



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

NOT REPORTABLE

Case no: 2446/2022

In the matter between:

CHRISTOPHER HENRY HARDING

Plaintiff

and

**NELSON MANDELA BAY METROPOLITAN
MUNICIPALITY**

Defendant

JUDGMENT

Govindjee J

The issues

[1] The plaintiff has instituted a delictual claim for damages against the defendant ('the municipality'). He alleges that he fell into an uncovered or open stormwater drain ('the drain') on 9 March 2021 in Despatch, and that the consequent injuries he suffered were caused due to the municipality's wrongful and negligent conduct.

Merits and quantum having been separated by agreement at the commencement of the proceedings, the following issues require this court's determination:

- a) Whether the plaintiff fell into the drain on 9 March 2021;
- b) Whether the municipality's conduct was wrongful;
- c) Whether the incident was caused by the negligence of the municipality and / or its employees; and
- d) If liability is established, whether there was contributory negligence on the part of the plaintiff.

[2] As to the municipality's negligence, it is alleged that the municipality failed to cover the drain adequately, or to cordon it off as a hazard, despite the issue having been reported. The municipality pleads that it took reasonable steps upon becoming aware of the missing drain cover. Further particulars provided by the municipality explain its position as follows:

'During or about July 2020, a vandalised drain cover lid was reported to the defendant, and soon thereafter a yellow barrier was put up ... A yellow barrier was put up after it was reported in July 2020, and the drain cover replaced on or before April 2021.

The evidence

[3] The plaintiff testified that he had stayed at a friend's smallholding in Despatch on the evening in question. He had borrowed his friend's vehicle, visited a pub, and consumed alcohol. When leaving that establishment, car guards had asked for money and cigarettes. He returned to his friend's dwelling and then realised that his cell phone was missing. He suspected that it had been taken from the car door at the time he had conversed with the car guards, while climbing into the vehicle. It was now past midnight. He returned on foot to an area close to where he had engaged with the car guards. He met the person who had taken his phone, who was with three others, in Amperbo Street, and requested the return of his cell phone. Having obtained the phone, an argument ensued. A man produced a knife. The plaintiff believed that the men wanted to assault him. He ran away and was chased before falling into the drain, landing on his left leg at the bottom of the drain and hearing his knee crack. He phoned his friend, who assisted him back to the smallholding. The pain increased overnight, and an ambulance was called to take him to hospital the following morning

[4] The plaintiff explained that it was dark at the time of the incident. There was no street lighting and he had not seen the open drain. He had subsequently returned to the scene twice, once during the day and once at night, so that he could show his fiancé how dark it was at that spot. His evidence was that he had been unable to see the hole even when not in a panicked situation. It was not visible even from a metre away.

[5] During cross-examination, the plaintiff accepted that the country was in lockdown at the time and that he ought not to have been on the streets at that time. He had informed his attorney and a doctor that he had been running away from assailants or robbers at the time of the incident, and had deposed to an affidavit, in support of an application for condonation, referring to the men as 'armed assailants'. He disputed what appeared in the ambulance records, namely that he had been 'running after thieves' when the incident occurred. He conceded that he had not visited the police station that was close to Amperbo Street at the time of the incident, and that his own Facebook post, seemingly from his time in hospital, alluded to his alcohol consumption on the night in question. He also confirmed that he had no sight in his right eye.

[6] The version put to the plaintiff on behalf of the municipality was that a ward committee member ('Mr Senekal') had reported a damaged catchpit during July 2020. A team had been sent to cover the drain and a yellow barrier had been erected prior to January 2021. The plaintiff maintained that the drain had been open and the barrier was not there at the time of the incident. It was, however, visible when he returned to the scene approximately six weeks after the incident. It may be accepted that he had not reported the incident to the municipality or police until a letter of demand was sent on his behalf.

[7] Mr Walter, the plaintiff's attorney of record, visited the scene on 8 April 2021 and took pictures and video footage, accepted into evidence, of a yellow barrier covering the drain, the opening itself and depth of the hole, estimated at between 2,45 to 2,75 metres. The yellow barrier had covered the gap upon his arrival. Mr

Walter had moved it to the side to take pictures. His uncontested evidence was that he could do so with one hand, as it was 'fairly light' and easily manoeuvrable.

[8] The video depicts the barrier seemingly lying on its side. Indentations create a crumpled appearance. Mr Walter is observed lifting the barrier with his left hand while filming using a cell phone with his right. One side of the barrier is lifted into the air and dropped twice, seemingly with ease. The barrier wobbles slightly when it lands. One of the photographs depicts two circular holes close to the ground, facing the camera.

