

IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION, MTHATHA]

[Not Reportable]

CASE NO: 3123/17

Heard on:
28/05/19

Delivered on: 04/06/19

In the matter between:

CHURCHILL SINUKELA

Plaintiff

and

KING SABATA DALINDYEBO MUNICIPALITY

1st Defendant

MUNICIPAL MANAGER

2nd Defendant

JUDGMENT

NHLANGULELA DJP

[1] The plaintiff is Sinukela Churchill, an adult male person residing at 321 Matolweni Street, Ngangelizwe Location, Mthatha. On 11 July 2017 he instituted an action for damages against King Sabata Dalindyebo Municipality (the Municipality) for a reason, as alleged by him, that on 08 January 2016 he

fell into a street water drainage tank, the property of the Municipality situated at the corner of Mabovula Road and Tembu Road, Ngangelizwe Location that had been left open due to the negligence of the employees of the Municipality who by exercise of reasonable care should and could have ensured that they left the drainage tank properly closed with a lid as soon as they had finished working on it.

[2] The pleaded defence of the Municipality is, firstly, that it did not deploy any of its workers to attend to the drainage tank under question and; secondly, that the lid of the water drainage tank had been removed by thieves. On those bases the Municipality seeks a dismissal of the action.

[3] It is common cause that the plaintiff caused a statutory notice of his intention to sue, as is envisaged in sections 3 and 4 of Act 40 of 2002, to be delivered upon the Municipality before issuing summons. In such notice full particulars of the claim were set out in order to inform the Municipality of the nature, the circumstances and the amount of compensation sought to be recovered for the delict caused by its employees and for which the Municipality is vicariously liable to pay. Despite this, the Municipality failed to respond thereto with the result that summons had to be issued.

[4] At the trial one Mr Thobelani Nogwavu, the supervisor in the Roads Section of the Municipality testified.

[5] The evidence adduced may be summarised as that during the morning of 08 January 2016 the plaintiff saw a group of employees of the Municipality all dressed in uniform attending to control water drainage leaks at the corner of Mabovula and Tembu Roads where the drainage tank in question is situated. The identity of the water drainage tank was confirmed by Mr Nogwavu when he testified. The plaintiff stated further that he took a taxi at Tembu Road en route to the town to get to Southernwood Township where he had been contracted to do some work. In the afternoon he knocked off from his work for the day and went back to Ngangelizwe where he alighted from the taxi and walked down the pavement of Tembu Road to join Mabovula Street. It was in the early evening,

but already dark, when he got to Tembu Road. When he reached the corner of those two roads, and unaware that the drainage tank was open, he fell into the tank and dislocated his left ankle. According to him there were no barricades or any sign put up on the road to warn him and other pedestrians about the danger posed by hole created by the open drainage tank. He was trapped in the hole for a considerable period of time. He cried out for help until he was rescued by people residing at Mabovula Road. He was later on taken to the hospital where he was admitted, treated and discharged after some days. He told the court that the injuries he sustained on his ankle are serious in nature.

[6] Mr Nogwavu testified that he was only informed by his employer about the plaintiff's claim on 06 May 2019 before he testified in court on 07 May 2019. On that occasion he got to know for the first time about the danger posed by the open drainage tank. As a result he discovered upon conducting an inspection that the steel lid of the tank had been removed. He quickly made arrangements for the tank to be covered by a new lid made of metal to prevent thieves, bent towards "trading" in stolen steel materials, from removing it again. This witness denied that the lid was removed on 08 January 2016 because he ordinarily would not have had workers on any site deployed by him who would work on a drainage tank and thereafter leave it uncovered by a lid without barricading the area around which it is situated.

[7] In my opinion the evidence of Mr Nogwavu is unhelpful to the Municipality due to the fact that it is hypothetical in nature. It cannot be said that it contradicts the version proffered by the plaintiff. That leaves the evidence of the plaintiff, coupled with the concession regarding the identity of the water drainage tank, as the credible evidence upon which the issue of negligent omission on the part of the Municipality must be decided.

[8] The evidence that Mr Nogwavu immediately attended to replace the lid of the drainage tank upon having become aware of the plaintiff's claim confirms that the Municipality owed a duty to the plaintiff by ensuring that it provided the lid to prevent the plaintiff, and any other member of the public, from falling into the tank. This is a statutory duty, which derives from the constitutional mandate

of the Municipality in terms of section 152 of the Constitution, not only to provide services to people but to ensure that such services are safe and healthy to use. A failure to comply with that mandate, as is the case here, amounts to wrongful omission which correctly found in the plaintiff's claim – see *Minister of Safety & Security v Van Duivenboden* [2002] 3 All SA 741 (SCA) and *Cape Town Municipality v Bekkerud* 2000 (3) SA 1049 (SCA).

[9] However, it remains for the plaintiff to prove the causal connection between the wrongful omission and the damage suffered by him. In this regard the case of *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) is apposite. With reference to *Bentley*, Brand JA in *ZA v Smith* 2015 (4) SA 574 (SCA) re-stated the test for legal causation as follows at para [30]:

“The criterion applied by the court a quo for determining factual causation was the well-known but-for test as formulated, eg by Corbett CJ in *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) ... at 700E-H. What it essentially lays down is the enquiry – in the case of an omission – as to whether, but for the defendant's wrongful and negligent failure to take reasonable steps, the plaintiff's loss would not have ensued. In this regard this court has said on more than one occasion that the application of the ‘but-for test’ is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the minds of ordinary people work, against the background of everyday-life experiences. In applying this **common-sense**, practical test, a plaintiff therefore has to establish that it is more likely than not that, but for the defendant's wrongful and negligent conduct, his or her harm would not have ensued. The plaintiff is not required to establish this causal link with certainty.”

[10] On the consideration of the facts of this case, the replacement of the lid by Mr Nogwavu on 06 May 2019 which could have been replaced before the plaintiff was injured on 08 January 2016 was unreasonable.

[11] I find that the plaintiff has succeeded to prove that a reasonable person in the position of the Municipality ought to have foreseen the possibility of harm to the plaintiff, would have taken steps to avoid it but failed to take preventive steps by either ensuring that the lid of the water drainage tank was always in place or, if not, an appropriate warning sign was put up around the tank to alert the pedestrian such as the plaintiff about the existence of danger. And, in my

opinion, the omission on the part of the Municipality is placed sufficiently close to the injuries sustained by the plaintiff. Consequently, liability for the delict is proved in this case because the facts of this case prove the requisites for liability as stated in the case of *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430 E-F.

[12] The determination of the *merits* of the case was separated from that issue of *quantum*. The costs attended to the hearing of the *merits* must follow the result of the trial.

[13] In the result the following order shall issue:

- (a) The first defendant be and is hereby held liable for damages suffered by the plaintiff on 08 January 2016.**
- (b) The first defendant shall pay the costs of the hearing on the issue of the *merits*.**
- (c) A hearing on the issue of *quantum* be and is hereby postponed sine die.**

Z. M. NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

MTHATHA

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