THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 632/07

In the matter between:

ALLISTAIR POVL McINTOSH **APPELLANT**

and

PREMIER OF THE PROVINCE OF KWAZULU-NATAL **1ST RESPONDENT**

MEC FOR THE DEPARTMENT OF TRANSPORT FOR KWAZULU-NATAL **2ND RESPONDENT**

Coram: **SCOTT, MTHIYANE, NUGENT, MAYA JJA *et* HURT AJA**

Date of hearing: **6 MAY 2008**

Date of delivery: **29 MAY 2008**

Summary: Delict – cyclist falling in attempt to avoid pothole in road - legal duty of Province apparent from statute – additional considerations when weighing up reasonableness of public authority's conduct.

Neutral citation: ***McIntosh v Premier, KwaZulu-Natal*** **(632/07) [2008] ZASCA 62 (29 May 2008)**

J U D G M E N T

SCOTT JA/ ….

SCOTT JA:

[1] The appellant, a keen cyclist in his late forties, sustained serious bodily injuries when he fell from his bicycle while swerving to avoid a large pothole in a road under the management and control of the respondents.[1] He subsequently sued the respondents for damages in the High Court, Pietermaritzburg, alleging that they had been negligent, *inter alia*, for failing to ensure that potholes in the road were timeously repaired or signs were erected warning road users of the danger. The matter came before Kruger J who was asked to decide only the issue of liability and to defer the issue of the appellant's damages for later determination. At the end of the trial the learned judge held, however, that the appellant's fall was attributable solely to his own negligence and dismissed the action with costs. The appeal is with the leave of the court *a quo.*

[2] The circumstances in which the appellant came to fall off his bicycle are largely common cause. On 21 August 2004 he and a group of friends went cycling in the Kamberg area near Pietermaritzburg. They cycled in a group – the appellant described it as a 'bus' – up a fairly steep incline on a road referred to in evidence as the P164. This section of the road rises to the top of a hill in the course of which there are a number of bends in both directions. The centre of the road is marked with a barrier line comprising two solid white lines with a broken white line between them. Shortly after reaching the crest of the rise the appellant and two of his companions decided to ride back in the direction from which they had come. They set off from the crest of the hill, one after the other, with a short interval between the departure of each. The appellant was the second to leave. He described the bicycle he was riding as a 'mountain bike' which had been fitted out as a 'road bike' with 'slick' tyres. The bicycle had a speedometer. He said that as he descended down the hill he attained a speed of about 55 kilometres per hour. He virtually had the road to himself and he travelled about a metre from the centre line. As he entered a bend in the road to his right he began to converge on the barrier line in order to negotiate the bend more easily. The road beyond the bend curved to his left so as to afford him a clear view of oncoming traffic. He observed an approaching vehicle but it was still a long way off. Suddenly he observed a large pothole ahead of him on the broken line between the

[1]The second respondent is the MEC for the Department of Transport for KwaZulu-Natal.

two solid white lines. He said his path of travel was then such that he would have struck the extreme left-hand side of the pothole. At that stage both he and his bicycle would have been leaning to his right, ie into the bend. In an effort to avoid the pothole he attempted to swerve to his left by shifting his weight to a more upright position. In the process he lost control of the bicycle and the next thing he remembered was lying on the grass on the other side of the guard-rail with people helping him.

[3] Photographs taken a few days later show that the pothole extended from the right edge of the left solid line (travelling downhill) to the right edge of the right solid line. It is common cause that its width was 400 mm at its widest, its length was 750 mm at its longest and, its depth was 750 mm at its deepest. Its depth was such that it had penetrated through the base course of the road. A manual compiled by the CSIR entitled 'Pavement Management Systems: Standard Visual Assessment Manual for Flexible Pavements', which is used throughout the country, categorises potholes as falling into one of three categories, namely degree one, three and five, the latter having a diameter in excess of 300 mm and being the most serious. A manual compiled by the KwaZulu-Natal Department of Transport entitled 'Maintenance Quality Standards' classifies potholes as degree one, two and three. The latter is described as follows: 'The defect is very prominent. A dangerous situation exists and damage will occur in all cases'. It is common cause that the pothole in question was a degree five pothole in terms of the former manual and a degree three in terms of the latter. None of the experts who testified had seen the pothole prior to its being patched. Based on the photographs, however, there was general agreement that it was at least three months old. Professor Visser, the chairperson of the South African Roads Board, thought it could have been as old as a year. Significantly, Mr Donald Robertson, a local farmer and frequent user of the road, testified that he knew of the pothole and that it had been there for about a year before the accident. The experts were also generally in agreement that by reason of the location of the pothole, ie in the centre of the road and not in the normal wheel path of vehicles using the road, it would have increased in size relatively slowly. Given its size when measured on 29 August 2004, it follows that it would have fallen into the categories of degree five and three respectively for some considerable time before the accident.

