



**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

Case no. EL 434/2020

In the matter between:

KHANYISA SKENJANA

Plaintiff

and

BUFFALO CITY METROPOLITAN MUNICIPALITY

Defendant

JUDGMENT

LAING J

[1] This is a claim for damages as a result of the plaintiff's having fallen while jogging on an uneven pavement along the main road in Amalinda, East London.

Background

[2] The accident happened on 26 February 2019. The plaintiff sustained serious injuries to her right knee and alleges that these were caused by the negligence of the defendant's employees inasmuch as they, *inter alia*, failed to maintain the pavement properly. The quantum of the claim is R3,139,327 and comprises past and future medical expenses, future loss of earnings, and general damages.

[3] The defendant denies liability, pleading that it regularly checks and repairs pavements within its municipal boundaries, within the constraints of the available budget, and takes all reasonable steps to warn pedestrians of damaged surfaces, drains and manholes. In the alternative, the defendant pleads that the plaintiff was fully aware of the damaged pavement and the risks associated with using it, but nevertheless elected to jog thereon; accordingly, she consented to the risk of injury. In the further alternative, the defendant pleads that the plaintiff was also negligent and that the damages must be determined in accordance with the provisions of the Apportionment of Damages Act 34 of 1956.

[4] The matter proceeded to trial for the leading of oral evidence. A request was made at the commencement of trial that the issues of merits and quantum be separated; an order was made to that effect in terms of rule 33(4).

The plaintiff's case

Ms Khanyisa Skenjana

[5] The plaintiff testified on her own behalf. She stated that she had started jogging approximately two weeks prior to the incident, she had been new to the sport. On the day in question, the weather had been clear and dry.

[6] The plaintiff had left her house at about 4.30 pm, wearing proper running shoes; she had proceeded along Main Road in the direction of Frere Hospital, and then turned around at the traffic circle. She had never taken this route before. At the time, there had been high volumes of traffic on the road and many pedestrians using the pavement. On the plaintiff's return, she had been watching the traffic when she had passed a pole on the pavement and suddenly felt herself falling. She had twisted her leg badly in the process, screamed in pain, and called for help from a fellow jogger.

[7] Ms Skenjana averred that the surface of the pavement had been uneven, as depicted in photographs that were submitted as evidence. That portion of the pavement had subsequently been repaired.

[8] She also indicated that she had spoken to a member of a local running club, Ms Yandisa Dintsi, who had cautioned her about the injuries that could occur while jogging. At the time of the incident, the plaintiff had not been jogging fast.

Ms Yandisa Dintsi

[9] The next witness, Ms Dintsi, testified that she was part of a running club. She had used the same route as Ms Skenjana for jogging and usually jogged three or four times per week.

[10] Members of the club used to caution each other about holes in the surface of the pavement; some of the members were not that observant. The portion of pavement depicted in the photographs had not been repaired for quite a length of time. It had, however, subsequently been repaired.

[11] That was the case for the plaintiff.

The defendant's case

[12] The defendant closed its case without leading evidence.

Issues to be decided

[13] The parties previously agreed upon the following issues for determination: (a) whether the plaintiff had set out the facts upon which to allege that the defendant should have foreseen that harm would be caused to the plaintiff; and (b) whether the plaintiff had proved negligence on the part of the defendant.

[14] The case is an action in delict. The essential requirements for delictual liability are well-known: harm sustained by the plaintiff; conduct on the part of the defendant which is wrongful; a causal connection between such conduct and the plaintiff's harm; and fault or blameworthiness on the part of the defendant.¹

¹ *Evans v Shield Insurance Co. Ltd* [1980] 2 All SA 40 (A); see, too, *HL & H Timber Products (Pty) Ltd v Sappi Manufacturing (Pty) Ltd* [2000] 4 All SA 545 (SCA).

[15] At the close of trial, the defendant argued that the plaintiff had failed to prove causation. This is a critical issue that needs to be decided before the court can determine the issues previously agreed upon by the parties. The court must be persuaded that there was indeed a causal connection between the defendant's wrongful conduct and the plaintiff's harm.

