THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 680/09

THE MEMBER OF THE EXECUTIVE COUNCIL FOR TRANSPORT FOR THE PROVINCE OF KWAZULU-NATAL	Appellant

and

JOHN MURRAY EASTMAN	First Respondent
JANE CHARLOTTE EASTMAN	Second Respondent
ROBERT MITCHELL	Third Respondent

Neutral citation: *The MEC for Transport of KwaZulu-Natal v Eastman & others* (680/09) [2011] ZASCA 38 (28 March 2011)

CORAM: Navsa, Malan, Tshiqi, Seriti JJA and Plasket AJA

HEARD: 2 March 2011

DELIVERED: 28 March 2011

SUMMARY: Claim for damages flowing from motor vehicle landing in culvert – against driver for being negligent – driving at an excessive speed in wet weather on rural road – against Member of Executive Council for Transport for Province of KwaZulu-Natal on basis that badly maintained roads caused or contributed to accident – evidence showed speed to be sole cause of accident – apportionment by court below between two defendants set aside.

ORDER

On appeal from: KwaZulu-Natal High Court (Pietermaritzburg) (Balton J sitting as court of first instance).

1. The appeal is upheld with costs, including the costs of two counsel to be paid by the three respondents jointly and severally, the one paying the others to be absolved.

2. The cross-appeal is dismissed with costs, including the costs of two counsel.

3. The order of the court below is set aside and substituted as follows:

'(a) The first defendant is held to be solely liable for the cause of the accident.

(b) The claims of the first and second plaintiffs and the first defendant as against the second defendant are dismissed.

(c) The first and second plaintiffs and the first defendant, jointly and severally, are ordered to pay the second defendant's costs of suit, including:

(i) the qualifying fees and expenses of the second defendant's expert witnesses;

(ii) reserved costs;

(iii) the costs of two counsel.'

JUDGMENT

NAVSA JA (Malan, Tshiqi, Seriti JJA and Plasket AJA concurring)

[1] When Mr John Eastman and his wife Jane, who are Australian nationals, travelled to South Africa during March 2005 to attend a wedding, they could not have imagined the disaster that would befall them. On Monday 21 March 2005, returning from a visit to the top of the Sani Pass (overlooking the Lesotho border) and travelling towards Himeville, the motor vehicle they occupied as passengers left a gravel road and landed in a donga. The accident rendered Mr Eastman a paraplegic and both Mrs Eastman's arms

were badly broken. Mr Robert Mitchell, a retired professor, who was the driver of the vehicle, is also Australian.

[2] During May 2005, Mr and Mrs Eastman instituted action in the Pietermaritzburg High Court against Mr Mitchell as first defendant and the Member of the Executive Council for Transport for the Province of KwaZulu-Natal (MEC) as second defendant, claiming damages for the consequences flowing from the aforesaid accident. The basis of their claim against Mr Mitchell was that the accident was due to his negligence in that he failed to keep a proper lookout, drove at an excessive speed, failed to keep the vehicle under proper control and failed to avoid the accident when, by the exercise of reasonable care, he could and should have done so.

[3] The basis of Mr and Mrs Eastman's claim against the MEC is that his employees were negligent in that they had failed in their legal duty to properly maintain the roads under his control, which included the Sani Pass road (the P318), on which they had been travelling. They alleged that the employees of the MEC were aware that the road in question became extremely slippery during inclement weather and that a dangerous donga existed next to the road. Mr and Mrs Eastman alleged that the accident was caused by the negligence of the MEC's employees, who not only failed to properly maintain the road, causing it to become extremely dangerous when wet, but also failed to erect signs warning of the state of the road and a barrier to prevent vehicles from sliding into the donga.

[4] The action was opposed by both defendants and the matter proceeded to trial before Balton J. It was agreed between the parties that the merits should be decided first and that the question of quantum should stand over. The court directed accordingly. After hearing evidence the learned judge concluded that the MEC had failed to satisfy the court that he had taken reasonable steps to maintain the road, which led to it being excessively dangerous. She held that the MEC ought to have erected signs to warn motorists, particularly tourists, of the condition of the road in wet weather and

furthermore that motorists ought to have been warned of the dangerous donga alongside the road.