[9] An application for absolution from the instance was dismissed at the close of the plaintiff's case. The reasons for that decision are apparent from the analysis to follow.

[10] Ms Ntaka, a senior superintendent employed by the municipality in Despatch, testified that she managed the depot responsible for the maintenance of, inter alia, stormwater drains and road infrastructure. Her responsibilities included attending to road defects, sidewalk concrete defects, road signs and markings and drain cleaning. There were 20 employees working at the depot in four teams, one of which dealt with repair of sidewalks.

[11] Mr Ntaka explained that community members were able to contact a call centre to report any road or stormwater infrastructure defects. A reference number would be issued. In addition, people walked into the depot to report defects, and ward councillors or committee members also played a role. A complaint had been received from the councillor's office, either by e-mail or WhatsApp, reporting the issue of a damaged stormwater drain in Amperbo Street. A 'ward committee activity sheet', referenced as 'report for January 2021 Stormwater Drains' was produced. That document had been received from Mr Senekal, a councillor or ward committee member, and reflects some 14 dates and reports, many of which included reference numbers. The relevant entry reads as follows:

'29/07/2020 Reinstatement of Catchpit Corner of Amperbo and Steill Street Heuwelkruin Ref No 1329833.'

[12] The witness explained that some councillors were more thorough than others, and, as in the present instance, would send a list of defects in the area that they expected the municipality to address. Ms Ntaka testified that she had received the report of the damaged catchpit in Amperbo Street on 29 July 2020, as reflected in Mr Senekal's corresponding entry. Her evidence was that her team would 'put' a yellow barrier on top of the affected area as an interim safety measure pending the catchpit being fixed properly. No job card or other written records of this instruction were available. This was due to Ms Ntaka having moved office. Despite a search the information was unobtainable. Her evidence was that her team would have been dispatched almost immediately once a complaint had been received.

[13] Ms Ntaka testified that a photograph depicting the damaged catchpit had been received from Mr Senekal during October 2020. She explained that there was a metro-wide problem of vandalism. Thieves would break the concrete cover to obtain steel and sell this at scrap yards. In cases of old covers, as depicted in the photograph, replacement covers would be made and cast at the depot before being brought to where they were needed.

[14] Ms Ntaka explained that Mr Senekal was in the habit of taking pictures of completed repair work and posting these on Facebook. A picture dated 26 January 2021 reflected repair work in Amperbo Street. In the distance, the yellow barrier was visible. The evidence was that this would have been put up sometime between June 2020 and January 2021. Mr Senekal would also e-mail and message Ms Ntaka on WhatsApp when he came across anything that required her attention.

[15] Ms Ntaka testified that the Covid-19 pandemic had affected operations. Her section had worked at approximately 50 per cent capacity, based on the applicable restrictions, the teams alternating their time on duty. Approximately 20 other drains were being repaired around that time. The drain in question had been repaired by April 2021.

[16] As for the yellow barrier, these were two metres in length and one metre in height, weighing 25 kilograms according to the set specification. Ms Ntaka agreed, during cross-examination, that the barrier in question was damaged. She added that the barriers were old and repeatedly reused, which, she indicated, explained the condition of the yellow barrier visible in one of the pictures.

[17] Ms Ntaka was unable to articulate precisely when the damaged catchpit had been reported to the call centre or received by her office. The presence of a reference number was indicative of a report to the call centre, but call centre records had not been obtained. The job card for the yellow barrier was also unavailable, because of Ms Ntaka's office move, and not stored digitally. The delay in replacing the drain cover had been caused by the backlog of other drains requiring repair, totalling between 20 and 30 drains. Given that backlog, Ms Ntaka reiterated that the yellow barrier was required to safeguard the area.

[18] In response to questioning by the court, she explained that the two holes that were visible could be used to give the barrier weight. Her understanding was that the 25-kilogram specified weight was when the barrier was empty. For catchpits, the practice was to make the barrier lie on its side to cover the entire area. Being two metres in length, this was adequate to cover the entire hole. As for the depicted indentations, Ms Ntaka speculated that the barrier may have previously been used on a road and been run over by a motor vehicle, so that it appeared as if it could no longer stand properly. Given the number of drains requiring repair, the municipality hoped that the temporary barriers would not be removed by anyone. It was not the practice to fill the barriers with water or sand. Drought and logistical difficulties were advanced as the reasons for this.

