REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED √
June 2016 DATE	..... SIGNATURE

CASE NO: 9627/2014

24/6/2016

In the matter between:

JOHANNES PETRUS NEETHLING **Plaintiff**

and

POLOKWANE LOCAL MUNICIPALITY **Defendant**

JUDGMENT

PETERSEN AJ:

INTRODUCTION

[1] On the 22 July 2012 at approximately 17h15pm, the Plaintiff rode his off-road motorcycle along an area between the tarred public roads known as Landdros Maré Road (otherwise known as the N1 highway) and Marmer Street, Polokwane ("*the ground portion*") when he fell into a concrete lined drainage canal traversing the ground portion. He sustained several injuries, including a fracture of the right knee joint, a fracture of the tibia and fibia, psychological shock and various lacerations, abrasions and bruises.

SEPARATION OF ISSUES IN TERMS OF UNIFORM RULE 33(4)

[2] At the commencement of the trial, pursuant to an agreement reached between the parties at the pre-trial conference, I granted an order separating the merits of the matter from quantum.

THE ISSUES

[3] The Plaintiff alleges:

(1) That there was a legal duty on the Defendant in respect of the Plaintiff and other members of the public to have identified the drainage ditch as a hazard or potential hazard to users of the ground portion; alternatively to ensure that if the ground portion constituted a hazard or potential hazard to have taken reasonable steps to prevent the said users from using same or to warn the users and/or intended users of the said hazard or potential hazard.

(2) The breach of the alleged legal duty on the Defendant is said to have occurred in one or more or all of the following respects: It failed to maintain, alternatively properly maintain the said ground portion when it could and should have done so; As a result the grass had grown over the ground portion resulting in the unprotected ditch not being visible/detectable creating an uneven and/or unstable surface which was a hazardous situation for users and/or intended users of the said ground portion; No warning signs and/or other preventative measures aimed at preventing the

users and/or intended users of the said ground portion from using the said hazardous or potentially hazardous ground portion and/or aimed at warning the said users of the said hazardous or potentially hazardous ground portion were erected or taken by the Defendant whilst the Defendant could and should have done so; The Defendant failed to prevent the incident when by the exercise of reasonable skill and care the Defendant could and should have done so.

[4] The Defendant essentially denies each and every allegation by the plaintiff.

ISSUES OF COMMON CAUSE AND THE ISSUE IN DISPUTE BETWEEN THE EXPERTS

[5] The Plaintiff and Defendant relied on the evidence of expert witnesses, Professor Alex Theo Visser and Mr Willie Renier du Preez respectively. The expertise of the experts was not placed in issue and I am satisfied that the experts were duly qualified to render their expert opinions in this matter. A joint meeting between the experts held on the 06 May 2016 preceded the trial. The discussions revealed the following issues of common cause and issues in dispute. I hasten to add that the issues of common cause between the experts, as will be demonstrated in the evidence of the Plaintiff, are conceded.

[6] It is common cause:

(1) that the ground portion or green area between the R101 (N1/Landros Maré Street) and Marmer Street is not a public area for use by vehicles; and

(2) the evidence and photographs does not demonstrate the lateral position of the motorcycle prior to its entrance into the storm water ditch.

[7] The only issue in dispute:

(1) According to Professor Visser hazard signs are not required as the ground portion is not a general public driving area and it has become custom for such signs to be stolen or removed. He holds the view that the

guardrail and parapet wall along the N1 offers protection to pedestrians and vehicles.

(2) According to Mr du Preez given the indicated point of entry, basically in the centre of the drainage ditch, there was not enough indication that there was a hazard.

THE EVIDENCE

THE PLAINTIFF

[8] The evidence of the Plaintiff, Johannes Petrus Neethling, in summary is that he possesses a licence to ride the off road motor cycle in question. The motor cycle was not roadworthy at the time of the incident. At the time of the incident he was with his son who was riding a different off road motor cycle en route from his home to a small business owned by the family close to an industrial area. The direction of travel he took along the ground portion ("veld" as he describes it) was down the centre. It was the first time he had ever driven on the said ground portion. As he rode his off road motor cycle at a speed of approximately 50-55km/h he could not see the drainage ditch as the area was dry and level with grass. There were no visible warning signs. When he saw the drainage ditch he applied his front brakes and when he realised he was going to fall he applied his back brakes. He kept the motor cycle up, decreased his speed but his leg still hit the ditch.

CONCESSIONS BY THE PLAINTIFF IN CROSS EXAMINATION

[9] The Plaintiff made the following concessions in cross examination:

(1) that he lived 3km away from the scene of the incident and he only crossed 3 areas of public road riding on the shoulder of the road.

(2) that the street barrier kerbs erected along Marmer Street serve as an indication to motorists that they are not allowed to drive onto the ground portion although he entered the ground portion where there were no kerbs;

(3) that the ground portion was not a road and was not meant for use by the public.

(4) that he whilst he was a trespasser on the ground portion, other vehicles used the ground portion and the said ground portion appeared to him to be safe.

