

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NUMBER: 5443/2007

DATE:01/08/2011

REPORTABLE

- (1) REPORTABLE: YES / NO
 (2) OF INTEREST TO OTHER JUDGES: YES/NO
 (3) REVISED.

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In the matter between:

MADOLO JOHN BUTISE

Plaintiff

and

THE CITY OF JOHANNESBURG

First Defendant

JOHANNESBURG WATER (PTY) LTD

Second Defendant

JOHANNESBURG ROADS AGENCY (PTY) LTD

Third Defendant

J U D G M E N T

MOKGOATLHENG J

- (1) The plaintiff has instituted action against the defendants for payment of the amount of R436 200.00, in respect of damages arising from a fracture sustained on the 26 September 2005 consequent upon falling into an uncovered valve chamber situate on the pavement at Mint Road, Fordsburg.
- (2) In his particulars of claim, the plaintiff contends that the defendants and their servants were negligent in that a legal duty rested on them to install or ensure the installation of an inspection cover over the uncovered valve chamber or to warn the public of its absence, and the danger it posed.
- (3) By consent the parties agreed to separate the question of liability from quantum in terms of *Rule 33(4)*. The only issue to be decided is liability. The parties are agreed that the second and third defendants objectively speaking, are entities owned by the first defendant created to execute the objectives of the first defendant as a local authority,

consequently, no legal duty is attributable to them, only the first defendant bears a legal duty to the public.

THE FACTUAL MATRIX

- (4) On 26 September 2005 at about 22h30 the plaintiff was jogging at a brisk pace on the pavement on Mint Road on his way to visit a colleague. It was a dark, rainy and windy night. When approaching the intersection at Fountain Street, he fell into an uncovered valve chamber and sustained a tibial plateau fracture of the right leg.

- (5) On investigation he established that his right leg had fallen into an uncovered four corned valve chamber. There was no barricading erected around or over the uncovered valve chamber, neither was there any warning signs posted to draw the public's attention of its presence and, to quote Price J in ***Stewart's v City Council of Johannesburg 1947 (4) SA 179 (W)***, it operated "*as something in the nature of a trap*".

- (6) During the early 2000's the first defendant experienced random endemic thefts of inspection valve chamber covers. It was a massive problem, as soon as the missing inspection covers were replaced they would be stolen. In addressing this problem, in 2004 the first defendant adopted a proactive policy to replace stolen inspection

covers through its capital expenditure department, Capex, and as part of its urban renewal project budgeted about one million rand.

- (7) Although subject to budgetary constraints the first defendant's approach in replacing stolen inspection covers was two pronged:
 - (a) reactively, when the public alerted it of the existence of damaged, stolen or missing inspection covers; and
 - (b) proactively, as an ongoing project, its Inner City Forum conducted surveys in identifying missing and damaged inspection covers sector by sector and systematically replaced them.
- (8) In responding to reports or complaints of missing inspection covers, the first defendant's servants only replaced missing inspection covers which in their opinion posed an immediate danger to the public. Because the reactive system relied on reports from the public, of necessity a delay occurred between the reporting, identification, and their eventual replacement.
- (9) The first defendant's servants did not demarcate the sites where uncovered chambers considered not to pose an immediate danger to

the public were situated, they only recorded the information. The first defendant did not pertinently have records showing that an inspection for missing inspection covers was conducted at the intersection of Mint Road and Fountain Street, nor were there any records in respect of the missing inspection cover on the pavement at Mint Road.

THE APPLICABLE LEGAL PRINCIPLES

- (10) Price J remarked ***Stewart v City of Johannesburg 1947 (4) SA 179 (W), at 186 para 2*** that: *“The purpose of a sidewalk is to enable pedestrians to pass to and fro along the streets of towns and cities in safety shielded from the street traffic...pedestrians are entitled to regard side walks as safe and to proceed accordingly unless they are plainly warned to the contrary. “This view was affirmed by Goldstone AJA, in the majority decision in **Langley Fox Building Partnership (Pty) Ltd v De Valence 1991 (1) SA 1 (AD)**, where he held, at 15E-F:-*

“...pedestrians walking on a city sidewalk are entitled to assume that, in the absence of adequate precautions or warnings, the way is clear and safe.”