[16] A brief overview of the applicable principles follows.

Legal framework

[17] It is necessary, at the outset, to investigate the principles that operate in relation to the question of wrongful conduct within the context of a municipality's failure to repair or maintain a street or pavement. After that, the principles of causation will be reiterated before dealing with the principles pertaining to fault or blameworthiness.

[18] The case law indicates that, previously, the law merely empowered a municipality to repair and maintain a street or pavement. There was no duty to do so.² In *Moulang v Port Elizabeth Municipality*,³ the erstwhile Appellate Division referred to 'the general degree of immunity for municipalities in relation to accidents caused by potholes and the like in the surface of streets'.⁴

² *Haliwell v Johannesburg Municipal Council* 1912 AD 659 and the cases that followed. Collectively, they were referred to as 'the municipality cases'.

³ 1958 (2) SA 518 (A).

⁴ At 522E-F.

[19] The situation changed, however, after the decision in *Cape Town Municipality v Bakkerud*,⁵ where the Supreme Court of Appeal held as follows:

[28] ...There can be no principle of law that all municipalities have at all times a legal duty to repair or to warn the public whenever and whatever potholes may occur in whatever pavements or streets may be vested in them.

[29] It is tempting to construct such a legal duty on the strength of a sense of security engendered by the mere provision of a street or 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 be 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 is not necessary, nor would it be possible, to provide a catalogue of the circumstances in which it would be right to impose a legal duty to repair or to warn upon a municipality. Obvious cases would be those in which difficult to see holes develop in a much used street or pavement which is frequently so crowded that the holes are upon one before one has had sufficient opportunity to see and to negotiate them. Another example, admittedly extreme, would be a crevice caused by an earth tremor and spanning a road entirely. The variety of conceivable situations which could arise is infinite.

[31] *Per contra*, it would, I think, be going too far to impose a legal duty upon all municipalities to maintain a billiard table-like surface upon all pavements, free of any subsidences or 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, go a long way to prevent the opening of the floodgates to claims of this type of which municipalities are so fearful.'

⁵ 2000 (3) SA 1049 (SCA).

[20] The decision in *Bakkerud* marks a distinct move away from the previous position, where municipalities enjoyed a 'general immunity' from liability for harm caused as a result of a street or pavement in a poor condition. An onus, however, rests on the plaintiff to present evidence that a legal duty rested on the municipality to repair such street or pavement or to warn the public about any hazard, and to prove that the failure to have done so gives rise to fault.

[21] The concept of wrongfulness regarding an omission was addressed in *Van Eeden v Minister of Safety and Security*,⁶ where the Supreme Court of Appeal held that an omission to act is wrongful where the defendant is under a duty to act positively to prevent the harm suffered by the plaintiff. The test is that of reasonableness. A defendant is under a duty to act positively where it is reasonable to expect of him or her to have taken positive measures to prevent the harm. The court determines reasonableness by making a value judgment based on its perception of the legal convictions of the community and on considerations of policy.⁷

[22] In *Du Plessis v Nelson Mandela Metropolitan Municipality*,⁸ the court dealt with a claim for damages arising from injuries suffered by the plaintiff when she stepped into a pothole after having alighted from her motor vehicle at night. The court addressed the question of when an omission to act must be regarded as wrongful conduct and stated as follows:

'A local authority, therefore, has a duty to act only where the legal convictions of the community demand the recognition of such a duty. 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*...

⁶ 2003 (1) SA 389 (SCA).

⁷ At paragraph [9]. See, too, *Bakkerud*, at paragraph [27].

⁸ [2009] JOL 24114 (ECG).

