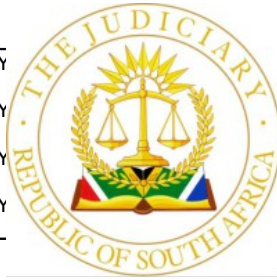


Reportable:	Y
Circulate to Judges:	Y
Circulate to Magistrates:	Y
Circulate to Regional Magistrates:	Y



HIGH COURT OF SOUTH AFRICA
[NORTHERN CAPE DIVISION, KIMBERLEY]

Case No: 587/2014

In the matter between:

CATHARINA ELIZABETH LOOTS

Plaintiff

and

THE MEC FOR TRANSPORT, ROADS AND PUBLIC WORKS

Defendant

Coram: Lever AJ

JUDGMENT

1. The plaintiff in this action is an adult businesswoman who claims delictual damages from the defendant arising out of a motor vehicle accident in which she suffered injuries. Although, the quantum and the merits of plaintiff's claim were separated by agreement, the evidence

established that the injuries had far reaching consequences for the plaintiff, who was in and out of hospital long after the accident had occurred.

2. The accident is alleged to have occurred on the 10 April 2011. Plaintiff pleaded that the accident occurred on a public road being the R31 between Hotazel and Kuruman, approximately three kilometres from Kuruman. Plaintiff pleaded that the accident was caused by her vehicle hitting a pothole, whereafter she lost control of her vehicle which then rolled.
3. Plaintiff pleaded that the defendant had the duty to maintain the R31, alternatively that the defendant was under a legal duty to ensure that the condition of the R31 was such that it could safely be utilised by road users. Further alternatively, that appropriate road signs would warn users of the R31 of any dangerous conditions on the road so that they might take appropriate action to avoid them.
4. Plaintiff pleaded that the defendant was in breach of his legal duty in that: he failed to repair the relevant pothole in accordance with his legal duty to maintain the road when he could reasonably have done so; and he failed to put up any, alternatively adequate road signs to warn motorists to be aware of potholes or any other unsafe conditions on the road surface.
5. Further, plaintiff pleaded that as a result of the defendant's neglect she hit the relevant pothole causing her vehicle to roll which resulted in the injuries she suffered.
6. Defendant pleaded that he had no knowledge of the date of the accident or the particulars of the vehicle plaintiff was driving and put plaintiff to the proof of those contentions. Defendant further denied the contention that the relevant accident was caused by a pothole in the road.

Defendant pleaded that the relevant accident was caused by the negligence of the plaintiff.

Defendant pleaded that plaintiff was negligent in one or more of the following respects: She travelled at an excessive speed; she failed to keep her motor vehicle under proper control; she failed to apply her brakes adequately, timeously or alternatively, at all; she failed to prevent the accident when by the exercise of reasonable care she could and should have done so; she failed to exercise the care expected of a prudent driver when she could and should have under the circumstances; and she failed to take cognisance and abide by the general rules and regulations of the road.

7. Defendant further pleads that in the event of the court finding that he was negligent in failing to repair the relevant pothole then he pleaded that the negligence of the plaintiff contributed to her damages and that any award of damages should be apportioned accordingly.
8. Defendant admitted that the R31 is a public road. Defendant also admits that he has a public duty and responsibility to maintain the provincial roads. However, defendant pleaded that such responsibility was subject to human and financial resources. Defendant further pleaded that he in fact had a maintenance programme for the road in question. Defendant denies the contention that he failed to display road signs regarding the condition of the road. Defendant also pleaded that the speed limit along the R31 differed according to the condition of the road.
9. Defendant denied the contention that he was negligent in failing to repair the relevant pothole and also pleaded that plaintiff did not comply with the road traffic warning signs on that stretch of road and that plaintiff failed to reduce her speed. Defendant also pleaded that neither he nor his employees acted wilfully or negligently.

10. Plaintiff's claim is not based on a positive act or action on the part of the defendant or his employees acting within the course and scope of their employment, but rather a failure to act or an omission when there can be said to be a legal duty to have performed the maintenance concerned or warned of the danger so that the plaintiff herself could have taken appropriate action to avoid the harm. A positive act which might cause harm on the part of the defendant or his employees would be *prima facie* wrongful. However, where there is a failure to act, this is not the case.

