman in the prime of her life. She was a busy, working mother to 2 young children at the time, and living with her parents and other family members at the family's smallholding in Bloemfontein. In the late afternoon of 27 July 2009, the plaintiff was returning to Bloemfontein after having attended work-related meetings in Kimberley and Postmasburg in the Northern Cape. She was driving on the road between Dealesville and Bloemfontein, when she was involved in a serious motor vehicle accident which has left her paralysed and wheelchair–bound.

[2] The MEC for Public Roads and Transport is the first defendant (first defendant), and the Premier of the Free State, is the second defendant (the second defendant), The plaintiff issued summons against the first and second defendants, in which she claimed an amount of R7 091 179.87 (Seven Million Ninety One Thousand One Hundred and Seventy Nine Rand and Eighty Seven Cents) in damages, together with interest thereon and costs of suit. The parties agreed that the plaintiff need not have sued the second defendant and, in the interest of streamlining the matter, that the matter should be regarded as proceeding between the plaintiff and first defendant only. The first defendant will, accordingly, hereafter be referred to as the defendant. The parties also agreed to separate the issues of quantum and merits, and an application in

this regard was granted by the court, in terms of Uniform Rule 33(4). The matter accordingly proceeded only in respect of the merits. Adv J Mullins SC, with Adv J Zietsman represented the plaintiff, and Adv B Mene represented the defendant.

THE PLEADINGS

[3] The plaintiff alleges in her summons that the accident was caused as a result of the negligence of the defendant, which negligence was a breach of the duty of care owed by the defendant to members of the public who use the provincial roads in the Free State Province, and, in particular, the road where the accident occurred, which is a provincial road in the Free State. The duty of care arose from the responsibility of the defendant to take reasonable steps to monitor and inspect the safety and condition of provincial roads, and to undertake reasonable, regular and routine maintenance of such roads in order to ensure the reasonable safety of users of the provincial roads in the Free State. In particular, the plaintiff alleges that the defendant and/or his employees, acting in the course and scope of their employment with the defendant were negligent, *inter alia*, in or more of the following respects:

3.1 he/they failed to take any or sufficient steps to ensure the road was reasonably safe for road users;

3.2 he/they failed to inspect or to reasonably and routinely inspect the road in order to establish its condition, and timeously rectify such condition;

3.3 he/they failed to take any, or reasonable and sufficient steps to ensure that the road was reasonably free from edge breaks and dangerous drops between the level of the tar and the gravel immediately adjacent to it, such steps being to maintain the road in a condition to ensure that it was reasonably free of the edge breaks and dangerous drops referred to.

3.4 he/they allowed the road to deteriorate into the state where dangerous edge breaks and drops developed between the tar and the gravel immediately adjacent to it existed.

3.5 he/they failed to comply with national guidelines relating to the maintenance of roads in order to render them reasonably safe for road users.

[4] The defendant, in his plea, admitted that he was responsible for the provincial roads, which responsibility included taking reasonable steps to monitor and inspect the safety and condition of provincial roads by undertaking reasonable, regular and routine maintenance of such roads, so as to ensure the reasonable safety of users of such roads. The defendant also admitted that at all times material to this matter, particularly 27 July 2009 and the period preceding that date, he owed a duty of care to members of the public using provincial roads and in particular, those using the road upon which the accident occurred, to reasonably monitor, inspect and maintain such roads, including the road upon which the accident occurred. The defendant denied that the accident occurred in the manner described in the summons, and that he or his employees were negligent in the manner alleged by the plaintiff or that such negligence caused the plaintiff's accident. The

defendant pleaded that reasonable steps were always taken to ensure that the road was reasonably safe for road users, and to this end routine inspection of the road was always done. It was also denied that the defendant allowed the road to deteriorate to such a state that there was a dangerous drop between the level of the tar and the gravel adjacent to it. The defendant alleged that the level of the tar and the gravel was in a reasonably good condition, as there was compliance with the Departmental Maintenance Quality Standards.

[5] The defendant also pleaded that:

5.1 the accident was caused by the negligence of the plaintiff in that she

5.1.1 failed to keep a proper lookout

5.1.2 failed to apply her brakes timeously or at all;

5.1.3 failed to exercise proper or adequate control over her vehicle;

5.1.4 drove on the side and/or shoulder and/ or edge of the road;

5.1.5 drove too fast under the prevailing conditions;

5.1.6 failed to drive her vehicle at a speed which would have enabled her to take evasive action or bring her vehicle to a standstill and thus avoid the accident.

The defendant pleaded in that alternative that:

5.2 The plaintiff was warned by way of road signs of the risks and/or condition of the road and was aware of the risks

and/or condition of the road. Despite this knowledge, she went off the road and/or drove on the shoulder and/or edge of the road to give way to an overtaking vehicle. She therefore voluntarily assumed risk or consented to subject herself to the risk of injury.

