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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

Case no: A150/2021

In the matter between:

MATUTUZELA JOHANNES NDLOVU

Appellant

And

**MEC FOR POLICE, ROADS AND
TRANSPORT FREE STATE PROVINCE**

First Respondent

BARNIES KONSTRUKSIE CC

Second Respondent

MATJHABENG LOCAL MUNICIPALITY

Third Respondent

CORAM: C REINDERS Jet MB NEMAVHIDI AJ *et* TL MANYE AJ

HEARD ON: 26 APRIL 2024

DELIVERED ON: 19 JULY 2024

JUDGMENT BY: C REINDERS J *et* MB NEMAVHIDI AJ

Introduction

[1] This is an appeal against an order of absolution from the instance with costs granted by Majosi AJ on 26 May 2021. The appeal came before us with leave from Mathbula J. The appellant prays that the order of the court a *quo* be set aside and replaced with the following:

"The application for absolution from the instance is dismissed with costs."

[2] The appellant (as the plaintiff in the court a *quo*) is Matutuzela Johannes Ndlovu, a major mechanic engineer at Tshepong Mine, Welkom, Free State. The first respondent (first defendant) is the Member of Executive Council for Police, Roads and Transport (MEC) for the Free State in his official capacity in terms of Section 2 of the State Liability Act 20 of 1957. The second respondent (second defendant) is Barnies Konstruksie CC, duly registered and incorporated in terms of Statutes of RSA with a registered business in Welkom, Free State. The third respondent (third defendant) is Matjhabeng Municipality who did not oppose the third party notice served upon it by the first respondent and are for purposes of this appeal not considered to be a party hereto.

The parties shall be referred to interchangeably as cited in the court a *quo* or in this appeal, as may be appropriate in the context of this judgment.

2.1 The plaintiff sued both defendants for damages he had allegedly suffered as a result of a motor vehicle accident which occurred on the R34 national road between Riebeeckstad and Tshepong Mine in the Free State.

2.2 In his particulars of claim plaintiff alleged that the first defendant had a legal duty to ensure that the road is maintained and free of hazards and that its failure to do so entailed that it was liable for all negligent acts or omissions by its members or employees of the department. Included herein was its failure to implement a system to detect any hazards or dangerous condition on the road and, if roadworks is undertaken, to ensure that steps are taken to give sufficient warning to members of the public in the form of road signs, warning lights or flagmen. It was pleaded by plaintiff that such legal duty extended to second defendant and its employees as they were appointed by the first defendant to undertake roadworks on the said road.

2.3 It was the case for the plaintiff that the accident occurred due to the sole negligence of the defendants, as the first defendant or alternatively the second defendant would have dug a trench across both lanes of the road, left it uncovered and thereby created a danger to road users without any warning in the form of road signs, warning lights or employees to warn road users and members of the public of the hazard and thus failing in their legal duty to maintain the road.

2.4 At the close of the plaintiffs case, both defendants applied successfully for absolution from the instance.

[3] On 25 November 2021 the plaintiff filed his notice of appeal. The grounds will not be repeated verbatim herein. It forms part of the record considered by us together with the submissions of all counsel appearing on behalf of the parties. It suffices to say that the upshot thereof is that the trial judge had erred in several ways, more specifically in her application of the test for absolution from the instance by making a negative finding on the credibility of the witnesses for the plaintiff in the instance where credibility ought not have played a role at that stage.

The test to be applied in applications for absolution from the instance

[4] Absolution from the instance may be granted at the end of the plaintiff's case, if the plaintiff has failed to adduce sufficient evidence upon which a reasonable court could or might grant judgment in favour of such plaintiff, or the plaintiff has not produced sufficient evidence to establish a *prima facie* case, in other words a case of which all the elements of the claim have been proven.

4.1 The test for absolution to be applied at the end of a plaintiff's case is set out in *Gordon Lloyd Page and Associates v Rivera and Another*¹ as formulated in *Claude Neon Lights (A) Ltd v Daniel*:

¹ *Gordon Lloyd Page and Associates v Rivera and Another* 2001 (1) SCA at 92E-93A.

