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

Reportable
Case No: 8864/2012

In the matter between:

ANTON HESSE	Plaintiff
and	
THE SOUTH AFRICAN NATIONAL ROADS AGENCY LTD	First Defendant
KAYAD CONSULTING ENGINEERING (PTY) LTD	Second Defendant
FOUNTAIN SQUARE TRADING 71 CC t/a MD CIVILS	Third Defendant
KAYAD CONSULTING ENGINEERING (PTY) LTD	First Third Party
FOUNTAIN SQUARE TRADING 71 CC t/a MD CIVILS	Second Third Party

Heard on: 13 – 16 August 2024; 19, 20, 23, 28 August 2024; 6 – 8 November 2024; 20 – 22 January 2025; 29 August 2025; 22 -23, 25 – 26 September 2025; 15 December 2025

Delivered on: 11 March 2026

Summary: Delict — Road authority — Wrongful omission — National freeway — Ponding and aquaplaning at known low point — Statutory stewardship/monitoring duty

(SANRAL Act ss 25(1), 26(c)) — Independent-contractor defence — Principal's non-delegable steps; inadequate oversight — *Chartaprops*; *Langley Fox* — applied with recent authority confirming that outsourcing does not absolve a principal where monitoring is deficient — Causation — Factual and legal causation established on emergency records, post-incident edge-build-up removal and *in loco* geometry — Contributory negligence — Not proved. Prescription — Prescription Act s 12(3) — "Material facts" and constructive knowledge — Identity of potential wrongdoers insufficient — *Links* applied; *Tembani* distinguished — Full contractual disclosure and amended plea in 2016/2017 triggered running — Joinder in March 2019 within three-year period — Special plea dismissed. Third-party proceedings — Indemnity and contribution under Rule 13 and s 2(2) of the Apportionment of Damages Act — Contingent claims postponed *sine die*. Condonation (Rule 36(9)) — Good cause shown; admission of late expert reports in the interests of justice**.** Procedure — Merits only; quantum postponed *sine die*.

Held — (1) Omission to avert/remove edge build-up at low point wrongful in principle; (2) Reasonable steps not taken by road authority and contractors; (3) Factual and legal causation established; (4) Independent-contractor defence unavailable on the facts given statutory monitoring duty and inadequate oversight; (5) Contributory negligence not established; (6) Special plea of prescription dismissed; (7) Condonation under Rule 36(9) granted with reserved costs made costs in the cause; (8) Defendants liable, jointly and severally, for 100% of proven damages on the merits.

ORDER

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1. The Special Plea of prescription is dismissed.
2. The First, Second and Third Defendants are held liable, jointly and severally, the one paying the others to be absolved, for 100% of the Plaintiff's proven damages on the merits.
3. The Defendants jointly and severally are to pay the costs of suit, including the costs of two Counsel, Senior Counsel on Scale C and Junior Counsel on Scale B, respectively.
4. The reserved costs of the interlocutory application heard on 29 August 2025 are declared to be costs in the cause.

5. The First Defendant's Third-Party claims for indemnity, rectification, and in the alternative contribution, against the First and/or Second Third Parties are postponed sine die for determination, if necessary, at the quantification stage, with the costs of the third-party proceedings likewise reserved.
6. The matter of quantum is postponed sine die.

JUDGMENT

ANDREWS AJ:

Introduction

[1] The Plaintiff instituted action against the South African National Roads Agency Ltd ("SANRAL") for delictual damages arising from a collision on 15 May 2009 after his vehicle aquaplaned on ponded water on the N1 near the Okavango interchange. The Second and Third Defendants were later joined after it emerged that they performed supervisory and maintenance functions on that section of road.

[2] In terms of Rule 33(4), the issues of merits and quantum were separated. The trial proceeded on the merits only.

Preliminary Issues

Reasons for the Interlocutory Order of 2 September 2025

[3] The court granted the following orders following a Rule 27 application launched by the Second and Third Defendants:

1. The Second and Third Defendants' non-compliance with Rules 36(9)(a) and (b) in respect of the supplementary report of Mr John Craig, dated 26 November 2024, and the report of Dr Peter Johnson, dated 10 December 2024, is condoned;
2. The Second and Third Defendants are granted leave to call Mr John Craig and Dr Peter Johnson to testify in support of their aforementioned reports;
3. The matter of costs will stand over for later determination.

[4] After carefully considering the papers and the submissions advanced by the parties, I was satisfied that good cause was shown for the late admission of the supplementary reports of Mr Craig and Dr Johnson.

[5] The change in the factual premise underpinning the engineering evidence arising from the correct identification of the actual low point in the roadway during the trial constituted a material development that justified the Defendants' filing of further expert reports. The reports were delivered promptly after that development. They addressed issues already traversed in evidence. To my mind, their admission did not cause trial prejudice, as the Plaintiff was afforded an opportunity to reopen his case. The content of the reports did not alter the nature of the issues to be determined. In these circumstances, together with interest of justice considerations, the Defendants' non-compliance with Rule 36(9)(a) and (b) was adequately explained, and condonation was warranted to ensure that the Court has the benefit of all relevant material when evaluating the technical evidence.

[6] As to costs, I considered it appropriate that the costs of the application stand over for later determination together with the remaining issues in the trial, so that the Court hearing the merits is best placed to assess the extent to which any party has been prejudiced or put to unnecessary expense by the late delivery of the reports.

Factual Background

[7] The incident at the centre of these proceedings occurred during the early hours of 15 May 2009, at approximately 03h00, when the Plaintiff, Mr Anton Hesse, was travelling along the inbound carriageway of the N1 near the Okavango interchange. While driving towards Cape Town in heavy rain and darkness, the Plaintiff's vehicle encountered a substantial pool of accumulated water in the right-hand lane, causing it to aquaplane, rotate, and leave the roadway, ultimately colliding with wooden poles and vegetation on the median of the highway.

[8] It is undisputed that water had ponded in the right-hand lane at the time of the incident and that this ponding caused the Plaintiff's vehicle to skid and collide with the median barrier, resulting in physical injuries. The section of road where the incident occurred lies between approximately kilometre markers 21.8 and 21.9, which

engineering evidence later confirmed to be a low-lying point on the inbound carriageway where surface water naturally collects.

[9] It is undisputed that SANRAL was incorporated on 19 May 1998 in terms of Section 3 of the South African National Road Agency Limited and National Roads Act 7 of 1998 ("the SANRAL Act"). In terms of Section 25(1) of the SANRAL Act, SANRAL was responsible for, and was given power to perform, all strategic planning with regard to the South African National Roads System, as well as the planning, design, construction, operation, management, control, maintenance and rehabilitation of national roads for the Republic. Therefore, at the relevant time of the incident, SANRAL bore statutory responsibility for the planning, maintenance, and operation of the N1 national road under Sections 25 and 26 of the SANRAL Act.

[10] Section 25 of the SANRAL Act states as follows:

*'**25 Main functions of Agency***

(1) The Agency, within the framework of government policy, is responsible for, and is hereby given power to perform, all strategic planning with regard to the South African national roads system, as well as the planning, design, construction, operation, management, control, maintenance and rehabilitation of national roads for the Republic, and is responsible for the financing of all those functions in accordance with its business and financial plan, so as to ensure that government's goals and policy objectives concerning national roads are achieved…

(2) For the purposes of subsection (1) –

(a) The Agency, on the incorporation date, will take over from the South African Roads Board the responsibility for all projects and work which, before that date, had been commenced in terms of the previous Act by the South African Roads Board in connection with the planning, design, construction, operation, management, control, maintenance and rehabilitation of a national road or the planning of a proposed national road, and which is still pending on that date;

(b) The Agency, as from the incorporation date, will be competent to continue with and to carry out those projects and that work or to have them carried out subject to the provisions of this Act and any existing contracts and agreements concluded by the South African Roads Board with regard to the execution of the projects or the performance of the work.

(3) Except insofar as this Act provides otherwise, the responsibility and capacity to perform the functions mentioned in subsection (1) in the Republic, are entrusted to the Agency only.'

[11] Section 26 (c) in relevant part stipulates as follows:

'In addition to the Agency's main powers and functions under section 25, the Agency is competent –

…

(c) to appoint any private person, institution or body, in terms of a contract concluded for that purpose, in order to perform any work on behalf of the Agency with regard to the planning or design of a national road or proposed national road or the construction, operation, management, control, maintenance or rehabilitation of a national road, or in order to perform any work in the execution of a project or in connection therewith, and to monitor the execution and the work performance…'

[12] In terms of written agreements concluded in 2005 and 2006 respectively, SANRAL appointed the Second Defendant, Kayad Consulting Engineers, as consulting engineer responsible for supervisory functions, and the Third Defendant, MD Civils, as the routine maintenance contractor for this section of road, the one or the other or both of them to perform all such work as was necessary to ensure that the functions were discharged. Both contractors had commenced work on the road prior to the collision.

[13] Following the incident, emergency records reflect call-outs at 03h15 and again at 12h35 on the same day, each noting water on the road surface in the vicinity of the scene. Shortly thereafter, on 18 May 2009, SANRAL's engineer issued a job instruction directing MD Civils to remove edge build-up, a growth of vegetation and soil capable of impeding drainage, over a substantial length of the median edge. This work was undertaken between 15 and 21 May 2009 and later certified for payment.

Summary of the Pleadings

[14] The Plaintiff instituted a delictual claim for damages, alleging that SANRAL, alternatively the Second or Third Defendants, further alternatively all Defendants jointly and severally, owed road users a legal duty to ensure that the N1 was maintained in a clean and safe condition, free from hazardous water accumulation, particularly during or after rainfall. He pleaded that the Defendants wrongfully and negligently failed to maintain the road, manage drainage, prevent edge build-up, or warn motorists of potential water accumulation, thereby causing the incident.

[15] The First Defendant, SANRAL, admitted its statutory functions but denied any wrongful or negligent omission on its part. It pleaded that any duties relating to maintenance were discharged by engaging the Second and Third Defendants as competent independent contractors, and that once they entered upon the work, SANRAL bore no further liability in respect of their omissions. SANRAL further alleged contributory negligence on the part of the Plaintiff.

[16] The Second and Third Defendants (engineering and maintenance contractors) denied owing any legal duty to the public beyond their contractual obligations to SANRAL. They denied wrongfulness, negligence, and causation. They also denied the presence of any hazardous water at the time alleged, and put the Plaintiff to the proof of his claims. In the alternative they pleaded that the Plaintiff was solely or partly negligent.

[17] The Second and Third Defendants raised a Special Plea that the Plaintiff's claim against them had prescribed, contending that he knew, or could with reasonable care have ascertained, their identity and connection to the incident by December 2015, when the Third Party Notice was served on the Plaintiff, whereas they were only joined as Defendants in March 2019. The Plaintiff replicated that material facts, specifically the Defendants' independent-contractor status, only became known upon SANRAL's amended plea filed on 10 March 2017. The First Defendant produced the complete copies of the underlying contracts at a pre-trial meeting on 9 March 2017[1]. It is undisputed that the Plaintiff received complete copies of the contracts from the Second Defendant on 18 June 2024.[2]

A. First Defendant (SANRAL): Summary of defences

[18] Wrongfulness (omission): SANRAL accepts a general stewardship role over national roads under ss 25(1) and 26(c) of the SANRAL Act, but contended that wrongfulness must be kept distinct from negligence; that public and legal policy do not

[1] Plaintiff's Heads of Argument, page 36 *"09 March 2017 – First Defendant produces full copies of the contracts with First and Second Third Party at pre-trial meeting.* ***(Therefrom the substantial facts of the matter had come to light.)***

[2] Index to Special Plea, Bundle D, pages 2 – 4.

impose on it a duty to warn motorists of transient ponding, because it is not a traffic authority under the National Road Traffic Act[3]; and that its duties sound in ensuring the physical condition and maintenance of the network rather than real-time traffic management.

[19] Independent-contractor defence: Relying on the majority in *Chartaprops*, SANRAL submitted that it discharged its duty by engaging reasonably competent independent contractors (Kayad for supervision; MD Civils for routine maintenance). It argued that any operational failure attracts the contractors' liability in delict, not SANRAL's vicarious liability, and that the Plaintiff did not plead a distinct "supplementary oversight-negligence" case against SANRAL.

[20] Personal fault (oversight): In the alternative, to the extent the Court enquires into SANRAL's own fault, SANRAL says it took reasonable steps through a structured inspection/maintenance regime and cannot be faulted on the evidence.

[21] Duty to warn: SANRAL denies the pleaded duty to warn motorists of ponding, submitting that such a duty would require an unworkable shadow traffic-policing system nationwide and is not supported by the SANRAL Act.

[22] Causation: On factual causation, SANRAL contended that the Plaintiff's mechanism, namely that edge build-up impeded drainage at a low point, is speculative and that a municipal pipeline or valve leak remains an equally probable explanation; and if the probabilities are evenly balanced, the Plaintiff has not discharged the onus.

[23] Prescription (alignment with co-defendants): SANRAL aligns with the Second and Third Defendants' plea that the claim against them prescribed once their identity became known in 2015, rendering the service and joinder in 2019 out of time.