5.3 The plaintiff's negligence contributed to the accident

[6] The plaintiff prepared four bundles of documents and marked them as follows: Pleadings, Trial, Photo and Expert Bundles. The Pleadings Bundle contained the pleadings and notices, the Photo Bundle contained the photographs depicting the accident scene and the condition of the road; the Trial Bundle contained, inter alia, the police docket, report of the accident, statements taken by the police, Manuals for Road Maintenance used in the Free State, worksheets from the defendant's Roads Department reflecting details of inspections, repairs and maintenance in respect of the road in question and articles, referred to by the defendant's expert, dealing with edge break and drop off on a road. The issue of edge breaks and drop off will be dealt with later in this judgment; the Expert Bundle contained the reports of the experts engaged by the plaintiff and defendant, as well as a joint minute by the experts.

EVIDENCE FOR THE PLAINTIFF

[7] As indicated the plaintiff was an active, independent woman. At the time of the accident she was employed as a sales representative by a company which provided cleaning services to various

companies and commercial entities. She commenced her employment with this company approximately four months prior to the accident. Her job required the plaintiff to spend a great deal of time on the roads, driving to various clients. On the day of the accident, she attended meetings in Kimberley and Postmasburg, in the Northern Cape Province. On the way back from Postmasburg to Bloemfontein, she stopped in Dealesville, a town in the Free State, where she bought some treats for her family and then continued on her journey back to Bloemfontein, using the road between Dealesville and Bloemfontein. She was driving a white Ford Bantam light delivery vehicle, commonly referred to, in South Africa, as a bakkie. It was late afternoon, which the parties accept was approximately 17h20. That appears to be the plaintiff's last memory of that day. She has no recollection of the accident happened or how she ended up in the hospital. Her next recollection was waking up in the Intensive Care Unit of a hospital.

[8] Andries Cornelius Viljoen (Viljoen) testified that in July 2009, he was employed in Bloemfontein as a sales representative by a company that sold office equipment. On the day of the accident, he was returning to Bloemfontein having visited clients in Vryburg, in the North West Province. He was travelling on the road between Dealesville and Bloemfontein in the late afternoon, after 17h00. About 30 kilometres outside Dealesville, he overtook a white Ford Bantam bakkie, being driven by a blonde woman. He testified that the speed limit on that road, at that time, was 100 km per hour (km/h). He was travelling at a speed of approximately 120 to 130 km/h. The bakkie was travelling much slower than he was, and he overtook it just before a dam which is located in the vicinity of the

road. After he passed the bakkie, he looked in his rear view mirror and noticed what appeared to be a cloud of dust. He looked again and saw the bakkie rolling on the left hand side of the road and it then landed in an open field (veld) alongside the road. He stopped, turned around and drove back to where he saw the bakkie rolling. He approached the vehicle to assist the driver. He noticed that she had an injury on the left side of her head. She was unable to give him her name or other details

[9] Viljoen then called the number of her company that was branded on the vehicle and obtained her details from the company. He called the police and ambulance. During this time, he found the plaintiff's cellular telephone in her vehicle and managed to find her father's number. He called her father and informed him of the accident. He also said that there were no road signs warning motorists of the condition of the road or any risks on that road.

[10] Gavin Ruben Frost (Frost), the brother of the plaintiff, testified that he was with his father when the latter received a telephone call from the person that was assisting the plaintiff at the scene of the accident. This person informed Mr Frost senior of the accident, and the family was kept informed of the condition of the plaintiff and which hospital she was taken to. Frost visited the plaintiff in hospital the next day. He confirmed that she had a cut on her head and seemed fine, except that she did not know how the accident had happened. Thereafter he, together with his father and his son, went to the scene of the accident, finding it from the description given to them by Viljoen and also by finding tyre marks on the road, as well as debris from the vehicle in that area. Frost took

photographs of the scene and the road. He realised that the road was in a very bad condition and two or three days later, he returned to the scene with a spirit level and tape measure, and took the rest of the photographs contained in the Photo Bundle, which indicated the measurements of the drop-off (being the difference in height) between the tarred surface of the road and the gravel shoulder adjacent to it. The photographs also gave insight into the condition of the edge of the tarred road and the extent to which the tar at the edges had broken off. This is what is referred to as edge break. I will deal with these photographs in more detail later in this judgment.

[11] Barry Grobelaar, a mechanical engineer, was one of the experts who testified on behalf of the plaintiff. His curriculum vitae reflects that in addition to his academic qualifications (Honours and Master's Degrees in Mechanical Engineering), he has vast and varied practical experience in, amongst others, vehicle engineering and mechanical design, and the design, development, manufacturing and testing of components and systems such as, inter alia, vehicle suspension systems and gearboxes. He is an experienced motor vehicle rally driver and a helicopter pilot, and was also a lecturer in the Department of Mechanical and Aeronautical Engineering at the University of Pretoria for thirteen years. Mr Grobelaar is, in addition, an accident reconstruction specialist, having been involved in the reconstruction of approximately 3200 motor vehicle accidents and automotive investigations over a period of 22 years.