- (11) Paraphrasing the *ratio* in the case of ***Kruger v Coetzee 1966 (2) SA 428 A at 430E-G***: *“The issue of negligence essentially involves a threefold enquiry. The first is whether the harm was reasonably foreseeable. The second is whether the diligens pater familias would have taken*

reasonable steps to guard against such occurrence. The third is whether the diligens pater familias failed to take those steps. The answer to the second enquiry is frequently expressed in terms of a legal duty.....

- (12) In ***McIntosh v Premier KwaZulu-Natal and Another, 2008 (6) SA 1 (SCA) paras 12 - 14*** it was held: “*Although a court will not lightly find a public authority to have failed to act reasonably because it elected to prioritise one demand on its possible limited resources above another, if foreseeable harm was suffered by someone in consequence of a failure on the part of the authority’s servants to take reasonable steps to guard against its occurrence, the authority should be held liable on account of that omission.*”

THE PLAINTIFF’S SUBMISSIONS

- (13) The plaintiff’s counsel Mr Johnstone argued that the first defendant at all times had a legal duty to the public to install or ensure the installation of an inspection cover over the uncovered valve chamber or to warn the public of its absence, and the danger it posed to the public. The first defendant’s servants did not barricade the uncovered valve chamber nor did they erect signs to warn the public of the missing inspection cover on Mint Road, consequently, the first defendant was liable for the damages suffered by plaintiff.

- (14) Counsel further argued that the reasonable foreseeability of harm to the public as a consequence of uncovered valve chambers on pavements, and the likely result of bodily injury to the public has not been challenged, more especially having regard to the first defendant's selective policy of not replacing missing inspection covers which did not immediately pose a danger to the public.
- (15) Counsel contended that no evidence was tendered by the first defendant regarding the policy of selecting certain sectors for the replacement of missing inspection covers in preference to others, and the basis upon which such selection was made, in the circumstances, the inference of negligence on the part of the first defendant or its servants was irresistible.

THE DEFENDANT'S SUBMISSIONS

- (16) The first defendant's counsel Mr Strathern argued that it was uncontested that the first defendant operated under budgetary constraints, that because thereof, it adopted a policy of immediately replacing missing covers which constituted an immediate danger to the public.
- (17) Counsel argued that the plaintiff had not established that the first defendant or its servants, ought to have been aware that the inspection cover on Mint Road was missing and consequently, ought to

have taken steps to replace it. Counsel contended that the plaintiff did not canvass and accordingly did not establish:

- (a) whether the uncovered valve chamber was located at a busy intersection or not; and
 - (b) how long the inspection cover had been missing prior to the plaintiff falling there into.
- (18) Counsel argued that in view of the absence of knowing how long the uncovered valve chamber had existed, the first defendant could not be expected to have guarded against something it did not know had happened, consequently it has not been established that the first defendant ought to have known about the missing inspection cover and ought to have taken steps to guard against the harm it represented to the public.
- (19) Counsel argued that the first defendant had shown that the policy of identifying and replacing missing inspection covers which immediately posed a danger to the public had been ongoing since 2000 prior to the incident involving the plaintiff, he submitted that the policy was adequate. The plaintiff has an onus to place sufficient evidence to enable the court to conclude that the first defendant was negligent in failing to replace the missing inspection cover or to warn the public of its absence as its legal duty dictated. The mere fact that the plaintiff fell into an uncovered valve chamber is not sufficient. Counsel

contended that the plaintiff was obliged to care for his own safety and consequently, has to establish:

- (a) a legal duty to repair or warn; and
- (b) that the failure to do so is blameworthy.