B. Second and Third Defendants (Kayad / MD Civils): Summary of defences

[24] Wrongfulness/Negligence: They deny any wrongful or negligent omission, asserting that the Plaintiff's mechanism is founded on Dr Roodt's

[3] The National Road Traffic Act 93 of 1996.

hypothesis, which in their view is methodologically unsound, fails to take alternative causes into account, does not accord with the rainfall evidence or the absence of observed edge build-up on the night, and is contradicted by the maintenance records and the inspection regime. In this context, "mechanism" refers to the causal process by which the accident occurred, that is how rainwater moved on the cambered surface, was impeded at the median edge by vegetation and soil build-up, pooled at the known low point, and induced aquaplaning.

[25] Alternative cause: They advance the municipal leak explanation as consistent with (a) valve-chamber geography; (b) the presence of a pumping vehicle; and (c) a later 12h35 call-out; suggesting that the rainfall data did not support the Plaintiff's theory.

[26] Contributory negligence: They argued aquaplaning at 70–80 km/h was "virtually impossible" and the Plaintiff over-steered.

[27] Special Plea of prescription: They contended the Plaintiff knew identities and the *facta* founding his claim by late-2015, and the claim against them therefore prescribed by late-2018.

[28] Given its potentially dispositive effect, I address the Special Plea upfront. If it fails, the judgment turns to the remaining issues: wrongfulness (including SANRAL's statutory framework), negligence, factual and legal causation, the independent-contractor defence, and (if necessary) contributory negligence.

Prescription

A. Statutory Framework

[29] The applicable statutory framework is contained in the Prescription Act 68 of 1969 ("the Act"). The Second and Third Defendants ('the Defendants") Special Plea is rooted in Section 11(d), read with Sections 12(1) and 12(3), of the Act. Section 11(d) of the Act prescribes a three-year period for "any other debt".[4] Sections 12(1) –

[4] Section 11(d) of the Prescription Act provides:

'save where an Act of Parliament provides otherwise, three years in respect of any other debt.'

(3) of the Act provide that prescription begins to run when the debt is "due", and a debt is not deemed due until the creditor has knowledge of both the identity of the debtor and the facts from which the debt arises. Constructive knowledge arises only where such facts could have been acquired by reasonable care.

[30] Sections 12(1) to (3) of the Act read as follows:

*'**12 When prescription begins to run***

(1) Subject to the provisions of subsection (2), (3), and (4), prescription shall commence to run as soon as the debt is due.

(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) *A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.'*

[31] The principles were restated in *Bruwer N.O and Others v Trustees of the time being of the Phillip Fourie Family Trust* [5], emphasising that a Defendant bears the full onus to establish prescription, including proving when the Plaintiff obtained, or could with reasonable care have obtained, the necessary knowledge. The burden shifts to the Plaintiff only once a prima facie case of prescription is shown.[6]

B. Parties' principal submissions

[32] The Defendants invoke Section 12(3) of the Prescription Act, contending that by October–December 2015, when SANRAL served its Third-Party Joinder application and the formal Third-Party Notice identifying Kayad and MD Civils and annexing extracts from their contracts, the Plaintiff had, or could with reasonable care have acquired, the requisite knowledge. On that footing, prescription began then and was completed before the Plaintiff joined the contractors in March 2019.

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[5] (918/2020) [2022] ZAWCHC 8; 2022 (6) SA 214 (WCC) (28 January 2022) at para 6:
'It is settled law that a person invoking prescription bears a full onus to prove it. A defendant bears the full evidentiary burden to prove a plea of prescription, including the date on which a plaintiff obtained actual or constructive knowledge of the debt. The burden shifts to the plaintiff only if the defendant has established a prima facie case.'

[6] See also, *Macleod v Kweyiya* 2013 (6) SA 1 at para 10; *Gericke v Sack* 1978 (1) SA 821 (A) at 827H - 828A.

[33] The factual sequence is common cause. The accident occurred on 15 May 2009. The Plaintiff issued summons against SANRAL on 10 May 2012, alleging SANRAL's sole responsibility for planning, control and maintenance. In 2014, in replies to requests for particulars, he stated that no other party bore the duties alleged.

[34] At a 30 January 2015 pre-trial, SANRAL indicated an intention to join further parties. It filed the Third-Party Joinder application on 29 October 2015 and served the formal Third-Party Notice on 7 December 2015, identifying the maintenance contractors and describing their alleged duties. The First and Second Third Parties pleaded on 22 February 2016. During 2016, the Third-Party process proceeded, and on 6 October 2016, SANRAL served its discovery affidavit on the Plaintiff.

[35] At a 9 March 2017 pre-trial, SANRAL furnished complete copies of the underlying contracts and, on 10 March 2017, delivered an amended plea setting out, for the first time, the contractors' contractual and supervisory roles with reference to Sections 25 and 26 of the SANRAL Act.

[36] The Plaintiff applied in August 2017 to join Kayad and MD Civils as Defendants, but withdrew the application on the hearing day in 2018. A further unopposed application was launched on 7 January 2019, and on 20 March 2019 an order joined Kayad and MD Civils as the Second and Third Defendants. The amended summons was served on 29 March 2019.

[37] The Defendants contended that a reasonable enquiry would have revealed the contractors' roles earlier, whether from signage, prior documents or public sources. Relying on *Absa Bank Ltd v De Villiers ("De Villiers")*[7] and *Peter Taylor & Associates v Bell Estates ("Peter Taylor")*[8], they argued that only service of process interrupts prescription and that the amended summons served in March 2019 was therefore late.

[7] *Absa Bank Ltd v De Villiers* 2001 (1) SA 481 (SCA).
[8] *Peter Taylor & Associates v Bell Estates* 2014 (2) SA 312 (SCA).

[38] In *De Villiers*, they argue that once a prima facie case of prescription is shown, and the creditor asserts delayed commencement, an independent onus regarding that delay rests on the creditor; thus, the evidential burden shifts to the Plaintiff.

[39] The Defendants reasoned that the earliest date on which prescription could have been interrupted would have been on the granting of the order on 20 March 2019, in terms of which the First and Second Third Parties (Kayad and MD Civils) were in fact joined to the action as the Second and Third Defendants. Or, more likely, on a proper construction of section 15(1), prescription only stopped running on the service on the First and Second Third Parties (Kayad and MD Civils) of the Plaintiff's amended summons, which occurred on 29 March 2019.[9]

[40] Relying on *Truter and Another v Deysel* (*"Truter v Deysel"*)[10], the Defendants emphasise that a debt is "due" when the creditor has a complete cause of action; they submit that the third-party material in 2015 provided what was necessary to sue the contractors.

[41] On the facts, they say the December 2015 Third-Party Notice identified Kayad and MD Civils and described their duties, thereby triggering s 12(3). Alternatively, the Plaintiff ought to have known of their connection by 30 January 2015 (pre-trial) or 29 October 2015 (joinder application). On this reasoning, prescription ran to December 2018, rendering the March 2019 joinder out of time.

[42] They add that reasonable care required enquiries by reference to routine-maintenance signage on the N1 and to Colyn's 2012 report reflecting SANRAL's outsourcing. The Plaintiff's failure to do so is said to fix him with constructive knowledge under Section 12(3), the proviso being that delay persists only until the creditor could have acquired the necessary facts by reasonable care.

[43] The Plaintiff's case is that the "material facts" required by Section 12(3)

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[9] In terms of Section 15(6),*'process'* for purposes of section 15 *'includes a petition, a notice of motion, a rule nisi, a pleading in reconvention, a third party notice referred to in any rule of court, and any document whereby legal proceedings are commenced'*.

[10] *Truter and Another v Deysel* (043/05) [2006] ZASCA 16; 2006 (4) SA 168 (SCA) para 16.

extended well beyond identity and that identity alone is not sufficient to trigger prescription. He contended that the substantial facts relating to the contractors' supervisory and routine maintenance roles, and thus their potential liability for the pleaded omissions, only emerged upon discovery in 2016 and were crystallised by SANRAL's Amended Plea in March 2017.

[44] Furthermore, the recent authority on prescription, namely *President of the Republic of South Africa and Another v Tembani and Others ("Tembani")*[11], does not alter this position and that *Links v Member of the Executive Council, Department of Health, Northern Cape Province ("Links")*[12] remains applicable where the court held that prescription does not run until the creditor knows facts giving rise to negligence and causation, not merely the existence of harm and the identity of a potential wrongdoer. *Tembani* distinguishes between knowledge of material facts and later legal conclusions or judicial pronouncements. Prescription does not await a court ruling where facts are already known, but equally does not begin until material facts (as contemplated in Section 12(3)) are accessible. In this matter, those facts, namely, the contractors' mandates and SANRAL's reliance on them, became available on 6 October 2016 (discovery) and 10 March 2017 (Amended Plea).

C. Evaluation

[45] The contention that the Plaintiff could reasonably have obtained the necessary knowledge from signage or the 2015 Joinder papers is not borne out by the evidence. Signage did not disclose the nature or scope of contractual functions, and the partial documents attached to the Third-Party application did not convey the material facts linking the supervisory and routine-maintenance mandates to the hazard in issue.

[46] The Defendants are correct that SANRAL's joinder of Third parties did not, without more, create a *lis* between the Plaintiff and those entities. The matter of

[11] *President of the Republic of South Africa and Another v Tembani and Others* (CCT 162/2022) [2024] ZACC 5; 2025 (2) SA 371 (CC).
[12] *Links v Member of the Executive Council, Department of Health, Northern Cape Province* (CCT 29/15) [2016] ZACC 10; 2016 (4) SA 414 (CC); 2016 (5) BCLR 656 (CC)para 45.
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Shield Insurance Co Ltd v Zervoudakis[13] confirms that no judgment lies in favour of a Plaintiff against a Third Party in that posture. Their point, however, does not assist in Section 12(3). The question is what material facts the Plaintiff knew or could reasonably have acquired, not whether SANRAL's Third-Party step itself interrupted prescription as between the Plaintiff and the contractors.

[47] For completeness, SANRAL served notices in terms of Section 2(2) of the Apportionment of Damages Act[14] upon Kayad/Knight Piésold and MD Civils; these notices preserve SANRAL's rights of recourse but do not affect the running of prescription as between the Plaintiff and those Defendants.

[48] The further submission that the Plaintiff's "independent-contractor vs subcontractor" terminology is legally irrelevant does not address the real point. The content of the supervisory and maintenance mandates, and SANRAL's reliance on those mandates, were the material facts required to link the pleaded omissions to the contractors. Whether styled "independent contractors" or "contractors", the substance of their roles was what mattered for Section12(3).

[49] The court was referred to the principles applicable to the delictual liability of contractors as set out in *Chartaprops 16 (Pty) Ltd v Silberman*[15]*("Chartaprops")*, *Langley Fox Building Partnership (Pty) Ltd v De Valence*[16] *("Langley Fox")* and *Stein v Rising Tide Productions CC*[17] which confirm that liability depends on conduct and fault, not capacity. That is correct as a matter of delict, but here these cases do not resolve when the Plaintiff knew the material facts needed to sue the contractors.

[50] Likewise, reliance on contractual extracts attached to the 2015 Joinder papers overstates what those partial documents revealed. In contrast, the full contracts furnished on 9 March 2017, read with SANRAL's 10 March 2017 Amended Plea, first set out with clarity the contractors' supervisory and routine-maintenance mandates relevant to the pleaded omissions.

[13] *Shield Insurance Co Ltd v Zervoudakis* 1967 (4) SA 735 (E) at 739B.
[14] Apportionment of Damages Act 34 of 1956.
[15] *Chartaprops 16 (Pty) Ltd v Silberman* 2009 (1) SA 265 (SCA).
[16] *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 (1) SA 1 (AD).
[17] *Stein v Rising Tide Productions CC* [2002] 2 All SA 22 (C).

[51] The argument that the Plaintiff adduced no evidence of late discovery overlooks the inherent sequence, namely that the complete contracts and the Amended Plea were only made available in March 2017. To the extent the Defendants rely on *Truter v Deysel*, the principle that a debt is due once a complete cause of action exists does not assist them unless the Plaintiff already possessed the material facts completing that cause of action.

[52] The Plaintiff's position is that those material facts, particularly the supervisory and routine-maintenance mandates, only emerged on 6 October 2016 (discovery) and were clarified on 10 March 2017 (Amended Plea). He says earlier documents did not link the contractors' roles to the pleaded omissions; many of the operative facts lay within SANRAL's knowledge; and expert interpretation was needed to appreciate the link between the maintenance regime, edge build-up, and the low-point hazard.

[53] The Plaintiff also contended that he could not reasonably have known of the negligent conduct or omissions on which the claim is based because the relevant facts were concealed, unavailable, or not reasonably discoverable. In that vein, he invokes Section 12(2) to the extent that SANRAL's representations or conduct reasonably led him to believe the matter was being attended to.

[54] The applicable test remains Section 12(3) that prescription runs only when the creditor knows the identity of the debtor and the facts from which the debt arises, unless such knowledge could reasonably have been acquired. The onus rests on the party invoking prescription.

[55] Applying that test, I am not persuaded that the Defendants have shown that the Plaintiff could reasonably have acquired the material facts before 2016/2017. While identity may have been known earlier, identity alone is not "the facts from which the debt arises". Neither signage nor the 2015 joinder papers conveyed the scope or content of the contractors' duties. Mr Craig placed no evidence before the Court that the Plaintiff did or could reasonably have known those substantial facts before the full contracts were disclosed. The timeline supports the Plaintiff's case that those facts emerged only on discovery and in the Amended Plea.

