

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 53968/2021

- | | |
|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: NO |

22 April 2025

DATE

SIGNATURE

In the matter between:

SIZAKELE YENDE

Plaintiff

and

**THE CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

First Defendant

JOHANNESBURG ROAD AGENCY

Second Defendant

JUDGMENT

DOMINGO, AJ

Introduction

- [1] This is a delictual claim brought by the plaintiff, for personal injuries suffered by her a result of falling into an open manhole whilst walking on a pavement.

- [2] By agreement between the parties the matter proceeded in respect of the merits, namely liability issues only, with quantum standing over for later determination in terms of Rule 33(4) of the Uniform Court of Rules.
- [3] During the trial, the parties relied on their respective trial bundles, that included photographs that were marked as exhibits. The plaintiff was the only factual witness. The defendants called only one witness Mr M Ngoveni a manager at the Johannesburg Road Agency.

Requirements for liability

- [4] The plaintiff's action is founded on the *Actio Legis Aquillia*. The issue of liability required the plaintiff to establish conduct, which was wrongful and negligent, on the part of the defendants, which caused her to be injured. The plaintiff bears the onus of proving these requirements.
- [5] The defendants contended that this Court in adjudicating the matter ought not to apply a blanket imposition on the defendants, but to consider the merits and demerits of the respective cases and then make a value judgment. Counsel on behalf of the defendants referred the court to the *Municipality of Cape Town v Bakkerud*¹ case where the court stated the following:

"While the Court *a quo*'s conclusion that it was open to it to re-visit the general or relative immunity of municipalities and, if justification existed, to jettison the notion, was therefore correct, I think that, having done so, it was wrong to substitute for it what amounts to a blanket imposition upon municipalities generally of a legal duty to repair roads and pavements. In my view, it has to be recognised that in applying the test of what the legal convictions of community demand and reaching a particular conclusion, the Courts are not laying down the principles of law intended to be generally applicable. They are making value judgments *ad hoc*."

Allegations advanced by the plaintiff

- [6] The defendants caused the construction of the manhole and accordingly had a legal way to keep it closed at all times.

¹ [2000] ZASCA 174; [2000] 3 All SA 171 (A) at para 27.

[7] The pertinent allegations advanced by the plaintiff are that the incident was caused by the sole negligence of the defendants who were negligent in the following:

7.1 It failed to maintain the manhole appropriately or at all.

7.2 It failed to put a notice or a sign to notify road users of the existence of the open manhole.

7.3 It failed to keep the street and its pavements in a safe condition as per its constitutional mandate and duty.

Defendant's defence on the pleadings

[8] The defendants defence on the pleadings was to put the plaintiff to the proof thereof that she indeed fell into the manhole. The existence of a legal duty towards the plaintiff was denied. The defendants denied they were responsible for the development, maintenance and upgrades of all roads, sewage drainage systems and general development of the area within its jurisdiction in Gauteng and more particularly in an around Soweto. The defendants in the alternative pleaded that if such a duty existed, that such duty was subject to the availability of manpower and resources. In the alternative, the defendants also pleaded contributory negligence on the part of the plaintiff.

Plaintiff's evidence

[9] The plaintiff gave evidence that on 1 February 2020 she was on her way home from Maponya Mall in Soweto where she had bought groceries for her business as a baker. She lives and was born in Soweto. She testified that she decided to catch a taxi at Chris Hani Road, as the taxis inside the mall were slow and she was in a hurry to get home. The plaintiff testified that while walking on the pavement, she was walking fast and was looking out for a taxi. While walking she fell in an open manhole and injured her right ankle. The plaintiff's right leg entered the manhole and she fell, the manhole she fell into was open, square shaped and it was dark.