[19] Mr Senekal testified that he was a pensioner serving the ward committee and focusing on infrastructure and energy. He took responsibility for various matters, including water leaks, potholes, sewerage, and catchpits, liaising with Ms Ntaka. When driving around the streets, Mr Senekal would note and report any problems. He would do the same when a member of the community alerted him to an issue, or capture a reference number if that member had already reported it to the call centre.

He ran a running list of outstanding issues, updating same when required, liaising with municipality officials such as Ms Ntaka, and reporting to the ward committee.

[20] Mr Senekal used WhatsApp and Facebook to communicate. For example, a photograph of completed repair work would be posted on Facebook. He testified that the reference to '29 July 2020' on his 'ward committee activity sheet' for January 2021 appeared to be erroneous, considering that he had photographed the damaged catchpit in question precisely three months later. Given the date of that picture, he assumed that he had only reported the issue to the municipality on that date in October 2020. This was on the basis that it was his practice to take a photograph of every issue that he reported. He had also taken the photograph of unrelated repair work to 44 Amperbo Street, which depicted the yellow barrier in the distance, on 26 January 2021, and the photograph when the catchpit was seen repaired on 13 April 2021.

Analysis

The proven facts

[21] Although the plaintiff's evidence was uncontradicted, its acceptability depends upon its quality. Evidence which is vague, contradictory, highly improbable or plainly irrational will not pass muster.¹ The plaintiff's evidence does not fit into any of these categories. Although some basic details emerged for the first time during cross-examination or by way of the court's questioning, he provided a consistent, plausible version of events. The narrative is certainly not improbable to the extent that it must be rejected outright and the first issue must be answered in his favour.

[22] The implication is that it must be accepted, based on the plaintiff's version, that Amperbo Street was extremely dark sometime around midnight on 9 March 2021, that the plaintiff was running away from and in fear of other persons, at least one such person being armed, and that he fell into the drain at that point in time.²

¹ *Siffman v Kriel* 1909 TS 538; *Katz v Bloomfield and Keith* 1914 TPD 379 at 381; *Nelson v Marich* 1952 (3) SA 140 (A) at 149A–D.

² The order issued in terms of Uniform Rule 33(4) followed an application for separation based upon a pre-trial minute. The order of separation necessitates consideration by this court only of the averments in respect of the incident, wrongfulness and negligence.

[23] Strictly speaking, the pleadings and bulk of evidence are such that this court is obliged to accept that a vandalised drain cover lid was reported to the municipality as early as July 2020. Ms Ntaka testified on this basis, and this was also the version put to the plaintiff. That evidence was gainsaid by Mr Senekal's statement that he had inserted an erroneous date in his January 2021 ward committee activity sheet. The municipality had seemingly not discovered the error during their consultations and when responding to the request for further particulars and proceeded on the basis that the July 2020 date correctly reflected when the issue had been reported by Mr Senekal. The municipality regrettably failed to produce activity sheets for any other months, or any call centre records whatsoever. That being said, in my view little turns on the discrepancy and, as will be indicated, the outcome remains the same even if the issue was in fact first reported only towards the end of October 2020.

Was the municipality's conduct wrongful?

[24] A negligent omission will not give rise to delictual liability unless it is wrongful.³ The issue may be easily dispensed with in the circumstances. It is convenient to consider the question in the usual manner, by assuming the existence of the other elements of delictual liability.⁴

[25] There is ample authority that the report made to the municipality, which it acknowledges, gave rise to a duty of care.⁵ The position has been described as follows:⁶

'The duty to take a positive step by the respondent began from the first day when its employees were advised ... of the presence of the hole. When the respondent became aware of the presence of the dangerous hole in the road a duty was created for it to prevent any harm that could be caused by the existence of the hole. The existence of a legal duty upon the respondent to warn of danger and to repair and maintain roads and pavements is not necessarily a general duty but it arises from the particular circumstances of a given case. The members of the community of the area in which there exists a dangerous hole would

³ *McIntosh v Premier, KwaZulu-Natal and Another* 2008 (6) SA 1 (SCA) ('*McIntosh*') para 11.

⁴ *Za v Smith and Another* [2015] 3 All SA 288 (SCA) ('*Smith*') para 21.

⁵ See, by way of example, the analysis in *Smith* above n 4 paras 14–21.

