

IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)

19/8/14

Case No: 49051/2010

In the matter between:

**B B SCHULTZ**

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: <i>YES</i> /NO.	Plaintiff
(2) OF INTEREST TO OTHER JUDGES: <i>YES</i> /NO.	
(3) REVISED. <i>✓</i>	
<i>19/8/14</i>	<i>[Signature]</i>
DATE	SIGNATURE

and

**MEC FOR PUBLIC WORKS, ROADS & TRANSPORT**

1<sup>st</sup> Defendant

**TSHWANE METROPOLITAN MUNICIPALITY**

2<sup>nd</sup> Defendant

---

**JUDGMENT**

---

**FOURIE, J:**

[1] This is a claim for payment of damages suffered by the plaintiff due to injuries sustained by him in a motor vehicle accident. The accident happened during the early hours of 11 July 2009 when the car he was driving left the road and collided with a pillar and palisade next to the road. The claim against the second defendant was withdrawn and the plaintiff tendered to make payment of the costs of the second defendant, subject to a finding that the first defendant is not liable for the costs of the second defendant.

[2] In essence, the plaintiff's case is that his motor vehicle left the road as there was a lack of proper signage and road markings. This is denied by the first defendant and it is alleged that the plaintiff's own

negligence was the sole cause of the accident. The parties agreed at a pre-trial conference to separate the issues of liability and quantum and such an order has already been granted. Consequently, the issues to be determined relating to the merits are wrongfulness, negligence and causation. Before considering these issues, I shall first refer to the pleadings and thereafter provide a summary of the evidence.

### **PLEADINGS**

[3] It is common cause that the accident occurred on the Old Johannesburg Road between the intersections of Panorama- and Lenchen Avenues, Centurion. As part of Exhibit "A" various photographs and a sketch plan of the relevant section of the road were made available. This road consists of a single lane for traffic travelling in opposite directions. For traffic travelling in a northern direction the road splits to the left, i.e. their lane of travel is diverted to the left, whereas the lane for approaching traffic remains straight. After the diversion to the left, the lane of travel for traffic moving in a northern direction then curves to the right. Thereafter both lanes for traffic travelling in opposite directions run parallel to each other for some distance, with a grass island in between.

[4] It is alleged by the plaintiff that the first defendant is responsible for the maintenance of secondary roads within its jurisdiction and that the road in issue is such a road. Save for the qualification that its responsibility is subject to the framework of government policy and budgetary constraints, these allegations have been admitted by the first

defendant. It has also been admitted (subject to the same qualification) that the first defendant is obliged to inspect and maintain these roads and to ensure that the necessary road- and warning signs are installed and maintained. It is also common cause that in this regard the first defendant, at all relevant times, owed people using these roads a duty of care.

[5] It is further alleged by the plaintiff that employees of the first defendant, acting in the course and scope of their employment, were negligent by failing to inspect the Old Johannesburg Road properly, to maintain the road, to put up sufficient warning signs indicating a diversion in the road and to maintain these signs.

[6] All these allegations are denied by the first defendant who pleads that it has, at all relevant times, complied properly with its duty of care and the obligations referred to above by putting up various signs warning motorists of the diversion ahead, to reduce their speed to a maximum of 80 km/h and directing motorists to keep to their left. It was also pleaded that the accident was caused by the sole negligence of the plaintiff who failed to keep a proper lookout, was driving under the influence of alcohol, was driving at an excessive speed and failed to heed the warning signs referred to above.

## **EVIDENCE FOR THE PLAINTIFF**

### **PLAINTIFF**

[7] The plaintiff who is 29 years old, testified that during July 2009 he was staying with his parents in the Reeds, but was looking after his grandparents who lived in Pierre van Ryneveld. The Reeds is a suburb close to where the accident took place and he has been residing there since he was born. During the evening of 10 July 2009 he and a friend went to the News Café in Garsfontein. He was driving his mother's car, a BMW 328. At approximately 20:30 he wanted to go home and was sitting in his vehicle waiting for his friend. From thereon he cannot remember anything. He was hospitalised for five weeks.

[8] In cross-examination he conceded that for the past eight years he had been travelling on the Old Johannesburg Road on numerous occasions, but that was before the diversion in the road was constructed. However, he also conceded that since the diversion was constructed he had been travelling this road, but not on numerous occasions. He knew the road as he lives in the area. He also conceded that most probably he had a beer to drink that night. He only had R50 and also had to pay an admission fee, as there was a function there that evening. When asked whether he knows a nightclub by the name of "Stones" he replied in the affirmative. According to him it is situated on the corner of Panorama

Avenue and the Old Johannesburg Road, less than a kilometre from the scene of the accident.

### MACDONALD

[9] Mr MacDonald, a municipal councillor for a ward in that area, testified that during August 2009 he requested for a meeting to be held between representatives of the first and second defendants to discuss this diversion in the road. According to him this is a very dangerous section and he became concerned as there had already been many accidents where about seven people had been killed. A site meeting was then scheduled for 25 August 2009. It was attended by the witness and representatives of both defendants.

