



THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Reportable: yes/no Circulate to other Judges: yes/no Circulate to Magistrates: yes/no

Case Number 1137/2019:

JOHANNES BENJAMIN BUYS

Plaintiff

and

MANGAUNG METROPOLITAN MUNICIPALITY

Defendant

CORAM: BERRY, AJ

HEARD ON: 03 MARCH 2023

DELIVERED ON: This judgment was handed down electronically by email to the parties' representatives and by release to SAFLII. The date and time for hand-down is deemed to be 15h00 on 27 March 2023.

JUDGEMENT BY: BERRY, AJ

JUDGMENT

- [1] Quantum and merits were separated.
- [2] The Plaintiff was involved in a motor vehicle accident on the morning of 12 July 2016 at around 06:05.
- [3] The Plaintiff claims he drove over a speed hump which was being constructed by a sub-contractor of the Defendant in Louw Wepener Street (eastern direction), Dan Pienaar, Bloemfontein.

- [4] The Defendant denies that the accident occurred on the specific site and raises a defence that construction on the specific speed hump has not started on the morning of 12 July 2016.
- [5] The Defendant sub-contracted the construction of two speed humps in the double carriage way to the west and two speed humps in the double carriage way to the east, over the period 07 July 2016 to 14 July 2016.
- [6] For the purposes of trial, a sketch plan was handed up which marked the two speed humps in the western direction as speed humps number one and two and the speed humps in the eastern direction as speed humps number three and four. They were constructed in the order they are numbered on the sketch plan.
- [7] Speed humps one and two regulates the traffic travelling in the double road to the west and speed humps three and four regulate the traffic travelling in the double road to the east.
- [8] The Plaintiff testified that on the morning of 12 July 2016 he left his house at approximately 05:45 to travel to work. This is his normal routine as he works in the construction industry and needs to be on site before 07:00 in the morning.
- [9] The Plaintiff was working on road construction on the N1 road at the time the accident occurred.
- [10] On his way to work he turned left (eastern direction) into Louw Wepener Street.
- [11] He drove over speed hump number three and proceeded some 140 meters to speed hump number four. He was driving in the right lane of the double carriageway.
- [12] He drove the same route the previous weeks to his work and on the morning of the accident he drove over speed hump three, which according to the Plaintiff, was finished and already painted.

- [13] The vehicles headlights were on bright, and the street was properly lit by streetlights.
- [14] It was winter, thus it was still dark at the time of the accident.
- [15] The Plaintiff testified he drove into a partially constructed speed hump which is identified as speed hump number four on the sketch plan. This was the last speed hump to be constructed.
- [16] The vehicle came to a standstill with the front and back wheels straddled over the top of the partially constructed speed hump.
- [17] He injured his back, got out of the vehicle, and phoned his wife for assistance.
- [18] He leaned on the right front seat of his vehicle and observed the partial construction work whilst waiting for his wife.
- [19] He saw that his vehicle's front wheels drove over gravel and cement bricks, whilst the tar ramps on both sides of the speed hump were not constructed yet.
- [20] According to the Plaintiff there was no warning signs indicating that construction work was in progress.
- [21] The Plaintiff testified that he did not notice any permanent warning signs indicating that there were speed humps ahead, or any chevron danger signs.
- [22] The Plaintiff's wife, Mrs Buys, testified that she received a call from the Plaintiff at around 06:05 advising her that he was involved in an accident.
- [23] He told her where he was, and she went to the accident scene.
- [24] On arrival the Plaintiff told her his back was injured and she assisted him to get into her vehicle and took him to the Mediclinic Hospital.

- [25] On their way to hospital, she phoned a colleague who came to fetch the vehicle and tow it back to their residence.
- [26] The vehicle was insured under her policy, and she made arrangements for the vehicle to be towed and repaired, whilst the Plaintiff was in hospital.
- [27] Mrs Buys also testified that she drove over speed hump number three on her way to her husband.
- [28] On arrival at speed hump number four she passed the Plaintiff's vehicle in the left lane and then parked her vehicle in front of his vehicle. The construction of the speed hump in the left lane has not started.
- [29] She walked to her husband and assisted him to walk to her vehicle.
- [30] She noticed the partially constructed speed hump where her husband was waiting for her at his vehicle.
- [31] The Defendant denies that construction work started on speed hump number four, prior to the morning of 12 July 2016.
- [32] The consulting engineer for the Defendant (Mr Venter) testified that he was the project manager on behalf of the Defendant. He conducts an independent civil engineering consultancy business.
- [33] As project manager he represented the Defendant on the construction site, and health and safety ultimately rested on his shoulders.
- [34] Mr. Venter testified that construction started on 07 July 2016 and he visited the site daily and took photos of the progress.
- [35] He only took photos of the work that was being done on the day in question, to enable him to report progress to the Defendant.