...It follows that the ultimate enquiry is whether the local authority can reasonably be expected to have acted in the circumstances of a particular case.⁹

[23] Turning briefly to the concept of causation, the law distinguishes between factual and legal causation. In relation to the former, the question to be asked is whether the defendant's conduct amounted to a *causa sine qua non*. The conduct, in other words, must have been a necessary condition for the plaintiff's harm to have occurred. In *International Shipping Co (Pty) Ltd v Bentley*,¹⁰ the erstwhile Appellate Division applied the so-called 'but for' test. This involves a hypothetical enquiry as to what would probably have happened but for the wrongful conduct of the defendant.¹¹ Regarding legal causation, the question to be asked is whether the factual link between the wrongful conduct and the harm suffered should be recognised in law; the harm must not be too remote.¹²

[24] Finally, the concept of fault is relevant to this matter inasmuch as the issues identified by the parties for determination entail an investigation into the existence or otherwise of negligence on the part of the defendant.¹³ The classic test for negligence (*culpa*) remains that enunciated in *Kruger v Coetzee*,¹⁴ where the erstwhile Appellate Division stated:

'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

⁹ The court referred to *Cutting v Nelson Mandela Metropolitan Municipality* [2006] JOL 16574 (A).

¹⁰ 1990 (1) SA 680 (A).

¹¹ At 700E-F.

¹² See Van der Walt and Midgley, *Principles of Delict* (LexisNexis, 4ed, 2016), at paragraph 181.

¹³ *Op cit*, paragraph 135. There are two manifestations of fault: intent and negligence; the existence of either forms the basis upon which to impute wrongful conduct to the defendant. Negligence is relevant to the present matter.

¹⁴ 1966 (2) SA 428 (A).

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps.’¹⁵

[25] Consequently, the question of whether the plaintiff in the present matter has set out the facts upon which to allege that the defendant should have foreseen that harm would be caused to the plaintiff, and the question of whether the plaintiff has proved negligence on the part of the defendant, must be determined in accordance with the test laid down in the above case.

[26] All the essential requirements for delictual liability must be proved before the plaintiff can succeed in her claim. The principles must be applied to the facts of the case at hand.

Application of the law to the facts

[27] The plaintiff alleges that the defendant and its employees had been negligent. The grounds of such negligence are listed in the plaintiff’s particulars of claim as follows, *inter alia*: the defendant and its employees had failed to maintain the pavement; they had failed to ensure its safety; they had failed to ensure that it did not constitute a source of danger; and they had failed to alert the public to the danger by not erecting warning signs. Furthermore, the plaintiff alleges that the defendant owed a duty to the public and that its failures or omissions amounted to a breach thereof.

¹⁵ At 430E-F.

[28] A key contention made by the defendant in argument was that the plaintiff placed insufficient evidence before the court to prove the above allegations. She failed to discharge the onus.

[29] In her testimony, the plaintiff stated that the pavement had been uneven, as apparent from the photographs submitted. Nevertheless, the photographs relied upon by the plaintiff give rise to questions of their own. The pavement appears to be tarred for the most part but only a strip, estimated to be approximately 50 centimetres in width when measured from the kerb, remains in reasonably good condition and runs past the pole described by the plaintiff. Near the pole, the tarred pavement gives way, along the outer edge, to what looks like a light gravel or stony surface. There is a small lip, estimated to be a centimetre or two in height, where the two surfaces meet. Just past the pole, but at a distance estimated to be slightly more than one metre away from the kerb, the light gravel or stony surface drops away at a gradient of approximately ten to 15 degrees, increasing in steepness at approximately two metres from the kerb to form what looks like a path that leads into the adjacent bush.

[30] The above observations are based purely on the photographs. The plaintiff never testified in detail about the condition of the pavement. It seems to have been far from perfect but not impossible to have used while exercising a reasonable amount of caution. There was nothing to suggest that it was marked by large potholes or broken paving or that the uneven surface was difficult to discern. There was also nothing to suggest that the pavement was located outside a busy shopping mall or abutted commercial premises where there were high volumes of users. Whereas the plaintiff indicated that there had been many other pedestrians using the pavement at the same time, what this meant is not clear; there may have been bustling throngs of people, making it difficult to see where she had been going, or there may simply have been a steady flow of people, separated by comfortable spaces between them. Moreover, the plaintiff never indicated whether the condition of the pavement had previously been brought to the attention of the defendant and that nothing had been done about it.