11. The legal position in respect of an omission was dealt with, set out and restated by Scott JA in the Supreme Court of Appeal (SCA) the case of **McIntosh v Premier Kwazulu-Natal**¹. The passage quoted is a lengthy one, but it is necessary to quote it, at least to the extent that I have, because it authoritatively and succinctly sets out the legal position. The SCA in the **McIntosh** matter, set out the legal position as follows:

"[11] As repeatedly stated by this Court, a negligent omission, unless wrongful will not give rise to delictual liability. More recently in *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* [2006 \(3\) SA 138](#) (SCA) [also reported at [\[2007\] 1 All SA 240](#) (SCA) - Ed] Brand JA, at 144A-C, paragraph 10, explained the requirement of wrongfulness as follows:

"Negligent conduct manifesting itself in the form of a positive act causing physical damage to the property or person of another is *prima facie* wrongful. In those cases, wrongfulness is therefore seldom contentious. Where the element of wrongfulness becomes less straightforward is with reference to liability for negligent omissions and for negligently caused pure economic loss (see eg *Minister of Safety and Security v Van Duivenboden* [2002 \(6\) SA 431](#) (SCA) ([\[2002\] 3 All SA 741](#)) in para [12]; *Gouda Boerdery BK v Transnet* [2005 \(5\) SA 490](#) (SCA) ([\[2004\] 4 All SA 500](#)) in para [12]). In these instances, it is said, wrongfulness depends on the existence of a legal duty not to act negligently. The imposition of such a legal duty is a matter for judicial determination involving criteria of public or legal policy consistent with constitutional norms."

The learned Judge continued at 144I, paragraph 12;

". . . when we say that negligent conduct . . . consisting of an omission is not wrongful, we intend to convey 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, his or her negligence notwithstanding. In such event, the question of fault does not even arise. The defendant enjoys immunity against liability for such conduct, whether negligent or not"

...

¹ [2008] 4 All SA 72 (SCA) at paras [11] to [14].

- [12] The second inquiry is whether there was fault, in this case negligence. As is apparent from the much quoted dictum of Holmes JA in *Kruger v Coetzee* [1966 \(2\) SA 428](#) (A) at 430E-F [also reported at [\[1966\] 2 All SA 490](#) (A) - Ed], the issue of negligence itself involves a twofold inquiry. The first is; was the harm reasonably foreseeable? The second is; would the *diligens paterfamilias* take reasonable steps to guard against such occurrence and did the defendant fail to take those steps? The answer to the second inquiry is frequently expressed in terms of a duty. The foreseeability requirement is more often than not assumed and the inquiry is said to be simply whether the defendant had a duty to take one or other step, such as drive in a particular way or perform some or other positive act, and, if so, whether the failure on the part of the defendant to do so amounted to a breach of that duty. But the word "duty", and sometimes even the expression "legal duty", in this context, must not be confused with the concept of "legal duty" in the context of wrongfulness which, as has been indicated, is distinct from the issue of negligence. I mention this because this confusion was not only apparent in the arguments presented to us in this case but is frequently encountered in reported cases. The use of the expression "duty of care" is similarly a source of confusion. In English law "duty of care" is used to denote both what in South African law would be the second leg of the inquiry into negligence and legal duty in the context of wrongfulness. As Brand JA observed in the *Trustees, Two Oceans Aquarium Trust* case, at 144F, "duty of care" in English law "straddles both elements of wrongfulness and negligence".
- [13] In the present case the reasonable foreseeability of harm to users of the road in consequence of potholes was not in issue. Mr George Hattingh, a consulting engineer who gave evidence on behalf of the respondents, readily conceded that quite apart from the damage caused to vehicles by driving over large potholes, their presence in the road was likely to cause drivers to swerve to avoid them which could result in collisions with other vehicles or pedestrians, particularly in wet weather when a swerving vehicle was likely to skid. The circumstances of the appellant's accident were admittedly somewhat unusual but it is well established that it is sufficient if the general nature of the harm to the injured party was foreseeable; it is not necessary that the precise manner of its occurrence be foreseeable.
- [14] The crucial question, therefore, is the reasonableness or otherwise of the respondents' conduct. This is the second leg of the negligence inquiry. Generally speaking, the answer to the inquiry depends on a consideration of all the relevant circumstances and 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. See eg *Cape Metropolitan Council v Graham* [2001 \(1\) SA 1197](#) (SCA) [also reported at [\[2001\] 1 All SA 215](#) (A) - Ed] paragraph 17. Where, however, a public authority is involved a further consideration arises. It is this: a court when determining the reasonableness or otherwise of an authority's conduct will in principle recognise the autonomy of the authority to make decisions with regard to the exercise of its powers. Typically, a court will not lightly find a public authority to have failed to act reasonably because it elected to prioritise one demand on its possibly limited resources above another. Just where the line is to be drawn is no easy matter and the question has been the subject of much judicial debate both in England and other Commonwealth countries. See eg *Stovin v Wise* [1996] AC 923 (HL); *Gorringe v Calderdale Metropolitan Borough Council* [\[2004\] 2 All ER 326](#) (HL); *Barratt v District of North Vancouver* (1980) 114 DLR (3rd) 577 (SCC); *Brodie v Singleton Shire Council* (2001) 206 CLR 512 (HC of A) paragraphs 161-162. But whether the criterion to be applied is ultimately one of rationality or some other principle is unnecessary to decide. What, I think, is clear is that if in the actual implementation of a policy or procedure adopted by the authority, or for that matter in the course of its operations, foreseeable harm is suffered by another in consequence of a failure on the part of the authority's servants to take reasonable steps to guard against its occurrence, a court will not hesitate to hold the authority liable on account of that omission. Indeed, as I read section 9(3) of the KwaZulu-Natal Provincial Roads Act, whatever its precise ambit may be, there can be no doubt that omissions of this nature were intended by the Legislature to be excluded from the general exemption embodied in the section."

