



IN THE HIGH COURT OF SOUTH AFRICA,  
GAUTENG DIVISION, PRETORIA

NUMBER: 63170/2013

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<u>04 / 04 / 2019</u>	
DATE	SIGNATURE

In the matter between:

NGULULU BULK CARRIERS (PTY) LTD

PLAINTIFF

And

THE PREMIER OF THE LIMPOPO PROVINCIAL GOVERNMENT

FIRST DEFENDANT

THE MEC FOR ROADS AND TRANSPORT OF THE

SECOND DEFENDANT

LIMPOPO PROVINCIAL GOVERNMENT

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JUDGMENT

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MAVUNDLA, J.

- [1] The plaintiff claims in *delict* against the defendant for payment of the sum of R993, 529. 65, arising from alleged damages sustained to its vehicle, a truck tractor combination (haulage tractor with registration letters and numbers FGZ 958 MP, Front interlink with registration letters and numbers DTS 365 MP; Rear interlink with registration letters and numbers DTS 367 MP) drove into a porthole-like excavation along or on the R555 road between Steelpoort and Middleburg, on the 26 December 2011.
- [2] The plaintiff's damages claim is based on the defendants alleged wrongful and negligent omission, in failing to repair a road defect on the R555, or warn motorist about the road defect, which road defect allegedly rendered the truck uncontrollable (through the steering locking), causing the vehicle to leave the road and sustain damages. The road defect in question is referred to as the edge break or pothole interchangeably. The incident occurred on the piece of road R555 at portion referred to as "road P169/2 in particular at km14-15. It is common cause that the road concerned was part of a provincial road, for which the Department was responsible for management and control, including repair and maintenance, which is referred to as P169/2 between Steelpoort and Middleburg, in respect of which the defendant owed a legal duty to users of the said road to act positively to prevent harm.
- [3] The issue to be determined was wrongfulness; negligence and causation. It is trite that the plaintiff as the party alleging liability on the part of the defendant, bore the *onus* to prove all the three aforesaid issues in dispute; *vide Mobil Oil, Southern Africa (Pty) Ltd v Mechin*<sup>1</sup> where the court held that:
- "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... 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."
- [4] In order to acquit itself of the onus resting upon it, the plaintiff called the following witnesses:
- 4.1 **Mr Mcingeni Joseph Malinga**, the driver of the relevant truck on the date of the collision; He was traveling at 70 kmh along the road which has a 80 km limit. he

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<sup>1</sup> 1965 (2) SA 706 (AD) at 711E-G.



accident occurred at about 10H00 in the morning. A vehicle approached from front, he decided to avoid it by veering, unfortunately his truck hit a pothole resulting in the steering wheel locking. He lost control and the truck careened over the embankment into the veld and eventually overturned. The front approaching vehicle had straddled the barrier lane. Between the approaching vehicle and his vehicle there were potholes. There were no other vehicles in the vicinity. The approaching vehicle was about 14 to 15 meters away from him. He veered to his left to avoid the approaching vehicle. He had already seen the pothole but in the process of veering off he hit into the pothole. He knew that the road at the relevant place had potholes. He said that the pothole was beyond the yellow line. Part of his wheels went over the tarred road and the yellow line on the gravel part off the road. He had hoped that by veering to his left he would avoid colliding with the approaching vehicle. Only the left front wheel went into the pothole. On hitting into the pothole he felt a swing from left to right on the steering wheel. The truck also swung to right. The pothole was about 30 centimetres deep. There were no warning potholes signs. The speed limit at that part of the section of the road was 80 kmh. The witness drew a line on the photo at page 61. He said that the tyres of his truck are about 32 centimetre in width. In his view, but for the pothole the accident would not have occurred. His truck wheel landed in the pothole resulting in impact causing the wheel to lock. He knew that there are potholes along that road and he used that road thrice a week. There were no vehicles behind him at the time of the accident.

Under cross examination he said that he told the insurance man that he was traveling at 70 km/h. The document was not read back to him and he did not ask that it be read back to him. He was referred to page 14 of bundle part 1 of 3, containing his statement. It was pointed out to him that according to his statement at page 14 he was traveling at 80 km/h and that he saw other vehicles.

- 4.2 **Mr Quinton Louw** 31 years old employed by KVTR (Kempston Vehicle Theft and Recovery) since 2007, a company appointed by the Insurer, Captive Administrator (the plaintiff's insurer), as an insurance investigator. He was appointed to do the investigation in regard to this accident. He received instructions to investigate the accident on the 27 December 2011. He visited the scene of the accident on the 31 December 2011. He cannot recall who directed him to the scene. He was given the land marks of the scene. He was referred to bundle 5 pages 12 etc. He was present when photos were taken in July 2012, namely items 5-47. He took the photo 61, 5 days after the accident. There was cement like substances inside the pothole. The purposes were to gather facts and investigate for the insurance accompany. He was referred to top of page 1 of vol 5 and confirmed that it was his report. He spoke to the driver and a witness to the accident but cannot recall their names. In photo 3 is the circle of the pothole. He prepared the statements of the witness he interviewed. He prepared it through a computer and thereafter asked the witness to sign after he they had read that statement. He cannot recall whether they read these statement.

Under cross examination he said that he cannot recall who accompanied him when he went to the scene. He cannot recall what direction or land marks were given to him. He was supposed to investigate what happened and what could have caused the accident. The client gives him the area where the accident happened and the driver tells him what happened and he then goes to the scene. Eddy van Rensburg was at the scene. Eddie gave him a background of the matter. Eddy told him that he had already spoken to the driver and what had happened. He cannot recall whether Eddie had given him landmarks. He is not told what to do. He was told that the driver swerved to the left to avoid a Corolla and went through a pothole and lost control, moved to the right off the road over the culvert up to where his vehicle it stopped. (I must hasten to state that this is hearsay evidence to be ignored.) He was looking for the conditions of the road, the pothole, the calved he went through and the final rest place of the vehicle. The road was not in good conditions due to the potholes and the uneven condition of the road.