[5] Balton J had earlier concluded that Mr Mitchell had been travelling at 50 kilometres per hour, which she held was excessive in the prevailing conditions. Having regard to the conclusion she reached in respect of the MEC's failure to maintain the roads and to erect road signs warning motorists about the hazards, she went on to apportion negligence between the two defendants and made the following order:

'(i) The first defendant is directed to pay to the plaintiffs 30% of their proved damages.

(ii) The second defendant is directed to pay to the plaintiffs 70% of their proved damages.

(iii) The first and second defendants are directed to commensurately pay the plaintiffs' costs, with such costs to include the plaintiff's airfare to and from Australia.'

[6] The MEC, with the leave of the court below, appealed against the correctness of the conclusions referred to above and the order set out in the preceding paragraph. Mr Mitchell, with the leave of the court below, cross-appealed on the basis that the court below erred in attributing any negligence to him, alternatively, that the apportionment of blame in relation to him should be reduced to 10 per cent.

[7] Before us, counsel on behalf of Mr Mitchell restricted his case to one instance of negligence on the part of the MEC's employees, namely, the failure to maintain the road causing it to become extremely dangerous when wet. For reasons that will become apparent that was a wise decision by counsel. It is now necessary to consider the material parts of the evidence to determine the cause of the accident.

[8] On the fateful day the journey by the Eastmans, up the road towards the top of the Sani Pass from Himeville was uneventful. The vehicle in which they drove was a 4x4 double cab bakkie (the vehicle), with an attached fibre glass canopy. En route they stopped at a quad bike centre where they hired quad bikes. Mr and Mrs Eastman and the owner of the quad bike centre drove

ahead on quad bikes and were followed by the vehicle. Mr Mitchell's wife sat in the passenger seat alongside him. Ms Paula Kinnane was a passenger who sat in the rear seat. Mr Mitchell's daughter, Jenny, the bride-to-be, was also in the vehicle. The section of the road above where the quad bike centre is located is described as typical four-wheel drive country. It is less so below the quad bike centre. On the way up, following the advice of the owner of the quad bike centre, Mr Mitchell engaged the four-wheel drive mechanism.

[9] Mr and Mrs Eastman and the remainder of their party returned to the quad bike centre after their visit to the top of the pass. On the way up, the road had been dry and weather conditions were clear. Before they travelled down towards Himeville, the owner of the quad bike centre had advised them to disengage the four-wheel drive, indicating that the road below was not 'too bad'. At the quad bike centre, because of the limited space in the double cab, it was decided by the others that Mr Eastman would sit in the rear bin under the canopy. On the way down to the quad bike centre, for approximately three kilometres, they had experienced ten minutes of light drizzle.

[10] In his testimony in the court below Mr Mitchell stated that because of the rain he had travelled at approximately 30 kilometres an hour. According to him, he had experienced no problems at all until they approached the area where the vehicle left the road. They had come over a slight crest onto a fairly straight part of the road when the vehicle started sliding to the left. In order to correct the vehicle he steered to the left, as one is required to in those circumstances. He might have touched the brakes lightly but the vehicle headed across the road and went off the verge and fell into the donga. He was up to his waist in the water. It is common cause that a water culvert alongside the road had degenerated and had been eroded to form the donga.

[11] The canopy had come off the double cab and had been flung 12-15 metres away from the vehicle. Mr Eastman who was in the rear bin of the double cab was half-in and half-out of the vehicle. He had broken his back. Shortly after the vehicle had plunged into the donga people arrived to offer assistance. Peter Bodman, a local farmer, arrived and summoned his wife,

Sandy, a nurse, to come to assist. Only Mr and Mrs Eastman had sustained serious injuries.

[12] It is necessary to record that Mr Mitchell has extensive experience of driving on gravel roads in a range of vehicles. He was well aware of the dangers that gravel roads in general pose in wet weather conditions. Mr Mitchell accepted that as a rule, significantly greater care and lower speeds are required when travelling on gravel roads. The common consensus appears to be that in wet conditions a safe speed on gravel roads in general, including the road in question, is 30 kilometres per hour.