12. As can be seen from the **McIntosh** matter, a determination must first be made as to whether in the circumstances of the particular case, the omission can be said to be wrongful. In other words, whether there was a legal duty on the defendant not to act negligently. The next enquiry is to determine whether there was 'fault' on the part of the defendant. In other words, whether the defendant can be said to have been negligent. The question of determining fault has two parts. Firstly, a determination of whether the harm was reasonably foreseeable. Secondly, would a *diligens paterfamilias* take reasonable steps to guard against such harm.

13. As can be seen from the pleadings set out above, the defendant has, *inter alia*, placed in issue the question of factual causation. The test to determine factual causation is the *sine qua non* test. Sometimes referred to as the '...but for test'. As Jansen J in the matter of **Celliers v South African Railways and Harbours**² put it: "Would the collision have occurred but for the negligence of the defendant?"

14. This question has been considered by the then Appellate Division (AD) in the matter of **International Shipping Co (Pty) Ltd v Bentley**³. The AD in that matter set out the position as follows:

"As has previously been pointed out by this Court, in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as 'factual causation'. The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a

² 1961 (2) SA 131 (TPD) at 141F.

³ 1990 (1) SA 680 (AD) at 700 to 701.

hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; aliter, if it would not so have ensued. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part."

15. In summary, in the present 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, this court must then decide whether the omission on the part of the defendant was wrongful. Then, this court must consider whether there was fault on the defendant's part in the particular circumstances of the case. Then this court must consider whether the plaintiff has established both factual and legal causation in relation to the harm she has suffered. In respect of the question of legal causation, 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 will then proceed to consider the question of contributory negligence.

16. The evidence of the plaintiff was to the effect that on the 10 April 2011, which was a Sunday, she was driving along the road from Hotazel to Kuruman. She was on her way to Bloemfontein as she was taking her son and daughter back to school. The vehicle was a Landcruiser Bakkie and while she drove, her daughter sat next to her in the middle and her son sat next to the passenger side door. She was not in a hurry and she was well within time to complete her journey. As she approached Kuruman and approximately 10 kilometres before Kuruman it started raining. At this point of her journey the speed limit was 80km/h. She was driving below

that speed due to the rain. Her windscreen wipers were on and she had to concentrate on the road.

17. Plaintiff testified that she always adhered to the speed limit and had never had a speeding fine.

Also, that she had both of her hands on the steering wheel at the time. She did not see any warning signs advising her how she should be driving. There were no road signs warning her of potholes. Plaintiff did not see a pothole, but she later learnt that it was the pothole that caused her to lose control of her vehicle.

18. Plaintiff testified that she did not see the pothole concerned that at the relevant time it was raining and that there were no warning signs in respect of potholes. Also, at the relevant point, there were no further reductions in the speed limit.

19. Plaintiff gave a description of her injuries which were serious. After the accident she spent three months in hospital. Thereafter there was a period of rehabilitation where plaintiff had to learn to walk again. Since then plaintiff has been back to hospital almost annually for operations and procedures related to the consequences of the accident concerned.

20. Under cross-examination, plaintiff stated that she had personally driven the same stretch of road some six weeks to two months before the accident and had not observed a pothole on the relevant stretch of road at that time. That she had been a passenger on a journey over the same stretch of road about a month before such accident. That on this journey she had not observed potholes, but it must be remembered that she did not drive, she was just a passenger on that journey. Plaintiff also testified that she had not seen any roadworks on the relevant stretch of road.

