

FORM A
FILING SHEET FOR SOUTH EASTERN CAPE LOCAL DIVISION
JUDGMENT

PARTIES:

- Case Number: **2361/2008**
- High Court: **Port Elizabeth**
DATES HEARD: **15 & 16 March 2010**
- DATE DELIVERED: **23 March 2010**

JUDGE(S): **D. Chetty**

LEGAL REPRESENTATIVES -

Appearances:

- for the Plaintiff(s): **Adv J J Nepgen**
- for the Defendant(s): **Adv M E Menti**

Instructing attorneys:

- Applicant(s): **Mr C de Villiers (De Villier & Partner)**
- Respondent(s): **Ms K Nonkwelo (Ketse Nonwelo & Ass)**

CASE INFORMATION -

1. *Nature of proceedings:* **Action for Damages**
2. **Topic:**

Key Words: *Negligence - Liability for - Liability of municipality for damages*

*resulting from omission to repair raised portion of
sidewalk caused by tree roots - Municipality conceding
that it had legal duty to maintain sidewalk - No evidence
to gainsay defendant's version that it was unaware of
defect - Operating system whereby defects could be
reported in use for period of 22 years and working
effectively - Proposed alternatives not shown to be
viable - Negligence not established*

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

CASE NO: 2361/08

In the matter between:

ROSE LILLIAN JUDD

Plaintiff

And

NELSON MANDELA BAY MUNICIPALITY

Defendant

Coram: **Chetty, J**

Dates Heard: **15 & 16 March 2010**

Date Delivered: **23 March 2010**

Summary: *Negligence - Liability for - Liability of municipality for damages resulting from omission to repair raised portion of sidewalk caused by tree roots - Municipality conceding that it had legal duty to maintain sidewalk - No evidence to gainsay defendant's version that it was unaware of defect - Operating system whereby defects could be reported in use for period of 22 years and working effectively - Proposed alternatives not shown to be viable - Negligence not established*

JUDGMENT

CHETTY, J

[1] The plaintiff is a sprightly 78 year old lady, a resident at The Sanctuary, an establishment for those advanced in years, situate at Bingley Street., Central, Port Elizabeth. As a devout Christian she was accustomed to frequenting her local church in Dickens Street, a short distance away from The Sanctuary. Getting there was normally achieved by walking, save for the odd occasion when she managed to secure a lift in a motor vehicle. The pedestrian route, which the plaintiff routinely followed, entailed exiting The Sanctuary in Bingley Road proceeding along the sidewalk towards its intersection with Westbourne Road, crossing Bingley and accessing the sidewalk along Westbourne via a concrete ramp at the street entrance to the Old Austria restaurant situate at the corner of Bingley and Westbourne Roads. On Sunday morning, 6 July 2008, the plaintiff followed her normal route to church and suddenly fell forwards onto the pavement in front of the Old Austria restaurant in Westbourne Road. Passers by immediately rushed to her assistance and eventually the plaintiff was assisted into a wheelchair and returned to The Sanctuary prior to being hospitalised. Fortuitously, one of the persons who witnessed the plaintiff laying on the sidewalk was the ward councillor, Mr. *Jeremy Davis (Davis)*, about, whom, more later.

[2] The plaintiff suffered a serious injury and in due course instituted an action for damages against the defendant. In her particulars of claim she alleged that she *“tripped and fell over a raised and cracked portion of the sidewalk”* and averred that the defendant, who was responsible for the maintenance and upkeep of the sidewalk owed her a duty of care. She alleged further that her fall was occasioned by the negligence of the defendant’s employees which she particularised as –

“5.1 They failed to warn pedestrians of the danger posed by the cracked and raised sidewalk/ pavement;

5.2 They failed to take any and/or adequate measures to prevent members of the public, to wit, the Plaintiff, access to this dangerous portion of the sidewalk/pavement;

5.3 They failed to maintain the sidewalk/pavement at a reasonable standard when consideration is had to the purpose of which it was used, namely, by pedestrians whilst walking;

5.4 They failed to take any and/or adequate measures to prevent the sidewalk/pavement from cracking and lifting thereby posing a danger to pedestrians utilising it;

5.5 They failed to take any and/or adequate measures to ensure that the sidewalk/pavement was safe for use by members of the public.”

