Reportable:	**NO**
Circulate to Judges:	**NO**
Circulate to Magistrates:	**NO**
Circulate to Regional Magistrates	**NO**

IN THE HIGH COURT OF SOUTH AFRICA
NORTHWEST DIVISION, MAHIKENG

CASE NUMBER: 2218/2019

In the matter between: -

PETRUS JACOBUS GERHARDUS JACOBS Plaintiff

and

MEC FOR PUBLIC WORKS AND ROADS Defendant

CORAM: MFENYANA J

Delivered: This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date for hand-down is deemed to be 14h00 on **12 March 2024.**

ORDER

(1) The defendant is liable for 100% of the plaintiff's damages as may be proven or agreed.

(2) The defendant shall pay the costs on a party and party basis, to be taxed.

JUDGMENT

MFENYANA J

INTRODUCTION

[1] The plaintiff instituted an action against the defendant for damages arising from injuries he sustained in a motor vehicle accident which occurred on 27 April 2018, on a road known as the Sterkstroom gravel road when the car he was driving hit a pothole that was on the road, lost control, and collided with a tree on the side of the road.

[2] The plaintiff contends that the defendant is liable for the damages suffered by the plaintiff as he has a legal duty

maintain the road in question, keep in a state of good repair and upkeep, and ensure the safety of all road users.

[3] In his particulars of claim, the plaintiff avers that the defendant was the sole cause of the collision in that he failed in his duty to perform routine maintenance and inspections on the road, such that areas of deterioration and potential danger were not identified timeously. The cause of the accident, the plaintiff pleads, was the sole negligence of the defendant. As a result, the plaintiff suffered *inter alia*, various fractures, contusion of the lungs, soft tissue injuries and injuries to his lungs. He claims damages in the amount of R8 600,000.00 for past and future medical expenses, past and future loss of earnings and general damages.

[4] The defendant's plea is essentially a bare denial. In the alternative, the defendant pleads that the accident was caused by the sole negligence of the plaintiff, further alternatively that the plaintiff was contributorily negligent for failing to keep a proper lookout and driving at an excessive speed and failing to avoid the accident when he could have

done so.

ISSUE FOR DETERMINATION

[5] Following agreement between the parties, the court granted an order separating the issues of merits and quantum. The matter served before me only on the issue of liability (merits).

[6] What stands to be determined is whether the defendant was the cause of the accident, and therefore liable for the damages incurred by the plaintiff; whether the plaintiff contributed to the accident and the degree of the plaintiff's negligence.

EVIDENCE

[7] Four witnesses testified on behalf of the plaintiff. Mr Thys Ingwerson (Ingwerson) was the first witness to testify for the plaintiff. He testified that he is a farmer by occupation, and is the plaintiff's brother in law. He is familiar with the road where the accident occurred as he lives approximately 8 kilometres from it.

[8] On the morning of 27 April 2019 he received a call from his father informing him about the accident. He attended at the scene of the accident. The road where the accident occurred is the alternative gravel road between Klerksdorp and Ventersdorp, which connects Opraap and Sterkstroom. This road is generally used if there are road works on the main road or the main road is for some or other reason inaccessible. The road itself is fairly busy and is in a fair condition.

[9] Ingwerson further testified that the accident took place in an area of the road leading to a marshland. The plaintiff was travelling in an easterly direction. Although the road is supposed to be a two – way road, it has narrowed over the years. He and other community members had previously complained to the local authorities about the condition of the road, but were told that there was no equipment and no fuel to fix the road. Thus, the road was not fixed.

[10] On his arrival at the accident scene, he called an ambulance and breakdown. His brother, sister and father arrived later.

[11] He testified that there were potholes all across the road, approximately 20 to 30mm deep and half a metre wide. After the last pothole he noticed that there were skid marks up to the resting position of the plaintiff's motor vehicle. According to Ingwerson, it appears that the plaintiff went directly into the pothole and lost control of the vehicle.

[12] The plaintiff was trapped in the car, unconscious, with injuries to the head and legs. In his word, the plaintiff was 'really messed up'.

[13] He told the court that there were no warning signs to warn road users of the potholes and the marshland. He took pictures of the road and the plaintiff's motor vehicle. These photographs were discovered and formed part of the evidence.

[14] In general, the photographs depict the condition of the road, as well as the scene of the accident. With reference to the photographs, Ingwerson testified that there are a number of trees on both sides of the road, forming a shade on the road. This made it almost impossible to see the potholes when you enter the area. He identified a total of six potholes from the

photographs.