Louw cannot recall which land marks were given to him nor does he know whether he was taken thereto by whom. If he was taken thereto it would be Van Rensburg. If he was not accompanied there, he would have identified the place through the landmarks. The truck had already been removed. There must be another culvert in the area. There were other potholes before and after the culvert. He looked at the direction from which the truck had come from and there was only one pothole which was big enough to have caused the truck to lose control. He went there on the 30 December. He cannot recall when he interviewed the driver, but according to his report it was on the 11 January 2012. He did not go to the scene with the driver because he deemed it not necessary because he had already been there on the 30<sup>th</sup>. Van Rensburg would have been the person who accompanied him to the scene. To him it is not really important who pointed out the scene unless he is unable to locate the scene on his own. It is not important to him to have the driver accompany him to the scene. He deems it not necessary to have someone to point out to him the pothole. He cannot recall whether he was provided with photos before he went to the scene.

He cannot recall whether he met Malinga at the hospital. He said that it was not only about the speed he was travelling at he asked Malinga. In page 14 of bundle 5 of his statement he recorded the Corolla having overtaken. What is contained in his statement was what Malinga told him. He cannot recall whether he read the statement back to Malinga. He did not establish whether Malinga could read. He cannot recall whether he read the statement back to him. He disputed that he probably took a photograph of a wrong pothole. He said that the pothole was already filled up on the day he went to the scene on 30<sup>th</sup>. At that stage he could not say whether the pothole was filled up recently, but it was the only big one around



the area. He cannot say whether this pothole was filled up at the time of the accident. It was the only big repaired pothole in the vicinity. He looked at its width.

I must hasten to state that this witness visited the scene 5 days after the event, but does not know whether or not he was accompanied thereto. It begs the question as to how he would have been able to identify the exact scene of the accident. One would have expected him to have taken measurements of the pothole or filled pothole. Authorities state that it is difficult to say how an accident happened, by merely looking at the scene after some days, unless there are clear and visible signs such as break marks, skid marks and or debris at the scene. Louw conceded that he was unaware of the condition of the road on the day of the accident. I find that his evidence was merely speculative and of no value.

**4.3 Mr. Eddy Janse van Rensburg a 43-year-old testified that:**

4.3.1 he was in the employ of plaintiff as check manager and accident investigator for 15 years, was assigned on the 26 December to investigate this accident and went alone to the scene on the said date. He went to the vehicle itself to assess whether the driver was injured. He spoke to the driver who informed him that he was injured and then arranged for him to be taken to the private hospital. He did speak to him about the accident. He spoke to him as he was taken to the ambulance. His first observation was that on the right hand side the truck had veered into the embankment. On the left hand side, there were potholes and on the right, one could see the markings of the truck where it went over. He overheard the driver speaking to someone saying that he lost control of his truck as there was another vehicle and moved to the left and his steering locked. He heard him directly saying so to someone. He observed that the road had potholes. Photos 51-55 in bundle 5. Photo 54 shows the end position of the truck at the road. Photo 62 shows the end position of the truck after it had been removed. The pothole was about plus or minus 70 meters, as measured by the plaintiff's expert from the end of the truck rest position. There is a concrete substance in the pothole which was about 30 centimetres in depth. It is remarkable that this witness does not say that he himself measured the pothole. He saw tyre marks through the pothole on the edge He said that there was a black mark on the pothole, which is not reflected in the photo 61. The pothole was not fixed on the 26th December when he saw it. He uses the relevant road very often. It is in good condition up to Lobatsi ridge. There were quite a few potholes during 2011. He used the road daily during 2011. The speed limit is 60 km/h but he is guessing. He cannot dispute that it was 80 km/h. There are lot of trucks along that road. There are mines and trucks in that area. He cannot remember seeing any warning signs warning of the potholes. There was no maintenance done on that road. Local companies would repair the road to minimize costs. Page 61 there were

edge breaks in the vicinity of the pothole but no other potholes. He believes that the repaired pothole in 61 is the vey one Malinga drove through. But he cannot recall when he spoke to Malinga. It could have been about 3 days after the accident. The truck was not loaded. The weight could be about 28 tons.

4.3.2 Under cross examination Van Rensburg said that his appointment as investigator was in accordance with the Occupational Safety Act s16.2. He investigates accidents for the company. His company is about 10 km away from the place where he found the truck. Primary responsibility is to give information to the insurance. He had a camera. He took photos 51-56. Photo 51 truck rest position in the veld. There is no good reason why he did not take photos of the pothole and the road at the scene of the accident. He saw the pothole on the same day but did not take pictures of the pothole. He spoke to the driver about the accident when he came back from hospital. He is not sure whether he went to the scene with Louw at all or before or after the driver had returned from the hospital. He and a colleague came across the pothole. They were looking for the reason why the steering ripped from the hands of the driver. He was of the view that it was a mechanical fault that caused the steering wheel to be ripped from the driver's hands. He looked for the condition of the road and saw the pothole. There were few other potholes which he saw before the scene of the accident. He settled on this particular pothole as it was in line with the place where the accident occurred. He saw a black mark of a tyre in the pothole. He still deemed it not necessary to take a photo. The pothole was about 30 centimetre deep. He was satisfied that he had something to work on after seeing the pothole. He wanted KVTR to further investigate and was going to give to them whatever information he had gathered. He did not mark the black mark, which I find it strange. It was the only one of that size. He had an arrangement with the insurance. He went to the scene with Louw. He conceded that he gave Louw directions where the vehicle landed. He identified the pothole to Louw. He saw the pothole on the same day he went to the scene. He is not too sure when he saw it. The condition of the road remained in a poor condition for a long time. Some companies repaired the road. Lion Xstrata repairs the roads. There are companies which repair the road themselves. It was put to him that the driver said that there are many potholes but did not identify the pothole he hit. It was further put to him that there was no pothole hit by the driver but he merely lost control. He re-iterated that he does not recall seeing any warning sign. It was put to him that the reason why he did not take a photo of the pothole is because there was none.

