



Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

	Y E S / N O
Reportable: Of Interest to other Judges: Circulate to Magistrates:	Y E S / N O
	Y E S / N O

Case No. 4312/2021

In the matter between:

LOURENS JOHANNES DU TOIT

1ST PLAINTIFF

MADELEIN DU TOIT

2ND PLAINTIFF

LOURENS JOHANNES DU TOIT N.O.

(In his capacity as the biological father and guardian of

ILOUDIE CATHARINA DU TOIT)

3RD PLAINTIFF

and

THE MEMBER OF THE EXECUTIVE COUNCIL:

DEPARTMENT OF POLICE, ROADS AND TRANSPORT,

FREE STATE PROVINCE

DEFENDANT

CORAM:

GUSHA, AJ

HEARD ON:

11, 12 & 14 APRIL 2023, 27-29 NOVEMBER 2023

DELIVERED ON:

12 FEBRUARY 2024

- [1] This is a claim for payment of damages resulting from a motor vehicle accident which occurred on the 1st April 2021 on the Theunissen and Winburg Road (R708).¹
- [2] The parties agreed to separate the issues and defer quantum for later adjudication. Accordingly, I am called upon to adjudicate only on the merits. Essentially the court is called upon to adjudicate whether, in the circumstances of this case, the damage must rest where it falls or whether the defendant is liable for the plaintiffs' proven or agreed upon damages.
- [3] The germane and undisputed facts are that on the said date the 2nd plaintiff was the driver of a 1999 Land Rover TD 5 with registration [...] FS. With her in the vehicle was her minor daughter, Illoudie. The road they travelled on was wet as it had been raining at the time. It is further not disputed that she was involved in an accident whilst driving the said vehicle. As a result of the accident she and her daughter sustained injuries and her daughter was transported from the scene for medical treatment. The vehicle she drove was written off due to the extensive damage it sustained.
- [4] It is further not in dispute that at all material times the 1st plaintiff was the owner of the motor vehicle.

¹The R708 which resorts under the control of and management by the defendant.

[5] The parties however hold divergent views on what the cause of the accident was. It is the plaintiffs' pleaded case that the accident occurred when the 2nd plaintiff drove through a pothole on the road, lost control of the vehicle and it overturned.

2

[6] The defendant denies the averments made in the plaintiffs' particulars of claim in this regard and specifically denies the existence of any pothole(s) on said road.³ The defendant further pleaded, that in the event its defence as alluded failed, then the accident occurred as a result of the 2nd plaintiff's negligence.⁴ As this claim was not pursued at trial, save for the order I make at the end, nothing more needs to be said thereabout.

[7] It is further the plaintiffs' stated case that the defendant had a duty of care towards the plaintiffs and all other road users travelling on the R708, which duty included the duty to;

"...2.4.1. provide safe roads;

2.4.2. take all steps reasonably necessary and possible to prevent the possibility of an accident due to unsafe road conditions;

2.4.3. maintain the road in such a condition as to prevent the occurrence of accidents as a result of potholes;

2.4.4. to provide and maintain a level, solid road surface free of potholes;

² Index – pleadings page 7 para4.3.

³*Supra* at page 29 para 8.

⁴*Ibid* at page 31-38.

2.4.5. sufficiently warn the plaintiffs and users of the road of an uneven road surface containing potholes.”

[8] With regards to the duty of care it owed as averred by the plaintiffs, I reproduce herein the defendant’s plea without emendation;

“Save to admit the allegation in this paragraph, the Defendant specifically pleads that the said duty of care and maintenance of public roads was rendered within the financial and operational resources available to the Defendant’s department.”⁵

[9] This defence however was not persisted with at trial. It is accordingly therefore not in dispute that the defendant owed a legal duty to members of the public using the R708 to take reasonable steps to inspect, repair and maintain the R708 and to ensure that it was safe for travel thereon.

[10] Manifestly, the plaintiffs’ claim is predicated upon the alleged omission on the part of what in effect is a public authority. In order to be successful, the plaintiffs must prove on a balance of probabilities that the omission relied upon was negligent, wrongful and must prove factual and legal causation.⁶ Put differently, this court must first decide whether the plaintiffs have established if there was an omission in relation to the harm that forms the basis of their claim. Then, assuming that the plaintiffs establishes such an omission, this court must then decide whether the omission on the part of the defendant was wrongful. Thereafter this court must consider whether, in the particular circumstances of the case, there was fault on the defendant’s part. Assuming there is, this court must then consider whether the plaintiffs have established both factual and legal causation in relation to the harm they suffered. In respect of the question

⁵*Ibid* at page 30 para 11.

