

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A216/2008

In the appeal between:

LESLIE IONE DEVONPORT

(acting in her capacity as mother and natural
guardian of her minor sons: R S D and N H D

Appellant

and

THE PREMIER OF THE FREE
STATE PROVINCE
THE MEMBER OF THE EXECUTIVE
COUNCIL
LESLIE IONE DEVONPORT N.O.

First Respondent

Second Respondent

Third Respondent

CORAM:

MUSI, JP *et* VAN DER MERWE, J *et*
MOCUMIE, J

HEARD ON:

16 NOVEMBER 2009

JUDGEMENT:

VAN DER MERWE, J

DELIVERED ON:

26 NOVEMBER 2009

- [1] This is an appeal, with the leave of the trial court, against its order dismissing with costs the appellant's claims in her personal capacity and her representative capacity as mother and natural guardian of her minor children, for loss

of support as a result of the death of her husband, Mr Robin William Devonport (“the deceased”).

[2] The deceased passed away as a result of injuries sustained when he fell whilst cycling on the R26 road between Fouriesburg and Ficksburg (“the road”). It was admitted by the first and second respondents that at all times relevant hereto “...the Free State Provincial Government was the sole body empowered, entrusted and authorised to exercise control over and maintain” the road. For the sake of convenience the first and second respondents will be referred to herein as “the province”.

[3] In her action against the province the appellant essentially alleged that the death of the deceased was caused by the negligent failure of the province to maintain the road or to exercise proper control thereover. The allegation of negligence was denied by the province. The province however also joined the appellant in her capacity as executrix of the estate of the deceased as a third party, on the basis that if the province is found to be liable to the appellant, the estate of the deceased is a joint wrongdoer

in respect of the damages suffered, as a result of alleged contributory negligence of the deceased.

[4] By agreement the trial court was asked to only determine whether the defendant was negligent as alleged and if so, whether the negligence of the deceased contributed to the incident. The court then also had to determine the respective degrees of negligence of the province and the deceased.

[5] At the trial the appellant presented the evidence of Mr Rodney Callaghan, Mr L de V Roodt and Mrs Wendy Adams. The province called Mr M C Brink as an expert witness in respect of road cycling.

[6] The evidence of Mr Callaghan that I consider material for the decision of the appeal can be summarised briefly. Mr Callaghan testified that he, the deceased and others participated in a social road cycling tour organised in the Eastern Free State. The deceased was a keen and very experienced cyclist. On Saturday morning 24 September 2005 at approximately 08h00 the group of cyclists

participating in the tour departed from Fouriesburg and cycled on the road in the direction of Ficksburg. The road is a tarred road with a single lane in each direction. The road appeared to be in good condition. Mr Callaghan did not have to take any evasive action as a result of the condition of the road in the approximately eight kilometers travelled on the road before the incident referred to below took place. There were also no warning signs in respect of the condition of the road. It was a sunny and clear morning with very good visibility. After the departure of the group of cyclists, the group was quite spread out, with the deceased and a friend of his, Mr Richard Adams, in front. The deceased cycled close to the left edge of the road with Mr Adams next to him on the right hand side of the deceased. Mr Callaghan and a companion decided to catch up with the deceased and Mr Adams. This they managed to do, whilst the deceased and Mr Adams were freewheeling down a hill with a moderate gradient. The deceased travelled at approximately 45km/h. Just about when Mr Callaghan fell in behind the back wheel of the bicycle of the deceased, Mr Callaghan noticed that the deceased turned his head to his right as he would do if talking to the person

on his right and at that instant Mr Callaghan saw that the front wheel of the bicycle of the deceased hit an obstruction on the road surface. As a result the deceased was thrown off his bicycle and he landed on his head on the surface of the road. This obstruction turned out to be a deformation of the tar due to failure of the road surface, resulting in a protrusion of tar forming a prominent bulge and projection on the road surface ("the protrusion"). The clear implication of the evidence of Mr Callaghan is that the deceased never saw the protrusion. There is no indication on the evidence of Mr Callaghan that the bicycle of the deceased deviated from its line of travel immediately before its front wheel hit the protrusion. If anything the deceased may have moved slightly to the right as a result of the movement of his head to the right at that speed.

- [7] Ms Adams testified that approximately 3 to 4 weeks after the incident she took photographs that were handed in as exhibits at the trial. It is common cause that there is no material difference between what is depicted on these photographs and the actual situation of the road and the protrusion on the day of the incident.

[8] Mr Roodt is a professional engineer. He visited the scene of the incident on the 8th of April 2007 but by that time the failure of the road surface and the protrusion had been repaired. He testified that in his expert opinion, according to the aforesaid photographs, the protrusion was rounded and lacked sharp sides for definition, was of the same texture, colour and material as the background thereof and formed a serious and dangerous hazard to cyclists. He pointed out that according to generally accepted norms of road maintenance the protrusion would be classified as a degree five deformation. A degree five deformation is regarded as severe and dangerous. He testified that the norm for a degree five deformation is a change in the road surface profile of 30mm or more from the original road surface and that in his opinion, according to the aforesaid photographs, the protrusion on the road surface constituted such change in excess of 50mm.

[9] The trial court accepted the aforesaid evidence of Mr Callaghan and this finding was not seriously challenged on appeal. The aforesaid evidence of Mr Roodt was not

disputed. Mr Brink, who according to the record gave evidence in a fair and helpful manner, dealt primarily with the question of negligence on the part of the deceased.

