



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case No.: 1447/2017

In the matter between

WERNER ROBERTS

First Plaintiff

JAMES HARRY ROBERTS

Second Plaintiff

and

THE MEC, DEPARTMENT OF POLICE,

ROADS AND TRANSPORT,

FREE STATE PROVINCE

Defendant

HEARD ON: 20, 21 and 23 NOVEMBER 2018

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 7 FEBRUARY 2019

I INTRODUCTION

[1] Some five kilometres outside the town of Hertzogville a young matric learner's motor vehicle trip from his school in Bloemfontein to his parental home in the Hertzogville district came to a sudden and abrupt end. In broad daylight at about noon he collided with a kudu bull that attempted to cross his path of travel. The question to be answered is whether it is a case of *res perit domino* – damage rests where it falls - or whether the Free State Province under whose control the particular public road resorts, must be held liable in delict as plaintiffs aver. It was not and could not be contended that the kudu belonged to anyone. It was accepted by necessary implication by all to be *res nullius*. Therefore no one, save for the present defendant could potentially be blamed for causing the damages suffered.

II THE PARTIES

[2] First plaintiff is Mr Werner Roberts, ("Werner") the former learner mentioned above, who was seriously injured in the aforesaid collision. Second plaintiff is his father, Mr James Harry Roberts, a farmer of the Hertzogville district. For the sake of convenience I shall hereinlater refer to first plaintiff as Werner and to his father as Roberts Sr, save when I refer to plaintiffs' averments as set out in

the pleadings. Adv PJJ Zietsman appeared for the plaintiffs on the instructions of Honey Attorneys.

- [3] The defendant is the MEC for the Department of Police, Roads and Transport, Free State Province (“the defendant”). Adv N Snellenburg SC, assisted by Adv LR Bomela, acted for the defendant on instructions of the Office of the State Attorney.

III **THE PLEADINGS**

- [4] In their particulars of claim the plaintiffs allege that on 26 June 2015 at about 11h30 a collision occurred between a motor vehicle driven by Werner and a kudu entering the R59 at about four and a half kilometres from Hertzogville whilst vegetation alongside the road obscured the kudu from Werner’s view, causing severe injuries to him.
- [5] It is *inter alia* plaintiffs’ case relating to wrongfulness that defendant knew that its failure to control the growth of vegetation on the road reserve alongside the R59 could restrict motorists’ view and endanger them as a result of reduced visibility and that it had a legal duty to take reasonable steps such as controlling the growth of vegetation in the road reserve to avoid risks presented by reduced visibility.

- [6] Plaintiffs' reliance on negligence is based on defendant's breach of its legal duty, through its employees, by omitting to cut the vegetation when they should have done so and as could reasonably be expected of them in the circumstances, thereby allowing the vegetation to grow and preventing Werner from seeing the kudu until it entered the road.
- [7] Werner suffered serious injuries as more fully set out in paragraphs [10] to [13] while Roberts Sr incurred medical expenses in respect of Werner's medical treatment as pleaded in paragraph [14].
- [8] In paragraph 4 of the plea defendant, whilst admitting a legal duty and *inter alia* the "duty to control the growth of vegetation within the road reserve adjacent to the road," denies the remainder of plaintiffs' allegations.
- [9] Defendant pleaded in paragraph 3 of its plea "... that its failure to control the growth of vegetation in the road reserve adjacent to the road, could not restrict the view of the reasonable motorist using the road and endanger such motorist as a result of reduced visibility." Wrongfulness, negligence and causation were all put in dispute. In particular, pertaining to causation, it is alleged in paragraph 3.4 that "the loss is too remote and not sufficiently linked to the loss (sic) so as to attract liability."

[10] Although defendant denied in its plea that a collision occurred, this became common cause later. It denied negligence as mentioned earlier, but alleged that in the event of a finding of negligence against defendant, Werner was also negligent in that he failed to (1) keep a proper look-out, (2) apply his brakes timeously or at all and (3) exercise proper and adequate control over his vehicle. During the trial it emerged, also from the testimony of defendant's own expert, that there was no merit in any of these defences. Mr Snellenburg sought an amendment after plaintiffs had closed their case in order to rely on excessive speed. Werner testified that he travelled at a speed of between 120 and 130 kph. I granted the amendment notwithstanding objection. Mr Zietsman did not apply to reopen plaintiffs' case and merely recorded that it was never put to Werner that he was travelling at an excessive speed.

IV **SEPARATION OF MERITS AND QUANTUM**

[11] During a pre-trial conference held in terms of rule 37(8) I separated merits and *quantum* by agreement in terms of rule 33(4), ordering that the disputes contained in paragraphs 5 to 9 of the particulars of claim read with paragraphs 2 to 6 of the plea be adjudicated at first. Prior to the leading of evidence I amended the order by agreement insofar as the allegations in paragraph 5 and subparagraphs 6(a) to 6(c) of the particulars of claim were not in dispute. The issues pertaining to *quantum* – paragraphs 10 to 14 – stand over for later adjudication if required

V COMMON CAUSE FACTS

[12] The following facts turned out to be common course, either from the pleadings, or as agreed prior to the leading of evidence, or during the hearing of the matter:

12.1 Werner was 18 years old and a grade 12 learner when he, the driver of a Ford Territory motor vehicle, collided with an airborne and full-grown kudu bull appearing from Werner's left hand side;

12.2 The collision occurred in daylight at about 11h30 to 12h00 on the R59, a tarred road, and approximately 4.5 to 5 kilometres from the town of Hertzogville ;

12.3 The road links Hertzogville and Bloemfontein in that motorists have to travel on the R64 from Bloemfontein through Dealesville whereafter the R59 turns off the R64 and continue to *inter alia* Hertzogville;

12.4 The R59 neither has a tarred shoulder, nor a yellow line indicating the edge of the road whilst relatively short grass grew on the gravel shoulder at the relevant time *ex facie* the admitted photographs;

12.5 From about thirty to forty kilometres prior to the area of collision, when driving from Bloemfontein, cultivated fields are found on both sides of the road and the road reserve is relatively cleared from shrubs and trees, save for the occasional single tree;

- 12.6 In the vicinity of the area of collision relatively dense shrubs and trees of different heights, particularly thorn trees, are abound on the road reserve on both sides of the road as is apparent from several photographs, including a Google Earth picture; in the area where impact with the kudu took place overhanging branches of a tree were measured to be 1.6 metres from the edge of the tarred road to Werner's left hand side as he was travelling, and reference was even made during testimony of a tunnel effect caused by the vegetation;
- 12.7 Defendant, through its employees, was under an obligation to maintain the road reserve alongside the R59; it was aware that vegetation grew in the road reserve and that animals were able to traverse the veld adjacent to the road and to enter the road;
- 12.8 Defendant, through its employees, was under a legal duty to control the growth of vegetation within the road reserve alongside the R59, but defendant was not prepared to concede that its failure would pose a safety hazard to motorists; defendant also denied that the legal duty entailed that it had to take such steps as were reasonable in the circumstances to avoid risk to motorists presented *inter alia* by restricted visibility.

