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NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE No: 74388/10

DATE: 01/02/2013

In the matter between:

JACQUES LAUWRENS

1ST PLAINTIFF

RINNIE LAUWRENS

2ND PLAINTIFF

and

MEMBER OF THE EXECUTIVE COUNCIL

FOR PUBLIC WORKS, ROADS AND TRANSPORT

OF THE LIMPOPO PROVINCE

DEFENDANT

JUDGMENT

RANCHOD J:

[1] On the 13 December 2008 the driver of a Nissan Almera motor vehicle (the Almera) lost control when crossing a depression in the road at the Rooisloot bridge (the bridge) on the R518 on the Mokopane/Zebedila road and collided with an oncoming Nissan LDV (the

bakkie).

[2] The occupants of the vehicle were Mr and Mrs Lauwrens in the front and their two minor children, S (12) and N (9) in the back of the vehicle. Mrs Lauwrens was the driver of the vehicle. S sat behind his mother. Both Mr and Mrs Lauwrens were killed outright in the accident, but the two minor boys survived.

[3] The first plaintiff is claiming in his capacity as guardian of the minor children and the second plaintiff is claiming in her capacity as guardian and primary care giver of the children. The children sustained injuries as a result of the accident and were hospitalised. The first and second plaintiffs' claim on behalf of the children is therefore based on loss of support consequent upon the death of the children's parents. The second plaintiff also sues for costs incurred as the primary caregiver of the children.

[4] By agreement between the parties, it was ordered at the commencement of trial that the merits of the plaintiff's claim against the defendant be separately adjudicated in terms of Rule 33(4) of the Uniform Rules of Court. It is not in dispute or it is common cause that prior to the institution of action, the Plaintiffs had served a letter of demand on the defendant in terms of the Legal Proceedings Against Certain Organs of State Act 40 of 2002.

[5] The plaintiffs allege that the accident was caused by the negligence of the defendant, alternatively, his employees acting in the course and scope of their employment, in the following respects:

5.1 failure to inspect the road, the road pavement and the surface of the road at all, alternatively with sufficient regularity, alternatively properly;

5.2 failure to ensure that bumping and/or undulations and/or formations do not develop on the road surface and road pavement where the road pavement met the bridge in question;

5.3 failure to ensure that when bumping and/or undulations and/or formations on the pavement and road surface where the road surface meets the bridge do develop, that they do not pose a danger to the users of the road;

5.4 failure to maintain, alternatively to properly and appropriately maintain the road, the road surface and the road pavement where the road pavement met the bridge in question; and

5.5 failure to appreciate, alternatively the failure to act in accordance with an appreciation, that because bumping and undulations did develop on the road surface and the road pavement where the road pavement met the bridge, it is critical for the reasonable road safety of motorists, that the defendant take steps to ensure that the road surface and/or road pavement where the road pavement met the bridge were clear of bumping and/or undulations and crack formation, and was not allowed to develop to such an extent that it poses a danger for the reasonable use of the road by motorists.

[6] The basis of the defendant's defence to the claim is that the sole cause of the accident was the negligence of Mrs Lauwrens who failed to adhere with and comply with the road traffic warning signs fixed immediately before the uneven road and undulation and her failure to drive at a reduced speed. In particular, the defendant avers that Ms Lauwrens drove the vehicle at an excessive speed and lost control after having gone through an undulation or bump adjacent to the bridge.

[7] The following appears to be common cause:

7.1 The defendant admitted that he has a duty of care and maintenance responsibility regarding the R518 road between Mokopane and Zebediela;

7.2 The defendant admitted that his maintenance functions included the regular and proper inspection of the road including the driving surface of the road and the road pavement, in order to evaluate the condition thereof;

7.3 The defendant admitted that he had the duty to perform regular and appropriate maintenance of the road in order to ensure that the road driving surface and the road pavement was safe for the use thereof by the public;

7.4 The defendant admitted that he had to take reasonable steps to ensure that the driving surface of the road pavement did not degrade to a level where it might pose a danger for the reasonable user of the road; and

7.5 The defendant admitted that he had to take reasonable steps to ensure that undulations, cracks and bumps in the road pavement do not develop on the driving surface of the road and should such undulations, cracks and bumps develop, that reasonable steps were taken to maintain and rectify

them

1.1 The defendant also pleaded that its maintenance responsibility for the road was subject to its available financial and human resources.

[2] It is also common cause that when the vehicle was driven over the settlement/depression where the road pavement met the concrete bridge, the driver of the vehicle lost control and veered over to the right hand side of the road surface and collided with the oncoming Nissan bakkie with registration letters and numbers BPY422L.

[3] It is apposite to mention that the deceased driver's estate is not a plaintiff, hence, the question of the deceased driver's contributory negligence is not in issue or to be determined. The only relevant question is whether the defendant was negligent or not.

[4] On the fateful morning of 13 December 2008 the Lauwrens family left their home in Ellisras to start their yearly holiday. Ellisras is approximately 220 km from the scene of the accident. Their intention was to travel to family friends where they would overnight before proceeding to the Kruger National Park. On the way they stopped to have breakfast and freshen up. Mr Lauwrens was the driver from Ellisras to Mokopane. Thereafter Mrs Lauwrens took the wheel to drive further on the road to Zebediela.

