IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case number: 19918/2013

In the matter between:

DESTINY TASHMEEN HENSON Plaintiff

and

THE MEC FOR TRANSPORT AND PUBLIC WORKS,
WESTERN CAPE GOVERNMENT Defendant

JUDGMENT DELIVERED ON 18 APRIL 2023

VAN ZYL AJ:

Introduction

1. On 10 December 2010, in the evening, the plaintiff was the driver and registered owner of a maroon Ford Escort bearing registration number C[…]. She and her passenger, Mr Otto, was travelling along the R311 between Hopefield and Moorreesburg, in an easterly direction.

2. The plaintiff, according to her evidence, encountered numerous potholes in the roadway. She attempted to avoid and safely navigated most of them, travelling at an average speed of 50km to 60km per hour. Suddenly, however, her vehicle

dipped into a pothole. This caused her to lose control and the car rolled and came to a standstill along the Patrysvlei Farm, a farm belonging to a Mr Bester.

3. As a result of the accident, the plaintiff suffered numerous injuries, including a severe degloving injury to her right arm, associated with an ulna nerve injury. The injuries are detailed in the particulars of claim and the expert reports filed of record.

The plaintiff's claims

4. The plaintiff claims delictual damages from the defendant arising from the injuries suffered as a result of the accident. The issues of liability and *quantum* were separated at the commencement of the trial. What is at issue at this stage is therefore only whether the defendant is liable to the plaintiff on any of the grounds set out in the particulars of claim.

5. The plaintiff bears the onus in respect of all the elements of the delict (see, for example, *Van der Merwe v MEC Public Works, Road and Transport and another* [2019] ZAFSHC 6 (28 February 2019) at para [16]). Thus, to succeed with her claim, the plaintiff must prove all the elements of the delict (having alleged them in her pleadings), namely (1) conduct on the part of the defendant, either, in the form of a commission (i.e., a voluntary human act) or an omission (the failure to take positive steps to prevent harm to another where there is a legal duty to act), (2) the wrongfulness of that conduct, (3) fault in the form of negligence (or intent), (4) harm suffered by the plaintiff and (5) a causal connection between the harm and the defendant's conduct.

6. The onus of proof is to be discharged on a balance of probabilities. What the Court does is to draw inferences from the proven facts. The inference drawn is the most probable, though not necessarily the only, inference to be drawn (see *Cooper and another v Merchant Trade Finances* 2000 (3) SA 1009 (SCA) at 1027F-1028D).

7. As the overarching basis for her claims, the plaintiff avers that a legal duty rests on the defendant to take all reasonable steps to ensure the safety of the plaintiff and other road users, particularly those using the R311 between Moorreesburg and

Hopefield. She alleges that the defendant breached his legal duty and that such breach resulted in the accident and, as a result, the damages that she suffered.

8. It is common cause that, pursuant to the provisions of section 7 of the Roads Ordinance No. 19 of 1976 ("the Ordinance"), the defendant has a duty to construct and maintain the R311, which is under his control. The defendant admits (both in his plea and by way of the evidence of his witness Mr Schoeman, discussed below) that the R311 falls under his direct control. The R311 is a public road and vests in the defendant. The Ordinance has, since the date of the collision, been repealed by the Western Cape Transport Infrastructure Act, 2013. In terms of section 2(1) of the Act, the defendant "*must finance, manage, regulate, upgrade, protect and rehabilitate provincial transport infrastructure, and all rights and obligations attached to such infrastructure vest in [the defendant]*".

9. The grounds of negligence upon which the plaintiff relies are, in the main, that the defendant (through his employees) failed:

    9.1 To maintain the R311 in a safe condition; to repair or fill the potholes; and to effect repairs and maintenance to the road to ensure that it was in a safe and usable condition;

    9.2 To provide adequate signage to ensure that members of the public, including the plaintiff, were made aware of the danger posed by the potholes;

    9.3 To ensure that regular or sufficient patrols were undertaken to ensure the plaintiff's safety from hazards of the type created by the potholes;

    9.4 To exercise reasonable care to prevent the plaintiff from driving through or into the pothole, when it was his legal duty to do so;

    9.5 To take reasonable or adequate steps to avoid, by the exercise of reasonable care, the injuries suffered by the plaintiff;

    9.6 To have taken proper safety precautions to ensure the safety of all road users, in particular the plaintiff.

10. The evidence led in support of these allegations will be dealt with below.

The application for a postponement

11. There was, at the outset of the trial, an application by the defendant for a postponement so as formally to qualify his witness, Mr Schoeman, as an expert. The application was opposed by the plaintiff. It appeared from the affidavit in support of the application, however, that Mr Schoeman was not in a position to give any expert evidence in the matter. The high-water mark of his evidence would, according to the affidavit, be as follows: ".. *I will have to deal with the RMT contract which were concluded in 2010 with the external service provides to establish the scope and extent of the work performed on public road MR231 [R311]). I will also require network level information from pavement management systems to ascertain the capital works that were done, and the costs involved. … In addition, the extent to which the maintenance programme covered public road MR231, in particular, the area where the alleged accident occurred. The costs of repairs, the patrols conducted including the costs of repairing a pothole, at the time of the information is available*".

12. This evidence, as was borne out by the evidence that Mr Schoeman was in fact able to give at the trial, was purely factual. There was no need to qualify him as an expert witness.

13. The application for a postponement was accordingly dismissed, with costs, and the trial proceeded.

The defendant's defences

14. As indicated, the defendant admits that the road between Moorreesburg and Hopefield is a public road, the ownership of which vests in the defendant. The defendant denies, however, that he or his employees were negligent in any way, and pleads that the road was at all relevant times suitable for or conducive to reasonable, proper and optimal vehicular use. The defendant denies that it *"owed* a *duty of care to the Plaintiff either on 10 December 2010 or at all.*"

15. The defendant pleads that it took various steps to ensure that the existence of potholes or any other defects on the public road were brought to his attention. Those steps included routine patrolling on the public road and the inspection of the road surface by, amongst others, technicians. The defendant contends further that, in 2010, maintenance work was performed by external contractors in terms of agreements between the defendant and sub-contractors. Such maintenance work included patching "*and/or*" the resealing of defects on the road surface, "*and/or*" the filling the road surface, as well as attending to the normal wear and tear of the public road.