⁶ *Du Plessis v Nelson Mandela Metropolitan Municipality* [2009] ZAECGHC 54 ('*Du Plessis*') para 20.

reasonably expect the respondent to fix and repair the hole or at least warn the road users of the danger created by the existence of the hole.’

[26] Other than highlighting that the plaintiff had been in the street during curfew hours, Ms *Zietsman*, for the municipality, did not suggest otherwise. That fact, on its own, is insufficient to absolve the municipality of a duty of care that it accepted. This, in the words of Goosen AJ, was ‘to ensure that the defective catchpit did not occasion harm to residents in the area and members of the public’.⁷ The municipality clearly appreciated that it bore such a duty in the present circumstances.⁸ On its own version it took steps to prevent such harm and pleaded that those steps were reasonable. That included the placement of the yellow barrier as an interim measure pending the construction and placement of a substitute cover.

Negligence

[27] The real issue at hand is whether the municipality was at fault in acting as it did. Negligence is established if a reasonable person in the position of the defendant would foresee the reasonable possibility of their conduct injuring another in their person or property and causing them patrimonial loss, and would take reasonable steps to guard against such occurrence. If the defendant failed to take such steps, in those circumstances, negligence would be established.⁹

[28] In *Herschel v Mrupe*,¹⁰ Schreiner JA explained the position as follows:

“The duty of the Court is to try to decide whether the conduct of the respondent was that of a reasonably prudent person, which involves two questions viz.: (1) what dangers of harm would such a person have anticipated in the circumstances in which the respondent found himself; (2) what then would have been the conduct of such a person in these circumstances.” ... No doubt there are many cases where once harm is foreseen it must be obvious to the reasonable man that he ought to take appropriate avoiding action. But the circumstances may be such that a reasonable man would foresee the possibility of harm but would nevertheless consider that the slightness of the chance that the risk would turn into

⁷ *October v Nelson Mandela Bay Metropolitan Municipality* [2008] ZAECHC 205 para 18.

⁸ Cf *Cutting v The Nelson Mandela Municipality* [2002] ZAECHC 18 para 9. Also see *Fischbach v Pretoria City Council* 1969 (2) SA 693 (T) (*‘Fischbach’*) at 697C–F; *Butise v City of Johannesburg and Others* 2011 (6) SA 196 (GSJ) (*‘Butise’*) para 24.

⁹ *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E.

¹⁰ *Herschel v Mrupe* 1954 (3) SA 464 (A) at 476G–477D.

actual harm, correlated with the probable lack of seriousness if it did, would require no precautionary action on his part. Apart from the cost or difficulty of taking precautions, which may be a factor to be considered by the reasonable man, there are two variables, the seriousness of the harm and the chances of its happening. If the harm would probably be serious if it happened the reasonable man would guard against it unless the chances of its happening were very slight. If, on the other hand, the harm, if it happened, would probably be trivial the reasonable man might not guard against it even if the chances of its happening were fair or substantial. An extensive gradation from remote possibility to near certainty and from insignificant inconvenience to deadly harm can, by way of illustration, be envisaged in relation to uneven patches and excavations in or near ways used by other persons.'

[29] In other words, culpability based on a negligent failure to act or to act timeously necessarily involves an assessment of the nature of the precautions that can be taken to guard against foreseeable harm to the public and whether such precautions are reasonable having regard to the circumstances of the case.¹¹ Merely because harm which was foreseeable did eventuate does not mean that the steps taken were necessarily unreasonable.¹² That issue involves a value judgment which seeks to balance competing considerations, including (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.¹³ In general, the inquiry whether the reasonable person would have taken measures to prevent foreseeable harm involves a balancing of considerations (a) and (b) with (c) and (d).¹⁴ The enquiry was described as follows in *ZA v Smith and Another*:¹⁵

¹¹ *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA) para 7.

¹² *Pretoria City Council v De Jager* 1997 (2) SA 46 (A) ('*De Jager*') at 55H–I.

¹³ *Ngubane v South African Transport Services* [1990] ZASCA 148; 1991 (1) SA 756 (A) at 776H–J; *De Jager* above n 12 at 55H–56C. In respect of the third consideration, the question is whether 'the game is worth the candle, with reference to the 'social value of the interest which the actor is seeking to advance'.

¹⁴ *De Jager* above n 12 at 56B–C.

