**IN THE HIGH COURT OF SOUTH AFRICA,**

**KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

**CASE NO**: 3205/2010

In the matter between:

**AMIT SINGH** **PLAINTIFF**

and

**ETHEKWINI MUNICIPALITY** **DEFENDENT**

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**JUDGEMENT**

**Delivered on:**

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**K GOVENDER AJ**

**Facts that are common cause and issues to be decided.**

1. The plaintiff, an adult male doctor, sued the defendant for damages alleging that he had been injured as a result of his motor vehicle colliding with a pothole on Alpine Road, Durban. It was alleged that the defendant was negligent inter alia in failing to ensure that the pothole in Alpine Road had been filled, repaired or had appropriate warning signs erected which would warn road users of the potential danger. The parties had agreed on the following facts as being common cause:

- On the 7th of June 2008 at approximately 02h30 the plaintiff, while driving his motor vehicle on the left hand lane of Alpine Road, swerved to avoid a pedestrian who had stepped onto the left hand lane. The plaintiff thereafter collided with a pothole in the right hand lane of Alpine Road. Annexure B indicates the direction in which the plaintiff was travelling when this collision occurred.
- The impact of this collision caused the plaintiff to hit a tree situated on the island in the middle of Alpine Road.
- The defendant accepted the authenticity of a fault management report that had been submitted to it on the 1st of June 2008 which recorded the following entry '… on the fast lane … this is a huge pothole could cause a possible accident.'
- The pothole was repaired on the 11th of June 2008 a few days after the accident.

2. I was asked to decide the issue of liability solely and the question of the quantum of the plaintiff's damages is to be deferred for later determination. From the agreed facts, the defendant had knowledge, at the latest, on the 1st of June 2008 of a huge pothole on the road that was potentially dangerous.

**Relevant legal background**.

3. In *Cape Town Municipality v Bakkerud* [1] ( *Bakkerud*), the SCA had to consider whether the 'general immunity' principle gleaned from the municipality cases of 'granting a high degree of immunity for municipalities in relation to accidents caused by potholes and the like in the surface of the streets'[2] was still applicable. The SCA in *Bakkerud* emphasised that the municipality cases never decided that at common law ' a municipality was absolutely immune from liability and that in no circumstances could it become obliged to repair a road or pavement or fall under a duty to warn of an unrepaired road or pavement.'[3] The court held that the 'supposed general immunity' granted to municipalities must be deemed to be considerably diminished. The main

[1] . *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 ( SCA) at para 3,
[2] . *Bakkerud* ( note 1) para 19 quoting *Moulang v Port Elizabeth Municipality* 1958 (2) SA 518 (A)
[3] . *Bakkerud*( note 1) para 21.

premise upon which this conclusion rested is that the supposed general immunity inhibited the courts 'from enquiring whether, notwithstanding the absence of a legislatively imposed duty to repair or any prior or concomitant act of commission, the legal convictions of the community demanded that a legal duty to repair (or to warn) should be recognised.'[4]

4. Importantly the court in *Bakkerud* went on to state that having reached this conclusion, it would be wrong to substitute the supposed general immunity with a blanket imposition of a legal duty to repair roads and pavements and held[5]:

> In my view, it has to be recognised that in applying the test of what the legal convictions of the community demand and reaching a particular conclusion, the Courts are not laying down principles of law that are generally applicable. They are making value judgments ad hoc.

The onus is on the plaintiff to prove that the facts in any particular case give rise to a legal duty on the part of the defendant to repair or at the very least to warn of the dangers posed by the existence of the pothole in the road. If such a legal duty exists then a further onus rests on the Plaintiff to prove that the failure to repair or to warn of its existence was blameworthy.[6]

**Summary of the evidence.**

5. The plaintiff was the only witness that testified in this matter. He was recollecting events that occurred almost 9 years ago on the 7th of June 2008. The plaintiff testified that he had attended a function and was returning home in the early hours of the morning. He was travelling at about 60 kms per hour on the left hand lane of Alpine Road. He testified that he saw a pedestrian standing on the left hand pavement. The pedestrian then ran across the road in front of his car from left to right and the plaintiff swerved to avoid him. After swerving, the plaintiff recollects hitting the pothole on the right hand lane of the road and this then caused him to lose control of the vehicle.

[4] . *Bakkerud*(note1) para 25 and 26.
[5] . *Bakkerud* ( note 1) para 27
[6] . *Bakkerud* (note 1) para 31

The vehicle then hit a tree situated on the island in the middle of Alpine Road. The plaintiff testified that he lost consciousness and only regained consciousness in hospital. Photographs of the approximate spot where the pothole was located and the tree with which the car collided were submitted and are marked Annexures C1 and C2.