[10] At this meeting they discussed the reflectivity and visibility of the road signs. The witness realised for the first time that the road signs that were there had the lowest reflectivity, whereas those that were put up later have *"one of the highest"*. He also pointed out that for traffic travelling in a northern direction *"before the bridge you do not see this at all"*. It only becomes visible *"when you are halfway across ... and this caused to some extent confusion because you are confronted with these boards in front of you and the visibility of the road going to the left especially at night..."*

[11] Furthermore, according to this witness there were no road markings. It was then decided that the *"chevron boards and the road*

*markings should be done as quick as possible". However, as the provincial officials indicated that it would take them quite a while, the second defendant was prepared to assist in this regard. The witness also pointed out that "contacting Gautrans or Provincial Road Authority and it is a case of hopelessness. It is very difficult to get hold of them and it is very difficult to get them to act and it is very difficult to get them to assist with problems on the Old Johannesburg Road." When asked whether anything had been done thereafter he replied as follows: "Yes, before the end of that day the first chevron signs were erected by City of Tshwane and sadly to say that is all that happened." He confirmed that road markings were also done, but at a later stage.*

[12] In cross-examination he said that he was living in the area (in Rooihuiskraal) for almost 20 years. When it was put to him that if a person is acquainted with the road it would make things much easier, his reply was: *"Partially yes ... I would say it take some time to get acquainted to that ... especially when it is night time or when the sight is poor ..."* He conceded that there are other signs next to the road for traffic travelling in a northern direction to indicate a diversion in the road further on. According to him one could easily pass these signs without seeing them, because there are trees prohibiting a proper view of these signs.

### GRIMSELL

[13] Mr Grimsell, an employee of the second defendant, testified that he was responsible for the maintenance of road signs within the

jurisdiction of the municipality. He and Mr Vermaak, who is in control of the complete network of road signs, also attended the site meeting on 25 August 2009. However, before attending this meeting, he inspected the scene where the accident had occurred. When asked what his impression was, he replied as follows:

*"Well, my personal impression was that the sign that was at the junction was a small sign and while I was there people drove past on the wrong side of that sign and I then decided to go and contact the guy from our network, Hugo Vermaak so that they can get hold of the province people to come and rectify the problem."*

[14] He described the road sign as a *"three aspect sharp turn to left sign"* and according to him it was on the grass where the island is. With reference to a photo on page 55 in exhibit "A" he explained that this particular sign had three chevrons or arrows on one plate. When asked whether there were other traffic signs or chevrons his reply was *"No, not there, not there at all."*

[15] The witness thereafter attended the site meeting. At this meeting *"they accepted that there should be common ground that it is a dangerous situation"*. According to him, at that stage, members of the South African Police were busy taking measurements with regard to another accident. Whilst they were standing there he noticed that people *"drove down on the wrong side of the split"*. That happened during the day.

[16] The witness was then referred to a photograph on page 59 of exhibit "A". This photograph is dated 20 October 2010. It depicts various road signs at the diversion for traffic travelling in a northern direction. Some of them are big and others are smaller. At least six of these signs are visible. They all indicate that the left hand lane diverts to the left. The witness testified as follows with regard to these signs:

*"And who put up those signs? --- That would be the council.*

*Do you know when those signs were put up? --- That was the signs that were put up by that contractor of Mr Vermaak.*

*That was not the position when you met at the site --- No, definitely not.*

*At that stage it was only one sign --- Ja, and it was smaller than this one."*

[17] In cross-examination the witness conceded that he does not have personal knowledge whether it was in fact the council's contractor who had put up these signs. It was also put to him that the first defendant (Gautrans) had already put up these signs a long time before the site meeting took place. His response was *"no, there was only one sign"*. However, he conceded that other road signs next to the road at distances of 300, 200, and 100 metres indicating a turn to the left, had already been there.



VERMAAK

[18] Mr Vermaak, also employed by the second defendant as a works inspector, testified that on 25 August 2009 he attended a site meeting where representatives of both defendants were present. He referred to an E-mail on page 98 of Exhibit "A" dated 27 August 2009 and said the road signs and road markings were inadequate. According to him everybody agreed *"that one sign on that island is inadequate and that the road markings is (sic) in a bad state"*. He also explained that this road sign was placed so far back, right on the edge of the asphalt, that a person travelling at 80 km/hr would not be able to understand what to do in time. It was then decided, as a short term solution, to repaint all road markings and replace the relevant signs, including the road-studs.

[19] He also testified that the representative of the first defendant, a certain Mr Gusha indicated to him that he did not have a contractor to execute the work and that he would like to *"go back and think about it"*. His response was there is no time to think about it as many people had already been killed there. The witness then volunteered, on behalf of the second respondent, to take responsibility for the execution of the work. He also said, whilst they were standing there, that a motor vehicle *"missed that kink as well"*, and came down the wrong way. He confirmed that the signs depicted on the photographs at page 59 and 60 of exhibit "A" had been put there by the second defendant shortly after this meeting.

[20] In cross-examination it was put to the witness that, according to his E-mail, he undertook to *“replace signs”*, i.e. indicating more than one sign. His reply was there were no other signs and *“I do not believe that I meant replace in the sense that take out something and putting back something in its place”*. He also conceded the possibility that signs could have been knocked down, leaving only one sign still in place.

### SCHULTZ SNR

[21] Mr Schultz is the father of the plaintiff. He was informed about the accident during the early hours of 11 July 2009. He went to the scene of the accident whilst it was still dark. There he found house keys in the dust and one shoe. As it was still dark, he waited until about 07:00. He looked around and in the vicinity of the island he noticed *“marks on the gravel that the vehicle actually went down the dip of an island and then shot across some or other way.”* He qualified his observation by saying that it could have been caused by another vehicle. He also referred to certain photographs which had been taken by him a day or two later. These photographs appear on page 52 to 55 of exhibit “A”. According to him the position was still the same as when he had first visited the scene. He did not observe any dislocated traffic signs and according to him the one appearing on his photographs (referred to as a “chevron”) was the only one in place.