[4] At an *in loco* inspection it was noted that the pothole would have been visible to anyone coming down the hill at a distance of approximately 60 metres. By the time of the inspection, however, the pothole had long since been repaired and the patch on the white line was readily visible. The two witnesses who observed the pothole before it was patched both expressed the view that it was not easy to see. The one was Mr Robertson, the local farmer; the other was Mr Adrian Rall who took a series of photographs of the scene on 28 August 2004. The latter explained that the light, chalky type dust in the pothole and its position on the broken white line made the pothole difficult to see until one was much closer than the 60 metres referred to. To the extent one can judge from the photographs, they appear to confirm Mr Rall's evidence.

[5] To complete the picture, it is necessary to record certain other features of the road. The speed limit was 100 kph. The radius of the curve where the appellant fell was 100 metres. According to Mr Barry Grobbelaar, a mechanical engineer and 'accident reconstructionist', the appellant's speed of 55 kph was well within the limit at which the curve could comfortably be negotiated. The road itself was 7.3 metres wide. Structurally, the relevant section of the road was in a poor condition and the consultants appointed by the Department to report on it had recommended that it be reconstructed. Nonetheless Mr Marthinus van Heerden, one of the consultants involved, expressed the view that from the users point of view the asphalt surface would have appeared to be in a reasonable condition, save for the potholes, and he said that he had no reason to doubt the appellant's evidence that until falling he had enjoyed a smooth ride down the hill.

[6] The respondents denied in their plea that they or their employees had been negligent. They alleged that they had taken various steps to ensure that the existence of potholes was brought to their attention and attended to. These steps, it was alleged, included the setting-up of a call centre for members of the public to report the existence, *inter alia*, of potholes, and the establishment of a system of weekly routine inspections of all the roads under their control and management. I interpose that with regard to the latter assertion, Mr Howard Bennett, a former senior employee in the Department who gave evidence on behalf of the appellant, confirmed that the P164 would have had a person allocated to inspect it on a weekly

basis. As far as the actual maintenance work was concerned, it was alleged in the plea that the defendants adopted two 'streams of systems'. They were:

'(i) an internal maintenance team for the area concerned, manned by six employees of the defendants;
(ii) a Vulindlela programme, in terms of which maintenance work is contracted out to emerging contractors, but is funded by the defendants.'

In addition and notwithstanding the aforegoing, it was alleged that the respondents had 'insufficient or inadequate funds set aside for the maintenance of roads in and around the area concerned, namely Mooi River/Rosetta/ Kamberg'.

[7] Much of the evidence adduced by the respondents was aimed at establishing that there had been a significant underfunding for the maintenance of roads in the KwaZulu-Natal province for a number of years which had resulted in a serious deterioration of the road network. Mr Wayne Evans, a senior official involved in the financial management of the Department, testified that for the financial year 2004 to 2005 the cost of maintaining the current road network was estimated to be R1.4 billion. The current funding, awarded on a three-year basis, was R681 million leaving a shortfall of R770 million. He said that this amount had been requested but the amount allocated by the provincial cabinet following the recommendations of the treasury was no more than R16m, leaving the Department underfunded and under resourced. It appears that the road network of the province is divided into four regions, each with its own local areas. The P164 is situated in the Vulindlela local area. This area contains some 1700 km of road of which 1250 km are gravel and 460 km of asphalt. Mr Blake Mackenzie, the cost centre deputy manager for the Pietermaritzburg region and the person responsible for the Vulindlela local area, testified that for the entire length of asphalt road there is only one 'black top team' whose function it is to attend to the patching of potholes and the repair of surface damage. Formerly, he said, there were three such teams. Subsequently, patching and surface repair work was outsourced to an 'emerging contractor', Godide Construction, as well as to other 'formal contractors'. Nonetheless, the in-house black top team, he said, remained over-extended.

