IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case no: **4143/2018**

In the matter between:

SAMUEL MPHUTHI Plaintiff

and

MALUTI-A-PHOFUNG LOCAL First Defendant

MUNICIPALITY

Second Defendant

THABO MAFUTSANYANE DISTRICT MUNICIPALITY

Third Defendant

MEMBER OF THE EXECUTIVE COUNCIL: POLICE, ROADS & TRANSPORT, FREE STATE PROVINCE

CORAM: **PR CRONJÉ, AJ**

HEARD ON: **5 – 6 SEPTEMBER 2023, 8 SEPTEMBER 2023, 4 DECEMBER 2023**

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DELIVERED ON: **29 FEBRUARY 2024**

JUDGMENT BY: **PR CRONJÉ, AJ**

BACKGROUND

[1] On 29 August 2015, the Plaintiff who was then 40 years old, was the driver of an Opel Corsa bakkie ("*the vehicle*") on a road under the jurisdiction of the Third Defendant. A number of grounds of negligence is pleaded, *inter alia* the failure by the Third Defendant to ensure that the road was reasonably safe for road users; failure to take reasonable and routine inspection of the condition of the road; ensuring that the road was reasonably free from potholes and dangerous variations; failing to take steps to maintain the road; allowing the road to deteriorate to a condition that is unsafe; failing to comply with National Guidelines[1] relating to the maintenance of roads; failing to take steps to ensure that the road was reasonably safe for road users; failing to warn road users of the condition of the road and the presence of potholes; failing to erect relevant signage of the condition and speed that vehicles

[1]No evidence or argument was tendered in respect of this ground.

should travel when using the road; failing to close the road in circumstances where it was not safe for use; and failing to take reasonable steps to comply with the duty of care.

[2] At inception of the trial, the parties agreed that the merits and quantum should be separated. This judgment therefore only deals with the question of whether the Third Defendant was negligent.

PLAINTIFF'S CASE

[3] The Plaintiff was at date of the accident employed as a principal at Manthatisi Secondary School where he taught Grade 10 – 12. The weather conditions were fine, the sky was clear, and there was no rain. He was alone in the vehicle and on his way to fetch wood. He travelled the road approximately 2 – 3 times prior to the accident. At the stage when the accident occurred, he was driving approximately 80 km/h when he saw two big potholes following each other approximately 70 – 80 centimetres (cm) apart. He estimated that they were 30cm deep. It is common cause that there was no road signage in respect of the condition of the road, the prescribed speed limit or a donga in the vicinity.

[4] He could not state what the circumference of the potholes were, but they were "*big enough"* and very deep. He saw the potholes when they were approximately 5 – 10 metres from him. He swerved to his left in an attempt to avoid them as he would be unable to safely drive over them. As soon as

he started to swerve to the left, he realized that there was a donga and that it would be fatal to him if he does not swerve back. The edge of donga was approximately 1 metre from the margin of the road. If he succeeded avoiding the potholes, the vehicle would not have overturned. If it was required to drive around them, it would have meant that he had to drive on the outside of the road surface. After he swerved back, he heard a loud noise when his right rear wheel hit the potholes. He initially did not recall much and regained his consciousness after a few minutes. He was lying upside down in the vehicle and had his seatbelt on. He could not move his arms or legs.

[5] In cross-examination he testified that he is used to driving on gravel roads as he grew up on a farm. He last used the road eight to ten months before the accident and travelled approximately 80 – 90 km/h on the day. Before arriving at the place of the accident, he did not have to use the brakes and he did not apply the brakes when he saw the pothole as he thought that it would be safe to go around them. He saw the potholes first when he was approximately 2 metres from them and stated that he could not remember that he testified in chief that it was 5 – 10 metres. He was asked to show a point in Court of how far he was from the potholes and after measurement it was established that it could have been 7 metres. According to him, the first pothole was 10 cm deep.

[6] When asked to indicate how big the first pothole was, he estimated it to be 48 x 33 x 10cm. The second pothole could be 63 x 32 x 10cm. The two

potholes followed each other and the distance between them were approximately 50cm or less. He conceded that he initially said it was 30cm deep. He later stuck to 10cm or more when a ruler was used.