[22] In cross-examination he again explained that the marks which he noticed were not skid marks, but a *“disturbance on the sand”*. He later (in

re-examination) indicated those marks with an "X" on a sketch plan at page 44 of exhibit "A". He conceded that when he had first visited the scene, he did not investigate it. When it was put to him that he cannot give evidence with regard to the state of signage at that time, he responded as follows: *"Well, there was not any at the scene of the accident or lying anywhere where I saw at 07:00 when the sun came up. There weren't any poles or chevrons or signage of roads lying, in the roadway or in and around the scene of the accident."*

### ROODT

[23] Mr Roodt testified that he is a civil engineer who specialises in the design of roads and road safety. He has 30 years experience in planning, design, construction, operations, assessment and research of road and traffic matters. He prepared an expert witness report as well as an addendum thereto, copies of which are included in exhibit "A". According to paragraph 2 of his main report he was provided with a bundle of documents containing, *inter alia*, certain photographs which had been taken shortly after the accident. This is a reference to the photographs which had been taken by the plaintiff's father, Mr Schultz.

[24] The witness visited the scene on 18 February 2011 and also took some photographs. According to him the grass island, after the diversion to the left, is 19 metres wide. The general speed limit which will apply to this class of road is 100 km/hr, unless there is a road sign indicating a different limit. According to him there was an 80 km/hr road sign south of

the intersection with Panorama Road, which is approximately 500 metres south of where the diversion is. People coming from Panorama road and travelling north will not see this sign. The witness accepted that the road signs next to the road could have already been there on the date of the accident.

[25] The witness pointed out, according to the photographs which had been given to him, that there was only one sign, a three aspect chevron board where the actual split occurs. He testified that on the day he was giving evidence there was also only one sign there. He noticed it when he was travelling on that road earlier that morning. According to him that sign in the transition area is totally inadequate *“because it tells the driver expect a split and the next message is there is a sharp turn to the left with no supporting information as to how negotiate this sharp curve”*. He referred in this regard to Chapter 30 of the South African Road Traffic Signs Manual which, according to him, provides as follows:

*“That where a road is closed, partially closed or diverted or where an obstruction exists in the roadway the alignment to be followed by vehicles should be delineated by delineators, cones or barricades, banners, road studs or road markings or appropriate combinations of these devices. Delineation should be created in such a manner as to give an expression of continuity both by day and night.”*

[26] He also indicated that a single sign in the median does not provide continuity. According to him there must be a line of continuity. He pointed out that road signs should always be supported by road markings which are *"our primary delineation devices"*. However, according to him they wear off very quickly and therefore road markings should be augmented with reflective road studs as an orientation device for people to see where the road line is going. With reference to the photographs of Mr Schultz Snr he concluded that the painted island was faded and only recognisable in certain patches. He pointed out that *"the important delineation line, the longitudinal lane line was so faded that it was probably totally ineffective"*.

[27] He was also of the view that after the diversion to the left, the road is quite hazardous. There is an "S" curve which the driver must follow with an off-set of 19,1 metres. With a radius that small a driver *"must execute demanding driving actions and that again requires a high level of signage."* He pointed out that this is a class 2 road, i.e. of great importance and it requires a high level of supervision as well as maintenance. In his view the road should be inspected on a weekly basis and job cards as well as statistics should indicate where maintenance is required or where signs have to be replaced. According to him, with reference to Google, there were no streetlights on the date when the accident occurred, although surrounding industrial parks and buildings could have created a lot of light in that vicinity.

[28] In cross-examination the witness was asked whether a driver, when approaching the deviation, should not reduce his speed. His

answer was *"No, a properly designed diversion will be at the design speed of the road"*. He pointed out that the road signs next to the road are not warning signs, but information signs and on that section of the road, north of the intersection with Panorama Road, there is no speed limit indication. It was also put to the witness that the road signs, as depicted on the photographs on page 63, 64 and 65 of exhibit "A", including the chevron signs in the background at page 65, reflected the state of the signage at the time of the collision. The witness, after having pointed out that the photo is dated 20 October 2010, conceded that *"the signs that existed on 20 October 2010 is adequate to guide drivers around that curve"*.

[29] The witness agreed that from the start of the taper to the sign is 63 metres and from the spit to the nose 80 metres. He then conceded, driving at 120 km/hr, there was adequate stopping distance available. With reference to a person who is familiar with the road, he explained that such a driver will have a *"larger margin of error (or) bigger safety factor"*, because he is more familiar with the road. He conceded that weekly inspections would be sufficient, but added, if there is a history of accidents, it will necessitate a shorter cycle of inspections. With reference to photo 1 on page 33 of exhibit "A" he also conceded that the line markings in that particular area are clear, but he qualified the concession by explaining that there is no crossing of lines by motor vehicles as on the painted island where there is a lot of encroachment. As far as accident history is concerned, he testified that if there are a number of fatal accidents in a particular area, that location is then classified as

hazardous. With reference to his expert witness report he concluded that at the time of the accident the signs and markings in that particular area were "*grossly inadequate*".