VI SUMMARY OF THE EVIDENCE

[13] I do not intend to summarise the evidence in any detail insofar as much is common cause as set out in the previous paragraph. Four witnesses testified for the plaintiffs, to wit Werner and Roberts Sr, Mr RC Brits and the expert, Dr L Roodt, a practising specialist civil engineer. I shall not deal with the testimony of plaintiffs and their witnesses in the order that they testified, but as I deem fit. Mr B Grobbelaar, a forensic engineer specialising in *inter alia* accident reconstruction cases, was defendant's only witness.

[14] Werner testified that he and Nicola van Heerden travelled the particular morning from Bloemfontein to the Hertzogville district in her mother's vehicle. He wrote an easy examination paper that morning – "opstel en brief" as he called it - and he did not have to prepare for it. He went to bed early the previous evening. He knows the road well and has been travelling it regularly since his grade 7 days. He testified that the speed limit was 120 kph as indicated by a road sign on the particular road. Although Werner was not cross-examined in this regard, it appears from Dr Roodt's evidence who visited the scene much later that he did not notice any road sign indicating a speed limit of 120 kph and therefore he accepted that the speed limit was only 100 kph. Mr Grobbelaar relied on the AR Police report in respect of the collision which indicated a speed limit of 120 kph. Werner's speed immediately

before the collision was between 120 and 130 kph. According to him that is the normal speed maintained by road users on that road. He stated that there could be kudu in the Hertzogville district although he had never seen or come across one on that road. From about 30 to 40 kilometres to the scene of the collision as he was travelling from Bloemfontein the road reserve was relatively clear from shrubs and trees as crop farmers removed the vegetation in order to ensure that their crops obtain the advantage of underground water. It was a clear day and at about 11h30 he entered the stretch of road that he called the tunnel of trees. The road ahead of him was clear. Suddenly he became aware through his periperal vision of a greyish object which was higher than his face and to his left. He was aware of the airborne object, but he could not recall the impact or what happened since that moment until he gathered consciousness later. According to him it could be a donkey and he could not say that it was actually a kudu. He testified that it was impossible to observe animals in the road reserve in the particular area as a result of the denseness of the trees. He confirmed that the road and the shoulder of the road to a width of 1.5 metres were clear as he approached. He could not do anything to avoid the collision even if he looked directly at the animal prior to impact.

- [15] Mr Snellenburg put it to Werner that he was a farm boy and should have foreseen that there might be animals in the bush or “bos” as said. Werner responded that he had never seen any animals in the road reserve in that area prior to the collision.

- [16] Mr Brits was the first person that arrived at the scene of the collision. He farms about 6 to 7 kilometres from the scene in the direction of Dealesville. He confirmed the relatively open and clear road reserve from Dealesville, save for occasional trees, unlike the dense trees found in the area where the collision occurred. It should be mentioned at this stage that the evidence of these two witnesses is confirmed by the Google Earth map and various photographs, as well as the evidence of Roberts Sr, Dr Roodt and Mr Grobbelaar.
- [17] On his way from Hertzogville to his farm Mr Brits came across the decapitated head of a full-grown kudu bull, lying on the road surface and in the lane in which he was travelling. He stopped and having heard a woman crying out, he investigated and came across the vehicle driven by Werner, who was still inside the vehicle and bleeding profusely. Werner did not react and could not speak to the witness. Mr Brits called his son with instructions to call Roberts Sr whilst he tried to stop the bleeding. Roberts Sr arrived soon, as well as a doctor of Hoopstad. Werner was taken to hospital and the witness remained on the scene for a while. He found the body of the kudu next to the road, *i.e.* to the left hand side as Werner was travelling. He explained that just before the area where the collision occurred, the road forms a small incline – “n opdraande of hobbeltjie” – the effect being that the road slopes downwards in the direction of Hertzogville.

[18] Mr Brits testified that he had been resident on his farm for forty years and although he was aware of kudu grazing in the area from time to time, they always move on to other areas. I wish to point out at this early stage that Mr Snellenburg eventually argued relating to foreseeability that according to Mr Brits' evidence the vegetation in the road reserve has been in exactly the same state for ten years. This is not correct. Mr Brits referred to an incident when he came across a vehicle that left the road which ended up underneath trees. Logic dictates that in a period of ten years vegetation such as shrubs and thorn trees would have become taller and more dense.

[19] At a later stage Mr Brits came across Mr Grobbelaar when Grobbelaar was busy with an inspection at the scene of the collision. They communicated and he also indicated to him the position of the kudu's carcass and where he found the head. He disagreed with the positions as documented by Mr Grobbelaar in his report and shown on photographs taken by him. According to him the head of the kudu was closer to Hertzogville than the carcass thereof and he also disagreed as to the position where he found the carcass. He insisted that the carcass was found close to a Suidwes thorn tree, which is different from other thorn trees found in the area.

[20] Roberts Sr testified that he had been contacted by Mr Brits who informed him of the collision. He confirmed the condition of the road reserve as testified to by his son and Mr Brits. On his way to

the scene he called the doctor from Hoopstad. He referred to the plaintiffs' photo bundle and confirmed that, save for two photographs taken by his father on the same day in his presence, the other photographs were taken by him the following Monday. He identified the position where the kudu's carcass was found (which was earlier marked with a tin can) and the path travelled by the vehicle from impact till its stationary position. Save for a minor difference between his version as to where the carcass of the kudu was found and the area of collision, his evidence is in line with that of Mr Grobbelaar. The photographs taken by the witness clearly shows the tunnel effect caused by trees alongside the road. At the point where the collision occurred, the branches of the one tree reach a point 1.6 metres from the edge of the tarred road. It is evident that the gravel shoulder of the road in the area was overgrown with grass at the time, indicative of a lack of maintenance. However, the height of the grass could not and did not play any role in the occurrence.

[21] Dr Roodt testified for plaintiffs as an expert. His report was accepted as part of the evidential material as is the case with Mr Grobbelaar's report. The expertise of both witnesses was accepted by the parties. Although Mr Snellenburg criticised Dr Roodt of being subjective, I am satisfied that the general tenor of his version makes common sense and should be accepted.

[22] Dr Roodt referred to the South African Road Classification and Access Management Manual (COTO 2012) endorsed by all

Provinces and classified the R59 as a Class R2 road. Mr Snellenburg tried to show that he was wrong and that it should be classified as a Class R3 road. It appears from the maps, Appendix A of Dr Roodt's summary, that the R59 does not discontinue at Hertzogville, but actually passes the town. It was not testified to by the witness, but anyone with a bit of knowledge of the area will be able to tell that the R59 continues to Christiana in the Northern Cape Province.

