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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

CASE NO.: 2044/2023

In the matter between:

BADEN BRENTON SCHOEMAN

Plaintiff

and

NELSON MANDELA BAY MUNICIPALITY

Defendant

JUDGMENT

GQAMANA J

Introduction

[1] In this matter the plaintiff instituted damages claim against the defendant as a result of injuries he sustained when he allegedly fell in a hole on the sidewalk at 3rd Avenue Windvogel, Gqeberha on 26 March 2023. As a result of the fall, he sustained a tibial

plateau fracture in his right knee and was treated at Livingstone Hospital. The hole was excavated by the defendant's employees on 24 December 2021.

[2] The plaintiff attributed negligence to the defendant on the basis that its employees failed to fill the hole, alternatively to cover the hole, further alternatively to cordon off the hole, which was not visible to him due to the presence of overgrowth and litter.

[3] The defendant has denied that the plaintiff fell in the hole. Further it also denied negligence, and in amplification thereof, it pleaded that the hole upon completion of the excavation work was adequately cordon-off in a manner that would have sufficiently warned any person approaching that vicinity, which was in any event outside the usual pedestrian path and was not part of any designated walkway. As an alternative, the defendant also pleaded contributory negligence in that the plaintiff failed to keep a proper lookout where he was walking. The trial proceeded only in respect of liability with the issue of quantum postponed sine die.

Issues

[4] The issues which I was called to determine were the following :

- (a) whether the plaintiff fell into the hole as pleaded;
- (b) whether the defendant discharged its legal duty by cordoning off the hole;
- (c) whether plaintiff's fall was caused by the negligence of the defendant's employees; and
- (d) in the event negligence is determined in favour of the plaintiff, whether there was contributory negligence.

Plaintiff's evidence

[5] The plaintiff testified and also called Mr *Roger Gysman* in support of his claim. Below herein is the summary of their evidence.

[6] The plaintiff's narration of events under which the incident occurred was that: on the date of the incident, he had visited his friend *Mershine* at his backroom flatlet at no: 2[...], [...] Avenue Windvogel, where they had spent the night socialising, smoking hookah pipe and drinking beers . In the early hours of the morning at approximately between 03h00 and 04h00a.m, on his way out to get a hookah pipe coal, at a house further up the street, he used the small gate, which I shall refer to as the pedestrian gate. He took one or two steps and fell in the hole in a forward motion to the ground and was unable to get up. It was dark and the streetlights were off because they were broken, hence he did not see the hole before he stepped into it. He screamed for help and *Mershine* and another gentleman (whom he does not know his name), came to his assistance. He was taken to the backroom flatlet. He felt immense pain and he requested *Mershine* to take him home. His evidence was that he was sober although his friends and him had drunk two or three beers throughout the night.

[7] On arrival at his home, he asked his father to take him to Livingstone hospital. He was treated at hospital for a right knee injury.

[8] The cross-examination commenced with shots fired exposing internal contradictions and inconsistencies on the case pleaded in the particulars of claim and the plaintiff's evidence in chief. In the particulars of claim it was pleaded that the hole was not visible 'due to the presence of overgrowth and litter'. But in his evidence in chief, his version was that he did not see the hole because it was dark. In desperation to rescue himself, he testified that the hole was 'closed' with rubbish and litter and there was nothing that prevented him from falling. At the end he said he did not see hole because of both the darkness and overgrowth and litter.

[9] Further, the plaintiff was grilled about the crucial omission on his original particulars of claim. It was pointed out to him that the exact place where he allegedly fell was not pleaded. The case pleaded was that he was walking in [...] Avenue, Windvogel and he stepped into an insufficiently demarcated excavation site, as a result of which he

sustained injuries to his right leg. On both the original and the amended particulars of claim, it was not mentioned that he fell in front of house no: 2[...] [...] Avenue, Windvogel. Plaintiff conceded that [...] Avenue is a big area.

[10] It was pointed to him that the case pleaded was that, he was walking on the sidewalk when he fell into a hole. But in his evidence, he fell on the grass verge in front of the pedestrian grate as depicted in photograph 2 of exhibit A, the photo album depicting the scene of the incident. The hole was a meter and a half or a meter from the pedestrian gate. He also mentioned that he used the main gate to enter his friend's premises, hence he was not aware of the presence of that hole. But on his way out to get the hookah pipe coal he exited through the pedestrian gate which was closer.

[11] Plaintiff was also cross-examined at length about the information on his hospital records. It was apparent that his evidence on how he sustained the injuries was incongruous with the information contained in the hospital records. He was grilled about the fact that in the hospital records he did not mention that he fell into a municipal hole. The information on the hospital records indicated that on admission, the plaintiff informed the doctor at casualty that he sustained the injuries when he fell in the morning at home.

