IN THE HIGH COURT OF SOUTH AFRICA **REPORTABLE**

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Appeal Case No:- AR 262/2011

In the matter between:

THE MEC FOR TRANSPORT FOR KWAZULU-NATAL Appellant

and

ALAN SHANE LOXTON Respondent

JUDGMENT

Van Zÿl, J:

1. The backdrop to this appeal is the violent and destructive storms and resultant high seas which prevailed during March 2007 and which caused wide spread and at places extensive damage along the KwaZulu-Natal coastline. The area of relevance to the present appeal is the old South Coast road, the R102, extending from Umkomaas in the South to Ilfracombe to its north.

2. The respondent in the appeal, who was the plaintiff in the trial, was a motorcycle enthusiast. At all relevant times he owned a Suzuki 1300cc motorcycle to which he referred as a "super bike" and his then 19 year old son had a smaller Suzuki 650 cc motorcycle. On 27 August 2007 father and son embarked upon a recreational motorcycle ride from Durban south to Umkomaas along the N2 highway, intending to return along a stretch of the R102 before rejoining the N2 on their way back to Durban.

3. Resulting from the storm damage officials of the appellant, the defendant at the trial, had closed certain portions of the R102. In the south the road was closed from Widenham to the southern side of the intersection of Roland Norris Drive with the R102 at Umkomaas. Further north the road was closed on the southern side of the Ilfracombe turnoff on the R102. The intention was to prevent traffic from the north continuing along the R102 in a southerly direction past the Ilfracombe intersection on to the Roland Norris intersection. At both the Roland Norris and Ilfracombe intersections the closures comprised a series of large concrete blocks, known as New Jersey barriers, placed across the width of the road surface.

4. From the Roland Norris intersection vehicles were permitted on to the R102 going north for what was described as local traffic only. According to the defendant's witness Mr J P Boshoff, what was

intended was to permit continued access to the local dive centre, the turn-off to which was situated an estimated 100 metres north of the Umkomaas river crossing.

5. The only officially sanctioned entrance to the stretch of the R102 extending north from Roland Norris Drive to the Ilfracombe intersection, was at the Roland Norris intersection. At that point two road signs of significance had been erected. The first was one at the centre of the concrete barrier preventing vehicles turning south along the R102 and reading "Road Closed". The second was one facing vehicles entering the intersection from Roland Norris and which read "Access onto R102 limited to Umkomaas River North Bank". The road closure at the Ilfracombe intersection along the R102 was an estimated 1,2 kilometres north of the river crossing.

6. For convenience the parties are referred to herein as at the trial. It was common cause that on the day in question the plaintiff, travelling north on his motorcycle, collided with the barrier across the road at the Ilfracombe intersection. He alleged causal negligence on the part of the defendant in erecting and maintaining the barrier and in failing to provide adequate warning of the existence of this obstruction to road users, such as the plaintiff. The defendant denied the negligence attributed to it and in turn alleged that the sole cause of the collision was the reckless or negligent conduct of the plaintiff himself in riding his motorcycle at an excessive speed, in failing to keep an adequate

lookout and in failing to have due regard to the applicable road signage. In the further alternative the defendant pleaded apportionment in terms of the provisions of the Apportionment of Damages Act 34 of 1956.

7. At the pre-trial conference it was agreed to separate the issues of liability and quantum and at the inception of the trial a consensual order was made in terms of Rule 33(4) to the effect that quantum would stand over and that the trial would proceed on the issue of liability only. At the conclusion of the trial the defendant was held liable to compensate the plaintiff for 30% of the damages he had suffered as a result of the collision. The defendant was ordered to pay the costs of the action to the date of such order. The issue of the quantum of the plaintiff's damages was adjourned to a date to be determined by the Registrar of the Court.

8. The defendant unsuccessfully sought leave to appeal against the finding, but was granted such leave to this Court upon petition to the President of the Supreme Court of Appeal.

9. At the trial the entitlement of and the justification for the defendant erecting the different barriers across the R102 were not in issue. It was also common cause that the plaintiff himself was negligent. The main attack upon the conduct of the defendant centred upon the alleged inadequacy of the warning signs erected by the employees of

the defendant relevant to traffic approaching the barrier at the Ilfracombe intersection from the south. In this regard and by way of comparison attention was drawn to the signs erected on the approaches to the Ilfracombe intersection and barrier for traffic along the R102 approaching from the north. The defendant on the other hand adopted the attitude that the signs erected were sufficiently clear and that the plaintiff, in all the circumstances, rode his motorcycle at a dangerous speed and failed to keep an adequate lookout for obstructions ahead of him. In short, the defendant contended that the conduct of the plaintiff was the sole cause of his own misfortune.

