

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

Case No: 419/2013

In the matter:

JONAS MOKOMA MASITENG

Plaintiff

and

**MEC FOR POLICE, ROADS
AND TRANSPORT**

Defendant

HEARD ON: 26-27 MAY, 17 JUNE, 14 SEPTEMBER & 1
DECEMBER 2015

DELIVERED ON: 14 APRIL 2016

MIA, AJ

- [1] The plaintiff drove his vehicle in the early hours of the morning on the 7 April 2012 on the R716, a main road in the Free State province when he was involved in a collision. No other vehicle was involved. The vehicle left the road and travelled on the gravel on the left hand side of the road and moved across the road to the right hand side and nosedived into a ditch on the right hand side of the road. He sustained injuries and alleged that the cause of the accident was the defendant's negligence as the road was riddled with potholes. The plaintiff claimed payment of the sum of R2, 470, 000.00 from the MEC for Police, Roads and Transport. The defendant denied liability.

- [2] The matter proceeded on the merits with the quantum being deferred by agreement. An order was accordingly made. The parties handed up an unsigned joint minute of the experts and undertook to hand up the signed copy during the course of the trial which was set down for three days. The matter was postponed by agreement on the third day. The experts' joint minute became a point of dispute and Mr Rontgen appearing for the plaintiff informed the Court that the experts could not agree on the joint minute. A signed copy of the experts' joint minute was eventually handed up on 1 December 2015, reflecting that the minute was signed by both experts. I will refer to the content hereof later.
- [3] The plaintiff alleged that the accident occurred because the defendant failed to keep the road in a reasonable and safe state of repair. It failed to adequately warn motorists of the existence of dangers such as potholes when there was a legal duty to do so and that it failed to take all reasonable steps to ensure the safety of those travelling upon the said road. The defendant denied that it was negligent in respect of the maintenance of the roads and if it were found to be negligent, it denied that such negligence was the cause of the collision. It alleged that the plaintiff was travelling at an excessive speed under the circumstances.
- [4] The defendant admitted the accident occurred on the road but placed in dispute that the vehicle struck a pothole causing the accident. The defendant averred that the plaintiff was negligent in that the plaintiff

had failed to observe the road signs indicating road works and the condition of the road. The defendant also averred that the plaintiff had failed to apply brakes timeously, drove at an excessive speed and failed to keep the vehicle under control.

[5] The issues which arise for adjudication were:

- 5.1 whether there was a pothole as alleged;
- 5.2 whether it was the cause of the accident in which the plaintiff was injured;
- 5.3 whether the defendant was negligent in one or more or all the respects alleged, or at all;
- 5.4 in view of the defendants plea, and if negligence were proved, whether the plaintiff's conduct contributed to the collision in any manner, and
- 5.5 the appropriate apportionment if the plaintiff was negligent in any manner.

EVIDENCE

[6] The plaintiff, Jonas Nkona Masiteng (Masiteng) was travelling on the R716 from Vereeniging to Deneysville. He departed from the family home very early in the morning to attend a funeral. The sun had not yet come out. He testified that he was travelling at 100 kilometres per hour and according to the speed limit on that particular section of the road. He did not notice the pothole in the road. He also did not recall any signs that there were potholes or that the speed limit was reduced due to potholes.

- [7] As soon as his vehicle made contact with the pothole his head hit the roof of the vehicle. He lost control of the vehicle and was unable to control the direction the vehicle travelled in. After he hit the pothole two of the tyres burst and the vehicle moved to the side of the road. As he approached the curve in the road, the vehicle travelled on the left hand side of the road, crossed the road to the right hand side and then nosedived into a ditch on the right hand side of the road. His tyres were ripped off and the front rim was scratched. He visited the scene sometime after the accident occurred and saw a big pothole with skid marks close by. These marks, according to the plaintiff, were from the rim of his vehicle and were made when his vehicle veered across the tarmac. He observed other potholes but they were smaller.
- [8] The father of the plaintiff, Mr. John Masiteng (Masiteng Snr) testified that he attended the scene of the accident after the police called to inform him there had been an accident. The vehicle was still on the side of the road when he arrived but his son had already been conveyed to hospital. He followed the trail of the vehicle backwards to ascertain the path of travel before it came to a halt. He observed scratches on the road, running from the left to the right hand side of the road as the vehicle travelled before coming to a halt. The scratches traversed the width of the road from left to right. He observed potholes on the road and one particularly big pothole. He also confirmed that his son did not injure his hip before the accident. He stated that while he was on the scene he observed correctional services staff cutting the fence.