[12] Further it was drawn to the plaintiff that he informed Dr *Grant* that he missed the step on pavement on the road and fell on his right knee, contrary to the case pleaded and his evidence in chief.

[13] Again he was shown the contradiction between his evidence and information recorded by Ms *Matiwane* in the hospital record.

[14] To conclude the cross examination it was put to him his version was an afterthought designed to align his case in law for the purpose of holding the defendant liable. It was also the defendant's line of cross examination that after the hole was excavated it was sufficiently cordoned off by a net which was put on top of the hole. The

plaintiff denied that and testified that the hole was not 'closed' and was no signage. Furthermore, it was put to him that after the hole was dug, it was 'half backfilled', the plaintiff denied that proposition.

[15] In re-examination the plaintiff was shown a memorandum dated 12 April 2023 from Livingstone hospital where the doctor recorded the following that:

“His injury was as a result of Mr Schoeman falling into an insufficiently demarcated excavation site”

[16] The second witness was Mr *Roger Gysman*, an adult male person who resides at No. 2[...] [...] Avenue, Windvogel. Mr *Gysman* is the elder brother of *Mershine Gysman*, the plaintiff's friend. He did not see how the plaintiff fell but he was made aware of the incident after it happened. On the morning in question, the plaintiff came and knocked at the front door of the main house looking for the coal for a hookah pipe. He opened the small door and informed the plaintiff that he did not have it, and he then closed the small door. He went to the toilet and after a while he had the plaintiff screaming for help. When he went to look, he saw *Mershine* and another guy carrying the plaintiff inside to the back servant's quarter. When he asked what had happened, plaintiff said he fell inside the hole, but it was nothing major he was okay. He closed the small door and went back to sleep.

[17] He also testified that he took the photographs in exhibit “A” a week or two after this incident at plaintiff's request. He testified in detail about what is depicted each photograph. He also confirmed that on the morning of the incident the streetlights were physically broken and were not working and it was dark outside. Furthermore, the outside light at his own house had a blown fuse and as such there was no light from the house.

[18] He gave detailed evidence on how and when the hole was excavated by the municipal employees. His version was that, on 24 December 2021, the municipal

employees were called to fix a burst water pipe. They came with a TLB to dig up the hole in order to sort out the burst water pipe. It was during that process that the underground power cable was damaged. The fixing of the problem continued until the early hours of Christmas Day. After the work was finished, they left.

[19] At about 12o'clock midday on Christmas Day they came back to fix it properly. The burst water pipe was fixed properly, but with the power cable they made a temporary connection. The hole that was dug by the TLB was left 'just like that' and there was a net that was thrown over the hole. The net was red and yellow or white.

[20] The hole was completely filled in 2023 or in 2024 after this incident.

[21] In cross examination he testified the hole that was dug by the TLB was 'a big hole and dangerous hole' and it was closer to his property. Because of that he would often advise and alert his visitors about the presence of that hole. He also mentioned that on 22 November 2022, he noticed sparks coming out the power cable from that hole. He often warned and shouted at the children not to kick the ball closer to that hole because it was dangerous. The plaintiff was not warned not to use the pedestrian gate. It was the big gate that the visitors would regularly use to enter and exit his premises because it was always open.

[22] It was put to him that the hole was half backfilled and cordoned off, but he disputed that. His version was that the hole was left like that with a net thrown over it.

[23] There was no re-examination and the plaintiff's case was then closed.

Defendant's case

[24] For the defendant's case three witnesses were called. The first witness was Mr *Bukotso Segatle*, an acting superintendent in the electricity and energy department of the defendant. He is in charge of investigations of all claims against the defendant that

originates from his department. Relevant hereto he investigated the underlying claim made by the plaintiff that he fell in the hole that was not covered by the municipality and sustained injuries. Such investigation was conducted shortly before this trial commenced.

[25] The first thing he did was to look on their internal system to see why the hole was dug. He could not find anything on the system; there was no complaint registered about power going off in that area at that time. There was never a complaint from the neighbours of the uncovered hole. There was no information at all from their system relating to this particular incident. There being no information from the system he consulted and also visited the site with the senior superintendent in charge of the area concerned.

[26] On the site, the superintendent mentioned that there is an underground voltage (electrical) cable that carries about 400 volts running in that path about 500 millimeters from the wall. He could also see that there was work done by the municipality in that area. Seemingly the employees from the electricity department attended to repair a cable which was damaged by water section.