[5] S, who was sitting in the back of the motor vehicle behind his mother, was getting ready to make himself comfortable to sleep when he felt a sudden jolt. He said it felt as if the car had driven through a pothole but just that it was more severe and caused him to lose his seating on the back seat. When he looked to the front he says he saw that the motor vehicle was out of control whereafter everything became dark and he lost consciousness. There was a suitcase between him and his brother, who was also seated on the back seat. He was unable to provide any further details on how the accident occurred.

[6] The second witness called by the plaintiffs was a Mr Reginald Nkuna. He was a passenger in the bakkie with which the Almera had collided. The Nissan bakkie was what is referred to as a double-cab. He was seated at the back on the left-hand side. He testified that when the bakkie approached the bridge, it was travelling at 60 km/h. The reason for travelling at such a speed was that he knew the road and what it is like at the bridge. He told the driver to drive slowly as the road was dangerous. As they were approaching the bridge he saw the Almera drive over a hump, 'jumped' and when it came in contact with the road surface again the driver lost control, came across into their lane and collided with the bakkie. He sustained injuries from the broken glass of the windscreen of the bakkie. He said when he first saw the

vehicle it was approximately thirty metres away. He further testified that immediately after the accident he assisted the passengers in the bakkie as he had not sustained serious injuries. He confirmed that the road was a busy road and it was also used by many trucks. He could only remember about two accidents that occurred around the area of the bridge, but could not give much detail in that regard.

[7] During cross-examination Mr Nkuna was referred to his statement which he had made to the police immediately after the accident. He identified the statement but mentioned that he was in pain at the time when he made it. However, when the statement was read to him, he agreed with the contents except, he said, that he did not tell the police he was 33 years old at that time but 34 and also that he did not mention that the vehicle was travelling at a high speed. He said he could not have been able to assess the speed at which the Almera was travelling whilst he was in the bakkie. He could not explain why the other portions in his statement were correct except for his age and the issue of the speed at which the Almera was travelling. During the examination in chief, Mr Nkuna was not referred to the statement although it formed part of the discovered documents of the plaintiffs. Mr Nkuna had also testified that the Bakkie was written off as a result of the accident.

[8] The third witness for the plaintiffs was Mr Grobbelaar, an accident reconstruction expert and mechanical engineer. He testified that he visited the scene of the accident on the R518 road on 15 February 2012 (the accident occurred on 13 December 2008) and also utilised the photographs which were made available to him and other information that was provided. He took measurements and photographs at the scene and these measurements were used in drafting the scale plan of the scene which was attached as annexure "A" to his report and the photographs were attached as annexure "B". He confirmed that having considered the police

photographs and the accident report (AR) form, visibility was clear on the day in question. He further testified that according to the photographs, it was apparent that the Almera collided with the Bakkie with its left front which is evidenced by the extent of the damage to the left front side of the vehicle. Under cross-examination he conceded that the vehicle could have been travelling at a speed of between 80 and 100 km/h immediately before the accident but that the speed could have been higher when it hit the first bump or undulation. He further conceded that as he did not inspect the vehicle he could not confirm whether the loss of control after the bump or undulation could also have been caused by a mechanical failure on the part of the vehicle. Defective shock absorbers and suspension system could also lead to a loss of control. In his expert report, Mr Grobbelaar states that the severity of the jump when the vehicle hit a bump would be dependent on a number of factors such as the severity of the undulation and other physical factors.

[9] In his expert report, Mr Grobbelaar indicated that:

‘An opinion regarding the speed of the Nissan calculated from the point of view of the Law of Conservation of Momentum, may be provided once the colour police photographs have been obtained in order to better establish the location of the gouge marks in relation to the positions of rest of both of the vehicles and the speed at which the Nissan LDV was travelling at impact has been obtained.’

[10] Despite having received the colour police photographs and the evidence of Mr Nkuna on the speed of the bakkie, in his evidence in chief Mr Grobbelaar did not provide an opinion regarding the speed of the Almera at the moment of impact. Under cross-examination, he merely provided some estimation of the speed. In his expert report Mr Grobbelaar states that the momentum of the vehicle would probably have been considerably larger than that of the

bakkie.. He conceded under cross- examination that having considered the extent of the damage to both vehicles, the impact was huge.

[11] The fourth witness called by the plaintiffs was Mr Bergh, who is a civil engineer. He was requested to provide an opinion on the condition of the R518 road; more specifically with regard to the road condition at the bridge on 13 December 2008. He said he was provided with a series of photographs of the particular section of the R518 where the accident took place. According to his information photos 1 to 96 were taken the day after the accident and photos 97 to 184 were taken approximately 5 days later. He conducted an inspection in loco during November 2011 and his report was based on his observations from the photographs as well as his observations and measurements that he personally made at the scene at the bridge. It was his opinion that depressions of more than 30 mm where the road connected to the bridge would be dangerous.

[18] The second aspect which he dealt with was the warning signs. He had referred to two warning signs which were placed alongside the road warning motorists travelling in the direction the deceased travelled about the danger ahead. The one sign, marked 3W331, warning of an uneven road ahead, was located 634 metres from the hazard when, in terms of the South African Road Traffic Manual it should have been located 240 m from the hazard if the speed limit was 100 km/h on that road. The second sign, warning of a drift ahead, was located 296 m away from the bridge when it should have also been placed 240 m away in order to be able to communicate a proper message to a road user of a hazard ahead.