4.3.3 Under re-examination he re-iterated that he wanted KVTR, to come and investigate. He was satisfied that the damage was more than R100 000.00.



He said that there were black tyre marks. He does not recall telling Quinton Louw that this is the particular pothole.

4.3.4 I must hasten to state that van Rensburg, who professes to have been an accident investigator for 15 years, having spoken to the driver of the truck, having been told of the steering wheel locking and the truck having gone into or through a pothole, failed to take a photograph of the relevant pothole on the same day of the accident, leaves much to be desired. With the alleged experience of 15 years, he failed to demonstrate such experience of 15 years, by not doing the most basic requirement to be expected of a seasoned accident investigator, namely capturing and preserving for future reference, the state of the scene of the accident, by taking photographs of, such as the pothole or potholes and the tyre marks, skid marks to say the least. In my view, he lacked experience to be regarded as an expert at all. I find that his evidence is of no probative value to this court and stands to be ignored, as I do. In this regard *vide IO Tech Manufacturing a Pty Ltd v Gallagher Group Ltd.*<sup>2</sup>

4.4 Mr Daniel Frederick Oosthuizen a 45 years old and engineering employee of plaintiff for about 12 years testified that:

4.4.1. He was at the scene of the accident on the day in question. He was a driver on the road as the accident happened. He was driving a double cab LVB, in the opposite direction in relation to the truck when the accident occurred. There were two other vehicles in front of him, a white Isuzu and a light Blue Corolla. These two other vehicles were driving towards Steelpoort. The blue Corolla overtook him and the Isuzu which was in front of him as well. The road is a standard two lane road allowing another vehicle to move to the other lane to overtake. When he saw the Corolla overtaking, he thought that there was going to be a head on collision with the truck travelling in the opposite direction. The truck went to its right hand side without going over the white line and after the Corolla passed he saw white dust and the truck went off the cobalt. He was referred to photo 61 and said that he was travelling down the photo. The truck moved to the white line side. Before that it was in the middle of its path of travel. When the Corolla approached he went back to the left. He then saw white dust and the truck made a sharp right move over the white line. When he saw the white dust he thought the truck wheel had burst. The Corolla at that time had already passed the truck. The truck moved through in between the Isuzu and his car. His impression

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E <sup>2</sup> 2014 (2) ALL SAS 134.

was that the truck driver steered it to the left hand side. He witnessed the full accident. He remained at the scene. He went to the truck and saw that there was lot of smoke from the truck and he removed the driver from the truck. The driver said that he his arm was injured. His phone was ringing and asked for it. He gave him his phone. He noticed that the left wheel had not burst. It was on the left hand side of the road that he saw lot of dust. Both tyres left and right front wheels he inspected. The left wheel was not deflated but the right one was. He thought the damage of the right tyre was as the result of the truck going over the culvert. He phoned the owners of the truck as well. He thought that because the left front tyre was not burst and concluded that the dust he saw was as the result of the pothole.

4.4.2 Oosthuizen said that pictures 63 is the end rest of the truck. Picture 61 shows a defect on the road on the left side. He on the day of the accident saw the pothole. He agrees with the measurement to be 70 centimetres. In terms of the dust he saw, it correspondent with what he had observed. He placed his foot in the pothole and it was about 100 centimetres under his knee. He said that the refilled pothole shown in picture 6 is the same pothole he saw that particular day. The relevant road is a busy one and he travelled along that road every day. There were no warning signs. The speed limit was 100 km/h. There were no other potholes. It is long time ago but he cannot recall seeing anyone fixing the road. It is busy main road. He cannot recall whether he was contacted about the accident. He was referred to page 15 of bundle 5. He recalls this statement. He was referred to paragraph 4 of the statement. His conclusion was that the pothole was the cause of the accident. The truck driver tried to avoid the accident and when he hit the pothole, he pulled hard as he tried to rectify. The depth of the pothole as measured when the witness demonstrated in court was about 45 centimetres. The truck was out of control. When he saw the cloud of dust he was about 50 meters away from the truck.

4.4.3 Under cross examination, Oosthuizensaid that at the scene of the accident he did not see any police vehicle. He said that he did not read his statement. The statement was taken from him by someone from the insurance. He cannot recall whether he signed his statement. He only read his statement herein court but not after it was taken. He thought that the Corolla did not cause the accident. He said that the speed on that road was 120 km/h and he was traveling at that speed. In his statement he had said that he was 500 meters behind the Isuzu. When the truck swerved out of the road he was about 50 meters away from it. The truck was much higher than his vehicle. The truck was on its correct lane, on the right hand side in relation to the path of travel of the witness. The truck moved from the surface to the left



hand. Before the truck moved to the left it moved to the right but going over the white lane. The truck did not touch the gravel but remained on the tarred road. At all times the truck remained on the tarred road. The truck had 18 sets of wheels. If it had gone off the road there would have been lot of dust. He conceded that in his statement there was no mention of a pothole and if it existed it would have been recorded.