[8] The work for this team (and the independent contractors) is planned at weekly meetings. Ironically, at a meeting held on 12 August 2004 the black top team was directed to effect surface repairs to the P164 from km 0 to the end of the road (approximately 30 km) during the period 17 to 18 August 2004. The fact that the work was so programmed did not mean, however, that it would be completed; it depended on the nature and extent of the work. In the event, the team commenced work on Wednesday 18 August and during the period 18 August to Friday 20 August repaired the damage to the road surface between km 15 and km 16. The damage to the remaining sections of the road, including the pothole in question which was at the 8 km mark, was repaired some time after the weekend. (It will be recalled that the accident occurred on Saturday, 21 August 2004.) Mr Sakhamuzi Mbedu, the leader of the black top team, explained that the procedure he adopted when repairing a road was to begin with what he perceived to be the most serious damage. If no particular damage had been identified he would drive along the road looking for the most serious damage to determine where to begin. This is how it came about, he said, that work was commenced on the road between km15 and 16. He said that he did not recall the pothole in question, but if he had initially ignored it, the reason would have been that because it was on the barrier line and not in what would normally be the wheel path of vehicles using the road, he would not have regarded it as a priority.

[9] The approach adopted by the court *a quo* was to determine the issue of negligence solely in relation to Mr Mbedu's conduct during the period 18 to 20 August 2004. It held that Mr Mbedu's *modus operandi* of attending first to what he considered to be the most serious damage to the road surface was reasonable, as was his attitude that, although he could not recall the pothole in question, he would not have attended to it immediately because of its location on the barrier line, but would first have attended to the other potholes which he considered to be the more serious. On this basis, the judge found that because on the days in question the respondents must have had the means of repairing the potholes on the P164, all the evidence adduced by the respondents relating to their lack of funds was irrelevant and he accordingly deprived the respondents of their costs in relation to that evidence.

[10] It is clear, however, from both the pleadings and the evidence adduced on behalf of the appellant that the latter's allegation of negligence on the part of the respondents was not confined to Mr Mbedu's conduct on the days immediately preceding the accident. It was always the appellant's case that the respondents' negligence lay in its failure to ensure that the pothole in question was repaired long before 21 August 2008 and long before it had grown to the size it had by that date. Indeed, counsel for the appellant did not suggest that Mr Mbedu was negligent for commencing the work at the 15 km mark, as opposed to any other area or at one or the other end of the road. In approaching the issue of negligence as it did, the court *a quo* therefore clearly erred. It accordingly becomes necessary to consider whether the appellant succeeded in establishing negligence on the part of the respondents on the grounds alleged in the particulars of claim in the light of the evidence as a whole. As the alleged negligence is founded upon an omission on the part of what in effect is a public authority it is desirable to deal first with the legal principles involved.

[11] As repeatedly stated by this court, a negligent omission, unless wrongful will not give rise to delictual liability. More recently in *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty)* Ltd 2006 (3) SA 138 (SCA) Brand JA, at 144A-C, para 10, explained the requirement of wrongfulness as follows:

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

The learned judge continued at 144I, para 12;

'. . . when we say that negligent conduct . . . consisting of an omission is not wrongful, we intend to convey that public or legal policy considerations determine that there should be no liability; that the potential defendant should not be subjected to a claim for damages, his or her negligence

notwithstanding. In such event, the question of fault does not even arise. The defendant enjoys immunity against liability for such conduct, whether negligent or not . . . .'

