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

CASE NO.: 5044/2015

In the matter between:

NQULELWA MTYIDO

Plaintiff

and

THE CITY OF CAPE TOWN

Defendant

JUDGMENT DELIVERED ELECTRONICALLY ON WEDNESDAY 24 JUNE 2020

DOLAMO, J

INTRODUCTION

[1] The plaintiff sued the defendant, the City of Cape Town (the City) for damages arising from an incident that occurred on the 17 October 2013, when she allegedly fell into an open manhole while walking in a street in Phase 3 Bardale Mfuleni, Western Cape, which was an informal settlement at the time.

[2] In her particulars of claim, the plaintiff alleged that:

“3. On or about 17 October 2013, and at or near Ukubetana Street, Mfuleni

which area falls within the area of jurisdiction and/or under the control of defendant and within the area of jurisdiction of the above Honourable Court, plaintiff stepped into an uncovered manhole, as a result of which she sustained a fractured right ankle [“the incident”].

4. *at all material times, defendant had a legal duty to members of the public, and to Plaintiff in particular, to:*

4.1 *ensure that areas within its jurisdiction and/or under its control and to which members of the public had unrestricted access were free of any danger/s and/or potential danger/s;*

4.2 *ensure that adequate measures were taken in all areas within its jurisdiction and/or under its control and to which members of the public had unrestricted access to safeguard members of the public against any danger/s and/or potential danger/s;*

4.3 *take reasonable precautions to warn members of public of any danger/s and/or potential danger/s in all areas within its jurisdiction and/or under its control to which the members of the public had unrestricted access.*

5. *In breach of the legal duty, defendant wrongfully and negligently omitted to:*

5.1 *ensure that areas within its jurisdiction and/or under its control and to which members of the public had unrestricted access were free of any danger/s and/or potential danger/s;*

5.2 *ensure that adequate measures were taken in all areas within its*

jurisdiction and/or under its control and to which members of the public had unrestricted access to safeguard members of the public against any danger/s and/or potential danger/s;

5.3 *take reasonable precautions to warn members of public of any danger/s and/or potential danger/s in all areas within its jurisdiction and/or under its control to which the members of the public had unrestricted access.”*

[3] The defendant denied these allegations and pleaded that:

“4.1 *The contents hereof are denied and the plaintiff is put to the proof thereof.*

4.2 *In amplification of such denial the defendant pleads that:*

4.2.1 *There was no legal duty on the defendant to repair the alleged uncovered manhole or to warn members of the public as pleaded merely on the basis that the alleged uncovered manhole fell within the area of jurisdiction and/or under the control of the Defendant; and*

4.2.2 *The defendant was not made aware of the alleged uncovered manhole.*

5.1 *Defendant denies that it was negligent as alleged or in any other way and pleads that the plaintiff was negligent in one or more of the following respects, namely:*

5.1.1 *The plaintiff, who frequently travels by foot to the water stop, was familiar with the site and surroundings;*

5.1.2 Plaintiff walked in the road when she should have walked on the sidewalk;

5.1.3 Plaintiff failed to apply caution and failed to keep a proper lookout;

5.1.4 Plaintiff failed to avoid the incident, which, by exercising reasonable and proper care, she would have been able to do so...”

[4] The parties agreed, in pre-trial proceedings, to a separation of issues in terms of Uniform Rules 33(4). As a result, the trial proceeded to determine the issues relating to the defendant's liability while those relating to plaintiff's quantum of damages stood over for later determination, should the defendant be found to be liable. The plaintiff and Barnabas Zwelihle Xwayi (Xwayi) testified in her case while Ian Quintas Wellman (Wellman), Pierre Maritz (Maritz) and Shafodien Hussein Japhta (Japhta) testified on behalf of the City.

[5] Plaintiff testified that she moved into house no 2[...], Ukubethana Street, Bardale Mfuleni in 2009. The only infrastructure on site at the time was an outside toilet and a tap next to it. She was and still is working for a fast-food outlet at the Cape Town International Airport where she daily had to report for duty at 04h30. On the 17 October 2013, at about 20h00, in preparation for the following day, she took a bucket and went to her tap to collect water. There was no water. She then decided to walk to the next street to look for water from the neighbours' taps. Although she was experiencing a water outage for the first time, she was aware of the general practice in the neighbourhood that, in such a case, one goes to fetch water from any neighbouring tap

where there was water.

[6] Plaintiff walked out of her yard, turned left into Ukubethana Street, proceeded for a few metres and turned right into Khwezi Street. Once in Khwezi Street, she elected to walk on the tarred surface of the road as the sidewalk, that was referred to as the pavement, was full of sand and overgrown with weeds and shrubs. According to the plaintiff, it was unsafe to walk on this sidewalk. An aerial photograph of the area, taken in February 2014, showed large deposits of sand on the tarred surface as well as on the sidewalk and, in some parts, completely covering the tarred surface of the road. It was already dark at the time. A high mast flood light, which was located in a section referred to as Garden City, provided light to the area. Although where she was walking was not in complete darkness, the light provided by the high mast light was insufficient. The distance from where she was in Khwezi Street to, where the light stood in Garden City, was neither measured nor estimated. As a result, it was not possible to get an indication of how well illuminated, or otherwise that area was.

[7] As she was walking, plaintiff fell into an open manhole with her right foot and broke her ankle. Two young women carrying pales of water, and who had just walked past her, came to her aid. One of them went to call the plaintiff's husband. The latter arranged for a vehicle that took her to the Delft Day Hospital. After receiving initial treatment, she was conveyed in an ambulance to Tygerberg Hospital, where she was admitted for further medical attention. She did not see the manhole before she fell into it

nor, was she expecting an open manhole in the road.

[8] In cross examination it was put to the plaintiff that she fell into the manhole because she was not keeping a proper lookout but was concentrating on finding a tap; that she walked on the tarred surface of the road, where it was not safe, instead of on the sidewalk. She maintained that she had never seen the manhole, or ever been in Khwezi Street before. This was because she had no reason to use that road as all the amenities, like schools, shopping centres and the like, were all located in the opposite direction from Khwezi Street. Towards the end of plaintiff's cross-examination, it was put to her that the City's witnesses would testify that: *"on the strength of the current situation with the manhole the evidence very strongly points to the fact that the manhole cover has never been removed"*.

[9] Xwayi, who lived opposite to the plaintiff in Ukubethana Street until he retired and left for the Eastern Cape in 2017, testified that he moved into the area in 2010. In 2013, approximately 2 months prior to the incident involving the plaintiff, he noticed an open manhole in Khwezi Street that posed a danger to road users. He went and reported it to the City's workers who were working nearby at the time. Their supervisor undertook to have it repaired. As a precautionary measure, Xwayi put 3 pieces of wood into the manhole and tied a red and white reflector tape to warn passers-by of the danger present in the open manhole. To his dismay people removed the pieces of wood, possibly to use as firewood.