'When absolution for the instance is sought at the close of the plaintiffs case, the test to be applied is not whether the evidence led by the plaintiff established what would finally be required to be established but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.'²

4.2 This test requires of the presiding officer to consider the proven facts and to determine if it amounts to a *prima facie* case absolution from the instance will ordinarily be granted sparingly and the court will refuse the application unless it is satisfied that no reasonable court could draw the inference for which the plaintiff contends. As a general rule the credibility of the plaintiff's witnesses at the stage of absolution does not play a role, but the plaintiff's evidence can be rejected if it is clearly contradictory and untruthful.³ It is a time honoured principle that a court of appeal will be slow to interfere with a credibility finding by the court *a quo*.⁴

The evidence tendered in the trial court:

[5] The record reveals the following:

5.1 The plaintiff testified that he left his home at Riebeeckstad at about 05:00 on 6 August 2014 driving his Toyota Fortuner to his workplace at Tshepong Mine near Odendaalsrus. It was dark that morning and there were no streetlights illuminating that road. He was driving on the R34 road between Riebeeckstad and Tshepong Mine at a speed of 80km/h, when he saw a heap of sand in the middle of the road with a blue and white sign with a right-pointing arrow on it. He then swerved to the right avoiding the sand heap and trench which was dug across both lanes of the single carriage of the road. He lost control of his vehicle which left the road surface and stopped 50 meters away facing the direction of the road. The sand heap was between 1

² *Claude Neon Lights (SA) Ltd v Daniel* 1976(4) SA 403A at 409G-H.

³ See: *Hartzer v Da Sousa and Others* (46158/09) [2013] ZAGPPHC 495 (

⁴ See: *AM and Another v MEC for Health, Western Cape* 2021 (3) SA 337 (SCA) at par [8] and [159];

and 1.5 meters high and stretched diagonally across the whole road. There were no warning signs indicating that the road was under construction or advising motorists to reduce their driving speed.

5.2 He managed to extricate himself from the vehicle and stumbled about two meters after which he collapsed and lost consciousness. Two police officers arrived at the scene and found him lying on the ground next to his vehicle. They discussed the accident details with him once he had regained consciousness whereafter an ambulance and a towing vehicle were called by the police. He was admitted at Medi-Clinic where he was treated for injuries and was discharged three days later.

5.3 During cross-examination by the defendant's counsel, he stated that he saw the heap of sand as well as the blue and white sign when he was about 40 meters away. He was uncertain if he applied brakes at that stage, although he thought he did. He could, however, not confirm whether he reduced his travelling speed. He could also not explain why, in his affidavit in support of a condonation application, he failed to refer to a sand heap, as he only referred to the trench. The accident report (AR) was compiled by Constable Mtuzi who found him on the scene. According to the AR, clearly visible road signs were present. The trench was indeed in the middle of the road, but no mention is made in the report of any sand heap or the blue and white sign. However, the appellant distanced himself from the contents of the AR report. It is not clear as to why he could not stop after observing the sand heap and what would have caused his vehicle driving at 80km/h to stop about 50 meters from the trench

5.4 On the previous afternoon he noticed the road works without road workers adjacent to the road but on the following morning he did not deem it fit to reduce his speed as there were no signs regulating the speed limit. Appellant testified that he did not see any yellow plants equipment (excavation bulldozers, backhoes loaders etc.) that could be identified as belonging to the first and second defendants to confirm that they were involved in digging the trench which presented a dangerous situation as

alleged in his particulars of claim.

5.5 Constable Mtuzi, stationed at Odendaalsrus SAPS, testified that he reported for duty at 05h30. He received a call from Constable Dlamini asking him to pick her up from Riebeeckstad, as she had no transport. After booking a vehicle, he left the station at 05:40 to fetch her. On his return he drove at a speed of 80km/h on the R34. After passing Kutlwanong Location, he noticed a white motor vehicle adjacent to the road. He then saw a trench with a sand heap in the middle of the road. He slowed down, left the tarred road and proceeded in the direction of the white motor vehicle. He concluded that the vehicle had rolled as he observed damages on that vehicle.