[15] He testified that the plaintiff's motor vehicle, which is a vehicle he is familiar with, was a Ford Everest. It was in a good condition as he knew personally that it was serviced regularly at Ford until it was out of motor plan. He recalled that at the time of the accident, it had just been fitted with new tyres from his mother.

[16] During cross-examination Ingwerson testified that he and the other people who were at the accident scene concluded that the plaintiff had hit a pothole, as the plaintiff was unconscious and could not tell them what had happened. When he was asked if there are other possibilities as to what caused the accident, and that their assessment could be wrong, he conceded that it is possible that they could be wrong and that there could be other possibilities.

[17] He further testified that he took the photographs in order to record the potholes on the road, and to get a clear sense of what caused the accident. Ingwerson was taken to task about the number of potholes he identified, and in the

process, identified five more potholes from the photographs. He explained that the potholes were about 20 cm wide and 10 inches (254mm) deep. He testified that he did not see the need to take pictures of the potholes at close range. He further explained that the pictures of the tyres were taken for insurance purposes.

[18] It was put to him that no two potholes are exactly the same and his description was therefore, not probable. His response was that he did not measure the potholes. He maintained that his phone took good pictures of the potholes as depicted.

[19] Mr Tjiane, counsel for the defendant, put to the witness that there were no potholes on the road. To this, the witness maintained that there were potholes as pointed out, to which counsel himself referred during cross examination. In re-examination Ingwerson testified that it was not possible to tell for sure the size of the potholes on the road.

[20] The plaintiff also testified. He told the court that he is a civil engineer by profession. He has no recollection of the accident, as he only gained consciousness when he woke up

in the intensive care unit in hospital. Save for what his wife told him, he has no recollection of the incident. He does not know what caused the accident and does not remember anything that happened before the accident. He told the court that he remembered events that happened about three days before the accident. Everything else was a blur.

[21] He testified that he was not familiar with the road where the accident occurred and very seldomly drove on it. He stated that he considers himself to be a cautious driver who had not received any traffic fines.

[22] He testified that he had an interview with Mr Barry Grobbelaar (Grobbelaar), the expert responsible for reconstructing the accident scene, long after the accident.

[23] During cross – examination, the plaintiff conceded that he had no independent recollection of the accident.

[24] Mr Willie Renier Du Preez (Du Preez) testified that he is a civil engineer. His qualifications were not placed in dispute and admitted into evidence.

[25] Du Preez stated that he conducted an inspection of the accident scene on 4 July 2022. He stated that the road in question was unattended, with heaps of soil dumped in the middle of the road and ‘danger plates’ lying on the ground face down. It was clear to him that there was no adequate inspection and no maintenance of the road, he testified. Warning signs were also not in place to warn road users.

[26] He testified that there were wet patches on the road, indicating water from underneath the road surface with no headwall on the side of the road to keep the water off the road. Potholes were erupting on the side of the road. According to him, this was due to the water under the road surface. He further testified that the potholes were difficult for road users to observe, because of the shady patches created by the trees on either side of the road. This, he said, had a negative effect on visibility as one would be moving from a well-lit area of the road, and immediately to a dark area where the trees are.

[27] The essence of Du Preez’s testimony was that there were potholes at the accident scene, no warning signs, and that the road in question was not adequately maintained or

inspected. Du Preez further stated that if there had been accidents on that road before as it was reported, the situation should have been rectified and warning signs erected to warn road users, but, this was not done.

[28] According to Du Preez the wetland in the area had the effect of weakening the road and needed to be properly maintained, but this was also not done. In his opinion, lifting the area affected by the wetland, higher, and ensuring regular checks could improve the condition of the road, which he said was a long- standing problem.

[29] During cross examination, Du Preez testified that he inspected the scene of the accident four years after the accident. He explained that at the time of his inspection, there were no potholes, as the road had just been graded. Responding to a question from the Court, he stated that it was possible that road signs might have been erected at some point and fell off. Because there were no regular inspections and maintenance, a road sign was found covered in mud, and appeared to have been lying on the ground for some time. He concluded that potholes take some time to form, suggesting that the road had not been attended to for

some time. He conceded that at the time of his inspection when the road was being graded, there were visible signs on the road.

[30] The last witness to testify for the plaintiff was Grobbelaar, a forensic engineer who was tasked with reconstructing the accident scene. Grobbelaar's qualifications were not placed in dispute and were admitted as evidence.

[31] He testified that in reconstructing the accident scene he examined the photographs provided to him, conducted interviews with the plaintiff and Ingwerson, and physically inspected the accident scene.