16. The defendant avers that the collision was caused by the plaintiff's own negligence, or that there was contributory negligence in her part. The defendant bears the onus in this respect (see *Van der Merwe supra* at para [17]) to prove that, as pleaded, she:

16.1 Failed to keep a proper lookout;

16.2 Failed to avoid any hazard on the public road when she could and should have done so;

16.3 Drove the vehicle while she was not able to or capable of doing so;

16.4 Drove at an excessive speed in the prevailing circumstances;

16.5 Failed properly to control the vehicle when she could and should have done so;

16.6 Failed, in circumstances where she could or should have done so, to maintain a proper lookout for, *inter alia,* pothole warnings signs; uneven road warnings signs and speed restriction warnings signs adjacent to the public road;

16.7 Failed at all material times to act with due and proper care when using the public road;

16.8 Failed to apply the brakes of the vehicle in circumstances where she should or could have done so; and

16.9 Increased the speed of the vehicle after it had left the tarmac road surface of the public road whilst it was unsafe to do so.

17. The defendant pleads, essentially, that the plaintiff failed to avoid the accident, in circumstances where she should or could have done so by the exercise of reasonable care and skill. In this respect, the defendant referred to what was stated in *Minister of Transport NO and another v Du Toit and another* 2007 (1) SA 322 (SCA) at para [17] as regards the responsibilities of a driver:

"A driver of a *vehicle is obliged to maintain* a *proper lookout. He (she) must pay attention to what is happening around him or her, 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 and the nature of the road, and the speed at which he or she 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 miss-rate or fail to react to a road sign. For this reason, it is imperative, particularly in unlit areas, for warnings and other signs to be clear, unambiguous, and appropriately positioned* so *that, if necessary, they may be read and comprehend at a glance."*

18. I shall return to whether the defendant has succeeded in discharging this onus.

The general immunity relied upon by the defendant

19. The defendant raises a general immunity pursuant to section 60 of the Ordinance. Section 60 provides as follows:

"*60. Actions for damages in certain circumstances.*

(1) No action shall lie against a road authority or any employee, agent or contractor of a road authority for or in respect of any damage or injury sustained or alleged to have been sustained by any person-

(a) in using any part of a public road or public path other than the roadway of a public road;

(b) in using a public road or public path merely by reason of the fact that such road authority has contributed towards the costs of construction, repair, improvement or maintenance of such road or path, or

(c) as a result of the exercise of the powers contemplated by section 59.

(2) If a person uses a public road for bona fide trekking with stock no action shall lie in respect of damage caused by such stock within a distance of forty-five metres from the boundary of such road on any side thereof on which it is not fenced, and such stock shall not be liable to be impounded while within such distance and for the purposes hereof a person shall not be deemed to have used a public road for the bona fide trekking with stock unless such trek was completed within twenty-four hours after its commencement, or unless during any twenty-four hours during which the trek lasted, a distance of at least ten kilometres in the case of small stock and twenty kilometres in the case of large stock, was covered in the same direction." [Emphasis added.]

20. The defendant says that section 60(1)(a), read with (b), provides it with an indemnity against the plaintiff's claim. Section 60(1)(a) is substantially repeated in section 59(1)(a) of the Act in the following terms (section 60(1)(b) is not reproduced in the Act):

"*(1) A responsible authority or any if its agents or employees or officials, or any person who operates or has constructed transport infrastructure, is not liable in respect of damage or loss suffered by a person-*

(a) through the use of that part of transport infrastructure not intended or constructed for the use of vehicles;…"

21. The defence has no merit, because the plaintiff was, on the undisputed evidence, not using any part of the public road other than the roadway on the day of the accident. She was not using any part of the road not intended for the use of vehicles. It was only as a result of, on her evidence, the striking of the pothole in the roadway that her vehicle left the roadway. Section 60(1)(a) is therefore of no assistance to the defendant.

22. As to section 60(1)(b), the plaintiff does not seek to hold the defendant responsible merely by reason of the fact that the defendant has contributed towards the costs

of construction, repair, improvement or maintenance of the road. Her claim is based upon the alleged negligence of the defendant and its employees – a claim which is not excluded on the ordinary wording of section 60(1)(b).

23. With this issue out of the way, I proceed to discuss the evidence furnished on behalf of the parties. Both parties put into evidence photographs of the location where the plaintiff testified the accident had taken place, and some distance prior to and beyond that location. Unfortunately, the photographs all depict the area either months before the accident, in April 2010, or as it was some years after the accident occurred, and they were therefore not particularly helpful. No contemporaneous photograph of the accident scene or the roadway as it looked at the relevant time exists.

The evidence on behalf of the plaintiff

24. Three witnesses testified in support of the plaintiff's case.

Destiny Tashmeen Henson (the plaintiff)

25. The plaintiff testified that, at the time of the accident, she was 20 years old and had obtained her driver's licence two years before, in 2008. On the day in question she had travelled with her motor vehicle, a four-door Ford Escourt, from Piketberg in the morning to Saldanha to fetch her then-boyfriend, Mr Otto, who is now her husband. The sky was clear and the roadway was dry. She remembered encountering potholes on the R311 in the direction of Saldanha. After meeting Mr Otto in Saldanha, they first visited with his family in the area and then travelled to Porterville along the R311. The plaintiff is not able to recall the exact time, but it was dusk when they commenced their journey back along the R311. They were not in a hurry, and she did not drive fast. The road was not busy.