10. In his judgment the trial Judge summarised the position, as follows:-

> "[18] The defendant's employees closed the road at Ilfracombe for a perfectly good reason. They took all reasonable steps to warn traffic approaching the closure from the north. There seems to have been an incorrect assumption that for all practical purposes the road immediately to the south of the closure had been closed to the public. This assumption was based on the fact that at the place where access to the R102 in a northerly direction could be obtained a sign had been erected which indicated that access was limited to the north bank of the Umkomaas River. Mr Boshof explained that the road was not closed at that point because they did not want to prevent access to the dive shop just to the north of the Umkomaas River. Their negligence lies therein that the notice which limited the access to the road was inadequate in the sense that it gave no warning of the danger constituted by the concrete blocks at Ilfracombe.
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> [19] The plaintiff's negligence lies in the fact, firstly, that he did not see or ignored the sign which limited access to the north bank of the river and secondly, that he then proceeded to travel at a grossly excessive speed."

11. There being no cross appeal from the plaintiff, the issues for determination in the present appeal are whether the trial Judge was correct in his view that the defendant was negligent and if so, then in apportioning a 30% degree of blameworthiness to the defendant. Of course, a court on appeal would not lightly interfere with the apportionment as determined by a trial court. (South British Insurance Co Ltd v Smit 1962 (3) SA 826 (AD) at 837F – 838A). This is because the apportionment of damages involves individual judgment and the assessment thereof is a matter upon which opinions may vary. A court of appeal would therefore become entitled to interfere with the decision of a trial court where it had failed to exercise its discretion judicially, or had been influenced by an incorrect principle, or had committed a misdirection on the facts, or had reached a decision which differs so markedly from that of the court of appeal that interference is justified. (Transnet Ltd t/a Metrorail v Witter 2008 (6) SA 549 (SCA), para 12, at page 557A - C).

12. Issues of fault, causation and negligence need to be considered against the background of the facts and circumstances peculiar to each matter as a whole and a piecemeal approach in this regard should be avoided (See: Rondalia Assurance Corporation of SA Ltd v Mtkombeni 1979 (3) SA 967 (AD) at page 972 A–D; Santam Versekeringsmaatskappy Bpk v Swart 1987 (4) SA 816 (AD) at page 819B). In Minister of Safety & Security v Van Duivenboden 2002 (6) SA 431 (SCA), Nugent JA at page 448 E – F remarked in para 23 that:-

> "[23] The classic test for negligence as set out in Kruger v Coetzee [1966(2)SA428(AD)] has since been quoted with approval in countless decisions of this Court: whether a person is required to act at all so as to avoid reasonably foreseeable harm and, if so, what that person is required to do, will depend upon what can reasonably be expected in the circumstances of the particular case."

13. Turning then to the facts of the case in hand it is as well to remember that on the pleadings and at the trial the evidential burden rested upon the plaintiff to have established causative negligence on the part of the defendant and which contributed to the damages suffered by the former.

14. The essential facts affecting the issues in dispute are largely common cause. On the fateful day the plaintiff and his son, each riding their respective motorcycles, entered upon the R102 at the Roland Norris Drive interchange at Umkomaas. The plaintiff was aware that the road to the south of that interchange was closed with concrete blocks. These were placed in a line across the width of the road in order to form a barrier and the plaintiff passed it at close range. The plaintiff, however, said that he did not notice the corrosion or "wash-away" damage to the road south of this barrier, nor the facing sign limiting access along the R102 northwards to the northern bank of the Umkomaas river. He explained that this was because there were "flagmen" directing traffic and a lot of work going on in the vicinity of the approaches to the intersection.

15. According to the plaintiff the R102 extends north from the intersection, passes over the Umkomaas river bridge and then makes a slight bend just after the bridge before it straightens out. The plaintiff said that they were familiar with this section of the road and that he considered it suitable, as a matter of habit, then to apply maximum acceleration or, as he put it, to "..basically open up the throttle to its max for a short burst" because this section of the road was not bordered by dwellings of any kind. Further along, according to the plaintiff, they would normally slow down because of a railway bridge which crosses the road and a proliferation of "shacks" which renders it dangerous to travel at high speed.