21. It was put to the plaintiff in cross-examination that the defendant would lead evidence to show that there were roadworks on the relevant stretch of road. However, defendant failed to adduce this evidence when he presented his case. In fact, defendant's case was that repairs to the R31 started at the other end of the road. There was no evidence to show that at the relevant time there had been any work done on the section of the road where the accident occurred.
22. Under cross-examination plaintiff was asked if she was wearing a seat belt at the material time. Without hesitation and in a direct manner she admitted that she had not been wearing a seat belt at the material time. In the context of the evidence that was adduced at the trial by both parties, plaintiff could easily have concealed this fact. This is strong evidence of plaintiff's inherent honesty. Which confirms my observations of her demeanour and manner in which she gave her evidence. When she was challenged with certain prior statements or correspondence, she gave direct and credible explanations in a proper manner for what appeared in such correspondence or prior statement. The plaintiff impressed me as an honest and credible witness who did not embellish the facts, which she stated simply and directly. If something was not within her knowledge she stated this directly, if she was relying on what she had been told by others, she also made this clear.
23. In any event, even if I am wrong on my assessment of the plaintiff's explanation in respect of the correspondence and prior statement, it will be seen from what is set out below, that the evidence that established the defendant's omission, the wrongfulness of such omission, the negligence that resulted in the harm suffered by the plaintiff and the evidence that established the factual as well as the legal causation in relation to the defendant, came from sources other than the plaintiff.

24. In cross-examination it was specifically put to the plaintiff that the relevant stretch of road was maintained during this period, that there were no warning signs because there were no potholes on the relevant stretch of road. That speed caused the accident. That the defence witnesses would give such evidence. It is noted that the evidence adduced by the defendant did not deal with these issues directly and did not by any means establish these contentions.
25. It was also put to plaintiff that the cause of the accident was speeding on a rainy day in foggy conditions. The plaintiff did not agree with this contention. However, defendant did not lead any direct evidence to establish such contention.
26. Plaintiff then called Ms Susannah Elizabeth Myburgh who testified that she took the photographs that the plaintiff handed in as an exhibit on the day of the accident. That such photographs were taken between 15H30 and 17H00 shortly after the accident occurred. These are the photographs that appear at pages 64, 66 and 67 of the plaintiff's bundle used in the trial. The said photographs were also published in the Kuruman Bulletin, a local newspaper shortly after the accident.
27. Ms Myburgh testified that the pothole was so broad that it was not possible for the person depicted in the photograph of the pothole to straddle such pothole. She also testified that the pothole had water in it. That she did not see another pothole. That whilst she was on the scene she did not see any signs warning road users about the presence of potholes. That she did not observe any road works in the region of the pothole.

28. Under cross-examination, Ms Myburgh maintained that she did not know the plaintiff. That the scene of the accident was not even 500 metres from Dr Grobblers' home, where she and her husband had been visiting Dr Grobblers and his wife.
29. In cross-examination it was put to Ms Myburgh that photographs can be 'photoshopped' meaning that they can be edited or manipulated. Ms Myburgh agreed that it was possible to photoshop the photographs. It was then put to Ms Myburgh that it would not be possible to see if a photograph had been photoshopped. To this Ms Myburgh did not agree and explained that the edges of an image inserted into or manipulated in a photograph would be pixilated. That this would show up as a white line around the image which had been manipulated and that this was not the case with the photographs concerned.
30. Ms Myburgh also testified that when she took the photographs concerned it had stopped raining. She also expressed the opinion that the rain could have contributed to the pothole.
31. The plaintiff then called Sonja Grobblers to give evidence. She identified the photographs in the plaintiff's bundle and she identified herself in the photographs in which she appeared. She also testified that the photographs were taken on the 10 April 2011. She testified that the photographs were taken between 16H00 and 17H00.
32. Ms Grobblers testified that her husband is a doctor and that on the day in question they had been having a braai with Mr and Mrs Myburgh. That they lived approximately some 500 metres from the scene of the accident and that they had lived there for approximately 22 years. That on the day in question the plaintiff's son and a friend came to ask for help from her husband.

