

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2769/2020

DATE: 16-07-2024

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

DATE 8 November 2024

SIGNATURE

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In the matter between

CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY

Applicant

and

TESHLYN DENICA NAIDOO

Respondent

EX TEMPORE J U D G M E N T

LEAVE TO APPEAL

20 **VAN DER MERWE, AJ:** This is an application for leave to appeal against a judgment where I held that the City of Johannesburg was to pay for all of the plaintiff's proven damages as a result of injuries sustained after she had fallen into a manhole.

Adv Shakung submitted that the only ground for

leave to appeal relied upon is that the claim ought to have been apportioned. It was submitted on behalf of the applicant, that it is not disputing its liability.

The applicant's counsel submitted that it was pleaded that the respondent - the plaintiff in the action - was contributory negligent as the plaintiff was the only one who fell into the manhole, and not her brother or mother who were with her.

In the heads of argument and during oral argument
10 it was submitted that she would have fallen and tripped in any event, had the manhole been covered or not. It was also submitted that it was still light enough for the respondent to see the open manhole.

This was simply not the respondent's evidence, neither was that the evidence of the plaintiff's brother and mother. Their evidence was not successfully challenged under cross-examination.

The respondent's counsel Mr Dlali, referred me to the trite law that the onus is on a party pleading
20 contributory negligence to prove the same.

The applicant did not prove any contributory negligence when the trial was heard. Adv. Shakung relied on the matter of Bakkerud¹, and reference was made to paragraph 29 where it is stated that "*It is axiomatic that*

¹ The Municipality of Cape Town v Bakkerud 2002(3) 1049 (SCA)

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... The public must be taken to realise that and to have a care for its own safety when using the roads and pavements." It was submitted that the facts in the Bakkerud matter and the present case are similar as the plaintiffs in both matters fell into manholes.

- 10 The full court in the Bakkerud matter found that the parties were to blame equally and reduced the damages award by half. It was submitted that the public (such as plaintiff) also had a duty to look and take care where they are walking.

In the Bakkerud matter, an elderly lady stepped into one of two small holes (when compared to the size of the manhole the respondent fell into) in the tarred pavement, she then stumbled and fell. Those holes were only 15 centimetres in diameter and 10 centimetres deep. The evidence of the elderly lady in the Bakkerud matter was
20 that she was aware of the holes, that it had been there for at least six months and that she must have been thinking of other things when she stepped into them, whereas in the present matter, the evidence was that it was dark, she was not aware of the open manhole and that she was not familiar with the road.

The threshold for the granting of leave to appeal under section 17(1)(a)(i) is higher than what it was under the previous Supreme Court Act. The full bench held that the Superior Courts Act had "*raised the bar for granting leave to appeal*"², referring with approval to the judgment of Bertelsmann J, in the matter of *Mont Chaveax Trust v Tina Goosen*³ and quoted the following passage:

10 *"It is clear that the threshold for granting leave to appeal against the judgment of a High Court has been raised in the new act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion. See Van Heerden v Cronwright and Others 1985 (2) SA 342 (T) at 343 H. The use of the word 'would' in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be*
20 *appealed against."*

I am not convinced that there are prospects of success, or any other compelling reason why another court would come to a different conclusion in this matter relating to apportioning the damages, based on the evidence that was

² Acting National Director of Public Prosecutions and others v Democratic Alliance (Society for the Protection of Constitution Amicus Curia) 2016 JDR 1211 (GP) at para 25

³ JDR 2325 (LCC)

led. Accordingly, the following order is granted:

ORDER

The application for leave to appeal is dismissed with costs.

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VAN DER MERWE, AJ

JUDGE OF THE HIGH COURT

DATE: 8 November 2024

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For the applicant:	Adv. Shakung
Instructed by:	K. Matji & Partners
For the respondent:	Adv. S. Dlali
Instructed by:	Smith Rand Attorneys
Date of the hearing:	
(Application for leave to appeal)	16 July 2024
Date of judgment:	16 July 2024
Date of request for	
written judgment:	29 October 2024 (as per emails and letter attached thereto dated 2 October 2024)

CASE NUMBER-initials
YEAR-MONTH-DAY

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JUDGMENT

Date of request for

Transcription:

30 October 2024

Date of receipt of

Transcription:

5 November 2024

Date of revised ex tempore

Judgment:

8 November 2024