- 4.4.4 He was referred to the evidence of the driver and Louw. He said that when he saw the dust he thought it was the nitrogen of the tyre. He was looking at the dust and after he had inspected the wheel and realised that it was not damaged, he then went to investigate the cause of the dust and then saw the pothole. He concluded that the white dust came from the pothole. After assisting the driver, he went back to the road to inspect the cause of the dust and that is when he saw the pothole. He is certain that the dust came from the pothole. There were lot of potholes in the vicinity. Between Steelpoort and Lenox there were lot of potholes. He said that on the 26 December 2011 there were other potholes before and after this one in issue. The dust could have been from previous refilling. Besides taking the driver out of the truck, he has not been with him at the scene. At the scene on asking the driver what happened, his response was that he does not know what happened. (This contradicts the evidence that the driver would have said to someone he does not know what happened.). After he discovered the pothole he informed the plaintiff's people thereof. The right tyre had burst as the result of the rocks. He is an engineer appointed in terms of the Act. He is skilled to inspect vehicles. He inspected the vehicle and concluded that the dust came from the pothole. He cannot remember what they spoke about with the investigator. The statement should have been mailed to him. He cannot remember who he concerning the pothole but it is the people who came to do inspection. He said that he has never seen the Road Department fixing this road. It was put to him that the road is a stretch of 30 klm and has a number P169/2 between Steelpoort and Stofferburg. He said that he does not know about the road identification number. He warned his fellow colleagues of the accident. He went with someone who he cannot recall, to the scene. He is aware of accident reconstruction experts. He went to the scene with road reconstruction experts. It was put to him that he had estimated the pothole to be 30 deep. He insisted that the particular pothole shown on p61 is the correct pothole. He said that the Corolla was light blue. It was pointed out to him that according to Malinga the Corolla was white. The version of Malinga that the Corolla was in the middle of the road straddling the middle lane and not overtaking any other vehicle. The truck was about 500 meters as they are approaching. He was about 500 metres from the Truck when the Corolla overtook. He said that it is not possible that the wheel could have deflated earlier before the truck veered to the left and or right.

- 4.4.5 Under re-examination he said that he is certain that the pothole at page 61 is the correct pothole which he inspected. In the vicinity of this pothole there is no other pothole. This response contradicts his version in chief that there were other potholes in the vicinity of this particular pothole.
- 4.5 The plaintiff called it's expect witness, Ms Welhma Bardenhuast a 40-year-old B.Sc. Applied Mathematics graduate who qualified herself as an accident reconstruction expert of 17 years, and testified *inter alia*, that:
- 4.5.1 she prepared a report after she attended the scene of the accident on 13 September 2013. She was accompanied by Oosthuizen who pointed out to her the pothole which was already repaired. She considered the measurement taken by KVTR which indicate the size of the road defect to be 00.9 meters and the length to be 2.8 meters in width.
- 4.5.2 The width of the lane, is 3.25 meters and the width of the defect is 0.9 meters, the actual drivable section if one wants to avoid that defect, is in the order of 2.35 meters. Further, considering a width of 2.6 meters or 2.5 meters for a typical heavy vehicle combination, the plaintiff's truck if it wanted to avoid the pothole completely, only had 2.35 meters' drivable section available and would have to go into the barrier line to fit in.
- 4.5.3 If the truck driver steered to the left, it would have resulted in the left front wheel going into the road defect and there would have been, accepting the depth as testified, a sudden drop of that left front wheel into the defect. Immediately thereafter, the wheel would have struck the opposite side wall of the road defect. There would have been a first drop, and a second impact against the opposite wall of the road defect.
- 4.5.4 The axle on which the driver basically sits on top, if that part is severely affected when the left front wheel went into the defect and collided with the opposite wall, in all probability, that would have resulted in the loss of control considering that there are two trailers pushing from behind or follow from behind.
- 4.5.5 She agrees that the distance from where the road defect was until where the truck ended was 77.6 meters. She said that it cannot be said that the road defect did not play a role in this collision.
- 4.5.6 She further stated that, if one set of wheels of the truck rotating on the gravel part of the road and the other set is rotating on the tarred road, there is a possibility that this will cause the driver to lose control of the truck.
- 4.5.7 If the driver applied brakes, it would have made little difference as the truck use "mechanical lag time". If the truck was empty, it would take a few meters before the truck comes to a complete stop.



- 4.5.8 If the Corolla had not overtaken the vehicle of Oosthuizen and the Suzy bakkie, Malinga would not have veered to the left, she cannot disagree with this version by the defendant.
- 4.5.9 According to Bardenhorst, she premised her conclusion on what she was told by Oosthuizen. The latter, in my view, is not an independent impartial witness because he is in the employ of the plaintiff. In my view, an expert, must conduct his /her own investigation premised on objective facts and make unbiased independent conclusions; he / she must not be a hired gun neither should there be such taint; *vide Sheiner NO v Aspeling*.<sup>3</sup> The court is not bound on the views of an expert, it is for the court to decide on the facts presented before it to make its own determination of the issues before it. *Vide ZS- Syndicate v 43 Air School (Pty) Ltd and Another*.<sup>4</sup> In the result, I find that the evidence of Bardenhorst is not impartial but influenced by the views of Oosthuizen who is also in my view not an impartial witness.

[5] The defendant called the following witnesses:

- 5.1 Mr Johannes Van Vuuren a 43-year-old of 33 years' experience, registered with the professional civil engineering extensively involved with road designing and services and rehabilitation of the roads and managing traffic officers doing Road Accident reports, with practical experience spans over 2000km town roads, investigation of road reports, qualified himself, in my view, as an accident- reconstruction expert. According to his evince:
- 5.1.1 On 6 March 2013 he conducted an inspection *in loco* between '4 -15 km mark on the road R555. He was furnished with certain documentation inter alia, the photographs of the accident, three 93s) sets of photographs 1-6 taken on 26 December 2011, 7-36 taken on 26 December 2011, and 37-77 taken on 5 July 2012 and police accident report.
- 5.1.2 At the inspection *in loco* he among other things took measurements of the distances from where the edge-break, which is alleged to have caused the accident is situated and where the truck rested. He looked at the terrain in general, the route and whether there are road signs and whether the road complies with the requirement standards and design guidelines set by the Road Agency Limpopo. He took pictures of the roads to consider how the edge-break affected the flow of the traffic on the day of the inspection. The photographs are part of his report.
- 5.1.3 Van Vuuren had seen the road maintenance (reports) or records of route R555 (P169/2) Section of the road. Having considered the information, he made the following findings---

<sup>3</sup> 2010 (5) SA 203 (W) at 211EE-212B.