In the present case the second respondent is enjoined in terms of s 3(1) of the KwaZulu-Natal Provincial Roads Act 4 of 2001 to administer the provincial road network in accordance with national and provincial norms *inter alia* 'to achieve optimal road safety standards within the Province' and to 'protect and maintain provincial road network assets'. In terms of s 3(2) the second respondent's responsibility is said to be 'within the Province's available resources'. However, a public law obligation does not necessarily give rise to a legal duty for the purpose of the law of delict. See *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) paras 79-81. But in the present case s 9(3) of the Act puts the issue beyond doubt. It provides:

'9(3) The Minister [ie the second respondent] is not liable for any claim or damages arising from the existence, construction, use or maintenance of any provincial road, except where the loss or damage was caused by the wilful or negligent act or omission of an official.'

On behalf of the appellant it was submitted that the liability excluded by the section was limited to a liability which could notionally arise in circumstances where the 'existence, construction, use or maintenance' of a provincial road was the responsibility of a municipality or some other person and not that of
the Minister. This construction was founded on the definition of 'official' and various other provisions of the Act. I am not sure that this is correct. But what is quite plain is that a negligent omission of an official in relation to the matters referred to is expressly excluded from the exemption contained in the section.

[12] The second inquiry is whether there was fault, in this case negligence. 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 drive in a particular way or 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. But the word ‘duty’, and sometimes even the expression ‘legal duty’, in this context, must not be confused with the concept of ‘legal duty’ in the context of wrongfulness which, as has been indicated, is distinct from the issue of negligence. I mention this because this confusion was not only apparent in the arguments presented to us in this case but is frequently encountered in reported cases. The use of the expression ‘duty of care’ is similarly a source of confusion. In English law ‘duty of care’ is used to denote both what in South African law would be the second leg of the inquiry into negligence and legal duty in the context of wrongfulness. As Brand JA observed in the *Trustees, Two Oceans Aquarium Trust* case, at 144F, ‘duty of care’ in English law ‘straddles both elements of wrongfulness and negligence’.

[13] In the present case the reasonable foreseeability of harm to users of the road in consequence of potholes was not in issue. Mr George Hattingh, a consulting engineer who gave evidence on behalf of the respondents, readily conceded that quite apart from the damage caused to vehicles by driving over large potholes, their presence in the road was likely to cause drivers to swerve to avoid them which could result in collisions with other vehicles or pedestrians, particularly in wet weather when a swerving vehicle was likely to skid. The circumstances of the appellant’s accident were admittedly somewhat unusual but it is well established that it is sufficient if the general nature of the harm to the injured party was foreseeable; it is not necessary that the precise manner of its occurrence be foreseeable.

[14] The crucial question, therefore, is the reasonableness or otherwise of the respondents’ conduct. This is the second leg of the negligence inquiry. Generally speaking, the answer to the inquiry depends on a consideration of all the relevant circumstances and involves a value judgment which is to be made by balancing various competing considerations including such factors as the degree or extent of the risk created by the actor’s conduct, the gravity of the possible consequences and the burden of eliminating the risk of harm. See eg *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA) para 17. Where, however, a public authority is involved a further consideration arises. It is this; a court when determining the reasonableness or otherwise of an authority’s conduct will in principle recognise the

autonomy of the authority to make decisions with regard to the exercise of its powers. Typically, a court will not lightly find a public authority to have failed to act reasonably because it elected to prioritize one demand on its possibly limited resources above another. Just where the line is to be drawn is no easy matter and the question has been the subject of much judicial debate both in England and other Commonwealth countries. See eg *Stovin v Wise* [1996] AC 923 (HL); *Gorringe v Calderdale Metropolitan Borough Council* [2004] 2 All ER 326 (HL); *Barratt v District of North Vancouver* (1980) 114 DLR (3rd) 577 (SCC); *Brodie v Singleton Shire Council* (2001) 206 CLR 512 (HC of A) paras 161-162. But whether the criterion to be applied is ultimately one of rationality or some other principle is unnecessary to decide. What, I think, is clear is that if in the actual implementation of a policy or procedure adopted by the authority, or for that matter in the course of its operations, foreseeable harm is suffered by another in consequence of a failure on the part of the authority's servants to take reasonable steps to guard against its occurrence, a court will not hesitate to hold the authority liable on account of that omission. Indeed, as I read s 9(3) of the KwaZulu-Natal Provincial Roads Act, whatever its precise ambit may be, there can be no doubt that omissions of this nature were intended by the legislature to be excluded from the general exemption embodied in the section.