[19] Warning signs with a white background were permanent signs whereas those with a yellow background were temporary signs. As the two signs in question had a white

background Mr Bergh inferred that the defendants did not intend to repair the road, which was in his opinion in a severe and unsatisfactory condition, in the foreseeable future. According to this witness the erection of the signs were not effective in preventing the accident. During cross-examination he was referred to chapter 3 of the manual that was attached to his report regarding warning signs where it is stated:

‘Warning signs are used to alert drivers to hazardous or potentially hazardous conditions on or adjacent to the roadway. Warning signs indicate a need for extra caution by road users and may require a reduction in speed or other manoeuvre in the interest of their safety and that of other drivers, pedestrians and animals.’

When it was put to him that the driver of the vehicle should have exercised caution by reducing speed in accordance with the warning signs, he responded that the signs were ineffective because they had not been placed at the correct distances in terms of the manual.

[12] The next witness for the plaintiff was Mr Stefanus Engelbrecht who lived on a farm approximately three kilometres from the bridge in question. He had been staying on the farm since 1994. According to him the road at the bridge had been deteriorating since 2006. During 2008 he had sent letters, including an email to the Road Agency in Limpopo about the problem at the bridge. He testified that most of his clients who came to the farm complained about the condition of the road at the bridge. He referred to a letter he wrote dated 6 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 the letter he acknowledged that after his complaints during 2006 temporary repairs were made. When he complained again in 2007 to a Mr Raymond Minnie and a Mr Nothnagel, (the defendant’s civil-engineer) the latter advised him that he should write to the

Roads Agency. He testified that when approaching the bridge one had to slow down to a speed of approximately 50 to 60 km/h. He said on 28 August 2008 he had sent an email to Mr Nothnagel indicating that in the previous week there had been an accident at the bridge and that the bridge was becoming dangerous and will cause or lead to serious accidents.

[21] During cross-examination he conceded that he could not tell what the cause of the accident was on 13 December 2008 in which the deceased died as he had only come to the scene after the event. He also confirmed that after he had raised his complaints both Minnie and Nothnagel personally came to his farm to discuss his complaints. It was also put to him that subsequent to the latest complaint on 22 September 2008, that is, some two months before the accident in question, the defendant effected repairs on the road by filling the settlement. He also acknowledged that the R518 road was a very busy road.

[22] The defendant's first witness was Ms Mabitsela who has been employed by his Department of Public Works, Roads and Transport for more than 22 years. Since 2004 she has been employed as a foreman in the road maintenance division. The job entails monitoring teams sent out to do repairs on roads and also to monitor daily production of the road works teams. She testified that she goes with the teams to the roads on a daily basis. Just under 220 km of roads in the Limpopo province fall under her team's jurisdiction. She explained that her team would repair roads on instructions from the Cost Centre Manager who was at the relevant time Mr Raymond Minnie. She mentioned that repairs were done at the bridge on 4 June 2008 as well as 22 September 2008. She further stated that at the time of the accident in December there were no potholes at the bridge. She also mentioned that it is the cost centre manager who normally inspects the provincial roads on a weekly basis. It is after the inspection that he would instruct her team to effect any necessary repairs. She confirmed that

repairs were also effected at the bridge five days after the accident on 13 December 2008 but she was not involved in those repairs. She said the reason for effecting major repairs after the accident was because there was a lot of patchwork on the road, hence they removed the surface and re-tarred the section leading to the bridge.

[23] Under cross-examination she testified that the road was safe for use even before the accident as long as a person obeyed the warning signs and travelled at a speed of approximately 60 to 80 km/h. She also explained that another reason for effecting major repairs in December after the accident was that they were expecting a lot of traffic for the Christmas holidays.

[24] The witness disagreed that the depression of the roadway at the bridge was the height of a Coca-Cola can standing upright. She was of the view that a more correct depiction of the height with the Coca-Cola can would be to place the can on its side. She said if Mr Raymond Minnie had reported a sinking at the bridge they would have gone and fixed it. However, he did not make any such report (after the repairs in September and before the accident in December).

[25] The next witness, Mr Matome Lefe Malesa testified briefly. The essence of his evidence was that certain repairs at the bridge (a hole had been filled) were done on 22 September 2008.

[26] Mr Raymond Minnie then took the stand. He was the cost centre manager of the Road Works Department of the defendant. By 2008 he was already 5 to 6 years in that post. He was in control of three teams: one that effected pothole repairs; a second team that did

clearing of the bushes and other overgrowth and a third team which attended to road signs. He was aware of the problems at the relevant bridge and had inspected it several times and also visited farmer Engelbrecht who lived nearby. He testified that the depression of the road at the bridge had been fixed several times. He testified that his department only did maintenance work whereas larger repairs requiring excavations were done by contractors who were hired for the purpose. 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. He testified further that the repair was a temporary job as they did not have the necessary equipment to effect major repairs. A contractor was appointed at some stage but the job was put on hold as they were moving offices. He also testified that warning signs had been put up to show the danger at the bridge. He said the warning sign of a drift was the only sign they could put in the circumstances, apart from the undulation sign.

