



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

CASE NO: A119/2021

In the matter between:

THE CITY OF CAPE TOWN

Appellant

And

NQULELWA MTYIDO

Respondent

Coram:	Erasmus, Salie-Hlophe et Papier JJ
Dates of Hearing:	19 January 2022
Date of Judgment:	2 August 2022

JUDGMENT

(HANDED DOWN ELECTRONICALLY)

ERASMUS, J

A. Introduction

[1] This is an appeal to the full court against the whole of the judgment of a single judge with leave from the Supreme Court of Appeal, the court *a quo* having refused such leave. The order of the Supreme Court of appeal reads as follows:

"IT IS ORDERED THAT:

1. Leave to appeal is granted to the full court of the Western Cape Division of the High Court of South Africa, Cape Town.
2. The costs of the court *a quo* in dismissing the application for leave to appeal is set aside **and** the costs of the application for leave to appeal in this court and the court *a quo* are costs in the appeal. If the applicant does not proceed with the appeal, the applicant is to pay these costs."

[2] The respondent (plaintiff) instituted action against the appellant (defendant), claiming that the appellant was liable to compensate her for damages suffered as a result of an injury she sustained when stepping into an uncovered manhole under the control of the appellant. The appellant denied any liability for the injury suffered by the respondent and, in particular, denied that the alleged omission claimed by the respondent was wrongful and/or negligent, having regard to the specific circumstances of the case.

[3] After hearing oral evidence supported by photographic material, the court *a quo* found in favour of the respondent holding that the appellant was liable for any damages proven to be determined in a subsequent hearing. The merits and quantum was separated in terms of rule 33(4) of the Uniform Rules of Court by agreement between the parties. The appellant was also ordered to pay the costs of the respondent herein.

[4] The appellant, in this appeal, claims that the court *a quo* misdirected itself in its findings of the facts and the law, insofar as it relates to the elements of the delict and the question of contributory negligence. It is specifically argued that the court erred in its evaluation of the evidence.

B. The Facts

[5] The respondent is resident in Ukubetana Street, Mfuleni, a suburb on the Cape Flats. She has been so resident since December 2009. The only infrastructure on the site where she was a resident was an outside toilet and a water tap next to it. She was employed at Cape Town International Airport, at a fast food outlet. Given the nature of her employment she had reported for duty at 04h30 in the morning, with the effect that preparations need to be done the evening before. On the evening of 17 October 2013 at about 20h00 she realised that her water tap was not working.

[6] The respondent was aware that it was customary in the area in which she resides, that should one experience a water outage that you would attend on a neighbouring communal tap where water will be available. Although she had never been to that particular tap before, she decided to take a bucket and fetch water from the communal tap. Her route to the water tap, took her via Khwezi Street, a street she had never been to before. At that time of the evening it was already getting dark and there was only one streetlight in the area. This streetlight was a high mast floodlight located in a different area and according to the respondent, although it provided some light it was insufficient. A sidewalk is provided but from the evidence it is apparent that it lacked proper maintenance and was full of sand and overgrown. The condition of the sidewalk forced the respondent to walk on the hard surface of

the road which on the face of it was the safer option. According to the respondent there was nothing that distracted her from concentrating on the way she was walking. She did not see an open manhole or drain nor expected same in the road.

[7] Whilst walking on Khwezi street she suddenly felt that she was falling and realized that her right leg had stepped into an open manhole or a drain with her left leg still outside. This caused her ankle to fracture. She sought assistance by calling out and two women who earlier passed her by, also carrying pails of water, came to her assistance. One of the women called the respondent's husband who then, in turn, arranged for transport to convey the respondent to the local Day Hospital. She was later conveyed by ambulance to Tygerberg Hospital for further medical attention.

[8] The respondent was requested by the appellant's legal representatives to attend to the scene of the incident some six years later during November 2019 whereupon she pointed out the manhole in question. During cross-examination counsel for the appellant put it to the respondent that she failed to keep a proper lookout, but was rather concentrating in looking for the tap, thereby suggesting that either the incident happened due to the sole negligence of the respondent or that she was at least partially responsible therefore. It was further put to the respondent that "on the strength of the current situation with the manhole the evidence very strongly points to the fact that the manhole cover was never removed."

