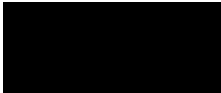


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 06828/2015

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
06/11/2023	
DATE	SIGNATURE

TEBOGO KING KUTU

Plaintiff

and

**CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY**

Defendant

JUDGMENT

MOLELEKI, AJ

- [1] On the morning of 20 September 2014 at approximately 8h00, the Plaintiff was walking along Koma Road, Jabulani, Soweto, when he allegedly stepped on a Municipal drainage opening, stumbled and fell therein and fractured his left leg in that incident. The Plaintiff is as a result, claiming damages in the sum of R692 616.00.

- [2] The Defendant contends that the Plaintiff is the sole cause of the incident and resultant damages alternatively he contributed to the damages suffered. If contributory negligence is found, the amount of damages to be awarded to the Plaintiff be reduced proportionally in terms of the Apportionment of Damages Act.¹
- [3] At the beginning of the trial, the parties agreed in terms of Rule 33(4) of the Uniform Rules to separate merits from quantum. The hearing is therefore, proceeding on the issue of merits only. The determination of quantum is postponed *sine die*.
- [4] This matter turns on two issues only: the issue of liability and whether there was any contributory negligence.

Evidence

- [5] The Plaintiff testified on the circumstances under which the accident occurred and he did not call any witnesses. The Defendant did not lead any evidence or call any witnesses. The Plaintiff testified that he was walking along Koma Road in Jabulani Soweto. He walks this route often and is familiar with its layout. When he got to the robot-controlled intersection he stopped until the traffic light turned green. He proceeded to cross the intersection and he saw a hole ahead of him when he was 2.5 meters away from it.
- [6] The hole was on the pavement, and it had been there for quite a while. He was required to walk on the road to go around the hole. When he looked behind he noticed that the vehicles that were approaching him from behind were still very far. As soon as he got to the hole, he turned back to once again check how far the vehicles were. By then, a vehicle was close by. He, therefore stumbled and fell into the hole whilst avoiding being hit by the said vehicle. As a result, he fractured his left leg.

Legal Principles

¹ 34 of 1956.

- [7] It is trite that the Plaintiff bears the onus to prove his case against the Defendant on a balance of probabilities. However, where contributory negligence and apportionment of damages is pleaded in the alternative, the Defendant would have to adduce evidence to establish negligence on the part of the Plaintiff on a balance of probabilities in respect of the counterclaim. The onus can only be discharged by adducing credible evidence to support the case of the party on whom the onus rests in respect of their respective claims.
- [8] Section 1(1)(a) of the Apportionment of Damages Act,² gives the Court a discretion to reduce the Plaintiff's claim for damages suffered, on a just and equitable basis and to apportion the degree of liability. Where apportionment is to be determined, the Court must consider the evidence as a whole in assessing the degrees of negligence on the parties.

Negligence

- [9] Whether the Defendant was negligent depends on whether its conduct in the circumstances fell short of that of a reasonable man. The test for negligence was set out in *Kruger v Coetzee*.³

“For the purposes of liability culpa arises if -

- (a) a *diligens paterfamilias* in the position of the defendant –
 - (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
 - (ii) would take reasonable steps to guard such occurrence; and
- (b) the defendant failed to take such steps.”

- [10] The only witness who was to assist the Court on how the injuries were sustained is the Plaintiff himself. One of the issues raised by the Defendant was that the Plaintiff's testimony does not accord with the pleaded case and was not in line with the previous statement he made under oath.

² 34 of 1956.

³ [2021] ZASCA 125,1966 (2) SA 428 (A) at 430.

[11] This requires the Court to consider the Plaintiff's case as pleaded and the evidence led at the trial. In his particulars of claim, the Plaintiff pleaded that he fell into a municipal drainage opening. The relevant part of the particulars of claim reads:

“On or about 20 September 2014 at approximately 08h00, at or near Koma Road, Jabulani, Soweto, Gauteng Province, the Plaintiff was walking when he stepped on an open municipal drainage opening, stumbled and fell into such drainage opening”.

[12] In its plea, the Defendant contended that it has no knowledge of the allegations, does not admit same and puts the Plaintiff to the proof thereof.

[13] The Plaintiff's testimony in Court was that on 21 September 2014 he fell into a hole whilst avoiding being hit by a motor vehicle. This error was also repeated in the affidavit that was prepared on his behalf by his attorneys and in the particulars of claim. However, the hospital records on the other hand, recorded that the Plaintiff was attended to on 21 September 2014. The issue of the date is clearly an error. The first report of what transpired was reported at the hospital on 21 September 2014 and it accords with the Plaintiff's testimony.

[14] The purpose of the pleadings is to define the issues for the other party and the court. It is therefore, incumbent on a party to allege in the pleadings the material facts upon which it relies. The Defendant takes issue with the fact that the Plaintiff in his particulars of claim pleaded that he fell into a drainage opening and not a hole as he testified. When considering the pleadings, the case the Defendant has to meet is plain and unambiguous. The Plaintiff's case is that he sustained injuries when he fell into a drainage opening, although in his testimony he stated that he, in fact fell into an open hole. Therefore, the Defendant is able to fully appreciate the case it is called upon to meet. Whether the Plaintiff fell into a drainage opening or a hole is immaterial. It cannot be disputed that in terms of legislation and policies ownership of municipal roads and pavements is vested in public entities, municipalities being one of such public entities.

