IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: 132/2015

In the matter between:

MOTLATSI JACOB MOFOKA (substituted by the executrix of his estate, being ANNA MOFOKA)	Plaintiff
and	
THE MEC DEPARTMENT OF ROADS **AND PUBLIC WORKS, NORTHERN CAPE**	1st Defendant
FRANCES BAARD DISTRICT MUNICIPALITY	2nd Defendant
DIKGATLONG LOCAL MUNICIPALITY	3rd Defendant

Coram: Lever J

JUDGMENT

Lever J.

BACKGROUND FACTS:

1. The original plaintiff Motlatsi Jacob Mofoka, who is now deceased instituted a claim against the three defendants listed above. The said plaintiff will hereafter be referred to as the deceased or Mr Mofoka, depending on the context. The said claim arose out of a motor vehicle accident involving only the vehicle driven by the deceased.

2. The said accident occurred on the 7 February 2012 at approximately 08H30. The deceased was travelling in a military vehicle, being a Light Delivery Vehicle (LDV) bearing the registration number BLZ 360 M. The road in question was referred to as the R31 in the evidence. It is common cause that the accident occurred on this road, that it is a provincial road and that the first defendant is the political head of the provincial department responsible for the care, maintenance and upkeep of the said road.

3. On the date and time set out above, the deceased was driving the said vehicle. The decease had one passenger with him, a certain Warrant Officer Frye (W/O Frye). Both the deceased and W/O Frye were members of the South African National Defence Force (SANDF) at the material time. The were on their way from Postmasburg to Kimberley to attend a meeting related to their employment in the SANDF in Kimberley.

4. On a stretch of road between Koopmansfontein and Danielskuil, it is alleged that the vehicle deceased was driving hit a pothole and that as a result thereof he lost control of the vehicle and suffered serious injuries rendering him a quadriplegic. The deceased instituted this action to claim compensation for such injuries.

5. On the 11 July 2017, plaintiff withdrew his action against both the second and third defendants.

6. The deceased died after the pleadings had closed and *litus contestatio* had been reached. On the 4 February 2021, the deceased was substituted by the *executrix* of his estate as the plaintiff in this matter.

THE ISSUES:

7. Initially, the first defendant had filed two special pleas. The first special plea related to the notice contemplated in section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 42 of 2002. The second special plea invoked section 2 of the State Liability Act 20 of 1957. The plaintiff applied for condonation. The matter was set down before my Sister Stanton AJ (as she then was). On the 25 June 2028 Stanton AJ granted the necessary condonation in respect of the first special plea. Stanton AJ dismissed the second special plea and reserved the question of costs. Stanton AJ also postponed the merits of the action to a date to be arranged with the Registrar and reserved the question of costs related to such postponement.

8. The further issues raised by the plaintiff his pleadings, still relevant to the matter between the plaintiff and first defendant at this time, are as follows: That first defendant was responsible for the maintenance and upkeep of the relevant road in order to keep such road in good repair; That the accident was caused by the sole negligence of the first defendant or his servants acting in the course and scope of their employment; That the first defendant and or his servants had certain positive duties towards road users in the position of the plaintiff; That the first defendant and or his servants were negligent in failing to comply with one or more alternatively all of the said positive duties; Such positive duties included *inter alia* that first defendant had failed to maintain and keep the relevant road in good repair and that first defendant or his servants had failed to display appropriate road signs in advance of such potholes warning motorists of the potholes in the road so that motorists

could adjust their driving in a manner appropriate to the existing road conditions; That in the circumstances first defendant and/or his servants owed a duty of care to motorists using the relevant stretch of road; and That the failure of the first defendant and/or his servant in failing to keep the said road in a proper state of repair and/or their failure to warn motorists by way of appropriate road signs of the risks on the road ahead, created a potential risk of harm which first defendant and/or his servants failed to take reasonable steps to prevent.

9. The first defendant pleaded to these issues set out above as follows: Admitted that he is responsible for the maintenance of the road in question; Admitted that he does owe motorists using the relevant road a duty of care; That he denied the contention that any act or omission on his part or on the part of his servants caused the said accident; He denied that the relevant accident was caused by potholes in the road; He pleaded that the accident was caused by the plaintiff's negligence; (Such alleged negligence included *inter alia:* the plaintiff drove at an excessive speed; he failed to keep his motor vehicle under proper control; he failed to apply brakes adequately, timeously or at all; he failed to prevent the accident when he could and should have done so; he failed to exercise the care of a prudent driver under the circumstances; and he failed to take cognisance of, or abide by, the general rules and regulations of the road); That plaintiff had failed to adhere and comply with road traffic warning signs erected on the relevant stretch of road and that plaintiff had failed to drive at a reduced speed; That in the circumstances first defendant is not liable to compensate the plaintiff for any damages he might have suffered; and That defendants action ought to be dismissed with costs <u>alternatively</u>, if this court finds the defendant liable for any of the damages the plaintiff suffered that such damages ought to be apportioned in terms of the Apportionment of Damages Act 34 of 1956 and that in these circumstances an appropriate order of costs should be made.