[9] The respondent also presented the evidence of Mr. Barnabas Zwehile Xwayi who, at the time of the incident, resided directly opposite the respondent. At the time

of his evidence he was already retired and had relocated to the Eastern Cape wherefrom he travelled specifically for the purpose of giving testimony in this matter. Prior to his retirement he was employed in the security industry for at least 10 years. It is apparent from his evidence that he performed his duties often as a night shift worker and returned home early in the morning. According to him, some mornings would be misty in the area and visibility was impaired. He had noticed that there was an open drain in the road which spot he had pointed on photographs that concerned him as a danger to the road users. Out of this concern he took it upon himself to report the existence of the open drain to the authorities. Some time prior to the incident, where the respondent was injured, he noticed workers that could be identified by an emblem of the City of Cape Town on their clothing and on hardhats that they were wearing, he pointed out the manhole to a person who was identified as being in authority. According to him he was promised that it would be closed. When the hole was not properly closed by the people he requested, he further took it upon himself to cover the area by placing poles into the hole and pellets around and marked the area with "a red and white sellotape". Unfortunately, and to the dismay of the witness, some of the local residents removed the structure and warning tape to use as firewood. More than two months after his report and the preventative measures put in place, he became aware of the incident in which the respondent was injured.

[10] Mr. Xwayi found it difficult to orientate himself on the photographs presented in court. This became the major criticism levelled against him by the appellant's legal representative. The fact that he laid a complaint to individuals, whether they

escalated it or not, was another issue that the appellant, through evidence, wanted to address. I shall return to this later in this judgment.

[11] In rebuttal to the respondent's case as set out above, the appellant called three witnesses the first of which was Mr. Ian Quintus Wellman. Mr. Wellman is a Project Manager employed by the appellant in its department of Human Settlements. His main responsibilities include the planning and implementation of low-cost housing developments, which post he occupied since 2006. He testified as to the processes for such approvals and implementation that culminates in the handing over of a serviced site to beneficiaries. The beneficiaries are required to sign the relocation and acceptance letters. According to Mr. Wellman the particular phase being phase 3B was completed in December 2009 and the adjacent phase only in 2018. He insisted that the manhole in question would have been covered at the handover of the site but could not confirm whether that was indeed so since the appellant used agents to perform this function. Insofar as it relates to the lighting in the area his evidence was speculative.

[12] Mr. Pierre Maritz was employed by the appellant as the Manager: Reticulation in the Engineering department which is responsible for the maintenance of manholes. He held this position for at least 10 years. At the relevant time, during 2013, there were roughly 192,000 manholes under the appellant's control. There was and still is the scourge of metal theft and, in particular, manhole covers in the areas under the control of the appellant. The appellant manages a complaint system in order to track, combat, maintain and replace manhole covers. It seems, from his evidence, that the preventative measures taken by the appellant is circumvented by

the thieves. From the available records of reports in the relevant area there were no reported incidents on the information system of the appellant.

[13] Mr. Maritz personally inspected the relevant manhole on 11 February 2020. Due to the fact that this particular type of manhole cover can only be replaced if the surrounding frame is also replaced he concluded, with reference to the condition of the tar depicted on the photographs and his physical inspection, that this cover was the original cover. Having given the court a full explanation of the reticulation system and the effect of an open drain cover based on his experience of some 24 years, he further concluded that it was improbable that this drain cover would have been open for an extended period as alleged. He readily conceded that he was not involved in the particular development between 2009 and 2013.

[14] The last witness for the appellant, Shafodien Hussein Jaffer (the court record reflects the surname as Jaftha), who was employed by the appellant as an Administrative Assistant in the Reticulation department. He explained the methodology and search functions on the electronic system of the appellant when a report is made of a missing manhole cover. Upon searching he could not find any reports for the area, save for a report in Ukubethana Street, in September 2014.

[15] All the witnesses for both the appellant and respondent referred to photographic evidence which was accepted on face value to depict what they purport to be. The trial court therefore had to consider the evidence, briefly summarized above, in conjunction with the photographic evidence, to determine whether the respondent proved her case on a balance of probabilities. The question thus to be

answered was, correctly in my view, summarized by the trial court in the following manner:

"It is on this evidence that the court must determine whether the plaintiff has proved, on the 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, Xwayi reported the missing cover to, 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."

C. Evaluation of Evidence and the Finding of Facts

[16] The appellant alleges that the court below erred in the factual findings made in respect of reliability and credibility by accepting the evidence of the respondent's witnesses, in that the respondent stepped into the open drain and that it was the same drain that Mr. Xwayi reported to the employees of the appellant. I shall first deal with the identification of the drain by Mr. Xwayi.