[9] According to Masiteng Snr. the pothole was approximately twenty centimetres across and quite deep. His view was that it would not have been visible in the dark but it would have been visible to a car with lights. He observed smaller potholes after the big pothole. He observed that the left front and back tyres of the vehicle were damaged and ripped and that the rim was scratched. He also observed scratch marks after the big pothole when the vehicle changed course from left to right.

[10] Mr Petrus Twala (Twala) is the cousin of the plaintiff. He visited the scene a day after the accident to inspect the roadway. He was accompanied by other persons who also visited the scene on the day of the accident. He observed a big pothole approximately thirty to thirty five centimetres in diameter. He also testified that the mark on the left hand side of the road was still visible three months later. He observed that the tyres and left rim were damaged on the left hand side of the vehicle. The tyres were on the rim but were ripped. He recalled that the front and back tyres were damaged. He saw the vehicle when it was towed and stored at home. He could not recall how far the pothole was from where the vehicle came to a halt. He recalled that there was a mark on the road just after the pothole which went off to the left and then the mark continued on the road to the right hand side of the road onto the gravel to the position the vehicle came to a halt.

- [11] Mr. Masona Murabe (Murabe) testified that he is employed in the South African Police Service. He is stationed at Deneysville and holds the rank of Constable. He compiled the motor vehicle accident report (the report) relating to the collision on the 7 April 2012. He confirmed the details noted in the report : the accident occurred 10 km out of Deneysville on the R71; there were no other vehicles involved in the accident; the accident was estimated to have occurred at 06h00; the speed travelled as informed by the plaintiff was 100 kilometres per hour; the vehicle was a BMW 320i. The road was a single carriage on a two way road. The weather was clear; the road surface was tarmac and was dry. He noted that the quality of the road was good and there were no potholes. Murabe testified that he obtained information from the driver who was conscious but in pain. The driver handed him the keys and his driver's license.
- [12] Murabe noted that there were no obstructions on the road and the topography of the road indicated a downward slope in the direction the plaintiff was driving. He was informed by the driver that the vehicle overturned and rolled to the point it remained stationery. He noted burst tyres, namely two at the back and one in the front on the left hand side, although the tyres were still on the rim. He also noted a skid mark of 20 metres on the left hand side of the road. Murabe testified that in his view, the driver had exceeded the speed limit which caused the accident. He drew this conclusion from the information available on the scene.

- [13] He testified that he inspected the road before drawing the sketch. There was a sharp curve in the road. There was a regulated "stop and go" point controlling traffic on the road. The "stop and go" point covered a stretch of road where only one lane of traffic on the two way lane was allowed to pass on the road for a period of time in either direction whilst workmen worked on the other half of the road, effecting repairs. This point ended just before Groenpunt Correctional Facility and before the curve and the 9 km marker in the road.
- [14] From his observation the vehicle came to a halt on the right hand side of the road opposite the Groenpunt Correctional Facility. The barbed wire was intact even though the vehicle went through the barbed wire fence. The poles were however bent. He did not see any potholes or repaired potholes in the vicinity. He conceded that there were skid marks on the road. He testified that the skid marks were not reflected on the report because he forgot to note them. He admitted however that they were important in determining the cause of the accident. He stated that the tyres on the vehicle were flat but intact and had not burst when he looked at the vehicle.
- [15] His observation was that after the "stop and go" point, the road was in perfect condition before the point of impact. He noted in the report that the vehicle rolled. He also conceded that if the car had rolled the roof would have been damaged. He admitted that the roof of the vehicle was not damaged when he saw the vehicle. He also stated that he forgot to mark the skid marks caused by the rim on the road. He recalled the skid marks on the road but forgot to place them on

the sketch. His explanation for this omission was that he was not good at drawing sketches. He observed tyre marks on gravel but not on the tarmac.

