



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

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

Case number: 2409/2015

In the matter between:

**ERNEST LENORD LE HANIE
ERNEST LENORD LE HANIE**

**1st Plaintiff
2nd Plaintiff**

and

METSIMAHOLO LOCAL MUNICIPALITY

Defendant

CORAM: NICHOLSON, AJ

HEARD ON: 28 FEBRUARY; 1 AND 3 MARCH 2017

JUDGMENT BY: NICHOLSON, AJ

DELIVERED ON: 3 MARCH 2017

- [1] This is an application for absolution from the instance. It was brought by the defendant at the end of the plaintiff's case. The plaintiff opposes the application.

BACKGROUND:

- [2] The 2nd plaintiff in this matter, Le Hanie Jnr, alleges that he was involved in a single vehicle collision while riding 1st Plaintiff's motorbike on Gamsberg Street, Vaalpark, Sasolburg, Free State, (Gamsberg) at approximately 17h50 on the evening of 22 July 2014. The date was later corrected to 20th July 2014. It is his contention that the accident was caused as a consequence of the negligent failure or refusal of the defendant to perform its duty by maintaining or repairing the road surface to ensure that it was drivable and safe for use or to adequately warn road users of the poor road surface and the potholes. The plaintiffs also contend that the defendant's negligent failure or refusal to repair the defective street lights in Gamsberg in the vicinity where the accident took place, also contributed to the accident. Both Plaintiffs claim to have suffered damages as a consequence of the accident. The first plaintiff claims for past medical and hospital expenses incurred as a consequence of the fact that the 2nd Plaintiff was a minor at the time of the accident and he was thus liable for 2nd plaintiff's medical treatment required as a consequence of the accident. 2nd Plaintiff, who has since reached the age of majority, claims general damages and for future medical expenses.

- [3] The Defendant denied any knowledge of the accident or the damage or injuries sustained as a consequence thereof. It also denied that it failed in its duties and alleges the road was in fact properly maintained and argues that the accident was caused by plaintiff's sole negligence in that he was driving too fast in the conditions, was not licensed to drive the motorbike, failed to wear adequate protective clothing and failed to apply his brakes to avoid the accident.
- [4] The parties agreed at a pre-trial conference to separate the merits and the quantum and the court is thus required only to adjudicate the merits of the matter, the quantum to be determined at a later date.
- [5] The following facts are **common cause**:
- The citation and addresses of the various parties to the matter and that the defendant's address is within the jurisdiction of the court.
- [6] In order for the 1st and 2nd Plaintiff to succeed in this matter they must establish the elements of a delict. As the case rests upon an alleged failure or refusal of the Municipality to repair or maintain the road and or street lights in the vicinity of the accident, they also need to establish the defendant's legal duty to act positively. There is considerable authority regarding omissions and the approach to be taken by the courts in such cases, however, for purposes of the present application for

absolution from the instance it is not necessary to explore this authority here.

THE LAW:

- [7] Erasmus says the following with regards to absolution from the instance: (*Superior Court Practice* at B1-292):

“When absolution from the instance is sought at the close of the Plaintiff’s case, the test to be applied is not whether the evidence established what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, or ought to) find for the Plaintiff. It follows that when absolution is asked for at the end of the plaintiff’s case, the court must bring to bear upon the evidence not his own but the judgment of reasonable man ...”

- [8] In *Mpumelelo Projects Construction v Sasol Wax (Pty) Ltd* (), Case720/2007 FSHC Rampai, J stated: (Par 16)

“the decisive consideration at this stage of a civil hearing is the objective assessment of the undisputed facts in order to determine a conclusion of law flowing from such common cause.”

The test is clear: the plaintiff must make out a *prima facie* case in the sense that there is evidence relating to all the elements of a claim on the strength of which the court can find in favour of the plaintiff.

- [9] This approach was also supported in *Smith v RAC* ([2015] ZAGPPHC 322) where the court stated (at par 8):

“The test for absolution to be applied by a trial court at the end of a plaintiff’s case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H in these terms:

‘when absolution from the instance is sought at the close of plaintiff’s case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established but whether there is evidence upon which a court applying its mind reasonably to such evidence could or might (not should or ought to) find for the plaintiff. Gascoyne v Paul and Hunter 1917 TPD 170 *at 173; Ruto Flour Mills (Pty) Ltd v Adelson (2)* 1958 (4) SA 307 (T).’”