¹⁵ *Smith* above n 4 para 24. Also see *Du Plessis* above n 6 para 22. In that matter, the plaintiff had stepped into a hole in the road of between 300 or 400 mms. When she stepped into or next to the hole a layer of tar gave way under her, causing the existing hole to enlarge. The respondent had been warned of the existence of the hole some days prior to the incident, but had taken no steps to fix the hole or warn the public of its existence, and had led no evidence as to budgetary or other constraints which prevented it from fixing holes in the street promptly, or from at least erecting warning signs when such holes in the street had been reported. The court held that it would have been sufficient for the respondent to warn the road users by encircling the area with a barrier, which would have involved minimal expenses. A reasonable municipality in the shoes of the respondent would have sent people to inspect the hole. Had they done so, it would have been apparent that there was an

‘...in determining what preventative steps the reasonable person would or would not take, every case must depend on its own facts ... it could only be answered with regard to all the facts and circumstances of that case. Including amongst these 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.’

[30] The present case must be decided on its own particular facts and in the light of the evidence that has been presented.¹⁶ As noted in *Kruger v Coetzee*, it is generally futile to seek guidance from the facts and results of other cases.¹⁷ Notwithstanding the manner of framing of the famed test, Holmes JA has himself made plain that it is inappropriate to resort to a piecemeal process of reasoning so as to split the ‘proof of negligence’ enquiry into two stages. There is in fact a single enquiry: has the plaintiff, having regard to all of the evidence in the case, discharged the onus of proving, on a balance of probabilities, the negligence averred against the defendant.¹⁸

[31] While the plaintiff is expected to adduce sufficient cogent, credible evidence, where a plaintiff is not in a position to do so on a particular aspect, less evidence may suffice to establish a prima facie case of negligence where the facts are peculiarly within the knowledge of the defendant.¹⁹ It has been held that in such a situation there is an evidentiary burden upon the defendant to neutralise or rebut the prima facie inference that the cause of the harm was as a result of its negligent act or omission.²⁰ Any explanation as may be advanced by a defendant forms part of the evidential material to be considered in deciding whether a plaintiff has proved the allegation that the damage was caused by the negligence of the defendant or its

immediate need to repair or fix the road or to at least put visible warning signs to alert the road users about the risk of harm. A collapsed drain was a serious matter calling for urgent investigation and the prevention of serious injury, which could have been achieved at no extra cost. Failing to take such steps constituted negligence: paras 23–24.

¹⁶ *Municipality of the City of PE v Meikle* [2002] JOL 9525 (A) (‘*Meikle*’) para 9.

¹⁷ *Kruger v Coetzee* above n 9 at 430G.

¹⁸ *Sardi and Others v Standard and General Insurance Co Ltd* 1977 (3) SA 776 (A) at 780C–H, as cited in *Goliath v MEC for Health, Eastern Cape* 2015 (2) SA 97 (SCA) (‘*Goliath*’) para 11.

¹⁹ *Butise* above n 8 para 27. Also see JC Van der Walt and JR Midgley *Principles of Delict* (4th Ed) (2016) at 244–245. Cf *Kruger v Coetzee* above n 9 at 431E–H.

²⁰ *Butise* above n 8 para 27.

employees.²¹ This includes proof of further steps that a defendant could and should reasonably have taken. The following summary of what is required, drawn from English law, has been cited by the SCA with approval:²²

‘At the end of the trial, after all the evidence relied upon by either side has been called and tested, the judge has simply to decide whether as a matter of inference or otherwise he concludes on the balance of probabilities that the defendant was negligent and that that negligence caused the plaintiff’s injury. That is the long and short of it.’

[32] The crux of the matter is whether the injuries sustained to the plaintiff when he fell into the drain were due to the negligence of employees of the municipality, in that they failed to cover the drain adequately, or cordon it off as a hazard. Answering this question requires consideration of the facts viewed as a whole.²³

[33] Applying the facts to the test, there is little difficulty in concluding that a reasonable person in the position of the municipality would foresee the reasonable possibility of a failure to adequately safeguard the drain causing serious harm to unsuspecting members of the public.²⁴ Heightened danger at night, because of reduced visibility, would have been equally foreseeable.²⁵ Reasonable steps to guard against such occurrence would follow naturally.²⁶

[34] It bears emphasis that the steps taken are not necessarily unreasonable purely because foreseeable harm eventuated, in the sense that the plaintiff fell into the drain.²⁷ The question of reasonableness requires the court to exercise a value judgment, balancing the relevant considerations. In particular, it is readily apparent that the possible consequences if the risk of harm materialised were grave, and that the degree of risk of the harm occurring was real, also considering the location of the drain on the pavement. Put differently, absent any barrier, there was a high risk of a

²¹ *Osborne Panama SA v Shell & BP South African Petroleum Refineries (Pty) Ltd and Others* 1982 (4) SA 890 (A) at 897G–H.