- [10] The plaintiff gave evidence that the manhole was situated on top of the pavement where she was walking, it was not closed and there were no signs next to the manhole. She only noticed the manhole when her leg entered the edge of the manhole. She fell on her right-hand side, she felt pain and she was helped out of the manhole by people who were passing by.
- [11] The plaintiff indicated that the incident occurred between 12h00 and 13h00 in the afternoon, the sun was out, and it was visible at the time when the incident occurred. However, she testified that she did not see the open manhole. She is not familiar with area as it was her first time walking in the area.
- [12] The plaintiff testified that after she fell, she called her husband who then fetched her from the scene of the incident and took her home. When she arrived at home, she thought she had a small injury, but the pain increased, and her husband then took her to Chris Hani Baragwaneth Hospital.
- [13] The plaintiff testified that she was admitted at the hospital from the 1 February till the 26 February 2020, during which time she underwent an operation on her right ankle and a pin was inserted into her ankle. Her ankle bone was broken at three places and a screw, and 2 plates were inserted in her ankle.
- [14] During cross-examination, a proposition was made to the plaintiff, that at the time that the plaintiff alleges the incident occurred, and the time that she was taken home up until the time she was attended to at the hospital, the timelines do not correspond. The plaintiff alleges that the incident took place between 12h00-13h00 however, the time that she was admitted at hospital indicates 12h50 on the hospital admission form. The plaintiff indicated that she did not know why the times do not correlate as it was her husband who provided the hospital admission with her information. The plaintiff then conceded that the time periods do not add up.
- [15] Another proposition made to the plaintiff was that according to the hospital records she was referred from a clinic, whereas in her evidence she did not indicate that she was taken to a clinic. The plaintiff stated that she never went to a clinic, and it was her husband who provided the information to the hospital staff.

- [16] During cross-examination, the plaintiff conceded that the paving where the alleged incident occurred was visible and made with bricks and she agreed that the paving around the manhole was not made with bricks but concrete. She conceded that the concrete section was much closer to the tarred road and conceded that the pavement was visible despite the weed on the pavement.
- [17] During cross-examination, the plaintiff conceded that she was multitasking as she was walking and looking for a taxi at the same time. The plaintiff stated that she was looking where she was going and looking out for a taxi. She disagreed with the defendants' averment that she contributed to her own negligence, as she did not see the manhole and there were no signs that there was an open manhole. The plaintiff conceded that the weed on the pavement did not affect her visibility on the day of the incident.
- [18] The location of the manhole was also identified by the plaintiff with a photograph introduced. The photo showed a manhole without a cover. No objection was raised to the photograph, thus entitling the plaintiff to produce the photograph. During cross-examination, the plaintiff testified that a lady who was working with her attorney took the photograph after the plaintiff's discharge from hospital. The plaintiff testified that the photograph depicted the area and how it looked during the period of the incident.
- [19] The plaintiff under cross-examination conceded that the stormwater drain (the manhole) area is different from the rest of the pavement and agreed that a person should walk on the side of the stormwater drain.
- [20] The plaintiff stated under cross-examination that there were other people passing, if the hole was closed, she would not have fallen, she further admitted that she was indeed in a hurry.

Defendants evidence

- [21] The defendants called one witness, Mr M Ngoveni.

- [22] Mr Ngoveni testified that he works for the Johannesburg Road Agency (hereinafter referred to as the "JRA") in Dobsonville depot in Soweto and he is the manger of Region D which have 38 wards.
- [23] He testified that the JRA has a maintenance plan, and the plan included a proactive and reactive plan. He stated that the JRA has limited resources, as in Region D there are only six inspectors, and the JRA rely on members of the public to report any defects on their structures.
- [24] Mr Ngoveni identified the manhole in this matter as a stormwater drain. He indicated that the turnaround time for fixing a defective stormwater drain is four days and the JRA will usually barricade the defective structure. In total he said that the JRA has about approximately 2500 stormwater drains. Mr Ngoveni testified that the JRA has a website for social media for reporting any defects and they use this platform to remind the public to report defects. He testified that when the JRA receives calls or notices they attend to the defects in their infrastructure. The lids/covers of the stormwater drains are inspected twice a year in preparation of the rainy season. Mr Ngoveni further testified that the JRA does not have the resources to inspect more than twice a year and ideally, he ought to have 38 inspectors as he has 38 wards in region D and at the time of the incident, he had 6 inspectors and now he only has 4 inspectors.
- [25] Mr Ngoveni testified that the plaintiff was supposed to have walked on the pavement as the stormwater drain is not part of the pavement. He noted that the sidewalk (pavement) is paved, and it was designated for pedestrians to walk on the pavement. He further testified that the manhole in the photograph presented to him is big and hard to miss if you are walking towards that direction; and the sidewalk (pavement) was clearly visible.
- [26] During cross-examination, Mr Ngoveni indicated that he manages region D, except for facilities, he knows what is happening on the ground as he has assistant mangers and there is an internal system that generates reports monthly.
- [27] He was referred to the manhole photograph discovered by the plaintiff and he conceded that there was no lid/cover on the manhole. He stated that when a lid