[17] The appellant readily concedes that Mr. Xwayi impressed them as an honest person but argues that honest persons make mistakes. Further, that it is probable that the manhole referred to by the respondent is the same as the manhole reported by Mr. Xwayi given the lapse of time between his report and the incident on 17 October 2013.

[18] Appellant places reliance on the confusion that occurred when the witness had to identify on an aerial photograph the location and position of the manhole in question. Not only does one have to have regard to the clear confusion that occurred

when the witness was first confronted with the photograph but also the manner in which the evidence was presented in open court.

[19] The criticism levelled against this witness is a good example of why it is so that a Court of Appeal is generally reluctant to interfere with the factual findings of a court below. The learned judge was aware of the criticism and alive to the manner in which the evidence was presented. The court nevertheless, having dealt with the aspect fully, came to the conclusion that on the evidence, evaluated holistically that the evidence of Mr. Xwayi is reliable in both respects, being the report made and the location of the manhole and is therefore of the view that this objection has no merit.

[20] I now turn to the complaint that the respondent's version was unreliable and was not materially corroborated and was characterized by contradictions and improbabilities. It is first important to note that all these arguments in relation to the evidence of the respondent was raised in the court below and considered in a fully reasoned judgment and dismissed. Having considered the reasoning of the court below, I am of the view that there is no merit in the arguments raised in respect of the reliability and credibility of the respondent.

[21] The court below is criticized for the finding that Mr. Xwayi corroborated the version of the respondent and it is argued that this was a clear misdirection. Whilst it is so that the respondent was a single witness as to the incident that occurred on 17 October 2013 she is corroborated insofar as an open manhole existed shortly before the incident occurred.

[22] The appellant argues that it is improbable and therefore affects the credibility of the respondent that she would not have visited an adjacent street during the four years of stay in the area. This argument does not take into account the fact that the respondent clearly testified that there was no reason to visit that street as all the amenities that the family would access is in a different direction to the street in question. It is instructive to note that the appellant's counsel at the trial was unable to unearth any contradictions in the evidence of the respondent. There is therefore, in my view, no merit in the attack on the reliability nor the credibility of the respondent and the findings of the court below in this regard.

[23] I now turn to the findings regarding the evidence of Mr. Maritz. The court below did not rely on the evidence of this witness for the reasons that the witness was not qualified as an expert and there was no compliance with rule 36(9) of the Uniform Rules of Court. The appellant contended that the respondent did not plead its case with sufficient clarity in order for the witness to deal with the complaint made by Mr. Xwayi to the appellant. The appellant further contended that it was unnecessary for the testimony of a witness who had dealt with a complaint prior to the one in question, or for such witness to be qualified as an expert on the reticulation system in relation to the evidence he ultimately gave.

[24] Whilst the appellant is correct that when the failure to comply is due to conduct of the other party, this should not be held against the party who is in non-compliance, it cannot be said that the respondent was to blame as the question of the prior report was not a necessary averment to be pleaded in the first instance, as it is evidence. The appellant also had the opportunity, if it was of the view that it was

prejudiced by the non-disclosure of the evidence at an earlier stage, to seek a postponement and deal with the matter effectively. To not complain about its misfortune is disingenuous.

[25] I am however of the view that even if the court below erred in this regard, it would not trump the evidence of the two witnesses for the respondent that clearly indicate that the respondent stepped into an open hole and that Mr. Xwayi observed an open manhole in the vicinity a few months before and reported same. This takes me to the evidence of Mr. Jaffer and the C-3 complaint system. The appellant cannot have it both ways. On the one hand arguing that they had no doubt that Mr. Xwayi reported a broken manhole to someone in the appellant's employ; whilst in the same breath arguing that the person to whom he made the report would not have relayed the information to the complaint system. It is improbable, given that the manhole is on the road surface utilized by motor vehicles. The inference of the court below that it is possible that the complaint was incorrectly recorded, was therefore reasonable.

[26] In summary therefore, I am of the view that there is no merit in the argument that the court below misdirected itself on the factual findings made and its credibility and reliability findings in respect of the witnesses.