²² *Goliath* above n 18 para 18, citing Lord Justice Hobhouse in *Ratcliffe v Plymouth and Torbay Health Authority* [1998] EWCA Civ 2000.

²³ *Van Wyk v Lewis* 1924 AD 438 at 453.

²⁴ *Cape Town Municipality v Butters* 1996 (1) SA 473 (C) (*‘Butters’*) at 484C–E. It is sufficient if the general nature of the harm to the injured party was foreseeable; it is not necessary that the precise manner of its occurrence be foreseeable: *McIntosh* above n 3 para 12.

²⁵ See *Butters* above n 24 at 478F–H.

²⁶ *Fischbach* above n 8 at 697H–698D.

²⁷ *De Jager* above n 12 at 55I.

person walking on the pavement falling into the drain. Given the depth of the opening, there was a high risk that serious bodily injuries would be sustained.²⁸ This must impact on the preventative steps a reasonable person would have taken.

[35] In *McIntosh*, the SCA held that a court determining the reasonableness or otherwise of the conduct of a public authority will, in principle, recognise the autonomy of the authority to make decisions with regard to the exercise of its powers. For example, a court will not lightly find a public authority to have failed to act reasonably merely because it elected to prioritise one demand on its possibly limited resources above another.²⁹ That notwithstanding, it is clear that if in the actual implementation of a policy or procedure adopted by the authority, or during the course of its operations, foreseeable harm is suffered by another in consequence of a failure on the part of the authority's employees to take reasonable steps to guard against its occurrence, a court will not hesitate to hold the authority liable on account of that omission.³⁰

[36] The question whether the municipality took reasonable steps or not may be addressed based on a recapitulation of the evidence. On the accepted evidence of the plaintiff, the stormwater drain was uncovered at the time he was injured. The yellow barrier was not in place. The location was unlit and extremely dark, so that the gap, which was approximately 2,5 metres deep, was not visible even from a close distance. Based on the uncontested evidence of Mr Walter, the yellow barrier covered the drain on 8 April 2021. But it was seemingly light, easy to displace and move, even with one hand. At the close of the plaintiff's case, there was sufficient evidence to give rise to an inference of negligence on the part of the employees of the municipality.³¹

[37] On the municipality's own evidence, the yellow barrier was damaged and, seemingly like many others, old and repeatedly reused. Although the barrier was constructed so that it could have been filled with water or sand to add weight and

²⁸ See *Grootboom v Graaff-Reinet Municipality* 2001 (3) SA 373 (E) at 380C–F.

²⁹ *McIntosh* above n 3 para 14.

³⁰ *McIntosh* above n 3 para 14.

³¹ *AA Onderlinge Assuransie-Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A); *Cooper and Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA), as cited in *Goliath* above n 18 para 19.

stability to the structure, seemingly no proper thought had been given to this possibility. The municipality hoped, with misplaced faith, that the temporary yellow barrier it had chosen to cover the drain would remain in place month after month without tamper, and seemingly had no mechanism to monitor this.

[38] Little evidence was led by the municipality on the cost or time implications of replacing the cover, as opposed to installing the temporary barrier, or whether other temporary options, such as placement of a concrete barrier, were feasible.³² Having installed the temporary barrier, however, it may have been expected that periodic inspection and maintenance would have been appropriate. In a different context, it has been held that the necessary frequency of this would be related to the item's sturdiness, the period for which it might reasonably be expected to function safely, and 'the known or reasonably to be expected depredations of vandals'.³³

[39] Far from displacing the inference of negligence, the evidence adduced by the municipality substantially supports the probabilities that its negligence was the cause of the plaintiff's injuries.³⁴ This conclusion is not to suggest that an unreasonable standard of constant vigilance was to be expected,³⁵ or that a 'slippery slope' of additional obligations for the municipality will eventuate.³⁶ It may be added that even the lengthy delay in replacing the cover would not necessarily have been negligent had appropriate temporary arrangements been in place.

[40] A reasonably prudent person would have realised that the protection afforded to the public by way of a reused, damaged, unfilled plastic barrier placed on its side and left unchecked week after week was inadequate.³⁷ As held in that matter, a reasonably prudent person would have realised that some additional safeguards

³² Cf *Butters* above n 24 at 481B–D.