## **EVIDENCE FOR THE FIRST DEFENDANT**

### **LIZE ROODT**

[30] Ms Roodt testified that on the night in question she was with her boyfriend and his friend at the News Café in Garsfontein. At approximately 02:00 the next morning they left to go to the Stones Nightclub next to the old Johannesburg Road. There she met the plaintiff for the first time. When asked whether the plaintiff was drinking, her response was she cannot say. She received a message from her boyfriend on her cell phone saying that he was "*going to check out Brian's car*". She interpreted this to mean that they were just going to look at the car. Later that morning she was informed that her boyfriend was involved in an accident and that he had been killed. In cross-examination it was put to her that, according to the blood alcohol analysis report, the blood alcohol contents of her friend was 0.05 grams per 100 millimetres and it therefore appears that he had not much to drink. She confirmed that it was also her experience.

### **GROBBELAAR**

[31] Mr Grobbelaar is a mechanical engineer and according to his *curriculum vitae*, on page 133 in exhibit "A", he has gained thorough

experience in the reconstruction of more than 3 000 motor vehicle accidents over the past 20 years. He prepared an expert witness report as well as an addendum thereto with regard to the accident in question. Certain Google images and a schedule setting out stopping distances are attached to his report. Appendix "A1" is a Google image of 24 March 2009 and "A2" another one of 12 November 2009. He also referred to appendix "B" on page 130 and 131, indicating images of the accident scene as it was during October 2009. The witness accepted that there were no streetlights in that area when the accident occurred.

[32] When questioned about the speed of the plaintiff's motor vehicle when it had left the road, he indicated that it was probably travelling considerably faster than 87 km/hr. Measurements on Google show that where the road curves to the left it has a radius of approximately 200 m. For a car travelling at a speed of 80 km/hr, the lateral acceleration to which the vehicle and driver would be subjected to, would be equal to a gravitational force of 0.25. This means that if a vehicle is driven to the maximum lateral acceleration at a gravitational force of 0.65, it would be travelling at approximately 129km/hr.

[33] The witness also testified about reaction time and the possibility of avoiding an accident. If a visualisation, perception and reaction time of 2 seconds is accepted for night time conditions (implying a travelling distance of 44.4m in two seconds), the driver of a motor vehicle should still be able to steer his vehicle to the left and follow his lane of travel where the road starts to curve to the left, if he had been keeping a proper



lookout. Furthermore, measurements on Google show that from the onset of the split in the road to the area where the grass median originates, is a distance of approximately 80m. From the start of the split there is a widening island separating the opposing traffic lanes. Therefore, in his view, a driver travelling at or below 80 km/hr should have been able to bring his vehicle to a stop in a distance of approximately 80 m when a reaction time of 2 seconds is allowed.

[34] When he was asked what his opinion would be if there was only one sign at the diversion on the day in question, his answer was “... *I have dealt with it in my report and I have dealt with it on the basis of a number of things, the road markings, the visibility, distance, the speed limit, stopping distances and so on ...*” He then concluded that if the plaintiff was travelling at a speed of 80 km/hr and a 2 second reaction time is accepted, his braking distance would be about 36 metres which implies that he could have stopped on the median, just before the nose of the island.

[35] In cross-examination the witness conceded that he was unable to contradict the evidence of Mr Roodt as far as his field of expertise is concerned. He also conceded that the diversion contributed to the collision “*to the extent that if the curve was not there, the vehicle would not have had to negotiate the curve*”. If one were to accept that only one chevron sign was at the island, his answer was: “*It may have been a contributing factor yes, once again, that is Mr Roodt’s field of expertise.*” According to him there were no guiding signs at the second curve to the

right when he inspected the scene. When he was questioned about the visibility of the road markings as they appear on page 128 of exhibit "A", he conceded that they *"are far less visible than those on the photograph (at) 129"*.

#### CAMPBELL

[36] Ms Campbell is the Provincial Chief Roads Superintendent. During 2009 (when the accident occurred) she was the Acting Regional Manager. She was then responsible for the maintenance of all provincial roads in the Pretoria region. She and her personnel had to inspect these roads and report on a daily basis to the Chief Road Superintendent. She was personally involved in performing these duties by driving these roads and doing inspections on a daily basis, or, if that was not possible, at least once a week.

[37] The high visibility signs next to the road at 300 metres, 200 metres and 100 metres for traffic travelling in a northern direction had already been put up prior to the date of the accident. After the accident, on 20 October 2010, she took photographs of these signs and of other road signs at the diversion as indicated on page 26 to 45 of exhibit "C". With regard to the signs at the diversion, as they are depicted on the photographs on page 31 and 32 of exhibit "C", she testified that these signs had already been there prior to the date of the accident. They were being replaced on a continuous basis after they had been knocked down or stolen. According to her the road markings in that area, prior to the

accident, were *“fairly good”*. With regard to the speed limit on that section of the road, her evidence was difficult to understand. On the one hand she testified that the speed limit was 80 km/hr, but on the other hand she was trying to explain that it should be regarded as 60 km/hr. She also referred to certain road studs which had been put in place, as one can see on the photographs on page 28, 29 and 43 of exhibit “C”. According to her the municipality replaced some broken road studs shortly after the accident. When she was referred to the photographs which had been taken by the plaintiff’s father (exhibit “A” at page 52 and 53) she testified that the other signs *“were also there at the date of the accident”*.