5.6 Once observing the vehicle up-close, he noticed that one of the airbags had deployed. He also noticed the appellant, who was lying on the ground next to his vehicle. Once the appellant regained consciousness, Constable Mtunzi discussed the event with him in order to obtain details of the accident. He reported the accident to his Police Station and an ambulance was summoned. Constable Dlamini, in turn, was tasked with directing traffic on the scene while the paramedics rendered medical assistance to the appellant before transporting him to the hospital. Once the recovery vehicle towed the appellant's away, he completed the Accident Report Form, detailing his observation at the scene including the information he received from the appellant.

5.7 During cross examination the following became evident:

- (a) The trench which appellant saw across the road was depicted as being in the middle of the road.
- (b) The trench was illustrated without a sand heap or a blue and white sign on top of it.
- (c) There were no skid or brake marks on the road surface.

- (d) There were no damages indicated on the vehicle.

5.8 The witness' pocket book did not indicate that he attended to an accident scene on 6 August 2014. It only made reference to the fact that he reported for duty free of injuries and attended the parade held by Officer Khatholo at 05h45, after which he booked out a fire arm with magazines at 06h00. He also booked out a state vehicle registered BSD[...] at 06h10 on the date. Furthermore, he could not explain as to how he could have been at the scene before 06h10 when he booked the vehicle at 06h10 and neither could he explain how he could have attended a parade at the time he was supposedly fetching his colleague as well as attending to an accident scene on the R34 road.

5.9 Constable Dlamini testified that she never requested to be fetched from her home as the practice is that her shift crew driver has to pick her up. While Constable Mtuzi was driving along the R34, she observed a sand heap causing an obstruction on the road. She also noticed a vehicle which was on the gravel side of the road. Mtuzi then reduced her speed, left the tarmac drove to the appellant's car. She noticed the appellant lying on his back behind the vehicle. As Mtuzi spoke to him, she left them and went to direct traffic. After a while, the appellant's wife arrived at the scene. While directing the traffic, Dlamini noticed a meter deep and a meter-wide trench on the whole surface of the road protruding slightly into the gravel shoulder of the road. However, despite her observations, she could not explain the following:

- (a) She was marked present at the 06h00 parade at her police station.
- (b) She could not explain as to how Mtuzi booked a firearm, magazine and a state vehicle immediately after the parade attended by both of them ended, while at the very same time they were attending to an accident scene on the R34.
- (c) She completed the Accident Register Book by referring to the

accident report form completed by Constable Mtuzi. Her evidence concluded the appellant's case. The second respondent, the company performing maintenance tasks on the road in question as appointed by the local authority, admitted in their pleas that they did work on the R34 on that day, but work only commenced after 07h00 on that morning. They argued that, at the time of the accident, none of the workers were observed by the plaintiff or the two constables.

The judgment by the trial court

[6] In paragraphs [10] to [29] the trial court dealt with the above evidence tendered by the three witnesses for the plaintiff. Having quoted (correctly so) the applicable law in respect of the test in an application for absolution from the instance, she dealt with the respective submissions made by counsel for the parties. Hereupon she evaluated same in light of the evidence and the pleadings.

[7] We deem it apposite to quote verbatim the trial court's summary of the submissions made by counsel for the respective parties (who were also the legal representatives for the parties in this appeal) as such submissions were repeated (and expanded upon) before us:

"[33] Counsel for the first defendant contended that the plaintiffs case for negligence relies heavily on its legal duty to members of the public to maintain the road and prevent hazardous or dangerous conditions in the road or road surface. More specifically, that the department (first defendant) dug a trench in the road which created a danger to road users and in as such and failed to ensure that its contractor (second defendant) covered it and failed to warn members of the public of the dangerous road surface via warning lights or signs and flagmen.

[34] It was contended that the evidence lead by the plaintiff did not identify the first defendant or any of its employees as the persons responsible for digging the offending trench. The plaintiff during his testimony also did not dispute as pleaded that this legal duty was assumed by Matjhabeng

Municipality as per their unopposed third party notice and that this local authority appointed the second defendant to do the actual work.