(5) whilst it his initial evidence that he could not see the distinct green portion where the drainage ditch was from his vantage point on the motor cycle some 20-30 paces away he conceded that because of the length of the grass sticking out from the ditch he would have seen it from some 20m away.

(6) when driving in his motor vehicle along the road every two weeks he had seen the guardrail which was meant to protect traffic from "something". He had never thought it could be a ditch and at most a culvert to prevent motor vehicles from going down that area. It was for this reason that he therefore rode down the middle of the ground portion because he knew that the guardrail signalled danger.

(7) whilst other motorists drove on the ground portion he had not followed their tracks but had rode down the centre and he could not dispute that the area used by other motorists was some 350m from the ditch.

THE PLAINTIFF'S EXPERT WITNESS

[10] Mr du Preez's evidence on the issues in dispute in brief is that in his opinion warning signs should be erected drawing attention to the drainage canal because of heavy duty trucks which utilise the ground portion as a crossing.

THE DEFENDANT'S WITNESS

[11] The evidence of Jack Goto Papu, Superintendent Roads and Stormwater for the Polokwane Municipality, in my view, on evidence on the issues in dispute assisted only in providing the measured distance from where trucks illegally utilise the ground portion to where the incident occurred, penning it at 307m. Notwithstanding his evidence that he has

lived in Polokwane all his life and regularly drives past the ground portion where he has only ever seen heavy duty trucks utilising the ground portion he readily conceded on the photographic evidence taken shortly after the incident that the ground portion was not only utilised by heavy duty trucks but bakkies and sedans as well.

THE DEFENDANT'S EXPERT WITNESS

[12] The evidence of Professor Visser on the issues in dispute is simply that there was no need to place warning signs where accidents are not meant to occur. He holds the view that the guardrail along the road is sufficient to alert road users/motorists of the danger where the drainage ditch is situated.

THE ARGUMENTS

[13] At the conclusion of evidence, Counsel for the Plaintiff addressed closing argument from the Bar whilst Counsel for the Defendant provided Short Heads of Argument. I have carefully considered the arguments and deal with the authorities cited insofar as they are relevant to the peculiar facts of this matter in the evaluation of the evidence.

THE ONUS IN A CIVIL MATTER

[14] It is trite law that the Plaintiff bears the onus to prove his case on a balance of probabilities. The onus in the present matter succinctly stated is whether the Plaintiff has proven the breach of a legal a duty on the part of the Defendant to ensure that the ground portion did not constitute a hazard or potential hazard to the Plaintiff as a user of the ground portion or other users or that if found that the ground portion constituted a hazard or potential hazard to the Plaintiff or other users to take reasonable steps to prevent the Plaintiff and other users from using the ground portion or warning them of the said hazards or potential hazards.

THE LAW

[15] In **Cape Town Municipality v Bakkerud**[1] the legal duties of municipalities were clarified and set out as follows:

"[28] There can be no principle of law that all municipalities have at all times a legal duty to repair or to warn the public whenever and whatever potholes may occur in whatever pavements or streets may be vested in them.

[29] It is tempting to construct such a legal duty on the strength of a sense of security engendered by the mere provision of a street or pavement by a municipality but I do not think one can generalise in that regard. It is axiomatic that man-made streets and pavements will not always be in the pristine condition in which they were when first constructed and that it would be well-nigh impossible for even the largest and most well-funded municipalities to keep them all in that state at all times. A reasonable sense of proportion is called for. The public must be taken to realise that and to have a care for its own safety when using the roads and pavements.

[30] It is not necessary, nor would it be possible, to provide a catalogue of the circumstances in which it would be right to impose a legal duty to repair or to warn upon a municipality. ***Obvious cases would be those in which difficult to see holes develop in a much used street or pavement which is frequently so crowded that the holes are upon one before one has had sufficient opportunity to see and to negotiate them. Another example, admittedly extreme, would be a crevice caused by an earth tremor and spanning a road entirely. The variety of conceivable situations which could arise is infinite(my emphasis).***"

[16] It is accepted that an omission on the part of the defendant is wrongful if the defendant is under a duty to act positively to prevent the harm suffered by the plaintiff. In **Van Eeden v Minister of Safety and Security**[2], the Court restated the test of reasonableness in the event of an omission, holding that a defendant is under a legal duty to act positively to prevent

---

[1] 2000 (3) SA 1049 (SCA) at 106D-G para [28]-[30]
[2] 2003 (1) SA 389 (SCA) at para [9]

harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent harm.

[17] In **Minister van Polisie v Ewels**[3] a change in our law was heralded when an omission was regarded as unlawful conduct when the circumstances of the case are of such a nature that the omission not only incites moral indignation but also that the legal convictions of the community deemed that the omission ought to be regarded as unlawful and that the damage suffered ought to be made good by the person who neglected to do a positive act.

[18] In **Kruger v Coetzee**[4], the test for proving negligence was set out 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.