[56] On the Defendants' own version, therefore, the Plaintiff could not know that the contractors' omissions, rather than some other explanation, constituted the factual basis of his claim until experts, discovery, and the Amended Plea clarified their roles. Constructive knowledge does not arise merely because further enquiry was theoretically possible. Reasonable care does not impose a duty of suspicion, nor require reconstruction of contractual arrangements without access to the contracts. That the Plaintiff did enquire, and only received the full contracts in March 2017, supports his position.

[57] The principle in *Links* is determinative as prescription requires knowledge of material facts relating to negligence and causation, not merely awareness of injury. On the evidence, those facts, namely the contractors' mandates and their connection to the pleaded omissions, emerged on 6 October 2016 (discovery) and 10 March 2017 (Amended Plea). The suggestion that prescription was complete by early December 2018 is therefore not sustained.

[58] In the result, the Defendants have not discharged the onus of proving that the Plaintiff had, or reasonably could have acquired, the material facts before March 2017. Prescription accordingly began running at that stage, and the March 2019 joinder fell within three years.

D. Conclusion on prescription

[59] On the totality of the evidence, the Defendants, who bear the onus, have not, on the probabilities, shown that the Plaintiff had, or with reasonable care could have acquired, the material facts contemplated in Section 12(3) before March 2017. Identity of potential wrongdoers is not, without more, "the facts from which the debt arises". The 2015 Third-Party papers and signage did not disclose the nature and scope of the contractors' supervisory and routine-maintenance mandates on which the pleaded omissions depend, and no evidence establishes that the Plaintiff could reasonably have obtained those facts before full contractual discovery and the amended plea.

[60] Consistent with *Links*, prescription begins when the creditor knows the material facts bearing on negligence and causation, not merely when loss or identity

is known; and, as *Tembani* makes plain, prescription does not wait upon a legal conclusion once the facts exist, but equally does not commence until those material facts are reasonably accessible. On the probabilities, those facts emerged only upon SANRAL's discovery on 6 October 2016 and its amended plea on 10 March 2017. Time therefore began running at that stage, and the March 2019 joinder fell within three years. The special plea of prescription accordingly falls to be dismissed.

Third-Party Proceedings (Rule 13 and s 2(2) of Act 34 of 1956)

[61] Pursuant to Uniform Rule 13, the First Defendant (SANRAL) joined Knight Piésold Consulting (Pty) Ltd (as successor to Kayad Consulting Engineers (Pty) Ltd) as First Third Party, and Fountain Square Trading 71 CC t/a MD Civils as Second Third Party. In the same process, SANRAL served notices in terms of s 2(2) of the Apportionment of Damages Act upon both entities, thereby preserving its rights of recourse in the event that it was held liable to the Plaintiff. The Third-Party Notices incorporate SANRAL's pleas that, if liability were established against it, the First and/or Second Third Parties are obliged either to indemnify SANRAL or, in the alternative, to make such contribution as is just.

[62] Rule 13 is a procedural mechanism that exists to avoid multiplicity of actions and operates in tandem with Section 2 of the Apportionment of Damages Act. Its validity and purpose were confirmed in *Gross v Commercial Union Assurance Co Ltd* [18].The principles governing the court's discretion in third-party costs were articulated in *Robertson v Durban Turf Club and Others*[19], which held that a Plaintiff should not be required to pay third-party costs unless the Defendant acted reasonably in issuing the third-party notice, and even then, fairness remains the overriding criterion.

[63] As regards the First Third Party, SANRAL relies on the 2005 Engineering Services Contract ("first agreement"), in terms of which Kayad undertook supervisory and maintenance-related obligations and provided an indemnity clause (cl 3.5.3), alternatively subject to rectification. As regards the Second Third Party, SANRAL relies

[18] *Gross v Commercial Union Assurance Co Ltd* 1974 (1) SA 630 (A) at 633–635.
[19] *Robertson v Durban Turf Club and Others* 1970 (4) SA 649 (N).

on the Routine Road Maintenance Contract ("second agreement"), incorporating the Standard Specifications for Routine Road Maintenance (2011) and FIDIC (1999), which included obligations to maintain drainage structures, remove edge build-up, and indemnify SANRAL under cl 17.1(a) of FIDIC.

[64] In the alternative to contractual indemnity, SANRAL pleads that both the First and Second Third Parties, having entered upon the work, owed public-law duties to road users and are consequently joint wrongdoers vis-à-vis the Plaintiff in terms of *Chartaprops*, rendering them liable to make a just contribution in terms of Section 2 of the Apportionment of Damages Act should SANRAL be liable.

[65] In its prayer, SANRAL seeks:

(a) Indemnity (jointly and severally, or against either third party);
(b) Rectification of clause 3.5.3 of the first agreement, only if necessary;
(c) Contribution, in the alternative to indemnity; and
(d) Costs in the Third-Party proceedings.

[66] As explained later in this judgment, because SANRAL and the co-defendants have been found jointly and severally liable to the Plaintiff on the merits, the Third-Party claims are contingent and need not be determined at this stage.

Issues for Determination

[67] Having dismissed the Special Plea of prescription, the Court is required to determine the remaining issues arising on the merits. These issues, distilled from the pleadings, the evidence, and the parties' submissions, are the following:

(a) Whether any of the Defendants owed the Plaintiff a legal duty in the circumstances. This requires a determination of whether SANRAL, Kayad Consulting (Second Defendant), and MD Civils (Third Defendant) bore a legal duty to act positively to prevent the creation of a hazardous condition on the inbound carriageway of the N1, consistent with the pleaded duties in paragraphs 11 and 13 of the particulars of claim and the applicable jurisprudence on wrongfulness and omissions.

(b) Whether the Defendants wrongfully and negligently omitted to discharge that duty. This issue concerns the application of the *Kruger v Coetzee*[20] negligence test to the pleaded omissions, including the adequacy of inspections, maintenance practices, the management of edge build-up, and any failure to avert the risk of ponding of water on the roadway.

(c) Whether such wrongful and negligent omissions factually and legally caused the ponding and the collision**.** This issue encompasses both:

(i) Factual causation, applying the "but-for" test, and

(ii) Legal causation, applying the flexible policy-based approach, including considerations of reasonableness, fairness, and remoteness.

(d) Whether SANRAL is entitled to rely on the independent-contractor defence**.** This involves determining:

(i) Whether SANRAL discharged its legal duty by engaging reasonably competent independent contractors under section 26(c) of the SANRAL Act;

(ii) Whether the contractors in fact entered upon and performed the work; and

(iii) Whether, notwithstanding *Chartaprops*, any supplementary duty of oversight remained engaged on the facts.

(e) Whether the Second and Third Defendants are themselves liable for wrongful and negligent performance of the work they undertook**.** This includes determining the nature and scope of the duties arising upon them "because they entered upon the work", in accordance with *Chartaprops*, and whether their conduct materially contributed to the hazardous condition.

(f) Whether contributory negligence on the part of the Plaintiff played any role in

[20] 1966 (2) SA 428 (AD) at 430E, where Holmes JA elucidated the proper approach for establishing the existence or otherwise of negligence as follows:

'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.'

the occurrence. This issue arises from the Defendants' pleadings alleging excessive speed, failure to maintain a proper lookout, or inappropriate responses after striking the water.

(g) The appropriate apportionment of liability (if required). If more than one Defendant is found liable, or if contributory negligence is established, the Court is enjoined to determine the proper apportionment under the Apportionment of Damages Act.

Applicable legal principles

[68] It is trite that the Plaintiff bears the overall burden of proof to establish the delictual elements on a balance of probabilities.[21] The civil standard requires only that the Court be satisfied that the Plaintiff's version is more probable than not. As Lord Denning put it, the burden is discharged once the tribunal can say "we think it more probable than not"; if the probabilities are equal, it is not discharged.[22] This Court adopts that standard.

[69] The proper approach to the evaluation of expert evidence is well-established. The authorities emphasise the difference between (i) factual observations by experts; (ii) discipline-specific general knowledge necessary to understand the issues; and (iii) the expert's opinions and inferences. It is trite that expert opinions assist the Court but do not bind it; the Court must be satisfied that the opinion rests on facts proved to exist and is supported by proper reasoning. The more

[21] See *Pillay v Krishna* 1946 AD 946 at 952.

[22] See *Miller v Minister of Pensions* 1947 2 All ER 372; *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159D; See also *South African Bank of Athens v 24 Hour Cash CC* (A3027/2016) [2016] ZAGPJHC 217 (11 August 2016):

'[9] We return to these questions after having first discussed the correct approach to the assessment of the evidence. A helpful discussion of this topic appears in the judgment of Van der Spuy, AJ in Selamolele v Makhado:

"The onus of proof and the legal requirements as to the discharge thereof

It is common cause that plaintiff bears the overall onus of proof, ie he must prove his version that he was pushed from behind and did not fall fortuitously backwards after a scuffle with defendant. It may be that defendant has some duty of adducing evidence in support of the latter version but the onus of proof in the overall case never shifts and remains on plaintiff. See Pillay v Krishna 1946 AD 946 at 952-3. A disagreement arose between counsel for the two parties, ie Mr Botha for plaintiff and Mr Pieterse for defendant, concerning that approach which I should adopt when determining whether plaintiff has discharged the onus of proving his version on a balance - preponderance - of probabilities. The disagreement arises from the well-known statement of the law in National Employers' Mutual General Insurance Association v Gany 1931 AD 187 at 199: …"'

an expert relies on facts not in evidence, the less weight the opinion carries; an opinion founded on facts not proved has no value. Indicators of diminished objectivity include limited mandates, litigation-driven products, selective engagement with evidence, and identifiable bias or interest. Even where experts agree, the Court must still be satisfied that the agreed opinion is factually underpinned and reasoned.

[70] In *PriceWaterhouseCoopers Inc and Others v National Potato Co-operative Ltd and Another*[23], Wallis JA endorsed the principle articulated in the Canadian decision of *Wightman v Widdrington*[24] that, before any weight can be attached to an expert's opinion, the facts upon which the opinion is based must be found to exist. An opinion founded on assumptions or facts not proved in evidence is of no value. The more an expert relies on facts that have not been established, the less weight their opinion attracts.

[71] Wallis JA reaffirmed these principles in *AM and Another v MEC for Health, Western Cape*,[25] emphasising that expert opinion involves the drawing of

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[23] *PriceWaterhouseCoopers Inc & others v National Potato Co-operative Ltd & another* (451/12) [2015] ZASCA 2; [2015] 2 All SA 403 (SCA) 4 March 2015 (*'PriceWaterhouseCoopers'*), at para 99.
"[99] Lastly when dealing with the approach to an expert witness I have found helpful the following passage from the judgment of Justice Marie St-Pierre in Widdrington:
'Legal principles and tools to assess credibility and reliability

> *[326] "Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.*
> *[327] "As long as there is some admissible evidence on which the expert's testimony is based it cannot be ignored; but it follows that the more an expert relies on facts not in evidence, the weight given to his opinion will diminish".*
> *[328] An opinion based on facts not in evidence has no value for the Court.*
> *[329] With respect to its probative value, the testimony of an expert is considered in the same manner as the testimony of an ordinary witness. The Court is not bound by the expert witness's opinion.*
> *[330] An expert witness's objectivity and the credibility of his opinions may be called into question, namely, where he or she:*
> *• accepts to perform his or her mandate in a restricted manner;*
> *• presents a product influenced as to form or content by the exigencies of litigation;*
> *• shows a lack of independence or a bias;*
> *• has an interest in the outcome of the litigation, either because of a relationship with the party that retained his or her services or otherwise;*
> *• advocates the position of the party that retained his or her services; or • selectively examines only the evidence that supports his or her conclusions or accepts to examine only the evidence provided by the party that retained his or her services.'*

[24] *Wightman v Widdrington (Succession de)* 2013 QCCA 1187 (CanLII) ('*Wightman v Widdrington*').
[25] *AM v MEC for Health, Western Cape* 2021 (3) SA 337 (SCA):

> *'The opinions of expert witnesses involve the drawing of inferences from facts…. [I]n any process of reasoning the drawing of inferences from the facts must be based on admitted or proven facts and not matters of speculation. As Lord Wright said in his speech in Caswell v Powell Duffryn Associated Collieries Ltd:*

inferences from facts. Such inferences must rest on admitted or proven facts and not on speculation. As explained by Lord Wright in *Caswell v Powell Duffryn Associated Collieries Ltd*, inference must be distinguished carefully from conjecture; where no objectively proven facts exist from which an inference can properly be drawn, the reasoning process collapses into speculation.

[72] The same reasoning appears in *Knoop NO and Another v Gupta and Another*[26]**,** *The Pasquale della Gatta*[27]**,** *Moraitis Investments (Pty) Ltd v Montric Dairy (Pty) Ltd*[28], and again in *PriceWaterhouseCoopers*, where the SCA applied these principles to reject expert testimony resting on unproven assumptions. Only where the primary facts have been established can the inferential reasoning of an expert properly arise.

[73] Moreover, the drawing of inferences must be done carefully, logically and in conformity with the proven facts. The inference must be one that is reasonably capable of being drawn from the established facts, must not be tenuous or far-fetched, and must be consistent with all the proven facts. Where more than one inference is possible, the inference drawn must be the more natural, plausible and probable conclusion.