[16] The report prepared by Murabe noted the burst tyres but his oral evidence was that the tyres were not burst. The report thus contradicted his oral testimony regarding the tyres. This witness was present in court whilst the evidence of the plaintiff was led. The value of his evidence is compromised in terms of serving as an independent witness as well in respect of the internal inconsistency. Murabe who was present at the scene of the accident and prepared the police report relating to the accident did not however dispute the photos taken by plaintiff. He admitted that the photographs on page 6 of the bundle looked like repairs to the road. The point of repairs was a distance of 460-479 metres from where the vehicle came to rest on side of the road.

[17] The second witness for the defence Mr. Soho Meshack Mokoena (Moekoena) is employed at the Free State Police Roads and Transport Department at Heilbron for 36 years. He was appointed as a senior foreman for the last 15 years. He stated that in 2012 when the accident occurred he was one of the foremen on duty. His task was to plan the work schedule and give instructions to the team regarding the work to be executed and to check whether they were executing their duties in line with the instructions given. He received weekly sheets regarding work executed. He did not inspect the road every day, however he recalls there were signs indicating that there

were road works occurring and workmen on the road. He testified that four "stop and go" signs were erected on the road and danger signs were erected on the side of the road in both directions. The signs indicated road works and included a sign to reduce speed.

- [18] He referred in his evidence to the instructions and work schedules relating to road construction in 2012. He did not prepare the particular worksheet for the area where the accident occurred. The work schedule handed up indicated the square metre of product used. He explained that based on the amount of product indicated in the table he estimated that the repairs were massive. He maintained however that the stretch where the road was repaired was so as to maintain uniformity of the road surface rather than to repair potholes.

SUMMARY OF EXPERTS' JOINT MINUTE

- [19] The experts were not called as witnesses however I was requested to have regard to the joint minute and to assess the oral evidence in relation to the joint minute. The experts' minute took into account the plaintiff's version that the collision was caused when he hit a pothole. They agreed that they could not establish which particular pothole it was that the plaintiff went through. They agreed that the area indicated by the plaintiff on the road had been repaired and the repairs were consistent with the repair of potholes. This area, alleged to be riddled with potholes at the time of the collision, was 195 metres before reaching the 9 kilometre marker on the road. The vehicle came to rest approximately 200 metres past the 9 kilometre marker.

They agreed further that the vehicle travelled a distance of 345 to 395 metres from the area of the pothole to the point it came to rest.

- [20] Based on the plaintiff's version that he travelled at a speed of 100 kilometres per hour and having regard to the point of rest of the vehicle after the collision, they agreed that it would have taken 12.4 to 14.2 seconds to cover the distance of 345 to 395 meters. If the plaintiff was *compos mentus* they agreed that this time would have been sufficient for him to have brought the vehicle to a safe stop in advance of the area where it in fact came to rest. This calculation was based on a stopping distance of 98 metres travelling at 100 kilometres per hour which included a visualisation, perception and reaction time of 1.5 seconds. They agreed that generally it should take approximately 5.5 seconds to stop the vehicle from a speed of 100 kilometres per hour including a visualisation, perception and reaction time of 1.5 seconds. They further agreed that it would have been highly fortuitous for the plaintiff to negotiate the sharp curve to the left in the road and to travel so far past the curve and then come to a rest, if he was *non compos mentis*. They also agree that if he was *non compos mentis* it was highly unlikely that the plaintiff's foot would have jammed on the accelerator pedal for an extended period of time, which implied that his speed on striking the pothole would have been in excess of 100 km per hour. In simple English I understand the experts to conclude that, in order to have travelled the distance traversed before stopping, the plaintiff travelled at a speed in excess of 100 kilometres per hour. It should have taken him 1.5 seconds to react and apply his brakes and to bring the vehicle to a

stop within 5.5 seconds and 98 metres from the point of hitting the pothole.