[23] The central theme of Dr Roodt's evidence is that road builders and also people in control of road maintenance should regard safety as paramount. A forgiving roadside environment should be provided. He explained the obvious, *i.e.* the wider the road shoulder, the lower the risk of a collision. He testified that the road reserve should be 6 metres in width and that it should be kept clean. All non-functional structures such as trees and shrubs that are not specifically protected should be removed. It is not in dispute that the thorn trees and shrubs in the road reserve are not protected plants. Human factors must also be taken into consideration when roads are designed and/or maintained, such as visual perception, reaction time, expectancy, frailty, fatigue and distraction.

[24] Dr Roodt testified that the vegetation on the R59 between km 52.35 and 53.0 (less than 700 metres) fails the test of safety on two counts, to wit it did not provide a safe recovery area in terms of the forgiving roadside approach and secondly, it obscured

potential dangers such as animals in the road reserve. He also referred to the tunnel effect created by the excessive trees and shrubs on the road shoulder and road reserve. He reiterated the reduced shoulder width as seen on the photographs annexed to his report. According to the witness, Werner could have evaded the kudu if the road reserve was clear of vegetation that obscured his vision.

[25] Finally, the witness referred to the national S'hamba Sonke programme for job creation and poverty eradication in rural areas, a programme funded by central government which is in addition to the Provincial Road Maintenance Fund and stated that funding was available "to promote maintenance on rural roads in local context using manual labour."

[26] Defendant failed to call any witnesses to show that the "good practice" adopted by Provinces as testified to by Dr Roodt should not be applicable to the Free State Province and why the admitted legal duty to keep the road reserve clean was not adhered to. Instead it elected to call an expert to provide the court with certain calculations in an attempt to show the absence of factual causation. The expert, Mr Grobbelaar, was the defendant's only witness. He visited the scene twice in May 2018, about three years after the event. He was in possession of photographs taken by plaintiffs, the AR form of SAPS, Dr Roodt's report and plaintiffs' particulars of claim when he visited the scene. He accepted that the kudu was airborne when it collided with the vehicle, bearing in mind the nature of the damage to the vehicle. He took

photographs and also relied on points *inter alia* pointed out by Mr Brits whom he met at the scene. He confirmed in his report “the bushes and grass on the western side of the road (left hand side as the Ford was travelling) in the road reserve on approach to the accident scene.” Mr Grobbelaar pointed out trees and shrubs at the other side of the stock fence (inside the adjacent farm) that would probably have concealed the kudu if it was in that area before the collision. He also testified about the embankment on the other side of the fence and the fact that at the particular point the road passes through a cutting, the effect being that the road surface was lower than the veld on the other side of the fence. For this reason also, the kudu would be obscured from Werner’s view as he was approaching, obviously on the assumption that the kudu simultaneously came running from the farm into the direction of the road.

- [27] Mr Grobbelaar measured the road reserve from the edge of the tarred road to the stock fence and found it to be 12.5 metres wide. The stock fence was 1.2 metres in height. He calculated stopping distances based on the vehicle’s speed at 100, 120 and 140 kph, taking into consideration reaction time and concluded the stopping distances to be 98, 131 and 169 metres respectively and stopping time to be 5.5, 6.4 and 7.2 seconds respectively. He also relied on the speed of a kudu when walking, trotting and bolting as between 3.6 to 7.2, 30 to 40 and 50 to 60 kph respectively and testified about the time it would take from the fence to the road in each case.

[28] Based on the calculations in the previous paragraph Mr Grobelaar considered three possible scenario's, accepting that there was no significant vegetation in the road reserve on the western side obscuring Werner's view. If the kudu was walking from the fence towards the road, there would have been sufficient time for Werner to avoid a collision. If the kudu was trotting from the farm, being obscured by vegetation on the farm as well as the embankment, then jumped the fence and trotted towards the road, it is improbable that Werner would have been able to avoid a collision as the kudu would have crossed the road reserve within 1.1 to 1.5 seconds. This scenario is based on the assumption that the kudu trotted in a straight line towards the road and in such instance Werner would not even have time to react. The third scenario is worse for plaintiffs' case. If the kudu bolted from the farm at a speed of between 50 to 60 kph, jumped the fence and ran directly towards the road, it would have taken him a mere 0.7 to 0.9 seconds to cross the road reserve during which time he would be visible to the oncoming Werner. Obviously, there would be no time to avoid a collision. Mr Grobbelaar conceded that it was unknown and impossible to establish where the kudu was at any given time prior to it jumping towards the road. He conceded that a kudu can jump into the air from a stationary position.

[29] Although the evidence is really quite straight-forward and no serious or material differences need to be considered during the evaluation process *infra*, it is important to extensively deal with several judgments in order to set the scene for a proper evaluation of the dispute. Leach, JA stated in *Crafford* to be discussed *infra*

that the law of delict is based on well-settled principles, but it will appear from the authorities quoted *infra* that there are still differences of opinion amongst judges. Several academic writers have also criticised the manner in which judges adjudicate the different elements of the law of delict. Therefore, and as it is often still cumbersome to apply the law to a particular factual scenario, I decided to consider several judgments in the hope that I may eventually arrive at the correct conclusion.

VII LEGISLATION AND AUTHORITIES

- [30] Part A of Schedule 5 of the Constitution provides for the functional areas of exclusive provincial legislative competence, one of which is provincial roads and traffic. In terms of s 125(2)(a) of the Constitution, the Premier, together with the other Members of the Executive Council, exercises executive authority by implementing provincial legislation in a Province.
- [31] When one considers the consequences of the failure to maintain roads, shoulders and road reserves, a person's fundamental right such as the right to an environment that is not harmful to his/her health and well-being, entrenched in s 24 of the Constitution, comes into play and it must be read with s 7(2) which stipulates that the State must respect, protect, promote and fulfil the rights in the Bill of Rights. Although in a totally different context, the *dicta* of Mogoeng, J (as he then was) in *F v Minister of Safety and Security* 2012 (1) SA 536 (CC) in paragraphs [57] to [61] and

Froneman, J, in paragraphs [121] to [124] should be appreciated. In adjudicating the element of wrongfulness, constitutional values should be considered during the evaluative assessment, in particular the norm of accountability.

- [32] The relevant provincial legislation is the Free State Roads Ordinance, 4 of 1968, as amended. Section 19, which is couched in permissive language, provides that “the Head of the Department may (a) plant trees or any vegetation; (b) remove trees or any vegetation; (c) effect such improvements; or (d) provide such amenities, within the road reserve of a public road, as he or she may deem fit.”
- [33] In *Schwartz v Schwartz* 1984 (4) SA 467 (A) Corbett JA (as he then was) said the following in respect of permissive language used in a statute at 473I – 474E:

“A statutory enactment conferring a power in permissive language may nevertheless have to be construed as making it the duty of the person or authority in whom the power is reposed to exercise that power when the conditions prescribed as justifying its exercise have been satisfied. Whether an enactment should be so construed depends on, *inter alia*, the language in which it is couched, the context in which it appears, the general scope and object of the legislation, the nature of the thing empowered to be done and the person or persons for whose benefit the power is to be exercised..... As was pointed out in the *Noble & Barbour* case *supra*, this does not involve reading the word “may” as meaning “must”. As long as the English language retains its meaning “may” can never be equivalent to “must”. It is a question whether the grant of the permissive power also imports an obligation in certain circumstances to use the power.”