10. The parties agreed at a pre-trial conference held on the 4 July 2017 that the issues of the merits and quantum be separated and that the special pleas be dealt with at the outset. The outcome of such special pleas has already been dealt with above.

11. In argument Mr Coetzee SC and the junior counsel, Mr Jankowitz, who appeared with him on behalf of the plaintiff, submitted that: the plaintiff has established the duty of care and the omission/s of the first defendant and or his servants; the first defendant was liable to compensate the plaintiff for the damages he suffered as a result of such accident; and that the first defendant had not established contributory negligence on the part of the plaintiff and that accordingly this court could not apportion blame in respect of the relevant accident.

12. Mr Bomela who appeared for the first defendant from halfway through the plaintiff's case up until the end of the case, argued in his heads of argument that plaintiff had voluntarily accepted the risk and that in the circumstances the defence of *volenti non fit injuria* applied. Wisely, given the evidence and the circumstances Mr Bomela did not pursue this defence in his final argument. In my view the facts as they emerged from the evidence do not support such a defence.

13. What Mr Bomela did argue in his final argument before this court was that the accident itself was not caused by a damaged road, but that before the edge-break in the road the vehicle swerved to the left and left the road then it is contended that the plaintiff swerved to the right and then hit the edge-break. In other words, Mr Bomela argues that the plaintiff lost control of the vehicle before it came into contact with any damage to the road surface. As a consequence of that sequence of events he contended that the first defendant was not responsible for the accident and the claim now managed by the deceased's executrix ought to be dismissed. In the event that the court finds the first defendant liable in damages, which

is still denied, then this court should apportion blame and subsequent damages in a manner that is consistent with the facts the court finds to have been established on the probabilities.

14. At this point it is prudent to point out that there was something of a debate on terminology applicable to damage to a road surface. The plaintiff's expert witness, Mr Du Preez testified that damage to the road surface on the edge of the macadam surface is called an edge-break. Although Mr Du Preez was of the opinion that at some point in the development of the edge-break it would qualify to be described as a pothole. The defendant's expert, Mr Strydom believed such damage could only be described as an edge break. Mr Matsoso, the Chief Engineer of the first defendant's roads division called it an edge-break, but he also expressed the view that at some point it would be described as a pothole. W/O Frye, in this context a lay witness, simply referred to it as a pothole. W/O Molwane, the policeman who attended the scene after the accident and drew a sketch plan described it as 'a pothole or a cut tarmac' in his sketch plan of the scene of the accident. W/O Molwane repeated this terminology in his oral evidence.

15. For present purposes absolutely nothing turns on how the relevant damage to the road is described. This will become evident once the relevant evidence is set out and discussed.

THE LAW:

16. The legal position in respect of an omission was dealt with, set out and restated by Scott JA in the Supreme Court of Appeal (SCA) the case of **McIntosh v Premier Kwazulu-Natal**[1]. The passage quoted is a lengthy one, but it is necessary to quote it, at least to the extent that

[1] [2008] 4 All SA 72 (SCA) at paras [11] to [14].

I have, because it authoritatively and succinctly sets out the legal position. The SCA in the **McIntosh** matter, set out the legal position as follows:

"[11] As repeatedly stated by this Court, a negligent omission, unless wrongful will not give rise to delictual liability. More recently in *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) [also reported at [2007] 1 All SA 240 (SCA) - Ed] Brand JA, at 144A-C, paragraph 10, explained the requirement of wrongfulness as follows:

"Negligent conduct manifesting itself in the form of a positive act causing physical damage to the property or person of another is *prima facie* wrongful. In those cases, wrongfulness is therefore seldom contentious. Where the element of wrongfulness becomes less straightforward is with reference to liability for negligent omissions and for negligently caused pure economic loss (see eg *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) ([2002] 3 All SA 741) in para [12]; *Gouda Boerdery BK v Transnet* 2005 (5) SA 490 (SCA) ([2004] 4 All SA 500) in para [12]). In these instances, it is said, wrongfulness depends on the existence of a legal duty not to act negligently. The imposition of such a legal duty is a matter for judicial determination involving criteria of public or legal policy consistent with constitutional norms."

