

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

28/01/2014

Appeal Case No: A315/13

Trial Case No: 74388/10

In the matter between:

**JACQUES LAUWRENS**

First Appellant

**RINNIE LAUWRENS**

Second Appellant

and

**MEMBER OF THE EXECUTIVE COUNCIL FOR  
PUBLIC WORKS, ROAD AND TRANSPORT  
OF THE LIMPOPO PROVINCE**

Respondent

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**JUDGMENT**

**DELETE WHICHEVER IS NOT APPLIC.**

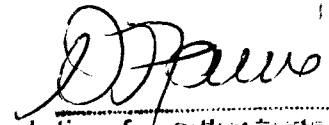
**D S FOURIE, J:**

(1) REPORTABLE : ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES : ~~YES~~

(3) REVISED ✓

28/1/15



[1] This is an appeal against an order of absolution from the instance granted by the Court *a quo*. The appellants, in their representative capacity as guardians, instituted a claim on behalf of two minor children for the payment of damages due to injuries sustained by them and for loss of support consequent upon the death of both their parents.

[2] These claims arose from a motor vehicle accident which occurred on 13 December 2008 at approximately 10h00 on the R518 Mokopane/Zebedila road. This is a provincial road which falls under the jurisdiction of the respondent. An order separating the issues of liability and

quantum was granted by the Court *a quo* and the trial proceeded with regard to the merits only.

[3] In essence the appellants' case is that due to a severe undulation or rut formation in this road, the motor vehicle in which the two minor children and their parents were travelling went out of control and collided with an oncoming vehicle. The respondent's defence, in a nutshell, is that the accident was caused by the sole negligence of the children's mother who was the driver of the motor vehicle in which they were travelling. According to the respondent she was driving too fast under the prevailing circumstances and she also failed to take into account certain warning signs next to the road.

[4] The Court *a quo* found that, had the children's mother complied with the speed limit and road signs, the accident could have been avoided. It also concluded that the appellants failed to prove any negligence and therefore granted an order of absolution from the instance with costs.

[5] The issues on appeal are wrongfulness, negligence and causation. The onus of proof, as during the trial, rests on the appellants. Before considering these issues, I shall first refer to those facts which are common cause between the parties and thereafter I shall provide a brief summary of the evidence.

### **FACTS WHICH ARE COMMON CAUSE**

[6] According to the record it appears to be common cause that the accident occurred at approximately 10h00 on a provincial road in the general vicinity of a concrete bridge. When the vehicle in question, a Nissan Almera was driven over a settlement or depression where the road meets the concrete bridge, the driver of the vehicle lost control and veered over to the right hand side of the road where it collided with an oncoming Nissan bakkie.

[7] Exhibit "B" contains copies of the police docket consisting, *inter alia*, of a photo album, sketch plan and an accident report form. Exhibit "E" contains various photographs of the road as well as the bridge. Some of these photographs were taken a few days after the accident and it depicts the road at the bridge as it was when the accident occurred. This is a tar road providing for one traffic lane in each direction where a speed limit of 100 km/h was applicable on the day in question.

[8] It is also common cause that the respondent had a duty of care and a maintenance responsibility with regard to this road. This included, *inter alia*, regular and proper inspection and reasonable steps to ensure that the driving surface of the road did not degrade to a level where it might pose a danger for the reasonable user thereof. These concessions were made

subject to the qualification that the respondent's maintenance responsibility of the road was subject to available financial and human resources.

### **EVIDENCE FOR THE APPELLANTS**

[9] Stefaan, the one minor child, testified that during the morning of the day in question his mother was driving their motor vehicle. He was sitting behind her and was getting ready to make himself comfortable to sleep when he felt a sudden jolt. He gave the following explanation:

*"Ek het 'n slag gevoel soos wat jy deur 'n slaggat sal ry, maar net erger as wat dit sou gewees het as wat jy deur 'n slaggat gery het."*

Shortly thereafter there was an impact whereafter everything became dark and he lost consciousness.