[12] On 20 April 2010, he inspected the bakkie driven by the plaintiff at the time of the accident, took photographs of the various parts of the vehicle that were inspected and prepared a report in respect thereof. He also visited the scene of the accident in July 2014 (some 5 years after the accident), and using the photographs taken by Frost, he reconstructed the accident. His report contained his findings & conclusions in this respect as well. His findings and observations will be dealt with later, in conjunction with the joint minute compiled by this witness and the defendant's expert, Mr Luchas Steenkamp.

[13] Adrian Bergh, a 95 year old consulting engineer with vast experience in road engineering, was the last witness for the plaintiff. In spite of his age, he was alert and authoritative in the delivery of his opinion. It is common cause that certain road maintenance standards are to be followed in order to maintain the integrity of roads within the jurisdiction of an authority, such as a Roads Agency or the Roads Department of a Provincial Government. To this end there is a National Roads Manual, applicable to all roads authorities in the country, as well as a Maintenance Quality Standards Manual, specifically for the Free State Province, that are relevant in this matter. I will deal further with these manuals and standards later in this judgment. Mr Bergh was the co-author of the original National Roads Manual. In summary, and against the background of his practical experience as a road engineer for several decades, he opined that the drop–off and edge break on the road, in the area where the accident occurred, caused the road to be in a dangerous condition. His further opinion was that the condition of the road, as observed in

the photographs taken by Frost, those attached and referred to in the police report, and as explained by Mr Frost, did not develop "overnight" but happened over many years as a result of neglect. Mr Bergh also summarised the recordings on the defendant's worksheets in respect of its inspections and maintenance of (specifically) the road on which the accident occurred, from 2005 to 2012. The worksheets reflected that no work was done in respect of the shoulders of the road since June 2005. There was however, concerted work done on the shoulders of the road, in the area of the accident, during September and October 2009, being after the accident in this matter. The plaintiff closed her case after the testimony of Mr Bergh.

EVIDENCE FOR THE DEFENDANT

[14] The defendant called the evidence of Lefu Joseph Poonyane, a Roads Foreman in the relevant Department of the defendant responsible for roads, and was employed in that capacity since 1997. He testified that he was responsible for safety and inspecting the roads that fell under his jurisdiction, to ensure that they are in a good condition. The area where the accident occurred fell under his jurisdiction. He confirmed the work done on this stretch of road, as reflected in the worksheets, and also confirmed that these were largely temporary repairs to potholes. He also indicated that at the time of the accident the road was not in a good condition, and the shoulders of the road were also not in a good condition. His view was that in some places the drop–off was regarded as degree 2 and in other places, degree 3. (I will deal with the significance of this later in this judgment). Mr Poonyane

confirmed from the photographs that the area where the accident occurred is very familiar to him, and that the shoulders of the road there were in a bad condition. According to him, the drop-off was between 110 and 111 centimetres. When he inspected the road on 3 April 2009, he reported the poor condition thereof to his superiors. The defendant closed his case after the testimony of this witness, and did not call the evidence of his expert, Mr Luchas Steenkamp (Steenkamp) whose summary was filed as part of the court papers and who co-signed the joint minute with Mr Grobelaar, the plaintiff's expert.

ISSUES

[15] The issues to be determined by this court are:

15.1 The manner in which the accident occurred;
15.2 Whether the accident was caused by the negligence of the defendant;
15.3 The validity of the defence of voluntary assumption of risk;
15.4 Whether there was contributory negligence on the part of the plaintiff.

THE LAW

[16] While the defendant has admitted that he owes a duty of care to members of the public using provincial roads to reasonably monitor, inspect and maintain such roads to ensure that they were reasonably safe whilst using such provincial roads, the plaintiff

bears the onus of showing that the defendant breached that duty of care and did so negligently. She also bears the onus of proving that such negligence on the part of the defendant caused the accident and hence the damages she suffered.

[17] The defendant bears the onus to show that the plaintiff was negligent in the manner he alleges, that she was aware of the condition of the road, via road signs warning her of the condition of the road, but, in spite of this, she proceeded to drive in a manner that indicated that she subjected herself to the risk of being injured. In other words, she voluntarily assumed the risk of injury and/or loss. The defendant also bears the onus of proving that the plaintiff's negligence contributed to the accident.

[18] The case of **Kruger v Coetzee 1966(2) SA 428 (A),** established the test for negligence, and has been widely followed, making it the *locus classicus* on this aspect. The court held as follows at page 430 E - F:

> "For the purposes of liability *culpa* arises if –
>
> (a) a *diligens paterfamilias* in the position of the defendant –
>
> (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
>
> (ii) would take reasonable steps to guard against such occurrence; and
>
> (b) the defendant has failed to take such steps.
>
> …Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend on the particular

circumstances of each case. No hard and fast basis can be laid down."

[19] In **McIntosh v Premier, KwaZulu Natal 2008(6) SA 1 (SCA)**, a cyclist fell from his bicycle while trying to avoid a pothole, and sustained serious bodily injuries. He sued the respondents for damages arising therefrom. The evidence established that the pothole was present on that road for more than a year, without being repaired, and no reasons were furnished by the respondents for not doing so. The court, citing the Kruger case above said at paragraph [12] that

"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… and, if so, whether the failure on the part of the defendant to do so amounted to a breach of that duty".