D. The Legal Principles

Conduct and Causality

[27] It is common cause that the respondent had the onus to prove the conduct and causality of the damage causing event on a balance of probabilities. The court

found it did. The appellant now argues that based on its view of the evidence and the probabilities, that the court below erred in finding that the respondent discharged its onus. They argue that the evidence was unreliable, improbable and uncorroborated. The evidence and probabilities all favour the appellant and as the claim is based on an omission, no nexus could be established between any conduct and the damages suffered by the respondent. This argument, in my view, has no merit. The court below had the benefit of hearing and seeing the witnesses for both the respondent and the appellant. It considered same and gave reasons for the findings of reliability and credibility. Whilst it is so that there is no direct corroboration of the witnesses *inter se*, this does not mean it detracts from the reliability test. The evidence must be evaluated as a whole and contextually.

[28] The respondent and Mr. Xwayi testified as to the open manhole, albeit at different times. Mr. Xwayi's evidence was faced with cross-examination insofar as it relates to the report to the employees of the appellant. It could, in my view, not be challenged effectively and the evidence of the appellant's witnesses is no more than conjecture.

Wrongfulness

[29] The appellant argues that the court below conflated the elements of wrongfulness and negligence and, therefore, erred in its findings that the respondent discharged the onus in this regard. They argue that the fact that the court referred to certain averments in the particulars of claim under this heading, related to negligence. The submission is misplaced. Although it is placed, in the judgment, under the heading. "Wrongfulness", the judgment is clear where it states: '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 supra'. The placement of the sentence in the judgment is of no moment as it clearly refers to the negligent omission.

[30] Turning to the application of law, the appellant relies on the dictum of the Constitutional Court in *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng*¹ where the court held that the element of 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." They argue further that the judicial determination of reasonableness within the context of the wrongfulness criterion would depend on considerations of public and legal policy in accordance with constitutional norms, in that, the Constitutional Court held in *Le Roux and Others v Dey*² ".... What is meant by reasonableness in the context of wrongfulness as nothing to do with the reasonableness of defendant's conduct, but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct."

[31] The appellant argues that the correct question to be answered is whether it is reasonable to impose liability on the appellant for an injury that occurred in this specific location and within the specific context where the single complaint was made to an unknown City employee at an unspecified time and where there is no record that the City was made aware of the alleged uncovered manhole.

¹ 2015 [1] SA 1 [CC] at para 20.

² 2011 [3] SA 274 [CC] at para 122.

[32] With reference to *BE obo JE v Member of the Executive Council for Social Development, Western Cape*³, the appellant argues that despite the clear statutory and constitutional duty placed upon the Minister to ensure children safety, the court held that the imposition of a legal duty to ensure the safety at each and every childcare facility crippled the core function of the government department. What must be considered is that the constitutional court specifically found that in the circumstances of that particular case public policy did not favour holding the Minister liable for damages.⁴

[33] The respondents pose the question differently in that they argue that the question that needs to be answered is whether the court below was compelled to address considerations of public policy. They propose the answer to be no. In my view, there is no need to consider this question as it is clear that the court is enjoined to consider considerations of legal policy. However, every matter should be determined on its own facts and in the context of the situation that prevails at the time of the alleged delict, considered holistically, having regard to all the facts. In the instant matter I am of the view that the historical background of low economic areas and the prevailing circumstances, they are relevant circumstances to be taken into account. The unfortunate double meaning of the word location in this matter is indicative of the historical background to be taken into account. A location in our context refers to a low income area generally populated by black people and underserved. In the instant matter it is apparent that the development was done in stages and that water and sanitation is scantily distributed. The pavement, insofar that it was provided, was overgrown and dangerous to be traversed. The condition of

³ 2021 [1] BCLR 1087 [CC] at paragraphs 1, two, 10 and 25.

⁴ see also *Municipality of Cape Town v Bakkerud* [2000] 3 All SA 171 (A) at paras [28] to [29].

the pavement, where one would normally expect pedestrians to move around, forced the road user onto the road surface reserved for vehicular traffic.

[34] The appellant complains that the judgment of the court below has a chill factor, I disagree. In *Judd v Nelson Mandela Bay Municipality*⁵, with which I am in agreement, the court emphasized that the failure of a municipality to repair and maintain roads and pavements will attract liability and would be held to be unlawful if the legal convictions of the community demanded that preventative action had to be taken on the facts of a particular case. I am of the view that it was incumbent upon the appellant to either repair, or warn members of the public of the apparent danger of an open manhole once it was brought to their attention. The evidence, accepted by the court below, clearly indicates the notification and an omission to act thereupon would be wrongful and attract liability.