<sup>4</sup> 2007 (6) (ECD) 389 at p 395 par [18].

5.1.3.1 that the section of the road meets the guide lines criteria set by the Road Agency distance of 400 meters at the speed of 120 km/h.

5.1.3.2 that the section of the road did not require any maintenance schedule as an indication that the patch of the potholes and edge-break was carried out prior to the accident on 26 December 2011.

5.1.3.3 that the photographs taken on 26 December 2011, photographs 1-6, clearly show the edge- break and state of the edge-break. That no repair work was required for that section. And that the road did not require any road signage.

5.1.3.4 having considered the available information, physical and documentary evidence, he came to the following conclusions:

5.1.3.4.1 that the estimated speed at which the truck may have travelled can be at about 99.2km/h;

5.1.3.4.2 that the fact that there were no skid marks visible on the road where the truck ultimately ended, is inconsistent with the allegation that the truck was out of control as the truck was not loaded, otherwise the skid marks would have been visible;

5.1.3.4.3 further, that from the photo series 1-6 taken on the day of the accident, there was no indication that the truck was out of control. In the absence of such information it is consistent that the truck was moving on a straight line;

5.1.3.4.4 that the size of the road as between kilometre mark 14 and 15 is 6.4 meters with a lane width of 3,2 meters and the width of the interlink combination being 2.48 meters in total, the tyre width of the truck is 300mm and could pass the edge-break which was 250mm without damage to the tyres, therefore the edge-break could be ruled out as the cause of the accident;

5.1.3.4.5 Further that the vehicle moving in the same direction could easily pass the edge-break without disrupting the traffic in the opposite direction.

5.1.3.4.6 that the cause of the accident was as a result of human error because sometimes drivers accurately perceive and interpret information but fail to respond appropriately because they make wrong decisions or because they make the right decision but perform a wrong response.

5.1.3.4.7 The lane width of the road is 3.2 metres and the measured width of tyre edge-break is 0.25 meters, therefore there is enough room for a truck to pass the edge-break. Further, that the tyre width of



the truck is 300mm and could pass the edge break which was 250mm without damage to the tyres. He concluded in his opinion that the edge- break had nothing to do with the accident.

5.1.3.4.8 He also prepared a supplementary report, which contained the sketch plans on pages 1-6. In the sketch plans he indicated what he called the "the green" and "red zones" the indication of the bridge and where the truck lost control and where it eventually landed. There are measurements taken in relation to each marking. They are marked "A", "B", "C" and "D": indicating certain markings of the distance the truck travelled before it came to a complete stop.;

5.1.3.4.9 after receiving Wilma Badenhorst's report, on 9 June 2014 he conducted an inspection in loco and took certain measurements at the accident scene:

He discovered that the truck driver was alleged to have been driving at a speed of about 80 km/h but there was no sign of skid marks or tyres anywhere prior to where the truck landed. He concluded that the event that followed stated close to the point "A" in the sketch which is on page 163 that is when the truck moved to the left to avoid the collision with the Corolla. After the truck had swerved to the left to avoid a collision with the Corolla, the driver by over correcting, lost control and crossed the tarred road, left the road at point "C" and ended up on the right side of the road, at point: D" as indicate in the sketch plan.

5.1.3.4.10 He further opined that the truck driver did not have a chance to apply brakes and by utilising the 2.2 seconds reaction time in combination of speed of the truck and the maximum distance can be determined by applying the following formula:

"D" = T x V where D= Distance T= Time and Velocity".

5.1.3.4.11 He further opined that the maximum distance that the truck trailer travelled at the start incident "B" as indicated on sketch plan 1 is 48.8 metres. That the second calculation, the angle of the impact of point "B" and "C" measuring 24.296 degrees by applying Pythagoras formula, the second distance can be calculating as 24.787 meters. The third calculation, the speed of the truck trailer of 80km/h = 22.22m/s + 24.78+ 1.1 second.

5.1.3.4.12 He said using the two (2) distances with a time span of 1,1 second and 2,2 seconds, one can safely say that 48.8 meters is the maximum and 24.787 is the minimum. This is marked as the red zone in the sketch plan.

5.1.3.4.13 He came to the following conclusions:

“that the origin of the accident was within the red zone indicated. Further, that if the Toyota Corolla did not start the event by reckless driving/ overtaking, the accident could have been avoided and that the accident is a direct result of the Toyota Corolla driver’s action.”

5.1.3.4.14 In his opinion the chain of events is:

That the driver of the truck swerved to the left to avoid the collision with the third party recklessly overtaking. This was the start of the events resulting in the accident. The truck driver with the left side of the wheel on the gravel shoulder, the driver of the truck trailer by trying to correct and move back to the tar surface misjudged himself and by over-correcting the truck trailer overshot to the right and ended up on the right side (point 'D).

5.1.3.4.15 The speed of 80km/h was high and the roadside ended before the driver could make a decision the truck trailer was already airborne and passed point “B” as indicated in sketch plan 1. All events prior to Point: B” happened within or less than 2.2 second, which was quick at the speed of 80km/h as the result the truck driver could not react on time thus losing control of the truck trailer resulting in the accident. The accident could have been avoided had the truck driver not been travelling at an excessive speed, and the Toyota Corolla driver not been driving recklessly. The edge break was not a factor in the case of the accident.