[34] In my view the defendant has an obligation to use the powers contained in s 19 of the Ordinance when the conditions prescribed as justifying its exercise have been met as stated by Corbett JA. Roads and road reserves fall within the exclusive legislative competence of the Province and no person or authority other than the defendant has the power to maintain road reserves, unless by agreement with the defendant. Although in a different context, it is apposite to mention the judgment of Roberson, J in *Agri EC v MEC, Department of Roads and Public Works* 2017 (3) SA 383 (ECG) at paragraphs [34] and [35] in particular. I agree with the sentiments expressed.

[35] In *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) the SCA per Nugent, JA expressed several *dicta* relating to the accountability of organs of State in paragraphs [19] to [22] and I paraphrase some:

“However, those barriers are less formidable where the conduct of a public authority or a public functionary is in issue, for it is usually the very business of a public authority or functionary to serve the interests of others...”

“...it must also be kept in mind that in the constitutional dispensation of this country the State (acting through its appointed officials) is not always free to remain passive.”

“The very existence of that duty (the positive duty to act in the protection of the rights enshrined in the Bill of Rights) necessarily implies accountability...”

“Where the conduct of the State, as represented by the persons who perform functions on its behalf, is in conflict with its constitutional duty to protect rights in the Bill of Rights, in my view, the norm of accountability must necessarily assume an important role in determining whether a legal duty ought to be recognised in a particular case.”

“There was no suggestion by the appellant that the recognition of a legal duty in such circumstances would have the potential to disrupt the efficient functioning of the police or would necessarily require the provision of additional resources.”

[36] The following may be mentioned to emphasise the points articulated in the previous paragraphs. Although the Department has the right in terms of s 13 of the Ordinance to *inter alia* remove a fence alongside a public road, the section being in permissive language as well, it would be highly controversial and unreasonable for the Department to start removing fences along public roads in areas where stock farming is undertaken.

[37] I referred to the principle *res perit domino* in the introduction *supra*. In considering the plaintiff’s claims I shall not ignore the warning of Harms, JA in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461* (SCA) in paragraph [12] where it was said that the first principle of the law of delict is that everyone has to bear the loss he or she suffers and that Aquilian liability provides an exception to that rule. Related thereto is always the apprehension of boundless liability.

- [38] Plaintiffs quite clearly believe that this is not a case of *res perit domino* in that they seek an order in terms whereof the defendant is obliged to bear the damages suffered by them. The case they elected to institute is based on delict. The five requisites for delictual liability are well-known. These are (a) conduct of the defendant which can be in the form of a *commissio*, e.g. a voluntary human act, or an *omissio*, e.g. the failure to take a positive step to prevent damage to another where there was a legal duty to act; (b) wrongfulness of that conduct; (c) fault in the form of negligence (or intent); (d) harm suffered by the plaintiff and (e) a causal connection between the harm and the defendant's conduct.
- [39] I shall refer to several decided cases dealing with *inter alia* the element of wrongfulness *infra*, but wish to start off with the often quoted judgment of *Minister van Polisie v Ewels* 1975 (3) SA 590 (A). It is stated at 597A-B that 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.
- [40] In *Hawekwa Youth Camp and Another v Byrne* 2010 (6) SA 83 (SCA) the SCA confirmed the legal position as follows in paragraph [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.”

- [41] In *MEC for the Department of Public Works, Roads and Transport v Botha* (20811/2014) [2016] ZASCA 20 (17 March 2016) the SCA warned against imposing a wide and general duty upon public authorities in the absence of relevant evidence. In that case the respondent (plaintiff in the court *a quo*) suffered damages as a result of a collision with a tree that had fallen into the road. The Department was held liable based on negligence and the SCA confirmed the judgment of the court *a quo* in that respect. The evidence showed that the Department’s employees were aware of the fallen tree and even started to take steps to remove it from the road surface, but then abandoned the unsuccessful attempts without warning motorists of the danger. Much evidence was led in respect of the Department’s alleged duty of care “... to maintain the road by removing trees that constantly grow and cause a potential danger to the road users.” Evidence was *inter alia* led as to the duty to examine the conditions of the ground and the roots at the base of trees and it was even suggested by one of plaintiff’s experts that the Department should have had in place a systematic programme of eliminating trees

which could potentially be blown over in a storm, resulting in an obstruction of the road. In the context hereof the SCA held at paragraph [13] that in the absence of evidence as to the costs and difficulty of taking preliminary measures by appellant, the imposition of such a duty was unjustified.

[42] In *Administrateur, Transvaal v Van der Merwe* 1994 (4) SA 347 (AD) at 359H – 360H the Appeal Court, as it was known, found that the fact that the Administrator had control and supervision over a road was a necessary factor to find liability on his part, but this was in itself not sufficient. In that case a fire emanated from the road reserve and spread to an adjacent farm. The Administrator had a policy in place in terms whereof, by reason of the cost factor, firebreaks would be made alongside proclaimed roads only when requested by landowners and in co-operation with them. The Appeal Court found that the Administrator's omission in not making firebreaks was, based on the totality of the evidence, not wrongful. See 361H - 362B and also the conclusion at 363C that affordability and proportionality between the potential damage and the potential cost of prevention should be brought into account in deciding the issue of wrongfulness.

[43] In *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) an elderly lady stepped into one of two potholes close to each other on a Sea Point pavement in Cape Town and fell, injuring herself. She was successful in the Magistrate's Court, in the High Court where the matter was dealt with by a Full Court, as well as

on appeal to the Supreme Court of Appeal. Marais, JA, writing for a unanimous SCA bench referred to the *dictum* of Brand, J (as he then was) in the High Court that the relative immunity conferred upon local authorities in the so-called “municipality cases” was inconsistent with the legal convictions of the public that municipalities were required to keep streets and pavements in a safe condition. The learned judge of appeal considered numerous authorities and held at paragraph [17] that “....when a court is required to consider whether a legal duty should be imposed in a given situation the ‘balance ultimately struck must be harmonious with the public’s notion of what justice demands.’”