6. He testified that he only became aware of the pothole when he hit it after swerving to avoid the pedestrian. According to the plaintiff, his reaction would have been different if warning signs or chevrons had been erected. If that had been the case, he stated that he would have exercised a greater degree of caution and would have reduced his speed and slowed down much more and taken more defensive action such as stopping completely or mounting the pavement on the left hand side of the road, if necessary.

7. Under cross-examination, the plaintiff accepted that this particular part of Alpine Road was not dimly light. He accepted that the various posts on which lights are mounted as depicted in annexure C2 were present on the date and time of the accident. The road was sufficiently well light for the plaintiff to have seen the pedestrian on the pavement. I will conclude from this that the road was reasonably well lit. Had the pedestrian not stepped in front of his vehicle, he would simply have continued on his journey to his destination. It was the act of the pedestrian in stepping in front of the vehicle that caused him to swerve to the right hand side to avoid hitting the pedestrian. He accepted that he did not apply his brakes as he had no time to do so. However he could not indicate with any degree of clarity the distance at which he first saw the pedestrian. Under cross-examination, he conceded that he saw the pedestrian far ahead but did not brake as he did not anticipate that the pedestrian was going to run in front of the car. He clearly saw the pedestrian some time before the latter stepped in front of the vehicle.

8. He testified that the pothole was near the yellow fire-hydrant depicted in annexure C2. He also agreed that there was a distance between the fire-hydrant and the tree

with which the car had collided. He also agreed that there was a lip in the road between the pavement and the left lane. It was specifically put to the plaintiff that given that the pedestrian had stepped in front of the vehicle, he had no option but to swerve right and would have done so no matter what was on the right hand lane. The plaintiff indicated that had he been alerted to the dangers on the right hand lane, he may have swerved to the left and mounted the left hand pavement if necessary.

9. The plaintiff accepted that the part of Alpine Road, where the pothole was and the tree with which the car collided is situated, is straight with no bends or obstacles obstructing the driver's view of the lanes. This is also apparent from annexures C1 and C2. The plaintiff accepted that he did not focus on the pedestrian as he (the pedestrian) was on the pavement and he did not anticipate that he would step on to the road in front of his vehicle. The plaintiff candidly conceded that he could not say that the accident would have been prevented had there been warning signs and chevrons notifying drivers of the dangers presented by the pothole. However he went on to state that had there been warning signs and chevrons, he would have slowed down considerably.

10. Under re-examination, he stated that he could not recall the lighting conditions at the time of the accident. While the pedestrian started the chain of events, it was the pothole that caused him to lose control and collide with the tree. He was clear that had there been warnings, he would have heeded them and taken appropriate precautions while driving. The reason that he swerved to the right was because there was no indication that it was not safe to do so.

11. Both parties closed their respective cases after the plaintiff testified. There was no evidence before me as to why the pothole was not repaired within the 10 days that the defendant had notice of its existence and neither was there any evidence as to why warning signs or chevrons were not installed to warn motorists of the dangers presented by the pothole. I was also unable to ascertain whether a policy existed

which regulated the manner in which the defendant dealt with the various categories of potholes on the roads that it maintained. Mr Broster, for the defendant) suggested that the lapse of time between the occurrence of the accident and the hearing of this matter, made it difficult to procure and present evidence on these issues. The summons in this matter was filed on the 3rd of May 2010 after demand had been made against the defendant. I would have anticipated that given that litigation had commenced, the defendant would have taken the necessary steps to preserve relevant information, policies and evidence that related to this matter. This appears not to have happened. Not having evidence of this nature before me impacted on the conclusions that I reached in this matter.

12. The plaintiff's action is in terms of the actio legis aquiliae. This requires the plaintiff to establish that the defendant was under a legal duty to take steps to avoid potential harm to the plaintiff, that in beach of this duty, the defendant failed to take reasonable steps to prevent the harm and that this failure caused the accident and the harm. I will deal with each of these requirements sequentially.

**Was there a legal duty on the defendant in the circumstances of this case to either repair the pothole or to put up warning notices or chevrons alerting motorists of the dangers presented by the pothole on Alpine Road**?