(20) In support of this proposition counsel cited the case of ***City of Cape Town v Bakkerud 2003 SA 1049 (SCA)*** at para 29-30. Where in addressing the applicability of the legal duty reposing on a local authority the Court held:

“[29] It is tempting to construct such a legal duty on the strength of a sense of security engendered by the provision of a street of pavement by a municipality but I do not think one can generalise in that regard. It is axiomatic that man made streets and pavements will not always been in the pristine condition in which they were when first constructed and that it would be well-nigh impossible for even the largest and most well funded municipalities to keep them all in that state at all times. A reasonable sense of proportion is called for. The public must be taken to realise that and to have a care for its own safety when using the roads and pavements.”

.....

[30]..... it would I think would go far too impose a legal duty on all municipalities to maintain a billiard table like surface upon all pavements in fear of any sub-sidenances or any other irregularities which might cause an unwary pedestrian to stumble and possibly fall.

It will be for a plaintiff to place before the court in any given case. sufficient evidence to enable it to conclude that a legal duty to repair or to warn should be held to have existed. It will also be for a plaintiff to prove that the failure to repair or to warn was blameworthy (attributable to culpa). It is so that some but not all of the factors relevant to the first enquiry will also be relevant to the second enquiry if it be reached) but that does not mean that they must be excluded from the first enquiry. Having to discharge the onus of proving both the existence of the legal duty and blameworthiness in failing to fulfil it will, I think, will go along way to prevent the opening of a flood gates to claim of this type of which municipalities are so fearful.”(my emphasis)

THE ANALYSIS OF EVIDENCE

- (21) It is common cause that valve chamber on Mint Road into which the plaintiff fell was uncovered. The first defendant concedes that it owed a legal duty to the public to guard against such harm consequently, the first leg of the test, reasonable foreseeability is established. The question is whether regarding second and third legs of the inquiry, the first defendant undertook reasonable steps to guard against the harm the uncovered chamber constituted to the public, differently stated, was the policy formulated by the first defendant objectively speaking, to guard against the harm, which due to budgetary constraints involved the selective replacement of inspection covers on uncovered valve

chambers which its servants designated as posing an immediate danger to the public, rational and adequate.

- (22) To paraphrase the *ratio* in **Ngubane v South African Transport Services 1991 (1) SA 756**; *“the answer to the inquiry depends on a consideration of all the relevant circumstances and involves a value judgment which is to be made by balancing various competing considerations, including the extent of the harm created by the first defendant’s conduct, the gravity of the possible consequences and the burden of eliminating the risk of harm. Where, however, a public authority is involved a further consideration arises. It is this; a court when determining the reasonableness or otherwise of an authority’s conduct will in principle recognise the autonomy of the authority to make decisions with regard to the exercise of its powers.....*

the criterion to be applied having regard to its priorities is ultimately one of rationality if in the actual implementation of a policy or procedure adopted by the authority, or for that matter in the course of its operations, foreseeable harm is suffered by another in consequence of a failure on the part of the authority’s servants to take reasonable steps to guard against its occurrence, a court will not hesitate to hold the authority liable on account of that omission.”

- (23) Further regarding the legal liability of a local authority, in **Mcintosh v Premier of KwaZulu-Natal and Others** (supra) it was held: *“where the defendant relies on budgetary constraints if foreseeable harm was suffered by a person as a consequence of the failure on the part of the authority and its servants to take reasonable steps to guard against the occurrence the authority is liable for the omission.”*
- (24) There is a positive legal duty on the first defendant to ensure that uncovered valve chambers did not constitute a danger to the public, and because of the endemic massive scale theft of inspection valve chamber covers, a greater duty rested on the first defendant to ensure the public’s safety through the regular consistent inspection of valve chambers, more particularly because the endemic theft was a continuous phenomenon.
- (25) The duty to act positively must be considered and applied in the light of the spirit, purport and objects of the Bill of Rights. In **Minister of Safety and Security v Van Duivenboddm 2002 (6) SA 431 (SCA) at 444**), it was held:-
- “(a) the defendant’s prior conduct in constructing an inspection port in the pavement points irresistibly to the existence of a legal duty to act positively to prevent harm, especially in the light of the extent*

and gravity of the consequences when such harm eventuated;

(b) the fact that defendants have control over a dangerous or potentially dangerous object, being a hole in a sidewalk; and

(c) The special relationship between defendants and plaintiff and the fact that the plaintiff was specially dependent upon defendants to exercise proper control over such dangerous or potentially dangerous object.”