is missing it can be reported by inspectors and/or members of the public. Mr Ngoveni conceded that the manhole was only covered on 5 August 2020 after receipt of a work order. The manhole was repaired after the plaintiff had fallen into the manhole. He noted that he only became aware of the plaintiff's case on the 7 February 2024. Mr Ngoveni indicated that the JRA investigated the case of the plaintiff, and an inspection of the manhole was done on 22 February 2024. He testified that the JRA was not aware that the lid/cover of the storm water drain was open at the time of the incident.

[28] During cross-examination, the defendants witness testified that the manhole was constructed and maintained by the JRA. Mr Ngoveni testified that maintenance entailed monitoring the state of the grass and whether there were any weeds on the pavement. He testified that the JRA also ensures that manholes are well kept and that they are closed at all times in order to keep members of the public safe. Mr Ngoveni further testified that the manhole lid is used for enabling the opening of the manhole so that the defendants' staff can gain access and go inside the manhole for purposes of cleaning it. Once cleaning is done, *"they close it for safety."* At the time of the incident, Mr Ngoveni conceded that the defendants failed to barricade the open manhole, and he testified that this should have been done.

[29] Mr Ngoveni testified that the plaintiff ought to have walked on the pavement made up of bricks and if there were other people, she ought to have yielded for them as that is what is expected of a normal human being as that process would not have taken more than a second.

[30] He further testified that any person who chooses to walk over a manhole is at risk whether the manhole is open or not, as the structure might be unstable and defects can be developed depending on various factors. He maintained during cross-examination that the plaintiff was not supposed to walk over the stormwater drain as it might be unstable but should walk on the designated pavement.

[31] It is common cause that for plaintiff to succeed she bears the onus of establishing the five elements of a delict. The five elements the plaintiff must establish to succeed are: (1) conduct (either act or omission); (2) wrongfulness; (3) negligence (fault); (4) causation; and (5) that harm was suffered.

[32] Herewith a brief summary of the five elements. Firstly, conduct can take the form of an act or omission. An omission can be committed where the defendant was under a legal duty, by virtue of its ownership or control of the property to take preventative action but failed to do so.² Secondly, a wrongfulness inquiry depends on the considerations of legal and public policy. In this particular matter the legal position that is a negligent omission, is only wrongful if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm³ Thirdly in regard to negligence; the legal questions to be asked is first, whether the reasonable person would reasonably have foreseen the harm in question and would have taken reasonable steps to guard against such harm and second, whether the defendants failed to take the required steps.⁴ Fourthly, there is causation. This requires a consideration of factual and legal causation. Factual causation: the “but-for” test, expressed as “but for” the defendants omission. Legal causation is concerned with the consideration whether, in law, the defendant’s negligence is linked closely enough to the harm suffered.⁵ The fifth element, is “harm or damages that requires the plaintiff to prove that personal injuries were suffered and this is related to losses in the form of example medical expenses, loss of earning capacity, or general damages for pain and suffering.”⁶

[33] In *Municipality of Cape Town v Bakkerud*⁷ the Supreme Court of Appeal stated:

“A minuscule and underfunded local authority with many other and more pressing claims upon its shallow purse, and which has not kept in repair a little used lane in which small potholes have developed which are easily visible to and avoidable by anyone keeping a reasonable look-out, may well be thought to be under no legal duty to repair them or

² *Schaefer v City of Cape Town* (4204/2019) [2025] ZAWCHC 46 (17 February 2025) at para 18.

³ *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA).

⁴ See *Kruger v Coetzee* 1996 (2) SA (A) 430 E-G.

⁵ *Supra* note 2 above at para 22.

⁶ *Supra* at para 23.