[32] In his report, which was admitted into evidence, he stated that the photographic material viewed by him indicated that the road had potholes and dips located in the lane on which the plaintiff was travelling. He visited the accident scene four years later for purposes of reconstruction. According to Grobbelaar, the road is in good condition for approximately 2.4 kilometres before the start of the gravel road. As it progresses to the section where the trees are, a road user is suddenly confronted by the trees.

[33] With regard to the potholes, as indicated by Ingwerson, Grobbelaar testified that the potholes were deeper than the profile of the plaintiff's tyres. He opined that the plaintiff's vehicle probably hit a pothole and yawed clockwise and hit the tree on the right side of the road. There were skid marks from the last pothole all the way to the tree. According to him, the accident started from the pothole. He stated that it was not possible to see the potholes or any sign of danger, before entering the area, as there was no forewarning.

[34] He estimated the speed at which the vehicle was travelling at 80 km per hour. He further testified that this speed is consistent with the damage to the vehicle. His conclusion was that the probable cause of the collision were the potholes and dips on the road. He deferred to the Court on whether this was probably what happened or whether there could be another explanation for the collision.

[35] In cross- examination, Grobelaar testified that he only interviewed Ingwerson who was not there when the accident happened. He did not get any information from the plaintiff. He however testified that Ingwerson did not give him an

opinion, he had to reconstruct the accident scene based on all the information he received.

[36] He conceded that there could be other possibilities as to what caused the accident, like loss of focus and high speed. However the wreckage is consistent with a speed of approximately 80km per hour and a collision with a solid object. As such, the impact is much worse than if the collision was with another motor vehicle. He further testified that the effect would be the same if the plaintiff's motor vehicle was travelling at 100km per hour, as indicated in the accident report. He said this was so because the impact was with a solid, stationary object. In those circumstances, all the impact is absorbed by the motor vehicle. He further testified that the condition of the plaintiff's tyres was good and that they were virtually new.

[37] The defendant closed its case without calling any witnesses.

[38] In its plea, the defendant denies that it is liable for the damages suffered by the plaintiff, alternatively, that the plaintiff was the sole cause of the accident, and further alternatively, that the plaintiff is contributorily negligent for

failing to keep a proper look-out, driving at a high speed and failed to apply brakes when it was necessary to do so, and in so doing failed to avoid the accident.

[39] Although the defendant admits that it has a duty of care towards the plaintiff, it contends that it could not reasonably be expected for the defendant to have been aware of the existence of the pothole, as the road was maintained and managed ‘in accordance with the reasonable standard expected from the defendant’.

[40] It is further the defendant’s contention that the plaintiff failed to take enough cognisance of the general conditions of the road. In this contention lies a concession which is not consistent with the defendant’s earlier assertion that there were no potholes on the road in question.

[41] Lastly, the defendant avers that the plaintiff failed to heed warning signs about the condition of the road and prescribed speed limits and failed to avoid the accident.

DISCUSSION

[42] The main issue in this matter is whether the defendant is liable for the damages suffered by the plaintiff, and if so, to what extent. The determination thereof turns on the evidence of the expert witnesses. It is so that the defendant opted not to call any experts or witnesses in this matter. However, it is trite that the role of expert witnesses is to assist the court in making a determination of the issues before it, as they may fall within their expertise.

[43] Ultimately, the matter revolved around the condition of the road as well as the maintenance thereof, in respect of road signage as to the condition of the road, potential hazard, and speed limits. The list is not exhaustive. The picture painted by the plaintiff's witnesses is that the road was in a state of disrepair, with no signs erected to warn road users of any hazard and speed limits. The photographic evidence presented on behalf of the plaintiff, is proof of this fact.

[44] On the contrary, the defendant denied that there were any potholes on the road, contending that the plaintiff was the sole cause of the accident. In essence, the defendant's stance is that there was no problem with the road at all. As I

have already stated, the evidence led on behalf of the plaintiff belies this contention. The defendant itself offered no evidence to sustain this contention.

[45] To a certain extent, the cross- examination of the plaintiff's witnesses, was dedicated to the amount of potholes that could be identified on the photographs. This is at odds with the defendant's pleaded case, which seeks to deny the existence of any potholes on the road in question. As a matter of fact, counsel for the defendant submitted that the entire case revolved around the existence of a pothole. 'We have to find a pothole' he said.

[46] From a conspectus of the evidence led, and findings of the experts, the following has been established:

46.1 That there were numerous potholes on the road in question.

46.2 that there were skid marks from the last pothole depicted, up to the point where the plaintiff's car hit a tree.