[74] In addition to the requirement that expert reasoning be factually grounded, our courts have stressed the centrality of objectivity. In *The Ikarian Reefer*[29], repeatedly applied, it was stated that an expert must take into account material facts which detract from the conclusion advanced. Selective consideration of evidence undermines both objectivity and credibility. Similarly, in *Stock v Stock*.[30], the court held

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> *'Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish … But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.'*

[26] *Knoop NO and Another v Gupta and Another* 2021 (3) SA 88 (SCA) at para 19.
[27] *MV Pasquale della Gatta; MV Filippo Lembo; Imperial Marine Co v Deiulemar Compagnia di Navigazione SPA* 2012 (1) SA 58 at para 24.
[28] *Moraitis Investments (Pty) Ltd and Others v Montric Dairy (Pty) Ltd* 2017 (5) SA 508 (SCA) at para 34.
[29] *National Justice Compania Naviera SA v Prudential Assurance Co Ltd* [1993] 2 Lloyds Rep 68 at 81.
[30] *Stock v Stock* 1981 (3) SA 1280 (A) at 1296F.

that an expert's opinion is of little value where the witness is partisan or advocates the cause of the party calling them rather than assisting the court.

[75] The SCA in *PriceWaterhouseCoopers* set out further indicators of bias or partiality; an expert who limits the scope of their mandate, presents a report shaped by litigation strategy, shows a lack of independence, has an interest in the outcome, or selectively engages only with material supporting their conclusion, compromises the probative value of their opinion. Objectivity is a "central prerequisite"; the expert's role is to assist the court, not to advance a litigant's case.

[76] The general principles governing the evaluation of evidence is trite. When evaluating all the evidence, the court must consider it holistically. The conclusion ultimately reached must account for the totality of the evidence and not isolated portions. In distinguishing probabilities and permissible inferences from conjecture, the court may draw inferences only from objectively established facts; speculation has no place in judicial reasoning. Inferences may be drawn and probabilities considered only in light of objectively proven facts.

[77] The established approach to resolving factual disputes is set out authoritatively in *Stellenbosch Farmers' Winery Group Ltd v Martell et Cie*[31]. The court must consider (a) the credibility of witnesses, (b) their reliability, and (c) the probabilities. Credibility concerns veracity, assessed through factors such as demeanour, bias, internal and external contradictions, and the inherent plausibility of the version. Reliability depends on the witness's opportunity to observe, the quality and integrity of their recollection, and the independence of their account. The probabilities require an analysis of which version is more likely in light of all the proven facts. Having assessed these components, the court must finally determine whether the party bearing the onus has discharged it.

[78] A court of appeal will ordinarily defer to a trial court's factual findings unless they are clearly wrong or influenced by a material misdirection. This is so

[31] 2003 (1) SA 11 (SCA); A M and Another v MEC for Health, Western Cape 2021 (3) SA 337 (SCA).

because the trial court is best placed to assess credibility and reliability through its observation of witnesses first-hand.

Summary and evaluation of the Evidence

A. *Viva Voce* Evidence

[79] The Plaintiff, **Mr Anton Hesse**, testified that at approximately 03h00 on 15 May 2009, while travelling inbound on the N1 near the Okavango interchange, he unexpectedly struck a deep body of water in the right-hand lane. The heavy rain and darkness prevented him from seeing the water beforehand, and upon impact, the vehicle lifted more on the right side, aquaplaned, rotated clockwise, and came to rest in the median after colliding with wooden poles and vegetation. He stepped out into ankle-deep water on both the roadway and the median, and he indicated the general area opposite the apartment complex as the place where he lost control. He maintained that he was travelling at approximately 70–80 km/h and denied any negligence in his manner of driving. His evidence regarding the approximate location of the ponding remained consistent and unchallenged.

[80] The Plaintiff gave his evidence in a straightforward and consistent manner. His description of the heavy rainfall, the sudden encounter with water, and the rotation of his vehicle did not materially shift under cross-examination. His inability to pinpoint the exact metre-by-metre location was understandable given the darkness, the rainfall, the shock of the collision, and the early-morning hour. Importantly, his evidence regarding the presence of pooled water in the right-hand lane and in the median was corroborated by the emergency call-out records and by his brother and Mr Rhode, which enhanced both his reliability and his overall credibility. Nothing in his demeanour suggested exaggeration, and he demonstrated no motive to distort the events. The Court is satisfied that he was a credible and reliable witness.

[81] **Mr Heinz Hesse**, the Plaintiff's brother, arrived five to six minutes after receiving a call about the collision. He observed that although the rain had ceased, the road surface remained extremely wet, and pooled water was clearly visible under the lights of the traffic vehicle. When he alighted from his own car, he stepped into water approximately 15 mm deep, and he noted that the water in the median appeared even deeper. He had to drive through standing water in the right-hand lane to reach the

Plaintiff. Like his brother, he placed the location of the pooled water in the vicinity opposite the apartment complex. He later heard the sound of another collision as he was towing the Plaintiff's vehicle away.

[82] Heinz Hesse corroborated the Plaintiff's account in material respects, particularly regarding the presence and depth of the pooled water and the location opposite the apartment complex. He gave his evidence calmly and without hesitation. His observations were based on a direct and immediate attendance at the scene minutes after the collision, which strengthens the reliability of his recollections. Although he could not speak to causation and could only describe what he encountered, his account aligned with the objective records and the photographic references in the inspection in loco. There were no significant inconsistencies or indications of bias. His evidence was credible and his reliability high.

[83] **Mr Brevin Rhode**, an independent witness, described that he too was involved in an incident at approximately 04h00 on the same morning in approximately the same area after striking pooled water. He testified that he observed a vehicle equipped with a pump attempting to remove water from the roadway and several vehicles splashing through accumulated water at the site. His evidence corroborated the presence of significant ponding in the right-hand lane during the early hours of 15 May 2009.

[84] Mr Rhode was an independent witness with no apparent interest in the outcome of the litigation. His evidence, that he too struck water at almost the same location on the same morning, was clear, spontaneous, and aligned with the emergency call-outs noting "water on road". He described water removal efforts underway, which further supported the inference that significant ponding had occurred. The consistency between his account and that of both Hesse brothers enhanced its probative value. His lack of any relationship to the Plaintiff made him particularly credible, and the Court accepts his testimony as reliable and impartial.

[85] **Dr Louis de Villiers Roodt**, a civil engineer called by the Plaintiff, identified the true low point of the inbound carriageway at kilometre markers 21.85 to 21.88, an assessment later confirmed by a contour plan and the inspection *in loco*. He

explained that vegetation and soil had accumulated along the median edge, creating an “edge build-up” that impeded the natural drainage of water off the road and effectively acted as a dam wall. In his opinion, this obstruction caused water to pond in the right-hand lane during the rainfall. He relied on the emergency call-out records at 03h15 and 12h35, both noting water on the road in the same chainage, and on the instruction issued on 18 May 2009 to remove about 200 metres of edge build-up in precisely that area. He rejected the alternative theory of a pipeline leak, stating that no factual evidence supported such a leak, and he explained the mechanics of aquaplaning, noting that even shallow water of between 6–17 mm could destabilise a light vehicle, especially where the depth differed between the left and right wheels.

[86] Dr Roodt impressed as a careful and objective expert who distinguished clearly between fact, inference, and engineering assumption. Although he initially worked from an incorrect assumption regarding the low point of the road, he readily revised his opinion when the contour plan became available. This willingness to adapt when better factual data emerged enhanced, rather than diminished, his credibility. His reasoning was consistently grounded in measurable site characteristics, emergency records, post-incident maintenance logs, and principles of roadway drainage. He answered questions directly and did not engage in advocacy. While he firmly rejected the pipeline-leak hypothesis, his reasons were cogent and supported by the absence of factual indicators. Overall, his evidence was carefully reasoned, aligned with objective documentation, and the Court finds him to be a credible and reliable expert witness.

[87] **Mr John Craig**, the civil engineer representing Kayad, offered an alternative hypothesis that the ponding may have been caused by a leak in the Wemmershoek municipal pipeline running through the median. Under cross-examination, he conceded that he had no factual evidence of any such leak and acknowledged that he had deviated from certain important concessions recorded in the joint expert minute, particularly the agreement that vegetation or edge build-up could trap water on the roadway. His objectivity was questioned because he had significant involvement with the Second Defendant, including signing its contract and its discovery affidavit.

[88] Mr Craig's credibility was significantly compromised. Although he presented himself as an expert, he played multiple roles in the litigation. He was involved in the underlying maintenance contract, he signed discovery affidavits for the Second Defendant, and he participated in resisting Joinder. These overlapping roles created a palpable risk of partisanship. His explanation that the flooding was caused by a municipal pipeline leak was not supported by any contemporaneous documentation, emergency record, or inspection finding and under cross-examination he conceded this. More concerning was his departure from key concessions recorded in the joint expert minute, particularly the fact that vegetation and edge build-up could trap water on the pavement. His attempts to minimise or retreat from the joint minute were unconvincing and suggested a defensive posture rather than an impartial scientific assessment. The Court therefore finds his evidence to be unreliable and accords it limited weight.

[89] **Dr Peter Johnston**, a climatologist, provided an analysis of regional rainfall patterns. He testified that rainfall measured at nearby stations reflected only light rain prior to the Plaintiff's collision. However, he acknowledged that localised heavy downpours frequently occur in the area and could not be excluded as having occurred at the site and time in question. He accepted that such localised rainfall could have contributed to ponding on the roadway when combined with impeded drainage.

[90] Dr Johnston's evidence was balanced and appropriately cautious. He relied on rainfall measurements from nearby stations, which indicated only light rainfall. However, he did not overstate the significance of those readings and accepted that localised downpours commonly occur in the region and could have produced significantly heavier rain at the accident location than the aggregated measurements suggested. He did not attempt to comment on engineering or drainage issues beyond his expertise and conceded readily where information fell outside his mandate. His neutrality, professional restraint, and willingness to acknowledge the limits of meteorological data enhanced his credibility. His evidence is accordingly accepted as reliable.

[91] **Mr Robin Davidse**, the contracts manager for MD Civils, confirmed that MD Civils held the routine maintenance contract for this section of the N1. He described the maintenance regime, noting that edge build-up would only be removed upon receiving an instruction from the engineer. He confirmed that edge build-up was in fact removed three days after the incident between kilometre markers 21.85 and 21.65, which corresponded with the low point later identified by the experts. He conceded that edge build-up is capable of obstructing drainage and poses a danger to motorists. He also accepted that he could not exclude the possibility of prior similar incidents having occurred at the same location. Although he referred to regular inspections and route patrols, he could not explain why the specific hazard had not been identified earlier.

[92] Mr Davidse possessed detailed knowledge of the routine maintenance practices and the documentation relating to the emergency call-outs and edge build-up removal. He gave his evidence openly and made several concessions adverse to the interests of his employer, which included acknowledging that edge build-up can impede drainage, that the low point corresponded to the area of the Plaintiff's accident, and that he could not exclude prior similar incidents. These concessions enhanced his credibility. However, aspects of his evidence reflected a degree of defensiveness, particularly when pressed on why the hazard had not been detected earlier despite inspections and patrols. While he was careful not to admit operational shortcomings directly, he did not dispute the presence of extensive edge build-up three days after the incident. The Court finds him generally credible, though his evidence must be weighed with some caution where it tended to deflect responsibility away from MD Civils.

B. Documentary Evidence

[93] Before turning to the analysis of wrongfulness, it is necessary to record, in general terms, the documentary evidence placed before the Court. Although the detail of each document has been canvassed in the evidence, it is helpful to outline the nature and evidentiary significance of the principal materials that featured prominently in the trial.

[94] The approach to joint minutes is consistent with the principles outlined earlier regarding the evaluation of expert evidence. Agreement on facts in a joint minute can be treated as common cause absent withdrawal on good grounds; but agreement on opinions does not relieve the Court of assessing whether the agreed opinion is supported by the underlying facts and logical reasoning. A later refinement of an expert's opinion in light of better factual data (for example, a newly-produced contour plan pinpointing the true low point) is not inherently discrediting, provided the expert explains the basis for the adjustment and remains anchored in proved facts.

[95] Where the dispute concerns technical causation, the Court considers whether the expert's analysis is congruent with contemporaneous records and objective site conditions. *In casu*, the emergency call-outs, the post-incident edge build-up instruction and measurements, the *in loco* geometry of the carriageway and median, and the joint minute concessions that vegetation at the median edge can trap water and cause ponding into the right lane. Opinions that align with and explain these records are, *ceteris paribus*, preferred over those that are speculative or inconsistent with contemporaneous documentation.

[96] A central document in the matter was the contour plan of the relevant section of the N1. This plan was produced by the Defendants shortly before the commencement of the trial and was examined extensively during the inspection *in loco*. It established, more reliably than visual observation alone, that the true low point of the inbound carriageway lies between kilometre 21.85 and 21.88, which is proximate to the apartment complex identified by the Plaintiff. The contour plan materially influenced the expert engineering evidence, particularly Dr Roodt's revision of his initial assumptions and the location of the ponding mechanism.

[97] The Court also received the joint expert minute compiled by the two civil engineering experts, Dr Roodt and Mr Craig. This minute recorded areas of agreement between the experts, most notably that vegetation or edge build-up along the median edge is capable of trapping water on the road surface, and that flooding did occur in the vicinity of the incident. It further confirmed that instructions had been issued to remove significant edge build-up in the immediate days following the accident. The minute also records agreement that water may have ponded back onto the

southbound carriageway from the median under such conditions. Although Mr Craig deviated from some of these agreed positions during cross-examination, the joint minute remained an important and binding record of shared technical facts.