The learned Judge continued at 144I, paragraph 12;

". . . when we say that negligent conduct . . . consisting of an omission is not wrongful, we intend to convey that public or legal policy considerations determine that there should be no liability; that the potential defendant should not be subjected to a claim for damages, his or her negligence notwithstanding. In such event, the question of fault does not even arise. The defendant enjoys immunity against liability for such conduct, whether negligent or not . . . ."

...

[12] The second inquiry is whether there was fault, in this case negligence. As is apparent from the much quoted dictum of Holmes JA in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F [also reported at [1966] 2 All SA 490 (A) - Ed], the issue of negligence itself involves a twofold inquiry. The first is; was the harm reasonably foreseeable? The second is; would the *diligens paterfamilias* take reasonable steps to guard against such occurrence and did the defendant fail to take those steps? The answer to the second inquiry is frequently expressed in terms of a duty. The foreseeability requirement is more often than not assumed and the inquiry is said to be simply whether the defendant had a duty to take one or other step, such as drive in a particular way or perform some or other positive act, and, if so, whether the failure on the part of the defendant to do so amounted to a breach of that duty. But the word "duty", and sometimes even the expression "legal duty", in this context, must not be confused with the

concept of "legal duty" in the context of wrongfulness which, as has been indicated, is distinct from the issue of negligence. I mention this because this confusion was not only apparent in the arguments presented to us in this case but is frequently encountered in reported cases. The use of the expression "duty of care" is similarly a source of confusion. In English law "duty of care" is used to denote both what in South African law would be the second leg of the inquiry into negligence and legal duty in the context of wrongfulness. As Brand JA observed in the *Trustees, Two Oceans Aquarium Trust* case, at 144F, "duty of care" in English law "straddles both elements of wrongfulness and negligence".

[13] In the present case the reasonable foreseeability of harm to users of the road in consequence of potholes was not in issue. Mr George Hattingh, a consulting engineer who gave evidence on behalf of the respondents, readily conceded that quite apart from the damage caused to vehicles by driving over large potholes, their presence in the road was likely to cause drivers to swerve to avoid them which could result in collisions with other vehicles or pedestrians, particularly in wet weather when a swerving vehicle was likely to skid. The circumstances of the appellant's accident were admittedly somewhat unusual but it is well established that it is sufficient if the general nature of the harm to the injured party was foreseeable; it is not necessary that the precise manner of its occurrence be foreseeable.

[14] The crucial question, therefore, is the reasonableness or otherwise of the respondents' conduct. This is the second leg of the negligence inquiry. Generally speaking, the answer to the inquiry depends on a consideration of all the relevant circumstances and involves a value judgment which is to be made by balancing various competing considerations including such factors as the degree or extent of the risk created by the actor's conduct, the gravity of the possible consequences and the burden of eliminating the risk of harm. See eg *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA) [also reported at [2001] 1 All SA 215 (A) - Ed] paragraph 17. Where, however, a public authority is involved a further consideration arises. It is this: a court when determining the reasonableness or otherwise of an authority's conduct will in principle recognise the autonomy of the authority to make decisions with regard to the exercise of its powers. Typically, a court will not lightly find a public authority to have failed to act reasonably because it elected to prioritise one demand on its possibly limited resources above another. Just where the line is to be drawn is no easy matter and the question has been the subject of much judicial debate both in England and other Commonwealth countries. See eg *Stovin v Wise* [1996] AC 923 (HL); *Gorringe v Calderdale Metropolitan Borough Council* [2004] 2 All ER 326 (HL); *Barratt v District of North Vancouver* (1980) 114 DLR (3^{rd}) 577 (SCC); *Brodie v Singleton Shire Council* (2001) 206 CLR 512 (HC of A) paragraphs 161-162. But whether the criterion to be applied is ultimately one of rationality or some other principle is unnecessary to decide. What, I think, is clear is that if in the actual implementation of a policy or procedure adopted by the authority, or for that

matter in the course of its operations, foreseeable harm is suffered by another in consequence of a failure on the part of the authority's servants to take reasonable steps to guard against its occurrence, a court will not hesitate to hold the authority liable on account of that omission. Indeed, as I read section 9(3) of the KwaZulu-Natal Provincial Roads Act, whatever its precise ambit may be, there can be no doubt that omissions of this nature were intended by the Legislature to be excluded from the general exemption embodied in the section."

17. As can be seen from the **McIntosh** matter, a determination must first be made as to whether in the circumstances of the particular case, the omission can be said to be wrongful. In other words, whether there was a legal duty on the first defendant not to act negligently. The next enquiry is to determine whether there was 'fault' on the part of the first defendant. In other words, whether the first defendant can be said to have been negligent. The question of determining fault has two parts. Firstly, a determination of whether the harm was reasonably foreseeable. Secondly, would a *diligens paterfamilias* take reasonable steps to guard against such harm.