⁷ *Supra* note 1 above at paras 28,29 and 30.

even to warn of their presence. A large and well-funded municipality which has failed to keep in repair a pavement habitually thronged with pedestrians so densely concentrated that it is extremely difficult to see the surface of the pavement, or to take evasive action to avoid potholes of a substantial size and depth, may well be under a legal duty to repair such potholes or to barricade or otherwise warn of them. 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.

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 roads and pavements.

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 or tremor and spanning a road entirely. The variety of conceivable situations which could arise is infinite.”

- [34] From the above case it is clear that a municipality’s liability in delict is not automatic as it must be considered on a case-by case basis, and a plaintiff bears the onus, on a balance of probabilities, to establish all of the elements of a delictual claim.⁸

Discussion and Evaluation

- [35] Having regard to the law the plaintiff must prove on a balance of probabilities that there was no cover on the manhole, and it was this defect that caused her fall and injury. The plaintiff must also prove that the defendants were responsible for

⁸ *Supra* note 2 above see para 28.

that manhole (stormwater drain) on that pavement and either knew or should reasonably have known that there was no cover on the manhole (stormwater drain).⁹ In applying the test established in *Kruger v Coetzee*¹⁰ the plaintiff must establish firstly, whether the defendants would reasonably have foreseen the harm in question and would have taken reasonable steps to guard against such harm and secondly, whether the defendant's failed to take the required steps. This matter only deals with the merits of the case; therefore, I will not deal with the damages enquiry. Finally, the plaintiff must establish factual causation that *but* for the defendant's failure to cover the manhole, barricade the manhole area or warn of the defect, she would not have injured herself. In respect of legal causation the plaintiff must establish that the type of harm must be within the realm of what is reasonably foreseeable.¹¹

[36] The plaintiff is the only factual witness in this matter. The defendants only witness conceded that he was not in a position to dispute and/or place doubt on the plaintiff's version that she fell into the manhole and sustained injuries.

[37] While there is no contradictory evidence that the plaintiff fell in the manhole. From the evidence deduced I cannot reach a conclusion that the plaintiff fractured her leg in three places. I can only conclude from the hospital records provided that the plaintiff had an injured leg, this is according to the hospital admission form completed on the day of the incident. The plaintiff testified that she was in hospital for a month and that she underwent surgery on her ankle. The plaintiff has not produced any medical records of her stay in hospital or discharge records from the hospital. She has not produced any medical records of her surgery or any medical records of the extent of her injuries as adduced from her testimony.

[38] In regard to the issue of the timeline raised by the defendants, from the time the incident occurred to the admission at the hospital the plaintiff conceded that the timeline does not align with her evidence that the incident took place between 12h00 and 13h00. However, she does state that her husband is the one that completed the admissions forms. It must be noted that the plaintiff's husband has

⁹ *Supra* at para 29.

¹⁰ *Supra* note 4 above.

¹¹ *Supra* note 2 above at para 29.

not been called as a witness and no corroborating affidavit by the husband has been filed by the plaintiff.

[39] The time of arrival at the hospital is indicated on the admissions form as 12h50, however, the hospital admission registration form does have an overall time stamp which reflects 14h52. While I am wary of the non-alignment of the time, this application deals with the merits of the matter only and not quantum, at this stage I can only conclude that the plaintiff fell into the manhole and injured her right leg as per the admission registration form.

a) Wrongfulness

[40] The defendants sole witness testified that the manhole was constructed and maintained by the JRA. Mr Ngoveni stated that the defendants failed to barricade the manhole and that it should have been done. He contended that the manhole was only covered after the plaintiff's incident on the 5 August 2020, this was done in response to a created work order. It is not clear from the records who reported the matter of the defective manhole to the JRA. The defendants, therefore, conceded that they had a duty to cover and barricade the manhole. Thus, the defendants' concession of its omission to cover and barricade the manhole amounts to wrongful conduct on the part of the defendants, on that basis the next issue to be addressed is the defendants' negligence.

b) Negligence and causation

[41] In the case of *Cape Town Municipality v Bakkerud*¹² the court stated that the same evidentiary evidence can be used to establish wrongfulness and negligence:

"It is so that some (but not all) of the facts relevant to the first enquiry [to establish wrongfulness] will also be relevant to the second enquiry [to establish negligence] (if it is to 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

¹² *Supra* note 1 above at para 31.