⁶ ***Van der Merwe v MEC Public Works, Road and Transport and another*** [2019] ZAFSHC 6 (28 February 2019) at para [16]).

of legal causation, whether as a matter of public policy, the defendant should be held liable for the harm in the circumstances of the case.

[11] It is against this backdrop that the court is called upon to adjudicate whether the accident in question and resulting damages were as a result of the negligence of the defendant.

[12] The test for negligence is trite and has been traversed sufficiently by our courts over the years and no benefit will be served by repeating it here.⁷

[13] It is furthermore trite that a negligent omission, unless wrongful will not give rise to delictual liability. In ***Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd 2006 (3) SA 138 (SCA)*** Brand JA, at 144A-C, para 10,⁸ explained the requirement of wrongfulness as follows:

"Negligent conduct manifesting itself in the form of a positive act causing physical damage to the property or person of another is prima facie wrongful. In those cases, wrongfulness is therefore seldom contentious. Where the element of wrongfulness becomes less straightforward is with reference to liability for negligent omissions and for negligently caused pure economic loss (see eg Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) ([2002] 3 All SA 741) in para [12]; Gouda Boerdery BK v Transnet 2005 (5) SA 490 (SCA) ([2004] 4 All SA 500) in para [12]). In these instances, it is said, wrongfulness depends on the existence of a legal duty not to act

⁷***Kruger v Coetzee*** 1966 (2) SA 428 (AD).

⁸ See also ***McIntosh v Premier, KwaZulu-Natal and another*** 2008 (6) SA 1 (SCA).

negligently. The imposition of such a legal duty is a matter for judicial determination involving criteria of public or legal policy consistent with constitutional norms..."

[14] In an endeavour to discharge the onus so placed on them, the plaintiffs presented the evidence of the following witnesses: Mrs. Madelein Du Toit, the 2nd plaintiff and the driver of the vehicle, Mr Roelof Du Toit (Du Toit Snr), Mr Lawrence Du Toit, the 1st plaintiff and owner of the said vehicle.

[15] As the dispute between the parties centers around the existence or not of a pothole on the R708 at the time of the fateful accident, I shall for purposes of this judgment concentrate only on that aspect and very briefly so. The 2nd plaintiff testified that she was familiar with the R708 as she often travelled thereon as a passenger. On the morning of the 1st April 2021 day whilst driving on the R708, she kept below the requisite speed limit⁹ as it rained heavily at the time, in fact it rained since the previous evening. Whilst driving she drove through something and lost control of the vehicle, it skidded and veered off the road and ultimately overturned. At the time of the accident she did not know nor see what she drove through, she was only informed after the fact that she in fact drove through a pothole.

[16] Her cross examination mainly centered on the existence of the pothole. Most importantly she was incessantly quizzed on whether she definitively knew, that which she drove through was a pothole. She conceded and testified that she was informed after the fact by her father-in-law that she hit a pothole. She was however adamant that the reason she lost control of the vehicle was as a result of

⁹She drove at 80 kilometers per hour.

something she drove through, and that it was probable that because the road was wet she may not have seen the pothole.

[17] Mr Du Toit Snr testified that the 1st plaintiff is his son, the 2nd plaintiff is his daughter-in-law and that their minor daughter Illoudie was his granddaughter. He was called to the scene after the accident, accordingly, but he did not witness the accident. He testified about the condition he found the vehicle in as well as the condition the 2nd plaintiff and his granddaughter were in upon his arrival. As he wanted to ascertain what may have caused the accident he went to the scene the following day. Thereat he took photographs depicting the R708 and its condition at the time.¹⁰ He observed skid marks on the road and same led him to an oval hole in the middle of the road. He observed that the hole has some water and small stones in it. He testified that albeit he took the photographs a day later, he was certain that, that was the point where the accident occurred as he still could observe skid marks on the road surface.

[18] He further testified that he was well *au fait* with the R708 as he regularly travelled thereon. He testified that the pothole had been there for some time and was only repaired in August 2021.

[19] During cross examination he conceded that as he had not witnessed the accident he could not state as a fact that the cause thereof was a pothole.