[27] Mr Minnie said that a bump as a vehicle approached the bridge was due to the tar getting pushed up against the bridge. It was his view that the depth or sagging of the road at the bridge was approximately half the height of the coca-cola can and not its full height. It was his opinion that the undulation was not dangerous and that the accident could have been caused by high speed and resultant loss of control of the vehicle.

[28] In December they could not wait any longer hence they arranged for machines to be brought from other areas which included three teams from different cost centres to effect major repairs. He said the repairs were not done as a result of the accident but because the road had kept on sagging. He was not aware of any other accident due to the sagging except

the one that occurred on 13 December 2008. He confirmed that there were undulation and drift warning signs alongside the road approaching the bridge from the direction of the deceased's vehicle. He said the purpose of these signs was to warn motorists to slow down. He then conceded that the road was dangerous at the time of the accident but that from his experience one could travel safely at 100 km/h over the bridge. He said he had travelled over that portion of the bridge more than 100 times without any problems.

[29] The witness was also shown a photograph of a truck and trailer crossing the bridge. The photograph depicted the rear wheels of the trailer lifted in the air after they hit the depression in the road at the bridge. I will revert to this aspect presently.

[30] The next witness was Mr Johannes van Vuuren who testified as an expert on behalf of the defendant.

[31] Mr van Vuuren is a road design engineer and professional technologist who said he is qualified to do roads building and maintenance. The witness referred to his report in which reference is made to American and United Kingdom guidelines which state that if an accident occurs within 15 to 20 m of a pothole then the accident would be attributed to the pothole. However, in the present case the accident occurred approximately 70 m away meaning that the accident could not have been due to a pothole. Mr Van Vuuren testified that at a speed of 100 km/h he doubted that a motorist would have felt any adverse impact when crossing the relevant section of the road at the bridge. Insofar as the measurement of the depression by using a Coca-Cola can was concerned he said one should use a line and level to measure the depth. He disagreed with Mr Bergh's assertion that the undulation is in category five, that is, those that require urgent attention and that it applied to the relevant section of the road. As

far as positioning of warning signs are concerned he was of the view that that remained within the engineer's discretion as to how far away they should be positioned from the place of danger. He said that apart from the drift sign the road manual had no other appropriate sign that could be used to warn of the depression at the bridge. He was of the view that the positioning of the undulation sign 634 m away was not inappropriate in the circumstances as a further sign, that is, the drift sign was placed some 300 m from the bridge. The two signs warned a motorist of some risk ahead.

[32] Mr Van Vuuren's evidence can be criticised in some respects. He assumed that all the photographs that he referred to in compiling his report had been taken in 2011. It was put to him under cross-examination that in fact almost half of the photographs had been taken two and five days respectively after the accident. He conceded that the assumptions he made on the basis that all the photographs were taken only recently and not at the time of the accident would make some of his conclusions incorrect. In his report Mr van Vuuren refers to the depression/settlement being visible from 400 m away. However, under cross-examination he conceded that that was not correct. He explained that he meant the discolouration on the road was visible from 400 m away and that he may have used the incorrect words but, he said, the depression was visible from about 100 to 200 metres away. The witness concluded in his report that according to his observations, the cause of the accident was as a result of human error and the accident could have been averted by the reduction of travelling speed. He further indicated that according to his calculations the point of impact of the accident should have been 40 m from the first undulation or bump between the road and bridge using a simulation speed of 120 km/h and a reaction time of 1,5 seconds whereas the actual point of impact was 79,3 metres away. This appears to be consistent with the evidence of Mr Grobbelaar, the reconstruction engineer. He further testified that considering the 60 km/h

speed of the bakkie, the distance of the impact being 79,3 meters from the hazard, by using a simple formula, it can be deduced that at the point of impact, the Almera was being driven at a speed of 143 km/h.

[33] Plaintiffs' counsel submitted that the calculations made by Mr Van Vuuren could not be challenged during cross-examination because this evidence had not been put by the defence to Mr Grobbelaar when he testified. However, it is apparent that Mr Grobbelaar in his own evidence indicated he would have been able to calculate the speed at which the Almera was travelling at the point of impact if he had known the bakkie's speed, which was provided in court by Mr Nkuna, the plaintiff's witness. However, he did not do so.

[34] Van Vuuren also testified that in 2006 and 2007 he had driven on that road almost every Monday and Friday and had had no problem navigating that portion of the road. He said he also travelled on it in the years 2008 and 2009. In 2008 undulations in the road were not so severe as to draw his attention as a road user. He confirmed that there was a difference in the elevation at the Bridge. He could understand why the undulation warning sign was placed more than 600 m away from the bridge because there was a curve in the road. He said putting it after the curve in the road would have meant that the sign would have been too close to the hazard being warned against.

[35] The onus is on the plaintiffs to establish that a reasonable person in the position of the defendant firstly, would foresee the reasonable possibility of his conduct injuring another in his person and causing him patrimonial loss and secondly, would take reasonable steps to guard against such occurrence and thirdly that the defendant failed to take such steps.