33. That her husband immediately went to render assistance as a doctor.
34. Ms Grobblers further testified that she has lived in Kuruman for some 26 years. That she knew the road between Hotazel and Kuruman. That she travelled the relevant stretch of road some three or four times a day. That she can't give a specific date when she first observed the pothole concerned, but that it had been there for at least three weeks before the accident.
35. Ms Grobblers estimated that the pothole was between 1 and 1.3 metres wide at its widest point. That in depth the pothole was about 20 centimetres higher than ankle height. That there was water at the bottom of the pothole. She also testified that there were no warning signs warning of the presence of a pothole on the date in question.
36. Ms Grobblers also testified that there were no road works in the vicinity of the pothole on the date in question. That the pothole in the photograph was about 50 metres from the wreck of the vehicle and that this was the only large pothole before the wreck. That the relevant pothole was repaired some one or two weeks after the accident concerned.
37. Under cross-examination Ms Grobblers testified that she had met the plaintiff once or twice before the accident. That she knew her by sight. She also confirmed that this was the only big pothole between the turn-off and the wreck. Ms Grobblers also testified that there were tracks in the grass that led from the pothole concerned to the wreck of the plaintiff's vehicle. Ms Grobblers also confirmed that the pothole had been there for at least three weeks before the accident and that there had been no roadworks on that stretch of road for a long time before the accident.

38. The plaintiff then closed her case.

39. The defendant then called two witnesses being Mr Jaco Roelofse and Mr Joseph Hermanus

Botha. Mr Roelofse gave evidence to the effect that he was presently employed by the Northern Cape Department of Roads and Public Works and that from July 2011 he was the Director of Road Planning and Design. Before that date and at the time of the accident he worked for John Taolo Gaetsiwe District Municipality as its manager of infrastructure development. His involvement in the R31 repair project at the time of the accident was as a technical manager coordinating different stakeholders to address defects on the road, that he was also the project engineer and certified payments.

40. Mr Roelofse confirmed that the relevant stretch of road where the accident was reported to

have occurred was the R31. That the R31 is a trunk road maintained by the provincial Department of Public Works. That the John Taolo District Municipality acted as the managing agent in maintaining certain of the provincial roads on behalf of the provincial department.

41. That due to the mining boom at the time there was a great deal more pressure on the road

system. That in 2010 there was a survey conducted and in 2011 two maintenance contracts were entered into. This critical maintenance was partially funded by certain mines and partially funded by the provincial department. That in this, his responsibility was that of the project engineer, he approved the standards and design and he also issued the final certification for payment of contractors.

42. Mr Roelofse testified that the increase in mine related traffic placed a major strain on the road

infrastructure. That when two heavy mine transport vehicles passed each other on narrow roads

this would cause shoulder breaks and sometimes potholes. From March 2011 there was a trial section of the first 30 kilometres to widen the road.

43. Mr Roelofse testified that priority would be given to fixing potholes and shoulder breaks that the highest risk areas would be dealt with first. Edge breaks that had the effect of narrowing the width of the road surface to three metres or less were given first priority. He was not able to identify where the photograph on page 66 of the bundle was taken. The relevant road was one of two that he travelled on a daily basis. The speed limit on the relevant stretch of road was 80km/h and it went down to 60km/h when it entered the built-up residential area. That at the time of the accident there were some problems on the relevant stretch of road with edge breaks and drop-offs in the level between the gravel shoulder and the tarred surface of the road.

44. Under cross-examination Mr Roelofse conceded that given the condition of the road as disclosed in the report that appeared on page 5 of the defendant's bundle that an accident was foreseeable and that was the reason for starting the project.

45. Mr Roelofse testified that R9 million was budgeted for this project. R3million was to be provided by the Provincial Department and R3million by each of Assamang and BHP mines totalling R9million.

46. Mr Roelofse testified that at the time of the accident the width of the road was designed to be 3.4 metres and that given its utilisation, it should have been 3.7 metres wide. That if there was an edge break of 40 centimetres or more which would make the usable tar surface of the road three metres or less wide, this would be the first priority to fix.

47. Mr Roelofse was then shown the photograph on page 67 of plaintiff's bundle and was informed that it was not disputed that the photograph was taken on the 10 April 2011 and it showed that such pothole existed on that date and that it had not been repaired. Mr Roelofse agreed with this statement. He also agreed that from what appeared on this photograph that such section of the road was unsafe. Further, he also agreed that no warning signs were evident from the said photograph.
48. Mr Roelofse confirmed that the defendant was responsible for maintaining the R31. He testified that the foreman was responsible for going out and inspecting the road surfaces.
49. Mr Roelofse further testified that the three certificates discovered by the defendant added up to R1.8million of the R9million budget available.
50. Mr Roelofse was informed that Ms Grobblers had testified that the pothole concerned had been there for at least three weeks and that this was undisputed. Which would mean that the pothole had been present from the 20 March 2011 up to the date of the accident and that in this time it had not been repaired by the department. To this he replied: "Based on what you say, I would agree."
51. Mr Roelofse was shown the photographs on pages 66 and 67 of the plaintiff's bundle and asked based upon what he saw in such photographs whether that should have been a priority to repair. He agreed that it should have been a priority to repair such pothole. Mr Roelofse agreed that in all probability the defect in the road shown in the photographs caused the accident concerned.

