

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 1291/06

In the case between:-

LESLIE IONE DEVONPORT

Plaintiff

(acting in her capacity as Mother and Natural
Guardian of her minor sons: **R S D**
and NH D

and

THE PREMIER OF FREE STATE PROVINCE

First Defendant

THE MEMBER OF THE EXECUTIVE COUNCIL Second Defendant

LESLIE IONE DEVORPORT N.O. Third Party

HEARD ON:

30, 31 OCTOBER 2007 AND
1, 2 NOVEMBER 2007

JUDGMENT BY:

MABESELE, AJ

DELIVERED ON:

15 NOVEMBER 2007

- [1] This is an action for damages arising out of an incident which occurred on 24 September 2005 on the Bethlehem/Ficksburg road in which Robin William Devonport (the deceased) fell from his bicycle and sustained injuries, which caused his death. The plaintiff instituted the action, both in her personal

capacity and capacity as mother and natural guardian of her minor children, for loss of support arising out of the death of the deceased. The first and second defendants deny liability to the plaintiff. Defendants have furthermore launched third party proceedings in which the plaintiff, in her representative capacity as executrix in the estate of the deceased, has been cited as a third party.

[2] By agreement between the parties, the trial proceeded on the issue of negligence only.

[3] According to the particulars of claim, the incident occurred when the bicycle ridden by the deceased encountered a protrusion of tar, forming a prominent bulge and projection on the road surface. In consequence of colliding with the aforesaid protrusion, the deceased lost control of his bicycle, fell to the ground and struck his head on the road surface, thereby sustaining fatal injuries.

[4] The plaintiff alleged that the first and second defendants had

a duty of care to maintain, manage and control the road and to warn the public of the potential danger, but were in breach of their duty in that, *inter alia*, they failed to remove the protrusion from the road surface in order to level the road and prevent harm to road users or failed to warn road users timeously, in particular cyclists, such as the deceased, of the dangerous condition of the road.

- [5] The first and second defendants denied, *inter alia*, that the road condition was dangerous and that there was a duty of care on them to warn cyclists of any danger.
- [6] The first and second defendants averred that should it be found that they are liable, a contributory cause of the collision was the negligence of the deceased in that, *inter alia*, he failed to keep a proper lookout; he cycled at an excessive speed, given the circumstances and failed to avoid the incident, when by the exercise of due and reasonable care, he could and should have done so.

- [7] Mr. Rodney Callaghan testified on behalf of the plaintiff. He and the deceased have been cycling together on several occasions and have a wealth of experience in cycling.
- [8] The two of them were part of nine other cyclists who were on a social cycling tour which started in Bethlehem and was to proceed up to Ficksburg. All of them were in their cycling uniform, such as cycling helmets, clothes and shoes. They stopped in Fouriesburg for breakfast. Thereafter they proceeded with their journey at approximately 08h00. The weather was clear and the road in good condition until they reached the area where the incident occurred. There were no warning signs. They cycled on the R26 road in the direction of Ficksburg. The deceased and other colleague of theirs, known as Richard Adams, cycled in front of him and Pfeffer. The two of them caught up with the deceased and Adams as they cycled down hill. The four of them were cycling at a speed of approximately 45 km per hour and were free wheeling. He cycled close behind the deceased who was cycling close to the edge of the left hand side of the

road. Richard Adams was cycling on the right hand side of the deceased. Pfeffer was cycling behind Adams. He and the deceased were cycling next to the stones which were lying along the edge of the road. The deceased kept a distance of approximately 15 cm from the stones while he himself kept a distance of 30 cm. The deceased and Adams were talking to each other as they cycled alongside the stones. He saw the deceased turning his head to the right to speak to Adams. Subsequent to that he heard a noise and then saw the deceased losing control of his bicycle, falling to the ground and struck his head on the road surface. He noticed thereafter that the front wheel of the deceased's bicycle collided with a protrusion which was in front of the deceased. He conceded under cross-examination that it was dangerous for the deceased to turn his head while he was cycling near the stones at the speed of 45 km per hour.

- [9] Louis de Villiers Roodt testified in relation to the design of the road on which a protrusion was located. He is a civil engineer and specialises in the design of roads. He holds

honours degree in civil engineering and masters degree in transport engineering.