[36] Apart from the evidence of Mr Nkuna and S, which is of very little evidentiary value, there is mainly the evidence of the expert witnesses as to the probable cause of the accident. The approach to expert evidence has been set out in a number of cases. In *Motor Vehicle Assurance Fund v Kenny* 1984 (4) SA 432 (ECD) Eksteen J held (I quote from the head note): 'Direct or credible evidence of what happened in a collision, must, to my mind, generally carry greater weight than the opinion of an expert, however experienced he may be, seeking to reconstruct the event from his experience and scientific training. Strange things often happen in a collision and, where two vehicles approaching each other from opposite directions collide, it is practically impossible for anyone involved in the collision to give a minute and detailed description of the combined speed of the vehicles at the moment of impact, the angle of contact or of the subsequent lateral or forward movements of the vehicles. An expert's view of what might probably have occurred in a collision must give way to assertions of the direct and credible evidence of an eyewitness. It is only where such direct evidence is so improbable that it's very credibility is impugned, that an expert opinion as to what may and may not have occurred can persuade the court to his view.' (See also *Van Eck v Santam Insurance Co Ltd* 1996 (4) SA 1226 (CPD))

[37] In *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 SCA at paragraphs [34]-[40] the Supreme Court of Appeal emphasised that the question of reasonableness and negligence is one for the court itself to determine on the basis of the various, and often conflicting, expert opinions presented. As a rule that determination will not involve considerations of credibility but rather the examination of the opinions and the analysis of the essential reasoning, preparatory to the courts reaching its own conclusion on the issues raised. What is required in the evaluation of such evidence is to determine whether and to what extent the opinions advanced are founded on logical reasoning. Finally, it must be

borne in mind that expert scientific witnesses do tend to assess likelihood in terms of scientific certainty. There is an essential difference between the scientific and the judicial measure of proof. This was aptly highlighted by the House of Lords in the Scottish case of *Dingley v The Chief Constable, Strathclyde Police* 200 SC (HL) 77 and the warning given at 89D-E that: '(o)ne cannot entirely discount the risk that by immersing himself in every detail and by looking deeply into the minds of the experts, a Judge may be seduced into a position where he applies to the expert evidence the standards which the expert himself will apply to the question whether a particular thesis has been proved or disproved - instead of assessing, as a Judge must do, where the balance of probabilities lie on a review of the whole of the evidence.'

I am mindful of the fact that that case involved a medical negligence claim and the experts were medical experts whereas in this matter before me the experts are road construction and accident reconstruction experts. However, the stated approach to medical expert opinion is equally applicable here.

[38] In *Abdo NO and Another v Senator Insurance Co Ltd and Another* 1983 (4) SA 721 (E) at 725-726 Kannemeyer J referred to the case of *Putzier v Union and South West Africa Insurance Co Ltd* 1973 ECD (unreported). The decision in Putzier's case was reversed on appeal on the facts. The judgement of the appellate division is also not reported but the approach adopted by Addelson J in the following terms was not questioned therein: 'It seems to me however that unless the opinion of the experts is either uncontroverted or incontrovertible, one should look first at the evidence of the eyewitnesses, if any. If such eyewitnesses are unacceptable then naturally the Court is bound to decide, if possible, which of the opinions of the various experts is preferable and to found its judgment on such opinion. On the other hand, where a choice can be made on a balance of probabilities and on

accepted principles between two sets of eyewitnesses, the Court should first make a provisional assessment of which of the versions of the eyewitnesses is acceptable. Having provisionally accepted one or the other version, the court should then consider the expert evidence and decide whether that evidence displaces the provisional findings made on the evidence of the eyewitnesses.'

[39] Mr Nkuna is the only eyewitness who testified in this matter. However, his evidence is not particularly helpful as he had in his statement to the police immediately after the accident stated that the Almera was travelling at a high speed but then retracted it during his oral testimony in court when he denied having said so. The deceased's elder son S was not really an eyewitness. He could only say that whilst sitting on the back seat of the Almera he had felt a jolt and thereafter everything went dark. His evidence is also not particularly helpful. Both these witnesses testified that the Almera 'jumped'. Mr Grobbelaar testified that the word jumped did not necessarily mean that the vehicle became airborne.

[40] We have then, only the evidence of several experts who gave their opinions regarding what might have happened when the Almera approached the bridge and veered into the opposite lane and collided with the bakkie.

[41] Mr Grobbelaar, the accident reconstruction expert, visited the scene of the accident more than three years later. He testified that some sections of his report are assumptions that he made based on the photographs that were taken one day and five days after the accident respectively. Mr Grobbelaar says in his report:

The photographs of the damaged Nissan Almera and damaged Nissan LDV show that the Nissan LDV probably collided with its right front into the left front side of the Nissan Almera. In

other words the Nissan Almera was probably at an angle with its front left in front of the Nissan LDV at impact when viewed from the Nissan LDV. Though not possible to quantify the magnitude of this angle with accuracy, it is likely that it was substantial when considering the extent of the damage to the left front side of the Nissan Almera.

It is unlikely that such an angle would be attained by a vehicle travelling at normal speeds for a road such as that in question and moving or swerving to the right unless the vehicle has lost control and is in some manner of a clockwise yaw. This would be so due to the relatively small angles (approximately 11°) attainable with a maximum swerve to the right into the approaching lane from a speed of approximately 120 km/h.'

[42] With reference to the gouge marks on the road, Mr Grobbelaar says in his report:

The reason for these gouges being deposited is probably as a result of the eastern edge being preceded by what appears to be a severe dip when considering the visual references to a soft drink can utilised in visualising it, though it is not possible to quantify the magnitude with certainty.'