[10] Xwayi identified the people to whom he reported as the City's employees because their protective clothing and their vehicle bore the emblem of the City. Secondly, when he reported the open manhole to their supervisor he did not turn him away but undertook to have it fixed. He was surprised when months later he learnt that the plaintiff had fallen into the manhole that was still uncovered. He got confirmation of the incident when he met plaintiff after she was discharged from hospital.

[11] For the defendant Wellman, a project manager in the City's Department of Human Settlements, testified about the development of the Bardale area, which started in 2006. His main responsibilities were to plan and implement low-cost housing developments. Bardale was a serviced site development. First, the City obtained the environmental authorisation, followed by the town planning approvals, and then the design of the civil engineering infrastructure (infrastructure). On completion, according to their norms and standards, the civil infrastructure would be signed off and handed over to the engineering department and, henceforth, be the latter's responsibility for maintenance. thereafter individual sites were created. These were later handed over to the identified beneficiaries. On handover, beneficiaries were required to sign relocation and acceptance letters, respectively. An inspection would be conducted with an individual beneficiary before taking occupation of the allocated site. The individual sites only had water and sanitation services and there were no formal houses built on site at the time.

[12] Phase 3B, according to Wellman, was completed in December 2009. Phase 5, which is adjacent to Phase 3B, was only completed in 2018. Although it initially appeared that Wellman was personally involved when the plaintiff signed the relocation letter on the 7 December 2009, it became clear that he was not present as he was not aware that plaintiff did not sign the acceptance letter on the 9 December 2013. The same is the case with the handover of the infrastructure. Though he insisted that the latter would not have been handed over to the Engineering Department, if it were not completed according to the norms and standards, he could not state with certainty when the handover took place. He asserted, nevertheless, that the manhole in question would have been covered on handover. So too, would have been the case with the pavement, which would have been tarred, he maintained. These assertions were made notwithstanding the fact that the human settlement used agents and consultants to do the inspection and handover.

[13] Wellman confirmed that high mast lights, that were approximately 40 metres high, were used in the area. This was because the area was “*fairly extensive*” and these type of lights could provide sufficient illumination. He conceded, when cross-examined, that he was never in the area at night during 2013, nor was he in any way attached to the electricity department of the City. He had also not tested the lights to determine their efficiency. He could not dispute that in 2013, the particular manhole cover did not go missing. It was also difficult for him to say whether it would have been safe to walk on the sidewalk, in the state in which it was.

[14] Maritz, the manager for water reticulation in the City, testified about the problems the City is experiencing and the measures it had put in place to curb the theft of metals, in particular, manhole covers. According to Maritz, there are 10700 kilometres of pipes carrying potable water throughout the City and about 9000 kilometres in the sewer network. These pipes are mainly underground. There are currently 20400 manhole covers in the water reticulation network. These increased from roughly 192000 in 2013. For every 80 metres there is a manhole with a cover along the sewer network. In addition, a manhole, with a cover, is placed on every gradient change. These are meant to deal with the velocities as the system operates at a certain velocity for self-cleaning. In the past, these manholes used to be located inside the yards at the back but because of problems of access, they are now installed in the road.

[15] Maritz was familiar with the Bardale development. His department took over the water reticulation network on its practical completion. By practical completion he meant that the project, in which his department would have been involved from the planning stage, was constructed according to specifications in the tender documents. Although he insisted that the manhole cover in Khwezi Street would have been installed on completion, since as a norm the City would not take over a bulk infrastructure until it was practically completed it was, however, not until the 11 February 2020, that he went physically to inspect it.

[16] To curb the scourge of the theft of metal the City put in place various measures. On the technical side the City installed manhole covers with lock mechanisms that

made it difficult to remove without using special tools; used microdot technology; took stock to establish how many different types of covers were in the system and the areas where emphasis needed to be placed to stem the tide of theft. The City also embarked on an educational awareness campaign. These included working closely with neighbourhood watch groups, sharing information with the police and establishing a Metal Theft Unit as well as Research and Development Unit. Some of these measures were already in place in 2013.

[17] The City also has a computer programme, called the C3, for reporting missing or stolen manhole covers as well as sewer blockages. A complaint may be lodged on this system via Short Message System (SMS), telephone or email. It can be by a member of the public or by the so-called pick-up process, i.e. where an employee of the City comes across a problem, like a missing manhole cover or a blockage, and notify the city through the C3 system.

[18] Once a complaint was lodged, it would be send to the depot, indicating the area from where it emanated. The date and the time of the complaint, as well as the name of the person who lodged the complaint, would also be recorded. The depot, according to Maritz's explanation in this context, is the place with the resources, i.e. where the appropriate tools and spare parts are kept. The staff that has to respond to the complaints is also stationed in the depot. Only one team is sent to respond to a complaint even if it involved a missing manhole cover and a blockage. Plan time, i.e. the reaction time by the team, from when the call of a complaint is received and entered into

the system to the time another staff member reacted to it, is also recorded. Thereafter, an entry would be made in the system to record the resolution of the problem. The information collected on the C3 system, such as whether a blockage was an engineering problem or a misuse of the system and the trends in theft and blockages, is used for planning and budgeting purposes.

[19] In preparing to give evidence in court Maritz drew records, from the C3 system, of all the complaints received regarding stolen or missing manhole covers for the period 1 January 2013, to 31 December 2013. These records showed that there was no reported stolen or missing manhole cover in Khwezi Street during this period. There was also no proof of a replacement of a stolen or missing manhole cover during the period. I digress to point out that the C3 system has a feature called the free text. This feature helps where the name of a street or suburb is. Using the misspelled name, the correct name can be established. Even using this feature, nothing relating to Khwezi Street was picked up on the system during this period.

[20] On inspection of the manhole in question, on the 11 February 2020, Maritz concluded that this was an A2 hinged cover that will require a special tool to open and remove. Secondly, that to remove the cover you needed to remove the frame as well. As the tarmac around the manhole was homogenous with the rest of the tar, on that section of the road, he concluded that this was the original cover. He also opined that if the manhole had been left open sand would have deposited into the pipes and affected the self-cleaning velocity. This was because sand, immediately when it becomes wet, compacts to what is referred to as 90% modification astro (it hardens). He arrived at

these conclusions based on his 24 years' experience in water reticulation. I shall in the course of analysing the evidence deal with the probative value of Maritz's opinions.

[21] In cross-examination, Maritz conceded that these type 2A manhole covers were also susceptible to loss or theft. He also admitted that he was not actively involved in the Bardale development between 2009 and 2013. He was not certain of the date of the handover of Phase 3B. He thought that one Chart Moller, the district manager for the region, could have dealt with the handover of the development.

[22] Japhta, an administrative officer whose duties with the City included drawing reports, used a programme called SAP, which is where the City's data is stored, to search for any report of a sewer manhole cover missing in Khwezi Street during the period 1 January 2013 to 31 December 2013. He also used the wild card feature on the system to search for any word remotely connected to Khwezi, and found no report of a missing manhole cover in that street. He was not certain but thought that he may have searched from 2013 until 2020 and found no report relating to Khwezi Street. There was, however, a report of a missing manhole cover in Ukubethana Street in September 2014. He confirmed that when the City needed to replace a manhole cover this would be sourced from the depot, but was not certain whether this would be recorded in depot's books.