[27] He testified that, on information given to him temporary supply to fix the cable was employed. He had no personal knowledge of this matter, but he testified that according to the standard operation procedure, after finishing installing the temporary supply the hole would be backfilled to about 300 millimeters. The hole would be barricaded and cordoned off. A visible nett would be put on top of the hole. They would try by all means to come back as quickly as possible to do the permanent repair and complete backfill of the hole. The cable pipe is about a half a meter underground. During his visit to the site there was no hole, but he had no information on when it was backfilled completely.

[28] Under cross-examination he admitted that the hole was excavated by the defendant's employees from water section in order to fix the burst water pipe and in the process, the electrical cable was damaged.

[29] He also admitted that he had no personal knowledge whether or not the hole was backfilled and the volume of work for that area which could have contributed to the delay to backfill the hole completely. He could not dispute that the hole was fixed completely only in 2023, although it was excavated on 24 December 2021. It was put to him that 11 months after the municipality dug the hole and did the work, there were flames coming out of the hole incongruous to his testimony that the hole was backfilled. However, he stuck his guns that it was impossible to have sparks coming out of the voltage cable once the hole is backfilled.

[30] He also conceded that the netting which was apparently used to cover the hole was not stable in that, if a person stepped on it, he or she would still fall into the hole. However, he capitulated and mentioned that the netting is there to alert members of the public of the danger. The net was visible even if it's dark if a pedestrian keeps a proper lookout at the ground in front of him where he walks.

[31] The second witness was Mr *Lauren Geswindt*, an acting senior superintendent at the department of water works. He testified that his department is responsible for fixing burst water mains and service leaks covering the Windvogel area.

[32] His evidence was that on 24 December 2021, his department received a call about the burst water main near house no 20, 3rd Avenue, Windvogel and he was amongst those employees that attended to repair the water problem. On his arrival he found that there was a burst water main and they needed to shut the water to do the repairs. They had to use a TLB to excavate and to get to the burst water pipe. While the TLB was digging it damaged the underground electrical cable. Because of that he called the senior superintendent at the electricity department and informed him about the damaged electrical cable. The energy and electricity department came to switch off the electrical cable so that the water department could continue with their work to repair burst water mains. After they finished with the burst water pipe, they backfilled the burst water main underneath the electrical cable. The water pipe was 1.5 meters deep

underground and the hole was backfilled up to a half a meter which was just underneath the electrical cable. They left the employees from electricity department still working on the electrical cable.

[33] In cross examination he admitted that when they left the site there was a half a meter hole where the electrical department had to do their part of the job and then fill it. Nothing much of controversy came out the cross examination of this witness.

[34] The third witness was Ms *Nompumelelo Matiwane*, a professional nurse working at Livingstone hospital in the male orthopedic ward. She has eight years of working experience as a nurse in the same ward. Her home languages are isiXhosa, Afrikaans and English. Her evidence was that she received the plaintiff at her ward on 30 March 2023 based on the information from the hospital records. The hospital records were handed in as exhibit D. Before that there were other medical staff who would have attended to him right from the casualty. When the plaintiff arrived at the orthopedic ward, he was put on the bed, and she then asked him in English what had happened. The plaintiff responded that he missed a step at home and fell on his right knee. The plaintiff was well orientated and alert at the time. She recorded that information on the plaintiff's hospital file and she signed it. She also obtained the vitals and recorded same in the file as well. The plaintiff had a right knee fracture. She disputed that the plaintiff was confused and not orientated. She was adamant that she wrote down everything said by the plaintiff because it is critical to know the history of the patient. At no stage did the plaintiff mention to her that he sustained his knee injury by falling into a municipal hole.

[35] In cross examination she repeated her evidence that everything the plaintiff said to her was written down in the file. Again, she was clear that it was very important to know the patient's history. With few questions in re- examination, the defendant's case was closed.

Discussion

[36] The plaintiff bears the onus to prove that the injury he sustained was attributed to the negligence of the defendant. The plaintiff was a single witness on how he stepped into the hole and fell. The plaintiff as the party who bears the onus, his evidence must be credible to the extent that his uncorroborated evidence satisfies the court on probabilities it is the truth¹. Even though a plaintiff's evidence is uncontroverted, its acceptability depends upon its quality². The court must consider its merits and demerits and decide whether, despite any shortcomings or defects in the evidence, it is satisfied that the truth has been told.

[37] The credibility of the witness and probability must still be considered. If the evidence is vague or contradictory or highly improbable, a plaintiff in such a case would not have discharged the onus.³

[38] Where there are contradictions on the disputed facts, the correct approach is that set out in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie SA and others*⁴.