[43] Further on, he says:

'However, when there are undulations of sufficient severity so as to cause the suspension system of the vehicle to go into full bump or close to full bump (suspension deflects into the bump stops), coupled to the uneven road surface, this would probably lead to gouging of the road surface for vehicles with component/s low enough underneath the vehicle under the circumstances, or for vehicles loaded sufficiently so as to lower the ride height (thereby decreasing the ground clearance) of the vehicle significantly. The multitude of longitudinal gouge marks in the area leading to the eastern edge of the bridge (at the western end of the

bridge) are therefore consistent with there having been a severe undulation in this area at the time of the accident.'

[44] Further on:

'Of further importance is the presence of a second undulation in the vicinity of the second road repair section some 13 m after the start of the bridge. Gouge marks can also be seen in this undulation in photographs 34, 37, 39 and 40 in this regard.'

[45] He says further that an elementary test was performed on a similar Nissan Almera with reference to its suspension system. He concluded that a critical speed of approximately 125 km/h for the Almera was produced for the distance of 19,25 metres between the two undulation points. In court Mr Grobbelaar testified that the figure of 125 km/h was a ballpark figure. The test was of an elementary nature and it was not the actual vehicle involved in the accident and the fact that the accident vehicle was loaded whereas the test vehicle was not loaded and that the exact spacing of the undulations were not determinable, the speed that he arrived at can only be seen as a rough approximation and:

'... would clearly be sensitive to changes in either the distance between the undulations as well as the natural frequency of the sprung mass of the Nissan. In this regard, for the accident Nissan been loaded, the natural frequency would probably be lower than that of the test vehicle with the implication of a lower calculated speed being the result. Both of these parameters (distance between undulations and frequency) would have a linear relationship with the critical speed (i.e. a 10% increase or decrease of either of them would result in a 10% increase or decrease in the critical speed. For speeds lower than the critical speed, the suspension system of the vehicle would have been able to rebound sufficiently to absorb the shock of the entry into (and the exit from) the second undulation, whereas for speeds faster

than critical speed, the suspension system would still be compressing when the vehicle exits the second undulation.'

[46] At paragraph 10 of his expert report Mr Grobbelaar says:

The expected dynamics of the Nissan, as discussed in the above paragraphs, is consistent with the version of the passenger in the Nissan Almera where he indicates that the Nissan hit a hump and jumped, though it must be noted here that the severity of the jump would be dependent on a number of factors such as the severity of the undulation and vehicle factors.'

It is clear that by "vehicle factors" Mr Grobbelaar also included therein the speed of the vehicle. He then refers to S's evidence that his mother lost control of the vehicle and says: 'Such a loss of control would be exacerbated in the event of the Nissan Almera being loaded at the time of the accident due to greater forces been induced as well as the ground clearance of the Nissan Almera reducing (i.e. the underside of the vehicle riding closer to the road surface). In this regard, it is understood that at the time of the accident the occupants of the vehicle with two adults and two children with there also being considerable baggage in the vehicle as they were going on vacation.'

[47] Finally, Mr Grobbelaar says:

'An opinion regarding the speed of the Nissan Almera at impact, calculated from the point of view of the Law of Conservation of Momentum, may be provided once the colour police photographs have been obtained in order to better establish the location of the gouge marks in relation to the positions of rest of both of the vehicles, and the speed at which the Nissan LDV was travelling at impact has been obtained.'

[48] Significantly, although Mr Nkuna testified that the LDV was travelling at 60 km/h and, no doubt, the colour photographs had been obtained some time prior to the trial, Mr Grobbelaar was not asked to or did not prepare a report regarding his opinion on the speed of the Almera.

[49] It is also significant to note that when the photographs were taken to depict the height or measurement of the depression at the bridge a Coca-Cola can was inexplicably used as well as a pen. The depth of the depression being the height of a Coca-Cola can, that is, an upright can, was disputed by several of the defendant's witnesses. In my view, it would have been a simple matter for the depth to have been measured with a proper measuring tape. Why this was not done is not understood. The defendant's witnesses testified that the depth of the depression would be approximately the height of the can lying on its side. In the circumstances it is difficult to draw a conclusion as to the depth of the depression or undulation, although, taking all the evidence on this aspect into account it is probable that it was the height of the can lying on its side. No evidence was led about the actual height and width of the Coca-Cola can. However, I am of the view that I can take judicial notice of the fact that it is about 110mm in height and its diameter 52mm.

[50] Under cross-examination, Mr Grobbelaar testified that his calculations regarding the speed of the Almera were very rough calculations because there were too many variables and some unknown ones as well. He ventured to suggest that the vehicle speed would have been anything between 80 to 110 km/h and that at the moment of impact it was perhaps travelling at 80 km/h. He further said under cross-examination that the gouge marks that were visible and to which he refers in his expert report could have been caused by the trailers of other motor vehicles. Of importance also is that he conceded that he did not know what the depth of the undulation was.

[51] The other expert witness for the plaintiff, Mr Bergh, also made certain assumptions based on the height of the upright Coca-Cola can depicted in some of the photographs. To that extent, his conclusion that the depression was 160 mm (bearing in mind that the can is 110mm high) and that therefore it meant that the settlement took place over 6 to 10 years cannot be accepted without reservation given the defence version that the depth of the depression was about the height of the can lying on its side - a version which I find to be more probable.