- [36] The speed humps were constructed by milling the top level of the tarmac from the existing street for about 1 meter on both sides of the speed hump.
- [37] Milling is a process where a machine breaks up the top layer of the tarmac, without damaging the backing or filling of the road. Thus, only the top layer of the tarmac is removed.
- [38] The milling is done to create space where a new tarmac ramp can be constructed and the foot of the ramp would have space to “kick” against the existing tarmac, to prevent the ramp from moving.
- [39] The speed hump’s top is constructed by compacting a gravel filling to the required height and then laying cement bricks on top of the gravel filling.
- [40] The gravel and the cement bricks are placed on top of the existing tar surface and only the tar road on each side of the ramp (front and back) is milled.
- [41] A tar ramp raising to be level with the top of the cement bricks is constructed on both sides of the speed hump. The new tarmac ramp “kicks” against the edge of the existing tarmac, in place of the flat tarmac which have been removed with the milling process.
- [42] The photos Mr Venter took were admitted as evidence.
- [43] The photos are numbered and shows the date and time when the photos were taken.
- [44] Mr Venter testified that the construction of the next speed hump would not start before the previous one was completed.
- [45] He also testified that there were warning signs for the construction work on site and that the contractor met all safety requirements.

- [46] Each photo has a computer printout which shows the date and time the photo was taken and is numbered in sequence to the actual photo. Thus, reference will be made to the photos as photo number one and photo number three, whilst photos two and four are the computer printout showing the date and time.
- [47] Photo one shows that on 07 July 2016 at 08:59 the speed hump in the left lane is completed and the open for traffic whilst the right lane has been milled (traveling in western direction).
- [48] The construction would be completed in one lane and then the other lane, before moving onto the next speed hump. This methodology was used to manage traffic flow.
- [49] It is evident from the photos that milling of both lanes occurred at the same time, but that construction would first be finished in one lane and then the lane would be opened to traffic before construction would commence in the other lane. Photos five, thirteen and nineteen illustrate the ramps to the top of the speed hump are completed on one lane and the road is opened for traffic, whilst the gravel and brick work in the other lane are first constructed, where after the tarmac ramp will be laid.
- [50] The tarmac ramp could not be laid before the gravel and brick work is completed, as the tarmac need to rest against the compacted gravel level to the top of the cement bricks and “kick” against the tarmac road, where the existing surface has been removed.
- [51] Photo eleven shows a completed speed hump number one at 10:01 on 08 July 2016.
- [52] Photos thirteen and fifteen show speed hump number two constructed halfway, with the right lane open for traffic, showing the compacted gravel filling and bricks laid in the left lane. The tarmac ramps were still to be constructed at 10:46 on 11 July 2016.

- [53] It was weekend from 09 and 10 July 2016, thus no construction work was done on these two days.
- [54] Mr Venter testified on behalf of the Defendant that one speed hump would be constructed and finished, before construction work on the next one would start, to manage the impact on traffic.
- [55] Photo twenty-one shows that the milling for speed hump three (eastern direction) is almost completed on both sides of the speed hump at 10:48 on 11 July 2016.
- [56] Photo twenty-one, with photo nineteen, shows that construction on speed hump two was still ongoing, when milling of the tarmac of speed hump three started.
- [57] This is in contrast with Mr Venter's testimony that a speed hump would be completed before work on the next one started.
- [58] Mr Venter also testified that a speed hump would normally be completed in a day.
- [59] Mr Venter responded that he did not consider milling as part of the construction process when he was confronted with the contradiction in his testimony.
- [60] Photo twenty three shows that the right lane of the third speed hump is completed and open for traffic, whilst construction on the left lane is in progress on 12 July 2016 at 10:26.
- [61] Photo twenty-three contradicts Mr Venter's testimony that a speed hump would be completed in a day. It shows that speed hump three was milled on 11 July 2016 at 10:48 (photo twenty-one), whilst the construction of the speed hump proceeded on 12 July 2016 at 10:26.

- [62] Photos twenty five and twenty seven show that the right lane of speed hump three is completed and the brickwork is being layered on the gravel filling for the left lane at 10:27 and 10:28 on 12 July 2016.
- [63] The only conclusion is that speed hump three could not have been finished on 11 July 2016, whilst the milling started on 11 July 2016. In contradiction to Mr Venter's testimony.
- [64] When Mr Venter was asked whether the milled road would create a safety risk, he was adamant that it would not as only the top layer of the tarmac was removed, or alternatively the milled tar would be left on the road.
- [65] The top layer tarmac that was removed is between 50 and 70 cm thick.
- [66] Mr Venter was evasive about the height of the completed speed hump and insisted that it was about 10 cm high and that the cement bricks are about 80 mm thick.
- [67] Even when he was shown on photo twenty-five, that the gravel was much higher than two cement bricks laying on top of each other (160 mm), Mr Venter would not make any concession and persisted that the height of the gravel was 10cm.
- [68] Photo twenty-nine shows that the right lane is completed and open for traffic at speed hump four, whilst the gravel and cement brick work is being done on the left lane at 12:09 on 13 July 2016.
- [69] All the photos show permanent chevron signs which was installed prior to the construction of the speed humps.
- [70] Photos thirteen, twenty-three, twenty-seven and thirty-three show that there were construction warning signs on site during construction.