16. In succumbing to the thrill of the moment the plaintiff said that he accelerated well beyond the permissible speed limit. According to him the historical speed limit for this section of the R102 had been 70 kilometres per hour. However, whilst he had not been aware at the time and had not noticed the road signs to this effect, he did not dispute that the speed limit had been increased to 80 kilometres per hour. Having accelerated, he then decelerated in order to glance back. This was because he had lost sight of his son in his rear view mirrors. Responding to a question from the Court, he said that he was able to turn to look back at high speed because he knew his capabilities and he then observed his son some three to four hundred metres behind him. He thereafter looked ahead again and was about midway up a slight rise when he ".. started seeing these chevrons and an obstacle

in front of (him)", applied brakes but collided with the obstacles, the latter being that New Jersey barrier blocks referred to earlier.

17. The plaintiff sought to explain why he had not observed the barrier at an earlier stage. He was somewhat contradictory in his account of visibility in that he at times suggested that visibility was impaired by what was called a sea mist or hazy conditions. However, earlier in his evidence in chief he had been quite clear in explaining that visibility, despite the haze and wind, was quite good. In this regard and under cross examination he admitted that he had made a statement to the plaintiff's investigator, one Proctor-Parker, to the effect that it was hazy and very windy at the time and that visibility was not good. But upon closer questioning the plaintiff conceded that if visibility had not been good, then that would have required of him to have ridden at a lower speed, which he did not do.

18. The evidence established quite clearly that the approach to the Ilfracombe intersection from the south was along an essentially straight section of road, with a slight rise and at the crest of which the barrier had been erected. The plaintiff was adamant that this was not a so-called blind rise. In this regard he did not dispute the accuracy of the series of photographs depicting the approach to the accident site and forming part of exhibit A. The first of these depict the view at a distance of 840 metres from the barrier (record page 283), with the following photographs taken at decreasing distances. With reference to

these photographs it is quite clear that the approach to the barrier is along a straight stretch of road and that in normal circumstances any obstruction should be visible to traffic approaching from the south at a considerable distance.

19. The plaintiff appears to have been quite casual and relaxed in his approach to riding north along the stretch of the R102, from where he entered it at the Roland Norris Drive intersection, to where the collision occurred. He said that it was a road and in an area he knew well. He was unconcerned by the workmen busy in the vicinity of the intersection, did not pay attention to and did not notice the structural damage to the road south of the barrier at that intersection and entered the intersection without noticing the sign announcing that access on the R102 was limited to the north bank of the Umkomaas river. Nor did he notice the speed limitation road signs indicating a speed limit of 80 kilometres per hour along that section of the R102. He took time to reduce speed and look back to see where his son was and thereafter noticed the barrier, but too late to avoid a collision.

20. The speed at which the plaintiff travelled in his approach to the site of the collision was the subject of cross examination and some debate. The accident reconstruction expert called by the defendant was Ms Wilna Badenhorst, whose expertise in her field was not disputed by the plaintiff. In the course of her investigations and calculations she relied also upon the report and photographs of the plaintiff's accident

reconstruction expert Mr Craig Proctor-Parker. The latter was not called as a witness but by consent his report was admitted in evidence. Important factors emerging from Ms Badenhorst's calculations included the length of the plaintiff's skid marks before hitting the barrier. These she calculated at a minimum of 130 metres. She also calculated the distance beyond the barrier where the plaintiff's motorcycle came to rest at 27 metres. Allowing for a 1,6 second reaction time and given the length of the skid marks in the approach to the barrier, the witness said that she conservatively calculated the distance at which the plaintiff noticed the obstruction at 214 metres from the barrier when, according to the witness, the plaintiff was travelling at approximately 189 kilometres per hour. She also calculated that he hit the barrier at a speed of approximately 97 kilometres per hour and allowing for a reduction of velocity arising from the impact, estimated the motorcycle's speed at leaving the barrier at 67 kilometres per hour, after which it came to rest some 27 metres from the barrier.

21. The plaintiff himself said that he was unsure of the speed at which he was traveling when he first noticed some form of obstruction ahead of him. He ventured a guess at 160 kilometres per hour, but admitted that was the speed at which he was travelling the last time he had looked at his speedometer. It is unclear at what point prior to noticing the obstruction that was. The plaintiff however did not dispute the accuracy of Ms Badenhorst's calculations of either the 130 metre skid

marks, or the speed of 189 kilometres per hour at which he was travelling before attempting to slow for the obstruction. Ms Badenhorst also calculated that the plaintiff would have been able to have slowed and avoided a collision even had he been travelling at 120 kilometres per hour when first noticing the obstruction. The plaintiff, in responding to a question by the Court, somewhat reluctantly conceded that as a possibility.

