

SUPREME COURT OF APPEAL OF SOUTH AFRICA

**MEDIA SUMMARY – JUDGMENT DELIVERED IN THE
SUPREME COURT OF APPEAL**

**ALLISTAIR POVL McINTOSH AND PREMIER OF THE PROVINCE OF
KWAZULU-NATAL AND MEC FOR THE DEPARTMENT OF TRANSPORT
FOR KWAZULU-NATAL CASE NO 632/07**

From : The Registrar, Supreme Court of Appeal

Date: 29 May 2008

Status: Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal

The SCA today upheld the appeal of a Pietermaritzburg advocate who sustained serious injuries when he fell from his bicycle while attempting to avoid a large pothole in a road controlled and managed by the KwaZulu-Natal Department of Transport. At the time, Mr Allistair McIntosh, a keen cyclist, was riding down a hill, with bends in both directions, in the Kamberg area, near Pietermaritzburg. He testified that while negotiating a bend in the road at a speed of about 55 kph he

suddenly became aware of a large pothole on the centre line. He could see that the road was clear ahead and was then converging on the centre line, leaning into the bend to his right. In his attempt to shift his weight to a more upright position and so pass to the left of the pothole, he lost control of his bicycle and fell.

The High Court, Pietermaritzburg found McIntosh to have been solely to blame for his injuries. On appeal, however, it was argued that the pothole had been in existence for about a year and had grown to such a size and depth that according to the Department's own maintenance code it gave rise to a 'dangerous situation'. The Department complained that it had insufficient funds to properly maintain the road network in the Province.

In delivering the judgment of the court, Justice Scott noted that the road in question was the subject of weekly routine inspections but notwithstanding these there had been no explanation forthcoming as to why the pothole had not been repaired. He said that 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, yet the Department had failed to lead evidence to show that by reason of the lack of funds the repair of potholes had to be neglected in favour of some other priority. In these circumstances, he said, the inference of negligence on the part of the Department's officials was irresistible.

McIntosh conceded in evidence that shortly after commencing his descent down the hill he had observed a pothole in the road. The SCA found that he had nonetheless proceeded downhill at a speed which left little room for error and for this reason he had also been negligent. In the result the court apportioned blame on the basis of 60 : 40 in favour of McIntosh.

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