CASE LAW

- [21] In assessing the evidence tendered, in deciding negligence in this matter, the credibility of the witnesses, their reliability and the probabilities are apposite. The articulation of Nienaber J, in **Stellenbosch Farmers Winery Group & Another v Martell et Cie & Others 2003(1)SA 11 (SCA)** at para [5] formulates the test as follows:

"To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The hard case,

which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another."

- [22] In assessing the evidence, I have had regard to the *dictum* of Zulman JA in **Santam Bpk v Biddulph 2004 (5) SA 586 (SCA)** at para [10] where the Court states:

" However, the proper test is not whether a witness is truthful or indeed reliable in all that he says, but whether on a balance of probabilities the essential features of the story which he tells are true (cf *R v Kristusamy* 1945 AD 549 at 556 and HC Nicholas "Credibility of Witnesses" (1985) 102 SALJ 32 especially at 32–35)."

- [23] Masiteng Snr, Twala and Murabe's evidence relate to observations after the collision occurred regarding the road and the vehicle. From the evidence of the plaintiff's witnesses it is clear that there were skid marks on the road. Murabe did not indicate skid marks on the road in the report but conceded in testimony that he forgot to indicate the skid marks in the report. He also indicated in the report that there were no potholes on the particular stretch of road but did not dispute the photographs of the pothole in the plaintiff's photos during cross examination. From the evidence of these witnesses it is clear that there were potholes and skid marks on the road. It is also evident from the evidence that there were road works on the road.

- [24] The plaintiff's photos taken shortly after the accident were not clear. Had the photographs of the relevant area been clear it would have been possible to show that there were no road signs as alleged by

the plaintiff. The photo shows a point in the road referred to as repairs. The experts accept that there were repairs to potholes in the road. Moekoena's evidence was that the road was properly signposted to indicate road works and to reduce speed accordingly. The photographs of the area taken one year later show the roadwork signage as well as reduced speed signage. It is clear from the photographs taken by the defendant that (at least one year after the collision) drivers on this road were alerted to a reduced speed being applicable and that the speed of 100 kilometres per hour as testified by the plaintiff was not applicable. The signage in the plaintiff's photos is not visible.

[25] In determining liability I have had regard to the "reasonable man test" as set out in **Kruger v Coetzee 1966 (2) SA 428 (A) at 430E-F** where Holmes JA stated:

"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."

[26] The probabilities indicated by the experts based on the plaintiff's version indicate that the plaintiff was probably travelling at a speed in excess of 100 kilometres per hour to have ended up on the right hand

side of the road in the ditch. In **RAF v Sharma; RAF v McAlister and Another 2005 JOL 14568 (T)** at 7, Van der Merwe J refers to the 1984 Oliver Schreiner *Memorial Lecture* delivered by HC Nicholas J (as he then was), "Credibility of witnesses", published in 102 (1985) *SALJ* at 32 in relation to credibility of witnesses where the learned author says:

"A witness is proved to be in error where his statements are contradicted by the proved facts or where he is guilty of self-contradiction. Where he has made contradictory statements, since both cannot be correct, in one at least he must have spoken erroneously. Yet error does not in itself establish a lie. It merely shows that, in common with the rest of mankind, the witness is liable to make mistakes. A lie requires proof of conscious falsehood, proof that the witness has deliberately misstated something contrary to his own knowledge or believe." (check spelling –is it "believe" or "belief"?)

- [27] In respect of the factual causation and negligence, the plaintiff's case was that the collision had occurred as a result of the condition of the road and the defendant's failure to warn motorists of the danger and or to take steps to avert the danger. Several witnesses were called upon to comment on the condition of the road. It was evident that the road was riddled with potholes. The road works indicate the defendant was addressing this problem. The plaintiff asserted that the warning signs on the road had been non-existent and insufficient and submitted that the defendants should have erected signs warning the public of the existence of potholes. The plaintiff's photographs do not prove this statement. The defendant's photographs show reduced speed signs in the area, and there is nothing to suggest that these signs were not present at the time of the collision

[28] The plaintiff has not succeeded in proving that the defendant failed to maintain the road as road works were occurring at the time. There was no unexpected emergency or sudden danger. The road was being repaired and the photos tendered in evidence indicate that there were signs indicating reduced speeds applicable. A driver in the position of the plaintiff ought to have kept a proper look out and if this was done, the signage indicating reduced speed, and repairs effected to the road would signal to the diligent driver to be careful. The topography of the road also indicated downward slope and a bend which required an adjustment of speed. The plaintiff's evidence that he travelled at 100km per hour was not an appropriate speed for a portion of the road characterised by road works and reduced speed.