52. In re-examination Mr Roelofse was asked the leading question: “The department did not have enough funds to fix the roads?” To which he replied, yes.
53. He reaffirmed in re-examination that the pothole concerned should have been a priority and he could not rule it out as being the cause of the accident.
54. Then defendant called Joseph Hermanus Botha. His evidence was to the effect that at the time of the accident he worked under Mr Roelofse at the John Taolo Gaetsiwe District municipality. He reported to Mr Roelofse on the R31 maintenance project. Inspections were carried out once or twice per week. His work involved measuring the work done and reconciling that with the claims for materials in preparation for certifying the work done. The certificates were signed by Mr Roelofse. The first 30 kilometre stretch was handed to the contractor and the contractor was responsible for prioritising the repair work. From the photographs placed before the court he was not able to recognise the stretch of road where the accident occurred. Under cross-examination he confirmed that maintenance at the material time commenced on the first 30 Kilometres from Hotazel towards Kuruman.
55. Ms Mamanyahu, who appeared for the defendant, criticised the plaintiff because she had not called her two children who were passengers in the motor vehicle at the time of the accident to give evidence in the trial. Ms Mamanyahu did not argue that I should draw an inference from such failure of plaintiff to call the said children. In any event I can only draw an inference unfavourable to the plaintiff if a proper basis for drawing such inference had been laid. On the evidence placed before me no basis had been laid for drawing any inference. In the circumstances I will not draw any inference from the plaintiff’s failure to call the said children to give evidence in this matter.

56. Ms Mamanyahu also argued that the plaintiff's witnesses were known to each other and they were sympathetic to the plaintiff. The facts do not support this in the case of Ms Myburgh. In the case of Ms Grobblers, she admitted that she knew the plaintiff by sight. No other relationship was established on the evidence before me. There was also no basis established to call into question either the reliability or the veracity of Ms Grobblers' evidence into question. In my view Ms Grobblers' evidence was not tainted by any relationship she might have had with the plaintiff.

57. On my assessment of the evidence, I have accepted the following as established facts on the probabilities revealed by the evidence:

57.1. There was a pothole on the relevant stretch of road. This evidence emerged from the evidence of Ms Myburgh and Ms Grobblers. This was substantiated by the photographs that formed part of the record and which were taken on the same day as the accident. The evidence established that these photographs were taken at most just a few hours after the accident. The defendant did not put up any direct evidence to counter any of the evidence adduced on behalf of the plaintiff on these issues;

57.2. The pothole was the cause of the plaintiff losing control of her vehicle resulting in the accident. This emerged from the cross-examination of Ms Grobler, where she testified that there were tracks through the grass leading from the pothole concerned to the wreck of the plaintiff's vehicle. Again, there was no direct evidence from the defendant to counter this evidence. On the contrary, the evidence led by the defendant tended to support this conclusion. Further, there is no reason to doubt the reliability or the veracity of Ms Grobblers' evidence on this issue;

57.2.1. In argument dealing with this issue Ms Mamanyahu, Counsel for the defendant, referred me to the case of **Meyer & Another v The Premier of the North West**

Province & Another⁴ (Meyer's case) and submitted that there was no evidence that the pothole caused the accident. The important distinction on the facts between **Meyer's** case and the present case is the observation and testimony by Ms Grobblers of the tracks in the grass leading from the pothole concerned to the wreck of the plaintiff's vehicle. Although plaintiff herself did not observe the pothole and Ms Grobblers did not observe the accident, the existence of the tracks through the grass leading from the pothole to the wreck of the plaintiff's vehicle is strong evidence that it was indeed the cause of the accident and the harm that plaintiff has suffered as a result thereof. On the probabilities I have concluded that such pothole did indeed cause the said accident.