[35] It was asserted that they had no case to answer as the plaintiff appeared to be the sole cause of the accident as he:

- a. was evasive as to whether he reduced his speed and kept a proper look out;
- b. was not sure if he applied his breaks but thinks he did and could not say if it was applied hard or soft;
- c. if he applied brakes hard he could have stopped as his vehicle was road worthy and he could have avoided the accident;
- d. the evidence of Mtuzi and Dlamini demonstrated that if the plaintiff had applied his brakes and slowed down, he could have avoided the alleged obstruction and moved safely to the side of the road.
- e. the accident report made mention that all road signs were visible and that no skid/brake marks were observed on the road surface which was contrary to the evidence presented. Furthermore, that the evidence of the plaintiff did not once substantiate the allegations in the particulars of claim that the first defendant dug the trench.

[36] Counsel for the second defendant argued that evidence presented by the plaintiff was of such a nature that no reasonable court could find for the plaintiff should the second defendant not adduce evidence. They submitted firstly that the plaintiff could not even indicate where the said trench, if it existed, was dug and by whom and it cannot be inferred that the second defendant was responsible for same as the incident occurred before 06h00 as they specifically pleaded that they only commenced work after 07h00.

[37] Secondly, none of the witnesses testified how they concluded that that the dangerous situation would have been caused by the second defendant (digging the trench) as they did not lead any evidence that workers or machinery belong to the second defendant caused the alleged accident. The evidence of the two constables were at odds with the official documents of Odendaalsrus SAPS denoting their presence at the said police station and not the R 34 road.

[38] Thirdly, they were also in support of the first defendant's argument that the plaintiff via its witnesses did not prove negligence as alleged in its particulars of claim on the part of the second defendant or first defendant for that matter due to the concessions made as indicated in paragraph 34 herein identifying him as the sole cause of the accident. Moreover, the AR report completed by Mtuzi specifically depicted road signs being clearly visible with no sand heap insight or brake marks.

[39] Counsel for the plaintiff contended that the said application ought to be dismissed with costs as the credibility of witnesses do not play a role at this stage and that the court can at this stage draw the inference from the pleadings that the legal duty had passed to the second defendant as they would have admitted in their plea that they did work on the R 34 that day albeit after 7am. Furthermore, that this roadworks was not just observed by the plaintiff, but also by Mtuzi and Dlamini.

[40] I was referred to *Marine & Trade Insurance Co Ltd v Van Der Schyff* 1972(1) SA 26 (A) more specifically the dicta on page 38 paragraphs C - E which reiterated the principles laid down in *Gordon Lloyd Page & Associates v Rivera and Another* supra mentioned herein. It was asserted that there is sufficient evidence for the court to infer that the defendants undertook roadworks on the R 34 and due to their negligence in not erecting warning signs/ lights or flagmen, caused the motor vehicle accident of the plaintiff."

[8] Having considered the aforementioned submissions by counsel, the trial judge evaluated the same in light of the tendered evidence and held as follow:

"[41] The plaintiff when he testified could not give a clear indication regarding the exact location of the accident save to say that it occurred on the R 34 road enroute to his workplace, near Tshepong mine. Mtuzi and Dlamini evidence did not shed any light on this location either. I therefore cannot conclude it is the same location where the second defendant later that day, installed the said pipe.

[42] The plaintiff mentioned that on the day of the incident, he did not observe any workers or heavy machinery on the scene that could be identified as belonging to the first or second defendants to confirm that defendants were indeed involved in digging the trench which presented a dangerous situation as alleged in his particulars of claim. This was despite him being referred to the relevant portions of the particulars of claim and Rule 37 minutes during cross - examination alleging same.

[43] The plaintiff wants this court to infer that as the second defendant's appointment to install a water pipe came about due to the first defendant's legal duty to maintain and upkeep the R 34, that the first defendant, alternatively the second defendant, could have been the only ones who dug the trench. This cannot be correct as the first defendant in their plea denied this allegation and served a third party notice on Matjhabeng Local Municipality, who was in fact, the local authority who appointed the second defendant.

[44] If one looks at the pleadings, more specifically that of the second defendant, they indicated that they were appointed by the local authority and only commenced work with its workers on the R34 after 7h00 road and denied they undertook roadworks at the time of the accident hence none of their workers were observed by the plaintiff or the two constables.

[45]....

[46] The evidence presented by the plaintiff in totality could not dispute this assertion as they had already left the scene before the stipulated time.