26. Whilst she travelled along the R311, having left Hopefield and going in the direction of Moorreesburg, she again noticed numerous potholes, which she tried to avoid. The potholes were not "agtereenvolgend" (loosely translated as "consecutive") and thus predictable, but occurred at scattered intervals. She saw no warning signs of

potholes, but applied her own logic by keeping a lookout and attempting to avoid the potholes to the extent that they were visible to her. There were no lights at the side of the road. Her vehicle suddenly dipped sharply into a pothole which she saw, but which she was unable to avoid. She felt a great impact, causing her to lose control of her vehicle. The vehicle rolled and came to a halt against the fence of the Patrysvlei Farm. She was able to get out of the vehicle, and waited for a long time before the police arrived at the scene.

27. During cross-examination, the plaintiff testified that it was due to the extent of the pothole into which she drove - she said that the vehicle had *"dipped"* into it - which caused her to lose control and the vehicle to roll. She said that she was travelling at approximately 50 to 60 km/hr and was not speeding. She maintained, in cross-examination, that her eyes were on the road at all times and that she could see many potholes on the road surface.

28. When it was put to her that warning signs regards the potholes could have been there, she readily conceded that there could have been warning sign or signs. She had, however, not seen these - a point I shall revert to later.

29. Much time was dedicated to cross-examining the plaintiff on the content of the police report compiled in relation to the accident. She maintained that she only provided the details of her personal particulars, whether she had consumed alcohol (she had not), and whether she held a valid driver's license at the time. She is unaware of where the police obtained the further details noted on the report, for example, the condition and quality of the road surface, whether it contained potholes; whether the roadsigns were clearly visible, and what the condition of the roadsigns was. The defendant emphasised that the police report does not show that the plaintiff had been able to identify the pothole in question.

30. In *Rautini v Passenger Rail Agency of South Africa* [2021] ZASCA 158 (8 November 2021), the Supreme Court of Appeal held that the content of a discovered document (such as the police report in the present matter) remains hearsay, inadmissible and irrelevant to the extent that it is denied by witnesses,

unless the person who recorded the information is called as a witness to such report:

"[8] This appeal raises the important issue regarding the admissibility of the contents of discovered documents, without the author having to testify about the correctness of the contents thereof. Counsel for the appellant argued that the medical records could not be relied on as they constituted hearsay evidence. The full court however attached considerable weight to them on the basis that the appellant, who in fact discovered them, never disputed their veracity. It then concluded that the appellant in fact supported the respondent's version of events.

[9] Section 3(1) of the Law of Evidence Amendment Act 45 of 1988 (the Law of Evidence Amendment Act) reads as follows: …

[10] The record indicates that the appellant's counsel in his opening address at the trial expressly stated that the discovered documents are what they purport to be, but that the correctness of the contents was not admitted. …This was confirmed by the respondent's counsel in this Court. In his heads of argument, the respondent's counsel confirmed that the documents were expressly admitted as evidence, although the content would remain hearsay evidence in the sense that the authors would not have to be called. Furthermore, to call the authors as witnesses was 'unnecessary in view of the agreement between the parties and would have been a waste of the court's time'.

[11] The contents of the hospital records and medical notes constituted hearsay evidence, and it is trite that hearsay evidence is prima facie inadmissible. The discovery thereof by the appellant in terms of the rules of court does not make them admissible as evidence against the appellant, unless the documents could be admitted under one or other of the common law exceptions to the hearsay rule.

[12] It is common cause that the respondent's counsel made no application for any of the hearsay evidence to be admitted in terms of s 3 of the Law of Evidence Amendment Act. In the circumstances, the full court's finding that material differences existed between the appellant's version and the medical records regarding where he fell from the train, the cause of his fall and his first lucid recollection after the fall, was erroneous. The full court's reliance on hearsay evidence in that regard amounts to a material misdirection that vitiates its ultimate finding on the outcome of the appeal that was before it." [Emphasis added.]

31. The defendant's attempt to impugn the plaintiff's credibility using the police report in the present matter is without merit, as the content of the report remains hearsay evidence. In the present case, as in *Rautini*, the parties accepted that the discovered documents are what they purport to be. The correctness of the contents thereof was not admitted. The plaintiff's counsel in fact emphasised this in his opening address. The police officer who had compiled the report was not called to testify, and the defendant never brought an application in terms of section 3 of the Law of Evidence Act for the content of the police report to be admitted as evidence.

32. The plaintiff was referred to certain photographs discovered by the defendant. It was put to her that, according to the defendant's records, no potholes existed on the road at the time. Departmental worksheets containing details of maintenance undertaken on the road prior to and after the accident were put to the plaintiff, on which she could, for obvious reasons, not comment. The plaintiff was steadfast in her evidence that there were numerous potholes in the road. She negotiated all of them save for the one that caused the accident close to the entrance to the Patrysvlei Farm.

33. On questioning by the Court, the plaintiff maintained that, once she had struck the pothole and applied her brakes, she lost control and her vehicle rolled. She described the injuries she sustained in the accident, in detail, which had left her with a virtually useless arm. Although she could not recall exactly where along the R311 the pothole was situated, she did not deviate from her evidence that there had been a pothole on the road surface which caused her vehicle to *"dip"*, resulting in her losing control and ending up against the fence of the Patrysvlei Farm.

34. No factual bases were put to the plaintiff during cross-examination as to any manner in which she could have been negligent in causing the accident. All that was stated to her in this respect was what the defendant had pleaded, and what was going to be argued on the defendant's behalf. The plaintiff was adamant that she had not been negligent in any way.

35. All things considered, the plaintiff's evidence was not undermined in any material way as a result of her cross-examination.

Mr Otto

36. Mr Otto was the passenger in the vehicle. He was awake for the duration of the journey. He corroborated the plaintiff's evidence that there were potholes on the roadway from the time that they started driving along the R311 from Hopefield in the direction of Moorreesburg. He stated that, at the point where the vehicle had "dipped" into the pothole, the plaintiff lost control and the vehicle came to rest on the side of the road next to the Patrysvlei Farm. It was put to him in cross-examination that the plaintiff, having been om the road for approximately "twenty hours", could have been tired at the time and that this resulted in her losing control of the vehicle. Mr Otto denied this, saying that they had stopped at a petrol station along the road to rest. This question had in any event not previously been put to the plaintiff herself.