18. As can be seen from the pleadings set out above, the defendant has, *inter alia*, placed in issue the question of factual causation. The test to determine factual causation is the *sine qua non* test. Sometimes referred to as the '...but for test'. As Jansen J in the matter of **Celliers v South African Railways and Harbours**[2] put it: "Would the collision have occurred but for the negligence of the defendant?"

19. This question has been considered by the then Appellate Division (AD) in the matter of **International Shipping Co (Pty) Ltd v Bentley**[3]. The AD in that matter set out the position as follows:

[2] 1961 (2) SA 131 (TPD) at 141F.
[3] 1990 (1) SA 680 (AD) at 700 to 701.

"As has previously been pointed out by this Court, in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as 'factual causation'. The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; aliter, if it would not so have ensued. If the wrongful act is shown in this way not to be a causa sine qua non of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a causa sine qua non of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part."

20. In summary, in the present circumstances, this court must first decide whether the plaintiff has established if there was an omission in relation to the harm that forms the basis of his claim. Then, assuming that plaintiff establishes such an omission, this court must then decide whether the omission on the part of the first defendant was wrongful. Then, this court must consider whether there was fault on the first defendant's part in the particular circumstances of the case. Then this court must consider whether the plaintiff has established both factual and legal causation in relation to the harm the deceased has suffered. In respect of the question of legal causation, whether as a matter of public policy, the first defendant should be held liable for the harm in the circumstances of the case. Assuming, that both of those questions are answered in favour of the plaintiff, I will then proceed to consider the question of contributory negligence.

THE EVIDENCE:

21. The plaintiff led the evidence of W/O Frye, Mr Van Der Ryst, Mr Van Der Bergh, Mr Du Preez (plaintiff's expert on road maintenance) and W/O Molwane (the policeman who drew the sketch plan of the scene). The defendant led the evidence of Mr Strydom (defendant's expert on accident reconstruction) and Mr Matsoso.

22. The evidence of W/O Frye was to the effect that: She was a retired member of the SANDF and held the rank or Warrant Officer on the 7 February 2012, the day of the relevant accident; She and the deceased were colleagues and the worked together in the SANDF; The deceased held a rank in the military that was junior to her rank; She had known the deceased for approximately 10 years prior to the accident; She considered the deceased to be a responsible driver and she had never known him to be a reckless driver; On the said date they were travelling in the military LDV for an official meeting related to their employment in the military; There is a strict procedure before a trip is authorised and a vehicle is allocated for such trip; This procedure included the driver showing his drivers licence; the vehicle being inspected for roadworthiness; The relevant vehicle was indeed roadworthy before they undertook the relevant trip on the day in question; Historically, she had travelled the road in question, the R31, on different occasions prior to the relevant accident; In her opinion the R31 had last been in a good condition about five years prior to the said accident; On the day of the accident they drove on the R31 from Kathu to Kimberley; While the road was in poor condition, it was not uniformly bad, there were places where they could speed up and places where they had to slow down; The accident happened about 10 kilometres before Koopmansfontein; the accident happened after a gentle curve in the road; About 500 metres before they entered this gentle curve they encountered potholes in the road surface; They had a deadline to reach Kimberley; They

discussed their speed of travel and W/O Frye requested the deceased to increase his speed so that they could make their appointment in Kimberley; They then encountered the pothole alleged to have caused the accident; She described this pothole as starting from the edge of the lane they were travelling and being in a horse shoe shape that encroached from the edge of the lane they were travelling in until about halfway into their lane of travel; She saw this pothole for the first time after she had been discharged from hospital whilst travelling home with her husband some three days after the accident; She testified that the deceased lost control of the vehicle after he hit this pothole; After the vehicle went out of control she saw flames and realised that the vehicle was rolling; She confirmed the sketch plan of W/O Molwane as representing how the accident occurred; On her way home she identified the accident scene by the marks that could be observed and the fact that where the tyre marks ended and the vehicle came to a rest she found broken glass from the windscreen; The vehicle was transported back to the Lohatla Military base where she works; About a week after the accident she saw this vehicle at the said military base; She observed that both left hand side tyres had burst; She testified that there had been no problem with the tyres until they hit the relevant pothole; After the accident, the deceased was paralysed from the shoulders downward and was confined to a wheelchair.

23. Under cross-examination by Ms Seboko, who appeared for the first defendant at that time, W/O Frye testified: That although she held a rank senior to the deceased that her request to increase speed was not an instruction; She herself also drove and that she would adjust her speed in accordance with the prevailing road conditions; The speed limit on the relevant section of road was 120km/h; W/O Frye was referred to her statement she made to the police where her description of the accident was different from her oral evidence; In her statement to the police she said the vehicle swerved to the left and then hit the relevant pothole; Her response to this was that she did not see the vehicle hit the pothole; After she

observed the vehicle at Lohatla Military base she concluded that both tyres on the left hand side of the vehicle burst after the vehicle hit the relevant pothole.