13. It is a trite principle that a negligent omission which is not wrongful will not give rise to delictual liability. In *Trustees, Two Oceans Aquarium Trust v Kantey & Temper ( Pty) Ltd,* [7] Brand J explained the requirements of wrongfulness as follows:

> Negligent conduct manifesting itself in the form of a positive act causing physical damage to the property or person of another is prima facie wrongful. In those cases, wrongfulness is therefore seldom contentious. Where the element of wrongfulness becomes less straightforward is with reference to liability for negligent omissions and for negligently caused pure economic loss

[7] . *In Trustees, Two Oceans Aquarium Trust v Kantey & Temper ( Pty) Ltd* 2006 (3) SA 138 (SCA) at 144

> … In these instances, it is said, wrongfulness depends on the existence of a legal duty not to act negligently. The imposition of such a legal duty is a matter for judicial determination involving criteria of public or legal policy consistent with constitutional norms.

In *Bakkerud*, the SCA held that in deciding whether a legal duty exists depends on the circumstances of the case and this is to be decided on an ad hoc basis. There was no legal duty 'upon all municipalities to maintain a billiard table-like surface upon all pavements, free of any subsidences or other irregularities which might cause an unwary pedestrian to stumble and possibly fall.'[8] In determining whether a legal duty exists, there has to be a reasonable sense of proportion between requiring municipalities particularly those that are well capacitated and funded to take appropriate action on the one hand and to require the public to take responsibility for their own safety when using the roads on the other.[9]

14. The defendant submitted that the plaintiff had failed to establish that there was a legal duty on it. It was contended that the facts in *Bakkerud*, where the court held that there was a legal duty, were materially different. On the facts in *Bakkerud*, the court held that the Sea Point area was a densely populated suburb, that the pavement abutted on residences that were in constant use and that the two holes in the road had been there for many months.

15. The defendant in this matter appeared to rely on the fact that the pothole was repaired in 10 days while in *Bakkerud*, the potholes were left unrepaired for months. In deciding whether a legal duty exists regard must be had inter alia to the extent and nature of the danger presented to motorists and other road users by the existence of the pothole, the size and depth of the pothole, whether the road is busy and regularly used by motorists and other road users, the capacity of and funds available to the municipality to attend to the repair of the pothole or to ensure that adequate warning signage is provided and the need for the users to exercise a degree of care for their own safety when using the road.

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[8] . *Bakkerud* ( note 1) para 31.

[9] . *Bakkerud* ( note 1) para 29

16. It was not disputed that Alpine Road is situated in a residential area and is generally a busy road even though it was not busy at the time that the accident occurred. It is highly material that a fault management report submitted to the defendant stated that a pothole was recorded on the system on the 1st of June 2008 with the annotation ' this is a huge pothole which could cause a possible accident'. The message indicates that the pothole was huge and that it presented a danger to the motorists that use the road on a daily basis. This message was accurate in that the pothole caused a serious accident. It is also relevant that a few days after the accident, the pothole was properly repaired.

17. There was no evidence on behalf of the defendant to suggest that the delay of about 10 days in repairing the pothole, which had been flagged as dangerous, was reasonable. There was no explanation as to why no warning signs or chevrons had been installed to warn of the dangers presented by the pothole. The fact that the pothole was repaired four days after the accident clearly indicates that the defendant had the capacity to deal with dangerous potholes expeditiously. Also I was not supplied with any policy in operation at the time dealing methodically and systematically with the repairing of or warnings of the existence of potentially dangerous potholes in roads.

18. Finally there was no evidence before me of any funding constraints that prevented the defendant from repairing or warning of the existence of the pothole in Alpine Road. There is no countervailing evidence to suggest that it would be disproportionate to require the defendant to repair the pothole or provide warnings of the existence of the pothole. I am satisfied that these facts if assessed cumulatively give rise to a legal duty on the part of the defendant to take reasonable steps to either repair the pothole or warn of its existence thus preventing harm to the motorists and other road users. I therefore agree with the plaintiff that the defendant had a legal duty in these circumstances to take reasonable steps to avoid harm and it was wrongful not to take such steps.

**Was there fault on the part of the defendant in failing to repair the pothole or warn of the existence of the pothole**?

19. The test for determining fault was restated in *McIntosh v Premier of the Province of Kwazulu-Natal and another*,[10] as follows:

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

I am satisfied that the first leg of the two-fold enquiry is met in this case. The fault management report generated for the defendant identified the existence of a huge pothole and stated that it could cause a possible accident. In *Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Anothe*r [11] the court held:

> It has been recognised that, while the precise or exact manner in which the harm occurs need not be foreseeable, the general manner of its occurrence must indeed be reasonably foreseeable.

The defendant had direct knowledge of the existence of the pothole and was alerted to the potential that this pothole could cause an accident. It was clearly foreseeable that an accident could be caused by the existence of this pothole on a busy road.