(26) Brand JA in dealing with negligence opined: “*A negligent omission, unless wrongful will not give rise to delictual liability. More recently in **Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd 2006 (3) SA 138 (SCA) [2007] 1 All SA 240) Brand JA, at 144A-C, para 10***, he explained the requirement of wrongfulness as follows:

*“Negligent conduct manifesting itself in the form of a positive act causing physical damage to the property or person of another is prima facie wrongful. In those cases, wrongfulness is therefore seldom contentious. Where the element of wrongfulness becomes less straightforward is with reference to liability for negligent omissions and for negligently caused pure economic loss (see eg **Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) ([2002] 3 All SA 741) in para [12]; Gouda Boerdery BK v Transnet 2005 (5) SA***

490 (SCA) ([2004] 4 All SA 500) in para [12]. *In these instances, it is said, wrongfulness depends on the existence of a legal duty not to act negligently. The imposition of such a legal duty is a matter for judicial determination involving criteria of public or legal policy consistent with constitutional norms."*

- (27) It is trite that the onus of proving negligence on a balance of probabilities reposes on the plaintiff through adducing sufficient cogent credible evidence. Where a plaintiff is not in a position to adduce sufficient evidence on a particular aspect, less evidence will suffice to establish a *prima facie* case of negligence where the facts are peculiarly within the knowledge of a defendant. In such a situation there is an evidentiary burden upon a defendant to neutralise or rebut the *prima facie* inference that the cause of the harm was as a result of its negligent act of omission.
- (28) Before the uncovered valve chamber's existence can give rise to an inference of negligence, there must be some evidence of either a direct or circumstantial nature that the first defendant at the time of the occurrence;
- (i) ought to have taken steps to prevent the existence of the uncovered valve chamber, alternatively;
 - (ii) knew; or

- (iii) failed to take reasonable steps to replace the missing inspection valve chamber cover.

(29) The evidence did not reveal when the inspection cover in question went missing. The first defendant was unable to provide evidence that the inspection valve chamber on Mint Road was reported as missing before the incident nor did it, in pursuance to its proactive response, tender evidence that the said valve chamber was ever inspected, or that the sector in which it is situated was surveyed by the first defendant's servants. There was no evidence that a sector survey was conducted regarding the uncovered valve chamber on Mint Road or its intersection with Fountain Street. In fact, no record of such inspection existed. Consequently, the inference is irresistible that the uncovered valve chamber was not inspected during the first defendant's sector survey, and its inspection cover was not reported by the public as missing and accordingly identified as such prior to the incident.

(30) Because the first defendant knew of the rampant theft of inspection covers, there was a greater positive duty on it to have a coherent rational policy of investigating, identifying and replacing missing inspection covers on a regular basis. The first defendant largely relied on the public to report the existence of uncovered valve chambers or missing inspection covers. When the public reported missing inspection valve chamber covers to the first defendant, its servants in pursuance of its reactive response after identifying such uncovered

valve chambers, did not immediately demarcate their location and warn the public of the danger they posed through signage, reflective lighting, or reflective tape.

- (31) The first defendant's servants after a report or after identifying uncovered valve chambers only recorded the uncovered valve chambers, and in their discretion decided whether such identified uncovered valve chambers posed a danger to the public and if so, immediately replaced their inspection covers, and if, in their discretion such uncovered valve chambers did not pose an immediate danger to the public, the uncovered valve chambers inspection covers were not replaced.
- (32) No rational explanation was presented by the first defendant as to why the uncovered valve chambers not considered as posing an immediate danger to the public were left uncovered, nor was any reason advanced by the first defendant of the failure to proffer such explanation. There was absolutely no explanation what rational criteria was used to identify certain uncovered valve chambers as posing an immediate danger to the public and others not, neither was there any explanation what rational criteria predicated the identification and selection of sectors where surveys were conducted.