- [44] In paragraph [26] of *Bakkerud supra* the learned judge of appeal agreed with the High Court’s conclusion that the general immunity of municipalities should be revisited, but it was made clear that it could not be substituted with a blanket imposition upon municipalities generally of a legal duty to repair roads and pavements. In applying the test of what the legal convictions of the community demand, the learned judge of appeal stated in paragraph [27] that “... the Courts are not laying down principles of law intended to be generally applicable. They are making value judgments ad hoc.” He continued in paragraph [28] to contrast the position of small and underfunded municipalities with large and well-funded municipalities and made two points. The small municipality may have many other pressing claims that require priority and in such case it may well be found that it did not have a legal duty to repair its streets and pavements. On the other hand, it may be impossible, even for a large and well-funded municipality to keep its streets and pavements in a pristine condition at all times.

[45] Ultimately it was found in paragraph [32] of *Bakkerud supra* that there was a legal duty on the municipality to repair the two potholes, bearing in mind that Seapoint was a densely populated suburb, the potholes were close to each other and not shallow and were there for several months. Negligence was also found and the municipality's appeal was dismissed. No evidence was presented by the municipality.

[46] In *Gouda Boerdery Bk v Transnet* 2005 (5) SA 490 (SCA), Scott, JA, writing for a unanimous court, explained in paragraph [12] that in order to find whether a legal duty existed to act positively, factors such as reasonableness, policy and, where appropriate, constitutional norms should be considered.

[47] In *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 (1) SA 1 (CC) the wrongfulness enquiry was dealt with as follows:

"[20] Wrongfulness is an element of delictual liability. It functions to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether 'the social, economic and others costs are just too high to justify the use of the law of delict for the resolution of the particular issue.' Wrongfulness typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirable or overly burdensome to impose liability.

[21]The statement that harm-causing conduct is wrongful expresses the conclusion that public or legal policy considerations require that the conduct, if paired with fault, is actionable. And if conduct is not wrongful, the intention is to convey the converse: ‘that public or legal policy considerations determine that there should be no liability; that the potential defendant should not be subjected to a claim for damages’, notwithstanding his or her fault.” (emphasis added.)

[48] In *Loureiro and Others v Invula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) at paragraph [53] the Constitutional Court warned that the concepts of wrongfulness and negligence should not be conflated. The court continued as follows:

“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.” Therefore the court held that a 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.”

[49] In *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC) Brand, AJ, the scribe of the majority judgment and whose general exposition of the law was in principle accepted by Froneman and Cameron, JJ in their minority judgment, stated the following in paragraph [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 on the defendant for the harm resulting from that conduct.” (emphasis added).

- [50] In *Za v Smith* 2015 (4) SA 574 (SCA) Brand, JA had yet another opportunity to express himself on the law of delict. In that case Mr Za slipped on a snow-covered mountain slope in the Matroosberg private reserve, and fell to his death over a 150 metre precipice. Brand, JA considered wrongfulness, negligence and causation in that order. Pertaining to wrongfulness he referred to all three Constitutional Court judgments cited in the previous paragraphs and provided his reasons for the finding of wrongfulness in paragraph [21]. He stated that “(I)n 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.” The court found that “both respondents were in control of a property which held a risk of danger to visitors” and that

visitors were allowed “to make use of a four-wheel-drive route, designed to lead directly to the area which proved to be extremely dangerous.”

[51] *MTO Forestry (Pty) Ltd v Swart NO* 2017 (5) SA 76 (SCA) is a more recent judgment on the delictual requirements of wrongfulness and negligence. In paragraphs [16] to [18] the SCA referred to the *dicta* of the Constitutional Court in *Loureiro* and *Country Cloud supra* pertaining to the wrongfulness enquiry, but 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.” It concluded in paragraph [18], after criticising some academics, 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.” (emphasis added). Leach JA, the scribe of the judgment, drove the point home in *Pauw v Du Preez* [2015] ZASCA 80, stating that “wrongfulness and negligence are two separate and discrete elements of delictual liability which .. should not be confused.”

[52] In *McIntosh v Premier, Kwazulu-Natal and another* 2008 (6) SA 1 (SCA) Scott, JA, writing for a unanimous court, had to deal with the appeal of a cyclist who suffered injuries as a result of riding through a pothole, causing him to fall off his bicycle, whose claim was dismissed by the court *a quo*. In paragraph [11] the learned judge of appeal considered wrongfulness briefly with reference to the provisions of the applicable provincial Act stipulating *inter alia* that the road network is “to be administered in order to achieve optimal

road safety standards within the Province”, acknowledging simultaneously that a public-law obligation does not necessarily give rise to a legal duty. The Act also provides that available resources should be taken into account in achieving the goals set out in the Act. The learned judge of appeal apparently accepted that a legal duty existed without expressly making such a finding and then continued to deal with the element of negligence. Although the judgment was criticised by Johan Scott, *Owerheidsaanspreeklikheid vir skade veroorsaak deur slaggate in openbare paaie*, 2009 TSAR 392, it has been referred to in several later judgments without criticism.

- [53] The often quoted *dictum* of Holmes JA in *Kruger v Coetzee* 1966 (2) SA 428 (AD) at 430E- G is worth repeating and I quote:

“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.”

- [54] In *Kruger v Coetzee supra* the Appeal Court held that the appellant, whose horses had entered a public road whereupon

the respondent collided with one of them causing damages to respondent, was not negligent. The Venterstad Divisional Council built a temporary road across appellant's property and caused a gate, giving access from the main road to the new road, to be erected. Workers and visitors to the Orange-Fish River water scheme more often than not left the gate open. Appellant, whose cattle and horses had been grazing in the camp adjacent to the main road for many years, had to close the gate on numerous occasions and even complained with the Council, but to no avail. The Appeal Court held that although the *diligens paterfamilias* in appellant's position would have foreseen the possibility of his horses straying through the open gate on to the main road, causing damage to motor vehicles which might collide with them and would have taken reasonable steps to guard against such occurrence, respondent did not prove that appellant could and should reasonably have taken any further steps. Therefore negligence was not established and the appeal succeeded.

- [55] In *Van Duivenboden supra* the SCA per Nugent, JA held in paragraph [23] with reference to the test for negligence set out in *Kruger v Coetzee supra* 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.”

It should be made clear at this stage already that defendant does not rely on an inability to keep the road reserve clean of shrubs and trees due to lack of resources or any other reason and consequently, the aforesaid *dictum* is not applicable. It was not necessary for plaintiffs to lead any evidence as to the costs to keep the road reserve clean of shrubs and trees.

[56] The SCA considered the issue of negligence as follows in *MTO Forestry supra* as follows:

“[45] As was mentioned by this court in Durr a landowner is under a ‘duty’ to control or extinguish a fire burning on its land. But as Nienaber JA stressed in H L & H Timber, 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.”

[57] In *Za v Smith supra* the defence was raised that the danger which materialised when the deceased slipped and fell was clear and apparent. In paragraphs [22] to [28] Brand, JA considered the defence with reference to the second leg of the test enunciated in *Kruger v Coetzee supra*. He found that precautionary measures should have been taken by respondents as suggested by the appellant’s expert. These include the warning and educating of visitors by way of signs and notices when dangerous conditions present themselves so that the unwary may know that they are entering a very treacherous area. See paragraph [12].