- [15] Although the Defendant did not call any witnesses, it submitted that there was no negligence on its part and it was the Plaintiff who was in fact negligent. The Defendant submitted that the Plaintiff had failed to discharge the onus that it had a legal duty to repair or to further warn pedestrians of the existence of the hole.
- [16] The Plaintiff's evidence that he fell into a hole is undisputed. There is therefore no reason not to accept that evidence. For a *delict* to be proven, the wrongful act must be the proximate cause of the damage. This connection is clear from the facts of this case. In my view, the Plaintiff accordingly proved the elements of harm and causation.
- [17] The contention of the Defendant that the Plaintiff has not proven that it had a legal duty to repair or to warn pedestrians of the existence of the harm, is without merit. The road in a township which is managed by a municipality belongs to a municipality. There is a duty on the Defendant to maintain and keep such roads in good order. A reasonable municipality in the position of the Defendant would have ensured that its roads and pavements are inspected regularly. From the evidence, it is clear that the hole presented a serious risk of injury to road users. If the Defendant inspected its roads, it would have realised the need to repair and or put visible warning signs to caution road users of the risk of harm.
- [18] Leaving an open trench on the pavement exposed road users to the risk of harm and is a serious matter that called for urgent attention by the Defendant. The Plaintiff stumbled and fell into this hole. The fact that the Plaintiff was avoiding being hit by a motor vehicle does not take away the fact that the Defendant was the cause of the Plaintiff's injury. Had the Defendant carried out prescribed procedures, this occurrence that caused the Plaintiff injury could have been avoided. By failing to put visible warning signs and or follow prescribed procedures, it constituted negligence on the part of the Defendant. Clearly, its conduct falls short of that of a reasonable man in the circumstances. The defendant is therefore, liable to pay the Plaintiff's proved damages.

Contributory Negligence

- [19] What remains to be determined is whether, on the Plaintiff's version, he did not make himself guilty of contributory negligence. If it were to be accepted that, whilst walking he did not keep a proper look-out, then there can be no doubt that he acted negligently as his actions would have drifted from that of a reasonable man.
- [20] Clearly, this is one of those cases where the Plaintiff should have kept a proper look-out. He was aware of the hole on the pavement as well as the fact that Koma road was a very busy road in terms of traffic. He should have been more cautious. When he looked back the first time, he saw motor vehicles approaching, though at a distance. It would appear that the Plaintiff underestimated the speed at which the motor vehicle referred to was travelling and the distance when he first saw it. When he looked back once again the vehicle was very close. This is a clear indication that he did not keep a proper look-out. He entered the road when the vehicle was very close. It cannot be excluded that a combination of all these factors may have caused him to lose focus, and to then stumble and fall into the hole.
- [21] A reasonable man in the Plaintiff's position would have waited for the vehicle to drive past before entering the road to go around the hole. As stated above, he should have been more careful. My view is that by entering the road when he did, he should have foreseen that his action could endanger his own life. The Plaintiff was aware of the hole all along and he saw it when he was still a distance away on the day of the incident. Clearly, the hole was visible, as it was 8h00 in the morning.
- [22] The Court in *Cape Town Municipality v Bakkerud*⁴ at par 27 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

⁴ [2000] ZASCA 174, 2000 (3) SA 1049 (SCA).

law intended to be generally applicable. They are making value judgments ad hoc. Each case will, therefore, be determined on its own facts.

[23] There can be no doubt that the Plaintiff acted negligently. This calls for the determination of the extent of the Plaintiff's contributory negligence. This is not an easy task as it is not a matter of mathematical calculation. What needs to be employed is a careful consideration of all the facts and an exercise of discretion. There will always be a difference of opinion in so far as the determination of negligence is concerned.

[24] If regard is to be had to the conduct of the Plaintiff, he complied with most of his duties. He was walking on the pavement. When he got to the hole he looked back before he entered the road so as to walk around the hole. However, on the other hand even though he looked back he did so when the approaching vehicle was already close. Had he kept a proper look-out, he would have noticed the vehicles that were approaching. In addition, he was fully aware of the layout of the road, including that there was a hole on that part of the road as well as the high traffic volume.

[25] Given these considerations, I find that the Plaintiff's conduct fell 40% short of what would have been expected of a reasonable person in his position.

[26] In the result, the Defendant is ordered to pay 60% of the Plaintiff's proven damages.

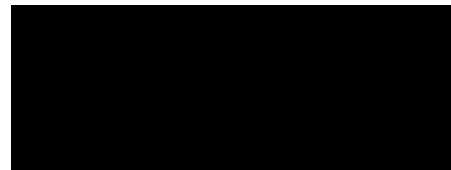
Costs

[27] The long-standing principle is that where both parties, in convention and reconvention, achieve success, the Plaintiff would be responsible for the costs of the counterclaim and the Defendant for the costs of the claim. There is also no basis to grant costs on a punitive scale as contended for by the Defendant.

Order

[28] In the result I make the following order:

1. The issues of liability and quantum are separated in terms of Rule 33(4).
2. The Defendant to pay 60% of the Plaintiff's agreed or proven damages.
 - 2.1 The Plaintiff is to pay the costs of the counterclaim.
 - 2.2 The Defendant to pay costs of the claim.



MOLELEKI AJ
JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of Hearing: 9 & 10 October 2023

Date of Judgment: 06 November 2023

Counsel for the Plaintiff: Adv Raynold Mthembu

Instructed By: M.N Mkansi Inc

Counsel for the Defendant: Adv Teboho Mosikili

Instructed By: MMMG Attorneys