[10] The next witness was Mr Nkuna. He was a passenger in the Nissan bakkie, coming from the opposite direction, which was also involved in the accident. He testified that when the bakkie approached the bridge, it was travelling at 60 km per hour. The reason for travelling at such a speed was because he knew the road and he told the driver to drive slowly as the road was dangerous. According to him there was a "speed hump" on both sides of the bridge and they had seen a lot of accidents where people "had rolled on that road". When asked what happened he said the following:

*"... The Almera after contacting the with the hump it jumped and finally coming back into contact with the surface he lost control and it ... then came straight to us".*

[11] In cross-examination he indicated that the bakkie was approximately 25 to 30 metres away from the approaching Almera when he saw the driver thereof losing control. He was also referred to his statement which he had made to the police immediately after the accident. When he was confronted with the allegation in his statement that the approaching vehicle was "coming with a high speed", his response was that this is not what he actually said. According to him he was in pain and lying on a stretcher when the statement was taken. He was unable to say at what speed the Almera was travelling. He also testified about two other accidents which had occurred at the bridge, one in which a person was also killed.

[12] The third witness for the appellants was Mr Grobbelaar, a mechanical engineer and accident reconstruction expert. He testified that according to the photographs it was apparent that the Almera collided with the bakkie with its left front side. Having regard to the angle between the two vehicles he concluded that the Almera must have been out of control. He further testified that according to the photographs there was what appears to be a severe dip on both sides of the bridge. This is indicated by various gouge marks caused by the undercarriage of motor vehicles bottoming out. In his view the Almera was probably travelling faster at impact than the

Nissan bakkie. Although difficult to calculate, he testified that it may have been anything between 80 to 100 km/hour.

[13] In cross-examination he explained that the Almera must have “jumped twice” as it went through the first undulation into the second one whereafter the driver probably lost control. He also pointed out that in his view there would have been very little time to do anything as both vehicles were travelling towards one another. When he was asked to calculate the speed of the Almera he responded as follows:

*“One can do that yes and I did very rough calculations and that it is why I say 80, 100, 110 somewhere around there but ... the variables ... are too many to ... (be) decisive. It does not indicate high speed in other words it does not indicate 120, 130, 140 km an hour on the part of the Almera but it is not easy to do a calculation with the variables unknown that we are having in this case.”*

He also confirmed that undulations can be classified as severe when the underside of motor vehicles comes into contact with the road surface.

[14] The next witness was Mr Berg. He is a road engineer by profession and his work includes the design and maintenance of roads. According to him the undulation or settlement at the bridge did not happen overnight, but developed over time, probably in excess of five to six years. In his view it was at least 150 mm deep at the time of the accident and according to him this can be classified as “5 plus” which is severe.

[15] The second aspect which he dealt with was the warning signs. He referred to two warning signs which were placed alongside the road warning motorists travelling in the same direction as the Almera was travelling. The first was a sign warning motorists of an uneven road ahead which was located 634 metres from the bridge. The witness made two observations in this regard. In terms of the South African Road Traffic Manual it should have been located 240 metres from the hazard if the speed limit was 100 km/h. He pointed out that the road in question was a good road which means that one would have to travel for 634 metres on a good road surface without knowing when and where to expect bumps in the road. It also does not inform a motorist at what speed should the bumps be negotiated at. He classified this as a poor traffic sign. He also referred to another sign close to the bridge indicating a drift. This, according to him, is most unexpected on a provincial road where in fact there is a bridge. Therefore, according to him, this sign is irrelevant. In cross-examination he explained that a road sign must send out a proper message which both these signs failed to do.

[16] The last witness for the appellants was Mr Engelbrecht who lived on a farm approximately three kilometres from the bridge in question. He had been living there since 1994. According to him the road at the bridge had started deteriorating since 2006. During 2008 he had sent letters, including an e-mail to the Road Agency in Limpopo about the problem at the bridge. He also referred to a letter he wrote during June 2008 which was sent to the Chief Executive of the Roads Agency and which also included the signatures

of several other petitioners complaining about the condition of the road. The complaint related to the sinking at the crossing of the bridge which caused a severe dip in the road. In this letter he said the following:

*"Crossing the bridge at any speed above 60 km/hour will seriously damage a vehicle. Drivers not knowing about this will lose control and there had already been various accidents."*

He also pointed out that since 2006 temporary repairs had been made, but according to him it hardly made any difference. When he was asked in cross-examination whether any repairs had been made after his complaint during August 2008, he answered in the negative but then also explained that if the problem was attended to, it did not make any difference.