[15] It was common cause that the P164 was the subject of weekly routine inspections. The evidence revealed that the pothole in question had been in existence for something like a year prior to the accident. During this period it had been allowed to develop to a stage where it had attained the dimensions of a degree 3 or degree 5 pothole depending on which code was applied. No explanation was forthcoming as to why, notwithstanding the weekly inspections, it was not repaired. The inference that arises is that it was either not observed in the course of the inspections or it was not reported. It was not in dispute that the repair of potholes constituted 'routine maintenance', as opposed to 'normal maintenance' (resurfacing of roads) and 'long term maintenance' (rehabilitation of roads). According to the experts the repair of potholes was a priority, both with regard to the safety of road users and the preservation of the structural integrity of the road. No evidence was led to establish that by reason of the lack of funds the repair of potholes was neglected in favour of some other priority. Nor was there evidence to suggest the existence of a policy to select some potholes for repair ahead of others and, if so, the

basis upon which such a selection was made. Mr Hattingh, the consulting engineer who testified on behalf of the respondents, expressed the view that the pothole in question was of a low priority because of its location on the barrier line. But this was clearly an afterthought. No one from the Department suggested that this was the reason why it had not been repaired. In any event, its very existence and the fact it had attained the size it had demonstrated that vehicles drove over it. According to the appellant – and this was confirmed by the photographs – it was possible to see if there was oncoming traffic when coming down the hill. In these circumstances although an offence, it would not have been negligent for road users to drive on or straddle the barrier line when descending the hill. As previously indicated, the P164 was not in a built-up area. The speed limit was 100 kph. There were no signs warning road-users of the existence of potholes. These were only erected after the accident. No rational reason presents itself as to why the pothole was left unrepaired for so long; nor was one advanced. In the circumstances the inference of negligence on the part of the respondents' servants responsible for the inspection and repair of potholes on the P164 is irresistible.

[16] There remains the question of the appellant's own negligence, which the respondents pleaded in the alternative was a contributory cause of the accident. When riding up the hill the appellant did not see the pothole in question. This was, no doubt, because he rode on the left side of the group, ie the side closest to the left side of the road. But once he commenced his descent he did observe a pothole. Nonetheless, he proceeded downhill at a speed which left little room for error. A cyclist trundling along a suburban road would normally have no difficulty avoiding a pothole. But the appellant's speed was such that when he did see the pothole he was unable to adjust the path of his travel by only the few centimetres necessary to avoid the pothole without losing control of his bicycle. Being aware of the existence of potholes, his speed in these circumstances was to my mind excessive and amounted to negligence on his part.

[17] The degree to which the respective fault of two parties contributed to a single occurrence is always a difficult matter and is essentially a matter of judicial judgment. The appellant described the pothole which he first saw when coming down the hill, as 'small'. As I have indicated, its existence should have alerted him to the danger.

But the pothole which resulted in his fall had been allowed to grow to such a size as to be described as creating a dangerous situation. Given that the road was inspected on a weekly basis, the failure to repair the pothole over such a long period is indicative, I think, of a greater degree of negligence than that attributable to the appellant. In the circumstances an apportionment of 60 : 40 in favour of the appellant seems to me to be fair and equitable in all the circumstances.

[18] The appeal is upheld with costs. The order of the court *a quo* is set aside and the following substituted in its stead.

> ‘(1) The defendants are ordered to pay 60 per cent of the plaintiff’s damages as may be agreed or proved.
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> (2) The defendants are ordered to pay the plaintiff’s costs, such costs to include:
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> (i) the costs occasioned by the employment of two counsel;
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> (ii) The qualifying expenses of the following witnesses: Visser, Bennett, Van Heerden, Rossouw and Grobbelaar.
>
> (3) The matter is adjourned *sine die* for the determination of the quantum of the plaintiff’s damages.’

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D G SCOTT
JUDGE OF APPEAL

CONCUR:

MTHIYANE JA
NUGENT JA
MAYA JA
HURT AJA