24. In re-examination she testified that she does not recall any hazard warning road signs or speed reduction signs in the vicinity of, or immediately prior to the relevant pothole.

25. The plaintiff then led the evidence of Mr Van Der Ryst, whose evidence was to the effect that: He is a local farmer in the vicinity of where the accident took place; He grew up in that area and travelled the relevant stretch of road at least twice a week; He confirmed that the condition of the relevant road in that vicinity is poor; It was in his opinion not safe to travel on the relevant stretch of road in an ordinary sedan vehicle; In confirmed that there had been a number of single vehicle accidents on the relevant stretch of road and that there had even been fatalities arising from such accidents; The poor condition of the road was due to the high volume of heavy vehicle using the relevant road on a daily basis; and he had not observed warning signs on the relevant section of road relating to potholes.

26. The plaintiff then called Mr Van Der Bergh who testified that he had taken certain of the photographs relied upon by the plaintiff and that the condition of the road surface on the relevant stretch of road was poor as he drives the said road regularly.

27. Then the plaintiff led the evidence of his expert Mr Du Preez, who is an engineer and specialises in the requirements for maintenance of roads and road surfaces. Although the plaintiff and the defendant both engaged experts to assist them in presenting their cases, they are not experts in the same field. The defendant's expert was an expert in reconstructing accidents. Nonetheless, they had a conference and filed an expert report. In such joint minute, they both accepted each other's competence to advise their respective

clients in their respective fields of expertise. In other words, they accepted each other's qualifications. In any event, this was not an issue between the parties.

28. The evidence of Mr Du Preez was to the effect that: He did not personally visit the scene of the accident, but based his report and conclusions from photographs and documents provided to him by the plaintiff's attorney; He filed an addendum to his report after the evidence led on the 23 and 24 February 2021; he referred to the fact that first defendant's counsel in cross-examining the plaintiff's witness referred to an edge-break shown in a certain photograph was in the order of 300mm to 400mm in size; Which he pointed out would be considered a severe edge break; He emphasised that that this meant that at such edge-break 300mm of the usable road surface from the edge of the road towards the centre of the lane of travel was no longer present; In his view this would constitute a significant hazard to road users; In his opinion the first defendant owed members of the public, using the relevant road, a duty of care to reasonably monitor, inspect and maintain such roads to ensure that use of such roads was reasonably safe; He then quotes directly from the first defendant's website to show that the first defendant was well aware of the condition of the relevant road and was also aware of the duty of care that he owed users of the relevant road; It emerged that prior to this accident, there had been a substantial increase in the volume of heavy vehicles using the relevant stretch of road and that prior to the relevant accident there had been heavy rainfalls in the relevant area; It also emerged from his evidence that the relevant stretch of road passed through a wetland and that the substrata of the relevant stretch of road would need special attention; and that all of these factors would have increased the rate of wear and deterioration on the relevant stretch of road.

29. Finally, the plaintiff called W/O Molwane to give evidence. W/O Molwane drew the sketch plan and authored the key to the said sketch plan which appears at pages 5 and 6 of the

plaintiff's exhibit bundle. His evidence was to the effect that: He drew the sketch plan on the 13 February 2012; He has no personal knowledge when the accident occurred, but he accepts the evidence placed before the court that the accident occurred on the 7 February 2012; When he visited the scene of the relevant accident, he was accompanied by the investigating officer in respect of the said accident. Such investigating officer had asked for his assistance to draw the said sketch plan; The relevant investigating officer has since passed away; He read the key to his sketch plan into the record; He testified that when he had visited the scene, the relevant motor vehicle had already been removed; He relied upon the police who took him to the scene to indicate where the vehicle came to a rest after the accident; He saw marks made by the relevant vehicle at the spot where the police indicated the vehicle came to rest; He also observed broken glass at that spot; On the opposite side of the road there was a telephone pole adjacent to where the said vehicle came to rest; He recorded the serial number attached to this telephone pole and used it as his fixed point; There were tyre marks of the said vehicle that ultimately led back to point "C" indicated on his sketch plan; Point "C" was described in the key to his sketch as 'a pothole or cut tarmac'; he described two tyre tracks that led from the outer edge of the said pothole to the right hand side of the road into the lane of oncoming traffic then these tracks went back to the left hand side of the road, being the lane he was originally travelling in and that these tracks finally left the road at point "D" indicated on his sketch plan; that these tracks came to an end at point "E" indicated on his sketch plan; Point "E" was opposite to the fixed point being the telephone pole on the other side of the road, which is marked as point "H" on the sketch plan; there were clear tyre marks from point "C", the pothole to where the vehicle finally came to a rest; These tyre marks started from the pothole, there were no tyre marks before the pothole; He was stationed at Delportshoop for 9 years and he knows the relevant stretch of road; he described that section of road as being broken on the edges of the road surface and having potholes in places; In his opinion the road was not in a good condition; When he was on the scene on the 13 February 2012 there was no indication that the relevant edge break had been repaired; When he drew the sketch plan there were no warning signs relating to potholes in sight; He would normally in drawing such sketch plan indicate if there were warning signs present; In his line of work he was aware of many accidents that had occurred on the relevant stretch of road; and the said road had a high volume of heavy trucks using it.