[20] The court held at paragraph [14] as follows:

"What, I think, is clear is that if in the actual implementation of a policy or procedure adopted by the authority, or for that matter in the course of its operations, foreseeable harm is suffered by another in consequence of a failure on the part of the authority's servants to take reasonable steps to guard against its occurrence, a court will not hesitate to hold the authority liable on account of that omission"

The court also expressed the view at paragraph [13] that

"…it is well established that it is sufficient if the general nature of the harm to the injured party was foreseeable; it is not necessary that the precise manner of its occurrence be foreseeable".

[21] With regard to the duty of the defendant to erect road signs and provide reasonable facilities to guard against foreseeable harm to road users, it was not specifically placed in dispute that the defendant was obliged to erect road signs or such other facilities to guard against reasonably foreseeable harm to road users. The court in **Minister of Transport and Another v Du Toit and Another 2007(1) SA 322 (SCA)**, said at paragraph [17] whether the steps taken by the first appellant (in this case, the defendant) were reasonable or not had to be determined with reference to the manner of driving of a reasonably competent and cautious driver A driver of a motor vehicle is obliged to keep a proper lookout. Depending on the state of the traffic, the nature of the road and the speed at which the motorist is travelling, he may have an extremely limited opportunity to read and comprehend the import of every road sign. The court said further that "For this reason it is imperative, particularly in unlit areas, for warning and other signs to be clear, unambiguous and appropriately positioned, so that if necessary they may be read and comprehended at a glance. This is all the more so where there is a potentially dangerous situation ahead…"

ROAD MAINTENANCE STANDARDS

[22] This is perhaps an opportune time to mention the accepted road maintenance standards to be followed by all roads authorities in South Africa, and particularly those in the Free State Province, in

order to contextualise and understand the obligations of the defendant in relation to proper inspection, maintenance and repair of the roads within his jurisdiction.

The foreword to the National Routine Road Maintenance Manual (the National manual), which deals with national highways states, *inter alia*, that "The importance of Routine Road Maintenance (RRM) is generally underestimated in the preservation of the road infrastructure asset....RRM is used, inter alia…for the longevity of the national highway system" The National Manual also lists the main objectives of routine maintenance, which, *inter alia*, are to provide a safe and acceptable level of service for the travelling public and maintain the condition of the road such that maximum life is obtained from the road.

In my view, this applies equally to provincial roads, and these objectives are in fact incorporated in the Free State Maintenance Quality Standards Manual (the Free State Manual), where it is stated that "The principle applied is that maintenance be performed in such a way as to prevent damage and/or repair existing damage to the road or road furniture, thereby avoiding/preventing dangerous situations. Maintenance is therefore primarily aimed at infrastructure preservation and improving safety".

[23] In describing the condition of roads for the purposes of maintenance, the Free State Manual categorises defects into degrees, ranging from 0 to 3. The descriptions of the degrees are as follows:

"0 – Ideal situation with no damage that may occur/has already occurred. No dangerous situation exists or can exist.

1 - A less visible defect exists. Non existing dangerous situation – merely slight damage can occur

2 – A defect is easily visible. In certain cases a dangerous

situation…can occur and damage has occurred.

3 - The defect is very prominent. A dangerous situation exists and damage will occur in all cases"

The reference to "dangerous situation" refers to dangerous situations and damage to the road user and the reference to "damage" refers to damage caused to the road and not to the road user.

[24] With regard to edge breaks, the degrees mentioned above bear the following descriptions:

"0 – No edge break present.

1 - Slight edge break of less than 50mm can be seen

2 – Significant edge break of between 50 to 150mm can be seen

3 - Severe edge break, which is a safety hazard to traffic, of between 150 to 300mm can be seen. An edge break of more than 300mm must be considered to be a pothole"

[25] The Free State Manual refers to drop-off as "Shoulders Too Low" and ascribes the following descriptions to the assigned degrees:

"0 – The shoulder is in a good condition and there is no height difference between the edge of the surfacing and the shoulder. No edge breaks are present.

1 - The gravel shoulder is in a reasonable condition, but the level difference between the edge of the surfacing and the gravel shoulder is a maximum

of 50mm. No dangerous situation exists yet and the traffic can move onto the shoulder at approximately 80km/h. Minor damage occurs as a result of edge breakage.

2 - The gravel shoulder is in a poor condition and the level difference between the edge of the surfacing and the gravel shoulder is a maximum of 100mm.

In certain cases a dangerous situation may develop and edge breakage can occur. Movement onto the shoulder can only be done at low speed.

3 - The gravel shoulder is in a very poor condition and the level difference between the edge of the surfacing and the gravel shoulder is more than 100mm and creates a serious safety hazard and edge breakage occurs regularly. The traffic cannot utilise the shoulder."