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.”

[42] In applying the principles espoused in the case above and the first part of the negligence test, one can easily conclude that that the defendants wrongful omission, had been negligent: a reasonable person in the shoes of the JRA would have had no difficulty in being instrumental in the taking of reasonable preventative steps.¹³ Furthermore, the defendants witness testified that manhole covers are being stolen and vandalised resulting in open manholes, therefore the JRA proactively inspects areas. This means that it could be reasonably foreseeable by the JRA that someone could be injured by falling into an uncovered manhole.

[43] Furthermore, in respect of foreseeability, the JRA worked on the alleged manhole on the 5 August 2020 in response to a work created order. However, the defendant's witness testified that he only became aware of this case by the defendants' legal team on the 7 February 2024. On the 22 February 2024, a team was dispatched to the area of the alleged manhole for inspection. At the time of inspection, photographs were taken which was introduced by the defendants as exhibits, which shows the manhole covered and repaired. Chris Hani Road in Soweto is high foot traffic road, like the plaintiff in this case, pedestrians use this road to catch taxis. Thus, after the incident of the plaintiff, there was a work order created which meant notice of the defective manhole was reported by someone other than the plaintiff. The foreseeability of real risk in this case was high.

[44] In regard to the defendants failure to take reasonable steps, Mr Ngoveni, the defendants sole witness testified that the defendants have both a reactive and proactive plan, they inspect stormwater drains twice a year in preparation of the rainy season and they have a 24/7 team that responds to reports from the public. The 24/7 team would go out to inspect the manhole, will barricade the area to make it safe and will then assess the situation to determine whether they have the necessary materials to deal with the matter of fixing the problem. The defendants submit that these duties are subject to the availability of manpower

¹³ See Johan Scott “How safe should a sidewalk be? The evergreen question of a municipality's liability for negligent omissions” in *TSAR* (2013) 164 -177.

and resources. As indicated by Mr Ngoveni at the time of the incident he only had 6 inspectors, presently he only has 4 inspectors but ideally, he would like 38 inspectors as he oversees 38 wards.

[45] It is submitted by the defendants that their legal duty was subject to the availability of manpower and resources. During cross-examination of the plaintiff, Counsel on behalf of the defendants did not put the defendants' version of the availability of manpower and resources to the plaintiff.

[46] Counsel for the plaintiff submitted that where a version is not put, it cannot be used. To support this assertion, Counsel referred the Court to the case of *Masilela v Leonard Dingler (Pty) Ltd*.¹⁴ the court stated:

"It is trite that if a party wishes to lead evidence to contradict an opposing witness, he should first cross-examine him upon the facts that he intends to prove in contradiction, to give the witness and opportunity for explanation. Similarly, if the court is to be asked to disbelieve a witness, he should be cross-examined upon the matters that it will be alleged make his evidence unworthy of credit."

[47] Further in *Small v Smith*¹⁵ the court stated:

"It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness, and if need be, to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved."

[48] The plaintiff's counsel submitted correctly that a party is obliged to put to the witness of his opponent a version of events as will be adduced by him. The rationale of this rule is that the other party should be forewarned of what the

¹⁴ (2004) 25 ILJ 544 (LC) at para 28.

¹⁵ 1954 (3) SA 434 (SWA) at 438.

version of the other party will be so as to afford him an opportunity to deal with it.¹⁶

[49] In regard to the resources and capacity defence of the defendants, the plaintiff's counsel further averred that no discovery was filed of record to evidence and/or support the submissions made by the defendants regarding their capacity and financial resources. The object of discovery is to ensure that before the trial both parties are made aware of all the documentary evidence at the disposal of the parties which in turn assist not only the litigating parties but also the court to discover the truth.¹⁷

[50] In the majority of cases dealing with municipality negligence the facts relating to the municipality's capacity and resources would lie particularly within the municipality's knowledge and that in such circumstances a small amount of evidence on the plaintiff's part would justify an inference of causation, barring evidence to the contrary.¹⁸

[51] In the present matter, if the JRA could substantiate its proactive and reactive policy on the basis of its financial and Human Resources capacity and had been able to supply this court with detailed documentary evidence on those aspects, the defendants may have been able to dispel the primary inference of negligence, as well as causation on its part.