[31] Overall, the principles laid down in *Bakkerud* require the plaintiff to have placed enough facts before the court to prove that there had been a duty on the defendant to have repaired or maintained that section of pavement or to have warned the public about any hazard. It is simply unclear from the evidence that such a duty had existed. Applying the test described in *Van Eeden* and *Du Plessis*, the court is not convinced, based on the evidence presented, that the legal convictions of the community would have deemed it reasonable to have expected the defendant to have taken positive steps in the circumstances. The photographs indicate, as the defendant has argued, that the strip of pavement between the kerb and the pole was passable. It was a relatively narrow strip, but it was a tarred, flat surface. The plaintiff did not advance any evidence to the contrary to discharge the onus of proof placed upon her.

[32] The failure on the part of the defendant to have proved wrongful conduct should be the end of the matter. It is necessary, however, to deal briefly with the issue of causation. The plaintiff alleges that she suffered serious injury to her right knee, necessitating substantial medical treatment. She avers that future medical treatment will entail, *inter alia*: ligament reconstruction, ongoing treatment for chronic instability associated with osteoarthritis, a debridement procedure, knee replacement, and a tendon transfer. The plaintiff testified, in relation to the incident itself, that she had jogged between the kerb and the pole; she had then felt her leg 'falling and turning'. She never indicated, however, precisely how or why she had fallen. There was no mention of her having tripped on the strip of tar itself or having tripped on the small lip where the tarred surface met the light gravel or stony surface or having tripped where the surface dropped away at the top of the path into the adjacent bush. There was also no medical evidence about the probable cause of the plaintiff's injuries, whether these had been purely as a result of the way she had twisted her leg or whether they had been complicated by underlying weaknesses in her ligaments and tendons. The court is left to speculate.

[33] Consequently, it is difficult to find that the alleged omission on the part of the defendant in relation to the condition of the pavement amounted to a *causa sine qua non*. The 'but for' test applied in *International Shipping* does not take the matter any further; it cannot be said that the plaintiff would probably not have fallen and injured herself but for the defendant's failure to have repaired the section of pavement in question or to have warned the public about any hazard that existed. From the plaintiff's testimony, she was an inexperienced jogger. She had also been watching out for passing motor vehicles at the time. The possibility that this combination of facts may have caused her to lose focus on her jogging and to stumble and fall, as happens from time to time, cannot be entirely excluded. In the absence of sufficient evidence, the court is not persuaded that the plaintiff has established factual causation to succeed in her claim.

[34] By reason of the court's findings, above, it is unnecessary to embark upon an investigation into the fault or blameworthiness of the defendant (and, by implication, the issues identified by the parties). The existence or otherwise of negligence no longer falls to be determined where the plaintiff has failed to present facts upon which findings of wrongful conduct and causation can be made against the defendant.

Relief and order to be granted

[35] The court has considered the pleadings and the evidence placed before it. The facts presented by the plaintiff are insufficient to persuade the court, in these circumstances, that the defendant had a duty to repair the portion of pavement in question or to warn the public about any hazard in relation thereto, and that the failure to have done so gave rise to wrongful conduct. Moreover, the facts are insufficient to persuade the court that the alleged omission on the part of the defendant gave rise to factual causation regarding the injuries suffered.

[36] Overall, the court is not satisfied that the plaintiff has discharged the onus of proof placed upon her. In other circumstances, where an adequate set of facts had been presented, the court may well have decided differently. Unfortunately for the plaintiff, this is not such a case; the relief sought cannot be granted. In relation to costs, there is no reason why these should not follow the result.

[37] Accordingly, the following order is made:

- (a) the plaintiff's claim is dismissed; and
- (b) the plaintiff is directed to pay the defendant's costs.

JGA LAING

JUDGE OF THE HIGH COURT

Appearing on behalf of the Plaintiff:

Adv Wood, instructed by Niehaus
McMahon Attorneys, East London.

Appearing on behalf of the Defendant:

Adv Quin SC, Adv Poswa, instructed by
Makhanya Attorneys,
East London.

Date Heard: 06 September 2022

Date Delivered: 29 November 2022