5.1.3.4.16 He opined that Malinga, confronted by the Corolla, steered to the left and overcompensated to the right.

Sudden application of brakes would result in the brakes locking because of the fact that it did not have any load, and the locking of brakes would result in tyre marks. His conclusion was that the driver did not apply brakes. If there is something on the road, the sudden reaction would result in applying brakes. He did not have enough time to do that regard to the time and velocity equation of determining the distance and speed. (page 165 para 17.NB. Point B and C in the sketch plan NB 17, 18, 19. The origin of the accident was within the red zone as indicated in the sketch. Based on the given speed of 80 k/h they had to recalculate and they determined that the accident was outside the red zone and the driver had already passed the defect when the accident occurred. In the previous report they tried to determine the speed of the truck and determined the speed of the truck on mathematical calculation which indicated on more than 100km/h. The origin of the accident was more likely in the centre of the red zone. The distance between the edge break and the red zone is 25,161 in the green zone. He surmises that the defect being the cause of the accident cannot be



supported. Page 166 NB 22 The driver of the truck swerved to the left to avoid a collision with the third party recklessly overtaking. The edge break was not the likely cause of the accident. This conclusion is consistent with his earlier conclusion that the human error was the cause of the accident. 80 kmh is the maximum permissible truck speed. The conclusion that the Corolla was also contributory, because it overtook two vehicles at an inappropriate moment resulting in the truck driver swerving to his left to avoid a head on collision with the Corolla, which was the root cause of the accident. Par 24, where the accident happened there was an embankment but if it had happened earlier where there was enough berth on the side and the truck driver would have managed to control and right the truck without any damage to the truck. The main cause of the accident was the Corolla.

5.2 Sergeant Ranoto Evans Kweni, a police officer of 12 years' experience, stationed at Burgersfort SAPS testified on behalf of the defendant:

5.2.1 that in 2011 in December he was stationed at Eerstergeluk, Burgersfort satellite police station. He knows about the accident of the 26 December 2011 as he was one of the police who attended the scene. He was on patrol along the Eerstergeluk area when he received a message from SAPS Radio informing that there was an accident at R555 near Sputschkop, Rte about 10 to 12 km. From the satellite. He used the R555 from North to South to get to the scene of the accident. On arrival at the scene, they found a truck written Ngululu, facing south. There was a person lying on the ground facing west, complaining of pain. It turned out that he was the driver of the truck which was severely damaged. In the vicinity of the accident there is a bridge and a river. The truck was from North to south and flew over the river. On their arrival they found people on the side and they checked the driver who was in pain as a result they could not take a statement from him. They tried to talk to him but he did not respond, besides complaining of the pain. They were given the driver's licence from an unknown person, who gave them his name and stated that the driver worked for the Ngululu Bulk Carriers. None explained to them what happened. They had to complete an AR form indicating the damages on the truck and if there are any injured people. The truck was severely damaged in front. The truck was pulling two trailers. The head was facing south with the two trailers still attached to the head. The river was not deep but there were wheels' tracks showing where the truck traversed. The truck was not that far from the river. The driver was taken to the hospital by ER while he was still on the scene. He knew the state of the road at the time because he does duties along that road. From its looks he thought the road was usable and there was no problem he observed. They did not see anything as much as they did not check because they focused on the driver. Accidents do occur along that road. He does not know of any accident caused by a pothole. From 2009 he started working in that area. R555 is a very busy road. Along that area there are a lot of mines. He is the one who opened the docket and took it to the police station where a CAS number



was allocated and transferred to the investigators. It is not true that the police never attended the scene of the accident on the day in question, as alleged. Although he was cross examined nothing of significance came out thereof. It is noteworthy that he did not say anything of a pothole. If indeed there was a 30cm deep pothole this witness would have seen it. I can only surmise that there was no pothole of the depth or magnitude contended by the plaintiff.

5.3 Mr Matebutebu David Mangwane, testified that:

5.3.1 his job is to fix roads under the department of Works in Libombo province. In 2011 he was in the employ of the Works department. His work was multifaceted in road maintenance, repairing potholes on the road resurfacing or the side of the road if warranted. He was supervising the task team charged with the maintenance and repair of the road. He dispatched people to do the investigation. There would be daily returns prepared detailing the type of work the team did and when as well as the material used. At page 17 bundles 15 is part of the weekly maintenance record. And page 18 is part of the daily report encompassing 5 days. Page 19 is a reporting detailing what was done in the week and maintenance done whether it was road surfacing or tarring of the road. At page 19 pothole indicated on road 2.40615 denotes the volume area repaired. It is through the daily report they would know the quantity used. In respect of Kilometre mark 14 and 15 there is documentation indicating that pothole was repaired at that particular place. Page 26 bundle 5 show on the 10/11/2011 on R169/2 surfacing, volume 22.3813. Page 22 from 11 / 11/ 2011 to 17/ 11/ 2011 indicating that the work should have been done over 5 days although it was done on a shorter period. At page 19 of volume 5 is indicated that a pothole on 169/2 and surfacing is where the depth is less than 25, they use their mixture cat 17 a little bit of tar and with concrete of 13,2 and fill up with mixture to be concrete and the depth would be below 25 ml. The issue of feeling and surfacing are two different issues. The 25 is the maximum. The mixture of feeling of pothole they use gravel of quarry and mix it with cement and tar ss60 called anionic spray, after putting water to mix the mixture. They leave a gap to 25 mm on which they use surfacing. He was referred to page 22 He was referred to page 61 bundle 5 he said that it could be an edge break and not necessarily a pothole. He did see the section in 2013. He noticed the material used to repair the edge break on that road. The material differs in colour to the one they use. He does not know who repaired the road. Bundle 13 page 18 the material used seems to differ to the material used on photo 61 bundle 5. On page 19 his team repaired this portion of the road in 2013. With regard to the allegation that on the 2011 December there was a pothole of 30cm depth, his response was not possible because in 2011 they worked between klm 169/1 and 2 and 7 they worked on that road he knows this through daily returns. He denies that there was an edge break when he passed there, as he saw it going to part 7 and 14. He knows because during that year he had no shortage of staff. There were people who were on