[38] In cross-examination she explained that prior to date of the accident she was responsible for the Pretoria region, but during May of that year (2009) she was transferred to Koedoespoort and was therefore no longer the Acting Regional Manager of the Pretoria area. A certain T Fekade was then appointed as the Acting Regional Manager. She later explained that she was still driving the road in question as they were busy overseeing a major optic fibre layout and I *“was on this road every day of my life”*. When she was asked questions by the Court in this regard she replied *“I was not every day there”* and explained that for approximately 8 days per month, during some weekends, she was not there.

[39] When asked whether she was aware of people who had been killed on that section of the road, she denied having any knowledge thereof. When she was asked whether any other person in her Department would be aware of it, she replied: *“No, they would not, because Tshwane Metro*

*has got my number and I am on 24 hour standby*". She also indicated that even on the day she was giving evidence she was unaware of people who had been killed on that section of the road. She was then referred to the photographs which had been taken during October 2010. She could not indicate which of those signs were put up by the Provincial Department, or when they were placed there. She later explained that she instructed her personnel to put up the G50 signs and therefore she *"can with certainty say that they were up"*, but she never instructed them to put up the W406 signs. She also conceded that she did not know what happened between May (when she was transferred) and July 2009 (date of accident). She explained, at a later stage, that her successor Ms Fekade *"has got no road experience, she has got no idea of anything about road maintenance"*.

#### NEMAKWARANI

[40] Mr Nemakwarani was on the day in question a member of the South African Police Service. He was employed as an official photographer, draughtsman and field worker. He attended the scene at 04:15. After making his own observations, he took photographs of the scene and also prepared a sketch plan. He later returned to the scene to also take photographs during the day. The photographs, sketch plan and key thereto appear on page 41 to 44 of Exhibit "A".

[41] Before taking the photographs he first drove from the intersection with Panorama Road up to where the accident had taken place to look for

clues on the road. He noticed road signs indicating a *"left turn off"*. He described these signs as *"danger plates with left pointing arrows"* which were on the island. He was unable to say how many there were, but according to him there were more than one.

[42] In cross-examination Mr Nemakwarani indicated that, when he arrived there, other police officials and members of Tshwane Traffic Department were already at the scene. According to him there was no disturbance at the island (as testified by Mr Schultz Snr earlier) but he later qualified his answer by saying *"it could be a disturbance from another vehicle, but not in connection with this car involved in the accident"*. He also testified that since December 2008 he had been investigating many accidents. When asked approximately how many, his response was *"on average 6 to 7 per week"*. He was then requested to explain why he could remember this accident scene so clearly. His response was *"well after acquainting myself over what is contained there in the bundle from page 30, that is how I got to the recall that."*

[43] He also testified (to questions put by the Court) that after he had completed his duties with regard to this accident, he was never again involved in this matter. According to him he was requested to come and testify a week before the commencement of this trial. When asked whether he had the opportunity to look at Exhibit "A" before he came to testify, his response was *"I see this exhibit here for the first time..."*

MOLOKOME

[44] Mr Molokome is a constable in the South African Police Service. He was on duty on the day in question. He visited the scene at approximately 03:00. When asked how that area looked like during that time of the morning, he said *"it was still in the night, with no lighting on the street"*. According to his observations there were chevron signs indicating that one should keep to the left until you reach the scene. There were more than one of these signs where the road splits. He completed the accident report form as it appears on page 3 to 6 of Exhibit "A". On this form he indicated that the visibility with regard to road markings was *"good"*.

[45] In cross-examination he said that he was employed as a police official since 2006 and that he attended accident scenes until 2011. When he was requested to indicate how many accident scenes he had already attended during this period he responded by saying that it is difficult to explain, because he was working *"two days, two night shift work"*. When asked to give an indication how many accident scenes he would have attended in one shift, he indicated four to five. According to him the road signs at the diversion were not on the tar, but on the soil or grass section on the edge of the tar. When he was referred to the photograph of the road sign on page 52 in Exhibit "A" (which was taken by Mr Schultz Snr), he testified that *"I do not recall having seen this sign in the photo"*.

[46] He was then referred to the accident report form which he had completed. He conceded that the date of accident as indicated (1<sup>st</sup> July 2009) is incorrect and that he had made a mistake. He was unable to recall who the investigating officer was.

## **DISCUSSION**

[47] Before considering wrongfulness, negligence and causation, it is necessary to first determine a factual dispute relating to traffic signs and road markings at the diversion at the time of the accident. According to the evidence for the plaintiff, there was only one chevron board, well within the nose of the island when the accident occurred. According to the evidence on behalf of the first defendant there were various road signs at the diversion as depicted on photographs in Exhibit "A" and "C". There is also a dispute with regard to the visibility of certain road markings in the vicinity where the accident took place. It therefore appears that there are two irreconcilable versions with regard to the road signs and road markings at the time of the accident.

[48] In SFW Group Ltd & Another v Martell et CIE & Others 2003 (1) SA 11 (SCA) at p 14 (par 5) Nienaber JA indicated that the technique generally employed by Courts in resolving factual disputes of this nature may conveniently be summarised as follows:

*"To come to a conclusion on the disputed issues a Court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a),*

*the Court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra-curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the Court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. ... But when all factors are equipoised probabilities prevail".*

(See also in this regard: Baring Eiendomme BK v Roux [2001] 1 All SA 399 (SCA) at par 7.)