[19] The test for proving negligence has withstood judicial scrutiny over the years and has been restated in numerous judicial pronouncements for the last 50 years. A careful reading of the case law demonstrates that requirement *(a)*(ii) is sometimes overlooked. The question to be begged on this requirement is whether a *diligens paterfamilias* in the position of the person concerned (defendant *in casu*) would take any guarding steps at all and, if so, what steps would be reasonable. This question in my view can only be answered by having regard to the particular circumstances of each case (the peculiar facts *in casu*). A study of our municipal cases generally shows the futility of seeking guidance from the facts and results of

---

[3] 1975 (3) SA 590 (AD)
[4] 1966 (2) SA 428 (A) 430E-H

previously decided cases. Whilst reference to previously decided cases is a useful tool for comparative analysis it very often yields no cogent answers to the peculiar facts of any case.

EVALUATION OF THE EVIDENCE

[20] The Plaintiff conceded that he was a trespasser on the ground portion. Notwithstanding this concession the Defendant itself had at the time of the incident and as the evidence demonstrates 4 years on, allowed either "trespassing" on the ground portion or possible violation of road traffic ordinances in allowing heavy articulated vehicles, LDV's, sedans, pedestrians and vendors to be present on the ground portion. In my view therefore nothing turns on the argument that the Plaintiff was a trespasser on the ground portion.

[21] In my view the narrow issue which forms the basis of the plaintiff's claim is whether or not there was a legal duty on the Defendant at the time of the incident in the peculiar circumstances of this matter to have taken steps to prevent harm to the Plaintiff. The crisp question is: (1) whether the defendant should have foreseen the possibility of the plaintiff falling into the drainage canal injuring him in his person and (2) failed to take reasonable steps to guard against such occurrence.

[22] The line of travel embarked upon by the plaintiff with his off road motor cycle on the real evidence (photographs of the scene of incident) was not a course ordinarily undertaken by the other unlawful users/trespassers of the ground portion. On the totality of the evidence, the plaintiff's actions on the day of the incident was both unique and an isolated incident in some 20 years of the existence of the ground portion.

[23] It is common cause that the Plaintiff was not a road user on the ground portion on the date of the incident and the ground portion where the incident occurred was not a road in the ordinary sense. The ground portion where the incident occurred was not frequently used. The drainage canal or ditch was sufficiently identified to road users. The Plaintiff on his own

account was a regular user of the adjoining N1 road and aware of the guardrail along the area of the drainage canal, indicative of a hazard to *road users*. Notwithstanding this knowledge the Plaintiff *thought* that the position of travel he embarked upon would evade the danger which he perceived the guardrail to be warning of, to his mind, being a culvert.

[24] The Plaintiff in my view, on his own account, created the danger for himself when he negligently embarked on using the ground portion with his unroadworthy off road motor cycle whilst being aware of the hazard informed to road users on the adjoining N1.

[25] Notwithstanding the Plaintiff's negligence the question of any possible contributory negligence on the part of the Defendant cannot be overlooked. The position of the drainage canal on the ground portion as it traverses the adjoining N1 and Marmer Road as source of danger is important to establish the extent of the risk of preventing harm. A reasonable municipality would only neglect such risk if it had some valid reason for doing so. The Defendant's case simply stated is that the ground portion where the incident had occurred is not meant for public use and there is accordingly no legal duty on it to have forewarned the Plaintiff and/or other users of the existence of the drainage canal on the ground portion. I reiterate what was said at paragraph [30] of ***Bakkerud*** *supra*: "...*Obvious cases would be those in which difficult to see holes develop in a much used street or pavement which is frequently so crowded that the holes are upon one before one has had sufficient opportunity to see and to negotiate them (my underlining). Another example, admittedly extreme, would be a crevice caused by an earth tremor and spanning a road entirely (my underlining).*

[26] The peculiar facts of this matter are distinguishable from the situation where a street (road) is frequently crowded or used that one would not have sufficient opportunity to negotiate any holes or crevices that may have developed. In my view, it cannot be said that the Defendant should reasonably have foreseen that the Plaintiff would ride his off road motor cycle on the path he took, thereby causing injury to his person when he fell into the drainage canal. The Defendant took sufficient steps through a

guardrail to warn or alert road users of the N1 of a hazardous situation on the adjoining ground portion.

[27] The Court accordingly finds that the negligence of the Plaintiff was the sole cause of the incident; that there was no legal duty on the Defendant to prevent the harm caused to the Plaintiff in the peculiar circumstances of the incident; and there was accordingly no contributory negligence on the part of the Defendant.

[28] In the circumstances I order:

(1) The Plaintiff's claim on the merits is dismissed with costs, including;

(2) The preparation and qualifying fees of the defendant's expert, Professor Alex Theo Visser, inclusive of costs of preparing his report; and

(3) Costs of Senior Counsel.

AH PETERSEN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appearances:

On behalf of the Plaintiff: Advocate J van der Merwe

Instructed by Thomas Grobler Attorneys

On behalf of the Defendant: Advocate P.P. Delport

Instructed by Savage, Jooste and Adams Inc.

DATES HEARD: 11 May 2016 and 12 May 2016

DATE OF JUDGMENT: 24 June 2016