57.3. The pothole concerned caused the relevant portion of the tarred road surface to be less than three metres wide. One of the defendant's witnesses, Mr Roelofse conceded this from the photographs that formed part of the record. Mr Roelofse further conceded that resulting from this fact, such pothole was a priority to repair. That it was foreseeable that such pothole could cause an accident. That in all probability, the pothole caused the accident;

57.4. There were no warning signs on the relevant stretch of road warning of the presence of potholes. This was the evidence of the plaintiff, Ms Myburgh and Ms Grobblers. This is substantiated by the photographs that formed part of the record;

57.5. The plaintiff adhered to the speed limit immediately prior to the accident. This was the evidence of the plaintiff. There was no direct evidence to indicate otherwise and no basis was set out in cross-examination to doubt this assertion by the plaintiff;

57.6. The failure of the plaintiff to wear her safety belt was negligent and probably contributed to the harm that she suffered; and

⁴ (729/10, 732/10)[2015] ZANWHC 21.

57.7. No other basis for contributory negligence has been established.

58. On the evidence before me, clearly there was a pothole which had not been repaired prior to the accident. Also, I have already found that on the probabilities, the pothole was the cause of the accident. The question that I now have to consider is the wrongfulness of the failure to repair such pothole on the part of the defendant. The defendant already having conceded that he was responsible for the maintenance of the relevant portion of the public road concerned.

59. In determining if there was 'wrongfulness' on the part of the defendant, the first question that has to be dealt with is, was there a legal duty on the defendant not to act negligently. The defendant had conceded in the pleadings that he had the duty to maintain the provincial roads. The evidence established that the R31 is a provincial road. The defendant is the political head of the department charged with maintaining the provincial public roads. A budget is allocated and people are employed by such department to effect such obligation to maintain the provincial roads. In exercising this obligation to maintain the provincial public roads, public and legal policy would place a 'legal duty' on the defendant not to act negligently.

60. The next question to be considered and determined is, was their 'fault', in the present case 'negligence' on the defendant's part, in failing to repair the pothole concerned or erect signs warning of the danger to road users of such pothole.

61. There was a project in which the defendant and two mines that utilised the road had pooled their resources to repair the road and deal with problems on the road. This in itself is an acknowledgement that there were problems on the R31.

62. Ms Mamanyahu, for the defendant, submitted that the rain had an effect on the pothole and that on the basis of **Cape Town Municipality v Bakkerud**⁵ that the defendant was not negligent as the accident happened on a Sunday and the repair crews were not on site. In this Ms Mamanyahu seeks to imply that the danger was created in circumstances where the defendant could not reasonably act. There are two problems with this submission. Firstly, it was put to the plaintiff that the defendant's evidence would establish that this section of road was repaired. Secondly, the evidence of Ms Grobblers that the relevant pothole had been present for a period of at least three weeks. The evidence that the pothole had existed for at least three weeks prior to the accident, was not in any way challenged by the defendant in the evidence adduced on his behalf. Furthermore, it is inherently improbable that a pothole of the size and magnitude of the pothole concerned would come into existence overnight, even if rain had an influence on the said pothole. In these circumstances, I cannot uphold this argument.

63. The evidence showed that the relevant pothole posed a danger to users of the R31. In the circumstances, the harm was reasonably foreseeable. In my view a *diligens paterfamilias* would have taken steps to guard against the occurrence of such harm. It is clear that the pothole concerned was not repaired. The available evidence which was not directly challenged shows that no warning signs were erected to warn road users of the danger the relevant pothole posed. Indeed, defendant took the position that warning signs were not required as the relevant section of road had been repaired. On the evidence before me this was demonstrably false.

64. In the plea filed on behalf of the defendant the defendant pleaded that he had neither the financial nor the human resources to repair the pothole concerned. The evidence showed that the department allocated R3million to the project and that two independent mines each

⁵ 2003 (3) SA 1049 (SCA) at paras [28] to [30]

contributed R3million to the project, giving a combined budget for the project of R9million. The evidence showed that a contractor was appointed that it was left to the contractor to prioritise the urgent repairs. The evidence shows that at the time that the accident occurred, the repairs were being done to the first thirty kilometres from Hotazel towards Kuruman. In other words, from the other end of the road to where the relevant pothole was located.

65. There was no attempt to explain why that was the starting point. There was no attempt to explain why the remainder of the road apart from the first thirty kilometres from Hotazel was not monitored for priority repairs.
66. The evidence showed that Mr Roelofse, a witness for the defendant, issued certificates for only R1.8million. There was no attempt to explain how the remaining R1.2million that the defendant's department contributed to this project was utilised. Similarly, there was no attempt to explain how the R6million contributed by the mines was utilised. The only evidence that there were insufficient funds was the mere say so of Mr Roelofse. In the light of the defendant's failure to explain or deal with the issues set out in this paragraph this carries little, if any weight. Further, if there was a crisis in maintaining the said provincial road, there was no attempt to explain why emergency funds could not be obtained from the provincial or the national treasury.
67. If cost was really an issue, then at the very least the defendant was required to erect adequate warning signs to allow road users to adjust their driving accordingly. The erection of two or three road signs would surely not be beyond the budget of the provincial department. In any event, there was no evidence before the court to suggest this was the case.