37. Mr Otto testified that it was dusk at the time of the accident. He was confused as a result of the impact and only regained his full memory once in the ambulance. In cross-examination, he was nevertheless adamant as to the events he recalled prior to the accident.

38. Much emphasis was placed in cross-examination on when and who Mr Bester (the owner of Patrysvlei Farm) had called and where he had obtained Mr Otto's personal details when Mr Bester requested repairs to his fencing. The evidence elicited did not take the relevant issues any further.

39. Mr Otto was cross-examined at length regarding the version provided early on in his affidavit deposed to after the accident, namely that the accident had occurred at 19:20, which differed from what was stated later in the affidavit, namely that the accident had happened at *"nighf"*. This alleged variance was explained by Mr Otto reiterating that it was dusk at the time and that the correct time was probably 19:20. I do not think that the slight confusion as to the exact time of the accident is material in the context of the evidence as a whole. There was some issue as to

where the affidavit had been deposed to. This is immaterial, as Mr Otto confirmed that the affidavit was his and that he had deposed thereto.

40. What is of importance is that Mr Otto's evidence, insofar as he had observed potholes along the R311 prior to the collision and that the cause of the plaintiff's vehicle leaving the road was her hitting the pothole, was credible, consistent and reliable.

Mr Christoffel Johannes Bester

41. Mr Bester is a farmer who owns farmland along both sides of the R311. As a result of his family having acquired the farm in 1974, and him having travelled along the R311 approximately three times per day since his early childhood, he has first-hand knowledge of the condition of the road both prior to 2010 and subsequent thereto. After harvest time in December, there is normally a lot of pressure on that roadway as a result of trucks conveying produce in the direction of Moorreesburg.

42. Mr Bester testified that the R311 from Hopefield to Moorreesburg was in a very bad condition. He described the road, in Afrikaans, as being "*in 'n haglike toestand",* with many potholes. He was adamant that the R311, prior to 2010, had many potholes along the length of it, not only in front of the entrance to his farm. He had complained to the municipality, who indicated that it was not their problem. The road was repaired from time to time. Mr Bester recalled that, after the work was completed, the rubble or waste was generally just left at the side of the road.

43. With reference to certain photographs discovered by the parties, he identified how the road had been "patched" with cement and, significantly, where he had himself patched potholes in the road at the entrance to his farm, Patrysvlei. His own patchwork was not very clear but Mr Bester identified a whitish smear on the road as his handiwork.

44. Mr Bester's version corroborates the versions of the plaintiff and Mr Otto, that the vehicle had slammed into and flattened Patrysvlei Farm's fence at the side of the road. Although he was not able to identify the cause of the accident and the precise

point of impact, as he was not a witness to the accident, he stated that his fence near the entrance to his farm had been damaged (completely flattened) as a result. Dissatisfied with the situation, he traced the plaintiff and Mr Otto from the details contained in the police report. He confirmed having contacted Mr Otto to request that he repair the damage to the fencing. Mr Bester could not pinpoint what had caused the accident, but was adamant throughout his evidence that there were "*verskeie"* potholes on that stretch of the road. As he put it: "... *die draad kon nie die ongeluk veroorsaak het nie."* He stated further that one does not have to be an expert to recognise a pothole. One can see that there is a hole in the ground.

45. In cross-examination, Mr Bester maintained that the road was in a "*haglike toestand'* prior to and during 2010 and that it was only around 2016 when construction was commenced to fix the R311. The construction took the defendant about two years to complete.

46. Further cross-examination revolved around the information Mr Bester had provided to the plaintiff's assessor, but nothing significantly adverse to the plaintiff's case was revealed in the course of his evidence. Mr Bester mentioned, as I have stated earlier, that he had reported potholes at or near the alleged scene of the accident to the local municipality. He could not recall having had sight of any warning signs.

47. Mr Bester did not deviate in any material respect in his evidence, although he was cross-examined in depth regarding photographs allegedly taken prior to 2010 and subsequent thereto. It was put to him that, according to photographs taken by the defendant's maintenance team, work had been done from November 2010 until 22 December 2010 and that no record existed of any potholes at the scene of the accident. (It is worth mentioning at this juncture that this version, put to both the plaintiff and Mr Bester, was not confirmed by defendant's own witness, Mr Schoeman.) Mr Bester maintained that the defendant's photographs could have been taken during 2016 or shortly prior thereto, but not in 2010, with specific reference to the construction in the vicinity of the bridge.

48. Mr Bester was an entirely independent witness. His demeanour was forthright and honest. His evidence can be accepted as credible and reliable.

The defendant's evidence

49. The defendant called one witness, namely Mr Stephanus Schoeman.

Mr Stephanus Schoeman

50. Mr Schoeman testified that he was the Chief Engineer: Construction and Maintenance at the Department's sub-directorate Construction and Maintenance based in Oudtshoorn. He performs an oversight role on the R311, where the accident occurred. He was not the incumbent of the position at the relevant time.

51. I have referred to the application initially made by the defendant for a postponement to qualify Mr Schoeman as an expert witness. As mentioned, this was refused because it appeared from the facts supporting the application that Mr Schoeman could not give any opinion relevant to the action. He could only give evidence as to factual issues. This was borne out by his evidence.

52. Mr Schoeman had not personally seen the road in 2010. He obtained information from his predecessors regarding the incident and had access to the so-called *"karretjie data"* (a database compiled of date images taken on inspection of the roadway), as well as worksheets relating to maintenance done on the road by external service providers. He could testify as to the factual information apparent therefrom, but could not identify, on the basis of such information, what defects existed on the road. The photographs tendered in evidence did not assist. When the plaintiff's photographs were put to Mr Schoeman for comment, he was unable to deny Mr Bester's evidence regarding the state of the road at the time of the collision. He confirmed that the R311 was, at the stage of the accident, nearing the end of its economic life. It was completely overhauled in and during 2016, or shortly prior thereto.