[7] He did not proceed to drive over the potholes with his wheels on either side as he realized that his vehicle was small and he would rather avoid them by going around them. According to him, the potholes were more to the left. He did not attempt to pass to the right as he saw a minibus driving behind him before and decided that it would be the safest to keep to the left. The road reserve was safe for him to pass. He instinctively move to the left when there is a problem though there may be a larger portion of the road available on the right. He had a split second to decide what manoeuvre to apply.

[8] He conceded that it is not unknown that there are potholes in road surfaces. One should apply caution and need to be vigilant. He grew up on a farm and is aware that road surfaces may be uneven and there may be loose gravel. A cautious driver should be on the lookout and would drive at a speed to negotiate loose gravel or uneven road surfaces. A cautious driver would also allow enough time to avoid an accident. He at all times attempted to be cautious and at the speed he was driving could meet any eventuality. When he saw the donga, he thought that his life will end and he must have swerved quickly to the right as far as he could. Looking at a photo he conceded that he would not have driven into the donga.

[9] Mr Solomon Makhubu testified that he worked for a firm of attorneys in 2016,

and was requested to attend the scene of the accident with the Plaintiff. The first pothole was 60 x 30 x 25cm, the second 60 x 40 x 15cm, and the third pothole[2] was 30 x 50 x 10cm. From the outer left side of the first pothole to where the grass starts can be approximately two metres. The distance between the grass and the donga can be between 50cm and one metre.

[10] Mr Boshanka Lelimo testified that he was a farmworker and close to the scene of the accident. In the area of the accident, the road was made up of gravel with potholes. They were approximately 48cm in circumference and approximately 37cm deep.

THIRD DEFENDANT'S CASE

[11] The Defendant called Mr Nicolas Moloi. He is a senior road superintendent, employed since 2008. His duties are the monitoring, supervision and inspection of roads that is approximately 562 kilometres long, which includes tar and gravel roads. He was referred to a worksheet that shows the type of activity performed on the road, the date thereof, the kilometres covered, the metre reading and product/used remarks. Provision is made for signature of the supervisor, the foreman, the mechanic and Mr Moloi.

[12] On 13 May 2015, normal blading was applied from kilometres 6 – 10 and it is also indicated that there was a diesel problem. From 6 – 8 July 2015, normal blading was applied. The document is signed by the supervisor,

[2]This differed from the two potholes the Plaintiff saw.

foreman and Mr Moloi. On 10 July 2015, one Mr ML Motsie apparently travelled 44 kilometres on the road for inspection. The form is signed by Mr Motsie, the transport officer and the departmental transport officer at the head office. On 20 August 2015[3], Mr Motsie apparently travelled on the road to check on the grader. The document is signed by Mr Motsie, but not by the departmental transport officer. No log sheet or document indicating that Mr Moloi inspected the road was presented and he did not testify.

[13] Mr Moloi applies his signature to the worksheet to confirm that the work was done. He conceded that he did not do a road inspection on 10 July 2015, nor on 20 August 2015. Notwithstanding stating that he also does road visits, no logbooks were presented. He agreed that a pothole of 25cm would create a dangerous situation, as would 10cm. It is easy to put up road signs warning users of the condition of and dangers in the road, and it is reasonably cheap to do so. He agreed that there was a donga in the vicinity where the vehicle overturned, but disagreed that the donga could be 1.5 metres from the road surface. It was not necessary to warn road users as the donga was far from the edge of the road. If the donga was 1.5 – 2 metres from the road surface, it would have justified a road sign.

[14] It was not necessary on the day of the accident to have a warning road sign as the road was in a good condition. The Third Defendant thereafter closed its case.

[3]Approximately 9 days before the accident.

ARGUMENTS

[15] Mr Zietsman SC, for Plaintiff, argues that Mr Moloi made various concessions in cross-examination, *inter alia* that he could not describe the condition of the road when the accident occurred as it was too long ago, that it is the responsibility of the foreman to check whether the work as indicated on the worksheets were properly executed, that he did not check whether the work as indicated in the worksheets were executed, that a pothole of 25cm deep creates a fairly dangerous situation and even one of 10cm deep would create a dangerous situation, that it is fairly easy and relatively cheap to put up road signs to warn motorists of dangerous situations, that the Third Defendant's responsibility to maintain the road is not only limited to the road surface, but also the road reserve, and if a driver approaches an area in the road where a dangerous situation is present, including dongas, warning signs are to be put up.

[16] He submits that there is no basis to reject the evidence of all the Plaintiff's witnesses regarding the existence of potholes as well as the existence of the donga in the road reserve. There is no basis to find that both potholes did not cause a dangerous situation to the Plaintiff.