- [10] The court must thus determine whether or not there is evidence relating to all the elements of the claim to survive absolution because, without such evidence no court could find for the appellant. (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37G-38A; Schmidt *Bewysreg* 4th ed at 91-2).

“As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one.”

- [11] In *Build-A-Brick BK en 'n Ander v Eskom* 1996 (1) SA 115 (0) at 123 A - E. Hattingh J found:

“that the test to be applied in determining the question whether the defendant’s application for absolution from the instance should be granted is not whether the adduced evidence required an answer, but whether such evidence held the possibility of a finding for the plaintiff, or put differently, whether a reasonable Court can find in favour of the plaintiff. Consequently, at the absolution stage the plaintiff’s evidence should hold a reasonable possibility of success for him and should the Court be uncertain whether the plaintiff’s evidence has satisfied this test, absolution ought to be refused.”

- [12] Furthermore, *Casswell v Powell Duffryn Associated Collieries Ltd* **1939 (3) All ER 722** at 733 states as follows:

“Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish ... But if there are no positive approved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.”

THE EVIDENCE:

- [13] The plaintiff led two witnesses, the 1st and 2nd plaintiffs. The 2nd Plaintiff, Le Hanie Jnr took the stand first. Mr. Le Hanie Jnr testified that he had been travelling from his father’s house to his mother’s house where he resides at approximately 5.45 pm on Sunday 22 July 2014, later corrected to 20th July 2014, when the motorbike he was riding struck a pothole in the road. He testified that the bike jerked beneath him and, despite his best efforts, it was impossible for him to regain control over the bike and both he and the bike fell. He indicated that the road surface was poor and visibility in the area where the accident took place was also poor as it was dusk, almost dark, the sun was setting behind the trees and there were shadows on the road surface. He testified that the street lights in the immediate vicinity of the accident scene were not working.
- [14] The court was taken through photographs of the accident scene and the witness informed the court that the street was a single lane travelling in each direction, that it was a tarred surface and that the road surface was badly damaged with potholes that were

both close together and difficult to traverse. He encountered one group of potholes that he managed to traverse safely by riding between them but then came upon the pothole he hit so suddenly that he saw it as he hit it. Hitting the pothole caused the bike to jerk, he lost control, which he was unable to regain, and he crashed.

- [15] Plaintiff 2 indicated that the road is located in a residential area and is approximately 4m wide. The road surface is damaged and potholed and the road markings on the road are faded. He indicated the sidewalk was planted out with grass and gardens and there were trees with turned soil at their bases, offering him no room to pass the potholes on the left. The only means by which the potholes could be avoided entirely was by riding in the right-hand lane into the face of the oncoming traffic. The witness indicated that as he was approaching a T-junction he was afraid to do this as he anticipated that he might be in danger from approaching traffic.
- [16] Plaintiff 2 estimated the pothole he hit to be approximately 45cm wide and maybe 50 cm long. He said he could not estimate the depth.
- [17] Plaintiff 2 stated that he was travelling at approximately 30-40 kilometers per hour when the accident occurred. He stated he reduced speed when he saw the first group of potholes and that he was focused on the bend ahead, his need to stop at the T-junction beyond the bend and on the other potholes near the one

that he hit, hence he did not see the pothole he hit until he was on top of it and it was too late to take evasive action.

- [18] The witness then explained to the court that, after the collision residents in the vicinity rendered him assistance and called his father and an ambulance. Paramedics attended him at the scene, dressed his wounds, splinted his left leg and put him onto a stretcher, into an ambulance and conveyed him to the local medi-clinic where he received further treatment.
- [19] The 2nd plaintiff testified that he suffered the following injuries: Injuries to ligaments of his left foot; laceration of his right knee that required stitches, loss of skin on his right knee, shin and calf between knees and ankle, injuries to his right hand and arm and left arm where there was further skin loss. Injuries to his toes on both feet.
- [20] The witness treatment at the hospital included the cleaning and dressing of his various wounds. The wound to the right knee required he be taken to theatre where, under anesthetic, the wound was cleaned, stitched and a drain was inserted. The patient was then returned to the ward. The witness indicated that while he was in hospital (5 days) and for a few weeks (2-3) thereafter, the wounds had to be cleaned and redressed daily. He indicated that this process caused him pain at a level of 8 out of 10 as the process re-opened the wounds, taking the newly formed skin off. After his discharge from hospital the witness

went to the doctor's consulting rooms for some dressing changes and his step mother performed the other dressing changes.