53. He explained that maintenance had been done on the R311 around the time of the accident. This appeared from the departmental worksheets which confirm that, during the time, there were service providers who commenced work from May 2010

to May 2011 and from October 2010 to February 2011. As mentioned, he was unable to identify the exact nature of the work done, or the exact location thereof. In cross-examination, he was not able to state, for example, if roadworks were done from a point referred to as "0" to "19,3km", exactly where along that stretch of road the patching of the road surface had occurred. There were eleven occasions from 1 November 2010 until 3 December 2010, approximately five weeks before the accident, that patchwork was done, but Mr Schoeman was unable to state exactly where such patchwork was done.

54. The worksheets show, for example, that if it is indicated that patching was done from a point denoted as "16km to 17km", one would accept that it was done for a 1km length of roadway. Significantly, after the accident on 1 February 2011 patching was done for approximately 32.24m^2 in the vicinity of Patrysvlei Farm, where the plaintiff says the accident occurred. Mr Schoeman was not able to testify what repairs had been done to potholes in the year 2010 and prior to the accident. The version put to both plaintiff and Mr Otto in cross-examination that no records had existed of potholes, was thus not correct. The fact is that the departmental records indicate repairs to have been done, but do not detail the exact nature of the repairs.

55. Mr Schoeman could thus not dispute the plaintiff's and the other witnesses' account that the R311 was riddled with potholes at the time of the accident and that Mr Bester had patched some of these holes near the entrance to his farm with cement.

56. Mr Schoeman referred, *inter alia,* in his evidence in chief to a 100km speed limit sign, and a pothole signpost from Hopefield to Moorreesburg, respectively at approximate 0,43km and 0,73km where the R311 commences in the direction of Moorreesburg. These appear from the photographs shown to him. It thus appeared from his evidence that the only signage prior to the turnoff to Patrysvlei was at the beginning of the R311. One must, however, keep in mind that the photographs depicting the signs had not been taken at the time of the accident or shortly thereafter, but in April 2010. It is therefore not known whether the sign was still

there at the time of the accident. I shall assume that it was.

57. Mr Schoeman was unable to state how many accidents had been reported on the R311. His evidence was based purely on the worksheets relating to repairs done from 1 November 2010 up to 28 March 2011.

58. This, then, was the gist of the evidence led on behalf of each of the parties.

Is the defendant liable in delict?

The existence of a legal duty towards the plaintiff, and the issue of wrongfulness

59. The issue of wrongfulness has been thoroughly discussed in the South African case law over the years.

60. In *Minister of Police v Ewels* 1975 (3) SA 590 (A) at 597A-B the then Appellate Division stated the following: "... *conduct is wrongful if public policy considerations demand that in the particular circumstances the plaintiff has to be compensated for the loss suffered by the defendant's negligent act or omission, i.e. the legal convictions of society regard the conduct as wrongful."*

61. In *Gouda Boerdery BK v Transnet Ltd* [2004] 4 All SA 500 (SCA) the Supreme Court of Appeal held, at para [12], that in order to find whether a legal duty existed to act positively, factors such reasonableness, policy and, where appropriate, constitutional norms should be considered. This position was confirmed In *Hawekwa Youth Camp and another v Byrne* 2010 (6) SA 83 (SCA) at para [22]: "*.... negligent conduct which manifests itself in the form of a positive act causing physical harm to the property or person of another is prima facie wrongful. By contrast, negligent conduct in the form of an omission is not regarded as prima facie wrongful. Its wrongfulness depends on the existence of a legal duty. The imposition of this legal duty is a matter for judicial determination, involving criteria of public and legal policy consistent with constitutional norms. In the result, a negligent omission causing loss will only be regarded as wrongful and therefore actionable if public or legal policy considerations require that such omission, if*

negligent, should attract legal liability for the resulting damages." [Emphasis added.]

62. *In Le Roux and others v Dey (Freedom of Expression Institute and Restorative Justice Centre as amici curiae)* 2011 (3) SA 274 (CC), the Constitutional Court held as follows at para [122]:

"In the more recent past our courts have come to recognise, however, that in the context of the law of delict: (a) the criterion of wrongfulness ultimately depends on a judicial determination of whether - assuming all the other elements of delictual liability to be present - it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and (b) that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, but it concerns the reasonableness of imposing liability of the defendant for the harm resulting from that conduct." [Emphasis added.]

63. In *Loureiro and others v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) at para [53] the Constitutional Court warned that the concepts of wrongfulness and negligence should not be conflated: *"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. … [the defendant'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."* [Emphasis added.]

64. In *ZA v Smith* 2015 (4) SA 574 (SCA) Mr Za had slipped on a snow-covered mountain slope in the Matroosberg private reserve, and fell to his death over a 150-metre precipice. Pertaining to wrongfulness the Court referred to *Le Roux*,

Loureiro and *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 (1) SA 1 (CC), and provided its reasons for the finding of wrongfulness in para [21]:

"In determining wrongfulness, the other elements of delictual liability are usually assumed. Hence the enquiry is whether — on the assumption (a) that the respondents in this case could have prevented the deceased from slipping and falling to his death; and (b) that he had died because of their negligent failure to do so — it would be reasonable to impose delictual liability upon them for the loss that his dependants had suffered through their negligence. While denying, of course, that these assumptions could validly be made, counsel for the respondents conceded that, if they were true, the answer to the question posed must be 'yes'. I believe that this concession was rightly and fairly made. Apart from the fact that both respondents were in control of a property, which held a risk of danger for visitors, the second respondent, with the knowledge and consent of the first respondent, as owner of the property, allowed members of the public, for a fee, to make use of a four-wheel-drive route, designed to lead directly to the area which proved to be extremely dangerous." [Emphasis added.]