[49] Mr Grimsell testified that before attending a site meeting on 25 August 2009, he inspected the scene of the accident. According to him there was a "three aspect sharp turn to left" sign on the grass where the island is. There were no other traffic signs or chevrons. With reference to a photograph on page 59 of Exhibit "A", depicting various road signs at the diversion for traffic travelling in a northern direction, he



testified that those signs were not there when he inspected the scene and were put up by a contractor of the second defendant after the site meeting. Mr Vermaak also attended the site meeting. He also referred to only one sign on the island. According to him the road markings would not pass a test if they were to be tested.

[50] Mr Schultz Snr (father of the plaintiff) referred to certain photographs which had been taken by him a day or two after the accident. These photographs appear on page 52 to 55 of Exhibit "A" and they indicate only one traffic sign, more or less at the edge of the tar road where the grass island is. He did not observe any dislocated traffic signs and according to him the one appearing on these photographs was the only sign in place. Mr Roodt testified that on the day he was in Court, giving evidence, there was only one sign at the diversion. With reference to the photographs of Mr Schultz Snr, Mr Roodt concluded that the painted island was faded and only recognisable in certain areas. According to him *"the important delineation line, the longitudinal lane line was so faded that it was probably totally ineffective"*.

[51] Ms Campbell, the Provincial Chief Roads Superintendent employed by the first respondent, testified that on 20 October 2010 she took photographs of road signs at the diversion, as depicted on page 31 and 32 of Exhibit "C". These photographs indicate various road signs at the diversion. Some of them are big and others are smaller. According to her these signs were there already prior to the date of the accident. It later transpired that during May 2009 she was transferred to Koedoespoort and

was therefore no longer the Acting Regional Manager of the Pretoria area. However, according to her she was travelling this road every day of her life, suggesting that she has personal knowledge of the road signs at the diversion on the day of the accident. However, she later conceded that she does not know what happened between May (when she was transferred) and July 2009 (date of the accident). She was also unable to indicate which of those signs were put up by the Provincial Department, or when they were placed there. According to her the road markings in that area were fairly good.

[52] Both Mr Nemaqwarani and Mr Molokome testified that there were more than one road sign when they arrived at the scene of the accident. At that stage they were both employed by the South African Police Service. They both conceded that they had been investigating many accidents before coming to Court to testify. According to Mr Nemaqwarani he acquainted himself with the contents of the bundle (probably referring to Exhibit "A") from page 30 thereof and could therefore still remember the scene of the accident. Mr Molokome was unable to recall the road sign as indicated on page 52 of Exhibit "A" (the photograph taken by Mr Schultz Snr). He completed the road accident report form, but made a mistake with regard to the date of the accident. He indicated on this document that the visibility of the road markings was good, but also conceded that it was still dark and there was no "*lighting on the street*". When Mr Grobbelaar was questioned about the visibility of the

road markings as they appear on page 128 of Exhibit "A", he conceded that they "*are far less visible than those on the photograph (at) 129*".

[53] As far as credibility is concerned, I have to take into account that Mr Grimsell and Mr Vermaak, who are employees of the second defendant, are not related to the plaintiff. At no stage did I get the impression that they were biased in any way. Unfortunately, the same cannot be said of some of the first defendant's witnesses. Ms Campbell, an employee of the first defendant, was inclined to overstate her evidence. For example, she was prepared to testify that she "*was on this road every day of my life*". When questioned by the Court about this statement, she replied "*I was not every day there*". She then explained that for approximately 8 days per month, during some weekends, she was not there.

[54] She also conceded that she does not know what happened between May (when she was transferred) and July 2009 (when the accident took place). Furthermore, her ignorance of any fatal accidents and her lack of knowledge of the site meeting is so improbable that it cannot be true. Mr Roodt, an independent expert witness, was of the view that the longitudinal line was so faded that it was probably totally ineffective. He made this observation with reference to the photographs of Mr Schultz Snr which were taken a day or two after the accident. According to these photographs and Appendix "A1" (and compared with Appendix "A2") to Mr Grobbelaar's expert witness report (p 128 and p 129 of Exhibit "A") it is difficult to understand how Ms Campbell could describe the road markings as fairly good. In my view she demonstrated a certain

degree of bias which not only affects the reliability of her evidence, but also her credibility.

[55] When considering the evidence of Mr Nemaqwarani and Mr Molokome I find it difficult to understand how they could, after approximately four years, still have an independent recollection with regard to road signs at the diversion. They were both involved in many accident investigations before and after the collision. They also conceded that they were not in any manner involved in the investigation of this accident after the photographs had been taken, the sketch plan prepared and the accident report form completed, until a week before the commencement of the trial. Mr Nemaqwarani, who visited the scene twice, did not even take a photograph of the road signs at the diversion. Mr Molokome was not only unable to recall who the investigating officer was, but also made a mistake with regard to the date of the accident when he completed the accident report form. For these reasons I find their evidence with regard to road signs at the diversion to be unreliable.

[56] As far as the probabilities are concerned, I take into account the following: First, the evidence of Mr Schultz Snr who testified that a day or two after the accident he took the photographs which appear on p 52 to p 55 of Exhibit "A". According to these photographs there was only one road sign at the diversion. Second, according to the evidence of Mr Grimsell and Mr Vermaak there was only one road sign at the diversion during August 2009. I also have to accept that their evidence with regard to the site meeting is undisputed, as neither Mr Gusha nor any

other person was called to testify on behalf of the first defendant in this regard. Lastly, Mr Roodt testified that on the date when he was giving evidence there was only one sign at the diversion. Why would so many people testify that they observed only one sign at the diversion the day after the accident, during August 2009 and during August 2013? In my view the probabilities are overwhelming that this was also the position when the accident took place. I also find that the longitudinal line was so faded that it probably was totally ineffective.