20. Having concluded that the harm was reasonably foreseeable, the next inquiry is whether the *diligens paterfamilias* would take reasonable steps to guard against such occurrence and whether the defendant failed to take such steps. The plaintiff is

[10] . *Allistair P McIntosh v Premier of the Province of Kwazulu-Natal and Another* [2008] ZASCA 62 para 12

[11] . *Sea Harvest Corporation( Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Anothe*r 2000 (1) SA 827 (SCA) para 21

correct in submitting that the pothole posed a serious risk as it jeopardised the safety of drivers of motor vehicles. Accidents caused as a consequence of the drivers being unaware of the pothole could result in extensive injury or even death. The *diligens paterfamilias,* given the nature of the threat, would at the very least have provided some warning of the existence of the pothole. The defendant was specifically warned about this pothole which was in a busy road and of the dangers it presented. Yet despite the severity of the threat, not even the rudimentary precaution of filling the pothole or erecting some form of signage was taken. No explanation was provided as to why this was not done. The fact that the pothole was repaired four days after the accident demonstrates that the defendant had the capacity to attend to or warn of potholes that posed a real danger to motorist. I am satisfied that the defendant in failing either to fill the pothole or warn of its existence acted negligently.

**Did the negligence of the defendant cause the harm sustained by the plaintiff**?

21. The next issue to be decided is whether there is a causal link between the negligence of the defendant and the harm suffered by the plaintiff. In *Mashongwa v PRASA*, [12] the Constitutional Court had to consider whether acts of omission on the part of the defendant, including operating trains with doors that did not shut while in motion, was causally linked to the plaintiff being assaulted and thrown off the train. The test for causation was restated by Mogoeng CJ in the following terms:

> *Lee*[13]never sought to replace the pre-existing approach to factual causation. It adopted an approach to causation premised on the flexibility that has always been recognised in the traditional approach. It is particularly apt where the harm that has ensued is closely connected to an omission of a defendant that carries the duty to prevent the harm. Regard being had to all the facts, the question is whether the harm would nevertheless have ensued, even if the omission had not occurred. However, where the traditional but-for test is adequate to establish a causal link it may not be necessary, as in the present case, to resort to the *Lee* test.

[12] . *Mashongwa v PRASA* [2015] ZACC 36 (CC)
[13] . *Lee v Minister for Correctional Services* 2013 (2) SA 144 (CC)

The defendant sought to argue that the plaintiff was speeding and that this was the cause of the accident. Based on annexure C2, the defendant submitted that there appeared to be a considerable distance between the fire-hydrant where the pothole was located and the tree with which the plaintiff collided. The implied premise is that the plaintiff must have been speeding to have landed at such a distance after colliding with the pothole. However no specific evidence was led that the distance between the fire-hydrant and the tree was such that the plaintiff had to have been travelling in excess of 60 kms per hour to have collided with the tree after the impact of the collision with the pothole.

22. It was also contended that if the plaintiff was travelling at 60 kms per hour, he would be covering 16 meters per second and that it would take him less that 0.3 of a second to have covered the distance from the left-hand lane to the right-hand lane. The argument was that the plaintiff's evidence of what occurred in 0.3 of a second must be viewed with suspicion. However the plaintiff's evidence was clear that he was travelling at 60 kms per hour and I did not get the impression that he was tailoring his evidence or that he was dishonest. He candidly admitted seeing the pedestrian and stated that he anticipated that the latter would remain on the pavement. His version that he swerved, hit the pothole and then lost consciousness is not improbable. The contention that he was speeding is speculative and I am satisfied, on a balance of probabilities, that the Plaintiff's evidence that he was travelling at 60 kms per hour, was truthful.

23. If the omission had not occurred and either the pothole had been filled or warning signs erected, I am satisfied, on a balance of probabilities, that the accident is unlikely to have occurred. The plaintiff stated quite categorically that had he been alerted to the danger he would have slowed down considerably and would have considered swerving to the left of the pedestrian onto the pavement. He swerved to the right as there was no indication of any danger on the right hand lane. This caused him to hit the pothole, lose control of the vehicle and collide with the tree. I am satisfied that on the traditional 'but-for test' the plaintiff has established a causal link between the negligent omission of the defendant and the harm suffered by him.

24. In *Mashongwa*, the court described the need for legal causation as follows:

> No legal system permits liability without bounds. It is universally accepted that a way must be found to impose limitations on the wrongdoer's liability. The imputation of liability to the wrongdoer depends on whether the harmful conduct is too remotely connected to the harm caused or closely connected to it. When proximity has been established, then liability ought to be imputed to the wrongdoer provided policy considerations based on the norms and values of our Constitution and justice also point to the reasonableness of imputing liability to the defendant.