65. In *MTO Forestry (Pty) Ltd v Swart NO* 2017 (5) SA 76 (SCA), a more recent judgment on the delictual requirements of wrongfulness and negligence, the Supreme Court of Appeal referred at paras [16] to [18] to the *dicta* of the Constitutional Court in *Loureiro* and *Country Cloud*, and warned that *"(i)t is potentially confusing to take foreseeability into account as a factor common to the inquiry in regard to the presence of both wrongfulness and negligence."* The Court concluded in para [18] that it should now be recognised *"that foreseeability of harm should not be taken into account in respect ·of the determination of wrongfulness, and that its role may be safely confined to the rubrics of negligence and causation."*

66. The defendant denies that it owed a "duty of care" to the plaintiff, but admits that, in terms of section 7(1) of the Ordinance, the construction and maintenance of the R311 are his obligations. It is so that public law obligation does not automatically 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) at paras [78], read

with para [81].

67. In the present case, however, a proper interpretation of section 60 of the Ordinance (and section 59 of the Act) puts the issue beyond doubt. It limits liability to very specific circumstances, not one of which is applicable in the present matter. I have dealt with the pertinent limitation earlier in this judgment.

68. In any event, the defendant effectively admitted in his plea that he had a duty to maintain the road pursuant to the provisions of the Ordinance. In the premises, a legal duty has been established (see, for example, *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA) at para [6], where the Court held that an admission that a defendant was under a legal duty to take steps so as to minimise injury to road users was, in effect, an acknowledgment of wrongfulness; *Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape* 2016 (1) SA 325 (CC) at paras [51]-[54]; and *CS and another v Swanepoel and others* [2022] ZAWCHC 37 at para [67]).

69. There are many cases dealing with the duties of a defendant in the context of delictual actions arising from the condition of roads. These include *MacIntosh v Premier KwaZulu Natal* 2008 (4) All SA 72 (SCA), *Loots v MEC for Transport Roads and Public Works* [2018] ZANCHC 60 (5 September 2018), *Marcus v MEC, Department of Public Works and Roads* [2017] ZANWHC 8 (1o February 2017), and *Van der Merwe v MEC, Public Works, Roads and Transport and another* [2019] ZAFSHC 6 (28 February 2019).

70. In the circumstances, this Court must first decide whether the plaintiff has established if there was an omission in relation to the harm that forms the basis of her claim. Then, assuming that plaintiff establishes such an omission, the Court must decide whether the omission on the part of the defendant was wrongful. Thereafter, this Court must consider whether there was fault on the defendant's part in the particular circumstances of the case. The determination of factual and legal causation in relation to the harm she has suffered follows. In respect of the question of legal causation, the issue is – as set out in the case law referred to earlier - whether as a matter of public policy the defendant should be held liable for

the harm in the circumstances of the case. Assuming that both of those questions are answered in favour of the plaintiff, I shall consider the question of contributory negligence.

71. Returning to the facts of the present case considered against the principles referred to above, I agree with the submission by counsel for the plaintiff that, on the defendant's own pleadings, coupled with the evidence of Mr Schoeman, there existed at the time of the accident a legal duty to maintain the R311. This duty included the duty to ensure that it be free of risks such as potholes. The defendant's witness did not dispute the fact that a pothole could pose a serious risk to a road user such as the plaintiff. Given the circumstances, the existence of a duty such as the plaintiff alleges accords with what I would perceive to be the legal convictions of the community (see *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) at 1056F-G). It would not be unreasonable to burden the defendant with such a duty (see *Gouda Boerderye supra* at para [12]).

Negligence and causation

72. In respect of the issue of negligence, the oft-quoted *dictum* in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-G bears repeating:

> *"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.*
>
> *This has been constantly stated by this Court for some 50 years. Requirement (a)(ii) is sometimes overlooked. Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can*

be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases."

73. In *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) the Supreme Court of Appeal held in para [23], with reference to the test for negligence set out in *Kruger v Coetzee*, that the enquiry as to what can reasonably be expected in the circumstances of a particular case "... *offers considerable scope for ensuring that undue demands are not placed upon public authorities and functionaries for the extent of their resources and the manner in which they have ordered their priorities will necessarily be taken into account in determining whether they acted reasonably".*

74. The Supreme Court of Appeal A considered the issue of negligence as follows in *MTO Forestry supra*:

"[45] …a landowner is under a 'duty' to control or extinguish a fire burning on its land. But … whilst landowners may be settled with the primary responsibility of ensuring that fires on their land do not escape the boundaries, this falls short of being an absolute duty. And in considering what steps were reasonable, it must be remembered that a reasonable person is not a timorous faint-heart always in trepidation of harm occurring but 'ventures out into the world, engages in affairs and takes reasonable chances'. Thus in considering what steps a reasonable person would have taken and the standard of care expected, the bar, whilst high, must not be set so high as to be out of reasonable reach

[46] .....

[47] A reasonable landowner in the respondent's position was therefore not obliged to ensure that in all circumstances a fire on its property would not spread beyond its boundaries. All the respondent was obliged to do was to take steps that were reasonable in the circumstances to guard against such an event occurring. If it took such steps and a fire spread nevertheless, it cannot be held liable for negligence just because further steps could have been taken." [Emphasis added.]

75. Turning to the principles applicable to causation: in *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34 E-G the then Appellate Division set out the requirements for the determination of causation. The first requirement is a factual one relating to the question whether the negligent act or omission in question caused or materially contributed to the harm giving rise to the claim. The so-called "but for" test applies. If factual causation is not proven, it is the end of the matter. The second requirement is a sufficient link between the negligent act or omission and the harm suffered, or put otherwise, legal causation.

76. A flexible approach is followed in this regard, as set out in *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 7641-765A in which "*factors such as reasonable foreseeability, directness, the absence or presence of a novus actus interveniens, legal policy, reasonability, fairness and justice all play their part.*" See also *Fourway Haulage SA (Pty) Ltd v SANRAL* 2009 (2) SA 150 (SCA) at para [34], where the Court cautioned that the factors normally applied to consider legal causation "*should not be applied dogmatically, but in a flexible manner so as to avoid a result which is so unfair or unjust that it is regarded as untenable.*"

77. In *Van Duivenboden supra* it was held at para [25] that a plaintiff is not required to establish the causal link with certainty, but merely that the wrongful conduct was probably a cause of the damage. This 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."* [Emphasis added.] A finding as to whether causation is established on a balance of probabilities depends on the facts of each case (*Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC) at para [73]).