[3] In its plea, the defendant, whilst admitting responsibility for the maintenance and upkeep of the specific sidewalk and that it owed the plaintiff

and the wider community a duty of care pleaded that such legal duty was premised on its developed operating system and facilities at its disposal.

[4] At the commencement of the trial and at the request of the parties I ordered that the merits of the dispute be determined first. The issues themselves had considerably narrowed and the only triable issues I was called upon to determine related to the occurrence of the incident itself and the question of negligence. As to the former the evidence conclusively established that the plaintiff fell at the raised portion of the sidewalk. Although the plaintiff was unable to state categorically that she tripped on the raised section of the sidewalk the inference is inescapable that her fall was occasioned thereby. *Davis*, who had emerged from a church across the road witnessed a group of people congregating on the sidewalk and proceeded thence. He saw the plaintiff laying in the vicinity of the raised sidewalk slab and his evidence justifies the inference that the plaintiff's fall was occasioned thereby.

[5] We are concerned in this case with delictual liability for an omission. The defendant's admission that it was under a legal duty to take reasonable precautions in order to avoid or minimise injury to pedestrians on the sidewalks carries with it the necessary corollary that if it is found to have negligently failed to take such precautions its conduct would not only be negligent but also

wrongful. The legal position is trite, succinctly formulated by Scott JA in Cape Town Metropolitan Council v Graham¹ as follows –

“[7] Turning to the question of negligence, it is now well established that whether in any particular case the precautions taken to guard against foreseeable harm can be regarded as reasonable or not depends on a consideration of all the relevant circumstances and involves a value judgment which is to be made by balancing various competing considerations. These would ordinarily be

' (a) the degree or extent of the risk created by the actor's conduct; (b) the gravity of the possible consequences if the risk of harm materialises; (c) the utility of the actor's conduct; and (d) the burden of eliminating the risk of harm'.

(See *Ngubane v South African Transport Services* 1991 (1) SA 756 (A) at 776H - J, where J C van der Walt in Joubert (ed) *The Law of South Africa* vol 8 para 43 is quoted with approval; *Pretoria City Council v De Jager* 1997 (2) SA 46 (A) at 55H - 56C.) If a reasonable person in the position of the defendant would have done no more than was actually done, there is, of course, no negligence.”

[6] Counsel for the plaintiff, Mr. *Nepgen*, has however submitted that the evidence adduced clearly established such negligence. He argued that the undisputed evidence that the raised portion of the sidewalk was at least 50 mm in height, which, by its very nature, created a risk of serious injury to members of the public ineluctably compelled the conclusion that the precautionary measures extant defendant's operating system, whereby hazards of similar ilk be timeously identified and corrected, was so unreasonable as to constitute negligence.

¹ 2001 (1) SA 1197 at para [7]

[7] The defendant's much maligned operating system, and which has attracted such strident criticism warranting its complete overhaul, amounts to the following. The responsibility for the maintenance and upkeep of sidewalks falls under the auspices of the defendant's infrastructure and engineering unit headed by its director, Mr. *John Sponneck* (*Sponneck*). He testified that the current system has been in operation for the past 22 years, has worked well and continues to do so. It is dependent largely on a number of factors, inter alia, the goodwill of the metropole's inhabitants, the conscientiousness and zeal of the particular ward councillor or reports received from the superintendents in the six zones which constitute the metropole detailing defects which have either been brought to their notice or which they encountered in the execution of their duties. The procedure for dealing with sidewalk repairs is that a complaint may be generated telephonically, either during office hours or after hours during designated hours on telephone numbers reflected in the telephone directory. Once a complaint is logged onto a log of complaints sheet the official will investigate the complaint and take whatever remedial action is called for. Whether telephonic or otherwise, the complaint is recorded onto a complaint form which is forwarded to an operations officer for investigation and whatever action he/she deems appropriate and a copy of the complaint form is also forwarded to the superintendent of the particular zone within the metropole where the defect manifested itself for investigation. Once the superintendent receives the

complaint form approving the remedial measures, he/she issues a job card to a foreman to effect the necessary repairs.

