

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, PORT ELIZABETH

NOT REPORTABLE

Case No.: 800/09
Date Heard: 10 September 2010
Date Delivered: 16 September 2010

In the matter between:

ISABELLA MARIA MAGDALENA CRONJE

Plaintiff

and

NELSON MANDELA BAY METROPOLITAN MUNICIPALITY

UITENHAGE

Defendant

JUDGMENT

EKSTEEN J :

[1] On 17 July 2008, a sunny winter's day, the plaintiff and her husband attended at the local butcher's shop in the suburb of De Mist, Uitenhage. After affecting her purchases they set off on foot back to their home. Not far from the Butchery, while walking on the sidewalk along Niven Street, she felt her foot catch on something, she stumbled and fell heavily to ground. Whilst lying there she looked back to determine what had caught her foot and observed a gaping crevice in the concrete surface. She concluded that she stepped into this crevice which caught her foot and caused her to stumble and fall.

[2] The plaintiff contends that the defendant knew or ought to have known that the cracked pavement surface constituted a hazard to pedestrians

walking on the pavement and accordingly owed a duty of care to the plaintiff. She contends that the defendant was negligent in permitting the cracked paving to constitute a danger to pedestrians and more specifically to the plaintiff.

[3] The plaintiff accordingly issued summons against the defendant claiming damages arising from the injuries she sustained as a result of the fall, alleging that the fall was caused by the aforesaid negligence of the defendant or its employees. At the commencement of the trial the issues were separated and the trial continued only on the question of whether the plaintiff was liable for damages which the plaintiff might have suffered in and as a result of her fall.

[4] Niven Street runs through the suburb of De Mist which is a residential area in Uitenhage. The evidence establishes that there are in Niven Street three business premises being the Butchery, a liquor store and a café. These three businesses are situated immediately adjacent to one another and constitute the only significant commercial activity in the suburb. It is accordingly a relatively busy hub of activity in an otherwise tranquil residential area. The plaintiff has for some 40 years lived in the area and is currently resident nearby. She is well acquainted with the area and transverses this pavement walkway, which lies between her home and the shops, approximately four times per week. She is aware that the pavement is in a poor condition and has been so for approximately 10 years.

[5] A series of photographs depicting the pavement have been tendered in evidence and were referred to extensively during the trial. There is no evidence as to when these photographs were taken, however, as will appear more fully below, the evidence establishes that the concrete pathway was entirely removed, excavated and reinstated during on or about November 2008. They were therefore taken prior to mid November 2008. The photographs depict the pavement along Niven Street in front of and in the vicinity of the three shops. They show a lengthy straight road which appears, for all practical purposes, to be level. Immediately alongside the tarred surface and curb stone at the edge of Niven Street there is a straight concrete pathway which the evidence establishes to be 1,2m in width. The pathway depicted on the photograph appears to be in an advanced state of disrepair. It presents as a mosaic of concrete fragments interspersed with gaping crevices which result, in places, in a mildly uneven surface.

[6] Notwithstanding the poor condition of the pathway the plaintiff had never previously submitted a complaint to the Municipality in this regard neither is she aware of any other persons who may have done so.

[7] Mr Pierre Bosch who is the owner of the Butcher shop in Niven Street testified that he had conducted this business in Niven Street for approximately 13 years prior to the incident. He says that the pavement has always been in a poor condition. He was referred to the photographs which I have described above and states that the pavement has been in as bad a condition as is depicted in the photographs for at least the last 6 years. This is not disputed.

[8] Mr Bosch was in his butcher shop on the day in question and recalls that the plaintiff had left the butcher shop shortly before the incident. Just after her leaving the butcher shop he heard the plaintiff cry and someone called him to come and help. He and one of his employees proceeded to the place where the plaintiff had fallen and assisted her husband in helping her up. He confirms the position where the plaintiff had fallen and that he found her lying immediately beyond a large fissure in the concrete. In this fissure there is a portion, approximately 30cm in length, which is considerably wider than the remainder of that crevice. It is this gap which the plaintiff believes that she stepped into. I consider that the inescapable conclusion from all the evidence is that she was indeed correct in concluding that this failure had been the cause of her fall.