[13] Against Mr Mitchell's testimony needs to be weighed the evidence of Mrs Eastman, who described how she sat behind Mrs Mitchell on the left-hand side and how their daughter, Jenny, sat in the middle of the backseat, between her and Paula Kinnane. Mrs Eastman stated that she was contemplating securing a seatbelt because she had felt a 'little unsafe' due to the speed of the vehicle and the bumpiness of the ride. The most significant part of her evidence is that when they came over the crest approaching the area where the vehicle left the road, Mrs Mitchell turned to her husband and yelled his name. In response, he looked towards her for a few seconds and then looked back. At that moment she felt the vehicle slide. Shortly thereafter the vehicle rolled and she felt the impact as it fell into the ditch.

[14] Under cross-examination, Mrs Eastman was adamant that Mrs Mitchell had shouted her husband's name *before* the vehicle started sliding. The following part of her evidence bears quoting in full:

'I think it was more the speed that she was concerned, that she called ─ I think she felt he was driving too fast and that's why she called his name, and then the ─ when he looked at her ─ as he looked back there was ─ this start of a sliding sensation.'

[15] Importantly, at that point, counsel representing Mr Mitchell turned to

his client to take instructions and said the following immediately thereafter:

'Yes, Mr Mitchell's recollection is not much different from yours. His evidence will be that his wife shouted first and it was virtually the next moment that he hit the patch of slipperiness which caused the vehicle to go out of control.'

[16] Mr Eastman's evidence on the question of the speed of the vehicle is equally important. He testified about how he had been voted by the others to sit in the rear of the vehicle. When he was asked whether he could comment on the speed he said the following:

'I can say that I was uncomfortable with the speed that we were travelling. . . . But I can't put a number on it, no.'

Mr Eastman repeated that observation. In my view, Mr Eastman attempted to be as fair as possible. He conceded that being in front of the vehicle would have made an assessment of the speed much easier and that the bumpiness might have contributed to his discomfort.

[17] In response to a question from the court about whether he had felt uncomfortable about the speed at which the vehicle was travelling, Mr Eastman said the following:

'The speed, yes, that the vehicle was travelling with me being in the back of the car with no seatbelt on, and I ─ just before the accident I had thought about making my thoughts known to somebody in the back by banging on the back of the car, but that was a little ─ that was too late because we started sliding off the road.'

[18] Under cross-examination by counsel representing the MEC Mr Eastman testified about how he had experienced sitting in the rear bin of the vehicle as they drove towards the accident scene:

'I felt uneasy with the ─ you get ─ I had ─ I got ─ you get a feeling when a car is driving too fast ─ when a car is travelling at a speed that you are not comfortable with, and that's the feeling I got.'

Soon thereafter he said the following:

'I thought of alerting the driver, but if you've ever sat in the back of one of those cars it's not something that's easily done.'

[19] In the insurance claim form it is stated that the driver was travelling between 30 and 40 kilometres per hour at the time that the accident occurred.

In that form the impression is created that the vehicle started sliding on a curve in the road rather than on the straight part as testified to in court by Mr Mitchell.

[20] In his statement to the police, Mr Mitchell stated that it had been raining and the road had become quite wet and slippery. There was clearly an attempt to create the impression that it was the heavy rain that had caused the road to become wet and slippery which resulted in the loss of control of the vehicle. In court he gave the impression that it was drizzling and that the vehicle started sliding unexpectedly mainly due to the condition of the road.

[21] The fact that the vehicle sustained fairly extensive damage at the front, coupled with the fact that the canopy came off and was flung 12-15 metres away from the vehicle is more consistent with the evidence of Mr and Mrs Eastman that the vehicle was travelling fast enough to cause them concern. More damning though, is the uncontradicted evidence of Mrs Eastman that Mr Mitchell's wife was concerned enough to shout his name. Her inference about Mrs Mitchell's concern at the speed at which the vehicle was travelling appears wholly justified. Mrs Mitchell was not called as a witness and it must be inferred that her evidence would not be at variance with that of Mrs Eastman.

[22] The evidence of the reconstruction experts who testified was not very useful. However, Mr Opperman, who testified on behalf of Mr Mitchell and was rightly critical about the experiments conducted by Ms Badenhorst who testified on behalf of the MEC, nevertheless, when pressed for his estimation of the speed at which the motor vehicle was travelling, ventured an estimate of 50 kilometres per hour. The assumptions he relied on were conservative and were favourable to Mr Mitchell.