30. Under cross-examination by Mr Bomela W/O Molwane testified that: He attended the scene with Sgt Kuloisi and not Raadt (Raadt filed an accident report but he was not called to testify so such report has no evidential value); W/O Molwane was not able to comment on Raadt's accident report; He reiterated that the tyre tracks started from the edge of the pothole and that there were no tyre marks before that point outside the edge of the road surface; In response to a question as to what would be a reasonable speed to navigate the relevant stretch of road, he replied that you could even go up to 120km/h; In his opinion the deceased drove through the pothole and due to the speed he was travelling he lost control of the vehicle he was driving; that the deceased lost control of the vehicle after he drove through the pothole; Mr Bomela asked, "You can also not confirm or deny that driving through either the pothole or the edge break, necessarily resulted in the cause of the accident?"; To which W/O Molwane replied, "According to me, I would say the accident was caused by him driving over the pothole."

31. In response to a question by the court after re-examination W/O Molwane confirmed that he made his measurements for his sketch plan with the aid of a measuring tape.

32. After the evidence of W/O Molwane, the plaintiff closed his case. The first defendant then led the evidence of his expert, Mr Strydom and the evidence of Mr Motsoso an official from the engineering division of the first defendant's road division.

33. Mr Strydom is an admitted attorney who has completed certain course that gives him expertise in road accident reconstruction. As set out above, the two experts accepted each others expertise and the qualifications of the respective experts was not at issue in this trial.

34. Mr Strydom relied upon the sketch-plan of W/O Molwane and the measurements contained therein. In fact, both experts in their joint minute accepted the relevance of W/O Molwane's sketch plan. Both experts agreed that the sketch plan was not drawn to scale. Mr Strydom explained that the drawing was not proportional to the measurements set out in the said sketch-plan key. Other than that Mr Strydom conceded that the sketch plan showed the correct sequence of events.

35. What is highly relevant from Mr Strydom's evidence is that with the assistance of certain officials from the first defendant's department he visited the scene of the relevant accident some eight years after such accident had occurred. He identified the fixed point set out in the said sketch-plan and with the aid of a tape measure he worked backwards using the measurements W/O Molwane set out in his sketch plan and he came to a repaired edge-break in the road which corresponded with point "C", the pothole or cut tarmac, described in the said sketch plan. If the said point "C" is not proportionally represented on the sketch-plan, it is of no moment in the present circumstances. The mere fact that Mr Strydom can some eight years after the accident use the sketch plan to find a repaired edge break corroborates the accuracy of W/O Molwane's measurements and is also strong corroboration of the plaintiff's version.

36. Mr Strydom's attention was drawn to the statement made in the affidavit of W/O Frye about the vehicle leaving the road to the left before hitting the pothole and then veering to the right after hitting the pothole as opposed to the sequence indicated by W/O Molwane in his sketch plan and then he was asked on the probabilities which was the more likely scenario of events. In answering this question Mr Strydom said he believed the sequence set out in the sketch-plan of W/O Molwane was more likely on the probabilities, as the sketch plan showed no tracks outside the road surface prior to the pothole and that plainly W/O Molwane had no personal interest in the outcome of any proceedings that may arise from his sketch-plan. W/O Molwane was adamant that the tyre tracks started from the edge of the relevant pothole and there were no tyre tracks before the relevant pothole.

37. Mr Strydom conceded on the probabilities that the vehicle driven by the deceased went out of control after hitting the relevant edge-break at point "C".

38. At different points in his testimony Mr Strydom was referred to a photograph of a road where a warning sign to reduce speed to 60 km/h was displayed. In respect of this photograph Mr Strydom was at great pains to ensure that the court understood that this warning sign appeared in the lane of travel opposite to the one the deceased would have been using in travelling to Kimberley and that according to the information he was provided with, such photograph was taken some months after the accident concerned.