46.3 that the plaintiff's vehicle was in a fairly good condition.

46.4 that the tyres were fairly new, high profile, and in good condition.

46.5 that there were no visible warning signs erected on the plaintiff's route of travel.

46.6 that the road was subsequently graded.

[47] This evidence remains unchallenged as the defendant opted not to call a corresponding expert to counter the evidence.

[48] As far as the evidence of Ingwerson is concerned, it pertained to first-hand information of what was observed by him, immediately after the accident. He testified to the pre-existing problems with the road in question. He stated that he had personally lodged complaints about the state of the road as he uses it on a regular basis, and is a member of the Farmers' Union in his area. He also testified to the lack of warning signs on the road, the poor state the road was in, and the condition of the plaintiff's motor vehicle. He painted a picture of the nature and condition of the road as he witnessed it. According to Ingwerson, the condition of the road was fairly good, up to the point where the wetland was. On the latter part, various potholes were present, although they were obscured by the shade formed by the large trees on the sides of the road. He testified that there were no warning signs on the road.

[49] Contrary to what the defendant's counsel avers that his evidence was largely marked by what Ingwerson's opinion of what happened was, his evidence largely pertained to what he observed. To the extent that his evidence related to skid marks and the potential cause of the accident, it was corroborated by Grobbelaar. He also took photographs of the accident scene on the same day that the accident happened. These photographs were tendered into evidence, and serve as proof of the facts the witness testified to. His evidence also forms part of the accident report which was admitted into evidence by agreement between the parties. It can therefore not avail the defendant to disavow the facts contained therein, having admitted them to be so. Ingwerson's evidence was not challenged.

[50] The defendant's version as stipulated in its plea is to deny any negligence on the basis that there were no potholes on the road. The defendant's plea in this regard falls to be rejected. It must automatically follow that having established the existence of potholes, and a link between them and the accident, the ineluctable conclusion is that the defendant was negligent in failing to maintain the road and keep it in a

constant state of repair.

[51] There is no merit to the defendant's alternative plea that "in the event of the above Honourable Court determining that the Defendant had indeed acted negligently (which is denied), then the Defendant denies that such negligence caused the relevant accident, and pleads that the Plaintiff's own negligence was the sole cause of the accident."

[52] What this insinuates is that despite the accident, the defendant's negligence played no role in causing the accident and thus, no consequences should follow from such negligence. Further, no evidence was led, or a basis laid by the defendant for this averment.

[53] The next part of the enquiry is whether the plaintiff, in any way contributed to the accident by either failing to keep a proper lookout or driving at a speed that could be regarded as excessive in the circumstances, in so doing failing to avoid the accident, when he could have done so.

[54] The plaintiff's duty to keep a proper lookout must be viewed against the information that was available to him at the time

of the accident. As already stated, the evidence presented shows that there were no road signs erected.

[55] In *Minister of Transport & Another v Du Toit & Another*[1] the Supreme Court of Appeal (SCA) noted:

> "*A driver of a motor vehicle is obliged to maintain a proper look-out. He (or she) must pay attention to what is happening around him; but most important of all, he must as far as possible keep his eyes on the road, particularly at night when his vision is limited. Depending on the state of the traffic, the nature of the road and the speed at which he is travelling, the opportunity which a motorist has to read and comprehend the import of each sign may be extremely limited. Indeed, it is not uncommon for even a competent and cautious driver to misread or fail to react to a road sign. For this reason it is imperative, particularly in unlit areas, for warning and other signs to be clear, unambiguous and appropriately positioned so that if necessary they may be read and comprehended at a glance. This is all the more so where there is a potentially dangerous situation ahead such as an unusually sharp bend or, for that matter, an unlit 'T' intersection which would otherwise not be anticipated by a driver who is unfamiliar with the road.*"[2]

[1] 2007 (1) SA 322 SCA.
[2] Paragraph 17.

[56] This is, in my view, dispositive of the defendant's contention in this regard.

[57] As regards the speed at which the defendant was travelling, it is common cause that the plaintiff did not lead any evidence in this regard, on the basis that he has no memory of any of the events that took place prior to the accident. The only evidence available in this regard, is by Grobbelaar, emanating from his reconstruction of the accident scene. He testified that he could work out the speed at which the plaintiff was travelling, shortly before the accident, to approximately 80km per hour. There is no evidence to gainsay this. In my view, even in the absence of evidence from the plaintiff, the available evidence, which as I have stated, remains unchallenged, established this fact and painted a clear picture of what happened on the day.