[9] On behalf of the defendant Mr Kotze testified. Mr Kotze is the principal technician, civil engineering, in the Roads and Storm Water Department of the defendant. Mr Kotze first learnt of the misfortune which had befallen the plaintiff when a letter of demand was received from the plaintiff's attorneys on 8 November 2008. The precise position of the alleged incident was not immediately apparent to him from the letter of demand and he took steps to ascertain precisely where the accident had occurred. Once this was ascertained he proceeded to the scene to conduct an inspection. He states that as he parked his vehicle alongside the pavement it was immediately obvious, even before he alighted from the vehicle, that the state of disrepair of the pavement surface created dangerous conditions. He considered that it

had deteriorated to the extent that it was not capable of repair. So dangerous was it that he caused immediate instructions to be given for the entire concrete pathway to be excavated and removed. This was done on the following morning. As the necessary materials to reconstruct the pathway were not immediately available the pathway was filled with soil and levelled as an interim measure. Sometime later it was reconstructed in its entirety as a concrete walkway.

[10] Mr Kotze says that had his department become aware of the conditions of the pavement at an earlier stage the same steps would have been taken earlier so as to avert the danger. It is apparent therefore that financial considerations did not pose any impediment to the repair. His department had, however, not received any complaint in respect of the pavement along Niven Street.

[11] He explained that the defendant has an extensive recordkeeping system and each complaint received in respect of any irregularity in the municipal system is recorded. Records are available extending back as far as 1998 and Mr Kotze has verified that no complaint in respect of this pavement had been received since 1998.

[12] He states that the defendant, in the Uitenhage area, has more than 400 km of roadway virtually all of which is flanked by pavements. The finances of the defendant do not permit for a dedicated team of inspectors to prowl the pavements of Uitenhage on a fulltime basis so as to monitor any

deterioration in conditions. Rather, the defendant relies heavily on the public participation and repeatedly invites members of the public to report any complaints relating to the municipal infrastructure and any of its services to the defendant. Upon receipt of such complaint it is immediately recorded and steps are taken to remedy the situation. In addition to the public participation Mr Kotze says that the defendant has an extensive staff working in various capacities maintaining various aspects of the municipal services. These range from sweepers who sweep the streets on a scheduled basis from time to time to traffic officers, maintenance staff on sewers and storm water systems, electrical maintenance staff and many others. All these employees of the defendant, so Mr Kotze testifies, have verbal instructions to report to it any irregularities which might be observed in other infrastructure not directly affecting their function. It is only in this manner that the defendant becomes aware of maintenance needs.

[13] In respect of pavements, specifically, Mr Kotze states that all employees are advised from time to time as to the features which they should specifically look out for. Whilst very many of the lowly employees of the defendant are often illiterate Mr Kotze states that from the feedback which is received from time to time it is apparent that they understand the features that they should be looking out for.

[14] This witness has drawn a record of all complaints received along Niven Street from 1998 to June 2010. He states that seven complaints were received in the general area of the three shops, four relating to sewer

blockages, one to a water leak and two to difficulties with storm water drainage. The precise dates and localities of each of these complaints do not emerge from the evidence. However, he does state that the records reveal that during January 2008 a complaint relating to storm water was received in the immediate vicinity of the three businesses situated in Niven Street . He confirms too that there was a complaint prior to the incident at 8 Niven Street, the home immediately adjacent to the butchery. It would be the obligation of the employees attending to these complaints to observe the pavement and report same.

[15] In cross-examination Mr Kotze states that the failure by these repair staff to have reported the condition of this particular pavement which he described as obviously dangerous, was entirely unacceptable and constituted a dereliction of their duties.

[16] It has been held repeatedly that no municipality can be expected to keep all its pavements in pristine condition all the time. In the ***Municipality of the City of Port Elizabeth v Meikel*** (2002) JOL 9525 (A) Nugent JA summarised the legal position as follows:

‘The liability of a local authority for omitting to repair or maintain streets and pavements in the exercise of its permissive statutory powers was revisited by this Court in *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA). A local authority has neither a general duty to maintain and repair, nor immunity from liability if it omits to do so. Consonant with principles relating to liability for omissions generally, as they have been developed in cases like *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (AD), *Minister of Forestry v Quathlamba (Pty) Ltd* 1973 (3) SA 69 (AD) and *Minister van Polisie v Ewels* 1975 (3) SA 590 (AD), a local

authority has a duty to act only where the “legal convictions of the community” demand the recognition of such a duty. After affirming those principles in *Bakkerud’s* case Marais JA went on to say the following at 1059I – 1060B:

“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*.”