### WRONGFULNESS

[57] The general norm to be employed in determining whether conduct is wrongful, is the *boni mores* or, put differently, the sense of justice of the community and considerations of legal policy, both of which now derive from the values of the Constitution. (Steenkamp N.O. v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC) at 138 and 139, par 40 and 41). This is an objective test which calls for a value judgment embracing all the relevant facts and involving what is reasonable and, in view of the Court, consistent with the common convictions of society. Having regard to these considerations, wrongfulness is established where there is a breach of a legal duty not to cause harm to another by one's negligent conduct (F v Minister of Safety and Security 2012 (1) SA 536 (CC) at 567, par 118).

[58] It is common cause that the first defendant is responsible for the maintenance of secondary roads within its jurisdiction and that the road in

issue is such a road. It is also common cause that the first defendant is obliged to inspect these roads and to ensure that the necessary road- and warning signs are installed and maintained.

[59] According to the evidence of Mr MacDonald he requested a meeting to be held between representatives of the first and second defendants to discuss the diversion in the road. According to him this is a very dangerous section and he became concerned about the safety of people using that road. Mr Grimsell testified that at this meeting *“they accepted that there should be common ground that it is a dangerous situation”*. Also Mr Vermaak realised the inherent dangers created by the diversion in the road. That is why he admonished Mr Gusha (who wanted to go back and first think about it) and volunteered to take responsibility for the execution of certain work.

[60] No doubt, this is a clear indication that various responsible members of the community identified this section of the road to be dangerous, particularly because so many people had lost their lives there. They also realised that a single sign at the island was inadequate and that the road markings were in a bad state. It was therefore decided that certain remedial work had to be done urgently. Furthermore, these views are supported by Mr Roodt that a single sign in the transition area is totally inadequate as it does not provide continuity. According to him the important delineation line was so faded that it was probably totally ineffective.

[61] Having regard to the responsibilities of the first defendant which are common cause between the parties and the evidence referred to above, it stands beyond question that the first defendant had and still has a legal duty not to cause harm to people using that road, but to guide motorists safely through a dangerous section of the road by providing proper signage and road markings and also to maintain them. This was not done and the omission of the first defendant in this regard was therefore wrongful.

### NEGLIGENCE

[62] The question of negligence involves a twofold enquiry: first, was the harm reasonably foreseeable? Second, would the *diligens paterfamilias* have taken reasonable steps to guard against such occurrence and did the defendant fail to take those steps? The answer to the first question is obvious. Evidence relating to several accidents which had already occurred at the diversion in the road, many people who had already been killed there and the evidence of Mr Grimsell and Mr Vermaak that drivers have “missed that kink” and “drove down on the wrong side of the split”, justify no other inference that it was not only foreseeable that motorists could suffer injuries, but also that they may be killed due to the dangerous situation on that section of the road.

[63] The second leg of the enquiry relates to the reasonableness or otherwise of the first defendant's conduct. Generally speaking, the answer to the enquiry depends upon a consideration of all the relevant

circumstances. It involves a value judgment which is to be made by balancing various competing considerations, including such factors as the degree or extent of the risk created by the conduct of the person concerned, the gravity of the possible consequences and the burden of eliminating the risk of harm (as per Scott JA in Cape Metropolitan Council v Graham 2001 (1) SA 1197 (SCA) at 1203, par 7).

[64] The first respondent was obliged to erect road signs and provide road markings in order to guard against reasonable foreseeable harm to road users. It is common cause that high visibility signs next to the road at 300 metres, 200 metres and 100 metres for traffic travelling in a northern direction were there already prior to the date of the accident. However, they do not guide motorists through the diversion. They only indicate there is a diversion further on in the road. Mr Roodt also pointed out that these signs are not warning signs, but information signs. With reference to Chapter 30 of the South African Road Traffic Signs Manual he was of the view that a single sign in the median where the diversion is, does not provide a line of continuity. This line of continuity is important, because after the diversion to the left, the road is quite hazardous. There is an "S" curve which the driver must follow and that requires a high level of signage.

[65] He also pointed out that this is a Class 2 road of great importance and that it requires a high level of supervision as well as maintenance. In his view the road should be inspected on a weekly basis and job cards as well as statistics should indicate where maintenance is required or where



signs have to be replaced. He concluded that on the day of the accident the signs and road markings in that particular area were “*grossly inadequate*”. I have no reason to doubt the evidence of Mr Roodt. Mr Grobbelaar who was called by the first defendant to also give expert evidence, conceded in cross-examination that he was unable to contradict the evidence of Mr Roodt as far as his field of expertise is concerned.

[66] A reasonable person would not only have foreseen this danger, but would also have guarded against it by putting up adequate signage and by properly marking the verge of the road as well as the painted island. There is no evidence that it was not possible for employees of the first defendant to have done so. It should therefore be inferred that these employees either did not frequently inspect the road, or, if inspections were held, they simply ignored the dangerous situation. I therefore find that employees of the first defendant, acting in the course and scope of their employment, were negligent by failing to provide and maintain proper signage and road markings to guide motorists safely through a dangerous section of the road.