[23] An examination of the record of proceedings in the court below reveals that the conclusion of the court below that Mr Mitchell was not an impressive witness is well-founded and his evidence that he was travelling at 30 kilometres per hour was rightly rejected. The court was correct in accepting

the evidence of Mr and Mrs Eastman to the effect that Mr Mitchell drove fast enough to cause them discomfort and unease. There is no doubt in my mind that the speed at which Mr Mitchell drove was excessive in the circumstances and he was thus negligent. The speed at which he drove was a cause of the accident. The question that remains is whether it was the sole cause. Is there a substance to the complaint of the respondents that there was a lack of maintenance of the road in question on the part of the MEC to the extent that it was excessively dangerous and contributed to the accident?[1]

[24] To answer the question in the preceding paragraph it is necessary to consider the evidence in regard to the condition and maintenance of that part of the road on which the accident occurred and then to determine whether it contributed to the accident. A range of witnesses, including a number of local residents, testified about their historical dissatisfaction with the state of the P318, particularly the lower part leading towards Himeville.

[25] A major incident on which the respondents relied to demonstrate how treacherous the road was, occurred in December 1998, more than seven years before the incident presently being considered. On that occasion, Dr Lindsay, a general practitioner in the Himeville area, had lost traction while travelling to the Sani Pass Hotel on the P318, in the opposite direction to which the respondents were travelling. When he lost traction he left the road and ended up in the culvert.

[26] The ire of the local community, concerning the condition of the P318 and what they considered to be the lack of response on the part of officialdom, was directed chiefly at Mr Victor Kimmince, the district superintendent. According to Dr Lindsay, he had complained to Mr Kimmince about the condition of the road at that time.

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[1] In terms of s 9 (1) of the KwaZulu-Natal Provincial Roads Act 4 of 2001, the MEC is, within available financial resources, responsible for the construction of provincial roads. In terms of s 9(3) of that Act the MEC is not liable for any claim or damages arising from the existence, construction, use or maintenance of any provincial road, except where the loss or damage was occasioned by the wilful or negligent act or omission of an official. It is undisputed that within such resources the MEC has a responsibility to obtain optimal road safety standards within the province.

[27] Mr Peter Bodmann, a dairy farmer in the Underberg Himeville area, who was one of the first on the scene after the accident, testified. His farm is situated just off the P318. He was familiar with the road on which the accident had occurred. When it was dry one could safely drive at 60 kilometres per hour. According to Mr Bodmann, when the road got wet it transformed and the surface became like glass, causing cars to slide.

[28] Mr Bodmann belonged to the local Community Watch. He testified that he had raised the general condition of the P318 at meetings on a regular basis. The concern was that the surface was not very good in wet weather. When asked who the complaints were raised with, he was unable to say how and to whom the complaints were communicated. He had not personally spoken to Mr Kimmince concerning the condition of the road.

[29] Mr Bodmann conceded that the Department of Transport graded the roads occasionally but was adamant that they did so irregularly. He testified, without reference to a specific date, that he had gone off the road on one occasion and referred to a doctor, presumably Dr Lindsay, who had on another occasion gone off the road. Describing how it had come about that his own vehicle had left the road, Mr Bodmann testified that he had gone through a ‘red patch’, which he had misread and consequently had slipped off the road surface.

[30] Under cross-examination, Mr Bodmann was unable to contradict police statistics that showed that between 2003 and 2006, on the road in question, there had been only one accident, which resulted in serious injuries. That accident is the one under consideration. He accepted that in general, gravel roads, when exposed to rainfall, become particularly slippery.

[31] Significantly, Mr Bodmann was referred to photographs taken in May 2005, before the entire road was resurfaced. According to him, they demonstrated a lack of hardening or gravel and reflected that there was only soil on the road, which in wet weather became slippery and dangerous. It is

the same photographs which experts in the court below testified showed a typical gravel road. The photographs themselves show an extensive gravel surface with shiny parts which appear to be the parts that cause slipperiness on gravel roads when wet.