[52] The thrust of Mr Bergh's testimony and his report related to the two warning signs. He testified that the "drift" warning sign which was located 296 m away was not a good warning sign and gave the wrong message as it spoke of a drift and gave no indication of any reduction in speed. He said the sign should have been 240 m away on a road with a 100 km/h speed limit as was the road in question.

[53] The other warning sign was the 'uneven roadway' sign which was located 634 metres from the bridge. He said that according to the South African Road Traffic Manual the location of the sign should have been 240 m from the hazard if the speed limit was 100 km/h on that road.

[54] Mr Bergh testified that according to the manual:

The drift warning sign W350 is to warn road users of a drift ahead which may contain water, rock outcrops or loose material or which may represent a hazardous depression in the roadway when dry.'

He was of the view that the erection of the uneven roadway sign 600 m from the hazard was

not effective. Insofar as the drift warning sign is concerned he says:

The motorist was travelling on the R518, which is a well aligned road both horizontally and vertically.... The driver approaches the bridge and some 300 m from the bridge, the motorist sees a clear open road, well aligned both vertically and horizontally and travelling on a surface free of potholes. He passes sign W350 indicating to him a “drift”-on a main provincial road? - and he sees a bridge ahead of him. The question that comes out loud and clear is would he have reduced speed?’

The clear answer in my view, is that he should reduce speed. He or she cannot simply ignore the warning signs, especially if he or she was not a regular user of the road (the evidence is that Ms Lauwrence was not) and therefore unfamiliar with its condition.

[55] Mr Bergh concluded his report by stating that the roads department authority in charge of the relevant road was fully responsible for the risk of taking the decision to postpone any urgent repair work to the approach to the bridge.

[56] It was put to him under cross-examination that if his opinion was to be accepted then there should have been many more accidents yet there had never been an accident at the bridge since 2004. His response was that that depended on the driver and his experience. In answer to a question from the court as to why would that particular motor vehicle behave the way that it did when the evidence is that on average 1000 motor vehicles per day travel on that stretch of road without apparent difficulty, his response was that he could not comment on it.

[57] The question that arises is whether the defendant took reasonable steps to guard against the presence of harm to road users. It is not in dispute that the officials of the defendant were

aware about the settlement at the bridge as Mr Engelbrecht had complained about it. During his evidence Mr Minnie testified that he responded to the complaint of Mr Engelbrecht by visiting him at his farm to discuss it in detail. He testified that he had inspected the road and during the inspection he drove over the settlement at a speed of about 100 km/h without any problems. Contrary to the evidence of Mr Bergh, who inferred the size of the undulation from the photographs, he had personally driven over the undulation and estimated it to be half the measurement of the upright Coke can.

[58] Mr Van Vuuren's evidence was particularly subject to criticism by plaintiffs' counsel in the heads of argument. Mr Van Vuuren testified that he has driven on the same road over a number of years. He said that if one drove at a reasonable speed, one could safely travel over the settlement at the bridge.

[59] The person who used the coke can to measure the undulation and who took some of the photographs referred to was not called to explain why a can was used to measure the depression at the bridge.

[60] Mr Engelbrecht had lodged only two complaints, one in 2006 and another in 2008. He conceded that temporary repairs were made subsequent to the complaints albeit not satisfactory according to him. He further acknowledged in his correspondence with the Department that temporary repairs were made. When he complained on 8 August 2008, the defendant sent a team to repair the settlement on 22 September 2008. Subsequent to the repairs, Miss Mabitsela inspected the repairs the following day and was satisfied that they were adequate for safe use of the road at the bridge.

[61] It is also to be noted that the “uneven road” warning sign was erected immediately prior to a curve in the road. In my view, that would make sense as it would probably lose its effectiveness if it was installed inside of the curve. Furthermore, the second sign, i.e. the drift sign, was erected after the curve.

[62] The accident occurred at 10:00 hours in the morning and several witnesses confirmed that visibility was clear. In my view, a reasonable driver would not have missed seeing the two warning signs which were reasonably spaced to convey messages of a possible danger ahead. In this regard it should also be borne in mind that Mr Van Vuuren testified that the distance at which the warning signs are placed was not compulsory but rather is a discretionary matter as various factors had to be taken into account when placing a road sign. He said that the road design engineers have discretion when erecting the warning signs and the manual is only a guideline in this respect. The evidence of Mr Bergh that the warning signs were ineffective as they were erected contrary to the guidelines in the manual can therefore in my view not be accepted. It is clear that the particular circumstances of the road at the relevant place were such that it was no doubt considered expedient to erect the two warning signs, one before the curve to warn road users in advance about the hazard, and the other 296 m from the hazard to remind the road user that a hazard is still ahead.

[63] In my view, the steps taken by the defendant in repairing the road and erecting warning signs were in the circumstances reasonable. Mr Engelbrecht testified about two accidents that previously occurred at the bridge but could not elaborate as to the cause of those accidents nor provide any detail in that regard. There is no evidence that there were many accidents that occurred that required anything more than what the defendant had done. In fact, as I said, the evidence is that the road was very busy with more than 1000 vehicles using the road

per day. With such a high number of vehicles - many of them trucks - using the road, there would probably have been many more accidents if the settlement was as severe as described by Mr Bergh. The defendant cannot be faulted in accepting that the steps it was taking in doing remedial repairs and having warning signs erected was reasonable and effective considering the number of accidents vis-a-vis the number of vehicles using the road on a daily basis.

