

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)**

Case No: 32201/05

Date heard: 04/06/2009

Date of judgment: 17 June 2009

In the consolidated matter between:

M.A. Vosloo

Plaintiff

and

Ekurhuleni Metropolitan Municipality

Defendant

Estie Civils (Pty) Ltd

Third Party

Case No: 32786/05

L. Kenny

Plaintiff

and

Ekurhuleni Metropolitan Municipality

Defendant

A. Botha N.O.

1st Third Party

Estie Civils (Pty) Ltd

2nd Third Party

M.A. Vosloo

3rd Third Party

JUDGMENT

DU PLESSIS J:

On the evening of Sunday 20 February 2005 just before 20h00 Mr MA Vosloo was on his way home with his motorcycle. A friend, Mr Kenney, was riding pillion. They were travelling north in Albatros Road in Kempton Park when, trying to avoid an obstruction in the road, Mr Vosloo hit a mound of earth that was heaped next to a hole in the road. Both men were thrown from the motorcycle and both were injured. Mr Kenney died as a result of his injuries.

It is common cause that the accident occurred in the municipal area of the defendant, the Ukurhuleni Metropolitan Municipality. Two actions for damages arising from the accident were instituted against the defendant. In the first action Mr Vosloo, the plaintiff in case number 32201/05, contends that the defendant's unlawful and negligent failure properly to warn road users of the hole in the road, caused the accident. He claims from the defendant damages arising from his injuries and also damages resulting from the damage to his motorcycle. The defendant denies that it was negligent and pleads that the accident was due to the plaintiff's own negligence. In Mr Vosloo's action the defendant has also joined Estie Civils (Pty) Ltd, the contractor who dug the hole, as a third party. As an alternative, the defendant contends that the accident was due to Estie Civils' negligence. Estie Civils did not defend the third party notice.

In the second action Ms Lianne Kenney, the daughter of the late Mr Kenney, claims damages from the defendant for her loss of the support of her late father. In Ms Kenney's action Vosloo, the late Mr Kenney's executrix and Estie Civils were all joined as third parties on the footing that the alleged negligence of Vosloo and Estie Civils were contributory causes to the accident and that Kenney's own negligence contributed to his death.

The parties, excluding Estie Civils agreed to seek an order consolidating the two actions and an order separating the quantum of damages in each action from the other issues. A draft order to this effect prepared by the parties was made an order of court. The consolidated actions are now before this court. I shall refer to Mr Vosloo as the plaintiff, to the defendant as such and to the other parties by name.

It is common cause that Albatros is a busy road. Where the accident took place it is a dual road, divided by a traffic island in the middle. There are two lanes for traffic from south to north. As only those lanes are relevant, I shall refer to them simply as the right hand lane and the left hand lane. By agreement photographs of the scene of the accident taken the day after the accident, Monday 21 February 2005, were placed before the court as Exhibit B1, B2, B4 and B5. While there is a dispute as to whether the road signs depicted on the photos were there at the time of the accident, the photos show the road and the hole in it as it was when the accident took place.

It is not in issue that the defendant commissioned Estie Civils to dig the hole in order for the defendant to install certain valves in an underlying water pipe. The hole in the road was dug in the course of the week before the accident. The photos show that the hole was dug in the right hand lane but more towards the island in the middle. Soil excavated from the hole was heaped to the north and west of the hole. The excavation site comprising the hole and the heaped soil ("the site") blocked practically the entire right hand lane. The hole was about 1,5 to 2 meters (5 to 6 feet) deep.

The plaintiff testified that he and Mr Kenney left Bonaero Park, where they lived, at about 08h30 that morning on what is colloquially called a breakfast run. They were on their way to Delmas but it was raining and they stopped at the Babsfontein hotel where a comedian was entertaining customers. At about 15h00 they proceeded to Delmas, but due to the rain returned to Babsfontein from where they left in the early evening. He did not drink any intoxicating liquor the plaintiff said. He confirmed that a bar frequented by motor cyclists, called the Mad Hatter, is close to the scene of the accident. He did not go there on the day, however. When the plaintiff gave evidence, some time was spent to find out which route he had taken from his home in the morning and which he took coming back. The purpose thereof was to show that he had probably gone past the Mad Hatter bar and had taken alcohol there. There is, however, no evidence that he was under the influence of alcohol, and I find it unnecessary to deal with

the evidence regarding the routes he took. That includes similar evidence by other witnesses.