EVALUATION

[26] When regard is had to Mr Bergh's evidence, together with the photographs taken by Mr Frost, it is evident that the condition of the stretch of road where the accident occurred was extremely poor, as the drop off and the edge break in many places exceeded the limits referred to in the Free State Manual, which set the standards of road maintenance followed (or ought to have been followed) by the defendant and/or his employees. Photographs 1, 5, 6 and 7, depict the severe edge break on the left hand side of the road, in the lane in which the plaintiff travelled at the time. The edge break was so severe that the yellow line was completely obliterated, as can be observed in photograph 2. What can also be seen on the gravel shoulder, in photographs 5, 6 and 7, is a set of tyre marks which Frost said was the first set he observed.

Photographs 1, 8, 13 and 14 reflect the second set of tyres referred to by Frost.

[27] The height of the drop off reflected in photograph 9 is approximately 112mm. It appears to be the same in photograph 16. The height of the drop off in photographs 17 and 18 is approximately 122mm. The two points measured were, according to Frost approximately two metres apart, in the vicinity of the "tip" at the edge of the tar reflected in photograph 5, in the vicinity of where the plaintiff's vehicle left the road for the first time. These measurements put the drop off present on the road in question into the category of a degree 3 deficiency, meaning (according to the Free State Manual) that

"The gravel shoulder is in a very poor condition and the level difference between the edge of the surfacing and the gravel shoulder is more than 100mm and creates a serious safety hazard and edge breakage occurs regularly. The traffic cannot utilize the shoulder". (my emphasis)

[28] Photographs 3, 5 and 9 clearly depict the enormous ingress of the edge of the tar into the driving lane, considerably reducing the width of the lane. The yellow line is for the most part completely obliterated. The measurements taken by Frost, and not placed in dispute by the defendant, show that the edge break, varies from 150mm to just over 300mm, placing the edge breaks squarely into the category of a degree 3 deficiency. My remarks in paragraph [27] above, and the reference to the Free State Manual, regarding the hazardous state of the drop off have equal application in respect of the edge breaks.

[29] Photograph 3 depicts pieces of tar that were freshly broken off, leading Frost to believe that this was the spot where the plaintiff's vehicle left the road for the first time. He indicated that he followed the tyre tracks reflected in photograph 13, which led towards the fence. There he observed the fence pole was bent and the ground was freshly scuffed. Beyond that in the open field or "veld", as it is referred to, he found the "debris" belonging to the bakkie driven by the plaintiff, such as the number plate and hub caps, which can be seen from photographs 19 and 20. This evidence of Frost was not challenged at all by the defendant. These photographs taken by Frost were used by Grobelaar to identify the area where the accident occurred and reconstruct the scene almost five years later.

[30] Grobelaar undertook a detailed analysis of the photographs taken by Frost, the results of his examination of the plaintiff's vehicle, after the accident, and his findings and measurements taken as a result of reconstructing the accident scene. I do not propose to repeat his report, which is part of the record and confirmed in his viva voce testimony. His conclusion is that "The fact that there are three marks visible off the tarred road surface, as well as that the marks curve to the left, indicates the probability that the Ford LDV was in an anti-clockwise yaw when these marks were deposited (ie the vehicle was progressing into a broadside motion with the right side of the vehicle facing more and more in the direction of the motion of the vehicle and the front of the vehicle angled to the left)". He also examined the spacing of the three curved marks on the gravel and concluded that this indicates the probability that the yaw had already developed to an advanced stage. He further opined that the location where the tyre marks left the road and the depiction of the road on the photographs show that the area where

the largest edge break occurred is where the lane of the Ford LDV was the narrowest. The distance between these two points, ie where the maximum edge break occurred and where the tyre marks left the road is 68 metres. It was his view that the accident probably occurred at the point of the maximum edge break.

[31] Grobelaar examined various scenarios with regard to the progress of the plaintiff's vehicle into an anti-clockwise yaw, and concluded that the contact of the vehicle's left front wheel, as it left the tarred surface, with the jagged edges of the edge break would likely have caused the momentum of the vehicle to carry it back onto the tarred surface, in its lane of travel and it was at this stage that the yaw was initiated, with the vehicle curving towards the left and off the road on the left hand side. This was consistent with the tyre marks visible on the photographs 1 and 13, taken by Frost. He also analysed the damage to the vehicle in relation to the photographs and opined that the loss of control could have been caused by the damage to the various parts of the front of the motor vehicle, such as the left front wheel, the suspension and its component parts, or the impact on the left front wheel forcing the wheel to the left, thus causing the wheel and the vehicle to steer to the left. These severe effects on the wheel of the plaintiff's vehicle resulted from its contact with the jagged edges of the edge break, with a drop off in excess of 100mm.

[32] Grobelaar further opined that while there is no physical evidence visible from the photographs to link the tyre marks to the area of severe edge break, from an expert point of view, it is consistent with the version of the plaintiff (as recorded in the police

statement), that she went off the road when a vehicle overtook her, and when she tried to come back onto the tarred road, she lost control of the vehicle, which overturned. It was also mentioned that at the place where she left the tar, it was higher than the ground. I pause to mention that the plaintiff indicated that while she has no memory of the accident or making a statement to the police, the content of the statement is probably based on what she was told, probably, by her brother and father who went to the scene of the accident, where her brother photographed the road and the condition thereof. In the various scenarios Grobelaar sketched regarding loss of control, the severe edge break would have played a role.