78. Lastly in relation to the relevant legal principles, the matter of *Mashongwa v Passenger Rail Association of South Africa* 2016 (3) SA 528 (CC) is an oft-quoted authority in respect of factual and legal causation:

"[41] The standard of a reasonable organ of state is sourced from the Constitution. The Constitution is replete with the phrase that the State must

take reasonable measures to advance the realisation of rights in the Bill of Rights. In the context of socio-economic rights the availability of resources plays a major part in an enquiry whether reasonable steps have been taken. I can think of no reason in principle or logic why that standard is inappropriate for present purposes. Here, as in the case of socio-economic rights, the choice of steps taken depends mainly on the available resources. That is why an organ of state must present information to the court to enable it to assess the reasonableness of the steps taken.

…

[68] No legal system permits liability without bounds. It is universally accepted that a way must be found to impose limitations on the wrongdoer's liability. The imputation of liability to the wrongdoer depends on whether the harmful conduct is too remotely connected to the harm caused or closely connected to it. When proximity has been established , then liability ought to be imputed to the wrongdoer provided policy considerations based on the norms and values of our Constitution and justice also point to the reasonableness of imputing imputing liability to the defendant." [Emphasis added.]

79. I return to the fact of the present matter.

80. The defendant argues that it appears that two mutually exclusive versions arise in respect of the element of causation, and that the probabilities, based on the evidence presented, favour the defendant. I do not agree. When the evidence is considered holistically and objectively, it is clear where the balance of probabilities lies.

81. The evidence of the plaintiff and of both her witnesses was credible and reliable. It was never suggested to any of them that their evidence was a fabrication. Although it was generally put to both the plaintiff and Mr Bester that no records existed of a pothole at the location of the accident (a submission that Mr Schoeman could not confirm), it was never put in cross-examination that the plaintiff had not struck a pothole which caused her to lose control of her vehicle, and that caused the vehicle to roll. On the defendant's own version, the signage at the beginning of

the road on the R311, clearly states that there were potholes in the road – this was confirmed by the plaintiff, Mr Otto and Mr Bester.

82. Mr Bester was an impartial witness to these proceedings and his credibility cannot be impugned. It was – correctly - never put to him or argued that he had a motive falsely to implicate the defendant or was biased in favour of the plaintiff. He had no interest in the matter.

83. Mr Bester's evidence must be accepted that the road was in a *"haglike"* condition in 2010 and even before then. This was not challenged. Mr Schoeman was also unable to dispute this allegation. Although Mr Bester conceded that the defendant had on occasion patched the R311 in certain·places, the road remained in a state of disrepair until about 2016 when a major overhaul took place.

84. The defendant submits that Mr Bester's evidence was irrelevant. I do not agree. Although Mr Bester did not witness the accident itself, he observed the location of the damage to his fence, and he was familiar with the state of the road at the time, especially in relation to the existence of potholes near the entrance to his farm. His evidence in this respect was not "speculative". He testified to facts with which he was familiar. These aspects were squarely relevant to the issues to be determined.

85. Mr Otto's evidence can also not be faulted, namely that he too had seen potholes all along the road and that the plaintiff had *"dipped"* into one, which caused the vehicle to roll and causing the plaintiff to suffer the permanent injuries evident form the record.

86. In the circumstances, I accept the evidence of the plaintiff and her witnesses.

87. The defendant's case did little to disturb the evidence led on the plaintiff's behalf, and to dispel the inferences that can reasonably be drawn therefrom. The denial, put to the witnesses in cross-examination and submitted in argument, that there was any pothole present at the scene of the accident is emphatically refuted by the plaintiff's evidence. It does not appear from the evidence led on the defendant's

behalf that the R311, on the day of the accident, was in a suitable condition for safe vehicular use. The defendant's case, and the submissions made on his behalf, were mainly based upon assumptions. The defendant submitted, too, that the plaintiff had not proven that there was a pothole because she could not produce any "real" evidence about its existence. The submission is based on the *dictum* in *Crafford v South African National Roads Agency Ltd* [2013] ZASCA 8 (14 March 2013) at para [21]:

"[21] Without knowing where the kudu came from, how it moved, the manner in which it came to be in the road, and where it and the appellant's motor vehicle were in relation to each other at any material time, it is really impossible to determine solely from the fact of a collision where the kudu would have been and at what stage it would have become visible to an approaching motorist, irrespective of the length of the grass alongside the road. In my view there are thus insufficient objective facts from which it can be inferred that if the grass alongside the road had been kept short the appellant would have seen the kudu earlier than he did, let alone that on seeing it he would have had sufficient time and space to have reacted and slowed his vehicle sufficiently to avoid a collision. The appellant therefore failed to establish on a balance of probabilities that if the grass had been kept short the collision would not have occurred."

88. *Crafford* does not assist the defendant, as it is distinguishable from the present matter. The Supreme Court of Appeal came to the conclusion in para [21] because of the nature of the beast (so to speak) in question:

"[19] The truth of the matter is that even had the grass alongside the road been short at the time, one does not have sufficient information to determine how the collision probably took place. The list of imponderables is infinite. We do not know whether the kudu came from the northern or southern side of the road, nor whether it was trotting or running. Even accepting that the appellant was driving at about a 100 kph, one has no idea how, in what manner and at what speed the kudu moved as the gap between it and the motor vehicle closed. It may have moved slowly into the road from a position in which it was standing behind a large clump of grass close to the road but, equally possibly, it may have come at a run from the bushveld

beyond the road reserve, clearing the fence and charging towards the road into the roadway directly in front of the vehicle, giving the appellant no chance to see it. To find that any one of these scenarios is in fact what probably occurred would be to indulge in impermissible speculation."