[29] The plaintiff's evidence indicated that he lost control when he hit the pothole. It seems probable that upon hitting the pothole he lost control of the vehicle, moved onto the gravel to the left and to correct his direction at the speed he was travelling, turned the steering wheel too far to the right causing him to move across the road into the ditch on the right hand side. The plaintiff's evidence indicated that he was able to avoid smaller potholes. Even if he did not observe the signage, the act of avoidance of these potholes indicated that he was aware of the condition of the road. There is no explanation why he was not able to observe the big pothole and instead drove through it. His father's evidence was that a vehicle with lights would have seen the pothole. There was no suggestion that the vehicles' lights were defective. On his own evidence he lost control of the vehicle upon hitting the pothole suggesting that he travelled at an excessive speed

and, at least, at a speed at which he could not maintain control of the vehicle having regard to the topography of the road.

[30] The experts' joint minute agreed on the probabilities of the version of events given by the plaintiff. It seems that the plaintiff if indeed he lost control of the vehicle tried to regain control by applying action to the steering wheel causing the vehicle to cross the road to the right. Even if it was accepted that factual causation existed and the collision had occurred as a result of the pothole the question is whether the plaintiff had, on a balance of probabilities, proved negligence. In this regard the question is whether the defendants had failed to display proper and adequate road signs on the road in order to warn road users, or to make them aware, of the dangerous condition of the road. The danger to road users was foreseeable.

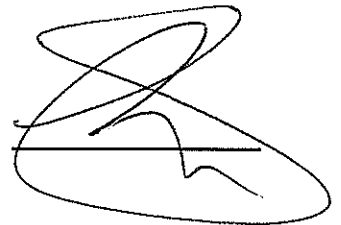
[31] The next question is therefore whether reasonable steps had been taken to prevent the damage. Having regard to the evidence of Murabe and Mokoena the "stop and go" points and surrounding signs indicated reduced speeds applicable and roads works in progress and indicated a reduced speed applicable. This evidence shows that the defendant had taken steps to meet its obligation to maintain the road and to warn road users of the road works in progress. In the circumstances, the plaintiff has not shown what other steps could reasonably have been expected to be taken by the defendant or what other safety measures could have been taken. The plaintiff has not proved negligence on a balance of probabilities and his claim cannot succeed.

[32] The defendant requested a punitive cost order in the matter in the event that this court found in favour of the plaintiff in view of the matter not proceeding on quantum. At the outset of the matter the parties indicated that the matter would proceed on the merits only. This matter was set down for three days and proceeded on the merits only. No expert witnesses were present. The award of costs is in the discretion of the court, which discretion must be exercised judiciously. A punitive order for costs usually signals the court's displeasure at the manner in which a party has conducted himself in relation to the matter. I am unable to find that the plaintiff conducted himself in a manner that warrants a punitive costs order. I am, therefore, not satisfied that a punitive costs order is appropriate under the circumstances.

ORDER

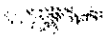
[33] In view of the above the following order is made:

1. The plaintiff's claim is dismissed.
2. The plaintiff is ordered to pay the costs of the defendant which includes the cost of two counsel.

A handwritten signature in black ink, consisting of a large, stylized 'S' and 'M' intertwined, with a horizontal line crossing through the middle.

S. C. MIA, AJ

On behalf of the plaintiff:

Instructed by: 

Mr KM Rontgen

Rontgen & Rontgen Inc.

Pretoria

(c/o McIntyre & Van Der Post Attorneys,
Bloemfontein)

On behalf of the defendant:

Instructed by:

Adv JY Claasen SC assisted by

Adv B S Mene

The State Attorney

BLOEMFONTEIN