[98] A further category of documentary evidence consisted of the SANRAL routine maintenance records, including emergency call-out sheets, job instruction forms, inspection requests, and payment certificates. These records reflect that, at 03h15 and 12h35 on 15 May 2009, water on the road was reported in the same general area as the Plaintiff's collision. They also show that on 18 May 2009, Kayad issued a formal instruction to MD Civils to remove edge build-up between kilometre markers 21.6 and 21.8, and that the actual work performed, as measured, extended between 21.85 and 21.65, precisely the section associated with the low point identified on the contour plan. These documents corroborated the testimony of both Dr Roodt and Mr Davidse that edge build-up was indeed present and removed shortly after the incident.

[99] The Court also had regard to the expert reports delivered by the civil engineering and climatology experts. These reports were supplemented by oral evidence and cross-examination, but they remain part of the evidentiary record. Dr Roodt's report advanced the theory that the combination of the low point and edge build-up caused the ponding. Mr Craig's report advanced alternative hypotheses, including a possible leak from the Wemmershoek pipeline, although that hypothesis was unsupported by any contemporaneous documentation. Dr Johnston's climatology report analysed rainfall data from multiple weather stations and informed the Court's assessment of the meteorological context.

[100] Finally, the Court received into evidence the construction and maintenance contracts concluded between SANRAL, Kayad Consulting, and MD Civils. These documents formed an important part of the legal landscape, because they defined the respective contractual duties of the Second and Third Defendants, the supervisory obligations of the consulting engineer, and the intended mechanisms for identifying and addressing road maintenance issues such as edge build-up. They also provided the context for the Defendants' reliance on the independent-contractor defence and for the Plaintiff's argument regarding the non-delegable statutory duties of SANRAL under sections 25 and 26 of the SANRAL Act.

[101] Taken together, these documents provided an essential foundation for determining the factual issues in dispute. They complemented the oral testimony, clarified technical matters that could not be reliably assessed through recollection alone, and provided objective records of the Defendants' maintenance practices during the period immediately surrounding the incident.

Wrongfulness

[102] The Plaintiff pleaded that at all material times, First Defendant, alternatively the Second Defendant, alternatively the Third Defendant, further alternatively the First, Second and Third Defendants jointly and severally owed the public utilising the road and the Plaintiff in particular a legal duty, which legal duty entailed that:

(b) The road was kept in a clean and safe condition for use by the public and the Plaintiff in particular;

(c) The road did not constitute a source of danger when utilised by the public and the Plaintiff in particular during and/or after rain and/or heavy rain;

(d) The road was kept clean and maintained in such a manner that no water build-up occurred on the road during rain and/or heavy rain to such an extent that it constituted a source of danger to users of the road;

(e) The road was designed and constructed in such a manner that no water build-up occurred on the road during rain and/or heavy rain to such an extent that it constituted a source of danger to users of the road;

(f) The public and the Plaintiff in particular were properly notified of the presence of or the possibility of the presence built-up water on the road during rain and/or heavy rain;

(g) The drainage system was designed and constructed to prohibit water build-up on the road during rain and/or heavy rain.

[103] Furthermore, that *'A reasonable person in the position of the First Defendant, alternatively the Second Defendant, alternatively the Third Defendant, further alternatively the First, Second and Third Defendants jointly and severally could or should have foreseen the reasonable possibility that failure to take reasonable steps to guard against the occurrence of the incident could cause a member of the public*

utilising the road or the Plaintiff in particular, to sustain serious bodily injuries, causing such member of the public or the Plaintiff in particular patrimonial loss.'

A. Was there a duty on SANRAL to warn motorists about ponding?

[104] Before dealing with the wrongfulness enquiry, the Plaintiff's assertion that SANRAL bore a specific legal duty to warn motorists of the presence or risk of ponded water on the roadway requires addressing. In this regard, SANRAL denied that such a duty rested upon it. It argued that the routine road-patrol function, including monitoring for conditions such as blocked drains and ponding, was contractually assigned to the Third Defendant under the Standard Specifications.

[105] SANRAL further contended that national roads fall within a traffic-policing environment regulated by the National Road Traffic Act, in terms of which designated traffic officers, not SANRAL, are empowered to regulate traffic, issue warnings, and close roads where necessary. On this basis, SANRAL submitted that the statutory scheme does not confer upon it any authority to undertake real-time traffic regulation or hazard warning functions.

[106] Imposing a specific legal duty to warn of transient ponding would, in its view, require SANRAL to establish a parallel nationwide traffic-monitoring and warning system, an unreasonable and impracticable burden. SANRAL accordingly contended that, applying the criterion of reasonableness within the wrongfulness inquiry, no specific legal duty to warn motorists of ponded water arose in law

[107] Although the Amended Particulars of Claim list a duty to warn motorists of ponded water, the imposition of such a duty upon SANRAL is not supported by the statutory framework or by policy. SANRAL is not a traffic authority and is not empowered under the National Road Traffic Act to regulate or control traffic or to issue hazard warnings. Sections 25 and 26 of the SANRAL Act, which will be discussed later in this judgment, impose responsibilities relating to the physical condition and safety of the national road network, not the operational policing of transient hazards. To require SANRAL to monitor the road continuously for sudden ponding would impose an unreasonable and unworkable burden. The duty to warn is therefore not one that public or legal policy would impose in these circumstances.

B. Wrongfulness: The competing legal frameworks

[108] In *Gouda Boerdery BK v Transnet Ltd*,[32] Scott, JA, writing for a unanimous Court, explained that in order to find whether a legal duty existed to act positively, factors such as reasonableness, policy, and where appropriate, constitutional norms should be considered.

[109] In *Chartaprops 16 (Pty) Ltd v Silberman,* the Supreme Court of Appeal reaffirmed that a principal is not vicariously liable for the wrongs of an independent contractor. The correct approach is to apply the fundamental rule that everyone must take the degree of care the circumstances demand. A principal who engages a competent contractor to perform the work may thereby take reasonable steps to guard against foreseeable harm. The SCA cautioned against treating the case as one of a non-delegable duty in order to "outflank" the general rule. The contractor remains personally liable to third parties for negligent performance of the work it undertook.

[110] In *Langley Fox Building Partnership (Pty) Ltd v De Valence (supra)*, which concerned building works across a public sidewalk, the Appellate Division held that where the work itself creates a foreseeable danger to the public, the employer must ensure that adequate precautions are actually taken. In such a setting, "reasonable steps" required more than engagement of a contractor; liability followed because adequate precautions were not ensured.

[111] The SCA has recently reaffirmed that outsourcing does not absolve a principal where its monitoring/precautionary systems are inadequate on the facts. See *Pick 'n Pay Retailers (Pty) Ltd v Williams*[33] (slip-and-fall), where reconsideration was refused and liability stood.

C. Plaintiff's articulation of the wrongfulness enquiry

[112] The Plaintiff's contention on wrongfulness draws on the established framework governing liability for omissions. More particularly that an omission is not

[32] *Gouda Boerdery BK v Transnet Ltd* **(314/03)** [2004] ZASCA 85; [2004] 4 All SA 500 (SCA); 2005 (5) SA 490 (SCA) (27 September 2004), at para 12.

[33] *Pick 'n Pay Retailers (Pty) Ltd v Williams and Another* (238/2024) [2026] ZASCA 7 (26 January 2026).

prima facie wrongful; rather, wrongfulness is engaged only where, viewed through constitutionally-aligned public and legal policy, the law requires that a negligent failure to act should give rise to liability.

[113] He relies on settled authority that wrongfulness is a normative enquiry distinct from negligence and must not be conflated with foreseeability.[34] In particular**,** *Minister of Police v Ewels*[35] for the proposition that policy considerations determine whether the negligent omission attracts delictual liability. He further invokes *Hawekwa Youth Camp v Byrne*[36] to emphasise that negligent omissions are actionable only where public or legal policy demands it, and he cites *Loureiro* and *Country Cloud*[37] for the distinct, normative character of wrongfulness, and the warning not to conflate it with negligence.

[114] Within that framework, the Plaintiff points to the statutory matrix of the SANRAL Act as the primary source informing wrongfulness in this road-safety context. Sections 25(1) and 26(c) collectively impose responsibility and confer powers on SANRAL to ensure the planning, operation, control and maintenance of national roads and to "monitor the execution and work performance" when work is performed by others. These provisions, the Plaintiff contends, support the imposition of liability in principle for omissions that allow hazardous ponding at a known low point on a national road. This statutory stewardship, the Plaintiff contends, is a strong policy reason to

[34] See *Minister of Police v Ewels* 1975 (3) SA 590 (A); *Hawekwa Youth Camp v Byrne* 2010 (6) SA 83 (SCA); *Loureiro v Imvula Quality Protection* 2014 (3) SA (CC); *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 (1) SA 1 (CC).

[35]*Ibid* at para 597A-B: "*… conduct is wrongful if public policy considerations demand that in the particular circumstances the plaintiff has to be compensated for the loss suffered by the defendant's negligent act or omission, i.e. the legal convictions of society regard the conduct as wrongful."*

[36] *Ibid* at para 22: "*…. negligent conduct which manifests itself in the form of a positive act causing physical harm to the property or person of another is prima facie wrongful. By contrast, negligent conduct in the form of an omission is not regarded as prima facie wrongful. Its wrongfulness depends on the existence of a legal duty. The imposition of this legal duty is a matter for judicial determination, involving criteria of public and legal policy consistent with constitutional norms. In the result, a negligent omission causing loss will only be regarded as wrongful and therefore actionable if public or legal policy considerations require that such omission, if negligent, should attract legal liability for the resulting damages.*"

[37] *Ibid* at para 53: "*The wrongfulness enquiry focuses on the conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability." Therefore the court held that a defendant's "subjective state of mind is not the focus of the wrongfulness enquiry. Negligence, on the other hand, focuses on the state of mind of the defendant and tests his or her conduct against that of a reasonable person in the same situation in order to determine fault*."

impose liability (in principle) for omissions that allow a hazardous condition, ponding at a known low point, to persist on a national roadway.

[115] Beyond SANRAL, the Plaintiff invokes the *Chartaprops* principle that an independent contractor's duty to third parties arises "because it entered upon the work," with the content of the contract defining the task undertaken but not negating the duty owed to non-contracting road users. On that footing, both the supervising engineer (Second Defendant) and the routine maintenance contractor (Third Defendant) attract potential delictual liability in principle for omissions within the field of work they undertook.[38]

[116] The recent decision of the Supreme Court of Appeal in *Pick 'n Pay Retailers (Pty) Ltd v Williams* underscores this approach. The Court held that although operational tasks may be outsourced, the principal retains a non-delegable duty to take reasonable steps to ensure the safety of those entering its premises. Outsourcing does not absolve the principal where its own monitoring or supervisory systems are inadequate. This principle aligns with SANRAL's statutory obligation in Section 26(c) to *'monitor the execution and work performance'* of contractors engaged to maintain the national road network.

D. First Defendant (SANRAL): wrongfulness as a "brake", and the independent-contractor frame

[117] SANRAL accepts that, by virtue of Sections 25(1) and 26(c) of the SANRAL Act, a legal duty rested upon it to take reasonable steps to ensure the safety of the national road network. It submitted, however, that the wrongfulness enquiry operates as a normative constraint on delictual liability and must not be conflated with negligence. The Constitutional Court has described wrongfulness as a limiting device that functions as a "brake" on the expansion of liability, ensuring that not every

[38] *Chartaprops 16 (Pty) Ltd v Silberman* (SCA) para 47: *'Neither the terms of Advanced Cleaning's engagement, nor the terms of its contract with Chartaprops, can operate to discharge it from a legal duty to persons who are strangers to those contracts. Nor can they directly determine what it must do to satisfy its duty to such persons. That duty is cast upon it by law, not because it made a contract, but because it entered upon the work. Nevertheless its contract with the building owner is not an irrelevant circumstance, for it determines the task entered upon'*

operational shortcoming in a complex system attracts delictual fault.[39] On that footing, SANRAL urged a strict separation between the policy-laden enquiry into wrongfulness and the reasonableness/foreseeability enquiry that belongs to negligence.

[118] SANRAL situates its wrongfulness analysis inside the independent-contractor defence. Relying on the majority in *Chartaprops*, SANRAL argues that an employer discharges its duty to avert harm to third parties by engaging a reasonably competent independent contractor to perform the relevant work; if harm occurs through the contractor's wrongful and negligent conduct, liability in principle lies with the contractor, not the employer. According to SANRAL, the appointment of competent independent contractors, coupled with their entry upon and performance of the work, constitutes the affirmative step that satisfies its duty; thus, liability in wrongfulness should not be imposed upon SANRAL for lapses by the contractors in the absence of SANRAL's own independent fault. SANRAL maintains that the issue falls to be determined under negligence, not wrongfulness.

[119] SANRAL also resists the Plaintiff's reliance on Section 18(1)(b) of the SANRAL Act[40] (the non-divestiture clause governing internal delegations by the Board). That provision stipulates that the Agency is not divested of any power nor relieved of any function or duty it may have delegated. SANRAL's position is that it engaged the Second and Third Defendants as independent contractors to perform defined maintenance and supervisory work under Section 26(c), and that doing so constituted reasonable steps to discharge the duties resting upon it. It contends that Section 18(1)(b) has no application to the appointment of external contractors under Section 26(c); the section preserves responsibility where the Board delegates internally to members or employees, and does not convert Section 26(c) appointments into a non-delegable duty that would defeat the independent-contractor defence recognised in *Chartaprops.*

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[39] *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 (1) SA 1 (CC) at paras 22–26 (explaining the normative and limiting role of wrongfulness as a control mechanism on delictual liability).
[40] Section 18(1)(b) of the SANRAL Act: *"…the agency will not be divested of any power nor be relieved of any function or duty it may have delegated."*

[120] On that approach, the policy balance within wrongfulness, avoiding over-extension of public-authority liability while protecting road users, favours recognising the contractor's primary exposure for negligent performance of the work it undertook, while reserving SANRAL's exposure to instances of personal wrongfulness, such as negligent selection or a failure reasonably to monitor performance where circumstances demanded intervention. SANRAL submits that these matters sound in negligence rather than wrongfulness, and that no stand-alone allegation of "supplementary oversight negligence" was pleaded, a point I consider separately below.