### **EVIDENCE FOR THE RESPONDENT**

[17] The respondent's first witness was Ms Mabitsela who has been employed by the Department of Public Works, Roads and Transport for 22 years. Since 2004 she has been employed as a foreman in the Road Maintenance Division. She testified that on 4 June 2008 as well as 22 September 2008 certain maintenance and repair work "by surfacing" were done on the road in question. She was aware about the problem at the bridge where there were a lot of potholes. During September 2008 a team was instructed to repair potholes at the bridge.

[18] In cross-examination she confirmed that there was no "speed limit", but only a sign to indicate a drift. She also indicated that there was no problem at the bridge for traffic approaching from Makopane, but shortly thereafter she said the following:

*"On the bridge there, there is a part that sinks ... that is why we had put a sign to warn people that there was a drift at the bridge ... (and) if you are a motorist and there is a sign indicating that there is a drift you are required to reduce your speed."*

She also confirmed that the road surface at the bridge was repaired five days after the accident, but said the reason for effecting these repairs was not as a result of the accident, but because they were expecting many vehicles during the December holiday.

[19] The next witness was Mr Malisa. The essence of his evidence was that certain repair work and the filling of a hole at the bridge were done on 22<sup>nd</sup> September 2008. Thereafter Mr Minnie testified. He was the cost centre manager. He was aware of problems at the bridge, had inspected it several times and also visited Mr Engelbrecht, the farmer who lived nearby. According to him the depression of the road at the bridge had been fixed several times. His department only did maintenance work whereas larger repairs requiring excavations were done by contractors who were hired for this purpose.

[20] He and his colleague Mr Nothnagel decided that at some point contractors would have to be hired to effect major repairs as far as the sinking of the road was concerned. They merely did maintenance work in the interim. On 22 September 2008 his team had fixed the settling of the road approaching the bridge. According to him that repair was of a temporary nature as they did not have the necessary equipment to effect major repairs. A contractor was appointed at some stage but the work was put on hold as they were moving offices. In cross-examination he conceded, with reference to the gouge marks caused by vehicles entering the bridge, that the road was dangerous at the time of the accident. However, according to him it would still be safe to cross that bridge at a speed of 100 km/hour.

[21] The last witness to testify for the respondent was Mr Van Vuuren. He is a professional technologist specialising in roads, storm water and preventative maintenance of roads. According to him the undulation at the bridge was clearly visible indicating that there was a problem in the road. When he was asked whether the undulation could be considered as dangerous he testified that at a normal speed of 100 km/hour he doubted if it would have had any impact when crossing the relevant section of the road at the bridge.

[22] As far as the positioning of warning signs are concerned, he was of the view that it remained within the engineer's discretion as to how far away they should be positioned from the place of danger. Apart from the drift sign,

the road manual had no other appropriate sign to warn motorists of the depression at the bridge. According to him the positioning of the road signs was not inappropriate in the circumstances as both signs warned a motorist of some risk ahead.

[23] He further indicated that, assuming a speed of 120 km/h and a reaction time of 1.5 seconds, the impact should have been approximately 40 metres from the first undulation. However, according to him the actual point of impact was 79.23 metres away and therefore, according to his calculation, the Almera must have been travelling at a speed of 143 km/h “based on pure mathematics” if one takes into consideration the speed of the Nissan bakkie. His conclusion was that the accident was caused by human error and not a lack of maintenance of the road.

## **DISCUSSION**

[24] Before considering wrongfulness, negligence and causation, it is necessary to first determine what appears to be a factual dispute relating to the undulation or settlement at the bridge at the time of the accident. According to the evidence for the appellants it can be classified as severe and dangerous. According to the evidence for the respondent the depression in the road at the bridge was not severe and the road could be regarded as safe even at a speed of 100 km/h. It therefore appears that there are two irreconcilable versions with regard to the extent of this undulation and whether it should be regarded as dangerous or not.