39. While generally Mr Strydom approached his evidence and his role in accordance with what this court would expect from an expert witness, there is one aspect of his evidence over which I have serious concerns. Mr Strydom testified that by use of a certain formula he could using a mathematical constant, the coefficient of drag and the distance travelled work out the speed of the vehicle at the beginning of the sequence that caused the accident. This was not challenged by the plaintiff and in and of itself this is not my concern with Mr

Strydom's evidence regarding the speed. My concern arises from the way he expressed his conclusion on the speed issue in his expert report as opposed to how he set it out in the joint minute between the experts. In his oral evidence he merely confirmed what is set out in the experts' joint minute without explaining what is obviously a different connotation and conclusion in his expert report.

40. As the manner of expression is central to my concern, I am going to quote the relevant extract of both documents verbatim. In paragraph 7.2 of the expert report that Mr Strydom filed, he set out his conclusion as follows: "Notwithstanding this alleged scenario, Mr Mofoka is said to have driven the Mazda LDV – Vehicle A at a speed of approximately 110km/h. My calculations suggest that he was driving at a higher speed of between 120 and 130Km/h." (My Emphasis)

41. Then in paragraph 3.10 of the experts' joint minute, Mr Strydom sets out the position as follows: "Mr Strydom is of the opinion that the Plaintiff's vehicle was being driven at a speed in excess of 120 km/h, at or about a speed of 130 km/h, conservatively speaking. Du Preez cannot comment on this statement as he is not an accident reconstruction expert." (My emphasis)

42. It is important to re-iterate that Mr Strydom confirmed the conclusion set out in the joint minute and did not explain the difference in connotation to the conclusion he set out in his expert report, which was filed in accordance with the Rules of this court. At the risk of being pedantic, it is important to set out the difference in connotation between these two versions of Mr Strydom's conclusion. In his expert report Mr Strydom says the deceased drove at a speed between 120 and 130 km/h. However, in the joint minute Mr Strydom is effectively saying that the minimum speed the deceased drove at the relevant time was 130km/h. A very different connotation with significantly different speeds at the point of

impact with the relevant pothole. At the very least this calls for an explanation. None was forthcoming.

43. In the absence of an explanation, one would have to question the utility of a formula that would cater for and validate such inconsistent conclusions. It is obvious, yet bears mention, that such difference in speed would have an obvious effect on the deceased's ability to control the vehicle he was driving at the time he hit the pothole (edge-break). The difference between the two conclusions Mr Strydom placed before the court as set out above, is significant enough to have had a real effect on the deceased's ability to control the vehicle in the circumstances. In these circumstances, I cannot rely on Mr Strydom's conclusions or evidence relating to the speed of the vehicle driven by the deceased at the point of impact.

44. Then the first defendant led the evidence of Mr Matsoso. Mr Matsoso is the chief engineer of the first defendant's road division. Mr Matsoso gave evidence about certain daily and weekly worksheets dealing with repairs to the relevant stretch of the R31 at the time in question. Mr Matsoso was not the author of these documents. Mr Matsoso did not himself go to the relevant stretch of the R31 and check the work indicated in the said reports against the physical repairs on the relevant stretch of the R31. Mr Coetzee in cross-examining Mr Matsoso pointed out certain anomalies in the said reports. Mr Matsoso acknowledged the said anomalies but could not explain them as he was not the author of the relevant reports. The first defendant did not call the author of the said reports to give evidence. In these circumstances I cannot rely on this evidence given by Mr Matsoso.

45. Mr Matsoso also testified that he attended on the scene of the relevant accident some months after the accident. He had W/O Molwane's sketch-plan, he measured the scene with a tape and took certain photographs. This evidence tended to confirm W/O Molwane's sketch-plan.

APPRAISAL OF THE EVIDENCE:

46. Turning first to the argument put forward by Mr Bomela that the deceased lost control of the vehicle he was driving before such vehicle hit the edge-break concerned. He based this argument on an extract of the affidavit W/O Frye provided to the police. Ms Seboko, who represented the first defendant at the time W/O Frye was cross-examined, did not deal with this aspect comprehensively in her cross-examination of Ms Frye. This version is at odds with the physical evidence found on the scene by W/O Molwane when he made his sketch-plan. The first defendant's own expert, Mr Strydom, relied on the evidence of Mr Molwane and his sketch plan. Mr Stydom correctly, in my view, conceded that the probabilities indicated that the deceased lost control of the vehicle as a result of hitting the edge-break (pothole).

47. In my view W/O Molwane was an honest and reliable witness. He did not carry a torch for any party connected to these proceedings. He recorded the physical evidence he found on the scene, including the tyre tracks. Nothing more and nothing less. Based on his evidence, I agree with Mr Strydom's conclusion that on the probabilities, the deceased lost control of the vehicle he was driving at the material time as a result of hitting the pothole (edge-break). In these circumstances, I must reject the argument put forward by Mr Bomela on behalf of the first defendant.

