

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A180/2012

In the appeal between:-

MOQHAKA MUNISIPALITEIT

Appellant

and

IDE CLAASSENS

Respondent

CORAM:

C J MUSI, J *et* MOLOI, J

HEARD ON:

18 FEBRUARY 2013

DELIVERED ON:

28 MARCH 2013

JUDGMENT

K.J. MOLOI, J

- [1] The appellant is Moqhaka Municipality, a local government structure established under the provisions of the Local Government: Municipal Structures Act No 117 of 1998. The appellant appeals against the judgment for damages of the magistrate, Kroonstad, in favour of the respondent herein.
- [2] The respondent instituted a claim against the appellant for damages caused to her motor vehicle in Suidweg, Kroonstad, when her motor vehicle hit a pothole on the

tarmac damaging two of the vehicle's tyres and a stone guard on 17 January 2011. The claim was for payment of the amount of R9 466,56.

[3] In its plea, the appellant denied that the incident happened. In the alternative the appellant pleaded that the negligence of the respondent caused the damages to her motor vehicle. In the further alternative it pleaded that its negligence, if any, did not cause the damages. In further alternative it pleaded that if the court found that it was negligent and that its negligence caused the incident, then, in that event, that the respondent was contributorily negligent.

[4] After evidence of the respondent and her witnesses the magistrate found no contributory negligence on the part of the respondent based on the ground that the appellant closed its case without giving evidence to prove the contributory negligence on the part of the respondent. The magistrate assessed the respondent's damages as follows:

A set of "Stone Guards"	R5 414.00
Labour	300.00
Wheel alignment	150.00
Two tyres at R460.00 each	920.00
TOTAL	<u>R6 784.00</u>

[5] In the grounds of appeal it was contended that the magistrate erred in finding that the respondent was not contributorily negligent and that she had not proved the quantum of her damages. Before the appeal was heard the

appellant applied for extension of the grounds of appeal to include the fact that the trial court erred in finding for the respondent when she had failed to allege and prove that the appellant had a legal duty to keep the said road in a state of good repair; that the failure of the appellant to repair the road was wrongful and resulted in the respondent suffering damages; and that the trial court ought to have granted absolution from the instance as a result. This application was not opposed and was consequently granted.

- [6] On the question of the respondent's negligence and/or her contributory negligence it was contended by Mr Pienaar that the fact that the appellant failed to give evidence to that end was of no consequence as held by the magistrate. It was contended that the respondent, in her evidence, conceded that in general the street surfaces in Kroonstad were in a poor state of repair and abounded in potholes; with regard to South Road that the respondent knew of the existence of the pothole in question as she had seen it some months before and expected it to have worsened over time. It was also contended that the speed of 60 – 65 km/h at which she travelled, was excessive and led to her failure to avoid the pothole that caused the damage to her vehicle. Moreover, the respondent had conceded that it was not right for her to drive at that speed in the circumstances bearing in mind that the respondent was aware of the poor state of the road at that point.

- [7] The fact that the appellant failed to give evidence is of no consequence in determining the respondent's negligence as that finding could be made with reference to the evidence placed on record by the respondent and other witnesses. What is, however, disturbing is that the appellant was aware of the state of disrepair of the roads in Kroonstad and the said road where the incident occurred, in particular, and had been aware of that for a number of years before the incident. Despite the existence of that dangerous situation which could result in damages to the vehicles of the road users, the appellant allowed the situation to persist and, indeed, worsen, the potholes multiplying and becoming bigger and deeper. The appellant's attitude towards this consciously created situation was that those using the road must exercise care and avoid hitting the potholes with their vehicles. According to the respondent she lived all her life in Kroonstad and knew about the pothole at the place of the incident; she was driving her vehicle at 15h45 that day and could not see the said pothole until it was too late; when she saw the pothole she noticed that next to it there was another pothole which made it impossible for her to swerve away to avoid it as doing so would result in her hitting the other pothole nonetheless and that there were no warning signs indicating the existence of potholes in that road.
- [8] A prudent municipality would ensure that potholes in its roads were covered as soon as it became aware of their existence and not place a burden on the road users to take evasive action to avoid hitting them and consequently

damaging their vehicles. In this case there was evidence that the damage such as was caused to the respondent's vehicle would happen even if the vehicle was moving at 30 km/h or even 10 km/h. The issue of the speed at which the respondent was moving becomes academic much as care must always be exercised to avoid hitting the pothole she knew was there. The question of the second pothole near the one hit by the respondent made it difficult, if not impossible, for the respondent to have taken evasive action even if she was moving at 10 km/h.