[67] This is, however, not the end of the enquiry. Another important question to be considered is whether the plaintiff was not also negligent. In this regard I have to take into consideration his own evidence that for the past eight years he had been travelling the old Johannesburg road on numerous occasions. He also conceded that since the diversion was constructed he had been travelling this road, albeit not on numerous occasions. He knew the road as he lives in the area.

[68] Mr Grobbelaar, a mechanical engineer testified that in his opinion the plaintiff was probably travelling considerably faster than 87 km per hour. He also pointed out that if a visualisation, perception and reaction time of two seconds is accepted for night time conditions, the driver of a motor vehicle should still be able to steer his vehicle to the left and follow his lane of travel when he reached the area where the road starts to curve. He concluded that if the plaintiff was travelling at a speed of 80 km per hour and if one were to accept a two second reaction time, his braking distance would be about 36 metres. This implies that he could have stopped in the median, just before the nose of the island.

[69] Having regard to the evidence of the plaintiff himself and that of Mr Grobbelaar, the inference is overwhelming that the plaintiff was either driving too fast or that he failed to keep a proper look-out. I therefore find that the plaintiff was also negligent.

### CAUSATION

[70] The question arises whether there is a causal link between the accident and the dangerous road relating to the lack of proper signage and road markings. There is no positive evidence of how the accident actually occurred. However, it is clear that this accident occurred in the direct vicinity of the diversion. The first defendant's expert witness, Mr Grobbelaar conceded that the curve or diversion contributed to the collision to the extent that if the curve was not there, the vehicle would not have had to negotiate the curve. He also conceded, if it were to be

accepted that there was only one chevron sign at the island, that it may have been a contributing factor.

[71] As far as the plaintiff is concerned, it would be difficult not to conclude that there is a causal link between his conduct (driving too fast or his failure to keep a proper look-out) and the accident. In the result I am of the view, having regard to the evidence and the objective facts, that the accident was caused by the negligence of both parties.

#### DEGREE OF BLAMEWORTHINESS

[72] The next issue to be considered is the degree of blameworthiness. In terms of section 1(1)(a) and (b) of the Apportionment of Damages Act, No 34 of 1956 damages recoverable shall be reduced to such extent as the Court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage. The effect of these provisions is to apportion the damage in accordance with the relative degrees of negligence. The criterion to be applied is the reasonable person test for negligence. This involves a comparison of the respective degrees of negligence of the parties involved (General Accident Versekeringsmaatskappy SA Bpk v Uijs N.O. 1993 (4) SA 228 (A) at 235B).

[73] In an attempt to come to a just and equitable finding I have to take into consideration, as far as the plaintiff is concerned, the following: The road in question was known to the plaintiff. He should have reduced his speed to enable him to safely negotiate the "S" curve at the diversion which, in all probability, he failed to do. As far as the first defendant is concerned, I take into consideration that a single sign at the diversion was totally inadequate and the longitudinal line so faded that it was ineffective to guide a motorist safely through that section during the night, even if that motorist is familiar with the road. However, as the plaintiff was acquainted with the road and would have had a *"larger margin of error (or) bigger safety factor"* his degree of blameworthiness should, in my view, outweigh that of the first defendant's employees, but to a limited extent only. Having regard to all the evidence and the circumstances of this case, I am of the view that a 60:40 apportionment of whatever damages may be proven, should be applied against the plaintiff, i.e. the plaintiff shall be entitled to 40% of his damages.

### **COSTS**

[74] As I have pointed out above, the claim against the second defendant was withdrawn and the plaintiff tendered to make payment of the costs of the second defendant, subject to a finding that the first defendant is not liable for the costs of the second defendant. The first defendant served its plea on 3 November 2010. In paragraphs 4 and 5 thereof the first defendant admitted that it is responsible for the maintenance of secondary roads and that the road in question is such a road. It has also been


admitted that the first defendant is obliged to inspect and maintain these roads and to ensure that the necessary road- and warning signs are installed and maintained. The second defendant's plea was served on 5 September 2012. In paragraph 4 the second defendant denied that it was responsible for the maintenance and upkeep of that section of the road where the accident occurred.

[75] Having regard to the contents of the first defendant's plea, there should have been no doubt that the road in question was the responsibility of the first defendant. I shall accept that it is difficult for a plaintiff to ascertain which authority is responsible for the maintenance of a particular road, but in this matter that uncertainty was already addressed in the first defendant's plea on 3 November 2010. Therefore, in my view, the general rule that costs follow the event should be applied, i.e. the party who has been substantially successful should be awarded his or her costs. No doubt, the plaintiff has been substantially successful and he should not be held responsible for the costs incurred by the second defendant prior to 3 November 2010. That should be the responsibility of the "losing party", but the plaintiff should be responsible for those costs as from 4 November 2010.

### **ORDER**

[76] In the result I make the following order:

- (a) It is declared that the first defendant is liable to make payment to the plaintiff of 40% of the damages which may be proven (or agreed between the parties) with regard to injuries sustained by the plaintiff on 11 July 2009.
- (b) The first defendant is ordered to pay the plaintiff's party and party costs to date hereof, which shall include the costs of two counsel;
- (c) The first defendant is ordered to pay the party and party costs of the second defendant up to 3 November 2010;
- (d) The plaintiff is ordered to pay the party and party costs of the second defendant as from 4 November 2010.

  
D S FOURIE  
JUDGE OF THE HIGH COURT  
PRETORIA 19/8/14.