- [71] Photo nineteen show permanent speed hump warning signs which were installed before construction started.
- [72] According to Mr Venter construction did not start on speed hump four before 13 July 2016, thus the defence that the accident could not have occurred at the construction site on 12 July 2016.
- [73] The defence put to the Plaintiff is that he must have been involved in an accident at another place and was concocting a story that it occurred at the construction site, to pursue a claim against the Defendant.
- [74] The Plaintiff's claim is supported with hospital records that show he was admitted at the Mediclinic Emergency section at 07:07 on 12 July 2016.
- [75] The Plaintiff also handed up a quotation for the repair of the vehicle dated 25 July 2016.
- [76] Of concern is the Plaintiff and his wife's testimony that they drove over a completed speed hump number three on the morning of 12 July 2016.
- [77] Photo twenty one shows that the milling at speed hump three was almost completed at 10:48 on 11 July 2016 and photo twenty five shows that construction on speed hump three was still ongoing at 10:28 on 12 July 2016.
- [78] They could not have driven over a completed speed hump number three on the morning of 12 July 2016 at around 06:00.
- [79] It is almost seven years since the incident occurred. Mistakes regarding the construction phase of the third speed hump, does not necessarily equate to untruthfulness.

[80] As quoted in **Milfi v Klingenberg** Case Number 2/97 Unreported [1998] ZALCC 7 par 79-81 from the 1984 Olive Schreiner Memorial Lecture delivered by Judge HC Nicholas¹.

“A witness is proved to be in error where his statements are contradicted by the proven facts or where he is guilty of self-contradiction. Where he has made contradictory statements, since both cannot be correct, in one at least he must have spoken erroneously. Yet error does not in itself establish a lie. It merely shows that in common with the rest of mankind the witness is liable to make mistakes. A lie requires proof of conscious falsehood, proof that the witness has deliberately misstated something contrary to his own knowledge or belief.

[81] I find the testimony of the Plaintiff and his wife credible even though they are mistaken that speed hump number three was completed on the morning of 12 July 2016.

[82] It would have been beneficial if the Plaintiff could call the person (Mr Luus) that came to tow his vehicle to his residence, but he unfortunately resides in New Zealand.

[83] Mr Venter’s unwillingness to make the concession that milling is part of the construction (photos nineteen and twenty-one), is an effort to get away from his testimony that construction on the next speed hump would only start, once the previous one is completed.

[84] His unwillingness to concede that leaving a milled road open overnight (photos twenty-one, twenty-three and twenty-five), will create a safety risk, raise serious questions about his impartiality, even though he renders services as an independent contractor for the Defendant.

[85] Mr Venter was ultimately responsible for the safety on the construction site, even though the Defendant has its own health and safety inspectors.

¹ “Credibility of Witnesses” Olive Schreiner Memorial Lecture, 24 August 1984, 33 published in 102 SA Law Journal (1985) 32.

- [86] I do not find Mr Venter a credible witness. Thus, I do not accept his evidence that construction work on speed hump four did not start before the morning of 12 July 2016.
- [87] The Defendant created the dangerous situation in the first instance and had to ensure a member of the public traveling on a public road, cannot access the construction site.
- [88] The question is what apportionment must be applied.
- [89] It was 06:00 in the morning and the construction workers were not on site yet, thus the construction site should have been blocked off to ensure members of the public cannot access the site.
- [90] The distance between speed hump three and four is 140 meters.
- [91] The Plaintiff drove a light weight KIA delivery vehicle which is quite high. His testimony was that the front seat is so high that he could lean on it to support his back, whilst he was waiting for his wife.
- [92] The Plaintiff testified that he drove over speed hump three without any difficulties and that he travelled between 40 to 60 kilometres per hour when he ran into the gravel with the brick layered on top.
- [93] The Plaintiff travelled the route frequently and was familiar with the route.
- [94] The weather was good and the street lights were on.
- [95] The Plaintiff drove with his headlights on bright as there was no traffic.
- [96] The Plaintiff did not keep the necessary look out whilst he was driving, thus his testimony that he did not even see the permanent warning signs next to the road.

[97] I find that the Defendant should be held liable for seventy percent of the Plaintiff's damages.

ORDER

[98] The following Order is made:

1. The Defendant is liable for seventy percent of the Plaintiff's damages, which are to be proven at a later stage.
2. The Defendant is ordered to pay the cost of the trial to date.

AP BERRY, AJ

APPEARANCES:

For the Plaintiff:

Adv. L Pohl SC

Instructed by:

Honey Attorneys

(Ref: HLB/jjm/I28722)

BLOEMFONTEIN

For the Defendant:

Adv. H Cilliers

Instructed by:

Phatshoane Henney Inc

(Ref: J van den Bergh/SJ/THE110/0226)

BLOEMFONTEIN