[20] The 1st plaintiff testified largely about the condition of the vehicle before and after the accident. He further testified with regards to how the accident affected him

¹⁰ Index: Plaintiffs' Trial Bundle pages 43-56.

and his family. He too did not witness the accident and also arrived after the fact. I shall therefore not take his evidence any further than I have as the aforementioned remained uncontroverted.

[21] This was the sum total of the plaintiffs' case.

[22] During the proceedings the defendant requested that the court hold an inspection *in loco* at the R708 at the point where the accident occurred. With regards to the pothole and the road surface I made the following observations and later placed same on the record;

- (a). on the road surface was an oval looking pothole which had since been filled in.
- (b). There were broken inverse barrier lines on the road surface. Which indicated that no overtaking was allowed from the direction Theunissen heading to Winburg but that same allowed from the opposite direction Winburg heading to Theunissen and that further no overtaking was allowed after the turn off heading to Strydenburg farm.

[23] Both counsel did not quibble with the observations made and placed on the record.

[24] In rebuttal of the claim, the defendant presented the evidence of Sergeant Pule. He testified that he was in the employ of the South African Police Service (SAPS) and that he attended to the accident scene on that fateful day and compiled the accident report and the sketch plan. Upon arrival at the scene he observed that the road was wet as it had rained the previous evening. He observed the road surface and surroundings in an endeavour to ascertain what the cause of the

accident was. Based on his observations he compiled the accident report.¹¹ In it he noted the road surface as a wet bumpy tarmac road with good road markings. He testified that upon his observations he did not see any pothole at the point where the accident is alleged to have occurred. He testified that he too knew the road very well as he regularly travelled thereon.

[25] During cross examination he conceded to making some errors in his report, amongst others, an incorrect depiction of the barrier line and not depicting where the vehicle's roof rack landed. He further conceded that he observed no road signs, and, or markings warning motorists to decrease driving speed on account of the road condition. He remained steadfast that there was no pothole and that if there was, he would have observed it when he was at the scene. He testified that albeit it rained, according to him, that stretch of the *road was such that it did not hold water, the water spilled to the side of the road.*

[26] This was the sum total of the defendant's case.

[27] As stated elsewhere in this judgment, both parties' case stands, and or, falls by whether the court finds that a pothole was present on the road and that same was the cause of the accident. As evident from the evidence led, the court is on this aspect confronted with two opposed versions. The approach by our courts to deal with irreconcilable differences is trite and needs no restating here.¹²

¹¹*Supra* fn. 9 at pages 5-8.

¹²**StellenboschFarmers' Wnery Group Ltd. and Another v Martell & Cie SA and Others** (427/01) [2002] ZASCA 98 (6 September 2002).

[28] I harbour no doubt in my mind that the plaintiffs' witnesses were honest and credible witnesses. None sought to exaggerate and or tailor their evidence, both Messers. Du Toit readily conceded that they did not witness the accident. Where concessions were warranted they readily made such concessions. I further hold the view that the 2nd plaintiff equally was an honest witness, she did not conceal the fact that she did not know what she drove through, stating only *that she drove through something*. Juxtapose this to the defendant's witness, a trained and experienced police official who by his own admission committed fundamental errors in his compilation of the accident report.

[29] *In casu* I hold the view that the probabilities favour the version as advanced by the plaintiffs. In my view, regard being had to the position where the pothole was allegedly located; the alleged size and shape of the pothole; the fact that it rained heavily the previous evening, such that the road was still wet on that fateful morning; the observations of a filled in pothole during the inspection *in loco*, the inescapable conclusion must be that the alleged pothole was indeed there at the time of the accident and was there for some time prior the accident. It is further probable that same, as a result of the heavy rains, was concealed to road users as it was in all probability filled with water.

[30] In the circumstances, I hold the view that the defendant failed in its duty of care by not repairing the pothole, and or, placing warning signs warning road users of the hazard. I further hold the view that a *diligens paterfamilias* in the position of the defendant would have foreseen that it was reasonably possible that a road user, such as the 2nd plaintiff, would suffer injury should the defendant fail to take steps to render the road safe by repairing the pothole or providing adequate warning of the said hazard. I further hold the view that by failing to repair the pothole or to

mitigate the risk, the defendant in view of its admitted duty of care, was negligent and that in accordance with the approach in **Za v Smith**¹³, the other elements of delictual liability are assumed. Thus the omission to repair the pothole or to mitigate the risk was wrongful as the defendant was in control of the road and responsible for its maintenance and should have recognized the risk posed to road users by the pothole.