[64] The test is not that the steps taken by the defendant must be effective and absolute in preventing the foreseeable harm. All that is required is that such steps should be reasonable. In dealing with a similar argument the Court in Pretoria City Council v De Jager 1997 (2) SA 46 (AD) at 55 E-I stated:

The Court a quo found that the Council had failed to take reasonable measures to guard against the danger created by the excavation not only because it had failed to provide an adequate walkway but also because of the inadequacy of the fence. The fence was held to have been inadequate on the simple ground that it had not prevented the plaintiff from falling into the hole. The conclusion that the Council was obliged to provide a fence of the type that would prevent such an occurrence was based, at least partly it would seem, on the finding that by reason of the inadequacy of the walkway the plaintiff had regarded herself as obliged to take the route she did. That route was undoubtedly dangerous because of the close proximity of the hole to the road. In this Court counsel for the plaintiff contended that even accepting that the walkway was adequate, the Council remained obliged to provide a fence that was of such a nature as to physically prevent pedestrians from falling into the hole as it was reasonably foreseeable that at least some pedestrians would take the shortcut to the traffic lights.

The Council was obliged to take no more than reasonable steps to guard against foreseeable

harm to the public. Whether in any particular case the steps actually taken are to be regarded as reasonable or not depends upon a consideration of all the facts and circumstances of the case. It follows that merely because the harm which was foreseeable did eventuate does not mean that the steps taken were necessarily unreasonable. Ultimately the enquiry involves a value judgement....'

[65] Plaintiffs counsel sought to rely on the case of McIntosh v Premier, KwaZulu- Natal and Another 2008 (6) 1 (SCA). However, that case is distinguishable from the matter before me. In McIntosh the court found that the defendant had failed to erect any warning signs to alert road users of the hazard on the road. That is not the case in this matter as the defendant did not only effect repairs at the bridge, albeit temporarily, approximately two months prior to the accident but had erected visible warning signs to road users. Given the volume of traffic on a daily basis it seems clear that if road users adhered to the road warning signs and drove at a reasonable speed the undulations could be safely navigated, which is what approximately 1000 vehicles per day did.

[66] 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 of much help.

[67] It is also important to note that the expert witness Mr Grobbelaar said during cross-examination that in coming to his conclusions he had relied on the documents that were provided to him. Included in those documents is the statement of Mr Nkuna who said that the Almera was travelling at a high speed and lost control. During his evidence Mr Grobbelaar did not refer to the contents of the statement as having been inconsistent with his findings in regard to the question of speed. The only inference to be drawn is that the consistency of the statement with his findings also included the high speed. It is also to be noted that Mr Grobbelaar himself stated in his report that the momentum of the Almera was probably larger than that of the Nissan LDV at the time of the impact.

[68] 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.

[69] The facts of this case resemble or are similar to those considered in the case of *The Member of the Executive Council for Transport for the Province of KwaZulu- Natal v John Morea Eastman and Others*, case no. 680/09 (SCA) (unreported) where the court found that speed was the sole cause of the accident. The Supreme Court of Appeal set aside the apportionment of negligence which was made in the court a quo. In his evaluation of the evidence in *Eastman*, Navsa JA, considered almost similar evidence as in this matter, inter-

alia, the evidence of witnesses who testified about their historical dissatisfaction with the state of the road before the accident. (See paragraphs 24 to 36 where the evidence of the various witnesses called to testify on the unsatisfactory state of the road is reported.) They testified about the damage to the road where the accident occurred. The Court took into account the fact that the road was used by some 200 vehicles daily and the figure could have been more by the time the accident had occurred. According to the Court, that meant that thousands of vehicles would have travelled over that stretch of the road during wet weather season. The only vehicle that left the road during that time was the one driven by Mr Mitchell. The learned Judge held at para 46:

‘Immediately before the vehicle started to slide Mr and Mrs Eastman and significantly, Mr Mitchell, all had cause to be concerned about the speed at which the vehicle was travelling. It is no mere coincidence that the vehicle started sliding at the time that their anxiety was heightened. To my mind, that evidence is decisive. The conclusion is ineluctable that it was the speed at which Mr Mitchell was driving that caused the vehicle to slide off the road. It is the speed that passengers were startled by that distinguished this vehicle’s passage from others on that stretch of the road. Mr Mitchell was negligent in not reducing his speed to meet the exigencies of the prevailing conditions.’

[70] In my view, had the deceased complied with the speed limit and the road signs, and furthermore even reduce speed after having observed the warning signs, the accident could have been avoided as it is avoided daily by almost 1000 road users of the relevant road. It cannot be said that all of the approximately 1000 road users comprise of people who were familiar with the road. The fact that Ms Lauwrens was not familiar with the road can therefore not be a factor. In fact, it would require more vigilance on her part as she was not familiar with the road, particularly after having noted two road warning signs. Taking all factors into account

it would appear that the cause of the collision was excessive speed on the part of Ms Lauwrens. That in my view is the inescapable inference to be drawn.

[71] There shall be absolution from the instance with costs.

N. RANCHOD

JUDGE OF THE HIGH COURT

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