[23] It is on this evidence that the court must determine whether the plaintiff has proved, on a balance of probabilities, that (i) the City owed her a duty to keep the

streets safe by, *inter alia*, ensuring that manholes are kept covered, (ii) that, in breach of this duty, the City's employee to whom Xwayi reported the missing manhole cover, negligently omitted to alert the City, as a result of which, she fell into the open hole and injured her ankle, and (iii) that there is a causal connection between the employee's negligent breach of his duty and the damages she suffered.

[24] The plaintiff's claim is based on delict. To be successful the plaintiff must prove all the elements of the delict, being, conduct, unlawfulness or wrongfulness, fault, damage and causation. The question of plaintiff's damages, if any, has been left for later determination.

CONDUCT

[25] There is usually no problem where the offender committed an act that resulted in the infringement complained about. Difficulties often arise where the infringement is the result of an omission. The problems arising from omissions in the sphere of delicts have persistently exercised the minds of lawyers¹. The problem has again raised its head in this matter.

NEGLIGENCE

[26] The test for negligence was formulated by Holmes JA in *Kruger v Coetzee*² as follows:

"For the purposes of liability culpa arises if -

¹ See *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA), *infra*, at para [1].

² 1966 (2) SA 428 (A) at 430.

(a) *a diligens paterfamilias in the position of the defendant -*

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps.

This has been constantly stated by this Court for some 50 years. Requirement (a) (ii) is sometimes overlooked. Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases.”

[27] In *Mashongwa v Passenger Rail Agency of South Africa (PRASA)*³ the Constitutional Court held that:

“[40] The real issue on this aspect of the case is not whether the posting of a single guard, or three guards, could have prevented the attack. It is whether the steps taken by PRASA could reasonably have averted the assault. Crucial to this inquiry is the reasonableness of the steps taken. However, it must be emphasised that owing to the fact that PRASA is an organ of state, the standard is not that of a reasonable person but a reasonable organ of state. Organs of state are in a position that is markedly different from that of an individual. Therefore, it does not follow that what is seen to be reasonable from an

³ 2016 (3) SA 528 (CC) at para [40].

individual's point of view must also be reasonable in the context of organs of state. That approach would be overlooking the fundamental differences between the State and an individual. It would also be losing sight of the fact that the standard of a reasonable person was developed in the context of private persons."

WRONGFULNESS

[28] Where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability: it will attract liability only if the omission was also culpable as determined by the separate test, formulated in *Kruger v Coetzee*, *supra*, of reasonable foresight. In the particulars of claim, where the negligence is founded on an omission, a plaintiff must not only set out the negligent omission relied upon but also the facts relied upon which, if proven in the trial, will establish wrongfulness⁴. This is so because an omission, is not *prima facie* unlawful. In *casu*, the plaintiff, in my view, has met this requirement. The negligent omission of the City and the facts relied upon were set out in paragraphs 4.1, 4.2 and 4.3 of the particulars of claim quoted *supra*.

[29] As far as the evolution from almost immunity for municipalities for omissions to liability in certain circumstances is concerned, the seminal judgment of Marais JA in *Cape Town Municipality v Bakkerud*⁵ is apposite. In concluding that a failure by a municipality to keep streets and pavements in a safe condition could, in certain

⁴ See *Minister of Law and Order v Kadir* 1995 (1) SA 303 (AD) at 318 I – J.

⁵ 2000 (3) SA 1049 (SCA).

circumstances, attract delictual liability, the court held that:

“[27] While the court a quo’s conclusion that it was open to it to re-visit the general or relative immunity of municipalities and, if justification existed to jettison the notion, was therefore correct, I think that, having done so, it was wrong to substitute for it what amounts to a blanket imposition upon municipalities generally of a legal duty to repair roads and pavements. 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 intended to be generally applicable. They are making value judgments ad hoc.”

[30] Negligence and wrongfulness are two separate elements of a delict and care must be taken not to conflate the two. Like negligence, wrongfulness is also an essential and discrete element that must be proved to found liability. The Constitutional Court in *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)*⁶ (Le Roux):

“[122] In the more recent past our courts have come to recognise, however, that in the context of the law of delict: (a) the criterion of wrongfulness ultimately depends on a judicial determination of whether — assuming all the other elements of delictual liability to be present — it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and (b) that the judicial determination of that reasonableness would in turn

⁶ 2011 (3) SA 274 (CC) at para [122].

depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.”

In addition, in *Country Cloud Trading CC v MEC, Department of Infrastructure Development*⁷ the Constitutional Court held that:

“[20] Wrongfulness is an element of delictual liability. It functions to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether ‘the social, economic and others costs are just too high to justify the use of the law of delict for the resolution of the particular issue’. Wrongfulness typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirable or overly burdensome to impose liability.

[21] Previously, it was contentious what the wrongfulness enquiry entailed, but this is no longer the case. The growing coherence in this area of our law is due in large part to decisions of the Supreme Court of Appeal over the last decade.”

[31] Negligence is not inherently unlawful⁸. In *Minister of Safety and Security v Van Duivenboden*⁹ the SCA held that negligence is unlawful, and thus actionable, only if it occurs in circumstances that the law recognises as making it unlawful. Where the negligence manifests itself in a positive act that causes physical harm it is presumed to

⁷ 2015 (1) SA 1 (CC) at paras [20] – [23].

⁸ *Stedall and Another v Aspelling and Another* 2018 (2) SA 75 (SCA) at para [15].

⁹ 2002 (6) SA 431 (SCA) at para [12].

be unlawful. The SCA further held that a negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm. In *Stedall and Another v Aspelling and Another*¹⁰ Leach JA, writing for the majority, held that the phrase “*legal duty*” in these circumstances:

“...means no more than that the omission must not be wrongful as judicially determined in the manner referred to above, i.e. involving criteria of public and legal policy consistent with constitutional norms – see Hawekwa Youth Camp and Another v Byrne 2010(6) SA 83 (SCA) at para 22. Importantly, the concept is not [to] be confused with the English law concept of “a duty of care” which encompasses both wrongfulness and negligence...”

CAUSATION

[32] The plaintiff must also prove that the wrongful omission of the City to keep the manhole covered was the cause of her fall and breaking of her ankle. She must establish that but for the omission to cover the manhole she would not have fallen and broken her ankle. This is called factual causation which is established by the application of the “*but for*” test. In *Minister of Police v K*¹¹ Zondi JA held at paragraph 56 that in the case of an omission, the enquiry involves:

“...substituting the defendant’s conduct with a hypothetical positive act and then asking whether, in the latter case, the harm causing event would still have occurred. If this is answered in the negative, the defendant’s conduct was indeed a factual cause of the plaintiff’s harm; while if answered in the affirmative, the

¹⁰ At para [16].