Ultimately, the enquiry is whether the local authority can reasonably be expected to have acted, and factors that will play a role in that enquiry were identified as follows in *Administrateur, Transvaal v Van der Merwe* 1994 (4) SA 347 (A) at 361H – 362B:

“Ten einde vas te stel of ‘n positiewe handeling of late sodanig is dat dit as onregmatig aangemerkt kan word, moet gevolglik onder andere die onderskeie belange van die partye, die verhouding waarin hulle tot mekaar staan en die maatskaplike gevolge van die oplegging van aanspreeklikheid in die betrokke soort gevalle, versigtig teen mekaar opgeweeg word. Faktore wat ‘n belangrike rol speel in die opwegingsproses is, onder andere, die waarskynlike of moontlike omvang van nadeel vir andere; die graad van risiko van intrede van sodanige nadeel; die belange wat die verweerder en die gemeenskap of beide gehad het in die betrokke dadighede of late; of daar redelik doenlike maatreëls vir die verweerder beskikbaar was om die nadeel te vermy; wat die kanse was dat gemelde maatreëls suksesvol sou wees; en of die koste verbonde aan die neem van sodanige maatreëls redelikerwys proporsioneel sou wees tot die skade wat die eiser kon lei.”

[17] In the current matter, Mr Kotze, even at a distance, could readily identify that the pavement presented obviously dangerous conditions. So dangerous did he consider them to be that immediate action was required even though materials required for the reinstatement of the pavement were not readily available. The pavement was accordingly immediately deconstructed and an interim measure was put in place. This consideration alone appears to me to be strongly indicative thereof that, in his opinion, the degree of risk for persons to sustain significant injury in traversing that surface

was high. It seems to me to establish that reasonably practicable measures to avoid such harm were readily available to the municipality and such steps were considered to be reasonably proportional to the damage which the plaintiff, or other pedestrians, might suffer. I consider that on a balancing of all those features set out in *Administrateur, Transvaal, supra*, they are indicative thereof that this local authority ought to have taken steps to guard against the harm which the plaintiff has sustained.

[18] There remains to consider the question whether the municipality was negligent in failing to do so. The undisputed evidence was that it had not previously come to the notice of Mr Kotze that the pavement in question constituted such a danger. It is similarly common cause that the pavement has been in the condition in which the plaintiff found it for at least six years. The evidence of Mr Kotze establishes that a number of employees of the defendant, including sweepers who would attend to the area on a scheduled basis from time to time and storm water repairers did attend the area. Mr Kotze describes their failure to report the dangerous surface of the sidewalk as unacceptable and a dereliction of their duty. In all these circumstances I consider that this is a matter in which the defendant ought to have been aware of the dangers which the Niven Street sidewalk posed to the plaintiff. The failure of their employees to have reported same and the failure of the defendant to repair same must accordingly, in my view, be considered to be negligent and to found liability in the present case.

[19] Ms *Mzisi*, on behalf of the defendant, argues, however, that the

incident occurred primarily in consequence of the negligence of the plaintiff. The complainant, as I have previously said, has been resident in the area for some 40 years. She traverses this pathway four times a week and has done so for many years. The incident occurred in the early afternoon on a sunny winter's day and visibility was good. She is well acquainted with the condition of the pavement which has been unchanged for at least 6 years. The treacherous hazards which it presents to an elderly pedestrian, who on her own evidence, experiences difficulty in walking with feet which swell when she engages in exercise are obvious at a cursory glance. On her own admission she was aware of these dangers, however, she states that she did not look in front of her as she walked but gazed further ahead of her. I accept, as a general proposition, that pedestrians walking on pavements are not required to keep their eyes glued to the ground, however, they may be expected to keep a general lookout. Where such general lookout reveals obvious dangers it is not unreasonable to expect of a pedestrian to take care to avert such dangers. In these circumstances I consider that the plaintiff was indeed negligent to a considerable degree.

[20] Mr **Mouton**, who appears on behalf of the plaintiff, readily concedes, correctly so, in my view, the extent of the plaintiff's negligence. In argument, he was constrained to acknowledge that an apportionment of damages ought to favour the defendant on the facts of the present matter. I consider that he is correct in this regard. I think it would be fair on a consideration of all the facts set out above to order the defendant to pay to the plaintiff 30% of such damages as the plaintiff is able to establish that she has suffered in

consequence of the injuries which she sustained in and as a result of her fall on 17 July 2008.

[21] In the circumstances I make the following order:

1. The defendant is liable to pay to the plaintiff 30% of such damages as the plaintiff is able to prove that she has suffered as a result of the injuries which she sustained when she fell while walking on the pavement next to Niven Street, De Mist, Uitenhage, on 17 July 2008.
2. The defendant is ordered to pay the plaintiff's costs occasioned by the hearing on the merits, together with interest on the plaintiff's taxed costs, calculated at the legal rate from a date fourteen (14) days after *allocator* to the date of payment.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv P Mouton instructed by Ungerer Struwig Hattingh
Peo, Port Elizabeth

For Defendant: Adv Mzisi instructed by Lulama Prince & Associates, Port
Elizabeth