[17] No contributory negligence should be attributed to the Plaintiff. The Court should guard against adopting an armchair approach in holding that the Plaintiff's decision to swerve to the left, as opposed to swerving right, constitutes contributory negligence. The Plaintiff seeks that the attendance

of Mr Solomon Makhubo and Mr Lelilo be declared necessary witnesses.

[18] Ms Wright, for the Third Defendant, relies on *McIntosh v Premier KwaZulu-Natal and Another*,[4] where it was stated that it is necessary to enquire whether, in the circumstances of a particular case, the alleged omissions can be said to be wrongful. The differentiation between wrongfulness and negligence has been affirmed by the Constitutional Court in *Loureiro and others v iMvula Quality Protection (Pty) Ltd*:[5]

> *"[53] …The enquiries into wrongfulness and negligence should not be conflated. To the extent that the majority judgment of the Supreme Court of Appeal did not distinguish between these, it is incorrect. The wrongfulness enquiry focuses on the conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability. Mr Mahlangu's subjective state of mind is not the focus of the wrongfulness enquiry. Negligence, on the other hand, focuses on the state of mind of the defendant and tests his or her conduct against that of a reasonable person in the same situation in order to determine fault.*
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> *[54] I begin with the enquiry into wrongfulness, because '[n]egligent conduct giving rise to damages is not …. actionable per se. It is only actionable if the law recognises it as unlawful'."(Footnotes omitted)*

[19] Simply because the accident occurred on a stretch of road for which the

[4]2008 (6) SA 1 (SCA) at para [14] – [16]; see also *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430 E; *Van Eeden v Premier van die Provinsie van die Vrystaat en Andere* 1999 JDR 0550 (O).
[5]2014 (5) BCLR 511 (CC).

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Third Defendant is responsible, does not lead to an inference that it is to be blamed for damages. A Court should be cautious not to be led by sympathy considerations.[6] A sensible judicial approach to all the relevant facts and circumstances should be adopted.[7]

[20] The photographs, taken more than seven and a half years after the accident were taken from an angle which does not allow for comparative observations similar to what the Plaintiff would have made. There were discrepancies between the distance from which he saw the potholes when he realized that they were in front of him.

[21] The mere fact that there is no person to dispute the version of the Plaintiff, cannot of necessity lead to an inference that his version can be accepted. His testimony was presented more than 8 years after the accident, he suffered severe injuries and it can reasonably be assumed that his memory became tainted over time. Human observation is notoriously fallible.[8]

[22] Mr Lelilo did not witness the accident, but stated that it is a gravel road with potholes where a 5litre container could fit in. He contradicted the Plaintiff regarding the number and size of the potholes. He only supports the

[6] *Broude v McIntosh and Others* 1998 (3) SA 60 (SCA) at 75 B – C.
[7] *Mkhatswa v Minister of Defence* 2000 (1) SA 1104 (SCA) at [23]; *Oppelt v Department of Health, Western Cape* 2016 (1) SA 325 (CC) at [107].

[8] *State v Mthetwa* 1972 (3) SA 766 (A) at 768A; *Stellenbosch Farmers' Winery Group Ltd. and Another v Martell & Cie SA and Others* (427/01) [2002] ZASCA 98.

Plaintiff's version in respect of potholes in the area.

[23] Mr Moloi testified that light grading of roads does fix potholes and notwithstanding that he did not recall the condition of the road at date of the accident, stated that the road was in a good condition. He was adamant that he has never seen potholes as deep as those described by the Plaintiff and his witnesses on gravel roads. No signs were put up as the road was in a good condition.

[24] The Plaintiff failed to show how long prior to the accident the potholes were present. Potholes on a gravel road in rural areas cannot be described as indicative of a negligent breach of a duty to maintain the road and the condition of gravel roads changes over time. It cannot be expected that the road would be in a perfect condition at all times.

DISCUSSION

[25] In respect of the condition of the road, only the Plaintiff and Mr Lelilo was of assistance. The Plaintiff drove on the road on two occasions and on all accounts found it to be in a fair condition. He was never faced with potholes on that road prior to the day and Mr Lelilo's evidence that there were potholes in the area does not in my view imply that the Plaintiff was aware of them. Although the speed limit is 80 km/h, the fact that he may have travelled at 90 km/h, does not mean that it made a difference in respect of what he was confronted with and what steps he took.