Negligence

[35] The appellant argues that the court below, erred in respect of the application of the negligence test to the specific circumstances of this matter. In *Kruger v Coetzee*⁶ the following is stated:

“purpose of liability culpa arises if-

- (a) *Diligens paterfamilias* in the position of the defendant-
 - (i) would foresee there is 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

⁵ [CA 149/2010] 2011 ZADCPHC4.

⁶ 1966 [2] SA4 28 [A] at page 430,

- (b) the defendant failed to take such steps.

This has been constantly stated by this court for some fifty (50) years. Requirements (a)(ii) 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 on a particular circumstance of each case.”

[36] The appellant relies on the Supreme Court of Appeal decision in *Minister of Safety and Security v Van Duivenboden*⁷ where Nugent JA held that:

“where the law recognizes the existence of legal duty does not follow that omission will necessarily attract liability - it will attract liability only if the omission was also culpable as determined by the application of the separate test that has consistently been applied by the court in *Kruger v Coetzee*, namely whether a reasonable person in the position of the defendant would not only have foreseen the harm but would have acted to avert it.”

[37] They further argued that it cannot be expected of the appellant to “exercise prophetic foresight”. They would be obliged to do no more than to act reasonably.⁸ The standard to be applied is that of a reasonable organ of state and not that of a reasonable person, the availability of resources plays a major part in this inquiry. The appellant relies on the reporting system operated by themselves whereby members of the public can report missing manhole covers and the like as it is a scourge in the area of jurisdiction of the appellant.

⁷ [2002] 3 All SA 741 (SCA).

⁸ see *Cape Town Metropolitan Council v Graham* [2001] 1ALLSA215 [A] paragraphs 11 and 14 to 15.

[38] In the reliance on *Za v Smith*⁹ where the court stated

“ In determining what preventative steps that a reasonable person would or would not take, every case must depend on its own facts.

..... Included amongst those would be, for instance, the proportionality considerations which would require the weighing up of the prospects of the proposed measures being successful; the degree of risk of the harm occurring; the extent of the potential harm; the costs involved in taking the preventative measures proposed; and so forth.”

The appellant now argues that on the facts of the instant matter the appellant was not negligent.

[39] I am in agreement and bound by the dictum quoted above and am of the view that given the particular facts of this matter in the context as described above, more particularly, that the missing manhole cover was reported by Mr. Xwayi to employees of the appellant with no response, that applying the test as set out by the authorities, the appellant was negligent.

Contributory Negligence

[40] The appellant argues that the court below erred in not finding that the respondent contributed negligently to the cause of the injuries sustained and the damages suffered in that it only relied on one aspect of the pleadings. I disagree with this proposition as it is clear that the court below considered all the evidence holistically in the context of the area where the respondent was injured, the time and all the prevailing conditions in determining whether the respondent contributed

⁹ 2015 [4] SA 574 [SCA] at paragraph 24.

negligently to the incident. I came to the conclusion that there was none, which finding in my view cannot be faulted.

E. Conclusion and costs

[41] On the facts and the reasons set out above there is therefore no merit in the appeal and the findings of the court below should be confirmed and the appeal be dismissed. There is no reason why the costs should not follow that result.

F. Costs

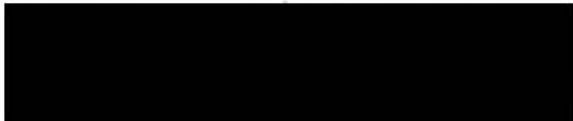
[42] Accordingly, I would issue the following order:

The appeal is dismissed with costs.

I agree.


N C Erasmus
Judge of the High Court

I agree.


G Salie-Hlophe
Judge of the High Court

IT IS SO ORDERED.


T D Papier
Judge of the High Court

APPEARANCES

Counsel for Appellant : Advocate Anél Du Toit
aneldutoit@capebar.co.za

Instructed by : MHI Attorneys
295 Durban Road
Bellville
Cape Town
7530
Tel: 0861 919 070
grantham@mhilaw.co.za

Counsel for Respondent : Advocate Lee Gabriel
leegabriel@capebar.co.za

Instructed by: : Kruger & Co
Peolpes' Bank Bldg, 159
Voortrekker Road,
Parrow
7500
Tel: 021 930 5530
betsie@krugercolaw.co.za