[21] 2nd Plaintiff had to use a moonboot and crutches for a few weeks after the accident and, after he returned to school could not wear school shoes because of the injuries to his toes. It was his testimony that he suffered pain on a scale of 6-7 out of 10 for a few weeks (2-3) after the accident as he had pain and discomfort walking, especially when navigating stairs. He was unable to participate in his various sporting activities, one, (Krav Maga) for 3mths and he has been unable to resume the, Taekwondo as it requires him to be on his feet. He had participated in Taekwondo at a competitive level and visited Korea to participate in an open international competition in 2011 where he won a bronze medal. Krav Maga is only a hobby.

[22] Plaintiff was, according to his testimony, possessed of a learner's permit to drive the motorbike at the time of the accident. He had been in possession of same for a period of approximately 4 weeks at the time of the accident. The license was issued on 24 June 2014. He testified that he had been wearing a helmet as required by the law but, as the trip was a short one, he had no other protective clothing on at the time of the accident.

[23] The court was taken through a series of photographs pages 9-32 of the indexed court bundle. (Hereafter "Bundle B") These photographs were taken by the 1st plaintiff who testified to that effect. The photos depicted the street where the accident took

place; damage to the road surface and potholes on the road; the street lights that were out of order; the treatment of the 2nd plaintiff at the scene of the accident and later in the hospital; and the plaintiff's various injuries. The photographs of the injuries sustained were taken at the scene and later at the hospital both on the night of the accident and in the day/ days thereafter. The photos of the street where the accident took place were taken a few days (2-3) after the accident occurred. The 2nd plaintiff did not point out to the first Plaintiff where to take the photographs as he was in hospital when they were taken.

- [24] The 2nd plaintiff verified that the scene of the accident is depicted in that the street in which the accident happened is shown, as is the general state of disrepair of the road surface. He however admitted that the pothole he hit is not shown in the photographs and was further up the street from where the photos were taken. He did estimate in testimony that the hole he hit was a mere 5 m beyond where he passed the potholes depicted in the photos and thus, it is puzzling that it cannot be seen on the photographs. That said, had the witness wished to mislead the court he could have claimed he hit any one of the potholes actually visible on the photographs.
- [25] 2nd plaintiff was adamant that sand and gravel had been put into the holes before the photos were taken. He assumed by residents.

- [26] 2nd Plaintiff was adamant that he couldn't avoid the accident, there were simply too many potholes. He saw no warning signs.
- [27] It was his testimony that the road now has some visible repairs but remains patched. Some holes are filled with ground and others topped with tar.
- [28] The 1st Plaintiff testified that he had taken the photos that had been shown to the court (Bundle B) and that he did not ask his son to point out the actual pothole that he hit. He did not witness the accident but arrived not long after it had taken place. The ambulance was on the scene when he arrived. As 1st plaintiff did not witness the accident, he was only able to corroborate the events that occurred after his arrival at the scene.

APPLICATION OF LAW TO FACTS:

- [29] The 1st and 2nd plaintiffs' entire case hinges on the existence of the pothole that is the alleged point of impact of the motorcycle and which it is alleged caused the accident. As the 1st and 2nd Plaintiffs failed to report the accident in terms of section 61 of the National Road Traffic Act (93 of 1996), the court has been deprived of the opportunity to have before it, an objective assessment of the accident and the accident scene which police could have prepared. That said, the failure of the Plaintiffs to report the accident to the authorities at the time does not bar their right to institute or pursue a civil action to recover damages.

[30] The absence of any objective report, sketch and, possibly also photographs does, however present the court with something of a conundrum in that, aside from the 2nd Plaintiff's bald assertion that there was a pothole in the road that was unavoidable and that he hit, and the defendant's denial of this in its pleadings, there is no evidence before the court to prove the existence or otherwise of the alleged pothole.

[31] That the road is in a poor condition, as depicted in the photos on page 9 and 10 of Bundle B does not lead to the reasonable inference that the pothole existed at the other end of the street. The fact that the plaintiffs never returned to take a photo of the offending pothole in fact argues against such an inference. For the plaintiffs to succeed with this claim would require the court to venture into the realm of speculation. This the court cannot do.

[32] Accordingly I have reached the conclusion that on the undisputed facts, the issue has to be decided in favour of the defendant. The plaintiffs have failed to present evidence by virtue of which a reasonable person might possibly find in their favour.

I therefore grant the defendant's application for absolution from the instance. 1st and 2nd Plaintiffs to pay the costs.

C. NICHOLSON, AJ

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