tenders and P169 was not one of the trouble roads. They did visual inspection on that road, it was himself and his foreman. It was around 16 November 2011 and they closed for Christmas. He denies that the depth was 30 centimeter. On 1/ 11/2011 his team had gone to do patch work at P169/7 and their moto is that if they had not completed their work they did not close. If there was such 30 mm depth they would not have closed because it would present a dangerous situation to road users. He does not know that there were no road signs because the road was not a danger to road users. Returned to work the 1 January of 2012. He is not aware of private companies or individuals fixing the road in that area. It was only the departmental team working on road P169/2.

5.3.2 Under cross examination Mr Mangwane, testified that he dealt with the quantification and recording of the yearly business plan regarding the repairs which were needed in the year 2011, which was however not before court. There are also daily repairs plan showing the maintenance done. These were also not before court. These would have shown what work and repair was done on road P169/2 in 2011. He conceded that what he testified about in court were weekly repairs documentation. He conceded that the area where the accident happened was on road p169/2 klm 13 and 14. He was referred to section 5 page 61. It was pointed out to him that the area depicted in picture at 61 is near the place where the accident occurred. He conceded that he did not see this place on the day of the accident on 26 December 2011. He would however not agree to that proposition, but conceded that he was not there on the day when the accident occurred. On 16 December 2011 they closed for the holidays. He conceded having said that he did not believe that the depth of the road defect was on the 26 December 2011 was 30 centimetre because (1) the department was not short stuffed and secondly the road p169/2 then did not need any maintenance or repair. It was pointed out to him that this photo on page 61 was taken 4 days after the accident. It was pointed out that the road defect was measured 2 Days after the accident as 2.8 meters long and 0.9m into the road. He does not agree that the road needed repair, because looking on the photo he is unable to determine how long the defect is. He conceded that based on the measurements given the road needed to be repaired. He said that to him it does not seem that there was any work done on the defect at page 61. He said that looking on the picture the material shown there is the base material and what is not there is the top of the road material which he does not believe that it was 30cmm deep. According to him there was no repair done on that defect shown on photo at page 61. He was referred to photo at page 126 volume 6 and volume 30 which photo was taken ...He conceded that this is not the work of the departments of Works. He conceded that it must have been someone else who did the repair work, which is not bound to the necessary repair

work required. At page 19 is the repair done by the department while they were doing the resurfacing. The picture of December 2011 shows no repairs done on the road defect, a picture taken in July 2012 shows no repair done by the department but someone else and picture taken in March 2013 shows repair done by the department. On photo 18 there are certain things which shows material next to the defect and which is white in colour, this material is not there, photo at page 61 what is not there is the top layer; at page 18 the repair done shows that there is something bad done, and at page 19 the department did the repair road as the defect was too deep to cause accident and they repaired. The road P169/2 is plus or minus 20 klm. He gave evidence regarding repair work done in 2011, on road P169/2-7. Repair done on 7 was to do surfacing and filling of a pothole. There was no work done on 2 because there was no need. There is difference between edge break and pothole, but the repair is not much different from the filling of a pothole. The edge break is at the edge of the tarred road. When they repair the edge road they used steel edge so that it should be straight and use the mixture which they then compact. They balance the edge steel so that it should not move and fill in the mixture. Pothole is normally found inside the road. They use the same material but they first trim the pothole At page 61 the defect is on the edge of the road. Page 41 of v5 reads Road maintenance 2011/2012 page 42 shows edge break 9.85 m3 no work was done. Critical conditions of roads that were mentioned below forced them to sacrifice days for doing edge break by doing pothole repairs and surfacing for at page 43 is shown p169/2 showing road in critical condition, but the witness does not agree with this. Surfacing is not that dangerous to road users. Page 46 and 47 refers to repair for 2011/2012 at 47 shows that repair was done on p169/2. He believed that his team would fix a pothole 30 cm deep if they had gone past it, so he believes.

5.3.3 Under re-examination, Magwane was referred at page 43, he said that inside the bracket were potholes fixed or repaired, and (surfacing = D2537, p116/1, p169/2 and D2484) . In respect of p61 all that was missing was a layer and that portion was not dangerous to road users because the missing top layer is not more than 30 mml. The white substance around the defect can be seen at page 61 V5. He is not sure as to the source of this white material. Material used must be selected material from a quarry, to be mixed with cement and lime and compacted. On this road two type of stones were used. In November 2011 repair was done on 169p to 7 was done. His team would have fixed any repair work needed.

5,3,4 In my view, Magwane was an impressive witness. I accept his evidence that before they closed for the Christmas holiday, they repaired the road as



he explained. I accept his evidence that in respect of the relevant portion of the road, it was not dangerous to road users. This evidence negates the plaintiff's evidence that there was a pothole of 30 centimetre depth at the relevant portion of the road.

- [6] In the matter of *Minister of Safety and Security v Duivenboden* 2002 (6) SA 431 (SCA) at 441E-F Nugent J held that; "Negligence, ... is not inherently unlawful--- it is unlawful, and thus actionable, only if it occurs in circumstances that the law recognises as making it unlawful. Where the circumstance manifests itself in a positive act that causes physical harm, it is presumed as unlawful, but that is not so in the case of a negligent omission. A negligent omission is unlawful only if it occurs in circumstances that the law regarded as sufficient to give rise to a legal duty to avoid negligently causing harm. ... Where the law recognises the existences of legal duty it does not follow that an omission will necessarily attract liability--- it will attract liability only if the omission was also culpable as determined by the application of the separate test that has consistently been applied by this court in *Kruger v Coetzee*, namely whether a reasonable person in the position of the defendant would not only have foreseen the harm but would have acted to avert it.....