48. The evidence of Mr Du Preez as supported by the direct quotations from the website of the Provincial Department of Roads and Public Works contained in the addendum to his expert report establishes the duty of care owed by the first defendant to the plaintiff and other road users of the R31. The said evidence also establishes that the first defendant was aware of such duty of care.

49. The first defendant had a duty of care to maintain the relevant road in a way that kept it free of road hazards to users of such road and in the event that he could not repair any such hazard timeously he had a duty of care to ensure that a warning sign relating to such road hazard was appropriately placed to warn drivers using such road that would allow users of the road to adjust their driving in an appropriate manner to navigate the relevant road hazard safely. In respect of the relevant duty of care, the first defendant failed on both counts.

50. In my view in the present circumstances, the first defendant has a legal obligation to compensate the plaintiff for the damage suffered.

51. The first defendant raised the issue of an apportionment of damages in relation to the respective degrees of negligence that can be attributed to the parties concerned. Mr Coetzee, on behalf of the plaintiff argued that the first defendant had not led evidence on this aspect and it could not be determined. In the circumstances, I cannot agree with this submission. Firstly, it is clear from the evidence of W/O Frye that both she and the deceased were aware of the general condition of the R31 being poor. They both knew that they had to adjust their driving speed to the prevailing road conditions. On the evidence of Ms Frye, the deceased increased his speed to about 110 km/h because they feared missing their appointment in Kimberley. In all these circumstances I believe that this increased speed. On the probabilities, played a role in the deceased losing control of the vehicle he was driving at that time. In these circumstances the deceased drove at a speed inappropriate to the prevailing road conditions. In my view these factors are appropriately established before this court. Accordingly, I cannot uphold the argument put forward by Mr Coetzee on behalf of the plaintiff in this regard.

52. In assessing this apportionment, it is clear that the main cause of the accident was clearly the failure to maintain the road appropriately and more particularly the failure to warn road

users of the particular road hazard, in a manner that would provide road users, including the plaintiff, an opportunity to adjust their driving accordingly. In these circumstances, I would apportion eighty percent of the blame to these factors. On the evidence of Ms Frye, the deceased was driving at a speed of about 110 km/h. Given the knowledge that they had about the poor condition of the road, also on the evidence of Ms Frye, this was not appropriate to the general condition of the road in question. On the probabilities, this speed was clearly a factor in the ability of the deceased to control the vehicle he was driving after hitting the relevant pothole (edge-break). In these circumstances, I believe twenty percent of the blame should be apportioned to the deceased.

53. This leaves the question of costs. The plaintiff requested costs to include the costs of two counsel where two counsel were employed. Having regard to the issues raised in this case, I do not believe an order for costs on the basis of two counsel would be appropriate and such an order will not be made.

54. I believe the appropriate order would be that the first defendant pay 80% (eighty percent) of the plaintiff's taxed or agreed costs. The plaintiff was substantially successful; in all of the circumstances of the case I do not think it would be appropriate to order the defendant to pay 20% of the first defendant's taxed or agreed costs. In the circumstances, the first defendant will be ordered to pay 80% (eighty percent) of the plaintiff's taxed or agreed costs. In all the circumstances of this case, I believe it would be appropriate that these costs be taxed on scale "C".

55. In her order of the 25 June 2018 Stanton AJ reserved costs in relation to two questions. Firstly, the costs of the condonation application and first special plea. Secondly, in respect of the costs of postponing the trial on the merits on that occasion. Neither of the parties made representations before me in respect of such costs. In the circumstances I believe the

appropriate order is to further reserve the question of these costs for the court dealing with the quantum in this matter.

In the circumstances, the following order is made:

1) The first defendant shall pay to the plaintiff 80% (eighty percent) of his proved or agreed damages.
2) First defendant shall pay to the plaintiff 80% (eighty percent) of his taxed or agreed costs. Such costs to be taxed on scale "C".
3) The questions of costs reserved by Stanton AJ in terms of her order of the 25 June 2018 are hereby further reserved for the court dealing with the quantum of the plaintiff's claim.

[redacted]

LAWRENCE LEVER
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION, KIMBERLEY

APPEARANCES:

Plaintiff:	Adv W.J. Coetzee (SC) with D.C. Jankowitz oio P. Joubert Inc (Ref NP/scj/PJJ 0206)
First Defendant:	Adv L.R. Bomela oio Gqadushe Attorneys
Date of hearing:	12 June 2024
Date of Judgment:	16 January 2026