¹¹ Case No 403/2019 [2020] ZASCA 50 (6 May 2020).

defendant's conduct was not the factual cause of the plaintiff's harm and caedit quaestio"

And at paragraph [59] that:

[59] The existence of a relationship of factual causation between the defendant's conduct and the harm suffered by the plaintiff is not sufficient to establish the presence of a legally relevant causal connection. An additional test is required to determine whether the defendant's conduct was a legal cause of the plaintiff's harm. This is legal causation. It entails an enquiry into whether the alleged wrongful act is sufficiently closely linked to the harm for legal liability to ensue. Generally, a wrongdoer is not liable for harm that was not foreseeable."

[33] In *Van Duivenboden, supra*¹² it was held that to discharge the onus:

"[25] ... A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics."

[34] There are two contradictory versions before Court. There is the plaintiff's version, corroborated by Xwayi that the manhole cover in Khwezi Street was missing and that he had reported it to the City's employees. On the other hand, there is the version of the City that, since inception, the manhole in Khwezi Street had never been left open. The

¹² *Van Duivenboden* at para [25].

evidence of the City's witnesses was said to have been corroborated with documentary evidence. The SCA in *Stellenbosch Farmers Winery Group Ltd and Another v Martell Et Cie and Others*¹³ set out the approach to the resolution of factual disputes as follows:

"[5]...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's 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 extracurial 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's 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. The hard case,

¹³ 2003 (1) SA 11 (SCA) at para [5] .

which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[35] In her Heads of Argument (HOA) Counsel for the defendant undertook an evaluation of the evidence for the plaintiff in an effort to show its unreliability and to lay a basis for its rejection. While most of the criticism against the evidence of the plaintiff is not on the scale suggested, I am compelled to deal with each such criticism to demonstrate its lack of merits:

35.1 that it was simply incredible for the plaintiff to maintain that she was not aware of the manhole in Khwezi Street despite having lived metres away from it for a period of almost 4 years. I find nothing incredible in the plaintiff's evidence on this point. The plaintiff gave a reasonable explanation why she had never used Khwezi Street: nothing compelled her to use Khwezi Street since all the amenities in Bardale were located away from Khwezi Street. Counsel, notwithstanding a lengthy cross-examination of the plaintiff, was unable to point to a single instance or event that would have necessitated her to use Khwezi Street or prove that she had indeed used Khwezi Street in the past. The mere fact that she had lived in the area for four years at the time is no basis for concluding that she must have used the street before the accident.

35.2 that it was clearly improbable and incredible that plaintiff would set out at

20h00, when it was dark on a route she has never taken, to go and find water from a tap, whose exact location was unknown to her. This submission ignores two aspects of the plaintiff's evidence. First, plaintiff had to be up at 02h30 to report on duty at 04h30. It is therefore reasonable to prepare a night before, if you have to be up that early. Secondly, Bardale was an informal settlement where people did not have the luxury of taps inside their informal houses. She therefore had to fetch the water a day before to keep in her house for use the next day, which, as stated, started very early. It also ignores the evidence of the defendant's witnesses that each serviced site had a toilet, a tap and basin next to it. Irrespective of whether or not plaintiff had been to any site on the street where she intended to fetch water, it is obvious that she would have easily located any tap in any yard: this would be next to the concrete toilet. This was the set up in the entire development. That plaintiff was only able to locate the specific tap she intended to use after the accident does not make her decision to proceed in that direction in search of water improbable, nor incredible in the circumstances.

- 35.3 There is nothing improbable in the plaintiff's evidence that on the 17 October 2013, she was experiencing a water outage for the first, and probably the last time. The evidence of Xwayi that he had often experienced water outages does not affect her version. The water outages experienced by Xwayi may not have occurred on occasions when plaintiff was in the area or may have only affected Xwayi's site. More so, plaintiff

was not confronted with specific incidences of water outages where she would obviously have been aware thereof to show the improbabilities in her evidence. In the absence of such evidence, it is opportunistic to allege that Xwayi has contradicted herself.

35.4 Plaintiff did not come with a version of the two women who were also coming back from fetching water, only when she was confronted about it in cross- examination, as was argued. In her evidence in chief, and to a question by her counsel as to whether she got help after falling into the manhole, her answer was *“Yes, my Lord. There were two ladies who had passed by me who had also buckets full of water from the other side. And then when I called out for assistance, they came to me”*. I have already dealt with the issue of the uniform location of taps in Bardale. There is therefore nothing improbable in the plaintiff not asking these two women where to find a tap with water. It is not clear what counsel meant with the statement that it was dark: plaintiff’s evidence was that the high mast light did not provide sufficient illumination of the area where she was walking but that does not necessarily mean that it was completely dark. It is therefore, incorrect to submit that plaintiff was walking in the dark desperate to find water and not knowing where she was going.

35.5 The submissions that the plaintiff was negligent by electing to walk on the tarred surface when a sidewalk was available is unfounded. This argument is against the clear documentary evidence, in the form of the photographs of the area, showing the sidewalk in Khwezi Street

completely covered by sand and overgrown with shrubs and grass. That the defendants' witnesses were aware that the sidewalk has always been tarred does not detract from the fact that it was completely covered in sand and overgrown at the time and could easily be mistaken for being untarred. It is self-serving to ask the defence witnesses questions about the state of the sidewalk in 2013, but referring them to a photograph taken in 2019, and merely asking them to confirm that it is how it looked back in 2013.

35.6 There is no merit in the argument that plaintiff was negligent by walking closer to the middle of the road than on the pavement. Once it is admitted that the sidewalk was full of sand and overgrown with weeds and that it would have been difficult, if not unsafe, to walk on it does not make any difference, in my view, where on the tarred surface she chose to walk. I shall deal later in the judgment with the submission that the plaintiff would not have stepped into the manhole with her right leg had she chosen to walk closer to the pavement. Suffice, at this stage, to point out that the risk of being hit by a vehicle, being the only risk that she could have faced, was too remote, as the area had no heavy vehicular traffic (she was not expecting an open manhole in the street). Khwezi Street, at the time, was on the outskirts of Phase 3B, was sparsely populated and the adjacent phases were not yet developed, or inhabited. The street was straight with no curves and, even if a vehicle were to approach her from the front, or the back, its lights would have warned her to move out of its way.