[32] Mrs Sandra Bodmann, who is a qualified nurse, also testified. According to her, that part of the road on which the accident occurred was passable in dry conditions and one could comfortably drive on it. Like her husband, she considered that part of the road particularly to become extremely treacherous when wet. She testified, without reference to a date, that she had 'slipped severely in some cases' but had not actually gone off the road surface. She stated that her mother had slipped off the road on a number of occasions. Once again, the court was not told when this had occurred. Mrs Bodmann testified that there had been occasions when she and her husband had pulled tourists off the edge of the road with their tractor. She conceded that the Department of Transport had occasionally graded the road, normally after complaints had been lodged. Mrs Bodmann attended monthly disaster management meetings at which she had raised complaints about the P318.

[33] Mrs Bodmann conceded that at times the whole of the P318 became slippery. When she was questioned about the areas of the road on which she had slipped she identified two other areas apart from the area where the accident had occurred. However, she did state that she had once slipped in that vicinity.

[34] According to Mrs Bodmann, she had assisted her mother after the latter's vehicle had slipped off the road at another location. She was unable to identify the other area about which her mother had reported to her. Mrs Bodmann's response to the suggestion by counsel representing the MEC, that the number of accidents on the relevant section of the road prior to March 2005 was few and far between, is instructive:

'Yes, I think you would be wrong.'

That response can hardly be considered emphatic.

[35] Mrs Bodmann was unaware of any accidents on that stretch of the road between January and March 2005. She stated that from personal knowledge she knew of only one accident from the time that she and her husband started living in the area up until the time of the accident. That was an instance where someone went off the road and landed in a maize field. That incident too was not located in time.

[36] Mr Brett Deavin, who at the relevant time provided a private ambulance service, arrived at the accident scene after being contacted by Community Watch to transport the Eastmans to hospital. He testified about how the section of the road where the accident had occurred became treacherous when wet. He spoke of incidents over the years where trucks and buses got stuck. Under cross-examination he testified that he had no personal knowledge of a single motor vehicle accident on that stretch of the road. Mr Deavin stated that he had knowledge of one instance, in December 2004, where a vehicle got stuck in the mud in that vicinity. He had no personal knowledge of any report having been made to the Department of Transport concerning that incident. Importantly, he accepted that there was no basis for the court to accept that this part of the road was akin to an ice rink in inclement weather.

[37] I do not intend to canvass every detail of every complaint concerning the P318. It is clear that the Sani Pass Hotel which is situated between the area where the accident occurred and the top of the Sani Pass complained to the Department of Transport on a number of occasions that tourist buses and their clients' vehicles were getting stuck in the mud on their way to the hotel. They were lobbying for the road to be surfaced with tar. Farmers also complained about their vehicles getting stuck on the P318. It is clear that heavy vehicles like buses and trucks churn up the road in wet weather conditions and cause muddy conditions.

[38] It is true that Mr Kimmince did not appear to be a particularly efficient administrator. He certainly was not a meticulous record keeper nor was he

particularly responsive to the local community. It does not necessarily follow that he was informed that this specific stretch of the road required immediate attention, nor does it follow that that particular stretch of road was a death-trap.

[39] It is common cause that on 18 March 2005, three days before the accident occurred, Mr W S Bennett, a regional engineer and Mr Kimmince's superior, in response to written complaints concerning the Sani Pass road, went out to inspect the road with Mr Kimmince. Mr Bennett concluded that, because of the heavy rainfall in the preceding months the road had deteriorated. Generally he thought that the greater deterioration had occurred in slightly steeper areas towards the top of the pass caused mainly by heavy vehicles churning up the road because of the gradient. Mr Bennett thought that it was an opportune time to upgrade and re-gravel the entire road. We know that this was ultimately done a few months after the accident.

[40] It is necessary to record that the Department of Transport's records reflect that an extensive part of the P318 was re-gravelled during 2000. Regrettably, the records do not indicate exactly which parts were re-gravelled. Nor do the records reflect which parts were subject to patch re-gravelling in the intervening period, it not having been in dispute that patch gravelling had occurred from time to time.

[41] It must be borne in mind that there is an extensive network of roads to be maintained by the department. Seventy-five per cent of the roads in the province are gravel roads and subject to deterioration due to traffic and weather conditions. The gravel road network for which Mr Bennett and Mr Kimmince hold responsibility extends to 1 200 kilometres.