[121] SANRAL retained a personal duty to monitor performance; even accepting the majority in *Chartaprops*, a principal may rely on an independent contractor only where it has itself taken the steps reasonably required to discharge its own supervisory obligations. Section 26(c) of the SANRAL Act specifically requires SANRAL 'to monitor the execution and the work performance' of the work it outsources. On the trial record, oversight at the known low point was reactive rather than preventative. The independent-contractor defence therefore fails on the facts because SANRAL's own monitoring duty was not reasonably performed at this location.

[122] The same tenor is evident in *Pick 'n Pay Retailers (Pty) Ltd v Williams (supra)* in which the SCA left undisturbed the conclusion that outsourcing does not absolve a principal where its monitoring is deficient, thereby reinforcing the principle that a residual duty of oversight may remain notwithstanding engagement of independent contractors.

E. Second and Third Defendants: wrongfulness confined to the task entered upon

[123] The Second and Third Defendants emphasise that they owed no statutory duty to the public at large and that any duties they owed arose within, and are circumscribed by, their contracts with SANRAL. They accordingly deny a general public-law duty and insist that wrongfulness must be tested against what they entered upon to do.

[124] At the same time, they invoke *Chartaprops* to argue that their legal duty to third parties is not derived from contractual privity but flows from entering upon the work. Thus, they accept the doctrinal point that contractors can, in principle, be delictually liable to strangers to the contract; however, they contend that as a matter of policy, wrongfulness should not be imposed unless the particular omission falls squarely within the defined task undertaken (supervision or routine maintenance) and represents the kind of public-safety hazard that the task was meant to address. [41]

[125] In their submission, the existence of structured inspection regimes, the need for engineers' instructions before certain items (like edge build-up removal) could be done, and the absence of evidence of systemic failure at this precise location, are all considerations that temper the policy case for imposing wrongfulness. Those issues, they say, ultimately crystallise as negligence rather than wrongfulness.

[126] Finally, the contractors emphasise the broader cautions articulated in *Country Cloud*, *Loureiro* and *MTO Forestry*. They submitted that courts must remain careful not to conflate wrongfulness with negligence and must ensure that, in the context of omissions, the imposition of liability accords with reasonableness, taking into account institutional roles, practical constraints, and the operational structure of the maintenance regime along an extended national route.

[127] On the authority of *Chartaprops*, contractors owe a duty to Third Parties flowing from the work they undertake. In this instance, the engineering supervision and routine maintenance functions performed by Kayad and MD Civils correspond precisely with the mechanism of harm. The instruction issued immediately after the collision, and the measured removal of about 200 metres of edge build-up at the low point, underscore both the operational relevance of the obstruction and the omission to remove it when reasonable to do so.

[41] Second and Third Defendants' Pleas (22 February 2016); Second and Third Defendants' Heads of Argument (23 August 2025); *Chartaprops 16 (Pty) Ltd v Silberman* 2009 (1) SA 265 (SCA) para 47.

F. Evaluation: wrongfulness

[128] The parties' approaches converge on the core doctrinal propositions: (a) wrongfulness in omissions is a normative policy-laden inquiry; (b) it must not be conflated with negligence; and (c) policy supplies the criterion**.** Their divergence lies in application.

[129] The Plaintiff urges that SANRAL's statutory stewardship over a known low point on a national road, together with the experts' common-cause engineering propositions about edge build-up and the immediate post-incident removal of 200 metres of vegetation, make this precisely the kind of public-safety failure for which liability should in principle be imposed if fault and causation are later established.

[130] SANRAL and the contractors respond that, as a matter of policy, wrongfulness should recognise the independent-contractor architecture of the Act and system, so that SANRAL's exposure, in principle, is limited to its own wrongful failures (e.g., negligent monitoring in defined circumstances), while the contractors face primary policy exposure only to the extent of the work they entered upon. Thus, treating the remaining disputes as matters of negligence rather than wrongfulness.

[131] Read together, *Langley Fox*, *Chartaprops*, and the recent *Pick n Pay* decision illustrate a consistent principle; while independent contractors bear primary responsibility for negligent performance of the work they undertake, a principal may nevertheless remain liable where policy, statute, or circumstances impose a personal duty of oversight. SANRAL's duty under Section 26(c) to monitor the execution and performance of maintenance work places this case squarely within that line of authority.

[132] This Court will, in the next section, apply these principles to the particular facts established on the record, taking care to keep wrongfulness distinct from negligence and causation, as the authorities require.

G. Application to the facts

[133] The documentary and technical record shows that the inbound carriageway contains a true low point in the vicinity of km 21.85–21.88, proximate to

the apartment complex, where water would predictably accumulate if the pathway from the paved surface to the median were impeded. This was confirmed by the contour plan and by the inspection in loco, which also recorded that the inbound lanes camber towards the median and that no median drain is situated at the low point. On those objective facts, the risk was not diffuse or hypothetical but location-specific and known.

[134] The maintenance records provide contemporaneous corroboration. There were emergency call-outs for "water on the road" on 15 May 2009, and, within the next business days, the engineer issued a job instruction (18 May 2009) directing the removal of edge build-up in that corridor, with the measured work capturing the critical stretch spanning the true low point. The sequence and the measured locations objectively link the hazard to edge build-up at the median edge.

[135] The joint expert minute records an agreed engineering proposition that vegetation/edge build-up can trap water on the road surface and that flooding did occur at the site. It further recognises that water may have ponded back from the median onto the southbound carriageway in these conditions. Those concessions mark the hazard as one falling squarely within the ordinary domain of routine maintenance and supervision.

[136] Taking the evidential context into account, and on the assumption that fault and causation are met, the Court is satisfied that public and legal policy, informed by SANRAL's statutory stewardship of the national road network under Sections 25(1) and 26(c), demand that omissions of this character attract delictual liability. Wrongfulness is founded on the failure reasonably to ensure free drainage and to monitor outsourced maintenance at a known low point. There is no free-standing duty to warn.

[137] As regards the Second and Third Defendants, the Court applies the principle in *Chartaprops* that a contractor who undertakes work capable of affecting the safety of the public assumes a corresponding duty towards road users. In this matter, the supervisory responsibilities performed by the Second Defendant and the routine maintenance functions carried out by the Third Defendant, including vegetation clearance and edge build-up control, bear directly on the hazard that arose. Subject

to the requirements of fault and causation, the omissions attributed to them accordingly constitute wrongful conduct.

[138] In the road-safety setting of national freeways, the statutory matrix (Sections 25(1) and 26(c) of the SANRAL Act) fixes the road authority with stewardship and an obligation to monitor outsourced maintenance. Public and legal policy, constitutionally understood, accordingly favour liability in principle where a known, site-specific risk (a sag at the median with no drain) materialises because routine vegetation and edge build-up were not timeously neutralised. This conclusion keeps foreseeability within negligence and treats wrongfulness as the normative judgment that liability should, in principle, attach if fault and causation are established.

H. Conclusion on Wrongfulness

[139] This conclusion does not conflate wrongfulness with negligence. It simply determines that, in this factual and statutory setting, the type of omission alleged is of the kind for which the law should impose liability in principle if fault and causation are later found. The negligence and causation enquiries remain to be addressed discretely.

[140] The Court remains alert to two recurring risks in delicts founded on omissions. First, to avoid conflation of wrongfulness and negligence, the Court treats policy-laden questions about imposing liability as analytically distinct from foreseeability and reasonable steps under *Kruger v Coetzee*. Second, in assessing the reasonableness of steps expected from public bodies and those engaged by them, the Court takes into account resource limits, the structure of contractual delegations, and the statutory injunction to monitor performance, without losing sight of the modest and practicable steps demanded by the foreseeable hazard in issue**.**

[141] SANRAL invoked the evidentiary-burden framework in *Monteoli v Woolworths*[42]*,* to the effect that where a Plaintiff establishes only a prima facie omission, a Defendant may neutralise the case by restoring equilibrium of

[42] *Monteoli v Woolworths* 2000 (4) SA 735 (W) at 745G–I.

probabilities. The difficulty with this submission is factual, not doctrinal. The evidentiary matrix here is stronger than that: the emergency call-outs on the day, the immediate instruction and measured removal of approximately 200 metres of edge build-up at the low-point corridor, the experts' joint-minute propositions, and the in loco geometry together place the plaintiff's case beyond the realm of a prima facie showing.

[142] On the evidential record, the Plaintiff's case rises above a mere prima facie threshold. The contemporaneous emergency call-outs on the day, the instruction issued on 18 May 2009 and the measured removal of edge build-up across the low-point corridor, the engineers' joint-minute concessions, and the geometry recorded *in loco* together establish probabilities that do not return to equilibrium. SANRAL's reliance on the mere appointment of competent contractors does not neutralise this evidentiary matrix. The *Monteoli* formulation is therefore not engaged, the probabilities favouring the conclusion that the monitoring and maintenance regime failed to detect or prevent a foreseeable hazard at a known low point.

Negligence *(Kruger v Coetzee)*

A. Legal Framework

[143] In our law, the culpa classic test for *culpa* as set out in the *locus classicus Kruger v Coetzee* arises if a *diligens paterfamilias* in the position of the defendant (i) would have foreseen the reasonable possibility of his conduct injuring another and causing patrimonial loss, (ii) would have taken reasonable steps to guard against such occurrence, and (iii) the defendant failed to take such steps. The reasonableness of guarding steps is fact-sensitive.

B. Foreseeability and the need for guarding steps

[144] On the evidence, the risk of water ponding at the specific low point was objectively foreseeable. The *in-loco* minute and contour plan identify the low point and the camber towards the median, with no drain at that point; the joint minute recognises that edge build-up can functionally "dam" water on the roadway. Those features made the hazard predictable in rainy conditions and amenable to routine edge management.

[145] The emergency call-outs on the day of the incident registered "water on the road" at the very corridor in question, and the prompt instruction (18 May 2009) to

remove edge build-up, with measured work spanning km 21.85 to 21.65, confirm that the issue was both real and remediable by straightforward maintenance intervention.

[146] In addition, the engineering evidence established that even modest water depths can destabilise a light vehicle, with aquaplaning/hydraulic drag occurring at shallow depths depending on speed and tyre characteristics; facts that underscore the need for prudent maintenance and timely intervention.

C. Reasonable steps in context

(a) In respect of the Second Defendant (supervising engineer)

[147] Reasonable steps included a proactive inspection regime sensitive to the geometry of the site, the issuing of timely instructions for edge removal at the low point before winter rainfall events and follow-up to ensure execution. The records show that an instruction was indeed issued; but after the incident, and that the work ultimately measured encompassed the low point. On the probabilities, reasonable steps called for earlier instruction and clearance at that specific location.

(b) In respect of the Third Defendant (maintenance contractor)

[148] Reasonable steps included ensuring that when edge build-up had developed to a depth capable of impeding drainage, it was cleared without delay upon instruction, and that routine reporting and route-patrol feedback escalated site-specific risks. The documentary record shows the removal of approximately 200 metres of edge build-up immediately post-incident in the precise corridor of concern, corroborating both the presence and significance of the obstruction. On the probabilities, maintenance attention to that corridor was required earlier than it occurred.

(c) In respect of SANRAL (road authority)

[149] Reasonable steps, over and above appointing competent contractors, included the exercise of reasonable oversight under Section 26(c) ("monitor the execution and work performance"), calibrated to the location-specific risk at this low point. While a robust system of inspections and route patrols existed in general, the fact that edge removal in the critical corridor only occurred after the event indicates that the monitoring did not, in this instance, trigger timely intervention at the known low

point. Whether that amounts to actionable negligence in light of the independent-contractor defence will be addressed in the dedicated section that follows; for present purposes, I find that reasonable steps called for earlier identification and treatment of the edge build-up at this site.

(d) Failure to take reasonable steps

[150] In light of the foreseeable risk at a known low point; the emergency records pre- and post-incident; the post-incident instruction and measured removal of edge build-up across the exact corridor; the joint minute's recognition of the ponding mechanism; and the *in-loco* confirmation of the geometry, I find that the Second and Third Defendants failed to take reasonable steps that were available and practicable to guard against the occurrence. The supervising engineer should have timeously instructed removal at the low point; the maintenance contractor's processes should have ensured that the edge condition at that point was detected and eliminated earlier.

[151] As regards SANRAL, on the evidence presently before me, I am satisfied that the risk profile at this location warranted earlier oversight intervention directed at the low-point corridor. Whether that personal fault (as distinct from vicarious liability) sustains liability, given the independent-contractor framework, will be determined when I address SANRAL's independent-contractor defence and the pleaded bases of liability. For present purposes, I record that *Kruger v Coetzee's* second and third elements, namely reasonable steps and failure, are prima facie satisfied on the probabilities in relation to SANRAL's monitoring function at this site.