I am satisfied on the facts of this case that the negligent omission is closely connected to the harm caused to the plaintiff and given the norms and values of our Constitution and principles of justice, it is reasonable in these circumstances to impute liability to the defendant.

25. I am therefore of the view that the conduct of the defendant was wrongful and negligent and that it caused the harm suffered by the plaintiff.

**Was there contributory negligence on the part of the plaintiff**?

26. It was submitted on behalf of the defendant that the conduct of the plaintiff contributed to the harm that was caused as he failed to keep a proper look-out of the surroundings. It was contended that it is not unusual for pedestrians to step out on to roads and drivers should therefore be on their guard when pedestrians are in close proximity to the road. The plaintiff argued that the defendant had not pleaded that there was contributory negligence on his part and that the facts indicated that the plaintiff was acting reasonably and in response to a sudden emergency. Paragraph 11 of the defendant's plea expressly states that the accident was caused partly by the fault of the plaintiff.

27. In the *Law of Collision in South Africa* (8th edition)[14], the learned authors, based on applicable precedents, describe the contents of the general duty of a driver regarding pedestrians as follows:

> The driver is required to keep a continuous look-out for pedestrians and to keep them under observation in circumstances where the road is relatively devoid of traffic. The duty to keep a look-out is generally present when the presence of pedestrians is reasonably foreseeable. The duty does not extend to a situation where a pedestrian, through, his/her actions conveys the message that he/she is aware of the driver and will give right of way to the driver. Under the latter circumstances a driver is entitled to proceed without maintaining constant observation. A driver must furthermore be able to anticipate the fact that pedestrians sometimes act impulsively and heedlessly and must regulate his/her driving accordingly. In circumstances where it is apparent that a pedestrian is preoccupied, a driver must hoot before passing such a pedestrian. A driver must leave sufficient room between him/ herself and the pedestrian when passing… There are no circumstances where a driver is totally relieved of his/her duty to keep a proper look-out.

The plaintiff was vague as to when he first noticed the pedestrian on the side of the road. However he did see the pedestrian some time prior to the latter running in front of the car. The road was reasonably well lit and despite seeing a pedestrian at 02h30 on the side of the road, he appeared not to have regulated his driving in response at all. He accepted under cross-examination that he did not focus on the pedestrian as the latter was on the pavement. He simply continued driving at 60 kms per hour until the pedestrian ran in front of his vehicle. The plaintiff also testified that he did not see the pothole until he swerved and hit it.

28. It is also material, and this is apparent from annexures C1 and C2, that Alpine Road is straight and the view of both lanes are relatively unobstructed. The plaintiff was familiar with the road as he resided in the area. If the plaintiff had regulated and adjusted his driving, reduced his speed and kept a proper look-out of his surroundings, he may have seen the pedestrian walk closer towards the road. This may have prompted the plaintiff to have been more cautious and circumspect and to have hooted or reduced his speed. Had he kept a better look-out of his surroundings, he may have observed the pothole which was described as huge. I am satisfied that the plaintiff ought to have kept the pedestrian under better observation and adjusted his

[14] . HB Klopper *Law of Collision in South Africa (8th edition*) page 68

driving accordingly. Had he done this and reduced his speed, it may have impacted on his ability to see and avoid the pothole.

29. The plaintiff must therefore bear some responsibility. As was pointed in *McIntosh v Premier of Kwazulu-Natal and Another*,[15] 'the degree to which the respective fault of two parties contributed to a single occurrence is always a difficult matter and is essentially a matter of judicial judgment'. Given the unexplained omission of the defendant to take the most rudimentary measures such as warning of the existence of the pothole when it knew of the dangers presented by the pothole, I am of the view that in the circumstances of this case a much greater degree of negligence is attributable to the defendant. An apportionment of 80:20 in favour of the plaintiff appears to be just and equitable in the circumstances of this case.

In the circumstances the following order is made:

**Order:**

1. **The defendant is ordered to pay 80% of the plaintiff's damages as may be agreed or proved.**
2. **The defendant is ordered to pay the plaintiff's costs.**
3. **The matter is adjourned *sine die* for the determination of the quantum of the plaintiff's damages.**

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K Govender

Acting Judge of the High Court

[15] . McIntosh v Premier of Kwazulu-Natal and Another [2008] ZASCA 62 AT 17

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