³³ *Cape Town Municipality v April* 1982 (1) SA 259 (C) ('April') at 261E–H, dealing with the upkeep of a merry-go-round installed by a municipality. The court's value judgment in that instance considered a fortnightly system of inspections to be reasonable and adequate. It has been held, again in a different context, that state conduct must be reasonable both in conception and implementation: see *Government of the Republic of South Africa v Grootboom and Others* 2001 (1) SA 46 (CC) para 42.

³⁴ Cf *Butise* above n 8 para 38.

³⁵ *De Jager* above n 12 at 56G–I; *April* above n 33 at 263A–E. In *De Jager*, the warning fence was brightly-coloured, including clearly visible red and white tape. Although the fence did not prevent persons from falling into a hole, in the circumstances, and considering financial limitations, this did not result in a finding of negligence.

³⁶ *Butters* above n 24 at 482B–E.

³⁷ *Fischbach* above n 8 at 698D–E.

were necessary to reduce the danger to which members of the public were exposed as a result of the use of this type of barrier.³⁸ A reasonable person in the position of the municipality would and could have taken steps to guard against or reduce the danger, and undoubtedly would have done so.³⁹ The municipality failed to take any such preventative action, relying exclusively on an inadequately conceived, defective temporary measure which it naively expected to withstand the vagaries of the elements and vandalism, absent any additional safeguards or supervision.⁴⁰ There can be little doubt that, applying its mind properly to the challenge, various proportional methods of obviating the danger may have been successfully implemented.⁴¹ Considering the evidence, the inference is inescapable that consideration was not given to these matters, particular in the context of a reused, damaged barrier being chosen to cover the hole, seemingly with the understanding that the backlog in repairs would necessitate the temporary measure being in place for a lengthy period of time.⁴² The prospects of success of the yellow barrier, on its own, were poor, the degree of risk of harm occurring high, and the extent of potential harm severe, implicating what might have been expected in respect of cost and effort to secure the gap. In my judgment the municipality failed to take the steps that reasonably would have been taken and the plaintiff has proved the negligence averred on a balance of probabilities.

[41] This analysis and conclusion resonates closely with the approach and outcome in *Fischbach v Pretoria City Council*.⁴³ In that matter the plaintiff was cutting grass, and moving backwards, on the sidewalk of a street when he fell down a stormwater catchpit which formed part of the pavement, and was injured. Trengove J approached the matter on the basis that a loose cover over the catchpit had been removed due to tampering by an unknown person. The court held that the defendant owed a legal duty to safeguard members of the public against a potential source of danger. As to negligence, it was reasonably foreseeable that harm might result if the

³⁸ *Fischbach* above n 8 at 698E–G.

³⁹ *Fischbach* above n 8 at 698G–I.

⁴⁰ *Fischbach* above n 8 at 698H–699E.

⁴¹ *Ablort-Morgan v Whyte Bank Farms (Pty) Ltd* 1988 (3) SA 531 (E) at 534I–535B, quoting *The Wagon Mound (No 2): Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd and Another* [1966] 2 All ER 709 (PC) at 719D–E. Also see *Butise* above n 8 para 30 and following.

⁴² See the judgment of Brand JA in *Hawekwa Youth Camp and Another v Byrne* 2010 (6) SA 83 (SCA) para 30.

⁴³ *Fischbach* above n 8.

catchpit chamber was not constantly kept covered. A reasonably prudent person in the position of the defendant would ‘unquestionably’ have realised that tampering might result in displacement of the cover, also foreseeing that an unwary pedestrian would be exposed to the danger of falling into the catchpit chamber. Importantly, it was held that the need for additional safeguards was glaring. This was ‘to reduce the danger to which members of the public were exposed as a result of the use of this type of cover’. The defendant, however, took no such preventative action, relying almost entirely on the weight of the cover and its tight fit, in that instance, as a safeguard, omitting to provide any additional safeguards. Employees of the defendant were not instructed to be on the look-out for such danger, nor was anyone required to carry out a regular inspection. Moreover, such options had never been considered.⁴⁴ In concluding that the defendant had been negligent, the court added the following:⁴⁵

‘However, there appear to be a number of ways in which the danger in question could have been guarded against more satisfactorily ... The defendant could also have erected notices warning the public to keep clear of the catchpit area. There may also be other methods of obviating the danger and if the defendant’s engineers had applied their minds to this problem they would, no doubt, have been able to devise some practical and additional safeguards. In *Wells v Metropolitan Water Board* ... Humphreys J, when confronted with a similar situation is reported to have made the following remarks which could also be applied to the defendant, namely:

“...I cannot believe that it is beyond the wit of those eminent scientific persons and practical engineers who are employed by this great authority, which spends vast sums of public money, and has that money at its disposal to spend, to invent some means whereby these covers which, if lifted up, are at once admittedly a danger and a nuisance, can be made safe ...”