[58] In *McIntosh supra* the SCA considered the reasonableness of the respondents’ conduct in paragraph [14] and reiterated that the adjudication of the second leg of the negligence inquiry “... involves a value judgment which is to be made by balancing various competing considerations, including such factors as the degree or extent of the risk created by the actor’s conduct, the gravity of the possible consequences and the burden of eliminating the risk of harm.” The court went further and stated that where a public authority is involved, a further consideration arises, to wit the autonomy of the authority to make decisions with regard to the exercise of its powers. In this regard it was found that “.... a court will not lightly find a public authority to have failed to act reasonably because it elected to prioritise one demand on its possible limited resources above another.” Having considered the detailed evidence led at the trial on behalf of respondents and

respondents' policy, it was apparent that the pothole existed for more than a year, and consequently the SCA concluded in paragraph [15]: "No rational reason presents itself as to why the pothole was left unrepaired for so long; nor was one advanced. In the circumstances the inference of negligence on the part of the respondents' servants responsible for the inspection and repair of potholes on the P164 is irresistible."

- [59] In *Van Vuuren v Ethhekweni Municipality* 2018 (1) SA 189 (SCA) the SCA was required to consider the elements of wrongfulness and negligence. The court referred to numerous judgments on these issues, some which I already referred to, in order to adjudicate the disputes. The facts are briefly as follows. Appellant's eight year old child descended down a water slide under the control of the municipality, apparently after being pushed by another child in the queue behind him. He sustained serious injuries as a result of an awkward landing. The municipality did not employ a person or persons to supervise children and to control the use of the slide. There was evidence that children used the slide in a chaotic manner. Navsa, ADP, writing for a unanimous court, found in paragraph [29] regarding wrongfulness that by providing the pool and slide facility for the use of young children, the municipality created a potential risk of harm. It must be emphasised that in order to determine whether a legal duty ought to be imposed on the municipality, the court referred in paragraph [22] to the immaturity and indiscipline of children and s 28(2) of the Constitution providing that in every matter concerning a child, his/her best interests are of paramount

importance. Finally, it held in paragraph [29] as follows on the element of wrongfulness:

“Considering, in relation to wrongfulness, the criteria of reasonableness, constitutional norms and policy, the compelling conclusion is that in the circumstances set out above, a legal duty is owed by the Municipality to avoid negligently causing harm to persons in the position of Jacques. As appears from what is stated earlier, the steps that could be taken to prevent harm by ensuring access control are relatively simple and would not place an intolerable financial burden on the Municipality.”
(emphasis added)

[60] Navsa, ADP expressed himself as follows in paragraph [31] of *Van Vuuren supra* on the element of negligence:

“As stated above, foreseeability was fiercely contested by the Municipality, particularly on the basis that parents are obliged to care for their children and that the Municipality was entitled to assume that parents would look after and supervise their children. It was contended on behalf of the Municipality that since the appellant herself did not foresee that Jacques would be injured, it follows that the Municipality itself could not be expected to foresee harm of the kind suffered by Jacques. We are here concerned with whether, objectively, a sensible person in the position of the Municipality would foresee the reasonable possibility of operating the facility without access control causing harm to children in the position of Jacques. As stated above, it was obvious to Gregersen. From his evidence, it would have been obvious to any official operating the facility on behalf of the Municipality, that unattended access had the effect of children bunching up and pushing against each other and that the kind of harm which ensued in this case

was a reasonable possibility. The Municipality failed to take steps to guard against such an occurrence.” (emphasis added).

- [61] The only authority available to counsel and the court relating to collisions with wild animals such as kudu prior to the leading of evidence is *Crafford v SANRAL* (215/2012) [2103] ZASCA 8 (14 March 2013). Once the legal representatives had submitted their closing arguments, I requested them to try and find further case law on the subject, reported or unreported, but they failed to present me with any authority. In *Crafford* the appellant, whilst driving his motor vehicle during the night, collided with a kudu. Leach, JA considered causation based on the appeal against the trial court’s finding that the appellant failed to discharge the onus of establishing that the state of the road reserve caused the collision. The learned judge of appeal held that causation was not proven and consequently, it was unnecessary to consider the elements of wrongfulness and negligence. He referred in paragraph [19] to insufficient information to determine how the collision occurred and to come to a finding in that regard he would have “to indulge in impermissible speculation.” He continued as follows in paragraph [21]:

“(W)ithout 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.”

[62] I shall deal in more detail with the SCA's findings in *Crafford* when I evaluate the evidence and I shall show that the facts *in casu* differ substantially from those in *Crafford*. Whether that is sufficient for a finding in favour of plaintiffs will be duly considered. Insofar as the SCA did not consider SANRAL's legal duty and the element of wrongfulness in a similar factual scenario, as well as negligence, I shall do my best to determine whether plaintiffs have proven the applicable elements of the delict based on the general principles enunciated herein.

[63] In *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34E-G Corbett, JA (as he then was) defined causation in the law of delict. 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. 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 764I – 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."

[64] In *Van Duivenboden supra* the SCA held in paragraph [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).

- [65] The sentiments in *Van Duivenboden supra* were repeated in *Za v Smith supra* by Brand, JA in paragraph [30]. The learned judge of appeal proceeded at paragraph [32] as follows:

“Unlike the court *a quo*, I therefore do not think it can be found as a fact that the warning measures proposed by Tromp (appellant’s expert) would be of no consequence. On the contrary, in my view, they would probably have been effective. This means that, but for the respondents’ wrongful and negligent failure to take reasonable steps, the harm that befell the deceased would not have occurred.”

- [66] In *Fourway Haulage SA (Pty) Ltd v SANRAL* 2009 (2) SA 150 (SCA) Brand, JA cautioned in paragraph [34] 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.”

- [67] In *SA Hang and Paragliding Association v Beswink* 2015 (3) SA 449 (SCA) Brand, JA again had an opportunity to consider and adjudicate a claim based on delict. He explained the “but for” test in respect of factual causation and found in favour of the appellants. He also dealt with legal causation or remoteness and stated in paragraph [37] that this is determined by considerations of policy, it being a measure of control or as he called it “a long-stop

where right-minded people, including judges, will regard the imposition of liability in a particular case as untenable, despite the presence of all other elements of delictual liability.” The ultimate question to be asked *in casu*, based on Brand, JA’s reasoning further on in the paragraph as well as in *ZA v Smith supra*, is whether that which defendant wrongfully and negligently omitted to do *in casu* – i.e. to take reasonable steps to keep the road reserve clean – (and only if this is found to be proven), increased the risk of the collision which resulted in Werner’s injuries.