[26] The Plaintiff was the only person in his vehicle on the day and I accept that he was confronted by, on his version, two potholes. Even if there were three or more, his decision to take evasive action was premised on the two that he saw. It is true that his estimations of size and distance differed during evidence in chief and cross-examination. It was only after a ruler and tape measure was used (objective instruments) that he affirmed what he believed to be correct. He presented the best evidence of what he was confronted with.

[27] The photos are indeed not noticeably clear in respect of where exactly on the road surface the potholes were and what area was available to the left and to the right of the potholes. He may even have been able to pass over the potholes if he kept a straight line. A Court has to be cautious of adopting an armchair approach. A wrong decision by a party is not always met with rejection of a claim.

[28] By way of analogy, the court in *Sekhokho v S*[9], in the context of sudden emergency[10], held:

> "…*'One man many react very quickly to what he sees and takes in, whilst another man may be slower. We must consider what an ordinary reasonable man would have done. Culpa is not to be imputed to a man merely because another person would have realized more promptly and acted more quickly. Where many have to make up*

[9][2010] ZAGPPHC 103.
[10]Which is not the case of the Plaintiff.

their mind how to act in a second or in a fraction of a second, one may think this course the better whilst another ma [sic] *prefer that. It is undoubtedly the duty of every person to avoid an accident, but if the acts reasonably, even if a justifiable error of judgment he does not choose the very best course to avoid the accident as events afterwards show, then he is not on that account to be held liable for culpa.' "*

[29] Even if grading took place at the place where the accident occurred, the grader driver or foreman did not testify as to the effect of the grading. The worksheet does not indicate that grading took place at the scene of the accident.

[30] Bearing in mind that the Plaintiff drove the road at least twice and was satisfied that it was in a fair condition and not posing any dangers, I cannot find that driving at 80- 90 km/h was negligent and that it contributed to the accident. I accept that the Plaintiff may have been able to safely negotiate the potholes if he drove over them (discounting the third pothole which did not play a role in his decision), or may have safely passed on the left and right-hand side of the potholes. Avoiding the armchair approach, the Plaintiff cannot be criticized for electing to pass the potholes on the left, as it is not only a rule of the road to keep left, but also that it was the safest choice that he, confronted with the potholes, made. Although the donga played a role in his decision to swerve sharply right thereby hitting the pothole with the right rear wheel, the donga in itself did not contribute to the accident. It can however, not be stated that he did not harbour a reasonable fear that his vehicle may fall into the donga.

[31] It can be accepted that the State cannot inspect every kilometre of every road in South Africa on a daily basis. However, it did decide to grade the road and it can therefore reasonably be accepted that it was aware of the condition of the road. The fact that the grader driver and the foreman did not testify in respect of the exact circumstances reigning on the date of accident, places the Plaintiff's version on what he was confronted with undisputable. It would create a dangerous precedent to absolve the State from negligence and liability purely on the basis of the distance it has to maintain roads.

[32] Given the fact that the Plaintiff would have been able, acting reasonably to have passed to the left, over and to the right of the potholes, some negligence can be attributed to him. I attribute a larger portion of the negligence to the Third Defendant.

[33] In respect of the credibility of the Plaintiff, I accept that his evidence, bearing in mind to that it was presented approximately eight 8 years after the accident, was credible and reliable. He made a good impression. Mr Lelilo's credibility cannot be faulted and even though he did not contribute much to the merits, he did give an explanation as to what the condition of the road was in the area. Mr Mokhobo's evidence was of no real assistance and I do therefore not make any credibility findings in respect of him. In respect of Mr Moloi, it can be said that he, as supervisor, tried to explain what the Third Defendant does in respect of maintenance of roads. He was however, not directly involved in the maintenance of the road and the worksheets does not really assist in indicating that the Third Defendant did what it reasonably

could to maintain the road and keep it free from dangers. I deem Mr Moloi's evidence as neutral in respect of credibility.

CONCLUSION

[34] It is unfortunate that it has become the norm to place an onerous duty on drivers of vehicles in South Africa to be aware that there may be potholes in road surfaces and to accept that the State argues[11] that it does not have the ability to inspect all roads or have funds to remedy defects. It would sanction a *laissez-faire* attitude.