- 35.7 The submission that Xwayi and the defendants' witnesses contradicted the plaintiff's evidence that Khwezi Street was not tarred further on, is immaterial and does not affect her credibility. Plaintiff had not reach that part of the road covered in sand where she could perhaps have noticed that it was in fact tarred. Xwayi, on the other hand, had a vehicle, had used Khwezi Street before and was in a position to notice that the street was tarred. Once again, the aerial photographs of the area, taken in 2014, shows copious amounts of sand covering the surface of the road to such an extent that no tar was visible. Her evidence that the latter part of Khwezi Street was not tarred, though understandable in the circumstances, remains immaterial.
- 35.8 The plaintiff never testified that there were streetlights where she was walking, or that it was dark as alleged in Counsel's submission. All she said was that the high mast light, which was in Garden City, did not throw sufficient light on the surface where she was walking. Her mention of streetlights was merely in reaction to the court's question whether there were any street lights in the area. After she said there were street lights she immediately clarified what she meant by streets lights, namely, the high mast light in question.
- 35.9 It is correct that plaintiff used phrases such as "*it was becoming dusk*"; "*it was becoming dark*" and "*it was dark*". She was, however, not veering from one to the other, as was submitted. In her evidence in chief, she said it was just becoming dark. It was in cross-examination, and for reasons

that are not clear, that it was put to her that she had said it was becoming dusk. This was clearly incorrect. It was her evidence throughout that it was dark.

35.10 The submission that the plaintiff contradicted herself when she said she was not distracted by searching for a tap is incorrect. From her answer, that she was frustrated because she did not have water, the court sought to clarify the question that was asked, as it appeared that she did not understand it. It cannot be inferred from her answers that she had contradicted herself by denying that she might have been distracted by searching for a tap. She denied that she was searching for a tap since, as pointed out *supra*, she knew where to find one.

35.11 The submission that the plaintiff was vague about the exact circumstances of her alleged fall into the manhole is not borne by the evidence. The plaintiff clearly stated that when she felt that she had fallen, that was when she realised that she had fallen into a manhole (which she called a drain). She further stated that she then dragged herself out. Counsel, at that time, accepted this explanation.

35.12 The submission that the photographs discovered by plaintiff's legal representatives cannot in any way substantiate her version, as no evidence was lead to prove their provenance, is simply without merit. On the 12 February 2019, the plaintiff's legal representatives gave notice, in terms of Rule 36(10), of her intention to produce photographs at the trial depicting the scene of the accident. These included photographs 1, 2, 3

and those on pages 28 and 29 in the trial bundle. These were made available to the City for inspection. The City was also notified, as the rule provides, that unless it objected within ten (10) days to such photographs being presented in evidence the plaintiff will be entitled to produce such photographs without formal proof thereof. There was not even murmur of objection from the City at the time.

In *Hotz and Others v University of Cape Town*¹⁴ the Court held that:

“[27] Uniform rule 36(10) provides for the admission without the need for formal proof of plans, diagrams, models and photographs. The mechanism for doing so is to give notice of the intention to produce such items at the hearing and to require the other party to admit them. If there is no response to that notice those items may be received in evidence on their mere production without further proof thereof. There was no response to the notices delivered by the university and hence all the photographs and video footage were receivable in evidence without further proof. It was in fact tendered to Allie J but we were informed from the bar that she indicated, that she did not think it necessary to view the material. Perhaps that was because the description of the contents of the video material was, in all but one respect, not disputed. That is the approach that most favours the appellants and I accordingly adopt it.”

¹⁴ 2017 (2) SA 485 (SCA) at para [27].

The effect of this rule is that *“if the prerequisites [of the rule] are established it creates an admission only (i) as to the authenticity of the document, i.e. it dispenses with the need to call the author of the plan or to provide prove of its authorship, and (ii) as to the physical features found by the author”*¹⁵.

It is correct that the plaintiff admitted that she had never seen these photographs before, did not know when they were taken, or by whom nor, who the persons were depicted on one of the photographs. Plaintiff, however, insisted that the photograph in question depicted the area where the accident occurred and she was not contradicted in this respect. In fact, following up on her answer, Counsel for the City confirmed that the two men were standing in Khwezi Street. Counsel also conceded later on that the area depicted in the photographs was *“the area in question”*.

What remains is to deal with Counsel’s submission that the photographs cannot substantiate plaintiff’s version, as the date on which they were taken has not been established. While the exact date on which the photographs were taken cannot be established by direct evidence, an inference¹⁶ can be drawn from the surrounding circumstances that they were certainly taken around or after November 2009, as is evident from the shacks that are depicted in the photographs. These shacks could only have been erected after people had moved into the area, which was

¹⁵ *Shield Insurance Co. Ltd v Hall* 1976 (4) SA 431 (A) at 438 F.

¹⁶ See Principles of Evidence page 538 at § 30.5.3: **Inferences in civil proceedings** *In civil proceedings the inference sought to be drawn must also be consistent with all the proved facts, but it need not be the only reasonable inference: it is sufficient if it is the most probable inference.*

around November 2009. What they establish is that the manhole was not covered at the time when the photograph was taken.

35.13 The submission that the plaintiff has never complained about the uncovered manhole before or after the accident is without substance. As already, stated plaintiff was never in Khwezi Street before the accident and therefore, could not be expected to complain about a situation that she did not know existed. There was no legal duty on her to report the manhole when, on her return from hospital, she found that it was still open.

The Plaintiff confirmed in cross-examination that she learned about the complaint laid by Xwayi after her discharge from hospital and had shared this information with her legal representatives. What her legal representatives did with this information is not for her to answer. That she had shared this information with her legal representative can be inferred from the fact that the latter knew about Xwayi and even called him as a witness.

35.14 It is submitted that there is no material corroboration for the plaintiff's version of her fall into an uncovered manhole. It was argued that it was puzzling that her husband of many years was not called as a witness as he could have provided evidence in support of her version.

The defendant's approach was dichotomous: on the one hand, it was denied that there was any legal duty on it to repair the alleged uncovered manhole or to warn members of the public merely on the basis that the

alleged uncovered manhole fell within the area of its jurisdiction. In meeting this case, the plaintiff testified about the uncovered manhole into which she fell and called Xwayi for corroboration.

Inexplicably and without pleading it in the alternative the defendant alleged that the plaintiff was negligent, *inter alia*, in that while she was familiar with the surroundings, she walked in the road when she should have walked on the sidewalk, failed to apply caution, or keep a proper lookout and failed to avoid an incident when by exercising reasonable and proper care she would have been able to avoid falling. Implicit in this defence is that the manhole was uncovered and it was due to the plaintiff's contributory negligence that she fell into it. In the circumstances, her husband who came after she had already fallen and injured herself could not offer any corroboration as to whether she kept a proper lookout or not. In this respect, he could not have contradicted her evidence as to how she had fallen into the manhole.

Even if there is no contradiction in the City's case the failure by the plaintiff to lead the evidence of her husband does not justify an inference that he would not have corroborated her version of events. In *Rand Cold Storage and Supply Co Ltd v Alligianes*¹⁷ it was held that:

"In the present case two persons, one of whom is an independent witness, testified for the respondent and gave an explanation of how the accident had happened. It is just as probable that the respondent regarded his case as "safe" with the evidence he had led of himself and

¹⁷ [1968] 2 ALL SA 241 (T) at 243.