22. The plaintiff was asked under cross examination and with reference to the sign restricting access north along the R102 to the north bank of the Umkomaas river, whether he conceded that the road was not accessible beyond that point. The plaintiff repeated that he had not noticed the sign in question, but argued that in any event it was misleading because it did not stipulate how far from the north bank such a restriction was situated.

23. In my view the sign at the Roland Norris Drive intersection should have been understood to signify that passage along the R102, at some point beyond the north bank of the Umkomaas River, came to an end. Hence access along this route was limited beyond that point. A road user embarking upon a journey northwards should thus be alerted to this fact and adjust his speed accordingly. Such a road user would also be alerted to keep a particular lookout for some kind of obstruction beyond the north bank of the river.

24. It is noteworthy that it was after this river crossing and having passed through the bend beyond the crossing that the plaintiff said that he applied maximum acceleration. That his acceleration must have been dramatic is indicated by the fact that he lost sight of his son in his rear view mirrors and slowed down in order to look back. At that stage his son was some 300 to 400 metres behind him. Since the distance between the north bank of the river and the site of the collision was estimated at a mere 1,2 kilometres, it must have been relatively shortly thereafter that he noticed some form of obstruction ahead, applied brakes and the collision occurred. However, whether the plaintiff's ability to keep a proper lookout was impaired by his turning to look behind him is unclear.

25. The question then arises whether the *bonus paterfamilias*, placed in the position of the defendant, would or should have anticipated, not only that a motorcyclist like the plaintiff might enter the restricted northbound section of the R102 at the Roland Norris Drive intersection without noticing the sign restricting access to the north bank of the Umkomaas River, but would then travel at such high speed that he is unable to stop in time to avoid a collision with the Ilfracombe barrier.

26. In this regard Holmes JA in Kruger v Coetzee (Supra) at page 430 E – H remarked, as follows;

> "For the purposes of liability culpa arises if –
>
> (a) a diligens paterfamilias in the position of the defendant -
> (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
> (ii) would take reasonable steps to guard against such occurrence; and
> (b) the defendant failed to take such steps.
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> This has been constantly stated by this Court for some 50 years. Requirement (a) (ii) is sometimes overlooked. Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases."

27. In his consideration of the qualities to be found in the reasonable man, Van den Heever JA in Herschel v Mrupe 1954 (3) SA 464 (A) at page 490F is reported to have observed that;

> "The concept of the bonus paterfamilias is not that of a timorous faintheart always in trepidation lest he or others suffer some injury; on the contrary, he ventures out into the world, engages in affairs and takes reasonable chances. He takes reasonable precautions to protect his person and property and expects others to do likewise."

28. It is naturally foreseeable that a road user might act recklessly, thereby endangering others, but it is not expected of a reasonable man that he should guard against reckless or even grossly negligent conduct on the part of other road users. (See, for instance Griffiths v Netherlands Insurance Co of SA Ltd 1976 (4) SA 691 (A) at page 696 G to 697 C). An example with regard to the foreseeability of harm used by Van den Heever JA in Herschel v Mrupe (supra) and which

resonates to a degree with the present appeal, was stated by the learned Judge of Appeal at page 490 D - E, as follows;

> "If I sell a powerful motorcycle to an impulsive young man, experience and the actuarial tables tell me that there is not only a possibility, but a distinct probability that sooner or later he will be involved in a crash. As a reasonable man I can foresee harm to him and to others. Responsibility for his accidents will be his own, however, not mine. Apart from such considerations as the actus interveniens of the purchaser and the remoteness of damages, I cannot be held liable, for I am not my brother's keeper."

29. Another example, possibly more apt in the present context, is to be found in Santam Versekeringsmaatskappy Bpk v Swart 1987 (4) SA 816 (A) where the court of appeal considered foreseeablilty in the context of causing an obstruction. There Smalberger JA remarked at page 819 E – F that;

> "Waar 'n voertuig op 'n ope pad op die ryoppervlakte stilhou, dws op daardie deel van die padoppervlakte waaroor ander verkeer gewoonweg beweeg, en sodoende 'n hindernis veroorsaak, kan dit, afhangende van die omstandighede, 'n gevaar vir ander padgebruikers skep. Behalwe in uitsonderlike gevalle … sou daar nouliks bevind kon word dat 'n bestuurder wat helder oordag op so 'n wyse stilhou op 'n reguit, gelyk, stoflose pad nalatig is. (Vgl Du Toit v Santam Versekeringsmaatskappy Bpk 1975 (3) SA 523 (O))."