[25] In SFW Group Ltd & Another v Martell et CIE & Others 2003 (1) SA 11 (SCA) at p 14 (par 5) Nienaber JA indicated that the technique generally employed by Courts in resolving factual disputes may conveniently be summarised 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 extra curial statements or actions ... 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. ... But when all factors are equipoised probabilities prevail."*

[26] In the matter before us the Court *a quo* distinguished between factual witnesses and the evidence of expert witnesses. It observed as follows in this regard:

*"Apart from the evidence of Mr Nkuna and Stefaan, which is of very little evidentiary value, there is mainly the evidence of the expert witnesses as to the probable cause of the accident." (par 36)*

The trial Court then indicated that Mr Nkuna is the only eyewitness who testified in this matter. Stefaan who was sitting on the backseat of the Almera could only testify about what he had felt (i.e. a jolt) and therefore, according to the trial Court, he was not really an eyewitness. At some stage the evidence of Mr Nkuna was criticised by the Court *a quo*. The following was said in this regard:

*"Mr Nkuna cannot be described as an independent witness. He gave the distinct impression that because he was called by the plaintiffs, his evidence should favour the plaintiffs. I do not say that he intentionally did so but that is the impression he created. He confirmed that he had said that the impact was huge when the two vehicles collided. In his evidence he had stated that he would often warn drivers of the vehicle in which he was travelling about the hazard on the road and that they should reduce speed. However, under cross-examination he denied seeing the warning signs on the roadside prior to the accident and said that he had only begun seeing those warning signs after the road was repaired after the accident, the implication being that they were erected only after the accident which is not plaintiffs' case. In the result, his evidence was not much of help." (par 66)*

[27] At first sight it appears that the trial Court regarded the evidence of Mr Nkuna to be unreliable because of him being biased in favour of the appellants. However, this appraisal does not seem to have depended on an

analysis of the various factors enumerated by Nienaber JA in SFW Group Ltd supra. First, Mr Nkuna was a passenger in another motor vehicle and there appears to be no relationship between him and the appellants. Second, the fact that Mr Nkuna under cross-examination denied having seen the warning signs on the roadside prior to the accident might be as a result of him not having noticed it. Third, it should also be borne in mind that some part of his evidence was never disputed in cross-examination. I shall refer to that later again. It is therefore not clear why the Court *a quo* was of the view he had given the impression his evidence should favour the appellants.

[28] It is also not clear why the Trial Court was of the view that the evidence of Mr Nkuna and Stefaan should be regarded as having “very little evidentiary value”. Again, this appraisal does not seem to have taken into account the various factors pointed out by Nienaber JA. It is not only what a factual witness observes, but also his or her experience of the event in question which should be taken into account. Both Stefaan and Mr Nkuna testified in this regard and what is even more important, they corroborated each other with regard to the sudden jolt (as described by Stefaan) and the fact that the Almera jumped (as observed by Mr Nkuna). It therefore appears to me, as far as this exercise is concerned, that the Court *a quo* did not apply the technique generally employed by Courts in resolving factual disputes properly. The outcome of this dispute should, in my view, depend on a consideration of the undisputed facts and the probabilities. This involves an evaluation of the evidence.

[29] It is not in dispute that on the morning of 13 December 2008 the Lauwrens family left their home in Ellisras to go on holiday. When Stefaan was getting ready to make himself comfortable to sleep, he felt a sudden jolt. According to the evidence of Mr Nkuna there was a “speed hump” on both sides of the bridge. He knew the road as he was travelling it frequently. He told the driver of their vehicle to drive slowly as the road was dangerous. He noticed how the Almera hit the hump and then “jumped” whereafter the driver thereof lost control. This evidence was never disputed in cross-examination and there is, in my view, no reason to reject it.

[30] Mr Engelbrecht who lived in the vicinity testified that he had sent letters to the Road Agency in Limpopo about a problem at the bridge. In a letter which he wrote during June 2008 he pointed out that crossing the bridge at any speed above 60 kilometres per hour will seriously damage a vehicle and drivers not knowing about this will lose control. Having regard to the photographs taken only a few days after the accident, both Mr Grobbelaar and Mr Berg were of the view that the undulation at the time of the accident can be classified as severe.

[31] According to the evidence of Ms Mabitsela on 4 June 2008 as well as 22 September 2008 certain maintenance and repair work “by surfacing” were done on the road in question. She was aware of the problem at the bridge where there were a lot of potholes. During September 2008 a team was instructed to repair the potholes at the bridge. Although she indicated

that there was no problem at the bridge for traffic approaching from Makopane and that the road was safe, she conceded in cross-examination that there is a part “that sinks” and that the road surface at the bridge was repaired five days after the accident.