- [68] In *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC) the Constitutional Court rejected the approach of the SCA that failed to follow the approach in *Van Duivenboden supra*. Nkabinde, J, the scribe of the majority judgment (there was a 5/4 split) dealt with causation and the flexible approach to determine factual causation and accepted in paragraph [47] that the “most recent, post-constitutional affirmations of that flexibility are to be found in *Van Duivenboden* and *Gore*.” The learned judge concluded in paragraph [73] as follows: “A court ultimately has to make a finding as to whether causation was established on a balance of probabilities on the facts of each case. Causation will not always follow whenever a wrongful and negligent omission is shown.”

VIII EVALUATION OF THE EVIDENCE AND APPLICATION OF THE LAW TO THE FACTS

- [69] I mentioned *supra* the facts which are common cause between the parties and the relative lack of serious and material disputes. I

intend to deal firstly with wrongfulness and then negligence, *inter alia* as Brand, JA and Navsa, JA did in *Hawekwa* and *Van Vuuren supra* respectively. Finally, causation will be addressed.

[70] It is clear what the constitutional and statutory obligations of the defendant are and the only question is whether it lived up to those obligations. I indicated *supra* that defendant in actual fact admitted its legal duty to maintain the road reserve and the only point of dispute is a measure of degree. The citizens of the country in general and road users in particular expect that our authorities contribute to their well-being when travelling the roads of our country. Road safety should be a priority, not only when roads are designed and built, but also afterwards. Everyone has a constitutional right to an environment that is not harmful to their health and well-being as entrenched in s 24 of the Constitution.

[71] It should also be pointed out that Dr Roodt's evidence pertaining to the national S'hamba Sonke programme for job creation and poverty eradication was not challenged at all. Furthermore, defendant did not plead financial constraints and/or that the particular road was low down on its priority list and did not qualify for maintenance above other roads. It also refrained from leading evidence to put the matter in perspective.

Wrongfulness

- [72] The question to be answered is if it could be found that defendant, considering all relevant circumstances, was under a legal duty to prevent vegetation such as trees and shrubs to grow in the road reserve to the extent proven and in breach thereof acted wrongfully by refraining from keeping the road reserve clear of such vegetation. As mentioned in *Loureiro supra* the test is whether the policy and legal convictions of the community, constitutionally understood, regard the failure to act as acceptable. Although there is a duty not to cause harm to others and to respect their constitutional rights, the concept of wrongfulness acts as a brake in the words of Khampepe, J in *Country Bird supra* where it is undesirable or overly burdensome to impose liability.
- [73] According to the uncontested evidence local crop farmers removed trees growing in the road reserve adjacent to their cultivated fields in order to avoid trees from using underground water needed by their crops. The area where the collision occurred was not kept clear by farmers for obvious reasons. There are no cultivated fields adjacent to the particular stretch of road, but veld consisting of grass and trees suitable for live-stock such as cattle.
- [74] Defendant did not rely in its plea on the prioritising of certain roads and/or lack of funds. In fact, no evidence was tendered by defendant to be considered as part of the totality of facts in order to arrive at a conclusion in favour of defendant. An aspect such as

the cost factor to keep the road reserve clean was not addressed at all in either the pleadings or the evidence. Mr Snellenburg questioned Dr Roodt in this regard and made statements to him, but no concessions were made. Statements by counsel are not evidence. In any event, any evidence that defendant might have tried to lead, would probably be objected to insofar as defendant did not rely on such defences in its plea.

[75] Defendant's version in the plea that the failure to control the growth of vegetation in the road reserve could not restrict the view of the reasonable motorist using the road is without substance, bearing in mind the uncontested evidence, the evidential material in the form of several photographs, as well as the evidence of its own expert, Mr Grobbelaar.

[76] It must also be pointed out as indicated *supra* that defendant conceded in paragraph 4 of its plea that it was under a legal duty to control the growth of vegetation in the road reserve adjacent to the road, but denied the further allegation that it also had a legal duty to take steps as were reasonable in the circumstances to avoid risk to motorists due to restricted visibility.

[77] I am satisfied that although there are other reasons why road reserves should be provided for and maintained, as Dr Roodt testified, an extremely imported reason is the safety of road users and even animals and pedestrians. An organ of State such as defendant should not be heard to say that road users on our

public roads, whether the speed limit is 100 or 120 kph, must reconcile themselves with the fact that they travel these roads with a tunnel vision because the vegetation next to the roads, such as *in casu*, totally or predominantly restrict visibility to the side and into the road reserve. It is unacceptable from a legal policy perspective consistent with constitutional norms.

- [78] Even if the cost of maintaining the road reserve properly is to be considered at this stage already as *inter alia* mentioned in *Administrateur, Transvaal and Van Vuuren supra*, I am satisfied that, based on criteria of public and legal policy consistent with our constitutional norms, defendant had a legal duty as alleged by plaintiffs. Its failure to act – its omission - should attract legal liability if the elements of negligence and causation are proven on a balance of probabilities. In the words of Navsa, ADP, the steps that could be taken to prevent harm are relatively simple and would not place an intolerable financial burden on defendant. I find that to impose liability *in casu* is neither undesirable, nor overly burdensome as mentioned by Khampepe, J *supra*.

Negligence

- [79] The test for negligence is an objective test, *i.e.* what would the reasonable person have done if put in the defendant's shoes. See: *Kruger v Coetzee supra*. The questions to be posed are whether the reasonable person would have foreseen the reasonable possibility that his conduct may cause harm and if so,

would he be taking reasonable steps to guard against such harm and finally, whether the defendant failed to take such steps.

[80] The reasonable person is not “‘a *timorous faint heart always in trepidation*’ of harm occurring” as explained in *MTO Forestry supra* in paragraphs [45] and [47]. However, the fact that Werner did not foresee the reasonable possibility that an animal, whether a kudu or other domesticated animal such as a bovine, horse or donkey, might enter the road and cause damage, is not the test. One needs to establish whether the *diligens paterfamilias* in the position of defendant would foresee the reasonable possibility of his omission injuring another, would take reasonable steps to guard against such occurrence and defendant failed to take such steps. As in *Bakkerud supra* defendant at its peril failed to lead evidence in this regard.

[81] It might have been argued that Werner did not foresee that an animal like a kudu could traverse the road and cause a collision with his vehicle and therefore the reasonable person in the shoes of defendant would also not foresee such occurrence. Such argument would be without merit. I refer to the judgment of Navsa, ADP in *Van Vuuren supra*. Mr Snellenburg did not deal in any detail with the element of negligence and merely concentrated on wrongfulness and causation. In my view defendant should have experts in its service such as engineers and other personnel trained in road maintenance. It should have been the case when the road was built insofar as defendant’s

predecessor, the Administrator of the Province at the time was concerned, and it remained defendant's duty to have capable, trained and experienced personnel in its employ to oversee, regularly inspect and maintain the roads and road reserves in the Province.