Contributory negligence

[42] The municipality bears the onus of proving that the plaintiff was contributory negligent.⁴⁶ The duties of pedestrians walking along a sidewalk were considered in *Stewart v City Council of Johannesburg*:⁴⁷

⁴⁴ *Fischbach* above n 8 at 698C–E.

⁴⁵ *Fischbach* above n 8 at 699C–F.

⁴⁶ *Mabaso v Felix* 1981 (3) SA 865 (A) at 877.

⁴⁷ *Stewart v City Council of Johannesburg* 1947 (4) SA 179 (W) at 186, cited with approval in *Wenborn v Cape Town Municipality* 1976 (1) SA 25 (C) at 29E–G; *Fischbach* above n 8 at 701A–E. Also see

'The ordinary pedestrian does not proceed along a sidewalk with his eyes glued to the ground. He does not expect to walk into excavations and obstructions on a paved sidewalk ... 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. If a local authority in its work on a sidewalk creates a danger, it is clearly the duty of such authority to take adequate steps to guard the public from such danger, by barricading it off from the public or by providing adequate warning signs clearly and plainly visible. Pedestrians are entitled to regard sidewalks as safe and to proceed accordingly unless they are plainly warned to the contrary. It is not without significance that immediately after the accident the defendant's servants in charge of the work barricaded the excavation. The excavation was, in my opinion, in the nature of a trap.'

[43] On the plaintiff's version, already accepted, it cannot be said that the plaintiff was negligent in proceeding as he did, notwithstanding that it was very dark at the time. He was entitled to assume that there was no void in the pavement into which he would fall. Absent the barrier being in place or visible, he would have been caught completely off-guard and with no time to react.⁴⁸

[44] As Mr *Niekerk* argued, there is no evidence to suggest that his impaired eyesight affected his ability to see ahead of him. The accepted evidence reveals an absent of any street lighting and a hole that was not visible even from close proximity. As in *Fischbach*, the plaintiff had no reason to expect that he might proceed into an open drain forming part of the sidewalk. That he was running, and not walking, in the circumstances, is immaterial.⁴⁹ The prior consumption of alcohol is, on its own, also not a basis for an adverse finding. While he was contravening lockdown regulations applicable at the time, this is explained by the need to recover his property. Considering these factors, to have approached the nearby police station would not have appeared efficacious.

the remarks of Goldstone AJA in *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 (1) SA 1 (A) at 15E–F: pedestrians walking on a city sidewalk are entitled to assume that, in the absence of adequate precautions or warning, the way is clear and safe.' Cf *Meikle* above n 16 para 11.

⁴⁸ Cf *Harrington NO and Another v Transnet Ltd t/a Metrorail and Others* 2010 (2) SA 479 (SCA) para 64.

⁴⁹ Cf *McIntosh* above n 3 para 16. In that matter, the plaintiff cyclist was aware of the existence of potholes and, in those circumstances, his speed was held to be excessive, amounting to negligence on his part.

[45] In all the circumstances, contributory negligence has not been proved. The drain was in the nature of a trap and caught him unawares, so that there is no finding of negligence on his part. This conclusion finds support, in analogous circumstances, in the judgment in *Butise*. As in the present instance, counsel for the municipality had contended for a 50:50 apportionment on the basis that the plaintiff did not keep a proper lookout whilst running. The court concluded as follows:⁵⁰

‘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, 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 was an uncovered valve chamber on the pavement ...’

[46] The plaintiff accordingly succeeds in his claim and the following order is issued:

1. The defendant is ordered to pay the plaintiff’s proven damages arising from the plaintiff’s fall into an uncovered stormwater drain on 9 March 2021;
2. The defendant is ordered to pay the plaintiff’s taxed costs of suit on a party and party scale in respect of the separated proceedings on liability.

A GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 23-24 November 2023

⁵⁰ *Butise* above n 8 para 40.

Delivered: 05 December 2023

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