Inspection *in loco*

[152] The Court, accompanied by the parties and their experts, conducted an inspection in loco on 15 August 2024. A minute of the inspection was prepared and signed. The following salient features, which are either common cause or objectively recorded during the inspection, bear directly on the mechanism of ponding at the *locus in quo*.

[153] First, the geometry of the roadway was established with precision. The inbound carriageway (towards Cape Town) exhibits a camber that slopes from the centre line towards the median, and the true low point of the inbound carriageway lies

in the region of km 21.85 to 21.88. The inspection further recorded that no median drain is located at that low point, with the result that excess water which accumulates in the median can, if impeded, present as ponding initially in the right shoulder and extend into the right-hand lane. These observations accord with the engineering explanation given at trial and with the later-produced contour plan considered by the experts.

[154] Secondly, the experts pointed out concrete slab structures and manhole covers associated with the Wemmershoek municipal water main situated within the median in the vicinity of the low point (including the valve chamber laddered structure). The physical locations of these features were recorded photographically in the inspection minute and its annexures. Their relative elevations and positions were noted for purposes of assessing how water would migrate in the event of rainfall or other inflow at the site.

[155] Thirdly, the Plaintiff indicated on site the general area where his vehicle struck the water and where it came to rest**.** The positions were documented by reference to identifiable landmarks, including the apartment complex on the opposite side of the N1, and cross-referenced to kilometer markers on the SANRAL system. These indications correspond with the corridor identified in the emergency records and with the later edge-build-up removal measurements.

[156] Fourthly, the inspection enabled the experts to synthesize the topography with the records. It was confirmed that excess water in the median would tend to collect at the low point and, in the absence of a median drain at that point, could be impeded by vegetation and edge build-up along the median edge, thereby trapping water on the inbound fast lane. This is consistent with the joint minute’s recognition of vegetation as a mechanism of ponding and with the post-incident instruction to remove edge build-up over approximately 200 metres straddling the low point.

[157] Finally, the Court notes that although the existence of a pipeline leak was mooted during the trial, the inspection findings and the absence of water inside the relevant manholes at the time of inspection provide no direct support for a leak as

the cause of the ponding on the night in question. In any event, the inspection confirmed that if significant water were to accumulate in the median at the low point, it would tend, on overflow, to migrate towards the outbound carriageway, given the relative levels, again underscoring the importance of keeping the median edge clear to allow roadway runoff to pass into the median without obstruction.

[158] Taken together, the *in loco* findings objectively corroborate the location-specific risk at the km 21.8–21.9 corridor and align with the documentary record (emergency call-outs and the ensuing edge-build-up instruction and measurements). They therefore provide independent confirmation of the foreseeability of ponding at this site under rainy conditions and the reasonableness of targeted vegetation and edge-build-up control as a guarding step in the maintenance regime.

[159] The positions indicated by the Plaintiff at the inspection for (a) the strike of water and (b) the vehicle's final rest are congruent with the documented emergency call-outs and the subsequent instruction to remove edge build-up in the same segment. These observations support the inference that water pooled at the low point on the right lane due to impeded drainage and that the ponding coincided with the area later addressed by the clean-up works.

Causation

[160] Causation requires the Plaintiff to establish both factual causation, namely that the Defendants' wrongful and negligent omissions were a *causa sine qua non* of the harm; and legal causation, which asks whether, as a matter of policy and reasonableness, liability should extend to the harm suffered. The Plaintiff need not demonstrate certainty. The test is whether the negligent omission probably caused the harm. As the Supreme Court of Appeal held in *Minister of Police v Skosana*[43], and as later developed in *Minister of Safety and Security v Van Duivenboden*[44] and *Lee v Minister for Correctional Services*[45], the inquiry calls for a sensible retrospective analysis, grounded in the evidence, rather than speculative metaphysics.

[43] *Minister of Police v Skosana* 1977 (1) SA 31 (A).
[44] *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA).
[45] *Lee v Minister for Correctional Services* 2013 (2) SA 144 (CC).

A. Factual causation

[161] The first question is whether, *but for* the Defendants' failure to maintain the roadway free of edge build-up at the median edge in the region of the low point between km 21.85 and 21.88, the Plaintiff's vehicle would probably not have encountered a body of water sufficient to induce aquaplaning.

(a) The location of the ponding

[162] The contour plan, produced shortly before trial, established the true low point of the inbound carriageway at approximately km 21.85–21.88, and this observation was reaffirmed during the inspection *in loco*. The low point's proximity to the apartment complex, the inbound camber towards the median, and the absence of a median drain at that location together created conditions conducive to the accumulation of surface water.

[163] The Plaintiff identified the general area in which he struck the water as being approximately opposite the apartment complex, and this area aligns with the kilometre markings appearing in the emergency call-out records and the later job instruction for edge-build-up removal.

(b) The presence and effect of edge build-up

[164] The routine maintenance records reflect two emergency call-outs on 15 May 2009, at 03h15 and 12h35, each noting water on the roadway in the vicinity of the low point. Three days later, on 18 May 2009, the supervising engineer issued a job instruction to remove edge build-up between kilometre markers 21.6 and 21.8, with the actual measured work performed from 21.85 to 21.65; precisely the corridor of the low point. This provides objective evidence that edge build-up was present at the time of the incident and was subsequently removed.

[165] The joint engineering minute captures agreement that vegetation and edge build-up can trap water on the road surface, initially causing ponding on the right shoulder before extending into the right-hand lane. This proposition was consistent across both experts, notwithstanding Mr Craig's later attempts to deviate.

[166] Dr Roodt explained that, absent edge build-up, rainfall would have drained off the surface, through the median, and away from the inbound lane. The presence of edge build-up functioned as a “dam wall”, slowing drainage and allowing water to accumulate on the roadway. He further explained that water of even modest depth, on the order of 6–17mm, is sufficient to induce hydraulic drag and aquaplaning, particularly in light vehicles.

(c) The expert synthesis

[167] Dr Roodt’s revised analysis, after receipt of the contour plan, located the point of ponding squarely at the low point. He described how water travelling down the cambered surface would reach the median edge, be impeded by vegetation/edge build-up, and be forced back into the right-hand lane. The *in loco* inspection confirmed the physical plausibility of this mechanism, including the absence of any drain at the true low point. Mr Davidse (MD Civils) conceded its plausibility and acknowledged that the 200m of edge-build-up removal immediately after the incident was an indication that the obstruction had been dangerous.

[168] Dr Johnston, the climatologist, accepted that localised heavy rainfall was possible despite regional variations and could not dispute the Plaintiff’s and Mr Hesse’s evidence of “heavy, heavy” rainfall at precisely the time and place of the accident. He conceded that rainfall could therefore have functioned as the trigger, with drainage impeded by edge build-up functioning as the mechanism of ponding.

(d) Applying the “but for” test

[169] In light of the known low point and camber of the road; the acknowledged effect of edge build-up on drainage; the emergency call-outs; the post-incident instruction to remove vegetation build-up at precisely that location; the 200 meters of removal actually undertaken; the lay evidence of water accumulation in both the right-hand lane and the median; and the concessions in the joint minute, I find on a balance of probabilities that but for the presence of edge build-up obstructing drainage at the low point, the Plaintiff would not have encountered a pool of water of such depth as to cause aquaplaning.

[170] On the probabilities, and having regard to the emergency call-out records of 03h15 and 12h35 on 15 May 2009, the 18 May 2009 job instruction and measured removal of 200 metres of edge build-up, the joint minute of the civil engineers that vegetation/edge build-up can trap water on the right lane, and the *in loco* geometry, the Court finds that edge build-up along the median edge materially slowed or impeded the drainage off the right lane at the low point, causing ponding of sufficient depth to destabilise a small hatchback motor vehicle at the speeds described. The post-incident instruction to remove edge build-up at precisely this chainage is consistent with an operational recognition, by those responsible for maintenance, that the edge build-up was causally implicated in the hazardous condition observed on the day. The factual link is therefore established; but for the failure to prevent or remove the edge build-up in the period preceding the incident, the hazardous pooling to a depth capable of aquaplaning or hydraulic drag would probably not have occurred.

[171] The Defendants' alternative hypothesis that a pipeline or valve leak caused the ponding is not borne out by the evidentiary record. There is no contemporaneous documentation, emergency notation, or field observation indicating any leak on the night in question, and the inspection *in loco*, conducted many years later, did not reveal any indicator within the relevant manholes that would support such a failure. Given both the temporal distance from the incident and the absence of corroborating evidence at the time, the pipeline-leak theory cannot withstand scrutiny and remains speculative on the probabilities.

[172] The Defendants' climatology expert accepted that localised heavy rainfall could not be excluded. The sequence of emergency call-outs noting water on the roadway, followed by the measured removal of approximately 200 metres of edge build-up in the precise corridor of the low point, is consistent with edge obstruction as the operative mechanism. The Court therefore rejects the valve-leak hypothesis as speculative on these facts.

[173] I turn briefly to SANRAL's pipeline-leak hypothesis. SANRAL contended that, if the Court were unable to choose between the Plaintiff's mechanism (impeded drainage due to edge build-up) and a municipal pipeline leak, the Plaintiff must fail

because the probabilities would be evenly balanced. To my mind, the submission overstates the evidential parity. The alternative hypothesis is unsupported by contemporaneous field notes, maintenance records, municipal documentation, or any credible expert foundation; and the *in loco* inspection, conducted years later, disclosed no objective indicator of a historic leak of sufficient magnitude to flood the median and southbound carriageway.

[174] By contrast, the emergency call-outs on the day of the incident and the post-incident instruction and measured removal of approximately 200 metres of edge build-up at the low-point corridor supply a coherent causal pathway grounded in impeded drainage. The evidentiary record does not present an equipoise between competing probabilities. The Plaintiff has therefore discharged the burden of establishing factual causation on a balance of probabilities.

B. Legal causation

[175] The remaining question is whether the harm is too remote or whether policy considerations preclude liability. As the Supreme Court of Appeal held in *Minister of Police v Skosana (supra)*, and as later developed in *Minister of Safety and Security v Van Duivenboden (supra)* and *Lee v Minister for Correctional Services (supra)*, the inquiry calls for a sensible retrospective analysis, grounded in the evidence, rather than speculative metaphysics. In *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd*[46], Brand JA emphasised that legal causation must be applied flexibly to avoid unjust results; and in *South African Hang and Paragliding Association v Bewick*[47] the same principle was reaffirmed.

[176] In respect of the matter *in casu*, the chain of causation is straightforward and linear:

(a) Edge build-up and vegetation accumulated at a known low point;

(b) The Defendants' maintenance/supervision regime failed to remove this timeously;

[46] *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* (653/07) [2008] ZASCA 134; 2009 (2) SA 150 (SCA); [2009] 1 All SA 525 (SCA) (26 November 2008).

[47] *South African Hang and Paragliding Association v Bewick* (1010/2013) [2015] ZASCA 34 (25 March 2015).

(c) During rainfall, the edge build-up impeded drainage, causing ponding on the right-hand lane and

(d) The Plaintiff, driving lawfully, struck the ponded water and aquaplaned, colliding with the median.

[177] This is not a case where an extraordinary or unforeseeable intervening act broke the chain of causation. Nor is this an instance of remote or policy-averse liability. To the contrary, the imposition of liability accords with the statutory purpose behind SANRAL's maintenance obligations under Sections 25 and 26 of the SANRAL Act, and with the operational obligations assumed by the contractors.

[178] Moreover, the hazard was not an abstract or diffuse danger arising anywhere along the N1; it occurred at a site-specific low point, repeatedly identified in the engineering evidence, the emergency logs, and the in loco inspection. The causal pathway is thus neither remote nor attenuated.

[179] The harm suffered by the Plaintiff was the direct realisation of the very danger that the Defendants' maintenance and supervision duties were intended to prevent, namely aquaplaning caused by a pool of water that had accumulated due to inadequate drainage.

[180] The harm was neither remote nor unfairly burdensome to ascribe to the failure to keep the roadway safe through routine maintenance of edge build-up at an identified low point of a national freeway. The policy considerations of reasonableness, fairness and justice, applied flexibly, favour liability where the risk (aquaplaning on pooled water) is well-known, the precaution (maintaining free drainage at the median edge) is modest and routinely contracted-for, and the post-incident works corroborate the causal pathway. There is thus no *novus actus*. Accordingly, legal causation is established.

[181] I interpose to deal briefly with SANRAL's argument that the Plaintiff did not plead "supplementary" oversight negligence. SANRAL submitted that the Particulars of Claim do not allege that SANRAL breached any supplementary duty to

monitor the contractors, and contends that SANRAL therefore cannot be held liable on that basis.

[182] SANRAL further argues that the Plaintiff did not plead a distinct basis of liability arising from SANRAL's failure to perform supervisory or oversight functions over its contractors. In my view this characterisation is too narrow. The Plaintiff pleaded a general delictual claim founded on SANRAL's wrongful and negligent failure to ensure that the road was maintained in a safe condition and free of hazardous water accumulation. A public body that is statutorily required under Section 26(c) of the SANRAL Act to monitor the execution and performance of outsourced maintenance work cannot separate that monitoring obligation from the negligence enquiry. Oversight of appointed contractors forms part of the content of the duty to take reasonable care. It is not a separate cause of action that must be pleaded independently. The absence of a standalone allegation of "supplementary oversight negligence" therefore does not preclude consideration of SANRAL's own omissions within the pleaded framework of wrongfulness and negligence.