Contributory Negligence

[52] The defendants pleaded that the incident if any, was caused solely by the negligence of the plaintiff who was negligent in one or more or all of the following respects:

52.1 the plaintiff failed to keep a proper lookout;

¹⁶ *Supra* at 438 F. See also *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); 1999 (10) SA BCLR 1059; [1999] ZACC (11) at para 61.

¹⁷ See *Durbach v Fairway Hotel Ltd.* 1949 (3) SA 1081 (SR) at 1083.

¹⁸ See *Supra* note 13 above.

- 52.2 the plaintiff failed to take adequate or any cognisance of the area at or near the location where the plaintiff walked;
- 52.3 the plaintiff failed to pay attention to where she was walking;
- 52.4 the plaintiff failed to pay attention to the conditions of the ground in the area where the incident allegedly occurred;
- 52.5 the plaintiff failed to exhibit the degree of care expected of her in the circumstances; and
- 52.6 the plaintiff failed to avoid the alleged incident when, by the exercise of reasonable care, she could and should have done so.

[53] In the alternative, the defendants contend for a 50%-50% apportionment based on contributory negligence.

[54] Section 1 of the Apportionment of Damages Act¹⁹ states:

“Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.”

[55] Counsel for the defendants referred the court to the case of *Hammerstrand v Pretoria Municipality*²⁰ where the court stated:

“The mere fact that a person having fallen into an excavation which has been lawfully dug by another raises no manner of presumption of negligence on the part of the latter; for, in spite of the defendant having taken all reasonable precautions the plaintiff may have fallen into the excavation through gross carelessness on her own part. There is, therefore, no reason to depart from the ordinary rule of law that he who alleges negligence must prove it.

But the law does not set impossible demands in such cases; it does not make any extravagant demands upon a person. It is entitled to assume that others will also take

¹⁹ Section 1(a) of Act 34 of 1956.

²⁰ 1913 TPD 374 at 376-377.

reasonable care of themselves, will keep their eyes open, and will not take risks of which they are or ought to be aware.”

[56] Having regard to the totality of evidence in this matter, I am of the opinion that there is contributory negligence on the part of the plaintiff. The plaintiff was consistent in her testimony that the incident took place during the day, it was sunny, she was walking fast, was multitasking between walking, and trying to catch a taxi. The photograph that was discovered by the plaintiff corroborates the fact that there was no obstruction that might have impeded the plaintiff’s visibility of the manhole as the manhole was not covered for example by grass or sand. Furthermore, the incident did not take place late at night where the visibility of the plaintiff may have been impeded. The plaintiff in her testimony and in her particular of claims did not provide this court with an explanation as to how and why she was not able to see the open manhole. It was only during cross-examination that the plaintiff mentioned there were other people walking on the pavement, however, she did not say whether there were people walking behind her or on the side of her. Neither did she explain how exactly the people in front of her impacted her negotiation in not seeing the open manhole. A reasonable sense of proportion is called for here taking into account the totality of evidence presented in this matter.²¹ I am of the opinion that contributory negligence is present, as the plaintiff did not keep a reasonable proper look-out of the pavement area while walking.

Order

[57] In the circumstances, I make the following order:

57.1 The defendants, jointly and severally, are liable for 50% of the plaintiff’s proven or agreed damages.

57.2 The defendants, jointly and severally, are ordered to pay 50% of the plaintiff’s costs on Scale B, with the one paying and the other absolved.

²¹ See *Municipality of Cape Town v Bakkerud* case *supra* note 1 above at para 28.

57.3 Quantum is postponed *sine die*.



W DOMINGO
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of hearing: 20 and 21 January 2025, head of arguments submitted on 24 and 27 January 2025

Date of Judgment: 22 April 2025

APPEARANCES

For the Plaintiff:

ADVOCATE K MVUBU
instructed by YONELA BODLANI
ATTORNEYS

For the Defendants:

ADVOCATE S DLALI instructed by K.
MATJI & PARTNERS ATTORNEYS