[32] Mr Minnie testified that the depression at the bridge had been fixed several times. However, he and his colleague decided that at some point contractors would have to be hired to effect major repairs as far as the sinking of the road was concerned. They merely did maintenance work in the interim. In cross-examination he conceded, with reference to the gouge marks caused by vehicles entering the bridge, that the road was dangerous at the time of the accident. However, he still maintained that it was safe to cross that bridge at a speed of 100 kilometres per hour. This was also the opinion of Mr Van Vuuren who said that the undulation at the bridge was clearly visible indicating that there was a problem, but notwithstanding this he doubted if it would have had any impact when crossing that section of the road at a normal speed of 100 kilometres per hour.

[33] When considering all the evidence, the following undisputed facts are important, as they will assist the Court in finding facts or making inferences: First, there was an undulation which caused various gouge marks on the road surface. Mr Grobbelaar’s evidence was that these marks were caused by the undercarriage of motor vehicles “bottoming out”. Second, Mr Engelbrecht had already during June 2008 alerted the road

authorities about the condition of this section of the road. His reference to drivers who will lose control and the fact that there had already been various accidents is a clear indication of the severity of this undulation. Third, Mr Nkuna warned the driver of their vehicle to drive slowly moments before the accident. He knew the road as he was traveling it frequently and he regarded it to be dangerous. Lastly, the evidence about a sudden jolt and “jumping” of the Almera is more compatible with a severe undulation than one which can be described as normal or even safe.

[34] It is difficult to reconcile the evidence that it would be safe to cross the bridge at a speed of 100 km/h with all the undisputed facts referred to above. Ms Mabitsela conceded in cross-examination that there is “a part that sinks” and that “you are required to reduce your speed”. Furthermore, Mr Minnie also conceded, with reference to the gouge marks at the bridge, that the road was dangerous at the time of the accident. Notwithstanding these concessions Mr Van Vuuren persisted in his view that at a speed of 100 km/h it is doubtful whether the undulation would have had any impact when crossing that section of the road.

[35] Having regard to all the evidence, more particularly the undisputed facts referred to above, it seems to me that the probabilities support a finding that the undulation was severe. Furthermore, the various gouge marks at the bridge, Mr Engelbrecht’s prophetic words of caution pointing out the possibility of drivers losing control, the fact that various accidents had already

occurred there (referring to the road at the bridge) and Mr Nkuna's undisputed evidence that he regarded the road at the bridge to be dangerous, justify the inference that this undulation was not only severe, but also dangerous. I therefore conclude that on the day in question the undulation was both severe and dangerous.

### WRONGFULNESS

[36] In Knop v Johannesburg City Council 1995 (2) SA 1 (AD) at p 27 G-I the test for wrongfulness was said to involve objective reasonableness, having regard to the legal convictions of the community as assessed by the Court. Put differently, the legal convictions of the community or the *boni mores* is a value judgment that embraces all the relevant facts, the sense of justice of the community and considerations of legal policy, both of which now derive from the values of the Constitution (Steenkamp N.O. v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC) at 139C). Having regard to these considerations, wrongfulness is established where there is a breach of a legal duty not to cause harm to another by one's negligent conduct (F v Minister of Safety and Security and Others 2012 (1) SA 536 (CC) at 567, par 118).

[37] It is common cause that on the day of the accident the respondent was responsible for the maintenance of the road and to ensure that the driving surface did not degrade to a level where it might pose a danger for the reasonable user thereof. I have already concluded that the relevant section

of the road was dangerous. According to the evidence of Mr Berg this situation did not happen overnight, but developed over time, probably in excess of five to six years. This view is corroborated, at least to a certain extent, by the evidence of Mr Minnie. He was aware of the problem at the bridge and had inspected it several times. His department only did maintenance work, but as far as the sinking of the road was concerned, he and his colleague had already decided that at some point contractors would have to be hired to effect major repairs. Unfortunately, this was only done a few days after the accident.

[38] Taking into account that the undulation at the bridge was not only severe but also dangerous and the fact that a responsible member of the community had already pointed out this fact to the road authorities, it stands beyond question that the respondent had and still has a legal duty not to cause harm to people using that road, but to ensure that the driving surface of the road is safe. This was not done timeously and the omission of the respondent in this regard was therefore wrongful.