Independent-Contractor Defence

[183] SANRAL relies on the rule articulated in *Chartaprops 16 (Pty) Ltd v Silberman*, namely that a person subject to a legal duty to prevent harm may discharge that duty by engaging a reasonably competent independent contractor; in such a case, the contractor's wrongful act/omission does not render the employer vicariously liable. SANRAL's position is that it (i) appointed MD Civils (routine maintenance) and (ii) appointed Kayad (engineering supervision), that both were competent, and that they entered upon the work. On this basis, SANRAL says, it has discharged its legal duty.

[184] Two further points arise. First, the Plaintiff's case against SANRAL is not confined to vicarious liability for the contractor's wrongs; it rests in part on SANRAL's statutory framework: Sections 25(1) and 26(c) of the SANRAL Act fix SANRAL with responsibility for maintenance and the competence to appoint contractors and to monitor their performance. While *Chartaprops* recognises the defence in principle, it does not negate a personal duty on an employer, in appropriate circumstances, to take reasonable supervisory steps, especially where the statute itself speaks in terms of ongoing monitoring of outsourced maintenance.

[185] Second, on the facts, the contemporaneous documents show that the routine maintenance system responded to the very hazard at issue after the Plaintiff's accident: emergency call-outs for "water in road" in the same chainage and, within days, a job instruction and measured edge build-up removal over the precise segment straddling the low point. That chronology supports the conclusion that the maintenance regime and supervision failed to avert a foreseeable hazard at a known low point and were reactive rather than preventative. *Chartaprops* does not immunise an employer if, on the facts, its arrangements and oversight do not prevent obvious risks within the contractor's mandate, particularly where post-incident works align with the very risk the Plaintiff encountered.

[186] The SCA's analysis in *Pick 'n Pay Retailers (Pty) Ltd v Williams* fortifies this conclusion. Although *Chartaprops* recognises the independent-contractor defence, the SCA reaffirmed that a principal may not rely on delegation where its own systems of oversight are deficient. The Court held that retailers remain responsible where weak supervision or inadequate monitoring allowed a hazard to persist despite the appointment of a competent contractor. In terms of SANRAL's monitoring duty under Section 26(c), the mere appointment of contractors does not absolve it of its responsibility to ensure that the national road remains safe for public use. In these circumstances, SANRAL's reliance on the independent-contractor defence fails on the facts.

[187] As for Kayad and MD Civils, *Chartaprops* underscores that a contractor owes a duty to Third Parties because it entered upon the work, not because of private privity. On the evidence summarised earlier, (including the joint minute, the emergency regime and the edge-build-up instruction), both the consulting engineer and the maintenance contractor fell short of the standard of care applicable to their respective roles in preventing or neutralising edge build-up that could (and did) lead to ponding at the low point.

Contributory Negligence

[188] The Defendants pleaded that the Plaintiff travelled at an excessive speed, failed to maintain a proper lookout, and did not respond appropriately after striking the water. There is, however, no objective measurement of the Plaintiff's

speed, nor any independent evidence substantiating a departure from reasonable driving behaviour in the prevailing conditions of darkness and heavy rain. The engineering evidence established that even modest differential water depths across the right and left wheels of a light motor vehicle are capable of inducing hydraulic drag and rotation without imprudent driver input. In these circumstances, post-impact reaction dynamics are an unreliable foundation for attributing fault to the Plaintiff.

[189] The lay evidence supports this conclusion. The Plaintiff, his brother, and the independent witness, Mr Rhode, each described unexpectedly encountering ponded water on the right-hand lane at approximately the same location in the early hours of the morning. Mr Rhode’s near-contemporaneous incident, in particular, reinforces the inference that the hazard lay in the roadway condition rather than in idiosyncratic driver error. Nothing in the record suggests that either driver behaved negligently; rather, both appear to have been confronted with a sudden and largely invisible hazard which would have challenged even a prudent motorist.

[190] In these circumstances, and on the probabilities, the Defendants have not demonstrated that the Plaintiff’s conduct fell below the standard of the reasonable driver. Any imperfections in his response after striking the water cannot, in the conditions described, be regarded as culpable or causally material. The defence of contributory negligence is therefore not sustained, and no apportionment of damages arises.

Discussion

[191] The Second and Third Defendants submitted that the Plaintiff’s causation case rests on speculation in the *Popi M* / *Recife* sense, and that the Court should not choose between improbable theories.[48] The record does not place the Court in that dilemma. The contemporaneous emergency call-outs, the post-incident instruction and measured removal of approximately 200 metres of edge build-up at the low-point corridor, the common-cause geometry recorded *in loco*, and the joint-minute

[48] *Rhesa Shipping Co SA v Edmunds (The Popi M)* [1985] 1 WLR 948 (HL) (on a court not being compelled to choose between equally improbable causes); *Control Chemicals (Pty) Ltd v Safbank Line Ltd and Others (The “Recife”)* 2000 (3) SA 357 (SCA) (insufficiency of proof where rival causal theories rest on speculation).

concession that vegetation at the median edge can trap water on the pavement together provide a coherent and probable factual substratum. The Court prefers the explanation that best fits those proven facts.

[192] The criticism that Dr Roodt 'speculated', failed to consider alternatives, or relied on selective material is overstated when viewed against the complete record. Although he corrected his initial assumption about the location of the low point once the contour plan became available, his final opinion was anchored in objective materials: the emergency call-outs, the measured post-incident works located at the critical corridor, the site geometry, and the joint-minute engineering propositions. By contrast, the alternative of a valve or pipeline leak never progressed beyond assertion. It was unsupported by contemporaneous field notes, repair tickets or municipal records at the relevant time and place.

[193] The Defendants emphasise rainfall station data described as light. That contention does not displace the mechanism of risk on the evidence. The enquiry here is not whether a regional cloudburst occurred but whether, at a known low point, impeded drainage on the right lane produced hazardous ponding during rain. The climatology evidence accepted that localised heavier rain could not be excluded and, when combined with edge obstruction at the median edge, could yield a hazardous water film in the fast lane. The mechanism is site-specific rather than gauge-specific.

[194] It is contended that no one observed 'edge build-up' on the night and that lay witnesses perceived more water in the median. Lay observation in heavy rain and darkness is an unreliable basis on which to exclude impeded drainage at the pavement-to-median interface. In any event, the measured removal of approximately 200 metres of edge build-up immediately after the incident in the precise corridor of the low point is objective corroboration that edge obstruction of consequence existed and was treated. The timing and location of that instruction are consistent with targeted hazard abatement, not a generic tidy-up.

[195] The suggestion that the 18 May works were 'reinstatement' after towing, or that the recorded chainage was 'away from' the low point, does not assist the defence. The measurement spans the critical corridor and aligns with the low-point

segment identified on the contour plan and *in loco*. On the probabilities, the instruction and its execution reflect operational recognition that edge obstruction in that corridor was implicated in the hazard encountered.

[196] The presence of a vehicle pumping water after the incident is equally consistent with post-event hazard mitigation and does not establish the origin of the water, still less a contemporaneous leak from the municipal line. The later call-out the same day confirms the existence of a roadway water problem in the same corridor; it does not prove a pipeline failure.

[197] The Defendants rely on an absence of recorded prior flooding and on a generally rigorous inspection regime to negate negligence. Those points are not determinative. A system may be broadly robust yet miss a location-specific risk where sag geometry and median interface require targeted vigilance. Reasonable care demanded calibrated inspections and pre-emptive vegetation/edge control at that site before winter rainfall; the fact that essentially the same treatment was carried out immediately after the incident confirms the step was modest, available, and should have been taken earlier.

[198] The contention that aquaplaning at 70–80 km/h was 'virtually impossible' is inconsistent with accepted engineering understanding of hydraulic drag at modest depths where differential water films act across tyres. In the prevailing conditions of night driving and rain, sudden encounter with ponded water is a recognised loss-of-control risk even without imprudent driver input. The near-contemporaneous Rhode incident underscores that the danger lay in the roadway condition rather than idiosyncratic driver error. The defence of contributory negligence is accordingly not made out.

[199] The Defendants' alternative explanation that a valve or pipeline leak is the 'only plausible' cause is not borne out by the record. There is no contemporaneous documentary or field evidence of such a leak at the relevant time; the *in loco* inspection conducted years later did not reveal supporting indicators; and the climatology evidence did not exclude localised downpour. The sequence of emergency call-outs,

together with the measured edge-build-up removal at the precise corridor of the low point, is consistent with edge obstruction as the operative mechanism.

[200] The submission that their liability is contingent upon SANRAL first being liable misstates the delictual position. In *Chartaprops*, contractors attract a duty to third parties because they entered upon the work. The supervision functions undertaken by the Second Defendant and the routine vegetation and edge-control functions undertaken by the Third Defendant align directly with the hazard that materialised. Subject to fault and causation, their omissions are wrongful in principle and are not contingent upon SANRAL's liability.

[201] As to SANRAL, reliance on an independent-contractor framework does not immunise a principal whose own monitoring is inadequate in the circumstances. On the authority of *Langley Fox*, and consistently with the Supreme Court of Appeal's recent approach in *Pick 'n Pay v Williams*, a principal remains liable where its systems of oversight fall short; outsourcing is not a safe harbour where the statute and the facts require proactive monitoring at a known risk location. Section 26(c) of the SANRAL Act fixes SANRAL with a personal duty to monitor performance. On this record, oversight at the low point was reactive rather than preventative.

[202] The Defendants' expert-methodology critique is addressed by settled principles. The Court attaches weight to opinion only to the extent that it is anchored in proven facts and cogent reasoning. Where an expert advances an alternative without contemporaneous support, departs from a joint minute without a proper basis, or approaches the record through a role invested in the litigation, the probative value is diminished. Against that yardstick, the pipeline-leak explanation cannot displace the probable causal mechanism supported by the objective record.

[203] In summary, the themes developed in the Second and Third Defendants' submissions do not undermine the Court's findings on wrongfulness, negligence, or causation. The hazard was location-specific and foreseeable; modest guarding steps were available; they were not taken timeously; and the post-incident works at the precise corridor corroborate the Plaintiff's mechanism. The independent-contractor

defence does not avail SANRAL on these facts, and the contractors' own duties remain engaged by virtue of the work they undertook.

Conclusion

[204] Wrongfulness has been established for the reasons set out earlier, including the statutory framework governing SANRAL's responsibilities, the applicable public-policy considerations, and the nature of the omissions concerned.

[205] Applying the test in *Kruger v Coetzee*, a reasonable road authority, consulting engineer, or maintenance contractor in the Defendants' respective positions would have foreseen the risk of ponding at the low point if edge build-up was not managed, would have taken reasonable steps such as inspections calibrated to site geometry and timely removal of edge build-up, and the Defendants failed to take such steps. The emergency records, the post-incident instruction and measurements reflecting removal of approximately 200 metres of edge build-up, the joint minute, and the in loco findings collectively satisfy both foreseeability and preventability on the probabilities.

[206] In considering the evidentiary landscape, I am satisfied that the failure to remove or prevent edge build-up at the low point probably caused the ponding that resulted in the collision. Legal causation is established for the reasons already given.

[207] The independent-contractor defence does not assist SANRAL, whose statutory duty to monitor performance remained engaged, and the duties of the contractors themselves were likewise triggered by the work they undertook. No contributory negligence has been established on the evidence.

Costs

[208] It is trite that costs ordinarily follow the result. I find no reason to depart from the accepted legal principle. Consequently, in the exercise of my discretion, the Defendants, jointly and severally, the one paying the others to be absolved, are ordered to pay the Plaintiff's costs of suit on the merits, including the costs of two counsel, Senior Counsel on scale C and Junior Counsel on scale B given the clearly identified features of this case that were sufficiently complex, important and valuable

to the respective parties. All issues relating to Third-Party costs are reserved for determination together with SANRAL's contingent Third-Party claims at the quantification stage.

[209] For completeness, the costs of the First Defendant's application for absolution from the instance, previously directed to stand over for determination at the conclusion of the trial, follow the result and are incorporated into the costs order made herein.

[210] Although condonation for the late delivery of the further expert reports was granted to ensure the Court had the fullest record, the Defendants' expert material ultimately did not advance their case and was accorded little weight on the merits. The Plaintiff's opposition was neither frivolous nor obstructive in the circumstances, and there was no discernible prejudice caused by the timing that would justify a punitive or one-sided order. In the result, fairness is best served by directing that the reserved costs of the opposed interlocutory application be costs in the cause.

Order:

[211] In the result:

1. The Special Plea of prescription is dismissed.
2. The First, Second and Third Defendants are held liable, jointly and severally, the one paying the others to be absolved, for 100% of the Plaintiff's proven damages on the merits.
3. The Defendants jointly and severally are to pay the costs of suit, including the costs of two Counsel, Senior Counsel on Scale C and Junior Counsel on Scale B, respectively.
4. The reserved costs of the interlocutory application heard on 29 August 2025 are declared to be costs in the cause.
5. The First Defendant's third-party claims for indemnity, rectification, and in the alternative contribution, against the First and/or Second Third Parties are postponed sine die for determination, if necessary, at the quantification stage, with the costs of the third-party proceedings likewise reserved.

6. The matter of quantum is postponed sine die.

[redacted]

P D ANDREWS AJ

Acting Judge of the High Court,

Western Cape Division

<u>APPEARANCES</u>:

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This judgment was handed down electronically by circulation to the parties' representatives by email.