On their way back to Bonaero Park they turned into Albatros Road. It was still “pouring rain” at the time and he travelled in the right hand lane at no more than 65kph. The street lights are on the island and the plaintiff travelled in the right hand lane to make the best of the light there.

Directly before the collision, the plaintiff saw a pole in the road about two meters in front of him. The pole had no sign on it. It was too late to brake and in order to avoid the pole, the plaintiff swerved to his right. As he did so he saw the hole in the road in front of him. The hole was not even a meter beyond the pole. The plaintiff said that he then swerved left in an effort to avoid the hole and the motorcycle’s front wheel stuck in the soil heaped around the hole. It cart wheeled and both the plaintiff and the late Mr Kenney were thrown from the motor cycle. The plaintiff landed about five meters beyond the hole and Mr Kenney landed still further.

Mr Vosloo said that there were no road signs whatsoever warning oncoming traffic of the hole in the road. He could not remember speaking to Inspector Lesufi, a metro policeman who attended the scene, and telling him that he “did not notice the road sign of the road work”. (The quotation is from Lesufi’s accident report, Exh. A68).

Mrs Colleen Pretorius testified for the plaintiff that at the time of the accident she was employed as a para-medical officer by Trauma Med, a private undertaking. On the night in question she was on duty, driving as a front seat passenger in an emergency vehicle. She and two of her colleagues were driving north in Albatros Road. The witness confirmed the plaintiff's evidence that it was raining hard. They were in the right hand lane. Mrs Pretorius said that they saw activity and an obstruction in the left hand lane, and moved in that direction in order to illuminate that side. She later explained that what they saw were the two men lying in the road but moving. They also saw the motorcycle. In short, they saw the scene of an accident. As far as she could remember there were no other people on the scene yet but it is possible that someone had waved them down. There definitely was no policeman.

Mrs Pretorius was not very precise as to where the two men and the motorcycle were on the road. She said that it was on the left hand lane, but she also said it was nearly in the middle of the two lanes.

Mrs Pretorius and her colleagues stopped and rendered assistance. She attended to the plaintiff and said that she did not smell any alcohol on his breath. Other emergency services arrived and she left the scene in one of the other ambulances taking the deceased to the hospital. There she and her two colleagues rendered further assistance. After leaving the hospital, they again drove past the accident scene. It was then about 21h30 or 22h00. An

investigator was on the scene taking measurements. They also saw a man erecting sign boards there.

According to Mrs Pretorius she only became aware of the hole in the road when they returned to the scene. When they came there for the first time, there were no signboards warning road users of the hole in the road. In fact, she testified, had they not seen the accident scene, they would have driven into the hole. When they went back to the scene, however, they saw several warning signs as they approached the scene.

Mr Ralph Flindt, the driver of the emergency vehicle in which Mrs Pretorius also was, gave evidence on behalf of Miss Kenney, the plaintiff in the second consolidated action. He confirmed that at about 20h00 they were driving north in Albatros Road at about 80kph. It was raining, a heavy drizzle. He said that, when he was about ten meters away from it, he saw a “mine dump” in front of him in the road. He slowed down and swerved to the left. He then saw the accident scene. There were some bystanders there but definitely no metro policeman or emergency service personnel. He stopped and they rendered assistance. He attended to the deceased and could not smell alcohol on his breath.

Mr Flindt said that there were no road signs to warn oncoming traffic of the hole. He confirmed the evidence of Mrs Pretorius that, after they had been to the hospital, they drove past the scene again. He saw a man there with a vehicle

putting up signs. In cross examination he said the man, wearing a blue overall, had a road sign in his hand. Although he again said that the man was putting up signs, he also said when questioned further, that he could not say exactly what the man was doing.