- (33) In the absence of any cogent credible rational explanation, the first defendant's random selection of sectors to be surveyed, and its designation of uncovered valve chambers considered to pose a danger to the public, was irrationally and arbitrarily executed, consequently, within the constraints of reasonable prudence this policy was inadequate and ineffectual.
- (34) It is not sufficient for the first defendant to only state that it was hindered by budgetary constraints to execute its legal duty to the public *vis-à-vis* all uncovered valve chambers. There is an obligation on the first defendant to adduce cogent credible evidence explaining how its priorities impacted on its budgetary constraints relative to its legal duty to the public to install inspection covers on all open valve chambers by showing that the budgetary costs for such venture were so "*astronomical*" that they warranted the inference that such costs should not reasonably be incurred by the first defendant in replacing all missing inspection covers in order to avoid liability where serious harm could occur to the public.
- (35) The first defendant must have foreseen that such an irrational arbitrary policy would create a serious source of danger to the public. The first defendant must have foreseen that such irrational arbitrary selection policy could not exclude the possibility of non danger posing uncovered valve chambers causing harm to the public. Consequently, having regard to such realisation, 1st Defendant must have reconciled

itself to the eventuality of the public being harmed by such uncovered valve chambers.

- (36) By its selection policy, it can be fairly said that the first defendant must have decided to accept the risk of liability in those cases arising from uncovered valve chambers designated as not posing immediate danger to the public, perhaps in pursuit of greater budgetary economy. This is particularly so if regard is had to the enormity of the first defendant's legal duty given the endemic theft of inspection covers.
- (37) Due to the dearth of explanatory evidence regarding the impact of budgetary constraints on the first defendants' priorities, the effective precautions which would have prevented the plaintiff's incident can safely be said to be unrelated to the budgetary constraints and priorities of the first defendant as a local authority. Consequently, the first defendant must have accepted and reconciled itself to the risk of liability arising from identified but uncovered valve chambers, due to the enormity of the theft of inspection covers and the curbing of the theft problem.
- (38) The first defendant has not challenged the reasonable foreseeability of harm to the plaintiff consequent upon the uncovered valve chamber on the pavement on Mint Road. In the circumstances of this matter it is therefore justifiable to invoke the legal maxim *res ipsa loquitur* and,

infer a *prima facie* case of negligence on the part of the first defendant, unless the first defendant has rebutted the plaintiff's case with evidence which invalidates the *prima facie* inference of negligence on its part, and so neutralise the plaintiff's case, if not, judgment must be entered in favour of the plaintiff against the first defendant. The question is whether the first defendant has produced sufficient evidence to displace the inference of negligence. In my view none was tendered.

- (39) In the alternative Mr Strathern contended for a 50% - 50% apportionment on the basis that the plaintiff did not keep a proper lookout whilst jogging, counsel contended that if the plaintiff had been walking at a reasonable pace and having regard to his safety, he should have realised that the pavement, tapers to a curb, and would have possibly slowed down and avoided falling into it.
- (40) In my view it cannot be persuasively argued that there is contributory negligence attributable to the plaintiff. The uncontroverted evidence is that the incident occurred at 22h30 at night when it was dark, rainy and windy. The uncovered valve chamber was not visible, was not demarcated, or barricaded, and did not have reflective signage warning the public of its presence, consequently, it cannot be reasonably expected that the plaintiff could have foreseen or suspected that there is an uncovered valve chamber on the pavement,

when it is uncontroverted that it was the first time he had traversed such pavement.

THE ORDER

- (42) In the premises the following order is made:
- (a) The first defendant is ordered to pay the plaintiff's proven damages arising from the fracture of his right tibial plateau on the 26 September 2005;
 - (b) The first defendant is ordered to pay the plaintiff's legal costs

Dated at Johannesburg on the 01st AUGUST 2011.

MOKGOATLHENG J

JUDGE OF THE HIGH COURT

DATE OF HEARING: 2ND DECEMBER 2010

DATE OF JUDGMENT: 01st AUGUST 2011

ON BEHALF OF THE APPLICANT: H C JOHNSTONE

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