### NEGLIGENCE

[39] The question of negligence involves a twofold enquiry: First, was the harm reasonably foreseeable? Second, would the *diligens paterfamilias* have taken reasonable steps to guard against such occurrence and did the respondent fail to take those steps? The answer to the first question is obvious. Evidence relating to accidents which had already occurred at the

bridge, Mr Engelbrecht's letter during June 2008 complaining about the dangerous condition of the road at the bridge and the fact that Mr Minnie conceded the road was dangerous at the time of the accident, justify no other inference that it was not only foreseeable that motorists could suffer injuries, but also that they may be killed due to the dangerous situation on that section of the road.

[40] The second leg of the enquiry relates to the reasonableness or otherwise of the respondent's conduct. It is well established that whether in a particular case the precautions taken to guard against foreseeable harm can be regarded as reasonable or not, depends on a consideration of all the relevant circumstances and involves a value judgment which is to be made by balancing various competing considerations. These would ordinarily be the degree or extent of the risk created by the conduct of the person concerned, the gravity of the possible consequences and the burden of eliminating the risk of harm. (Cape Metropolitan Council v Graham 2001 (1) SA 1197 (SCA) at 1203, par 7).

[41] The respondent was responsible for the maintenance of the road and obliged to ensure that the driving surface did not degrade to a level where it might pose a danger for the reasonable user thereof. There is evidence that certain maintenance and repair work "by surfacing" was done. This includes repair work of potholes in the vicinity of the bridge. As far as the undulations at the bridge are concerned, the respondent's employees

also did maintenance work in the interim. According to the evidence of Mr Minnie he and his colleague decided that at some point contractors would have to be hired to effect major repairs as far as the sinking of the road was concerned. The reason why this major repair work was not carried out timeously is because the work was put on hold as the Department was moving offices. However, according to the evidence of Mr Berg the undulation or settlement at the bridge did not happen overnight, but developed over time, probably in excess of five to six years. His view is corroborated by the evidence of Mr Engelbrecht who had already during 2006 noticed that the road at the bridge was deteriorating.

[42] It was contended on behalf of the respondent that it had taken reasonable steps to warn motorists of the danger ahead. Reference was made to two road signs in this regard. Mr Berg pointed out that the first sign (indicating an uneven road) was located too far away from the hazard, whereas the second one (indicating a drift) should be regarded as irrelevant because there was a bridge. Mr Van Vuuren responded by saying that it was within the engineer's discretion as to how far away a road sign should be positioned from the place of danger. He also pointed out that, apart from the drift sign, the road manual had no other appropriate sign to warn motorists of the depression at the bridge.

[43] The appropriateness of these road signs should be considered in view of all the facts. First, according to evidence of Mr Berg the road in

question was a good road (which was not disputed). It means that one would have to travel for a considerable distance without knowing when and where to expect an uneven road surface. This sign also does not inform a motorist at what speed the uneven section should be negotiated at. Furthermore, an uneven or bumpy road is not the same as a severe and dangerous undulation or depression in the road. Second, the drift sign does not warn a motorist of a dangerous undulation (as opposed to a real drift) at the bridge. There is also no other sign warning motorists, when approaching the bridge, to reduce speed. It therefore appears that these signs were not appropriate as far as the particular circumstances are concerned. No doubt, a road sign should be informative and effective, but certainly not confusing. Having regard to these considerations, I conclude that these road signs were not only inappropriate but also ineffective in warning motorists of a specific danger at the bridge. They can therefore not be regarded as a reasonable precaution with regard to this particular danger.

[44] It was also contended on behalf of the respondent that the accident was caused by the sole negligence of the children's mother as she was driving too fast under the prevailing circumstances. It is important to point out that the deceased driver's estate is not a party to these proceedings. It means that the question of the mother's contributory negligence is not in issue. Proof of the proverbial 1% negligence by the respondent's employees will be sufficient. On the other hand, if the accident was caused by the sole negligence of the children's mother, then the appeal should be dismissed.

[45] It appears to be common cause that the speed limit at the time of the accident was 100 km/h. There is no direct evidence (except for calculations performed by the expert witnesses) of the approximate speed at which the Almera was travelling. Mr Nkuna's statement to the police only refers to a "high speed". Even if one were to accept this to be correct (which the witness denied), then it is still not clear whether this high speed was above the speed limit of 100 km/h, or whether it was below it but still too high bearing in mind the dangerous situation at the bridge. There is also no evidence that the children's mother had any prior knowledge of the dangerous situation at the bridge.