Even if I am wrong in this view, the evidence of the plaintiff and the two constables was not convincing in any shape or form. The plaintiff himself was highly evasive regarding him applying brakes or reducing his speed or why the accident report indicated visible road signs or the absence of a sand heap.

[47] The evidence of the police officers could not account for the discrepancy of their whereabouts as contradicted by official SAPS documents. Although they insisted that they were at the scene of the accident, they could not provide an explanation for this material contradiction. This left serious doubts in my mind that they were in fact on the accident scene or if they were in fact at the Odendaalsrus Police Station, attending a parade being held by their Commanding Officer and Mtuzi thereafter, booking out his firearm and state vehicle.

[48] The plaintiff was very specific pertaining to the time of the accident would have occurred any time from 05h45 and 06h00 and he would have only left the scene when it was just before 07h00. In my view, I cannot infer that the said hazard on the R34 was caused by the defendants or that there is a causal link between the accident and alleged failure by the defendants to comply with their legal duty.

[49] In the absence of such evidence, I cannot conclude that the plaintiff presented any evidence which established on a *prima facie* basis, on which I may find in its favour or in the event the defendants do not adduce evidence."

The trial judge concluded that the defendants' application for absolution from the instance must therefore succeed.

Submissions by counsel on appeal

[9] Before us counsel for the appellant stressed that the trial court had erred in her findings, more specifically with regards to the issue of the credibility of the witnesses for the plaintiff. He pressed on us to find that that the evidence of the plaintiff satisfies the absolution test, namely that evidence was tendered upon which

a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. rendering this matter not to be a deserving case where the credibility of all the witnesses ought to be adjudicated at the absolution stage.

9.1 Counsel submitted that the court's finding in paragraph [41] of the judgment did not take into consideration the plaintiffs evidence that the accident occurred near the scene where he, the day before the accident, observed construction work in the field next to the road. It also disregards the evidence of Mtusi and Dlamini that the accident occurred near Kutlwanong, read with the second defendant's plea, that it was executing roadworks near Kutlwanong nor that no other roadworks was executed on the R34 en- route to Odendaalsrus. The only reasonable inference is, so the argument went, that the accident occurred where the second defendant was executing its contractual obligation towards the Mangaung Municipality by installing water pipes across the R34 road.

9.2 It was submitted that the court erred in paragraph [44] of the judgment in relying on second defendant's pleaded version with regards to the time, on the morning of 6 August 2014, when it allegedly started working on the road. Counsel argued that no evidence in this regard is before court and the court's reliance on the pleaded version was misplaced. Moreover, so it was submitted, the court *quo* rejected the plaintiff's version in totality on the basis that the plaintiff was "*highly evasive*", with reference to him applying breaks or reducing his speed and that this was only relevant in as far as it might have a bearing on the ultimate adjudication on contributory negligence.

9.3 It was also submitted by counsel that the evidence tendered by Constable Mtusi and Dlamini in respect of certain documents have not been proven by the relevant authors thereof.

[10] On behalf of the first respondent counsel submitted that the trial court was correct in granting absolution from instance in respect of the first defendant and that the appeal stands to be dismissed with costs.

10.1 It was argued that in regards to proving negligence the plaintiff did not dispute that:

10.1.1 No employees of the first defendant carried out any works on the R34 road between the 5th and 6th August 2014. According to the plaintiff there were people who were doing work of excavation but he could not say who those workers worked for.

10.1.2 At the time of the accident permission was given to the third defendant to install a water pipeline across the road, who appointed the second defendant to carry out such works.

10.2 It was submitted that plaintiff sought the court to find that the presence of the heap of soil on the road amounted to a *prima facie* case against the first defendant and that the first defendant failed to maintain the road. It was stressed that the alleged heap of soil on the road had nothing to do with the maintenance of the road by the first defendant. The reason therefore is, so the argument went, that on the version of the plaintiff, the roadwork was undertaken by the second defendant and not the first defendant. This roadwork related to the installation of the water pipeline.

10.3 It was finally submitted that in casu clearly the court a *quo* could not rely on the evidence of the plaintiff and his witnesses based on their credibility and that the court a *quo* correctly exercised its discretion in having regard to the credibility of the witnesses of the plaintiff.

[11] Counsel on behalf of second respondent likewise submitted that it is clear from the court a *quo*'s judgment that it properly and carefully considered the evidence adduced by the plaintiff. The Court properly exercised its discretion in its finding. By virtue of this test, it is clear that there is no evidence upon which a Court, applying its mind reasonably to evidence adduced, could or might find for the appellant.

11.1 As was done in the trial court, our attention was drawn to the plaintiffs cause of action as pleaded in the particulars of claim and the plea filed by the second defendant. The second plaintiff specifically pleaded that:

"7.2.1 Construction work involving the surface of the road by the digging of a trench only commenced after 07:00 on 6 August 2014;

7.2.2 No trench was dug or existed in the road surface on 6 August 2014 between 05:45 and 06:00 as alleged."

11.2 Counsel ultimately submitted that there is no evidence before court that the second respondent was responsible for the presence of an alleged heap of soil on the R34 on the date in question, as the appellant's evidence contradicts his pleadings and other documents in which he recorded the alleged incident. It was submitted that, according to the plaintiff's own evidence the presence of a trench was not the cause of the incident but rather the presence of an alleged heap of soil; construction work was undertaken on 5 August 2014 in the vicinity where the incident occurred but not on the road surface; he does not know who undertook such alleged construction work; the incident occurred about 3 km before his workplace (Tshepong Mine), which he estimated the distance from Riebeeckstad to Tshepong Mine as about 16 km and plaintiff could not deny that the second defendant did work on the R34 on 6 August 2014 at a later time only after the accident had occurred.

Evaluation

[12] Having considered the aforementioned, we find ourselves in agreement with the submissions made by counsel for the first and second respondents as alluded to in paragraph 7 above and expanded upon in paragraphs 10 and 11 respectively above in opposition to the appellant's grounds of appeal. These submissions resulted in the findings of the trial court.

[13] In our view the *court a quo* was correct in finding that it cannot simply infer

that the appellant's hazard on the R34 was caused by the respondents and its consequential finding that there was no causal link between the accident and the alleged failure by the respondents to comply with their legal duty. The submissions made on behalf of the appellant as referred to herein above, more specifically that the presiding judge misdirected herself in evaluating the evidence for the appellant concluding the same not to be credible, do not find favour with us. In particular, the submission that the court *a quo* rejected the plaintiff's version 'in totality on the basis that the plaintiff was "*highly evasive*",' cannot, with respect, be correct on a reading of the judgment as a whole. The trial court, in considering the totality of the evidence placed before it in adjudicating whether the appellant had made out a *prima facie* case against the respondents, did so from paragraphs [41] to [48] of the judgment as quoted above. This included the appellant's inability to give the exact location of the averred accident and his concession of not having observed any workers or machinery belonging to the respondents. We have not been convinced that the trial court misdirected itself in any way. We hold the view that the judge carefully considered the evidence and pleadings and properly exercised her discretion in granting an order of absolution from the instance. There was no evidence upon which the presiding judge, in applying her mind reasonably to such evidence, could or might have ultimately found for the appellant against the respondents. Put differently, there was no *prima facie* evidence of negligence tendered before the trial court against either of the respondents. Under these circumstances and in applying the case law as set out herein above, the appellant's appeal against the order of absolution from the instance with costs, stands to be dismissed.

[14] Counsel were *ad idem* that, in awarding a cost order, the appropriate scale to be applied as envisaged in Uniform Rule 67A should be that of Scale C. We do not have any reason for a deviation from the usual order that cost should follow the event, and accordingly it shall be so reflected in the order below.

[15] For the reasons as set out herein above, we make the following order:

The appeal is dismissed with costs on scale C as envisaged in Uniform Rule 67A.

C REINDERS J**MB NEMAVHIDI AJ**

I concur.

TL MANYE AJ**Appearances**

For the Appellant: Adv PJ Zietsman
Instructed by: SC Honey Attorneys
Bloemfontein

For the 1st Respondent: Adv BS Mene SC
Instructed by: State Attorneys
Bloemfontein

For the 2nd Respondent: Adv J Cilliers SC
Instructed by: Niemann Van Rooyen Attorneys Welkom
c/o Phatsoane Henney Attorneys
Bloemfontein