68. In the light of all of these issues, I am forced to the conclusion that the defendant's conduct was unreasonable in the circumstances. In other words, defendant's conduct in failing to effect the repair of the relevant pothole or his failure to erect appropriate road signs warning of the danger posed by the said pothole was negligent.

69. I now turn to the issues of both 'factual causation' and 'legal causation'. In applying the 'but for' test to the facts of the present case it is inescapable to conclude that if the pothole had been repaired or if adequate warning signs had been erected, the accident would not have occurred. If the accident had not occurred the plaintiff would not have suffered the harm that she did. Accordingly, the question of factual causation must be decided in favour of the plaintiff.

70. The 'legal causation' entails a determination of whether there are public policy grounds upon which the defendant should not be held liable for the harm suffered by the plaintiff. For example, was the harm foreseeable, was there a *novus actus interveniens* responsible for the harm suffered by the plaintiff or was the harm suffered too remote from the wrongful act itself. On the facts of this case, there was no *novus actus interveniens*, the harm suffered by the plaintiff was reasonably foreseeable and it cannot be said that the negligent omission was too far removed or remote from the harm suffered. In other words, there is no reason not to hold the defendant liable for the harm suffered by the plaintiff. Thus, the question of 'legal causation' must also be answered in favour of the plaintiff.

71. The final question to be considered is the question of contributory negligence. Ms Mamanyahu for the defendant, persisted that the plaintiff was negligent in that she drove too fast in the circumstances and drove recklessly. That plaintiff was also negligent in not wearing a seatbelt. Ms Mamanyahu maintained that I should find the plaintiff negligent in both respects. That accordingly, I should reduce plaintiff's claim by 50% for driving too fast or recklessly in the

circumstances and that I should reduce plaintiff's claim by a further 20% for not wearing a seatbelt.

72. There was no evidence to show that plaintiff drove too fast in the circumstances or was in any other way reckless in the manner in which she drove. The only grounds upon which I can find the plaintiff negligent in a manner that would have contributed to the harm she suffered, is that on her own admission, she did not wear a safety belt at the material time.

73. In debating this issue with both Ms Stanton, for the plaintiff and Ms Mamanyahu, for the defendant, I raised the issue that I had no evidence available to me on how the plaintiff's failure to wear her seatbelt contributed to the harm she suffered. Which injuries may have been directly caused by that failure or which injuries may have been exacerbated by that failure. There was some evidence to suggest that the plaintiff was thrown clear of the vehicle at some point. This too may have exacerbated her injuries, or it may have saved her from other injuries. Both Counsel agreed, albeit reluctantly, with my suggestion that the apportionment of damages arising from the failure to wear a safety belt be reserved for the court that dealt with the quantum should I find for the plaintiff and such order had already been made when I reserved my judgment herein.

74. The final question to be considered is the issue of costs. Ms Mamanyahu raised the issue of the costs of the postponement on the 26 June 2017 and submitted that these costs should be paid by the plaintiff. The difficulty that I have is that no evidence was placed before me regarding the cause of this postponement. In these circumstances, I can only reserve the costs of the 26 June 2017 for the decision of the court determining the quantum of the plaintiff's damages. In respect of the remaining costs, there has been no basis established to depart from the normal rule that costs should follow the result and I will make a costs order on that basis.

In the circumstances, the following order is made:

- 1) The defendant is liable to compensate plaintiff for the proved or agreed damages she suffered arising from the accident on the 10 April 2011.
- 2) The plaintiff contributed to the harm she suffered by not wearing a safety belt at the material time.
- 3) The exact apportionment of damages arising from this failure to wear a safety belt, is reserved for the decision of the court that determines the plaintiff's quantum of damages.
- 4) Save for the costs of the 26 June 2017, the defendant is to pay the costs of this action to date hereof.
- 5) The question of the costs of the postponement on the 26 June 2017 is reserved for the decision of the court determining the quantum of the plaintiff's claim.

Lawrence Lever AJ

Northern Cape Provincial Division

Legal Representation:

For Plaintiff: Ms Stanton oio Engelsman Magabane Inc

For Defendant: Ms Mamanyahu oio State Attorney

Dates of hearing:

18 September 2017; 20 September 2017; 21 September 2017 and 13 December 2017

Date of Judgment: 5 September 2018