[39] From the onset I must mention that there are different versions before me on how the plaintiff sustained his injury. In the original particulars of claim the version pleaded was that: he stepped into an insufficiently demarcated excavation site whilst walking. That version changed in his amended particulars of claim. The version pleaded is that: he was a pedestrian at the time he fell into a hole on the sidewalk. In court he gave another version. His evidence was that he took one or two steps, and he fell into a hole in forward motion on the ground in front of 'the small gate.' These contradictions were unearthed during his cross examination.

[40] Besides the above versions, there is another different version given by him on

¹ Botha v Kirk Attorneys (ECD 757/2016) [2019] ZAECELHC (22 January 2019).

² Harding v Nelson Mandela Bay Municipality (2446/2022) [2023] ZAECQBHC 65 (5 December 2023) para 21.

³ Nelson v Marich 1952(3) SA 140 (A) at 149 A-D.

⁴ 2003(1) SA 11 (SCA) para 5.

admission at the orthopedic ward at Livingstone hospital. That version is that he missed a step and fell at home. A witness, Ms *Matiwane*, was called by the defendant to confirm the notes that she had written on the plaintiff's hospital file. Although the plaintiff is Afrikaans speaking the conversation between him and Ms *Matiwane* was in English. Ms *Matiwane* is also fluent in Afrikaans, her home languages are English, Afrikaans and isiXhosa. Therefore, the issue of a language barrier does not come to the fore. There was suggestion that the plaintiff had taken medication and was confused when he gave that information, but Ms *Matiwane* refuted such suggestion and stuck to her evidence that the plaintiff was well orientated and alert at the time.

[41] In attempt to salvage the plaintiff, Mr *Niekerk* referred me to an entry dated 12 April 2023 in the hospital record which indicates that the plaintiff's injury was as a result of him falling in an insufficiently demarcated excavation site. The person who made that entry was not called by the plaintiff and there was no agreement on the correctness of the content of such records. In light thereof not much weight can be attached to such entry or information. In my view, the testimony of Ms *Matiwane* in relation to the plaintiff's history, that she was informed by the plaintiff that he missed a step and fell at home is a credible version. Ms *Matiwane* has no interest in this matter, and she was a completely independent witness. She impressed me as an honest and reliable witness.

[42] The plaintiff also gave three different versions of the reasons that he could not see the hole before he stepped into it and fell. For instance, the case pleaded on his behalf is that the hole was not visible because of 'overgrowth and litter'. But his evidence in chief was that, the invisibility of the hole was caused by darkness due to the streetlights not working. However, in cross examination he gave a third version. According to that version, his visibility was obstructed because of both overgrowth and litter and darkness. Despite the opportunity given to him to explain these contradictions, he was unable to do so.

[43] The plaintiff was not a good witness. I am alive to the fact that he testified through

an interpreter. Indeed, the services of the first interpreter⁵ had to be terminated in the middle of the cross examination. But a second interpreter was procured again by his own attorney. I do not agree with Mr Niekerk's submission that the plaintiff's credibility was compromised because of the quality of interpreters. Throughout the evidence in chief, the issue of the competency of the interpreter did not arise at all. It was through the heat of cross examination that the interpretation came to the fore when the plaintiff was unable to answer questions posed to him by the defendant's counsel. When the second interpreter was procured, the plaintiff still could not surf well on the rough waves of questions exposing the internal and external contradictions in his version. In my overall assessment the plaintiff was an unreliable and poor witness.

[44] The plaintiff's evidence considered as a whole and objectively left me with the impression that it was a fabricated version designed to align it to his cause of action and claim with the purpose of holding the defendant. The material inconsistencies and incongruities mentioned above render his version incredible and consequently it is rejected.

[45] Accordingly, the plaintiff has failed to discharge the onus on the balance of probability that his version is the truth and that his knee injury was as a result of a fall in the hole which was left uncovered by the defendant's employees.

[46] There is no reason for the costs not to follow the results.

Order

[47] In the circumstances, the following order shall be issued:

- 1. The plaintiff's claim is dismissed.**
- 2. The plaintiff is ordered to pay the defendant's costs on a party and party scale including the costs of Counsel on scale B.**

⁵ He was arranged by the plaintiff's attorney.

N GQAMANA
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Plaintiff	:	<i>Adv D Niekerk</i>
Instructed by	:	Swarts Attorneys Gqeberha
 Counsel for Defendant	:	 <i>Adv X Nogantshi</i>
Instructed by	:	Rushmere Noach Inc. Gqeberha
 Heard on	:	 28–29 May and 23 July 2025
Judgment delivered on	:	28 August 2025