89. The pothole in the present matter was fixed; it could not move around in an unpredictable manner such as a kudu can. The plaintiff presented oral evidence as to the state of the road and the existence of the pothole. She also furnished evidence as to the probable location of the pothole, indicated by the flattening of Mr Bester's fence. The defendant was unable to refute this evidence.

90. The case of *Snyman v Premier van die Noordwes Provinsie* (unreported judgment of the North West Division of the High Court, Mafikeng on an application for leave to appeal, case number 614/2004) upon which the defendant relies, also does not assist the defendant's case. In that case, the Court noted at para [19] that "*it was not the evidence of the Applicant that he indeed struck a pothole. It was simply an assumption on the part of the Applicant that he <u>may</u> have struck a pothole*."

91. The Court in that case stated further at para [21] that expert evidence indicated that the damage to the vehicle could not have been caused by a pothole: "*…the expert, Mr Kichenbrand who testified further that the collision, especially having regard to the damage to the Applicant's motor vehicle, could not and was not caused by the Applicant's vehicle having struck a pothole. Instead, he opined, that the damage to the Applicant's vehicle is commensurate with the wheel of the Applicant's vehicle having struck another vehicle."*

92. This is not the case in the present matter. The plaintiff testified that she had seen the pothole, but was unable to avoid it. Given the state of the road, riddled with potholes, the probabilities that the plaintiff in fact hit a pothole which led to the accident and its *sequelae*, favour the plaintiff.

93. That maintenance was done on the road during 2010 is common cause. Such maintenance, however, appears to have been inadequate. The defendant did not lead evidence that it was not in a position to repair potholes along the R311 during

2010 or prior thereto. On the contrary, the evidence indicated (although not directly in relation to the time at which the accident took place), that the defendant knew about the problems with the road, and that his employees or agents returned to the road on various occasions to try to fix the damage.

94. Whether potholes – undeniably present on the roadway - were fixed remains unclear. The defendant's evidence did not establish that routine patrols had been done on the road for the purpose of detecting potholes or other serious defects along the R311 by a foreman or technicians, save for the rather neutral evidence led by Mr Schoeman. He could not pinpoint, for example, when the entire road had been patched for a distance of 90km, or exactly where the *"patching had been done".* He could not say whether any potholes had been repaired. The defendant failed to call the service providers which the defendant had employed to establish whether they had or had not attended to pothole repairs in 2010.

95. In short, the evidence did not dispel the inference that the defendant, as a reasonable roads authority, could have done more than it did specifically in relation to the pothole problem (see *Loureiro supra* at para [53]).

96. Mr Schoeman conceded that it would be foreseeable that a pothole could cause serious injury to a motorist.

97. No evidence was led to the effect that a lack of financial resources hampered the defendant in the execution of his maintenance duties. The defendant's submission that the plaintiff set the maintenance bar too high for the defendant realistically to achieve is not borne out by the evidence. There is no dispute that some maintenance had been done. The extent of the maintenance, however, remains unclear.

98. The defendant did not produce evidence that it had erected "*multiple*" signs along the road, as pleaded, to bring to road users' attention the state of disrepair of the road. What has been established is that there were two signs, one stating "*potholes*", and the maximum speed sign, some way before the Patrysvlei Farm, near the beginning of the road in question. Considering the evidence of the plaintiff

and Mr Bester, the signage was wholly inadequate. The contention in the defendant's plea that *"various steps had been taken to ensure inter alia the existence of potholes and/or any other defects on the public road were brought to its attention ..."* falls to be rejected.

99. The defendant argues that it cannot be excluded that, on the evidence led, that there may have been more roadsigns warning about potholes. Even if there were only one sign, then the plaintiff had been warned. This may be so, but the plaintiff did know about the potholes. She encountered many of them, and was on the lookout for them, despite the fact that she had not seen the pothole warning. The fact remains that the road was in such a bad state that she could not avoid the pothole that caused the accident.

Contributory negligence

100. Insofar as the defendant contended that there had been contributory negligence on the part of the plaintiff, there exists no factual basis for this proposition. It was never put to the plaintiff how or why, on the facts of the matter, she had been negligent in contributing to the accident.

101. It was not put to the plaintiff to what extent she failed to keep a proper lookout. It was not put to her how she had failed to observe any hazard on the road. It was not put to her that she had driven at an excessive speed or had become too tired to drive. Surprisingly, it was put to Mr Otto that fatigue could have overcome the plaintiff and that that could possibly have caused the collision. This proposition was not put to the plaintiff and remains speculative. It falls to be rejected.

102. There is simply no evidence to show that the plaintiff drove too fast in the circumstances or was in any other way negligent in the manner in which she drove as pleaded by the defendant.

103. In the circumstances, the defendant has not discharged the onus of proving that the plaintiff's negligence contributed to the accident.

Conclusion

104. In all of these circumstances, I find that the plaintiff has proven, on a balance of probabilities:

104.1 That the defendant had a legal duty during 2010 to repair potholes along the R311;

104.2 That the defendant was negligent; and

104.3 Factual and legal causation were present in that that her vehicle had struck a pothole close to the Patrysvlei Farm, which had led to the serious injuries she had sustained in the accident.

Costs

105. There is no reason to depart from the general rule that costs follow the event.

Order

106. In the circumstances, the following order is granted:

106.1 The defendant shall compensate the plaintiff for 100% of her proven or agreed damages.

106.2 Mr Otto and Mr Bester are declared to have been necessary witnesses.

106.3 The defendant is to pay the costs of the action, including the costs of senior counsel, as well as the reasonable travelling costs of the plaintiff and her two witnesses, such costs to be taxed and paid within 30 days after taxation.

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P. S. VAN ZYL

Acting judge of the High Court

Appearances:

For the plaintiff: M. Salie SC, instructed by Gerrie Steyl Attorneys

For the defendant: C. Tsegarie, instructed by the State Attorney