Mrs. Venter as that Lemas would, if he had been called, have contradicted those two witnesses. In Seamatso's case the Court had no eyewitness account at all of the accident. The rule laid down in Galante v Dickinson, 1950 (2) S.A. 460 (A.D.), was therefore applied, viz. that where the defendant (driver) does not give evidence and there is consequently no evidence of what he had done to avoid an imminent accident, the alternative favouring the plaintiff could be adopted by the Court as the true one. The decision in Galante's case is obviously not applicable to the facts of the present case, where the issue raised is not one of having no explanation offered but one of having two diametrically opposite explanations put forward. The failure to call Lemas may be attributable to the respondent's sanguine view of his case or to the absence of Lemas from the country or to his death or to his hostility for reasons unconnected with the present dispute (cf. Elgin Fireclays Ltd v. Webb, 1947 (4) S.A. 744 (A.D.) at p. 750). The inference that he was not called because he would have contradicted the defendant's version is not a more probable one than any of the others and its weight is, therefore, in my opinion, nil. It is axiomatic that a party need not, and cannot be blamed if he does not, call all the witnesses who may give pertinent evidence; he is entitled to take the risk of offering less than all the evidence available to him if he is of the opinion that what he has offered would suffice to win. He may of course in the result be shown as having been too confident but that is something different from being found to have deliberately suppressed evidence unfavourable to him—which is the conclusion sought to be drawn here. In Brand v Minister of Justice

and Another, 1959 (4) S.A. 712 (A.D.), it is said at p. 716:

“This statement does not, however, mean any more than that, if, in the absence of the testimony of the witness in question, the evidence is otherwise equally balanced, the onus will come into effective operation. The statement in question does not mean that any greater obligation to call the witness rests upon the onus-bearing party: it merely means that, if he does not call the witness, he runs the risk of the onus proving decisive against him.”

In the present case the respondent rested his case on his own evidence and that of Mrs. Venter, and the magistrate accepted it as decisive of the issue. The respondent was not examined on whether or not the witness Lemas was available. It is true that the respondent, at the criminal trial of Ngwenya, had said that he had Lemas available as a witness, but this was not investigated again at the civil trial. Nor is there any evidence that he was not available as a witness to the appellant.

No inference, in my opinion, is to be drawn from the failure to call Lemas either for or against the respondent.”

No adverse inference can therefore be drawn, in the circumstances against the plaintiff for not calling her husband to testify.

[36] Although cross-examination of Xwayi was perfunctory and nothing contradictory was elicited his evidence was nevertheless criticized. It was argued that Xwayi struggled with identifying his own house on an aerial photograph of Bardale and had to be prompted by plaintiff’s Counsel to identify it as well as the manhole in question. I do not agree that Xwayi was struggling to identify the manhole or his house, as suggested.

It is correct that Xwayi was at first confused by the photograph as it was presented to him. After making a request that the photograph be turned around and, with the help of the interpreter and Counsel for the plaintiff's question, he was able to comprehend and relate to the photograph. He was thereafter, able without any prompting, to identify not only his house but also, importantly, the manhole in Khwezi Street that is in issue. His initial hesitation with the photograph, as Counsel for the City conceded, was not due to mendacity but rather confusion. In my view, it was also due to lack of sophistication. His remarks that he was seeing the photograph for the first time therefore, must be put into proper context. When he said he was seeing that photograph for the first time, in my view, he meant that particular copy. His initial confusion with the photograph is, in the circumstances, immaterial and warrants no further scrutiny as it does not detract from his overall credibility.

[37] I have often expressed my frustrations with the tendency of some Counsel to ask a witness, plainly illiterate and unsophisticated, to make a pointing out or an identification of something depicted on a plan, diagram or photograph, without first establishing whether the witness was *au fait* therewith. In some instances, the document in front of the witness would be a poor copy with little or no resemblance to the original. From the witness' inability to use or relate to what the document represents, his or her credibility would then be opportunistically called into question. Where photographs, plans or diagrams are to be used and to avoid a witness's credibility being unnecessarily impugned, it is imperative to first establish whether the witness understands what he/she is asked to deal with, and where it appears that the witness

has difficulties with comprehending the document and what he/she is expected to do. It would be prudent for a presiding officer to intervene and clear any misunderstandings before allowing him or her to use it to testify. Without being disrespectful to Xwayi, who only went as far as standard 4 in his formal education and clearly unsophisticated, he fits into this category.

[38] While Counsel for the City conceded that Xwayi at some point in time had pointed out an open manhole to an employee of the City, it was argued that it was probable, in the light of all the evidence, that it was not the same manhole into which the plaintiff allegedly fell on the 17 October 2013. This submission is against the clear and uncontradicted evidence of Xwayi, who independently pointed out the same manhole as the one pointed out by the plaintiff that it was the manhole in Khwezi Street which has no cover. There can therefore be no merit in the argument that plaintiff and Xwayi had probably referred to different manholes, respectively.

[39] There is equally no merit in the submission that Xwayi could not remember the exact date on which he made the complaint to the City employee. It is sufficient, in my view, that Xwayi was certain that he made this complaint approximately two months prior to the accident involving the plaintiff. It would have been suspicious if, for example, not knowing that one day he would be called to testify about the incident and therefore made a note of the date, Xwayi would have alleged to know the exact date on which he made the complaint. His credibility and the probative value of his evidence is not dented by him not recalling the exact date on which he made the complaint or the name of the person to whom he complained. The date and name becomes immaterial once it is

conceded that Xwayi made this complaint to a City's employee prior to the incident involving the plaintiff.

[40] Counsel for the City, on the other hand, urged the Court to accept the version of the City as proffered by Wellman, Maritz and Japhta. She argued that the City's version was the more probable of the two versions.

[41] Wellman, although he was the project manager of the Bardale development, was not personally involved in the handover of the infrastructure to the City's engineering department. Nor could he, from personal knowledge, state whether the manhole cover was in place on handover or on the date on which the accident took place. He could only assume that it would have been in place, otherwise handover would not have taken place. He could therefore, not dispute that the manhole cover could have gone missing between 2009 and 2013. Wellman did not refer to any records, other than the elementary map of the Bardale development and the relocation and acceptance letters respectively, that could have assisted him to determine the exact date of the handover of the infrastructure, the exact items in the infrastructure and who on the City's engineering department verified the completeness of the project. These records, in particular, could have assisted him to establish the facts. Without this information, it remains a speculation on his part to say that the manhole cover was in place.

[42] Maritz, whose educational qualifications were not placed on record, but who has 24 years' experience in water reticulation, only inspected the manhole cover in question

in February 2020, almost eleven years after the handover of the infrastructure. His assertion therefore, that the civil infrastructure was built according to the norms and standards was not based on personal knowledge, from inspecting the works, but solely on what would normally have happened on completion of the construction. His opinion that the cover was the original one was based on his view that the tar around the manhole was homogenous with the rest of the surroundings.

[43] The problem with Maritz expressing an opinion is that he was not qualified as an expert nor was there compliance with the provisions of Rule 36(9) before calling him to give opinion evidence. This subrule provides that no person shall, save with the leave of the Court or the consent of all the parties, be entitled to call as a witness any person to give evidence as an expert upon which evidence of expert witnesses may be received. There was also no compliance with subparagraph (b) in that the summary of his opinion and his reasons therefor was not delivered to the plaintiff.