[33] As indicated, the defendant did not call his expert witness, Luchas Steenkamp, whose expert summary forms part of the papers in this matter. It is noteworthy, that his view is very similar to that of Grobelaar's, regarding the probable manner in which the accident occurred. Both experts did sign a joint minute and agreed, *inter alia*, that:

33.1 The accident happened at 17h20 and sunset was at 17h41 on 27 July 2009. The plaintiff's vehicle was travelling in an essentially southerly direction, with the sun probably on her right hand side. It is also probable that the sun had not at the time set below the horizon.

33.2 The drop off from the tarred surface to the gravel shoulder was in excess of 100mm.

33.3 According to the Street View Images in Google Earth, there was a speed restriction of 80 km/h, on this road in February 2010, and the relevant sign was positioned 1.7km before the

accident scene as the plaintiff approached. The speed limit when Grobelaar inspected the scene in 2014 was 100 km/h. The experts agreed that speed limit at the time of the accident would be a matter for evidence.

33.4 As indicated, the experts were in agreement that the drop off caused the tyres to "scrub" against the edge of the tar, preventing the plaintiff from regaining the tarred surface. The manner in which the vehicle behaved thereafter, resulting in the loss of control over the vehicle was also agreed. Grobelaar added that when considering the severe edge break in excess of 100mm, the accident could also have occurred due to this severe edge break with its jagged edges and drop off causing significant resistance to the left front of the vehicle. He then repeated his comments, which I have mentioned earlier, regarding how this resistance resulted in the behaviour of the vehicle prior to its overturning.

[34] In determining how the accident occurred, I refer to the evidence of Viljoen, coupled with the observations of Frost the day after the accident, which are important. Viljoen and Frost confirmed that the speed limit on 27 July 2009 was 100 km/h. Frost's evidence is that he drove from the accident scene to Dealesville and back, and he found no road signs or other means of warning motorists of the hazards on the road. The absence of road signs was confirmed by Viljoen. The Joint Minute by the experts indicates that in February 2010, some seven months after the accident, the speed limit on that road was 80 km/h. It changed again at some stage, as Grobelaar found it to be 100 km/h in July 2014. No evidence was led by the defendant in this respect, nor were Viljoen and Frost

challenged on their evidence regarding the speed limit on the day of the accident. I accept therefore, that the speed limit on that road was 100 km/h on the day of the accident. Viljoen travelled at 120-130 km/h and testified that the plaintiff's vehicle was travelling at a slower speed than he was. In the absence of any other evidence, it is accepted that the plaintiff travelled at a speed of approximately 100 km/h.

[35] The accident occurred about twenty minutes before sunset, and the experts agree that the sun would have been on the plaintiff's right hand side. Comments in Steenkamp's summary regarding visibility at sunset are relevant. Under the heading "Environmental Considerations", he makes the common-sense remarks that "At sunset our eyes must adapt to the changing level of brightness and it becomes more difficult to recognise threats to road safety. Although the sky may still be light, the road will be darker with deep shadows and there is less contrast in colours. It will leave drivers closer to any hazard and leave a much reduced stopping distance".

Steenkamp referred to two articles by American author and engineer **John C Glennon** which the plaintiff obtained some time after Grobelaar completed his report. These were titled "**Effect of Pavement/Shoulder Drop-Offs on Highway Safety"** and **"A Primer on Roadway Pavement Edge Drop Offs.** These articles also form part of the papers in the Trial Bundle. It became clear that the views and technical explanations of Glennon match those of Grobelaar in all respects. During the course of his evidence, Grobelaar indicated that there was nothing in those articles, contrary to his findings and explanations regarding the edge breaks, drop –offs and the manner that these impact on vehicle behaviour and driver reaction in accident matters.

[36] The plaintiff's evidence is that she is not a speedster, and did not drive at high speeds. She explained that during the time that she participated in endurance horse riding (for which she holds South African colours), she would drive her horses as well as those of other people around the country to the different events. Driving these trucks was her part time job. She is in possession of a licence to drive heavy duty vehicles, which cannot be driven at speed. The bakkie she was driving was not built for speed, so she did not drive it at a high speed. Viljoen's evidence that when he overtook the plaintiff's vehicle, it was travelling slower than his vehicle, lends credence to the plaintiff's evidence regarding her driving habits. The defendant alleges that the plaintiff drove at a speed that was excessive in the circumstances, without specifying what those circumstances are.