30. In the present matter the obstruction complained of, though not a vehicle parked on the driving surface, was likewise situated upon a straight, level, dustless road, in plain view of traffic approaching from the south. In addition there were warning chevron boards placed across the width of the road surface some 14 metres ahead of the New Jersey barriers in order to draw attention to the obstruction.

31. Mr Boshoff, one of the witnesses for the defendant, conceded under cross examination that, in hindsight, it may be that the defendant should have erected more, or more explicit, signage. But he stressed that at the time the defendant's servants believed that the sign at the access point to the R102, that is at the Roland Norris Drive intersection, advising road users that access along that stretch of road was limited to the north bank of the river, was sufficient warning.

32. In my view a diligens paterfamilias and thus the defendant could not reasonably have been expected to anticipate a speed addicted motorcyclist, firstly not noticing the sign and secondly using the final stretch of the closed off road with reckless abandon as a speed track.

33. But even if I were wrong in my view of what would have been expected of the diligens paterfamilias in those circumstances, then a degree of negligence would not necessarily have been actionable, or shown to have caused or contributed to the collision. Dealing with the issue of negligence in abstract, Nugent JA said in Minister of Safety & Security v Van Duivenboden 2002 (6) SA 431 (SCA) at page 441E to 442 B in para 12 that;

> "[12] Negligence, as it is understood in our law, 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 negligence manifests itself in a positive act that causes physical harm it is presumed to be 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 regards as sufficient to give rise to a legal duty to avoid negligently causing harm. It is important to keep that concept quite separate from the concept of fault. Where the law recognises the existence of a 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 also have acted to avert it. While the enquiry as to the existence or otherwise of a legal duty might be conceptually anterior to the question of fault (for the very enquiry is whether fault is capable of being legally recognised), nevertheless, in order to avoid conflating these two separate elements of liability, it might often be helpful to assume that the omission was negligent when asking whether, as a matter of legal policy, the omission ought to be actionable."

34. The crux of the dispute in the present matter concerns the alleged negligent failure of the defendant's servants to have put up more numerous, more noticeable, or more explicit warning signs about the obstruction along the R102 north of the Umgeni River. The question arises whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted more aggressively to avert it. Put differently, should it be expected of the defendant's roads department to anticipate reckless conduct of a high order on the part of road users and to embark upon extraordinary measures to try and warn the foolhardy?

35. In my view such a department should be expected to take such measures as may be called for to warn unwary road users of an obstruction. In casu it did so. It warned motorists entering that stretch of road that access by the road was limited to the Umkomaas River North Bank. Inherent in that warning was that some form of obstruction prevented use of the road beyond that point. In addition the obstruction was also so located that it was clearly visible at a

considerable distance. It was in the form of a solid barrier, ahead of which was placed a row of chevron boards to draw attention to and warn of the barrier. According to the evidence the warning was adequate so that a motor cyclist in the position of the plaintiff would have been able to avoid a collision if he had travelled at a speed of 120 kilometres per hour, but not at 189 kilometres per hour. A reasonable person in the position of the defendant cannot, in my view, be expected to guard against foolhardy recklessness, as was displayed by the plaintiff on the day of the collision.

36. With regard to the issue of causation Nugent JA said in Minister of Safety & Security v Van Duivenboden (supra) at page 449 E - F that;

> "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."

37. In the present matter the plaintiff was oblivious to the warning signs at the point of entry, the obvious storm damage to the R102 immediately south of his point of entry, the road signs seeking to regulate a safe speed along its course and, finally, to the obstruction itself at the end of a long straight stretch of road, until it was too late to take safe avoiding action. In my view the probabilities favour the view that additional road signs may equally have been missed by the plaintiff on the day.

38. In the final analysis I therefore do not believe that the plaintiff managed to establish, with the requisite degree of proof, an actionable wrong as against the defendant in all the circumstances of the matter and I therefore find myself in respectful disagreement with the conclusions of the trial court.

39. In the result I would propose that;

a. The appeal succeeds, with costs, including the costs of two counsel, where employed.
b. The order of the trial court is set aside and it is replaced with an order that:-
    i. The plaintiff's action is dismissed.
    ii. The plaintiff will pay the defendant's costs, such costs to include the costs of two counsel, where employed.

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VAN ZÿL, J.

I agree

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BALTON, J.

I agree and it is so ordered.

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JAPPIE, DJP.

CASE INFORMATION

Date of Hearing: 14 June 2013

Date of Judgment: 27 June 2014

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