[44] The main purpose of Rule 36(9) is to require the party intending to call a witness to give expert evidence to give the other party such information about his evidence as will remove the element of surprise from the trial¹⁸. The opinion that Maritz expressed, in my view, can only be expressed by an expert, qualified as such, in road construction and, on the qualities of the tar, by a chemical engineer. That the City intended to lead this type of evidence was foreshadowed in the plaintiff's cross-examination, when it was put to her that on the strength of the current situation with the manhole the evidence

¹⁸ See Erasmus D1 – 488B.

strongly pointed to the fact that the manhole has never been removed. It was at that point, that the City ought to have realised that it needed to qualify Maritz as an expert before he can tender such evidence. This it could have done by complying with the provisions of Rule 36(9). However, if it only dawned on the City at that late stage that Maritz needed to be qualified as an expert and a summary of his expert opinion ought to have been furnished, then by seeking the leave of the Court or the plaintiff to lead his evidence on this aspect. Although Counsel for the plaintiff gallantly tried to attack Maritz's evidence on this point it remains a trial by ambush that the plaintiff was not afforded an opportunity to prepare to meet the opinion evidence of Maritz.

[45] How then must the evidence of Maritz, which was lead in contravention of Rule 36(9), be dealt with? In *Colt Motors (Edms) Bpk v Kenny*¹⁹ the Court held that:

“Waar deskundige getuienis nie deur die Hofreëls toegelaat word nie tensy die party wat dit wil lei eers sekere stappe doen (naamlik die aflewering van 'n kennisgewing of die verkryging van die verlof van die hof of die toestemming van die teenparty), kan die party wat versuim het om die bepaalde stappe te doen nie sodanige getuienis in enige geval lei (terwyl die teenparty in die hof nie miskien onmiddellik besef dat dit op deskundige getuienis neerkom nie) en daarna, as geen beswaar gemaak word nie, aanvaar dat die hof die nodige verlof of die teenparty die nodige toestemming verleen het nie.

Ek gaan natuurlik nie sover om te sê dat 'n hof nooit sy verlof, of 'n teenparty nooit sy toestemming, stilswyend kan gee nie. Dit kan natuurlik geskied. Voordat

¹⁹ 1987 (4) SA 378 (T) at 387 F.

dit op sulke wyse geskied, moet dit duidelik wees dat die hof besef het dat sy verlof, en dat die teenparty besef het dat sy toestemming, verlang word, en dat hulle dit stilswyend verleen het.

In die onderhawige geval was dit op geen stadium duidelik dat sodanige verlof en toestemming verlang is nie. Dit kan dus nie afgelei word dat dit stilswyend verleen is nie.”

[46] The opinion of Maritz regarding the manhole cover in question and the tar surrounding it will in the circumstances not be accorded any determinative weight. If I am wrong and Maritz was not testifying as an expert but only expressing an opinion, then his opinion that the manhole is the original one because the tar around it was homogenous with the surrounding area is irrelevant. In *Ruto Flour Mills Ltd v Andelson*²⁰ the Court held that:

“In the case of Hollington v. F. Hewthorn and Co. Ltd., 1943 (2) A.E.R. 35 at p. 40, GODDARD, L.J., referred to the fact that it frequently happened that a bystander had a complete and full view of an accident and that it was beyond question that while he may inform the Court of everything that he saw, he may not express any opinion on whether either or both of the parties were negligent. According to GODDARD, L.J., the reason commonly assigned is that this is the precise question the Court has to decide, but in truth it is because his opinion is not relevant. Any fact that he can prove is relevant, but his opinion is not.”

²⁰ [1958] 4 ALL SA 198 (T) at 200 – 201.

[47] Maritz also relied on the records drawn from the C3 system to substantiate the point that no cover in Khwezi Street was reported missing during the period 1 January 2013, to 31 December 2013. Capturing information on this system is dependent on human intervention. It must be borne in mind that the City conceded that Xwayi had indeed reported a missing manhole to its employee but argued that this may not have been the one in Khwezi Street. This is inconceivable. Xwayi was not mistaken about the identity of the manhole that was exposed. His evidence that it was the same manhole as the one pointed out by the plaintiff was not challenged. The only reasonable explanation why there was no record on the C3 system is that the employee to whom Xwayi reported never forwarded the complaint to the relevant department, or did not do so before the end of 2013. When the missing cover was eventually picked up, it is possible that it was incorrectly recorded on the C3 system.

[48] The question that may then be asked is, when was the cover that Maritz found, when he went for an inspection in *loco* on the 22 February 2020, installed? The answer is that it was any time after the 31 December 2013. The records of missing and replaced covers in Khwezi Street, or Ukubhethana Street, for that matter, from the 1 January 2014, to date, have not been made available. Japhta, though he alluded thereto, was not certain that he had also looked at the records from 2014 to date. He was not even certain but thought that there may have been a record of a missing cover in Ukubethana Street in September 2014. He was, however, not stating this as a fact.

[49] The problem for the City is that its witnesses testified without having facts to back up their bald assertions. This problem could easily have been avoided if, with all its available resources, all the relevant records were drawn and reference was made thereto in evidence. With these records, the witnesses could have confirmed as fact those issues on which they lacked personal knowledge or had fading memories. An official of the City, who keeps custody of these records, could have placed them before court²¹. From these records, facts like when exactly in 2009 did the handover of the Bardale Phase 3B infrastructure to the engineering department take place, who actually did the handover and the list of items signed off, could easily have been established.

[50] In my view, the version of the plaintiff is not equipoised with that of the defendant, as submitted by the City's Counsel. Even if the plaintiff's version is the most probable and is to be preferred to that of the City. Plaintiff and Xwayi were factual in their evidence I have already remarked about the credibility of Xwayi, his independence and lack of bias. He corroborated the plaintiff's version about the open manhole in Khwezi Street. The submission that he and the plaintiff were not referring to the same manhole is, in my view, a last ditch attempt to avoid the conclusion that the plaintiff's version is the more probable one. I accordingly accept the plaintiff's version that on the 17 October 2013, she fell into an open manhole in Khwezi Street and broke her ankle.

²¹ Such records, in my view, would have qualified as public documents since they comply with all the requirements: (i) they were made by a public official; (ii) in the execution of a public duty; (iii) are intended for public use; (iv) they are accessible to the public. Alternatively, they could have been tendered into evidence in terms of section 11(1) of the Electronic Communications and Transactions Act 25 of 2002 which provides that information is not without legal force and effect merely on the grounds that it is wholly or partly in the form of a data or message.