[37] In view of the evidence relating to the plaintiff's driving habits and her speed at the time of the accident, I am unable to find that she travelled at an excessive speed. Although her evidence is that she has travelled on this road many times before, she could not be expected to know of the seriously deficient state of the road, at the point where her vehicle was overtaken by Viljoen. Given the evidence of the various witness outlined above, I am inclined to accept the probability that the accident happened as a result of the plaintiff moving instinctively to the left of the road, as she was being overtaken by Viljoen, in the belief that she was still on the tarred surface of the road, as she was unable to see the severe edge break and drop off present at that point in the road due to the shadows cast by the setting sun. The result is the accident which

happened as described by Grobelaar and confirmed by Steenkamp.

[38] I turn now to the issue of whether the defendant was negligent in this matter and whether such negligence caused the accident. The defendant has admitted that he is responsible for the road on which the accident occurred, and that he owed a duty of care, to the members of the public who use this road, to undertake proper and regular inspection, repairs and maintenance of the road to ensure the reasonable safety of such road users. The Free State Manual, which sets the benchmark to be followed by the defendant, reiterates the purpose and importance of proper road maintenance. In terms of the standards set by the Free State Manual, it is evident that the road on which the plaintiff travelled fell far short of such standards and was allowed to deteriorate to the point where the deficiency in the road was so serious as to be classified degree 3. The photographs taken by Frost as well as those taken by the police shortly after the accident, provide a visual depiction of how the edge break has ingressed into and obliterated the yellow line and, in some places, went beyond the yellow line into the travelling lane of motorists. The height of the drop off also caused a serious safety hazard, with the result that traffic could not and ought not to have utilised the shoulder of the road.

[39] The worksheets reflecting road maintenance undertaken by the defendant on this stretch of road show that repair work was undertaken mainly in respect of potholes on the surface of the road. There was no maintenance or repairs done to the shoulders

of the road for a period of four years prior to the accident, in spite of Mr Poonyane drawing the hazardous condition thereof to the attention of senior functionaries in the employ of the defendant. After the accident there was what has been described as a “flurry of activity “ to effect repairs to the shoulders of the road. No explanation whatsoever has been forthcoming from the defendant as to why it failed to repair or maintain the shoulders of the road and what the reasons are, if any, for allowing the road to deteriorate into the condition that it was in at the time of the accident. In view of Mr Bergh’s evidence and that of Mr Poonyane, it is clear that the poor and dangerous condition of the road developed over a period of a number of years, due to neglect on the part of the defendant and/or his employees. The evidence of Grobelaar was unchallenged in its entirety, as the defendant declined to cross-examine him. The rest of the state witnesses were not seriously challenged, other than to suggest to them that they were not present at the time of the accident and cannot say what happened.

[40] In applying the test for negligence as established in the case of Kruger *supra*, it is clear that a reasonable man (*diligens paterfamilias*) in the position of the defendant would have foreseen the reasonable possibility that his conduct in failing to properly maintain and repair the road on which the plaintiff travelled, and in allowing it to deteriorate to the hazardous condition it was in, would result in a person (in this case the plaintiff) being injured and suffering patrimonial loss in consequence thereof. The reasonable man would certainly have taken the appropriate steps (such as regular inspection, repair and maintenance of the road) to guard

against the occurrence of an accident, especially one as serious as that which the plaintiff was involved in. It is patently obvious that the defendant and /or his employees failed to take such steps necessary to prevent the damage and loss suffered by the plaintiff. In my view, the accident was caused as a result of the poor condition of the road, which condition can be attributed to the negligence of the defendant in failing to maintain the road in a proper condition to ensure the reasonable safety of the users of that road. The defendant in so conducting himself, breached the duty of care that he owed to the members of the public, and specifically the plaintiff, using that road.

[41] As indicated earlier, the defendant bore the onus to prove the pleas he raised, namely that there was a voluntary assumption of risk on the part of the plaintiff, who was warned about the condition of the road on the day of the accident, but nevertheless chose to drive on the shoulder, and that her negligence contributed to the accident. Both Viljoen and Frost testified that there were no road signs present at the time of the accident, Frost having driven all the way to Dealesville and back to look for such signs. They were not challenged on this aspect, nor was any proof to the contrary tendered by the defendant. Similarly with regard to the allegation that the plaintiff's negligence contributed to the accident, the defendant failed to lead any evidence in this regard. Mr Mene valiantly attempted to bolster the defendant's case by arguing that the plaintiff's loss of memory in respect of the accident was too convenient, suggesting that she was not being truthful about her lack of memory. The evidence tendered by the plaintiff, however, put paid to this line of argument. Mr Mene also argued, without

success, that the plaintiff drove at a speed that was excessive at the time. No proof of this was forthcoming. The ultimate outcome is that the defendant failed to prove the allegations in respect of which he bore the onus, namely voluntary assumption of risk and contributory negligence. The plaintiff, on the other hand, did discharge the onus on her to prove the manner in which the accident occurred, that the defendant was negligent and that such negligence caused the accident. The plaintiff is, accordingly entitled to recover 100% of her agreed or proven damages against the defendant.