- [82] A once-off and effective removal of shrubs and trees such as the thorn trees in the relatively small area concerned could not cost an arm and a leg and the same would be the case if further growth had to be curtailed from time to time. If individual crop farmers along the particular road had the means, in the form of machines, other tools and equipment, labour and financial resources to clean the road reserve adjacent to their farms, then surely defendant could not be heard to plead poverty. It appears as if defendant had a *laissez faire* attitude. I accept that there is no indication that anyone complained about the state of the road reserve prior to the collision, but defendant as a prudent entity in control of roads in the Province must have teams with qualified personnel in its employ, allocated to each district to regularly oversee the roads and road reserves under its control and to arrange for maintenance thereof when required. These employees are supposed to be defendant's eyes and ears on ground level. Defendant elected not to lead evidence in this regard. The court is in the dark as to whether it has road maintenance programmes in place, how these are implemented and when, how and by whom the particular road and road reserve were inspected and maintained.

[83] In my view the *diligens paterfamilias* in the position of defendant, acting through its employees, would foresee the reasonable possibility of its omission causing injury to another and would take reasonable steps to guard against such occurrence, whilst defendant failed to take such steps. I need to emphasise that the fact that a kudu traversed the road is in my view immaterial. It could have been a domesticated animal such as a bovine, horse, goat or donkey, or any other wild animal. It could just as well be a pedestrian.

Causation

[84] Mr Snellenburg relied on *Crafford supra* and well-known authorities such as *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) in respect of factual causation and *Standard Chartered Bank of Canada v Nedperm Bank Ltd supra*. He submitted that the question *in casu* is simply whether the collision would have occurred on the probabilities, but for the wrongful omission to remove the vegetation and concluded that factual causation had not been proven.

[85] As indicated *supra*, *Crafford* is totally distinguishable on the facts. That collision occurred during the night. Appellant, the driver of the motor vehicle that collided with a kudu, suffered from amnesia and could not recall how the collision occurred. He was *au fait* with the particular road and had on several occasions prior to the collision seen kudu next to the road. The road passes through

fairly thick bushveld and the court accepted that kudu are likely to abound in the area. Road signs warn against the possible presence of kudu. The court stated that no evidence was tendered from which direction the kudu came, whether it was already in the road when the appellant approached it, but did not see it, or whether the kudu came at a run from the bushveld beyond the road reserve, clearing the stock fence and charging towards the road into the roadway directly in front of appellant's vehicle. Consequently the court found in paragraph [12] that the list of possible scenarios "is truly endless." In that case no photographs were handed in, showing the height of the grass in the road reserve at the time, although it was accepted that there were clumps of grass and that the particular type of grass can grow up to 2 metres in height. It was also accepted that kudu by way of skin colouring are difficult to see, especially at night. Furthermore, a driver's range of vision is restricted at night to the area illuminated by the headlights of the vehicle. The court ultimately found that even if the grass alongside the road had been short at the time, "...one does not have sufficient information to determine how the collision probably took place." Therefore it concluded that "the list of imponderables is infinite" and "to find that any of these scenarios is in fact what probably occurred would be to indulge in impermissible speculation." The court continued in paragraphs [21] and [22] to hold that even if the grass was short, it would be speculative to find that the kudu would become visible when there was still sufficient time to successfully avoid a collision.

- [86] If the facts *in casu* were in line with that in *Crafford*, I would be bound by the *stare decisis* principle and would have to dismiss the claims on the basis that causation was not proven. However, I agree with Mr Zietsman that the two cases are distinguishable. *In casu* Werner collided with the kudu in daylight. The previously obscured kudu approached the road from Werner's left hand side at a time when it was airborne. It was accepted by Mr Grobbelaar that a kudu can jump into the air from a stationary position and also, that it can accelerate fast from a stationary position.
- [87] I am of the view that there is no reason why the "but for" test for factual causation should be based on mathematics. Although it cannot be totally ignored, it is rather a matter of common sense as Brand, JA held at paragraph [30] in *Za v Smith supra*, taking into account the background of everyday-life experiences and considering the matter in a practical manner. The plaintiffs merely have to prove that the occurrence was more likely than not, but for the wrongful and negligent conduct. The causal link does not have to be established with certainty. See also *Van Duivenboden* paragraph [25] and *Lee* paragraph [41] *supra*.
- [88] Judicial notice can be taken of the fact that antelope such as kudu in particular are shy and avoid humans. Kudu are likely to be found in thick bushveld as Leach, JA held in *Crafford supra* and seldom venture into the open veld. Therefore, if the road reserve was cleared of dense vegetation, the kudu would probably have avoided the road reserve, unless it wanted to cross the road to

the other side. In all probabilities the kudu bull was grazing between the trees and shrubs next to the road where he was obscured by the much taller trees and shrubs from Werner's view. The more plausible and reasonable inference to be drawn from the proven facts is that the kudu, whose vision would have been impaired as well, was frightened by the oncoming vehicle and tried to flee, causing him to jump into the direction of the approaching Ford driven by Werner. In my view such inference can be legitimately drawn from the proven facts. It would be highly speculative to suggest that the kudu was inside the adjacent camp and then all of a sudden started to run or trot in the direction of the road, jumping the stock fence, going down the embankment, and making a bee-line for the road in order to cross it right in front of the Ford. In my view factual causation has been proven.

- [89] Based on the totality of facts which need not be repeated I am satisfied that there is a sufficiently close link between the occurrence and defendant's wrongful and negligent omission in order to satisfy the test relating to legal causation. As Brand, JA stated in *Fourway Haulage supra*, legal causation should be considered "in a flexible manner so as to avoid a result which is so unfair or unjust that it is regarded as untenable." Consequently, I am satisfied that plaintiffs have proven all the required elements for delictual liability in order to obtain success on the merits of the claims.

IX COSTS

[90] There is no reason why costs should not follow the event and why the cost order requested by Mr Zietsman shall not be granted.

X ORDERS

[91] Consequently, the following orders are made:

- (1) Defendant is liable towards plaintiffs for the full extent (100%) of their respective proven or agreed damages arising from the first plaintiff's collision with a kudu on 26 June 2015;
- (2) Defendant is liable for payment of plaintiffs' taxed or agreed party and party costs in respect of the merits, which costs will include, but are not to be limited to the following:
 - (2.1) The reasonable preparation, qualifying, reservation, accommodation and travelling costs in respect of the expert, Dr Louis Roodt;
 - (2.2) Counsel's fees and expenses;
 - (2.3) The costs attendant upon obtaining the payments referred to in this order.
- (3) Mr RC Brits is declared a necessary witness.

J.P. DAFFUE, J

On behalf of the plaintiffs: Adv PJJ Zietsman
Instructed by: Honey Attorneys
Bloemfontein

On behalf of the defendant: Adv N Snellenburg SC assisted by
Adv LR Bomela

Instructed by: Office of the State Attorney
Bloemfontein