[46] As far as calculations and opinions of expert witnesses are concerned, one has to take into account certain variables or uncertainties, for instance the distance travelled from the bridge to the point of impact. According to the evidence of Mr Nkuna the bakkie was approximately 25 to 30 metres away from the approaching Almera when he saw the driver thereof losing control. In reconstructing the point of impact Mr Grobbelaar testified that it was 57 metres from the second undulation where he found gouge marks indicating the probable area of impact. He calculated the speed of the Almera to be somewhere around 80, 100 or 110 km/h.

[47] According to Mr Van Vuuren the actual point of impact was 79,23 metres away from what appears to be the first undulation and therefore he calculated the speed of the Almera (assuming the approaching speed of the

Nissan bakkie was in fact 60 km/h) to be 143 km/h. To complicate the matter even further, the accident report form (in exhibit "B") indicates that the distance between the bridge and the point of impact was 48 metres (60m minus 12m). What distance should be used to calculate the speed of the Almera? Is it 48 or 57 or 79.23 metres?

[48] In Owners of MV Banglar Mookh v Transnet 2012 (4) SA 300 (SCA) at 319E the following was pointed out in this regard:

*"(T)he expert tasked with reconstructing what occurred is often dependent for the reconstruction not simply on the application of scientific principle to accurate data but on calculations based on imperfect human observation. The fact that the reconstruction rests on a potentially imperfect foundation is the reason for caution in determining its evidential value."*

[49] Having regard to this word of caution, I have to point out a further number of aspects which are not clear when an attempt is made to calculate the speed of the Almera. First, according to the evidence of Mr Nkuna and Mr Engelbrecht other accidents had also occurred in the vicinity of the bridge. As Mr Grobbelaar visited the scene of the accident only on 15 February 2012 (more than three years after the accident in question) one can only assume, at best, that the area of impact identified by him relates to the accident in question and not any other. Second, Mr Grobbelaar measured the distance from the second undulation to the point of impact, whereas Mr Van Vuuren apparently used the first undulation as his starting point. The two undulations

are at least (if not more) 13 metres apart (length of the bridge as measured by Mr Grobbelaar and referred to in his report, appendix "A1"). Third, and perhaps most importantly, where did the driver of the Almera lose control? Was it at the first or second undulation or was it even after that?

[50] If the undisputed evidence of Mr Nkuna indicating a distance of approximately 25 to 30 metres between the two approaching vehicles were to be accepted, then it is possible that the driver of the Almera lost control after the second undulation. This was also the view of Mr Grobbelaar who testified that the Almera must have "jumped twice" as it went through the first undulation into the second one when the driver thereof probably lost control.

[51] Having regard to all the variables, uncertainties and different possibilities referred to above, it should follow that the calculation of 143 km/h, as suggested by Mr Van Vuuren, should be looked at with circumspection, to say the least. As a matter of fact, this should apply to any attempt to calculate the speed of a motor vehicle under these circumstances. One should be careful not to draw conclusions based on unproven facts or to accept a calculation which rests on a potentially imperfect foundation. A court should still decide whether it can safely accept an expert's opinion or his calculation, even in the absence of an opposing view by another expert witness.

[52] However, the Court *a quo* followed a different approach. The learned Judge expressed himself as follows in this regard:

*"It was submitted by plaintiff's counsel that Mr Van Vuuren's testimony that according to his calculations the Almera was probably travelling at about 143 km/h was not put to the plaintiff's expert for comment. However, in this regard, as I said earlier, Mr Grobbelaar had ample opportunity to express an opinion regarding the speed after obtaining the colour photographs and the speed of the Nissan LDV but failed to do so. In the result, Mr Van Vuuren's evidence on this aspect stands undisputed."* (par 68)

[53] Unfortunately I cannot agree with this conclusion. Mr Grobbelaar had already explained that there are too many variables to be decisive. This is not an expert opinion. This is a fact which has already been pointed out above. Notwithstanding this, Mr Grobbelaar nevertheless attempted to calculate the speed of the Almera. Without being unyielding, he indicated a wide range of possibilities, somewhere between 80 to 110 km/h.