COSTS

[42] The usual order is that costs (normally on the party and party scale) follow the result, hence the plaintiff is entitled to a costs order in her favour. Mr Mullins indicated from the outset, during his opening address, that he would seek a punitive costs order (on the attorney and client scale) against the defendant, and repeated this intention on more than one occasion during the course of the trial. A punitive costs order is made by the court, usually to demonstrate its displeasure at the manner in which a party conducted himself in the course of the litigation between the parties, or in the course of the trial. The conduct of the defendant and especially of his employees in this matter displays, in my view, a lack of appreciation of, or a cavalier disregard for the duty on a public entity (such as the defendant) to behave ethically and especially to protect the public purse, by ensuring that it does not litigate in a manner that causes the unnecessary escalation of costs.

[43] From the time the defendant received the summons, he and/or his functionaries, would have been eminently aware of the condition of the road in question, and that the required standards of road maintenance, prescribed by its own Maintenance Quality Standards Manual, were not adhered to. Yet, the defendant proffered a plea, which was manifestly inaccurate and untrue. The report of the defendant's expert, Steenkamp was dated February 2018 and filed on 30 April 2018. The report of the plaintiff's expert, Grobelaar, although dated 4 November 2014, was served on the defendant on 7 May 2018. It ought to have become immediately apparent that the defendant's expert agreed, in a large measure, with the plaintiff's expert. If there was any doubt, the Joint Minute by the two experts (filed a day before the trial in this matter commenced on 4 December 2018), where they agreed on all material matters regarding the accident, would have put the matter beyond any doubt. It was incumbent on the defendant at that stage, to have initiated discussions with the plaintiff in order to ascertain if the matter could either be settled, or issues curtailed. It seems that some overtures may have been made by the plaintiff, but which came to naught, prompting the response by Mr Mullins that he would seek a punitive costs order against the defendant.

[44] The conduct of the defendant and/or his employees during the course of the trial, is a further demonstration of their unreasonable and obstinate approach to the litigation in this matter. The plaintiff was obliged to secure the attendance of Grobelaar at court, and he remained in attendance from the start of the trial on 4th December 2018 until he concluded his testimony at the end of the day on 5th

December 2018. The defendant refused to give any indication prior to Grobelaar testifying, of whether they will accept his report, in order to obviate calling him. After he testified for almost a day and a half, the defendant indicated that they had no questions for him in cross-examination, which effectively meant that the defendant accepted his report. It seems that this was also the attitude of the defendant in respect of the Joint Minute by the experts. It was only during the cross-examination of the plaintiff's third witness, Mr Frost, and after being pressed to do so, did Mr Mene indicate that the defendant does not "quibble about the Joint Minute". Mr Mene's difficulty in obtaining clear and reasonable instructions continued throughout the trial, as indicated by the many instances that he requested time to take further instructions.

[45] A disturbing instance of the defendant's failure to properly instruct its legal team, is when Mr Mene indicated that he received photographs either that morning (4 December 2018) or the day before, ostensibly emanating from a visit by an engineer to the accident scene. It was put to Mr Frost that the engineer used a tube of Lip Ice (which is a brand of lip balm), to measure the drop off on the road and arrived at a measurement of 67mm. Even at that late stage, the defendant insisted that the road was in a reasonable condition. This very late disclosure by the defendant to the plaintiff and its own legal team that he sent out an engineer to the scene is perhaps a good example of the cavalier disregard, I referred to earlier, of the duty on the defendant as a public entity to behave ethically and litigate in a manner that avoids the unnecessary escalation of costs.

[46] The plaintiff was obliged to incur the costs of proceeding to trial, engaging counsel and calling four witnesses, two of whom were experts. Added to this is the fact that she had to wait nine years after the issue of summons to have her matter heard, a matter which ought not to have come to court in the first place, due to unmeritorious defences being raised, which had no prospect of success. I am in agreement with Mr Mullins' submission that this is a fitting case for the grant of a punitive costs order, together with an order for the related costs sought by the plaintiff

[47] In the circumstances, I make the following order:

47.1 The defendant is liable to the plaintiff for 100% of her agreed or proven damages, arising out of the injuries she suffered in a motor vehicle accident, which occurred on 27 July 2009 on the road between Dealesville and Bloemfontein;

47.2 The defendant is ordered to pay the plaintiff's taxed or agreed costs on the scale as between attorney and client, such costs to include:

47.2.1 The costs of senior and junior counsel;

47.2.2 The reasonable preparation/qualifying, travelling, accommodation and reservation fees and expenses of the experts, Mr AO Bergh and Mr B Grobelaar;

47.3 Mr GR Frost and Mr C Viljoen are declared to have been necessary witnesses in respect of this trial.

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S. NAIDOO, J

On behalf of Plaintiff:	Adv. J Mullins SC, with Adv J Zietsman
Instructed by:	Honey Attorneys Honey Chambers Northridge Mall Bloemfontein (Ref:HLB/lmv/17592)
On behalf of Defendant:	Adv. B Mene
Instructed by:	JMA Engelbrecht Office of the State Attorney 11th Floor Fedsure Building 49 Charlotte Maxeke Street Bloemfontein (Ref: 739/201000668P15V)