- [10] The trial court nevertheless found that no negligence on the part of the province was proved and that the deceased was
- “... the creator of his own misfortune.”

It is this finding that the appellant challenges on appeal.

- [11] In applying the well-known test for negligence to the facts of this case, three questions should be asked, namely,
- i) Was injury of the kind in question reasonably foreseeable from the perspective of the province?
 - ii) If so, would the reasonable provincial authority have taken steps to guard against that injury?
 - iii) If so, did the province take such reasonable steps?

See the classical exposition in **KRUGER v COETZEE** 1966 (2) SA 428 (A) at 430E – F. See also **McINTOSH v PREMIER, KWA-ZULU NATAL AND ANOTHER** 2008 (6) 1 SCA.

[12] It is not clear on what exact ground the trial court found against the appellant. What is clear though, is the case the province presented at the trial. Not only did the province not dispute the aforesaid evidence of Mr Roodt, but in both cross-examination by counsel for the province and in the evidence of Mr Brink it was conceded in a forthright manner that the protrusion did represent a danger to cyclists. Counsel for the province also fairly accepted that the protrusion could have been repaired or warned against before the incident, had the province been so minded. The case for the province was that no such steps were reasonably required as it was not reasonably foreseeable that the protrusion could cause injury or harm. This proposition in turn was based squarely on the allegation that the (admitted) danger caused by the protrusion was so obvious and easily avoidable that injury as a result thereof was not reasonably foreseeable. For the reasons that follow, I am unable to agree.

[13] First, I do not think that this kind of reasoning can be applied in a case such as this, where a public authority is entrusted with the responsibility of control and maintenance of a

public road with public funds. The logical conclusion of this argument is that the bigger the danger in a road, the more it would or should be apparent and therefore the less need to repair or warn against it. Once a hazard is recognised by a public authority such as the province in these circumstances, it cannot in my judgment be heard to say that injury was not reasonably foreseeable simply because the danger should be apparent to road users. Whether and to what extent in all the circumstances of a particular case the authority also has a duty to take guarding steps is of course a different matter. As I already pointed out, it is not contested by the province in this matter that if injury was reasonably foreseeable, it had a duty to take guarding steps.

- [14] Second, in any event, according to the evidence the protrusion was not particularly conspicuous. The condition of the road did not provide an implicit warning of danger ahead. The protrusion to some extent blended in with the background as explained by Mr Roodt. The last-mentioned aspect is borne out by examination of the relevant photographs. In this regard, the presence of some loose

stones on the extreme left hand side of the road in the immediate vicinity of the protrusion, is immaterial.

[15] A reasonable provincial government would in my judgment have realised that cyclists such as the group in the present case would use the road from time to time. It would have also realised that some of these cyclists reach relatively high speeds and do not always keep a perfect look-out and are therefore vulnerable to dangers such as the protrusion. A reasonable provincial government would in my view have regarded injury of the kind in question as a reasonable possibility that should be guarded against and could be guarded against by the simple and relatively inexpensive steps of repairing the particular patch of the road or providing an appropriate warning. I am satisfied therefore that negligence on the part of the province was proved.

[16] The next question is whether the province proved contributory negligence on the part of the deceased. I think that it did. The deceased was a very experienced road cyclist. A reasonable person in the position of the deceased would have realised that a road cyclist is

particularly vulnerable to an obstruction in the road. The road bicycle is a rigid machine, as it was referred to in evidence. It has very thin tyres that are pumped very hard and has no suspension. At a high speed such as 45km/h an object as small as a golf ball can cause a fatal accident. A reasonable person in the shoes of the deceased would therefore have kept a particularly vigilant lookout and had he kept such lookout he would in my judgment have observed the protrusion in time and avoided it by a simple manoeuvre.

[17] In apportioning the blame, I believe that the greater part thereof should be placed at the door of the province. The primary factor contributing to the incident is the failure of the province to remove or warn against a danger that it was aware of or should reasonably have been aware of. For reasons already stated, there was also a marked degree of negligence on the part of the deceased. In all the circumstances of this case I think that a 60:40 apportionment in favour of the appellant is fair and equitable.

[18] The costs of the appeal and the trial should follow the result.

Pages 387 – 515 of the appeal record, however, contain transcription of discussions and mostly argument that should not have formed part of the record of appeal, as was readily conceded by counsel for the appellant. The costs pertaining to these unnecessary portions of the appeal record should therefore be disallowed.

[19] In the result the following orders are issued:

1. The appeal succeeds with costs, excluding the costs pertaining to pages 387 – 515 of the appeal record.
2. The orders of the trial court are set aside and replaced with the following:

- “i) It is declared that the injuries sustained by Robin William Devonport on 24 September 2005 on the R26 road between Fouriesburg and Ficksburg, were caused by 60% negligence on the part of the first and second respondents and 40% negligence on the part of said Robin William Devonport.
- ii) The first and second respondents are ordered to pay the costs of the trial.”

C.H.G. VAN DER MERWE, J

I concur.

H.M. MUSI, JP

I concur.

B.C. MOCUMIE, J

On behalf of the appellant:

Adv. I. J. Zidel SC
Instructed by:
Matsepes Inc.
BLOEMFONTEIN

On behalf of the first and
second respondents:

Adv. P. C. F. van Rooyen SC
Instructed by:
The State Attorney
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