[35] The Plaintiff admitted that one should apply caution and need to be vigilant as there may be potholes, he grew up on a farm and is aware that roads may be uneven and there may be loose gravel and a cautious driver should be on the lookout. This can, however, not absolve the State from complying with its obligations. In respect of an error of judgment, Fisher AJ in *Fourie v Road Accident Fund*[12] held that:

> "…*a course of action, depending on the circumstances, may be justified if no other acceptable means be available for avoiding the collision and that the conduct of the driver having to take such a decision should be examined within the context of the extreme circumstances in which he finds himself and not in the placid atmosphere of a courtroom and with reference to the so-called after-acquired knowledge (see the remarks generally of Van den Heever J (as he was then) in Cooper v Armstrong 1939 OPD 140 at 148)*."

[36] The law does not call for perfection. What it calls for is reasonable conduct. The concept of the reasonable person is not that of a timorous faint-heart

[11] This was not the case of the Plaintiff or argued by Ms Wright.
[12] [1999] 3 All SA 661 (O) at 670.

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.[13] In *International Shipping Co (Pty) Ltd v Bentley*[14], Corbett CJ, in dealing with the issue of whether wrongful conduct was the factual cause of loss, held:

> *"The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such a hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; aliter, if it would not so have ensued. If the wrongful act is shown in this way not to be a causa sine qua non of the loss suffered, then no legal liability can arise.*
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> *In keeping with the onus in civil matters, 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'.""*

[13]Herschel v Mrupe 1954 (3) SA 464 (A) at 490F.

[14]1990 (1) SA 680 (A) at 700F-H, quoted in *Charter Hi (Pty) Ltd and Others v Minister of Transport* [2011] ZASCA 89 at [49].

[37] I conclude that the conduct of the Third Defendant was wrongful and negligent. The public, and motorists specifically, can expect that the State comply with, if not its statutory duties, then a duty of care. Taxpayers fund the Third Defendant to comply with its duties, it has the power and resources available to comply with its obligations, and shifting an onerous duty on motorists would be against public policy. I am satisfied that the test on negligence was satisfied.

[38] The lack of maintenance of roads within the jurisdiction of innumerable municipalities, and the knowledge thereof, does unfortunately not absolve motorists from appreciating the possibility of dangers. Balancing the competing negligent conduct and failure of a duty of care by the Third Defendant with the marginal failure of the Plaintiff to execute a safer manoeuvre, leads me to attribute negligence to the respective parties where the Plaintiff was 20% negligent and the Third Defendant 80% negligent.

[39] In *South British Insurance* Co, *Ltd v Smit*[15] it was held:

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[15] 1962 (3) SA 826 (A) at 837 F-H quoted in *Fox v RAF* [2018] ZAGPPHC 285 at [15]..

> *"From the very nature of the enquiry, apportionment of damages imports a considerable measure of individual judgment: the assessment of the degree in which the claimant was at fault in relation to the damage is necessarily a matter upon which opinions may vary. In the words of Lord Wright in British Fame (Owners) v Macgregor (Owners),* ***1943 (1) A.E.R. 33*** *at p35: 'It is a question of the degree of fault, depending on a trained and expert judgment considering all the circumstances and it is different in essence from a mere finding of fact in the ordinary sense. It is a question, not of principle, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be difference of opinion by different minds'."*

[40] In respect of costs, I am of the view that ordering costs in accordance with contributory negligence would not serve justice. The Plaintiff was substantially successful. Most of the evidence and time spent in Court can be attributed to the Plaintiff.

[41] I borrow from the judgment in *Fourie supra* where the Court held that to reserve costs pending judgment on the issue of the quantum of damages will as such detract from the great advantage which is conferred by a separation in terms of rule 33(4) of the Uniform Rules of Court. It was patently clear during the trial that Plaintiff had sustained serious bodily injuries. No purpose will be served in reserving any order as to costs at this stage.

[42] Wherefore the following orders are made:

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ORDER:

1. Both the Plaintiff and the Third Defendant were negligent in causing the accident.
2. Negligence of 20% is attributed to the Plaintiff and 80% to the Third Defendant.
3. Mr Boshanki Ernest Lelilo is declared a necessary witness.
4. Third Defendant is liable for payment of the Plaintiff's costs in respect of the merits. Costs are not apportioned.

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PR CRONJÉ, AJ

Counsel for Plaintiff:	Adv PJJ Zietsman SC
Attorneys for Plaintiff:	Honey Attorneys Bloemfontein
Counsel for Third Defendant:	Adv GJM Wright
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