For the defendant Mr FW Bryce testified that in 2005 he worked for the defendant as a prosecutor in the municipal court. He had previously been a policeman and was trained in the investigation of accident scenes. Due to manpower shortage in the defendant's accident bureau, charged with investigating serious accidents, he helped out as an investigator over weekends. He was on duty on the Sunday of the accident.

Mr Bryce referred the court to a number of entries in the occurrence book of the metro police. According thereto the defendant's engineering department made regular reports, starting on the Friday, that everything at the excavation site was in order. Bryce said that earlier on the day of the accident he was returning from another accident when he heard a civilian person who identified himself as being from Estie Civils talking on the official radio of the metro police. The person reported that the signage and markings at the site were all in place. The person reported that he had checked the signage as there had been an accident at the site a day or so earlier. Bryce drove past the site and he found it properly marked. There were more signs, but he could remember seeing drums with red and white tape on them and orange cones on the tarred surface demarcating the site.

Bryce said that he was called to the scene of the accident at about 20h26. He put on a reflective overall and drove to the scene where he arrived some 10 to 15 minutes later. The two injured men had already been removed but he found Inspector Lesufi of the metro police, Mr Jaco Els of Estie Civils and family of the injured persons on the scene. Els told Bryce that somebody had raised concerns about the marking of the site. Bryce then walked to a bridge about 250 plus meters to the south of the hole. Moving back towards the site, he took photos of every road sign and other equipment marking the site. He also made notes of what he saw. Thereafter he took a measuring wheel and measured the distance from each sign to the site.

On the Monday after the accident Bryce briefed Superintendent Van Greunen, the head of the accident bureau about the accident and his investigation thereof. He gave his notes and photos to Van Greunen. Based on this briefing, Van Greunen drew a written report (Exh. A1 to 3). Bryce confirmed the content of the report. According to the report the following road signs were in place on the night of the accident (distances are to the site when approaching from the south):

- i. At 212m a "road works ahead" sign;
- ii. at 191m a 20kph speed limit sign;
- iii. at 181m a sign that the road narrows from the right;
- iv. at 160m and again at 143m keep left signs;
- v. at 122m another 20kph speed limit sign;

- vi. at 105m a further keep left sign;
- vii. at 91,7m another sign indicating that the road narrows from the right;
- viii. at 77,8m a “road closed” sign;
- ix. at 49,1m a sign to keep left and one that the road narrows from the right;
- x. at 44,1m “hazard and chevron boards”;
- xi. at 27,4m a keep left sign.

In evidence Bryce said that all the signs mentioned in the report were actually on the scene when he arrived there. The first three were on the island but the other signs were all in the road. Not mentioned in the report, Bryce said, there also were orange cones on the road to the left of the site and drums next to the site. Bryce said that he could not remember anybody putting up signs that night but added that Estie Civils might have put up additional signs.

According to Bryce the only reason for the accident can be that the plaintiff ignored the signs. The signs were placed such that, in order to ride into the soil heap, the plaintiff had to weave through the signs and other markings. Later he added that for Flindt to have driven up to ten meters from the soil heap, he must have knocked over several road signs.

Of all the photos that Bryce said he took on the scene, only indistinct copies of seven were put before the court in the form of an album (Exh. A4 to 10). Only the road sign closest to the site, a keep left sign, is shown on two of these photos (Photos 01 and 02 in exh. B5). The photos do not show or purport to show any

other road sign. The captions of both these photos convey that the photos show “where the road sign was”. Bryce said that one of the spools of photos taken were lost while in Van Greunen’s possession. Van Greunen has since passed away. With reference to the photos taken on the Monday, Bryce said that the signs shown on exh. B5 were on the scene when he was there. Looking in the direction of the site, the signs on B5 are, first, a road narrows to the right sign placed on a tripod on the island. Secondly, the photos show a road closed sign placed in the right hand land next to the island. In the third place, the photo shows a keep left sign placed in the right hand lane, close to the barrier line between the right hand and left hand lanes, nearly in front of the site but a little to the left thereof. The road signs on the photo correspond with those mentioned in paragraphs vii, viii and ix above, except that vii is depicted on the island and not on the road as testified to by Bryce. The other photo on exh. B5 shows two drums in a north/south line to the left of the site and connected by red and white tape. Cones are also shown on the photos.

Inspector SS Lesufi of the metro police was called to the scene soon after the accident. He testified that when he arrived it was not raining but soon thereafter it started to drizzle. The plaintiff and the deceased were still on the scene but there was nobody else. On finding that the two men had been injured seriously, Lesufi called for an ambulance.

Still on the scene, Lesufi spoke to the plaintiff who told the inspector that “he did not notice the Road Sign of the Roadwork. Unfortunately he went over them

and then tried to over (*sic*) the hole ...” (The quotation is from Lesufi’s accident report, exh. A68). Lesufi testified that he found chevrons intermittently placed from about 500m to the south of the site so as to warn oncoming traffic that the road is narrowing to the left. Close to the site such a chevron was placed across the right hand lane. There were metal “pins” (poles; standards) around the hole with “danger tape” (red and white striped tape) put up in between them. He testified that he does not remember seeing cones on the road when he arrived. It is possible that the emergency services placed such cones. In cross examination Lesufi, however, said that the plaintiff went past the cones. According to Lesufi, the plaintiff must have driven through between the chevrons. The motorcycle, Lesufi said, then hit the soil heap, jumped over the hole, broke the tape and overturned and scattered some of the standards. From skid marks he saw, Lesufi concluded that the plaintiff must have been driving very fast.

Lesufi said that he arranged for Bryce to be called to the scene. He was with Bryce when the latter did his investigation (“tried to find the point of impact”). Lesufi, however, also said that he left when the ambulance did. While he was there, he did not see anyone putting up road signs.

Mr DJ Mulder works in an administrative capacity for the defendant’s water department and he did so at the time of the accident. For reasons that are not relevant the water department decided, in the week preceding the accident, to install a valve in a water pipe underlying Albatros Road. The defendant commissioned Estie Civils to do the excavation. Although he did not do the

appointment, Mr Mulder testified that it was done on his recommendation. He recommended Estie Civils, among other reasons, because he knew them as a reputable firm that had done large contracts for the defendant. Mr Mulder expressed the opinion that the proper marking of the site was the duty of Estie Civils. He added that, in the past they had done so adequately on other sites. The witness said that, from the defendant's side, its operations officer was responsible for overall supervision of Estie Civils' work, including the proper marking of the site.

Mr Mulder testified that he visited the site on the morning of Friday, 18 February. He had heard that a car had driven into the site on the Thursday evening, but the purpose of his visit was to assess work progress. For purposes of warning oncoming traffic thereof, he found, he testified, the site adequately marked. He could remember that there were a road closed sign, a keep left sign and a sign indicating that traffic must move to the left. On the Saturday morning he drove past the scene by coincidence. There were noticeably more road signs. At that stage, Mulder said, there were signs intermittently from about 250m to the south of the site. In addition to the signs on the Friday, he could recall a sign to reduce speed and a speed limit of 40kph.

The defendant's last witness was Mr LM van Niekerk who is, and was at the relevant time, employed by the defendant as a manager in its traffic engineering department. The maintenance of road signs and the installation of new ones formed part of his work. The site was opposite the offices of the defendant's

traffic department. In the week before the accident, Mr Van Niekerk saw the excavation in the road, formed the view that the marking thereof was inadequate and informed the head of his department accordingly. When Mr Van Niekerk drove to his office on the Friday morning, he saw that a car had driven into the site. Despite his earlier communication with his departmental head, Mr Van Niekerk saw on the Friday morning that the marking of the site was still inadequate. There were, he said, a “road closed” sign, a “keep left” sign and cones on the road. There might have been a “road works ahead” sign. Mr Van Niekerk said that he again called his senior to inform him of the situation and Van Niekerk requested his senior to attend to the problem.

On Saturday morning Van Niekerk realised that nothing had been done to improve the marking of the site. He received a phone call from Mr Els of Estie Civils who asked him whether he (Els) could borrow road signs from the defendant. Although not authorised to do so, Van Niekerk went to the depot, took signs from it and lent them to Els. He also helped Els to put the signs up.

Starting 250m to the south of the site, Van Niekerk and Els put up a graphic sign indicating that there are road works ahead, a 60 or 40kph speed limit sign (the defendant has no such 20kph signs), a graphic sign that the road narrows to the left, a graphic sign to keep left and a second sign indicating that the road tapers off to the left. Most of the signs were placed on the island and also on the other side of the road. Van Niekerk said they placed cones around the site. Inside the area thus demarcated by the cones, they placed a drum with a

horizontally mounted board on it. The board had red and white stripes and indicated that the road had been closed. This board was placed on the southern side of the site and spanned just less than the width of the left hand lane.

After he and Els had placed the boards, Van Niekerk asked Els from time to time to check that the boards are in place. He has never before heard of a civilian reporting over the metro police radio, however.

In cross examination counsel referred Van Niekerk to exh. B5, two of the photos that were taken on the Monday after the accident. Van Niekerk initially said that is how the signage was on the Friday before he and Els had placed the additional signs. When it was pointed out to him when the photo was taken, Van Niekerk persisted that the signage on the photos are inadequate and placed too close to the site. That, the witness said, definitely was not how they placed the signs on the Saturday.

On the pleadings one of the issues is whether, by not wearing a properly protective helmet, Mr Kenney was negligent. Although that in my view was one of the issues to be decided now, Mr Ferreira informed the court that he did not think so and did not address the issue on defendant's behalf. Therefore, the defendant will be prejudiced if the issue is now determined. Mr Van der Westhuizen for Miss Kenney and the executor in the estate did not object to that issue also being left for adjudication together with the issues that have been separated and postponed.

Although there were suggestions that the plaintiff and Kenney might have consumed alcohol before the accident, there is no evidence whatsoever to such effect. It is found that neither of the men was intoxicated.

With the exception of Lesufi, the relevant witnesses were agreed that it rained at the time of the accident. There is a difference as to the intensity of the rain.

The site, in the middle of the fast lane of a busy urban road was without doubt dangerous for oncoming traffic. The essential factual disputes are whether there were road signs warning oncoming traffic of the site and, if so, whether they were adequate. I shall now deal with these issues.

The plaintiff saw no road signs warning him of the site. Mr Ferreira for the defendant submitted that, by telling Lesufi that he did not “notice the road sign”, the plaintiff was on the night of the accident implying that there were road signs. The argument loses sight thereof that Lesufi’s report was written on the scene and does not necessarily convey the plaintiff’s exact words. Even if it did, the plaintiff could not have been implying that there were signs that he did not see. First, if he did not see them, he would not have known they were there. Second, he made the statement while lying in the road beyond the site and could not have known whether there were signs on the other side of the site. Finally, the use of the word “the” probably is the result of inaccurate expression on the part of Lesufi

or the plaintiff rather than an implication that there were signs that Vosloo did not see.

The plaintiff and his two witnesses were firm in their evidence that there were no road signs warning oncoming traffic of the site. The defendant's four witnesses all said that there were road signs, albeit, as I shall illustrate, they do not agree on which signs there were. Photographs that were taken on the day after the accident show road signs. The question arises whether those photos do not afford objective evidence of what probably was on the scene at the time of the accident. Pretorius and Flindt said that they saw a man putting up road signs after the accident. Although he did not agree that there was no road sign before that, Bryce volunteered the evidence that somebody from Estie Civils might have put up road signs after the accident. Moreover, the photos, exh. B, do not correspond with the signs mentioned in exh. A 1 – 3. Van Niekerk was sure that the signs on the photographs were not the same as those he said were put up on the Saturday. From all this it may be concluded that the road signs on the photographs taken on the Monday probably do not depict the scene as it was at the time of the accident.

In essence the two opposing versions before the court are, for the plaintiff, that there were no road signs and, for the defendant, that there were adequate road signs. On the plaintiff's version it was pouring rain, visibility was poor and, being on a motorcycle, he had to turn his face sideways to avoid rain directly in his face. Under those conditions the possibility that the plaintiff might have

missed road signs cannot be discounted. Flindt, an independent witness also saw no road signs. He explained that he had to utilise his special training as the driver of an emergency vehicle to avoid the heap and the site. Bryce and Lesufi both could not understand how the plaintiff could have driven into the soil heap as, on their version, he must have weaved through at least two road signs to get to the heap. Bryce volunteered the opinion that for the plaintiff to have driven into the heap, he must have ignored the road signs. One cannot bind the defendant to Bryce's opinion, but that opinion is the inevitable conclusion to be drawn from his evidence: On his evidence the signs close to the site were so placed that a motorcycle could only reach the site by weaving through them. If that were so, the plaintiff could not have reached the site without seeing and ignoring the signs. I can neither on the evidence nor on the inherent probabilities find any reason for such reckless, if not homicidal, conduct on the plaintiff's part. On Lesufi's version, the plaintiff must not only have weaved through road signs, he must also have squeezed past the horizontal board that Lesufi said was mounted on one of the drums and that spanned most of the right hand lane.

According to Van Niekerk's evidence the signs closest to the site were possibly not as close as Bryce said they were. Even if Van Niekerk's evidence is accepted, one does not know whether the signs were at the time of the accident still as he left them.

Mulder's evidence that he was satisfied with the placing of the signs already on the Friday is of no assistance: It is the court's function to judge whether the

signage were adequate. It is the witness function to tell the court how the signs were placed.

Regard being had to the evidence as a whole, it is inherently improbable that the plaintiff would have driven into the heap if all the signs that the defendant's witnesses testified to were indeed there. This inherent probability is not upset if one took into account, as Mr Ferreira for the defendant submitted one must do, that on the busy road no other vehicle drove into the site. For that there might be many reasons. In my view the version that there were no signs is on the evidence before the court more probable than the opposite one. Even if there were signs, they could in the light of the inherent probabilities not have been clearly visible.

My conclusion is fortified by Flindt's evidence that he was able to avoid the heap only by utilising his special driving skills. It is also fortified by Bryce's volunteered opinion that for Flindt to have driven up to about ten meters from the heap, as Flindt said he did, he must have knocked over several signs. Flindt did not knock over any signs. Unless Flindt is an outright liar, his experience on the night of the accident is also destructive of the versions of Bryce and Lesufi. As I shall point out, I do not think that Flindt lied to the court.

I am further fortified in my conclusion by the particularly poor quality of the evidence given by the defendant's witnesses. In the first place the defendant's four witnesses gave practically four versions of the road signs that were on the

scene. There is some overlap between the signs that Bryce testified to and the ones Lesufi testified to, but even those two, who were on the scene together, did not give the same account. In this regard it is important to bear in mind that at least Bryce knew at the time that allegations of inadequate road signs had been made.

Bryce sought to strengthen his evidence with his reference to the occurrence book. That book recorded that the road signs were inspected and found in order already on the Friday evening and early on the Saturday morning, at 07h49. Yet, according to Van Niekerk, Els called him on the Saturday to ask to borrow signs and they only put the signs up at about 09h30. Disconcerting as such a conclusion is, the discrepancies indicate that the occurrence book is by no means reliable. Not a single witness could explain why it was found necessary to inspect road signs and report that they are in order.

Bryce testified that he took the photos and measurements because he had been told of the allegations that the signage were inadequate. Yet, the defendant could produce only two photographs showing where “the road sign was”. (I am referring to photos 01 and 02 at Exh. A5.) Despite the fact that an official album of relevant photos was compiled (Exh. A4 to 9), the defendant did not explain what had become of, according to Bryce, two “spools” of photographs. Assuming that in these days of digital cameras, the defendant still used cameras with film spools in 2005, Bryce’s efforts at explaining the loss of his photographs is unconvincing.

Even if one assumed that the photos taken the morning after the accident depict the scene as it was at the time of the accident, most of the road signs that Bryce and Lesufi testified to are not on those photos.

As for the plaintiff and his witnesses, Mrs Pretorius was not too sure of her facts. In my view the plaintiff and Flindt's evidence may safely be accepted, and also that of Mrs Pretorius where it is corroborated. The contrary evidence on behalf of the defendant is rejected as false.

In paragraph 5 of his particulars of claim the plaintiff alleged that the nature of the road works put on the defendant a duty adequately to close the relevant portion of Albatros Road and to put up adequate warnings signs. To this the defendant pleaded that it "was the obligation of Estie to warn all motorists and road users about the excavation" and that Estie alleges that it had done so.

The defendant municipality caused a hole to be dug in the fast lane of one of the busier streets in its jurisdiction. There is no doubt that the hole and its surroundings constituted a very dangerous situation. There can also be no doubt that in the circumstances the law cast upon the defendant a duty adequately to warn traffic of the hazard or otherwise to guard against damage to road users.

With the above Mr Ferreira for the defendant had no quarrel. He submitted, however, that the defendant fulfilled its legal duty by appointing Estie

Civils, a reputable business, to see to the marking of the site and by supervising Estie Civils' in that regard. I assume without finding that the evidence shows that Estie Civils was a reputable business in the context of putting up adequate warning signs and that the defendant did supervise it.

When considering counsel's argument, it is important to bear in mind that the plaintiff did not sue the defendant for something the defendant did, but did negligently. He sued the defendant for something that the defendant negligently did not do, for a negligent omission on the defendant's part. In that context there is in this case no question of the defendant being liable for something that Estie Civils did or did not do. The plaintiff seeks to hold the defendant liable for what the defendant itself did not do.

Where, as in this case, the law casts a duty upon a party to do something that party has what is sometimes called "a legal duty" to act or a "duty to take care". If the party on whom the duty to act is cast fails to act, such failure or omission is unlawful (wrongful, "onregmatig"). A duty that the law puts upon a party cannot "be delegated and the employment of an independent contractor is an irrelevant consideration" in the context of whether the omission was or was not wrongful (See **Dukes v Marthinusen 1937 AD 12** at 23). The appointment of another to perform the duty is irrelevant because, if the required duty is not performed, then, as a matter of fact the party bearing the duty did not perform it.

Once it has been established that the law cast upon a party a duty to act and that that party did not act, the omission is unlawful. That does not mean, however, that the party is necessarily liable for damage caused by the omission. A person seeking to hold the party bearing the duty liable, must of course also establish that the omission was negligent in the sense that a reasonable person would not have omitted to act (See the **Dukes**-judgment on p. 24, 25).

It is in the context of negligence (*culpa*, “skuld”) that Mr Ferreira submitted that the defendant acted reasonably by leaving it to Estie Civils to put up the necessary signs and for it (defendant) to have supervised Estie Civils in that regard. In my view, counsel’s argument is not covered by the pleadings. As I read the pleadings, the defendant pleaded that it had no legal duty because it had appointed Estie Civils. I shall nevertheless assume in the defendant’s favour that the issue raised by counsel’s argument was duly raised on the pleadings.

Although the legal duty remains his, a party bearing a legal duty to act can as a matter of fact appoint another to perform the duty: *qui facit per alium facit per se*. Sometimes a party who has so employed another to perform a duty on his behalf might be heard to say: “My failure to act was unlawful but I was not negligent because it was reasonable for me to have expected the one I have appointed to act”. But the position is different where a party embarks upon a dangerous undertaking in the sense that the undertaking itself implies the possibility of harm or injury to others. In such cases “the law casts upon the author of the operation the duty to take ... precautions and the breach of that

duty is called *culpa* or negligence” (See the **Dukes**-judgment on p. 24). Thus, the legal duty cast upon a party authorising an inherently dangerous undertaking is such that that party’s failure to take precautions is in itself negligent. Our courts have consistently held that to be the position (See **Chartaprops 16 (Pty) Ltd and Another v Silberman 2009(1) SA 265 (SCA)** at paragraph 40 in particular. See in the latter paragraph the quotation from **Grawhall v Minister of Transport and Another 1963 (3) SA 614 (T)**).

Digging a hole in the fast lane of a busy street certainly is an inherently dangerous undertaking in the sense referred to above. It follows that it is no answer for the defendant to contend that it has instructed Estie Civils to take the necessary precautions and only to supervise it. The defendant’s failure itself to have taken the necessary precautions was negligent.

Mr Ferreira submitted that the plaintiff was himself negligent by driving in the pouring rain at 65kph. That is so, counsel argued, because the plaintiff himself said that he could only see two meters ahead. The latter was not the plaintiff’s evidence. He said that he could only see an unlighted and unreflective pole when he was two meters away from it. In any event, the defendant did not establish that if the plaintiff had driven slower, he would not have collided with the site. Counsel’s argument that the plaintiff should not have driven at all is not borne out by the evidence: it was raining but the evidence does not establish that it was raining so hard that driving was impossible. I have pointed out that the plaintiff probably faced sideways so as to avoid rain directly in his face. This

impaired his vision ahead to some extent but in my view does not mean that in the circumstances he drove without keeping a proper lookout. The hazard that the defendant created in the road was not reasonably to be expected. The defendant did not establish that the reasonable motorcyclist would have seen the site in time. It is concluded that the defendant did not prove that any negligence on the plaintiff's part contributed to the accident.

The defendant contends that Estie Civils had a duty to the defendant to ensure the safety of the site. It did not perform that duty, the defendant further contends. Estie Civils did not appear to dispute these contentions.

The plaintiff was represented by two counsel. The issues dealt with at the trial were not involved. The case, however, is of prime importance to the plaintiff and the issues were only separated at a relatively late stage. In my view the costs of two counsel should be allowed. I was informed that there are previous orders reserving costs but that the parties agree that those costs should follow the event. This judgment does not resolve all the issues between the defendant and the first third party in case no. 32786/05, the executor in the late Mr Kenney's estate. The issues of whether the deceased was negligent in the type of helmet he wore and whether that negligence contributed to his injuries and death stand over. The first third party was not separately represented in this trial and most of her costs will be covered by the costs order in favour of Miss Kenney. Accordingly, I do not propose to make any cost order in respect of the first third party.

In the result the following order is made:

1. It is declared that the defendant is liable for all the damages that the respective plaintiffs in case no. 32201/05 and in case no 32786/05 suffered as a result of the accident that took place on 20 February 2005 in Albatros Road, Kempton Park.
2. It is declared that Estie Civils (Pty) Ltd is liable to compensate the defendant for any amount that the defendant pays in damages pursuant to this order.
3. The questions whether the late Mr Alec Stephen Kenney was negligent by reason of the type of helmet he wore on the night of the accident and whether such negligence contributed to his injuries and resultant death are postponed sine die.
4. The defendant is ordered to pay the costs, including the reserved costs, of the respective plaintiffs in case no 32201/05 and case no 32786/05, the costs of the plaintiff Vosloo to include the costs of two counsel.

B.R. du Plessis

Judge of the High Court

Case No: 32201/05

On behalf of the Plaintiff:

Potgieter Penzhorn & Taute inc.
Woltemade Building
1st Floor, Room 5
118 Paul Kruger Street
Pretoria

Adv: B.P. Geach (SC)
Adv: P Nel

On behalf of the Defendant:

Macintosh Cross & Farquharson
210 Nedbank Building
246 Paul Kruger Street
Pretoria

Adv: J.E. Ferreira

Case No: 32786/05

On behalf of the Plaintiff:

Potgieter Penzhorn & Taute inc.
Woltemade Building
1st Floor, Room 5
118 Paul Kruger Street
Pretoria

Adv: Van Der Westhuizen

On behalf of the Defendant:

Macintosh Cross & Farquharson
210 Nedbank Building
246 Paul Kruger Street
Pretoria

Adv: J.E. Ferreira

The attorneys for the plaintiff acted for the third parties Vosloo and Botha.

The third party Estie Civils (Pty) Ltd was unrepresented.