[54] Furthermore and perhaps more importantly, the Trial Court failed to take into account the potentially imperfect foundation upon which Mr Van Vuuren's calculation was based. This relates, *inter alia*, to the question which distance should be accepted as the most reliable for purposes of calculating the Almera's speed. This issue has already been discussed above. There is no reason, in my view, to accept the distance and calculation suggested by Mr Van Vuuren and to reject all the other possibilities. There are no proven facts or probabilities indicating that his calculation, amongst several conceivable ones, can safely be accepted as the most reliable to indicate the possible speed of the Almera.

[55] For these reasons I think the Court *a quo* misdirected itself when it concluded that the deceased driver failed to comply with the speed limit. There is not sufficient and reliable evidence to justify such a conclusion. Even if one were to accept that she was driving too fast under the prevailing circumstances, then in my view there is still not sufficient evidence to conclude that the accident was caused by her sole negligence.

[56] Having regard to all the evidence and circumstances of this case, I am of the view that a reasonable person responsible for the maintenance of this road would not only have foreseen the consequences of the danger at the bridge, but would also have guarded against it by having executed the necessary repair work to provide a safe road. Furthermore, having regard to the fact that a severe and dangerous road condition at the bridge had already existed at the time of the accident, the precautions taken to guard against foreseeable harm cannot be regarded as reasonable. The danger at the bridge was a longstanding problem not properly addressed in time and the road signs were not effective to warn motorists of this specific problem at this specific place. There was also not an appropriate sign warning motorists to reduce speed when approaching the bridge. Having regard to the gravity of the possible consequences and the fact that employees of the respondent were aware of this danger, I have to conclude that they were negligent by failing to rectify the problem properly and timeously. A dangerous condition on a public road cannot be allowed to continue indefinitely in the hope that a few inappropriate and ineffective road signs will take care of it. People's lives

may be at stake. Fixing the problem as soon as possible should always be a priority.

### CAUSATION

[57] The last question to be considered is whether there is a causal link between the dangerous section of the road at the bridge and the accident. There is direct and undisputed evidence of how the accident occurred. Mr Nkuna noticed how the Almera hit the hump and then “jumped” whereafter the driver thereof lost control. This evidence is supported by Stefaan who felt a sudden jolt whereafter he lost consciousness.

[58] As far as drawing inferences are concerned, Mr Grobbelaar also testified that, having regard to the angle between the two vehicles at the point of impact, the Almera must have been out of control. Taking into account the finding that the undulation was severe and dangerous, and in the absence of any acceptable evidence to the contrary, there can only be one logic conclusion – the dangerous condition of the road at the bridge was the direct cause of this collision. In the result it should follow that the appeal must succeed.

### ORDER

The following order is granted:

1. The appeal is upheld with costs which shall include the costs of senior counsel;
2. The order of the Court *a quo* is set aside and replaced with the following:

2.1. It is declared that the defendant is 100% liable to compensate the plaintiffs, in their representative capacity on behalf of the two minor children referred to in paragraph 1.1 of the particulars of claim, in respect of the damages suffered by them arising out of a motor vehicle accident which occurred on 13 December 2008, the extent of such damages to be proven or agreed upon;

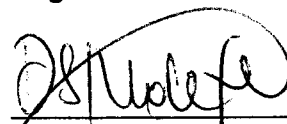
2.2. The defendant is ordered to pay the plaintiffs' party and party costs, which shall include the following:

- 2.2.1. the reasonable costs of obtaining expert reports of Mr Grobbelaar and Mr Berg;
- 2.2.2. the reasonable preparation and qualifying fees of Mr Grobbelaar and Mr Berg;
- 2.2.3. the reasonable reservation fees of Mr Grobbelaar and Mr Berg for attending the trial;

2.3. Mr Nkuna and Mr Engelbrecht are declared to be necessary witnesses.

  
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**D S FOURIE**  
JUDGE OF THE HIGH COURT  
PRETORIA

I agree:

  
\_\_\_\_\_  
**D S MOLEFE**  
JUDGE OF THE HIGH COURT  
PRETORIA

I agree:

  
\_\_\_\_\_  
**J A MOTEPE**  
ACTING JUDGE OF THE  
HIGH COURT  
PRETORIA

Date: