



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NUMBER: 25026/2011

REPORTABLE

In the matter between

RASHIED ABRAHAMS

PLAINTIFF

and

CITY OF CAPE TOWN

DEFENDANT

JUDGMENT

Date of hearing: 14 March 2025

Date of judgment: 22 April 2025

BHOOPCHAND AJ:

1. The Plaintiff closes its case. Counsel bows before taking his place. The Defence arises and utters a firm plea. Dismiss this claim, Milord, with poorly concealed glee. The Plaintiff has failed to prove anything, if at all, and its case hangs not on the certainty of the law but on a prayer and a wing. Why torment the Defendant to further trial when the Plaintiff's case has missed by a mile? It's absolution we seek, from the instant case presented so weak. Absolution, you say? It

is hard to order, as a *prima facie* option, the main course could augment poor starters frittered away, and the dessert may yet fall to the hapless opponent whose case is seemingly in disarray.

2. The Plaintiff claimed damages from the Defendant arising from a motor vehicle accident that occurred late at night on 16 July 2010 on the M5 Kromboom Parkway. The M5 is a major arterial motorway that connects the City to its southern suburbs. On the fateful night, Plaintiff lost control of his vehicle after it encountered water on the roadway, spun and careered off the road into a tree. The accident occurred on the stretch of the M5 between the Klipfontein on-ramp and the Kromboom Road off-ramp. The Plaintiff was left paraplegic from his accident-related injuries. The matter proceeded to trial on the issue of liability alone. At the close of the Plaintiff's case, the Defendant applied for absolution from the instance.

3. The Plaintiff particularised a multi-pronged attack on Defendant's alleged wrongfulness and negligence. Plaintiff alleged that Defendant had to ensure that water would not pool on the road surface and pose a threat to motorists using it. Defendant had to ensure that the road was properly drained and that the stormwater drains alongside it had to be properly maintained. The Defendant had to ensure that any person or entity employed, alternatively contracted to carry out the duties, would do so speedily, properly and effectively and that the road surface would not endanger anyone driving on it. Defendant had to ensure the safety of persons driving on the road and take all reasonable steps to avoid such incidents. The Defendant failed in each of these respects.

4. The Defendant pleaded that it was at all material times responsible for the maintenance of the roadway and denied negligence. Defendant provided a plea in the alternative and thereby sought an apportionment of liability if the Court found it was negligent in some respect, and its negligence contributed to Plaintiff's damages. The Plaintiff failed to wear his seat belt and was unrestrained when the accident occurred. He drove recklessly and at an excessive speed, failed to keep a proper lookout, another vehicle collided with his car, and participated in illegal drag racing with another motorist on the roadway. There was no indication that Defendant

intended to persist with its allegation that another vehicle had collided with Plaintiff's car or that Plaintiff was drag racing.

5. The trial in this matter began on 27 January 2025. The Plaintiff led the evidence of three lay and two expert witnesses. Ms Bronwyn Andrea Witbooi ('Witbooi') witnessed the accident. Mr Manyonga ('Manyonga') was the police officer who attended the accident scene. Mr Mogamat Adiel de Villiers ('de Villiers') was an ambulance assistant who arrived at the scene with his senior colleague to attend to the Plaintiff, who was trapped in his vehicle. Mr Barry Grobbelaar ('Grobbelaar') testified as an accident and reconstruction expert. The final witness called by the Plaintiff was Dr L D Roodt ('Roodt'), a Civil Engineer. Grobbelaar and the Defendant's equivalent expert, Mr John Craig ('Craig') compiled a joint minute as did Roodt and the Defendant's Engineer, Mr J C Krogscheepers ('Krogscheepers').

6. The Court has opted to examine the evidence presented at the trial out of sequence to which it was presented, to provide the necessary context to where and how the accident occurred. The testimony of Roodt provides the backdrop against which the case for the Plaintiff is best understood. The land's topography, upon which this stretch of the M5 traverses, the road design and drainage that was required, and the point where the Plaintiff's vehicle lost control and careered into a tree alongside the road, all impact upon the conditions that prevailed when the accident occurred. Defendant sought to prove, in addition to the absence of water on the roadway, that Plaintiff had not established a point where he lost control of his vehicle to enable the Court to extrapolate whether the expert's opinions about the flatness of the road and the state of the drainage at that point were relevant to the cause of the accident.

ROODT

7. Roodt testified that the stretch of the M5 between the Klipfontein Road on-ramp and the Kromboom Road off-ramp first goes downwards and then up again. The transition area has a flat spot measuring about twelve metres square. A flat section on the road surface would encourage water to collect in this area. Ponding of water on the road surface is extremely dangerous for two reasons: it can cause a

vehicle to aquaplane, initiating a total loss of traction and steering ability if the front wheels point in any direction other than straight ahead. When the vehicle moves out of the ponded area, the sudden availability of friction can lead to a sharp swerve and subsequent loss of control. The other possibility is that one of the front wheels can strike the water before the other, causing unbalanced drag and leading to the vehicle swerving out of control.

8. A road designer should endeavour to avoid the combination of zero longitudinal gradient and zero crossfall. A pond depth of 15mm is sufficient to cause hydroplaning, and a lesser depth will suffice if the tyres are worn out. Flat surfaces on the road accumulate water, which must be drained efficiently. The flow depth of the water during a once-in-five-year storm should not exceed 6 mm, and the minimum crossfall should be 2 degrees¹. A once-in-five-year storm is a standard that expresses the risk of something happening.² It has a one per cent chance of happening. In drainage design, the preferred way is to say that if a certain event can happen once every hundred years, it is a one-percent chance. So, if there is a one-in-five-year storm, it means that every year, there is a twenty-per-cent chance of it happening, i.e., when the 6mm is exceeded.

9. A knowledgeable and experienced road foreman or supervisory engineer who inspects the road when wet would see water standing there. Roodt referred to a Google Street View map of the road taken in 2013, which shows that this stretch of road remains wet after rain. The road rolls over to the flat area gradually from 30 to 60 metres away. The road is flat over quite a long distance, but manifests as a

¹ A crossfall in road design refers to the gentle slope built into a road surface to help water drain off. If the surface were completely level, rainwater could collect, creating puddles or flooding. Engineers design roads with a slight tilt from the centre to the edges to prevent this. It is analogous to a dinner plate: if it is perfectly flat, spilt water stays put. But if you tilt it slightly, the water runs off towards the edge. That's essentially what crossfall does for roads. It directs rainwater toward the sides so it can flow into drains or ditches, reducing the risk of water pooling and making roads safer for vehicles.

² The Court obtained a simplified explanation of a once-in-five-year storm for its own edification. A "once-in-five-year storm" does not mean it happens exactly every five years—it just means that, statistically, there's a 20% chance of such a storm occurring in any given year. Think of it like rolling a dice with five sides—each year, you roll the dice, and if it lands on a certain number, that big storm happens. Some years, it might not occur at all; other times, it could happen multiple years in a row. In the context of road flooding, this kind of storm is intense enough to overwhelm drainage systems, cause rivers to overflow, and make roads temporarily impassable. While it's not the worst storm imaginable, it's serious enough that cities prepare for it with flood prevention measures.

problem over the 12-metre square area. Anyone with road design or maintenance experience would have noticed that this road is flat over a long distance. The vertical alignment over 132 metres is 0.06 per cent.

10. Roodt testified that the road surface drainage over this area is inadequate. The engineers involved in this case all agree that the road is flat due to the sag curve³ and the superelevation rollover⁴. The underlying principle in road safety is that the road must be reasonably safe for the reasonable road user. The risk of ponding in this area will take the road user by surprise. It is unexpected as 99.99 per cent of the roads do not have ponding problems. The road stretch can be resealed with a coarse overlay of aggregate (stones and bitumen) to mitigate the risks associated with ponding. The Defendant would be responsible for this. The flat area may lead to slow sheet flow⁵ when heavy rains occur. The depth of the sheet flow will depend upon the intensity of the rainfall. The depth of water ponding will depend upon the depth of sheet flow and its ability to flow off the road.

11. Water should flow off the road and into the stormwater drains and drain away unless the stormwater drains are blocked. The water should flow into the channel⁶, which takes it to the catchpit and then through pipes to the manhole, and the other pipes take the water under the road to the canal running on the western part of the

³ In road design, a sag curve is a vertical curve connecting a descending slope to an ascending slope, forming a U-shape or "sag." It's typically used in areas like valleys or dips in the terrain. These curves are crucial for ensuring smooth transitions between slopes, maintaining driver comfort, and meeting safety standards

⁴ Superelevation in road design is the banking or tilting of a road surface, particularly on curves, to help vehicles maintain traction and safely navigate turns at higher speeds. Imagine you're running on a flat track and suddenly need to make a sharp turn—you'd probably slow down to avoid slipping. But if the track were slightly tilted, it would help you stay balanced while turning. Roads work in a similar way! Engineers design curves with a gentle slope, raising the outer edge of the road higher than the inner edge. This helps counteract the sideways force that pushes vehicles outward when they go around a bend. Superelevation improves safety by reducing the risk of skidding or overturning, especially in wet conditions. It also enhances driving comfort by making curves feel smoother and more natural. Tilt amounts depend on factors like speed limits, vehicle types, and climate conditions.

⁵ Sheet flow refers to the thin, uniform layer of water that spreads out and moves across a surface—like a road—without forming distinct channels or streams. Instead of water gathering into defined rivulets, it spreads evenly, flowing as a shallow sheet. On road surfaces, sheet flow usually happens after heavy rain when water can't immediately drain away. The slope of the road influences how the water moves—if the surface is level, water may linger and create hazardous conditions, while a slight incline helps it flow toward drainage systems. Engineers design roads with specific grades and surface textures to manage sheet flow and prevent excessive pooling, which can lead to hydroplaning.

⁶ The channel is the concrete furrow or gutter built alongside part of this stretch of road and leads water to a catchpit, which is a hole from where pipes drain the water to the stormwater pipes.

dual carriageway. Roodt believes the channel does not extend far enough as it stops before the 12 m square area. Beyond this area in a northerly direction, the water, including that over the flat spot, has to flow past the grassed edge and into the manhole with side inlets. Water will always collect at a flat area until it rises high enough and then pushes back on the road surface, first in the emergency lane and then onto the lanes themselves. If the grass at the edge has dense growth, it can prevent water from clearing the edge rapidly. Vegetation at the edge of the road impedes the flow at that critical point where the water must run off the road. The vegetation must also be managed to prevent edge buildup. The channel is there to reduce the effect of vegetation impeding water flow off the road, but it does not extend far enough north. The channel should at least extend to the pipes from the manholes to make the runoff efficient. The combination of the superelevation roll off, the sag curve, and the drainage is the perfect storm of contributing factors.

12. Roodt contended that the credibility of the accident statistics for this stretch of road collected by the Defendant is suspect, as they make no reference to the Plaintiff's serious accident. He pondered about other small accidents that may have occurred in this stretch of road. The catchpit has a double grid and it collects water flowing over quite a distance from south to north, i.e. from the incline of the Kromboom Road off ramp to the lowest point, which is at the grid. There is an extensive row of alien trees alongside the channel. They drop leaves in winter, which block the channel and the grid. If the grid inlet is not cleaned in a timely manner, it will pack up quite deep with debris. As the road authority, the Defendant has the duty to maintain the drainage. They can contract people to do the task, but cannot delegate responsibility. With over forty years of operating experience, the Defendant should have known it was required to maintain the stormwater drainage in the area, independent of the accident statistics. Over the 45-year period since the road was built, road inspectors, foremen, and maintenance staff should have driven on and inspected the road for the duration of the rainy season for half of the year. They should have seen the ponding of the road, as was evident in some of the photographs included as evidence. Part of their duty is to ensure that ponding does not happen. The Defendant need not wait for an accident statistic to do work that is patently logical to do.

13. Roodt suggested that the Defendant can remove vegetation and open up the grid inlets to see if there is material that has accumulated in the catchpits. They can ensure that the pipes in the catchpit are open. The pipes that carry the water are 200 and 250mm wide. The bore of the pipes is at high risk of blockage. Normally, a stormwater drainage pipe would be 450 mm. Some municipalities and SANRAL⁷ use 600mm pipes to enable workers to see through them and crawl inside to clean them, as they risk clogging up. Maintenance supervisors must go out, check and arrange for the drainage system to be cleaned. These drains can be cleaned in various ways, including high-pressure hosing. The Defendant is responsible for a huge network of roads, and they must have the experience, knowledge and skills to maintain the roads properly.

14. As for the trees alongside the road, which are just outside the clear zone advised in the SANRAL manual, the Plaintiff's expert stated that a road reserve is not a botanical garden. It is a functional space, not a space to create more hazards. The expert referred to American studies, which found that accidents that occur away from solid objects like trees are less severe because drivers can come to a stop or manoeuvre back to their path of travel. The Americans developed the concept of a clear zone or recovery area, and part of the research was to determine the area that would be safe. They cited the figure of six metres. The SANRAL manual mostly recommends 10 metres, depending on the recommended speed of the road and the traffic volumes. Drivers can make mistakes, but they should not pay for it with their lives. The expert advised a stricter approach to removing fixed objects

15. Roodt described a superelevation as the crossfall of a road adapted to the curves' turning movements. The Defendant sought to pin Roodt down to the road building and design standards and establish whether there was deviation from these standards along the stretch of road implicated in the accident. Defendant suggested to Roodt that his testimony, at least on the length of the channel and the clear area of the verge, was an abstract ideal. The expert conceded that the latter were within the acceptable standards. He elaborated on the need for plans to operate the road and a regime of inspections and cleaning out, which is a management issue

⁷ South African National Roads Agency Limited

involving the frequency and type of maintenance to be done to prevent the situation from deteriorating to the extent that it is unsafe. Roodt asserted that the Defendant did not have a maintenance manual, hence it did not establish standards. SANRAL has a generic road manual that has to be adapted to a particular situation. When it comes to maintenance, there is no specific standard, but a certain engineering logic and approach that should be in place to deal with maintenance to obviate problems.

16. Roodt elaborated on propositions put to him during cross-examination. He accepted that there are two types of drainage in this section, namely the channels and the catchpit and then the manholes with side inlets. The manholes are 40 cm lower than the road surface, and the side inlets are even lower. The channel is in an area where the topography or the contours of the land adjacent to the road are higher than the road surface. The manholes cover the area where the land adjacent to the road is lower. The expert explained it as an old river course in the topography that creates a low point. The channel's purpose is to catch the water from the grass and the road. If it were not for the channel, then the soil in that area, which is higher than the road surface, would erode. The water flows down the channel through the grid inlet into the catchpit. It would drain away, save for a blockage. The manholes drain a sub-catchment area. In that area, a channel is not required. The expert repeated his opinion that the channel was stopped too short. It should have continued up to the flat square on the road surface, i.e., for a further twelve metres. The vegetation growing in this area that blocks the water from clearing the road edge is a real problem. Roodt repeated that the channel should have been extended and piped from an inlet into the pipe system. He accepted that the position regarding the vegetation at the edge of the road was a matter of evidence. The expert stated that his opinion was based on engineering judgment and possibilities. He resisted the proposition that his opinions were speculative. He accepted that the two types of drainage were sufficient for the area and conceded that the flat square at the transition point is not absolutely flat.

17. Roodt was examined on the need for topographical surveys. He responded that these surveys identify the lay of the land and are usually done in the design or pre-construction phase of road building. Without catastrophic events like a road caving in or a rebuild, there would be no need for a topographical survey. Nor would

it be necessary, if there is no record of accidents in the area or complaints from members of the public or the authorities tasked with maintaining the road and observing ponding. Roodt was reminded that he had requested accident data from the Defendant for at least five years before the accident. He testified that he sought this data to determine whether there was a statistical trend of accidents in this part of the road. There was no data involving that stretch of the road. Accident data is one of three ways a problematic road surface would come to the Defendant's attention and warrant the road authority performing a topographical survey. The second involves maintenance officials observing an issue; the third is information from citizens who call in and lodge complaints. Absent these three sources of information, there would be no reason to undertake a topographical survey of a stretch of road unless a substantial rebuild is contemplated. Absent these methods, there would be no way of knowing that the stretch of road is flat.

18. It is standard engineering practice to include a channel with a cut instead of a fill. A cut is where the road edge is lower than the natural ground. A fill is where the road edge is not lower than the natural ground. The channel and the grid inlet provide for stops where the cut stops. The manholes are in a little gully, a historic watercourse. At some point, one goes from cut to fill. The channel ends where the cut ends and the fill begins. Roodt conceded that the end of the channel and the start of a different form of drainage on this stretch of road accord with standard engineering practice. He conceded further that when he testified about the shortness of the channel, it would fall into the category of preferred best practices and not standard practice. Roodt's investigation did not extend to drainage or stormwater analyses. Nor did he consider the issue of cuts and fills, which the Defendant raised. Nor was there any reference to cuts and fills in the expert reports. The reference to these concepts arose in the context of the length of the channel.

19. The Defendant enquired whether the expert had conducted a stormwater analysis to determine the thickness of the sheet flow. Roodt testified that he used a civil design program to check where ponding would occur relative to a certain rain intensity. Water falling uniformly on a small area of road does not concentrate immediately. It flows like a sheet towards the lowest point. It will then begin ponding or finding a channel through which it can flow. Sheet flow is just a flat

sheet. Depth of flow is something that occurs in a channel (not the roadside channel), but depth of flow can also manifest in channel formation. Sheet flow thus can have an associated flow depth relative to the rain's intensity, the slope, and the road texture. Ponding means there is no flow; the water has reached a standstill. Ponding occurs where the water, flowing in a sheet-like manner, comes to an area that is now flat and the depth of the ponding will accumulate or increase if there is a constant flow of water into it. Even in the ponding area, if the height of the water is high enough and the edge is lower than the energy gradient, it will also start flowing off. The pond is the water residue that has collected but not yet dissipated.

20. Flowing from the propositions relating to the lack of a stormwater analysis to determine whether the thickness or depth conformed with the standard, and Roodt's testimony that sheet flow should not exceed 6 mm, the issue of dynamic aquaplaning arose. Roodt testified that the risk of dynamic aquaplaning is directly proportional to the depth of the water on the road, and the depth is affected by a wide range of factors contributed to by the environment, geometric design, drainage design, maintenance, and the condition of the vehicle. The expert had assessed just one of the factors, i.e., the flat area. The expert did not analyse the sheet flow, nor the accumulation at the low point, at the flat area, or the drainage of the road. He did not investigate the entire drainage system, whether the pipes were compliant or whether the system was otherwise compliant. Roodt accepted that he did no analysis or calculations. He expressed opinions. He could not comment on the vehicle, the driver's behaviour or the need to slow down in adverse weather conditions.

21. It was put to the expert that municipalities do not have endless resources and that they must act responsibly within their available budgetary resources. Roodt replied that being proactive means doing routine things that follow patterns, like trimming vegetation and cleaning drainage systems in the rainy season. All of that is premised upon optimising resources. The Defendant found no quarrel with the proposition that routine and reactive maintenance is required. It was put to the expert that he had no evidence that routine maintenance did not happen, i.e., the verge was not trimmed, and the pipes were not cleaned. The expert agreed that there was no such detail, except that the whole case was based on water, witnessed by people who were on the scene. It was put to the expert that he was not suggesting that

because there was a flat area, the drainage was inadequate. The expert replied that there is a flat area, and certain drainage elements failed; therefore, the conclusion is that they were inadequate.

22. Where there are extensive flat areas, water can be positioned. It follows that the drainage is inadequate. It was repeatedly pointed out that the expert had not actually measured whether his opinions were at odds with the standards. Roodt's stock reply was that it was his interpretation of the situation without quantifying. The expert suggested that the diameter of the pipes was below the standard 400 mm advised, i.e., 200mm and 250mm. One of the photographs suggested that the diameter of one of the two pipes was 375mm, double the width suggested by the expert. Many of the propositions put to Roodt in cross-examination were qualified by excluding the absence of data collection, maintenance, and inspections.

23. The key features of Roodt's testimony were that the design of this stretch of road, necessitated by the land topography, lent itself to water ponding. Drainage was necessary over the flat surface of the road, which was not confined to the twelve-metre square area but extended to over 30 to 60 metres northwards of the square. The vertical alignment of the road over 132 metres was 0.06 per cent.⁸ There were two types of drainage in this stretch of road: the channel and catchpit, and the manhole with side inlets. The channel and catchpit were appropriate for the cuts in the topography, and the manholes for the areas of fills. Water ponding on the road surface probably arose from blocked drains or overgrowth of edge vegetation.

WITBOOI

⁸ Vertical alignment in road design refers to how the road changes in elevation along its length, going up and down. It's what gives a road its slopes, hills, and dips rather than being completely flat. Engineers use vertical alignment to ensure the road is smooth, safe, and comfortable for drivers. It includes gradients or slopes, which are slight inclines or declines that help vehicles travel efficiently. Crests or high points where the road reaches a peak, like the top of a hill and sags or low points where the road dips down before rising again. Good vertical alignment ensures visibility, improves drainage, and makes driving easier by avoiding sudden steep climbs or drops. Without it, roads would feel much bumpier and could be unsafe, especially in bad weather. A 0.06% vertical alignment refers to the gradient or slope of a road. In simple terms, it means that for every 100 meters of road length, the elevation changes by 0.06 meters (or 6 centimetres). Since this percentage is very small, it indicates a very gentle slope, barely noticeable to drivers. Engineers use such subtle gradients for smooth road transitions, ensuring efficient drainage without creating steep inclines that could affect vehicle performance or safety.

24. Ms Bronwyn Andrea Witbooi ('Witbooi') was a front-seat passenger in a tow truck travelling behind Plaintiff's vehicle on the night the accident occurred. The driver of the tow truck vehicle was Mr Richard Thompson ('Thompson'), who has since passed on. They parked at Liesbeek Parkway and left when it began raining heavily there. The two, headed home on the M5, heading southwards. It was dark and drizzling slightly. They were a distance behind another whitish vehicle, but close enough to see it. As they approached the Kromboom turnoff, Witbooi saw "a big splash of water, a big plane of water; it was just water" that she saw splashing everywhere as the car encountered it and spun out of control and hit a tree on the side of the road. Thompson pulled over to assist. She got out but was instructed to remain in the vehicle. She testified that the entire left side of the road was filled with water, right up to and over the middle line of the road. "It was one big dam, you could say". Witbooi called the emergency services. Thompson parked his vehicle ahead of the accident scene. It was drizzling at that point. She got out but returned to the vehicle on Thompson's instruction. Her further observations were from the vantage of the van.

25. Witbooi visited the scene with Thompson in the same month. She was curious as to why the accident occurred. She walked around and noticed the drain was full of leaves and rubbish. She thought the clogged drains may have caused water to build up on the road and contributed to the accident.

26. Under cross-examination, Witbooi explained why she returned to the accident scene. The M5 in the accident area was a straight stretch of road. There were no other vehicles involved. She had travelled the road many times. She had seen water build up in that stretch but had never seen an accident there. They travelled about 100km/hr on the night of the accident. She estimated the car ahead of them was doing the same speed, but she was unsure. Her affidavit was based on the questions she was asked during the interview. She was shown photos of the road, but initially denied seeing any with blocked drains. The car ahead of them was whitish in colour. She concluded that the accident occurred through water on the roadway, as she and Thompson experienced a similar situation on the M5 at another

location. They hit a whole lot of water on the road. Thompson lost control of the vehicle and then crashed into a pole.

27. On questioning from the Court, Witbooi testified that the car went across the road when it hit the water. The car spun on the slow lane. From the left, it went to the middle of the road onto the white line and spun its way back. It went halfway across the road over the two lanes, then over the two lanes, and then it came back. When she returned to the accident scene, she walked around and saw the drains coincidentally. She did not go there specifically to see the drains. She saw two manholes in the vicinity of the drain. The shallow drain alongside the road was blocked.

MANYONGA

28. In his affidavit, Manyonga stated that it was pouring when he arrived, and the road was wet. He completed the accident report form on 17 July 2010 at 01h20. He also deposed to an affidavit on 17 July 2010 at 02h30. He parked behind the ambulance. It was raining. It was pouring before the accident in Rondebosch East and Belgravia. He described the road as a flat, tarred road. The road was full of water covering both lanes. He and the paramedics struggled to walk in the water, which extended from the grass into both lanes. Manyonga was invited to illustrate the extent of the water he saw on a photograph forming part of the exhibits. He drew a line depicting the extent of the water from just over the channel onto the grass next to the light pole and onto the emergency lane and a fraction of the slow lane. This photograph (page 155 of the bundle) shows an upright chevron sign about 1.5 metres high on the grass verge and alongside the channel at an angle to the tree where the car eventually stopped. The photograph seems to have been taken around about 12 September 2011 if the content of the affidavit covering it is correct. Although Manyonga did not tick off the block provided for standing water in the accident form he completed, he testified that there was standing water and the road was wet. He deferred to the correctness of the accident form under cross-examination.

DE VILLIERS

29. ER24 Ambulance Services employed de Villiers as a basic life supporter. He was on duty the night the accident occurred and attended the scene to provide emergency care to the Plaintiff with his senior partner, Andrew Coutts ('Coutts'). The ambulance parked in the emergency lane. As de Villiers got out, he realised he was standing in water. The water was ankle-deep. He asked Coutts to move the vehicle forward so they did not have to stand in the water. The water extended to the stipple line, which split the two lanes to his right. De Villiers testified that the water was as far as he could see, but his focus was on the patient.

30. Under cross-examination, de Villiers stated that he had been working at ER24 for just over three years before attending the accident. There were initially only two emergency personnel, but Coutts asked for backup as the Plaintiff was trapped in the car. Struan Reid, an advanced life supporter employed by another company, arrived to assist. The ambulance form noted that the patient was unrestrained. De Villiers interpreted this to mean that the Plaintiff was not wearing his seat belt. The form also stated that it was a motor vehicle accident at high speed, and the Plaintiff's vehicle was rear-ended. The witness could not remember which of Coutts or Reid filled out the form. The witness was asked about why he remembered the accident. He had testified that he remembered the accident because of certain things. The patient was trapped and unresponsive, and he was unable to assist. It spurred him on to study further and become a rescue practitioner. An investigator contacted him one year after the accident. The witness did not cite the water on the road surface as a reason for remembering this accident. However, the transcript shows that his testimony in this respect was incomplete.

31. The Defendant tested the independent recall of the three lay witnesses, given that the accident had occurred fourteen years before their testimony. They underwent rigorous cross-examination, which exposed lacunae in their memory of events and inconsistencies with the documentary evidence. Their evidence relating to the presence of water on the slow and emergency lanes remained intact. In particular, Witbooi's evidence that the Plaintiff's vehicle spun as it encountered water on the slow lane and de Villiers' testimony that the water extended as far as he could

see were not seriously challenged. The Court is not required to make any credibility findings at this stage.

GROBBELAAR

32. Mr Grobbelaar testified as an Accident Reconstruction specialist. The speed limit on the stretch of the M5 where the accident occurred is 100 km/hr. The damage to the Plaintiff's vehicle was on its left rear. The vehicle spun over 180 degrees before slamming into a tree alongside the road. The presence of water on a road surface is conducive to vehicle aquaplaning. The phenomenon depends upon, among others, the speed and weight of the vehicle and the type of tread, width and pressure of the vehicle's tyres. Aquaplaning seldom occurs at speeds below 80 km/hr. If the water depth on the left-hand side were more than its right, the forces acting on the vehicle would be unbalanced. The force acting on the left rearwards would be more than on the right. An unbalanced force would cause an anticlockwise moment. If the force is large enough, it would cause the vehicle to go into an anticlockwise spin. There were no roadside signs warning drivers that the road was slippery when wet.

33. The Plaintiff had approached this stretch of road at night. The wetness of its surface would have swallowed up the headlights. It was unlikely that the driver would have seen any puddles of water on the road surface in time or at all. The more water a vehicle splashed up, the more water there was to be displaced and the more resistance the water would cause to the vehicle. Grobbelaar noted the crossfall of the road sloped downwards from right to left at a point 35 metres from the tree against which the car came to a rest. This point corresponded to the grid inlet of the catchpit situated on the road's edge. He testified that a vehicle with less weight had a greater chance of aquaplaning.

34. Grobbelaar then testified about the coefficient of friction and the conclusions the Defendant's expert reached based upon its usage to show that the Plaintiff's vehicle could not have lost control in the vicinity of the northernmost catchpit on this stretch of road. The coefficient of friction, in this instance, is the traction between the tyre and the road surface. If there is a low coefficient of friction, the tyre will slide

more easily. The higher the coefficient of friction, the more grip the vehicle has. For the Plaintiff's car to have hit the tree, it would have encountered water about fifty metres away from the inlet grid of the catchpit, about thirty-five metres away from the tree, i.e., eighty-five metres north of the tree. The vehicle crossed from a tarred surface covered with water over the concrete channel and onto the grass. The Defendant's expert used a coefficient of friction of 0.5 to calculate where the spin began. Grobbelaar criticised the approach of using a fixed coefficient of friction as it did not consider the friction the wheels would have encountered if they dug into the grass verge. He referred to the flat area on the roadway. The northernmost part of the flat square is about sixty metres from the tree. There is an indentation on the right driver's door, the cause of which the experts disagreed on. The Defendant's expert was of the view that the indentation occurred as the front door buckled against the fender, pushing rearwards as it crumbled. Grobbelaar suggested that the vehicle hit a pole on its way to its final resting position, causing the indentation. The relevance of this suggestion was that the vehicle's impact with a pole would have further affected the coefficient of friction, and that using a constant coefficient of friction would not be appropriate in the circumstances.

35. Defendant attempted to show under cross-examination of this witness that Plaintiff had not proven where he lost control of his vehicle, the relevance of which related to whether the flat square or the drainage of that part of the road was relevant at all to the accident itself. Grobbelaar conceded, under cross-examination, that his theories were contingent upon the evidence tendered. The two theories he proposed to explain how the accident could have occurred included a straight-line aquaplaning, or a left-sided deflection, a so-called yaw. The latter would have occurred if the left side of the vehicle alone encountered a puddle of water.

36. Grobbelaar was asked about perception-reaction, the time between seeing and responding to a hazard. He testified that it is broken down to half a second to perceive, half to decide what to do and half to act, an average total of one and a half seconds. Aquaplaning becomes dangerous when the driver reacts, e.g., by braking or oversteering. Grobbelaar was quizzed about how long it would have taken Plaintiff's vehicle to cover the flat area in this stretch of the road. Grobbelaar calculated the time by dividing the distance travelled by the speed. If the Plaintiff was

travelling at 100km/hr, which had to be converted to metres per second, i.e., 27.7 metres per second, and the flat area is ten metres, the vehicle would have travelled over the flat area (10 divided by 27.7) in 0.4 seconds. The Defendant sought to demonstrate that it would take less than the perception reaction time to travel over the flat area identified by Roodt and Krogscheepers, and that the loss of control did not necessarily happen at the grid.

37. The Plaintiff's expert could not estimate where the loss of control occurred. If the factors identified by the Plaintiff's expert are incorporated into the coefficient of friction, e.g., the sideways deviation of the vehicle, the grass verge, the concrete channel, and a possible impact with a pole, the loss of control could have happened at the grid. Grobbelaar's theory, however, was that the loss of control of the vehicle occurred more northerly of the grid. Too many variables were involved for him to express an opinion on where the loss of control occurred. He was referred to Ms Witbooi's evidence in court, i.e., the car spun into the right-hand lane and then spun into the left-hand lane across the grass and into the tree. The expert explained Ms Witbooi's version to be that the rear would have appeared to have spun to the right while the car was going forward and sideways towards the grass verge and the tree.

38. The crossfall to the emergency lane on the area of the road in line with the tree where the vehicle finally came to a rest, which is south of the flat area, is 1.5 per cent. The flat area has a crossfall of 0.2% towards both sides and vertically. The more northerly part of the road cross falls from left to right. It was put to the expert that wet grass has a coefficient of friction of 0.3, i.e. a lower coefficient of friction than a tarred surface. If the tyres were digging into the verge, the muddy surface, then it would change angle much more quickly. If the car hit a pole, like a chevron pole, it would have had some effect on the trajectory the car followed. The expert repeated that he raised all of these variables to argue that the Defendant's expert could not exclude that the car lost control in the area of the catchpit or in the flat area. His position was that he could not determine where the car lost control, but neither could Craig exclude that the car could have lost control in the area of the catchpit.

EVALUATION

39. A Plaintiff has to present a *prima facie* case comprising evidence relating to all elements of the claim if it is to evade an application for absolution, as the absence of such evidence would constrain a Court from finding for the Plaintiff. A Plaintiff may rely upon reasonable inferences that can be drawn from the evidence. Absolution at the end of the Plaintiff's case is granted sparingly, but if the circumstances dictate that it should be ordered in the interests of justice, a Court should not waver in its acquiescence. The test to be applied is not whether the evidence led by the Plaintiff establishes what would finally be required to be proven, but whether there is evidence upon which a Court applying its mind reasonably to such evidence can or may, not, should or ought to find for the Plaintiff. Witness credibility plays a minimal role in these circumstances, and evidence led, absent exceptional considerations, is assumed to be true.⁹ A Court may also consider that a Plaintiff's case may be supplemented by evidence emerging during the Defendant's case.¹⁰

40. The focus then shifts to the elements of delict that the Plaintiff had to prove, namely, conduct as either an act or omission that was wrongful and unlawful, committed either negligently or intentionally, which caused the harm or loss complained of, and resulted in actionable harm, loss or damage.¹¹ The Plaintiff's case and the evidence presented are premised on negligent omissions. An omission is wrongful when it evokes moral indignation and the legal convictions of the community, constitutionally understood, regard it as unacceptable.¹²

41. The Plaintiff put together a remarkably compelling case even though he could not contribute due to amnesia for the accident induced by his injuries. Analysis of the evidence will determine its sufficiency to prove the delictual elements. The Plaintiff presented expert evidence on the flatness of the road between the Klipfontein on

⁹ *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409 G-H, *Gordon Lloyd Page & Associates v Riviera and Another* 2001 (1) SA 88 (SCA)[2000] ZASCA 33 at para 2, *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26(A) at 37G-38A, *Hartzer v De Sousa and Others* 2015 JDR 1320, *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T), *Atlantic Continental Assurance Co of SA v Vermaak* 1973 (2) SA 525 (E)

¹⁰ *Ruto Flour Mills* supra at 310 A-B

¹¹ *MTO Forestry (Pty) Ltd v Swart NO* 2017 (5) SA 76 (SCA) at para 12, Neethling, Potgieter, Visser, *Law of Delict*, 6th edition, Lexis Nexis, at page 25

¹² *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597A-B, *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC), *Minister of Safety and Security v Van Duivenboden* [2002] ZASCA 79; [2002] 3 All SA 741 (SCA), *Loureiro and Others v Imvula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC); 2014 (5) BCLR 511 (CC) (Loureiro) at para 53

ramp and the Kromboom Road off ramps in the southward direction. The road surface enters a decline northward of the Klipfontein Road on-ramp and curves into a flat stretch with superelevation and sag curves to a relatively flat area of about 12 metres square, the southernmost edge of which was about fifty metres north of the tree that the Plaintiff's car eventually abutted against after spinning off the road. The design of the stretch of road is conducive to water pooling on the road surface unless it is drained effectively.

42. Witbooi witnessed the accident and saw the car splash through a body of water on the slow lane before it spun. Witbooi, Manyonga, and de Villiers testified variously to pools, dams, and puddles of water, some ankle deep and about three centimetres high, on the road surface, the emergency lane, and portions of the grass verge. The evidence remained sufficiently intact after cross-examination. The Court accepts that Plaintiff had elicited sufficient evidence of water pooling on the slow lane in the line of Plaintiff's travel when the car spun off the road.

43. The drainage system was designed with the cuts and fills of the adjacent land layout to drain the water off the road. A crossfall from right to left allows water to drain to the left edge of the road. A channel conveys water from the Kromboom off-ramp alongside the roadway to catchpits 200m apart. The northernmost of these catchpits is about twelve metres short of the southernmost edge of the flat square on the roadway. Further north of this catchpit and near the flat square, excess water should flow over the road's edge into a manhole with side inlets. The land's topography required two types of drainage to facilitate water flow off the road surface.

44. The Engineers agreed that flat surfaces do creep into road design. Even then, water should flow off the road into the stormwater drains and move away unless they are blocked. The vegetation or edge growth on the roadside could prevent water from rapidly flowing off the road into the lower ground and side inlets of the manholes. If the inlet to the catchpit is blocked, the water will flow to the lowest point, which is approximately 10 metres to its north. They agreed that it was not evident when the accident occurred if the stormwater inlets' drains were effectively maintained. Trees are growing alongside the road, and they shed their leaves. Water

ponding on the road surface would have been unlikely with the requisite maintenance.

45. The Defendant accepted responsibility for maintaining the M5. The Plaintiff could not prove that on the night of the accident, the edge vegetation was overgrown or that the drains were blocked, but relied upon the court to make that inference.¹³ Expert evidence suggested that the car aquaplaned once it reached the water, but it was acknowledged that aquaplaning itself would not cause the Plaintiff to lose control of his vehicle. He had to do something else, like braking or oversteering, to lose control of his vehicle. From this set of facts, the court must determine whether the Plaintiff has proved the delictual elements encompassing the wrongful and negligent omission that caused the accident and established the Defendant's liability. This case does not readily lend itself to identifying those elements.

46. The evidence is that a failure of monitoring and maintenance would lead to blocked drains and overgrowth of edge vegetation. The Defendant's omissions relevant to this case are its alleged failure to ensure that the channels, catchpits and the side inlets of the verge manholes were cleared and that the edge grass was cut to allow effective water runoff. The Plaintiff could not prove that the drains were blocked or that the grass was overgrown on the night of the accident. The Plaintiff requires the Court to infer negligence based on general maintenance failures. The Court has no difficulty making the inference, as the Defendant could not elicit or suggest any other reason from the Plaintiff-appointed expert for the water to pond on the road. The inference is reasonable in the circumstances.

47. The Court must assess whether the Defendant had a legal duty to maintain the road and whether its failure was wrongful. Municipalities are constitutionally mandated to maintain roads and manage stormwater systems.¹⁴ The Municipality cases exemplify the intersection between public and private law. The Defendant has admitted, and correctly so, that it has a duty to maintain the roadway. Subordinate

¹³ The Plaintiff relied upon the *res ipsa loquitor* maxim to fill the gaps in the evidence that is usually within the Defendant's knowledge. The Plaintiff relied upon *Naude v Transvaal Boot & Shoe Manufacturing Co* 1938 AD 379 at 398-399 and other cases which expound on this maxim. The Court does not consider it necessary to apply the maxim in this case.

¹⁴ Sections 155, 156, and schedules 4 and 5 of the Constitution, Act 108 of 1996

legislation was in place to further refine the ambit of that duty, but neither party relied upon it. Any failure of the Defendant to maintain the road would thus be unlawful. The question is whether the failure to monitor and maintain the road created an unreasonable risk of harm.

48. The Court has to consider and balance a whole set of factors when considering the element of wrongfulness. The foremost consideration is whether the Defendant could implement reasonable and practical measures to prevent the harm that ensued to the Plaintiff. The other considerations include, among others, the foreseeability¹⁵ and possible extent of the harm; the degree of risk that the harm will materialise; obligations imposed by the Constitution, breaches of statutory duties; the interests of the Defendant and the community; who has control over the situation; the availability of practical preventative measures and their prospects of success; whether the cost of preventing the harm is reasonably proportional to the harm; and whether or not there are other practical and effective remedies available.¹⁶

49. The Court is cognisant of the impracticality and cost implications of expecting the Defendant to redesign the road, remove the flat area, and investigate and improve the drainage system. The evidence has, however, identified the presence of these defects and inefficiencies, and it is for the Defendant to establish whether they are practical, reasonable, and cost-effective. This aspect of the case is still open for the Defendant to present evidence on the adequacy of the drainage system and the costs of reducing the risk along this stretch of road, like, for example, enlarging the runoff pipes that carry water under the road surface to the canal running on the western side of the roadway, or of resurfacing the road with an aggregate of bitumen and coarser stone as the Plaintiff's expert suggested.

50. From a reasonable and practical consideration, Defendant is eminently capable of attending to the three factors identified by the Plaintiff-appointed Engineer: trimming vegetation and cleaning drainage systems in the rainy season

¹⁵ The issue of whether foreseeability of harm should even factor in an analysis of wrongfulness has been raised in cases but the apex Court continues to list it as one of the factors that a Court should consider under wrongfulness see e.g., *Mushongwa supra*.

¹⁶ *Kruger v MEC, Transport & Public Works for the Western Cape and Another* (10067/2011) [2015] ZAWCHC 158 (29 October 2015 (*Kruger v MEC*) at para 43

and effective monitoring and maintenance of the road by Defendant's road engineers and maintenance personnel.¹⁷ These measures are premised upon optimising the Defendant's resources, and their costs are reasonably proportional to preventing the risk of harm. A municipality must present information to the court to enable it to assess the reasonableness of the steps taken. The Defendant expressed that it found no quarrel with the proposition that routine and reactive drainage system maintenance is required.

51. Having identified practical and cost-effective measures to avoid danger to drivers using this stretch of road, the Court finds that the Plaintiff has placed sufficient evidence before it to determine whether the Defendant's alleged omissions were wrongful and unlawful. The Constitution and statute obligate the Defendant to maintain the roadway. Maintenance of the drainage of roadways is part of the obligation. If there is a drain, a channel, or side inlets to a manhole, they have to be cleaned. If roadside vegetation overgrows and obstructs the flow of water to purpose-built manholes, they have to be trimmed. That is common sense. A failure to do so is wrongful and unlawful, and the Court does not waver in making these findings. Imposing liability on the Defendant would depend upon whether the Plaintiff has established the two further elements of a delict: negligence and causation.

52. The negligence enquiry requires an answer to whether the Defendant could have reasonably foreseen harm befalling Plaintiff due to water ponding on the road surface from ineffective drainage. If it should have foreseen the harm, then should it have taken reasonable steps to prevent the harm?¹⁸ The Defendant had to foresee the possibility that a failure to clean the channels, the catchpits, the side inlets to the manhole and the pipes leading to the manhole from the catchpit would cause pooling of water on the road surface and pooling of water could injure a person in the position of the Plaintiff and cause him patrimonial loss. The Defendant had to take steps to ensure that the drains were clear and the roadside vegetation trimmed. The evidence thus far before the Court is that the Defendant did not take reasonable

¹⁷ *Kruger v MEC* supra at para 43

¹⁸ *Kruger v Coetzee* 1966 (2) SA 428 at 430E-F: For the purposes of liability, culpa arises if— (a) a diligens paterfamilias in the position of the defendant— (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and (ii) would take reasonable steps to guard against such occurrence; and (b) the defendant failed to take such steps.

steps to guard against the blockage of the drainage system or to ensure that water could flow freely off the road into the side inlets of the manhole.

53. The Defendant cross examined the Plaintiff appointed Engineer on prevalent patterns exposed by accident data and communications from the public to alert it to hazards on particular stretches of road. The expert conceded that the accident data did not record any accident on this stretch of road since 2005. However, he contested the accuracy of data held by the Defendant that did not even list the accident the Plaintiff was involved in. The Engineers agreed that the accident data provided by the Defendant lacked sufficient detail, specifically the exact locations, the actual causes of the accidents, the environmental conditions at the time of the accident and its incompleteness.

54. Witbooi's evidence that she had seen water pooling on this stretch of the road on previous occasions was uncontested. The other witnesses testified without coercion about the flatness of this stretch of road. The Plaintiff-appointed Engineer spoke of experienced road foremen who would recognise the road design and the purpose-built drainage systems and ensure that appropriate measures were implemented to avert the water hazard in winter months. The Defendant had 45 years of experience in administering this roadway. The evidence presented thus far has triggered an onus on Defendant to explain its monitoring and maintenance protocols if it intends to deflect the groundswell of negligence that Plaintiff has presented to the Court. The Plaintiff has proven that the Defendant was negligent in at least these aspects of his grounds of negligence. It is for the Defendant to present countervailing evidence to displace this finding.

55. The inquiry then moves to the final element of delictual liability. Was the ponding of water caused by ineffective monitoring and maintenance measures, the factual cause of the accident? The Plaintiff presented evidence that water above a certain depth on the road surface can cause aquaplaning in a straight line or result in an anticlockwise moment of the vehicle if there is braking or oversteering. The evidence raises questions about factual causation. Did the Defendant's omissions, i.e, the failure to unblock the drains and to cut the grass, the direct cause of the

accident, or were they proximate causes to the ponding of water that caused the accident? Did the Plaintiff's reaction to aquaplaning contribute to the loss of control?

56. As for the issue of the Plaintiff's reaction to encountering water on the road, the Court has to consider that he was unable to augment this aspect of the evidence as his injuries have rendered him amnesic for the events that preceded the accident. The Court can find on the available evidence that the Plaintiff would have taken another step to cause his car to spin and career off the road and into the tree. The additional action taken by the Plaintiff does not affect the determination of causation at this stage.

57. In the enquiry on factual causation, the question that arises is whether the harm would have nevertheless ensued, even if the omission had not occurred. The Plaintiff had to establish that it was more likely than not, but for the Defendant's wrongful and negligent conduct, his harm would not have ensued. The Plaintiff did not have to establish the causal link with certainty.¹⁹ The Plaintiff would not have lost control of his vehicle if there had been no water pooling on the road resulting from drainage impediments. The application of the 'but-for' test²⁰ is a matter of common sense based on the practical way ordinary people's minds work against the background of everyday life experiences. The evidence that the Plaintiff has presented permits the Court to find that the omission complained of was the proximate cause of the accident, but that the direct cause was the ponding of water on the road surface. If water had not ponded on the road surface, the accident would not have occurred. The water would not have ponded if the drains were clear and the grass verge cut.

58. Was the pooling of water and the ineffectual drainage system the legal cause of the accident? The imputation of liability to the wrongdoer depends on whether the harmful conduct is too remotely connected to the harm caused or closely connected to it. When proximity has been established, liability ought to be imputed to the wrongdoer, provided policy considerations are based on the norms and values of our

¹⁹ *Za v Smith and Another* (20134/2014) [2015] ZASCA 75; 2015 (4) SA 574 (SCA); [2015] 3 All SA 288 (SCA) (27 May 2015)

²⁰ *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700 E-H

Constitution, and justice also points to the reasonableness of imputing liability to the defendant. The omission complained of is the proximate cause of the accident. As addressed earlier under the wrongfulness enquiry, and without confusing wrongfulness with causation, the Court has considered what reasonable and practical steps the Defendant had to take to avoid water pooling on the road surface. In the circumstances, and at this stage of the trial, the Court would have had no hesitation in finding that the omissions thus identified are the legal cause of the accident.

CONCLUSIONS

59. When a court is asked to grant absolution from the instance and decides to deny it, the court must strike a balance between analysing the evidence and law sufficiently to justify its decision, while avoiding making definitive findings that could constrain its final judgment after hearing the entire case. The finding of liability is not automatic as it must be considered on a case-by-case basis, and a Plaintiff always bears the onus, on the probabilities, to establish all the elements of a delictual claim.²¹ It has done so. The onus is now upon the Defendant, and the Court has emphasised this aspect in its findings, to deflect them to the extent that the evidence requires it to do so and thereby avoid liability. To escape liability, the Defendant has to present countervailing evidence on its monitoring and maintenance plans and whether the costs involved in reducing the risk of water ponding on this stretch of road are prohibitive. The Defendant has suggested that it does not have the finances to afford these interventions. The Defendant must also explain why it has not erected signage to warn drivers of the risk in inclement weather conditions under the general grounds of negligence particularised by the Plaintiff. It will also have the opportunity to present its evidence on the alternate defences raised in its plea relating to the Plaintiff's driving of his motor vehicle and contributory negligence.

60. The Court finds that the Defendant cannot prevail on its application for absolution from the instance.

²¹ The National Employers' General Insurance v Jagers 1984 (4) SA 437 (ECD) at 440 D-441A

COSTS

61. The Defendant sought its costs and Counsel's fees on the highest scale permissible under Rules 67A and 69 of the Uniform Rules of Court if it prevailed in this application for absolution. The Defendant belatedly argued that if the Court were to dismiss its application, it should order costs to be costs in the cause. The Defendant relied upon the case of *MN v BN* as authority for this submission.²² The case reminds us that an application for absolution is part of the trial, and costs should be in the cause, subject to the court's discretion. The Supreme Court of Appeal's decision in *Koukoudis* supports the usual order that an unsuccessful applicant is spared the application costs.²³ Applications from the instance and their preparations are part of the trial proceedings, and a specific order relating to these costs seems superfluous. In *MN v BN*, the Court heard the whole matter and dismissed the action, including the costs of the application for absolution. The Court emphasised that the usual order is that costs follow the result and that a successful party should be awarded their costs. Still, it is entirely the Court's discretion exercised judicially after considering the facts peculiar to the case before it and, as a matter of fairness to both sides, that informs its decision on costs.²⁴ The Plaintiff sought its costs and Counsel's costs on the C scale. He contended that he had to deal with a forced issue.

62. The Court does not relinquish its discretion on awarding costs in this matter. The application for absolution was ill-conceived. Even though the Court facilitated the parties acquiring the transcript of the proceedings, the Defendant does not seem to have considered it fully. It is inexplicable how Defendant could argue that, at best for Plaintiff, he had established *prima facie* that the road where the accident occurred was wet. The Defendant then argued that the lay witness testimony amounted to no more than that there was water on the road. The witnesses could not specify where the water had pooled and to what extent in each location. The undisturbed evidence

²² *MN v BN* (210/2016) [2023] ZAFSHC 236; [2023] 3 All SA 809 (FB); 2023 (5) SA 519 (FB) (13 June 2023)

²³ *Koukoudis and Another v Abrina 1772 (Pty) Ltd and Another* 2016 (5) SA 352 (SCA) at para 56

²⁴ *Wanderers Club v Boyes-Moffat and Another* 2012 (3) SA 641 GSJ at 643 I-J, *MN v BN* supra at para 215, *Gelb v Hawkins* 1960 (3) SA 687 (A), at 694A, *Graham v Odendaal* 1972 (2) SA 611 (A)

was that Plaintiff's vehicle encountered copious amounts of water that splashed to all sides before it went into a spin and careered off the road.

63. This stretch of road is flat over at least eighty metres before the transition square of about twelve metres occurs. The land topography includes the historical river course at the flattest part of the roadway, which would have caused water to flow naturally before the roadway was built.²⁵ Manyonga testified that there was water that had encroached onto the grass. De Villiers spoke of water as far as he could see. The witnesses were interrogated on their memory of an event fourteen years ago, but they remained resolute about the water they encountered at the accident scene.

64. The Defendant submitted that there was simply no evidence that the City was negligent about the situation and the hazard the water may have posed. The Engineers agreed that it was not evident that there was effective maintenance of the stormwater inlets and drains at the time of the accident. If there had been effective maintenance, it was unlikely that ponding would have occurred. The Defendant did not provide any other explanation for the Plaintiff's expert to consider about how the ponding could have occurred. It began by relying upon rainfall records that had yet to be introduced into evidence, which suggested that no rainfall had fallen in the area for about two days before the accident. It then opportunistically suggested to the Plaintiff's Engineer that the pooling could have only occurred if substantial rain had fallen.

65. The Defendant submitted that the Engineer's testimony had not clarified what the Defendant should have done and what it did not do. The Court is satisfied that the Engineer had identified three practical and reasonable measures, among others, that would have prevented water pooling on the roadway. These measures do not require repetition except to say that the Defendant was alive to them and had elicited some concessions after it had asked the expert to exclude these measures from consideration.

²⁵ See *Pappalardo v Hau* (63/08) [2009] ZASCA 160; 2010 (2) SA 451 (SCA) ; [2010] 2 All SA 338 (SCA) (30 November 2009) for a discussion of natural flow of water in a different context before the advent of urbanisation and how a Court deals with this issue.

66. The Plaintiff's case ended early on the fourth day of the trial, and an extra day had to be arranged to hear the argument on this application. The Court had to await the transcript, read it, and produce a judgment. The application was ill-conceived. In the circumstances, the Court has exercised its discretion on costs, which is reflected in the order that follows.

ORDER

1. The application for absolution is dismissed with costs.
2. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs of the application for absolution and Counsel's taxed or agreed fees on scale C.
3. The parties shall approach the Court to arrange for the further conduct of this matter.

Bhoopchand AJ
Acting Judge
High Court, Western Cape Division

Judgment was handed down and released to the parties by email on Tuesday, 22 April 2025.

Plaintiff's Counsel: E Benade
Instructed by Adendorff Attorneys Inc
Counsel for the Defendant: M Maddison
Instructed by Clyde & Co.