[42] As stated in para 7 above, counsel representing Mr Mitchelll advisedly restricted Mr Mitchell's case against the MEC to one instance of negligence, namely, the failure to maintain the road. It is clear that Mr Mitchell was aware that gravel roads are dangerous when wet and that speed on gravel roads had to be reduced under those circumstances. A board indicating that the

road was slippery when wet would not have been news to him. Insofar as the lack of a barrier to prevent egress from the road is concerned it is unclear that more extensive injuries might not have resulted if such a barrier had existed. Furthermore, the erection of such a barrier on one or both sides of the road narrows the width of a road and may cause greater potential danger than the harm it seeks to prevent.

[43] The onus of proving the allegations concerning the inaction or omission of the MEC's employees, in relation to the maintenance of the roads, rested on the Eastmans.[2] The court below erred in approaching the matter on the basis that the MEC had failed to show that his department had maintained the road thereby failing to prevent the dangerous situation complained of.

[44] In my view, the evidence does not establish that the section of the road on which the accident occurred was, at the material time, a death trap or resembled an ice rink. The photographs taken during May 2005, before the re-gravelling exercise, do not reveal a road that is atypical of gravel roads.

[45] Mr Bodmann meticulously kept a record of monthly rainfall. His statistics were unchallenged. It is important to consider the rainfall figures supplied by Mr Bodmann for the months January to March 2005. The rainfall figure for January was 286 mm, for February 344 mm and March 181 mm. In the two months preceding the accident rainfall was far greater than in March. In that time, there were no accidents or incidents in which vehicles slipped off the road. For a few hours on the day in question, immediately following the accident, the presence of cars and the movement of people in the vicinity might have caused approaching motorists to be more careful. However, during the remainder of the day the tempo of the rain increased. One would expect motorists coming over the crest to have experienced even worse road surface conditions than did the Eastmans and their party. There were no other incidents on that stretch of the road for the remainder of that day or on any other day in March or in the preceding months, when rainfall was heavier. It

[2] *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) para 31.

should be borne in mind that statistics compiled many years before the incident in question showed that 200 vehicles per day used the Sani Pass road. It was accepted by all that that figure would have increased appreciably by the time the accident occurred. This means that thousands of vehicles would have travelled over that stretch of road during the wet-weather-season. The only vehicle that left the road during that time was the one driven by Mr Mitchell.

[46] Immediately before the vehicle started to slide, Mr and Mrs Eastman and significantly, Mrs Mitchell, all had cause to be concerned about the speed at which the vehicle was travelling. It is no mere coincidence that the vehicle started sliding at the time that their anxiety was heightened. To my mind, that evidence is decisive. The conclusion is ineluctable that it was the speed at which Mr Mitchell was driving that caused the vehicle to slide off the road. It is the speed that passengers were startled by that distinguished this vehicle's passage from others on that stretch of the road. Mr Mitchell was negligent in not reducing his speed to meet the exigencies of the prevailing conditions.

[47] There is no acceptable evidence that any omission on the part of the employees of the MEC caused or contributed to the accident. In this regard the Eastmans and Mr Mitchell failed to discharge the onus resting on them. The court below, in my view, erred in not holding Mr Mitchell solely responsible for the accident.

[48] For the reasons set out above the following order is made:

1. The appeal is upheld with costs, including the costs of two counsel to be paid by the three respondents jointly and severally, the one paying the others to be absolved.
2. The cross-appeal is dismissed with costs, including the costs of two counsel.
3. The order of the court below is set aside and substituted as follows:

'(a) The first defendant is held to be solely liable for the cause of the accident.

(b) The claims of the first and second plaintiffs and the first defendant as against the second defendant are dismissed.

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(i) the qualifying fees and expenses of the second defendant's expert witnesses;

(ii) reserved costs;

(iii) the costs of two counsel.'

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M S NAVSA
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	V I Gajoo SC I T Stretch Instructed by The State Attorney KwaZulu-Natal The State Attorney Bloemfontein
For 1st and 2nd Respondents:	J J Wessels SC Instructed by Munro Flowers & Vermaak Johannesburg Claude Reid Inc Bloemfontein
For 3rd Respondent:	J Marais SC Instructed by Deneys Reitz Incorporated Pencarrow Park Webbers Bloemfontein