In *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 570A-B it was held by this Court that a negligent omission will be regarded as unlawful conduct when the circumstances of the case are of such a nature that the omission not only evokes moral indignation but the 'legal convictions of the community require that it should be regarded as unlawful. ... The inquiry in that regard is a broad one in which the relevant circumstances must be brought to account. In *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 27G-I Botha JA held that the following well-known passage from *Fleming The Law of Torts* 4<sup>th</sup> ed at 136 correctly sets out the general nature of the enquiry:

" 'In short, recognition of a duty of care is the outcome of value judgment, that the plaintiff's invaded interest is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant. In the decision whether or not there is a duty, many factors interplay; the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall. Hence, the incidence and extent of duties are liable to adjustment in the light of the constant shifts and changes in community attitudes.'

The inquiry encompasses the application of the general criterion of reasonableness, having regard to the legal conviction of the community as assessed by the Court."

In the matter of *Sea Havers Corporation v Duncan Dock Cold Storage* 2000 (1) SA 827 (SCA) at 828C-829A-B. it was held that: whether what had been labelled as the relative theory of negligence (articulated in *Mukheiber and Another v Raath and Another* 1999 (3) SA 1065 (SCA) at 1077E-F) or what had been labelled as the absolute or abstract theory of negligence (articulated in *Kruger v Coetzee* 1966(2) SA 428 at 30E-F) was adopted, it should not be overlooked that, *ultimately*, the true criterion for determining negligence was whether, in the particular circumstances, the conduct complained of fell short of the standard of the reasonable person.

Further, that, whichever formula were adopted, there should always be a measure of flexibility to accommodate 'grey area' cases; the need for various limitations to the broadness of the enquiry where circumstances so demanded had been long acknowledged. It had thus been recognised that, while the precise or exact manner in which harm had occurred need not have been foreseeable, the general manner of its occurrence had to have been reasonably foreseeable."

- [7] The version of the plaintiff, can be summed up as follows: that the cause of the accident, was that the truck drove into 30 cm deep pothole, thus causing the steering wheel of the truck to lock eventuating in the truck going out of control and veering to its right and off the road to its rest place. That the defendant was negligent in not ensuring that the pothole or road defect was repaired to avoid any accident.
- [8] In so far as the depth of the pothole is concerned, I have not been persuaded by the plaintiff's witnesses in that regard. It brooks no argument that there were no photos of the alleged pothole taken on the relevant day, notwithstanding the fact that some of the plaintiff's witness attended to the scene of the accident on the relevant day, or the 26 December but failed to take photos of the alleged pothole, although they took photos of the truck. It is mindboggling that the very alleged cause of the truck careening off the, road, as the result of the alleged pothole, would be neglected. This can only happen when such alleged pothole did not exist.
- [9] The parties are nonetheless *ad idem* that there was on the relevant road a defect. Malinga, on his own evidence, he was meandering on the road while travelling at an excessive speed. The expert witnesses calculated the speed at 100km/h, which was too excessive in the circumstances. The evidence of Van Vuuren is cogent and lucid, and is to be preferred than that of his counterpart Bardenhorst, who I have already critiqued earlier. According to Van Vurren, the root cause of the accident, was the Corrola, which overtook at an inappropriate moment, unleashing a chain of events,



with Malinga, trying to avoid a head on collision with the Corolla, by swerving to his left and overcorrect and swung to his right in the process his vehicle careening over the embankment. Malinga in my view was also negligent in travelling at an excessive speed in the prevailing circumstances as Van Vuuren testified *inter alia*, that the road defect was not the cause of the accident. The evidence of the defendant's expert witness Van Vuuren is in my view cogent and persuasive and to be preferred than that of the plaintiff's expert witness Bardenhorst. I have earlier expressed myself about the evidence of the plaintiff's witnesses, and need no repetition.

- [10] From the authorities referred to herein above, accepting that there was a road defect on the relevant portion of the road, its presence does not necessarily attribute negligence on the part of the defendant. The evidence of Mangwane demonstrate that repair work was done along that road. It could not have been expected of the defendant to have foreseen that the Plaintiff's driver, would have in the circumstances that prevailed at that particular moment, would have travelled at an excessive speed, when he was familiar with the relevant road, and would have been confronted with a sudden emergency, and would have overcorrected his path of travel and lost control of his vehicle and careened off the embankment. On the contrary, the evidence of Mamgwana demonstrated that the defendant had taken sufficient reasonable steps to effect repairs on the relevant road. In the premises, I find that the road defect was not the cause of the accident. I find that the plaintiff has not proven any negligence on the part of the defendant. It stands to reason that the plaintiff's case therefore stands to be dismissed.

- [11] It is trite that costs follow the event. Both parties engaged the services of senior counsel, justifiable so regard being had to the nature and quantum of the claim. The defendant should not be put out of pocket, as the result it is reasonable and fair that the plaintiff should be ordered to pay the plaintiff's costs inclusive those of engaging senior counsel, where applicable.

- [12] In the result the plaintiff's claim is dismissed with costs, which costs to include, *inter alia*, the cost of employing the services of senior counsel where applicable.



N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 04 / 04 / 2019  
PLAINTIFFS' S ADV : ADV H. P. PRETORIUS  
INSTRUCTED BY : NORTON ROSE FULBRIGHT SOUTH AFRICA INC.  
DEFENDANTS' ADV : ADV MAKHUBELA S.C & ADV PHASWANE  
INSTRUCTED BY : STATE ATTORNEYS (PRETORIA)