[8] *Sponneck's* evidence that the defendant's operating system was efficient and operated smoothly was sought to be assailed on the basis of what counsel contended was the less than dilatory approach adopted by its officials once the complaint concerning the defect in the sidewalk had been communicated to the defendant. He submitted that this compelled the conclusion that the system was woefully deficient and, a fortiori, so unreasonable, to justify the finding that it was negligent. The submission is superficially attractive but proceeds from a wrong assumption. The facts certainly do not support the contention advanced.

[9] The argument proceeds from the assumption that the defect in the sidewalk must have been reported to the defendant but not recorded on a complaint form. This is pure speculation. It is common cause that *Davis* telephonically contacted Mr. *Tony Arthur (Arthur)*, the assistant director of the defendant's Roads and Storm Water infrastructure and engineering directorate, shortly after the incident involving the plaintiff. Arthur testified that from the import of the communication he deduced that it related to a reinstatement of the sidewalk and conveyed the complaint to the responsible official, Mr. *Hollen Msila (Msila)*. He assumed that the latter, whom he considered to be an efficient and responsible person, would attend to the matter expeditiously. The defect had

however not been repaired and on 17 July 2008 *Davis* addressed a letter to the defendant's municipal manager detailing the events surrounding the plaintiff's fall and its sequelae. It is evident from the terms of the letter that since his initial telephonic report to *Arthur* the defect had not been repaired.

[10] It appears common cause that this letter galvanised *Arthur* in seeking an explanation from *Msila* for the lack of progress in effecting the remedial work. *Msila's* explanation that the problem was not a reinstatement but a complaint relating to a defective sidewalk led to Arthur communicating the complaint to the responsible official, Mr *Jeffrey Sawuli* (*Sawuli*) that the repairs be effected expeditiously. *Arthur* readily conceded under cross-examination that there was an inordinate delay in *Msila's* reporting to him. Does this remissness on the part of *Msila* however justify the inference sought to be drawn that the defendant's operating system is woefully deficient? In my view clearly not. An isolated instance of dilatoriness on the part of *Msila* cannot be the yardstick by which to judge the defendant's operating system nor, as adumbrated hereinbefore, does it afford corroboration for the speculative contention advanced that there may well have been earlier complaints received by the defendant concerning the state of the sidewalk.

[11] As part of his arsenal of reasonably viable alternatives to the defendant's operating system plaintiff's counsel proposed that the most efficient method to

identify defects in the sidewalks within the metropole was the establishment of what may conveniently be termed, a dedicated sidewalk policing unit, each of whose members would be provided with either a 25 mm piece of plastic or cardboard and tasked with traversing the entire network of the metropole's sidewalks in search of elevated sections in excess of 25 mm, recording their findings and reporting same to their superiors. Mr. *Nepgen* submitted that this could be done at minimal cost to the defendant in as much as unskilled or semi-skilled persons could be employed and remunerated accordingly. The other alternatives propounded were that the defendant's refuse collectors and street sweepers could be provided with pen and paper and instructed to note sidewalk defects in excess of the permitted 25 mm elevation. *Sponneck's* response to the latter two proposals was that given the aforesaid municipal workers schedule it would be well nigh impossible to expect them to do so. As to the former and whilst conceding that a dedicated sidewalk policing unit would provide the most effective method, he remained steadfast that the defendant's current operating system was tried and tested and the most effective.

[12] In an ideal world all streets and sidewalks would be in pristine condition but the reality is that in a large metropole such as that managed by the defendant no reasonable municipality could be expected to keep its roads and sidewalks in a perfect condition. *Sponneck* emphasized that the defendant's invitation to the general public to report defects in its roads and sidewalks network by utilising

both the office and after hours telephone numbers is frequently made use of and, to my mind, does not cast an onerous burden upon the metropole's inhabitants.

[13] I am satisfied that it cannot be said that the current operating system is unreasonable in the circumstances. Whilst I have the utmost sympathy for the unfortunate consequences of the plaintiff's fall, negligence on the part of the defendant has clearly not been established and the plaintiff must be non suited. In the result the following orders will issue –

- 3. The plaintiff's claim is dismissed with costs.**
- 4. The defendant is ordered to pay the costs reserved on 23 February 2010.**

D. CHETTY
JUDGE OF THE HIGH COURT

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