[51] Acceptance of the plaintiff's version is not the end of the enquiry. The question remains whether the manhole was left open as a result of the City's omission in derelict of its legal duty to keep the street of Mfuleni safe for its inhabitants and any other persons using such streets and whether this was due to negligence. Counsel for the City submitted that a legal duty would only arise where there was a prior positive conduct. Relying on the judgment of Navsa JA in *Van Vuuren v Ethekwini Municipality*²² she argued that there was no evidence of prior positive conduct and reliance to find a legal duty was based merely on the fact that the manhole was within the City's jurisdiction. While it is correct that wrongfulness is a discrete element of delict and that it was for the plaintiff to establish the existence of a legal duty, I do not agree with the argument that the plaintiff has failed to do so and merely relied on the contention that the uncovered manhole was under the control of the City. Although the plaintiff's particulars of claim are not a model of precision, the necessary averments were nevertheless made: the plaintiff pleaded that the City, in breach of its legal duty, failed to ensure that the areas under its control were free from danger, to ensure that adequate measures were taken to safeguard members of the public and to take reasonable precaution to warn the public of any danger. The City was not left in doubt as to the basis upon which it was averred that it was liable.

[52] A duty may arise where the defendant has by lawful prior positive conduct (*commissio*) created a potential risk of harm to others. If the defendant then omits to take reasonable steps to prevent the risk from materialising (*omissio*) the duty is

²² 2018 (1) SA 189 (SCA).

breached²³. In terms of section 152 of the Constitution the object of local government is *inter alia* to ensure the provision of services to communities in a sustainable manner and to promote a safe and healthy environment. A municipality must strive within its financial and administrative capacity, to achieve these objectives. Regarding these objectives, the Constitutional Court held in *Democratic Alliance and Another v Masondo and Another*²⁴ that these are to ensure that government is efficient and effective in the rendering of services and the promotion of social and economic development. Flowing from this Constitutional obligation is a legal duty to ensure that services that a municipality provide are done in a safe way. The City owes a legal duty to protect the public from suffering any physical harm by the infrastructure through which it provides services for.

[53] I turn now to the question of negligence. It was argued that while it could be foreseen that an uncovered manhole in a public road could pose a serious risk, had the City been made aware of it, there was no evidence led to support the contention that the alleged incident was a foreseeable risk in the Bardale area. Relying on the judgment of the SCA in *Z v Smith*²⁵ that in determining what preventative steps the reasonable person would, or would not take, every case must depend on its own facts. It was submitted that the measures taken by the City to prevent and react to missing or stolen manhole covers, including the reporting system at the time of the incident in 2013, where those of a reasonable organ of state that operates in a limited resourced

²³ See *JP Midgley & JC Van der Walt "Delict" 2 Lawsa 2nd Edition* par 65; quoted in the *Van Vuuren* judgment at para [19].

²⁴ 2003 (2) SA 413 at para [17].

²⁵ 2015 (4) SA 574 (SCA) at para [24].

environment, as was stated in *Mashongwa*²⁶, *supra*.

[54] In the *Mashongwa* matter, *supra*, the appellant sued the respondent in delict flowing from injuries he sustained when he was attacked on one of its trains by robbers and thrown out of an open door. His assertion was that the failure to close the door and to post a guard on the train were the cause of his injuries and that these omissions were wrongful and negligent. While the Constitutional Court agreed that the omissions were wrongful, it declined to hold the failure to post a guard on the train as negligent. In coming to this conclusion the court considered the reasonableness of the steps taken to prevent the harm. It accepted that it was necessary to factor in security measures by route, region and time of the day and year and also that the steps that could be taken were constrained by the available resources. On the available information it could not conclude whether the steps which were taken were reasonable or unreasonable.

[55] In *casu* the City did not lead any evidence to show the adequacy of the system of reporting to detect missing manhole covers even in instances where its own employees failed to react to reports received from the public. Nor did it plead lack of resources to cover such instances. Instead it was argued, on the one hand, that the manhole cover in question has always been in place since 2009, and on the other hand, that Xwayi could have reported a totally different manhole to the one in Khwezi street into which the plaintiff fell. This argument goes against the clear evidence of the plaintiff, which was corroborated by Xwayi that the manhole cover in question is the one in Khwezi Street.

²⁶ At paragraph 26.

[56] I have dealt with the adequacy of the evidence of Xwayi regarding the employee to whom he had complained and the period during which he lodged this complaint. The fact that the City has no record of this complaint is precisely due to the negligence of this employee to forward the complaint to the C3 system. It is not overly burdensome to expect a local government, which has considerable resources to devote some of it to the maintenance of its infrastructure, including the replacement of missing or stolen manhole covers, and to ensure that its employees comply with their responsibilities by keeping a vigilant eye on any missing manhole covers.

[57] It is important to emphasise that the City does not allege that the reporting by Xwayi was not according to a prescribed procedure. This is because there is no prescribed procedure. Bringing the open manhole to the attention of a City employee, as Xwayi did, was sufficient. It is but one of the many ways in which the City can be made aware of the problem. It was the failure of this employee to forward the complaint to the reporting system that constitute negligence. The City is accordingly found to have been negligent and this negligence is the cause of the plaintiff's injuries.

[58] I need to deal with the submission that the plaintiff was also negligent and her negligence contribute to her own injuries. It was submitted that in the unlikely event that this Court were to find that the City was negligent, it was for this Court to reduce the damages recoverable by the plaintiff, having regard to the considerable degree to which she was at fault in relation to the damage in terms of section 1(1)(a) of the

Apportionment of Damages Act²⁷.

[59] I assume that the alleged contributory negligence of the plaintiff is with reference to the submission that she walked in the “*middle*” of the road where it was not safe, instead of walking on the sidewalk. There is no substance to this argument. As already stated *supra*, the sidewalk was completely covered in sand with shrubs and grass growing thereon. It would have been unsafe for the plaintiff to walk on the sidewalk in the condition in which it was. On the other hand, there was nothing which constitute danger in a walk on the tarred surface since she did not expect an exposed manhole, as she was entitled to.

[60] Although it is often said that contributory negligence must be specifically pleaded in *AA Mutual Insurance Association Ltd v Nomeka*²⁸ the Appellate Division held that in an action for damages for personal injuries, provided the plaintiff’s fault is put in issue, an apportionment of damages need not be specifically pleaded. The plaintiff’s alleged fault was put in issue in paragraph 5 of the defendant’s plea. There it was alleged, *inter alia*, that plaintiff frequently travels by foot to the water stop and was familiar with the site and surroundings. This is completely inaccurate in the light of the defendant’s witnesses’ evidence that each site in Bardale has its own tap. There was no need for her to travel frequently to a water stop. For this and the other reasons stated *supra*, I find no contributory negligence on the part of the plaintiff.

²⁷ Act 34 of 1956.

²⁸ 1976 (3) SA 45 (AD).

[61] In the result, I make the following order:

1. The defendant is held liable for the damages, if any, that the plaintiff has suffered in consequence of the accident which occurred on 17 October 2013 when she fell into an open manhole in or near Khwezi Street Bardale, Mfuleni;
2. The defendant is ordered to pay the plaintiff's costs.
3. The matter is postponed *sine die*.

M J DOLAMO
JUDGE OF THE HIGH COURT