- [10] He testified that the road is currently a single carriageway rural road, known as route R26. The road runs between Bethlehem and Ficksburg, bypassing Fouriesburg. The road surface appeared to be in good condition, with localised failures, typically occurring in sections where the road is in cut. The number of patches indicating past failures is relatively low. The patching is related to the mechanisms of failure, which is a process of rutting and potholing in the wheeltrack, exacerbated by water in the pavement layers, due to high water tables cut. The compression of material in the wheeltrack often leads to displacement of material to the side, forming a bump next to the rut or pothole. The road presents itself as a typical, maintained major route, on which it is safe to travel at high speed and the driver expects to drive with little interference and interruptions. Imperfections or failures of the road surface are difficult to perceive, as they are static, often blend into the background, due to same

colour, texture and being rounded and lacking sharp sides for definition. If these failures are isolated and few, they are not expected. The driver can thus be confronted with a hazardous situation that is difficult to see and recognise. He estimated the height of the protrusion as 40 mm.

[11] Wendy Adams confirmed that she took photos marked “A” at the scene of the incident. She could not recall the date on which the photos were taken.

[12] After the close of the plaintiff’s case, Martin Brink testified on behalf of the first and second defendants. He was the only witness who testified on behalf of the defendants. He was called upon to demonstrate, as an experienced cyclist, how a reasonable cyclist, in the position of the deceased, would have conducted himself on the same road on which the deceased was cycling.

[13] He testified that he cycled on the said road on 11 September 2007. While cycling down hill, at the speed of 60 km per hour, he noticed an object in front of him at a distance of 100 metres. The height of the object was approximately 40 mm.

The object depicted the same colour as the road. He conceded, when questioned by the court, that a road user may observe the objects in front of him or her easily when the road is in good condition as compared to the road in bad condition.

[14] In regard to the evaluation of evidence of all the witnesses, the versions of Callaghan in relation to the events of the tour immediately prior to and during the incident and Wendy Adams in relation to photos marked "A" are undoubtedly accepted as true.

[15] Louis de Villiers was called, to demonstrate, as an expert, the extent to which the road could be said to be dangerous to the road users, particularly the cyclists. Although he pointed out certain incidents on the road, such as patches, which may cause danger to the road users, he acknowledged that the road surface appeared to be in good condition and presented itself as a typical route on which it is safe to travel at a high speed. From this acknowledgement, it cannot be

said that such a road was so bad that it required necessary attention. In my view, the road users could still use it, with care, as always expected of them.

[16] Mr. Brink performed his experiment on the R26 road after the road was repaired. As a result he could easily observe objects in front of him at a distance of 100 metres. The deceased cycled on a bad road. Therefore, based on Brink's experiment, it cannot be said that the deceased should have observed objects in front of him at the distance of 100 meters. In my view, Brink's evidence did not strengthen the defendants' case.

[17] ⁹The test for negligence is clearly illustrated in a well-known matter of **KRUGER v COETZEE** 1966 (2) SA 428 (A) wherein Holmes JA stated that for purposes of liability, culpa arises if a diligence *paterfamilias* in a position of the defendants would foresee the reasonable possibility of their conduct injuring another in his person or property and

9 1. Third sphere of government after Provincial Government. Therefore, the position of Provincial Government should be the same as municipalities.

causing him patrimonial loss and would take reasonable steps to guard against such occurrences and the defendants failed to take such steps.

[18] It is for the plaintiff to place before the court sufficient evidence that a legal duty to repair the road or warn the public should be held to have existed and to prove that failure to repair or warn was blameworthy.

[19] Marais JA, in **CAPE TOWN MUNICIPALITY v BAKKERUD** 2000 (3) SA 1049 (SCA) at 1060, stated that there can be no principle of law that all municipalities¹ have at all times a legal duty to repair or warn the public whenever and whatever potholes may occur in whatever pavements or streets may be vested in them. The learned judge said:

“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 the roads and pavements.”

[20] The judge stated further that a little used lane in which small potholes have developed which are easily visible to and avoidable by anyone keeping a reasonable look-out, may not be repaired and public may not be warned of their presence. However, a well-funded municipality which has failed to keep in repair a pavement habitually thronged with pedestrians so densely concentrated that is extremely difficult to see the surface of the pavement or to take evasive action to avoid potholes of a substantial size and depth, may well be under a legal duty to repair such potholes or to barricade or warn of them. (See unreported judgment of **MANN, JACK v THE PREMIER OF GAUTENG PROVINCE**, Case No. 02/23860.)

[21] It was argued on behalf of the plaintiff that the protrusion should have been removed as it caused a hazard on the road, or the road users should have been made aware of its presence. Reliance was sought in **MANN, JACK v THE**

PREMIER OF GAUTENG PROVINCE, *supra*. In this case the road was used regularly by milk lorries, school bus, lorries delivering diesel and by farmers. Two potholes which were the cause of the collision were next to each other and almost straddled the road surface. They were three to four inches deep, approximately three quarters of a metre wide and about two or three metres long, making it impossible to drive that part of the road without at least one set of a vehicle's wheels having to go through the potholes. Considering the volume of traffic on that road, I am of the view that the two potholes undoubtedly caused a hazard and danger to the road users and were supposed to have been attended to.

- [22] In the present matter, the protrusion was close to the edge of the road surface. There is no evidence that it made it impossible for road users to travel that part of the road. Neither was there evidence that the road was frequently used. In my view, therefore, **MANN, JACK'S**-case does not advance the plaintiff's case.

[23] Mr. Zidel SC, relied also in **ESTERHUIZEN AND OTHERS v MEMBER OF THE EXECUTIVE COUNCIL, PUBLIC WORKS, ROADS AND TRANSPORT**, Case No. 1673/2004, unreported, in which case Van Coppenhagen J, found that the height of 50 mm gravel shoulder which was next to the tar-edge constituted a danger to the motorists who must drive from the gravel shoulder back to the tar edge which they deviated from unexpectedly. This case also does not advance the plaintiff's case, in my view, as demonstrated below.

[24] Evidence was adduced in the above-quoted case that three years after the plaintiff was involved in an accident, another motorist experienced the same problem as the plaintiff not far from the vicinity where the plaintiff overturned. In my view, there was evidence that the road was used frequently and failure to repair it constituted a danger to the motorists. In this regard, Scott JA, in **CAPE METROPOLITAN COUNCIL v GRAHAM** 2001 (1) SA 1197 (SCA) at 1204 C

– D said:

“The weather conditions prevailing when the other failures occurred are unknown. It is also unknown whether there were other similar failures; There were, however, a number of minor or less severe slope failures which were known to have caused injury to users of the road and in one case the death of a motorist. Several reports dealing with the stability of the slope were obtained from time to time by the appellant and its predecessors from consulting engineers.”

[25] The significance of occurrences of accidents caused by unexpected objects on the road which justify bad condition of road was also pointed out by Beadle J, in **MURRAY v BULAWAYO MUNICIPALITY** 1952 (4) SA 575 (Southern Rhodesia, Bulawayo) at 585 G – H as follows:

“If a rut of the nature of the rut in this case had constituted a “real and substantial danger to traffic” one might have expected in these circumstances to have had some further evidence of accidents. Irrespective of this, however, in my considered view, this rut was not a real and substantial danger

to cyclists, and the lack of evidence of accidents does go to support this view.”

[26] The road on which the deceased collided with a protrusion is described as rural. There were visible stones close to the edge of the road, with a protrusion of 40 mm in height around their vicinity. There is no evidence of previous accidents on the said road. Neither there is evidence of frequent use of the road, either by the motorists or cyclists. It is not known exactly for how long was the protrusion on the road. There is also no evidence whether or not Adams Richard, who was cycling alongside to the deceased, in front of Callaghan, did collide with any object at the same spot where the deceased collided with a protrusion. However, one can safely conclude from the evidence of Callaghan that Richard Adams did not experience any problem while he was cycling alongside the deceased. The result is that other cyclists used the same road without difficulty.

[27] The question now is whether it can be said that the officials of the defendants were under a legal duty to remove a protrusion

or warn the public of its presence under the circumstances described above. My considered view is that the officials were under no such legal duty.

[28] The deceased, an experienced cyclist, was cycling down hill at a high speed, prior to the incident. The weather condition was good. He came around visible stones, close to the edge of the road, with a protrusion of 40 mm in height around their vicinity. He then cycled approximately 15 cm away from the stones, obviously to avoid harm to himself. While still within a danger zone, and while it was not safe to do so, he moved his eyes from the road in front of him to look at his colleague, Adams, with whom he had been talking and subsequently collided with a protrusion in front of him. Quite clearly, the deceased, who was cycling at a high speed, did not keep a proper look-out even though he realised that he was cycling in a danger zone. In my view, the deceased is a creator of his own misfortune. The result is that the plaintiff's claim against the first and second defendants cannot succeed.

[29] I am fortified, in my view, by comprehensive and well researched authorities which were referred to, in argument, by Mr. Van Rooyen SC, on behalf of the first and second defendants.

[30] In the result, I make the following order:

1. The plaintiff's claim against the first and second defendants is dismissed.
2. The plaintiff is ordered to pay costs.

M. M. MABESELE, AJ

On behalf of the plaintiff and
third party:

Adv. I. J. Zidel SC
Instructed by:
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On behalf of the first and
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