[58] Mr Maritz, on behalf of the plaintiff, referred me to a decision of the Supreme Court of Appeal (SCA) in *Meyers v MEC, Department of Health, EC*[3] for the proposition that 'a court is not called upon to decide the issue of negligence until all the

[3] 2020(3) SA 337 (SCA).

evidence is concluded. When an inference of negligence would be justified, and to what extent expert evidence is necessary, … depends on the facts of the particular case. Any explanation as may be advanced by or on behalf of the defendant forms part of the evidential material to be considered in deciding whether a plaintiff has proved the allegation that the damage was caused by the negligence of the defendant …'

[59] This is on all fours with the present case. The defendant provided no explanation. The defendant had to shed some light on how, according to it, the accident occurred. Its failure to do so meant that on the evidence as it stands, the defendant ran the risk of a finding of negligence against it[4].

ONUS OF PROOF

[60] The plaintiff bears the onus to prove on a balance of probabilities that the defendant breached his duty of care toward him, and that such breach resulted in the injuries suffered by the plaintiff. In those circumstances, the defendant has a legal duty to take reasonable steps to

[4] See in this regard: Meyers v MEC, Department of Health, EC, ibid.

prevent harm.

[61] The test was set out in *Kruger v Coetzee*[5] as follows:

> "… for the purposes of liability *culpa* only arises if a *diligens paterfamilias* in the position of the defendant not only would have foreseen the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss, but would also have taken reasonable steps to have guarded against such occurrence; and the defendant failed to take such steps."[6]

[62] In the circumstances of the present case, a *diligens paterfamilias* in the position of the defendant would have foreseen the possibility of the lack of maintenance of the road causing an accident and causing harm to road users. The evidence of the plaintiff's witnesses is that the road is notorious for accidents. The defendant had a duty to take reasonable steps to guard against such occurrences. The defendant conceded to having such a legal duty towards the plaintiff. The defendant failed to take such steps.

[63] In my view, the requirements of the test laid in *Kruger v*

[5] 1966 (2) SA 428 (A).
[6] See also in this regard: *Sea Harvest Corporation v Duncan Dock Cold Storage* 2000 (1) SA 827 (SCA).

Coetzee have been satisfied.

CONTRIBUTORY NEGLIGENCE

[64] In its plea, the defendant pleaded that "the plaintiff was contributorily negligent in the causation of the accident" in the ways specified in the plea. He prayed for the plaintiff's claim to be dismissed. Although no specific prayer is made for apportionment of damages, the law is trite that 'provided the plaintiff's fault is put in issue, an apportionment need not be specifically pleaded or claimed'.[7]

[65] The effect of the defendant's contention in this regard is that blameworthiness should be apportioned, and the plaintiff's claim reduced. Inasmuch as the defendant makes the allegation, no evidence was led to prove contributory negligence.

[66] I can do no better in this regard, than restate the legal position as set out in *Fox v RAF*[8] where the Full Court

[7] *AA Mutual Insurance Association Ltd v Nomeka* 1976 (3) SA 45 (A); See also: Harwood v Road Accident Fund 2019 JDR 1768 (GP).

[8] (A548/16) [2018] ZAGPPHC 285 (26 April 2018).

noted:

> *"Section 1(1)(a) of the Apportionment of Damages Act 1(1)(a) gives a discretion to the trial court to reduce a plaintiffs claim for damages suffered on a just and equitable basis and to apportion the degree of liability. Where apportionment is to be determined, the court is obliged to consider the evidence as a whole in its assessment of the degrees of negligence of the parties. In this instance in order to prove contributory negligence, it was necessary to show that there was a causal connection between the collision and the conduct of the plaintiff, this being a deviation from the standard of the diligence paterfamilias. In this instance no testimony was adduced by the defendant."*[9]

(my emphasis).

[67] I do not agree with Mr Tjiana that the plaintiff's case is based on assumptions and speculations. It is based on the evidence of the plaintiff's experts, none of which was gainsaid by the defendant.

[68] I am persuaded that the plaintiff has discharged the onus of proof which rests on him, that the defendant was the sole

[9] Paragraph 14.

cause of the accident.

ORDER

[69] In the result, I make the following order:

(1) The defendant is liable for 100% of the plaintiff's damages as may be proven or agreed.

(2) The defendant shall pay the costs on a party and party basis, to be taxed.

_____

S MFENYANA
JUDGE OF THE HIGH COURT
NORTHWEST DIVISION, MAHIKENG

APPEARANCES:

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Date reserved	:	23 August 2023
Date of Judgment	:	12 March 2024