[31] Having found negligence and wrongfulness on the part of the defendant, I now turn to deal with the aspect of causation. Causation in the law of delict gives rise to two rather distinct problems. The first is a factual one and relates to the question as to whether the negligent act or omission in question caused or materially contributed to the harm giving rise to the claim. If it did not, then no legal liability can arise and *cadit quaestio*. If it did, then the second problem becomes relevant, viz. whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether, as it is said, the harm is too remote. This is basically a juridical problem in which considerations of legal policy may play a part.¹⁴

[32] A plaintiff is not required to establish the causal link with certainty but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics.¹⁵

¹³**Za v Smith** 2015 (4) SA (SCA) at para 21.

¹⁴**Minister of Police v Skosana** 1977 (1) SA 31 (A) 34D-H, **International Shipping Co (Pty) Ltd v Bentley** 1990 (1) SA 680 (A)

¹⁵**Minister of safety and security v Van Duivenboden** 2002 (6) SA 431 (SCA) at 25.

[33] On the proven facts it is manifest that the accident, factually, occurred as a result of the 2nd plaintiff driving through the pothole resulting in her losing control of the vehicle. Albeit this was disputed; I could find no basis to reject the 2nd plaintiff's evidence that she drove through something. On the proven facts and the probabilities *viz*; the road was wet, it was raining heavily and she drove below the speed limit; the observations during the *inspection in loco* of a filled in pothole; the skid marks depicted on the photographs and sketch plan, what else could have caused the accident? In the circumstances of this case the most probable inference to draw is that the pothole caused the accident.¹⁶

[34] *In casu* there was no *novus actus interveniens*, the harm suffered by the plaintiffs was reasonably foreseeable and it cannot be said that the negligent omission was too far removed or remote from the harm suffered. On the proven facts I am, on a balance of probabilities, satisfied that a causal *nexus* existed between the accident and the pothole. Accordingly, there is no reason not to hold the defendant liable for the harm suffered by the plaintiff.¹⁷

[35] In conclusion with regards to whether as a matter of public policy, the defendant should be held liable for the harm in the circumstances of the case, in deciding as I do, that the defendant should be held liable as a matter of public policy, I can do no better than the remarks of the court in **Mashongwa v Passenger Rail Association of South Africa 2016 (3) SA 528 (CC)**;

¹⁶*Cooper and another v Merchant Trade Finances* 2000 (3) SA 1009 (SCA) at 1027F-1028D).

¹⁷*Loots v MEC for Transport, Roads and Public Works* (587/20140 [2018] ZANHC 60 (5 September 2018)).

"[41] *The standard of a reasonable organ of state is sourced from the Constitution. The Constitution is replete with the phrase that the State must take reasonable measures to advance the realisation of rights in the Bill of Rights. In the context of socio-economic rights the availability of resources plays a major part in an enquiry whether reasonable steps have been taken. I can think of no reason in principle or logic why that standard is inappropriate for present purposes. Here, as in the case of socio-economic rights, the choice of steps taken depends mainly on the available resources. That is why an organ of state must present information to the court to enable it to assess the reasonableness of the steps taken.* (my emphasis)

...

[68] *No legal system permits liability without bounds. It is universally accepted that a way must be found to impose limitations on the wrongdoer's liability. The imputation of liability to the wrongdoer depends on whether the harmful conduct is too remotely connected to the harm caused or closely connected to it. **When proximity has been established , then liability ought to be imputed to the wrongdoer provided policy considerations based on the norms and values of our Constitution and justice also point to the reasonableness of imputing liability to the defendant.**" [Emphasis added.]*

[36] Accordingly, I make the following orders;

1. The defendant is liable for 100% of the plaintiffs' proven or agreed damages resulting from the accident which occurred on the 1st April 2021.
2. The defendant shall pay plaintiffs' taxed or agreed party and party costs in respect of the merits which costs shall include, where applicable, the reasonable fees for travelling, accommodation, preparation and reservation for the plaintiffs' attorney and 1 counsel.
3. The defendant's counterclaim / claim in reconvention is dismissed.

NG GUSHA, AJ

On behalf of the plaintiffs'

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