- [9] In section 152(1)(b) of the Constitution of the Republic of South Africa Act No 108 of 1996, it is stipulated that one of the objects of local government is "to ensure the provision of services to communities in a sustainable manner". Schedule 5 Part B of the said Constitution mentions "municipal roads" as one of the responsibilities of local government making it one of the services the municipality must perform on a sustainable basis. The keyword here is sustainable. The **New Shorter Oxford English Dictionary** states that to sustain is 'to cause to continue in a certain state; maintain at the proper level of standard. Maintain or keep going continuously; sustainable as 'being able to be maintained at a certain rate or level' and sustainer means "a person or thing which sustains, upholds or maintains something; a supporting structure. **Collins Cobuild English Dictionary** says sustainable means "plan, method or system can be continued at the same pace or level of activity without harming its efficiency and the people affected by it".

- [10] From the above it becomes clear that the appellant had a legal duty to keep the road in a good state of repair *ex lege*. The additional defences raised by the appellant, namely that the respondent failed to allege (in her summons) and prove that the appellant had a legal duty to keep the roads in a good state of repair on a sustainable basis and that the failure of the appellant to do so would result in the respondent suffering damages, were matters that should have been addressed by way of an exception or pleaded in the magistrate's court. That was, however, not the case, the appellant conceded at the hearing of the appeal. They were brought forward at appeal stage as an afterthought.
- [11] As to the question of the respondent's quantum, the magistrate took into account the evidence of the experts who testified as to the costs of new as against retreaded tyres; the actual costs of the stone guard which could not be repaired by any means; the actual costs of the wheel alignment which was an absolute necessity to be done and the actual labour costs, that was not disputed. This exercise brought the magistrate to a reduced sum of R6 784,00 as opposed to the original amount of R9 446,56 claimed with regard to the new tyres the respondent had claimed.
- [12] The appellant relied heavily on the case of **Cape Town Municipality v Bakkerud** 2000 (3) SA 1049 (SCA) at 1060D where the following was stated:

“There can be no principle of law that all municipalities have at all times a legal duty to repair or to warn the public whenever and whatever potholes may occur in whatever pavements or streets may be vested in them.”

Furthermore, the appellant referred to the same case at 1060E – F where the following was stated:

“It is axiomatic that man-made streets and pavements will not always be in the pristine condition in which they were when first constructed and that it would be well-nigh impossible for even the largest and most well-funded municipalities to keep them all in that state at all times. A reasonable sense of proportion is called for. The public must be taken to realise that and to have a care for its own safety when using roads and pavements.”

The appellant was hereby attempting to have the respondent liable for contributory negligence.

- [13] The fact is that the facts of this matter are not the same as those in the **Cape Town Municipality** case above. In this case the appellant itself told that it was aware, and for a long time for that matter, that the roads within its area of responsibility were in a terrible state of repair and that it had a number of claims pending against it caused by the potholes that are worsening by the day; that it is using that fact as a defence against such claims and thus proud of that state of affairs, that the public have virtually no roads to travel on and if they do, they must bear the costs of damages occasioned by the roads, defeating the very purpose they are created for, viz to keep the roads user-friendly on a sustainable basis.

The appellant offered no explanation or excuse why its roads over extended period of time are allowed to deteriorate in that manner. This was not the case in the **Cape Town Municipality** case. The following except from the same case at 1060F – G (par [30]) indicates the point:

“It is not necessary, nor would it be possible, to provide a catalogue of the circumstances in which it would be right to impose a legal duty to repair or warn upon a municipality.”

This, in my view, is one such case where such a legal duty should be imposed. The municipality's attitude is unpalatable and creates, deliberately so, a dangerous situation for any road user and it seems to pride itself therein. It brandishes the bad state of its roads as a defence while doing nothing for many years to have the roads repaired.

[14] I can find no fault with the magistrate's handling of the matter and the appeal must fail.

Consequently the APPEAL IS DISMISSED with costs.

K.J. MOLOI, J

I concur and it is so ordered.

C.J. MUSI, J

On behalf of appellant: Adv C.D. Pienaar
Instructed by:
Naudes
BLOEMFONTEIN

On behalf of respondent: Adv M.D.J. Steenkamp
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