



IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NUMBER: 6934/2021P

In the matter between:

THAMSANQA WILSON MADUBANE

PLAINTIFF

And

ETHEKWENI MUNICIPALITY

DEFENDANT

JUDGMENT

P C BEZUIDENHOUT J:

[1] Plaintiff instituted an action against Defendant for damages resulting from injuries he sustained after falling into a manhole at Ward 5[...] A[...], I[...], KwaZulu-Natal 6 June 2019. As a result of a previous order that was granted the matter proceeded only on the issue of liability. Defendant also raised a special plea that there was non-compliance with the institution of legal proceedings against certain organs of state Act 40 of 2002. This was however cured when an order was granted that the notice provided by Plaintiff complied with the Act.

[2] It is common cause between the parties that Plaintiff fell into the manhole and that he was injured and that Defendant had a duty of care to ensure that the manhole was safe and not hazardous. Defendant admitted a set of photographs produced by Plaintiff and it was handed in as exhibit "A".

[3] Plaintiff testified that on 6 June 2019 at 19h45 in Ward 5[...] A[...], I[...] there was loadshedding and the area was in total darkness. He then went to a shop nearby to purchase a candle. He walks this route about 3 to 4 times a week to go to the shop. It is a pavement along which he walks. As he was walking he fell into in a manhole and his whole body went into the manhole and a steel iron on the inside of the manhole penetrated his leg. He had to be pulled out of the manhole. In exhibit "A" the open manhole into which he fell can be seen. He took the photographs the next morning 7 June 2019 when he was on his way to the doctor. There are various photographs of the manhole as well as all the garbage that was inside the open manhole which is on the pavement and close to a fence.

[4] He testified that previously red tape had been placed across the manhole but on the evening when he went to the shop it was no longer there. The red tape was used to alert the people about the open manhole. On photograph 5 red tape can be seen on the side of the manhole where there is a steel rod and also against a fence which is next to the manhole on photograph 6. He stated that he was in a hurry because it is dangerous in the area, it was dark and he had to get to the shop to purchase a candle due to the loadshedding. It has been reported to Defendant that the manhole is open. After he was pulled out he went to the shop and purchased a candle and returned home.

[5] During cross examination he admitted that he knew where the manhole was but that it previously had red tape around it to indicate the open manhole. He was not sure who had placed the red tape there but was sure that it was members of the authorities because people in the area would not have such tape. He stated that although he was in a hurry he was not able to know where exactly the manhole was

as it was not demarcated and it was dark. Photographs of his injuries were handed in as exhibit "C". These photographs were taken when he returned from the shop. It was put to him that as soon as Defendant became aware of the manhole, they attended to it and repaired it. He stated that it had been open for months before and that it was reported and no notice was taken of it. He personally did not report it. He stated that the only person who knew about his injury is the councilor who stated it had been reported.

[6] The next witness for Plaintiff was Mrs. Madubane, the wife of Plaintiff, who recalled the incident and the injury sustained by Plaintiff. She knew where the manhole was and that the manhole cover was missing. It had been left open for some time. At one stage the manhole was cordoned off with red and white tape. When Plaintiff returned home he was limping and she then treated his wounds and bandaged it. That was the case for Plaintiff.

[7] Bharatary Govender, employed by Defendant as a senior manager in the engineering and storm water maintenance departments testified that he was responsible for the northern region which includes 5 depots, such as the greater Inanda, Verulam, Tongaat and Phoenix areas. He knows about the claim. The area where the incident happened was within his area of responsibility. The depots have workers in the area to attend to defects including repairs to storm water drains. There was proactive and reactive work which was done and the proactive is when they as a department identify any defects and reactive when they react to report which are received. Staff report to him and there are road inspectors who inspect the areas. In rural areas such as this area they are inspected about once every six months.

[8] There was a call centre to which public complaints were sent. Manhole complaints came to his department. They normally receive such complainants within 24 hours. It is sent through by the site inspection officer. Once it has been reported it is repaired within ten days. There was no complaint received about this manhole

and he had no record thereof. He however did not produce any records of reporting etc. to indicate that it had not been reported. At the end of January 2019 an inspection was done in ward 5[...]. No defect was reported. The next inspection was on 13 June 2019 when it was found that the lid was removed. This was after the said incident and was repaired within a week. He confirmed, under cross examination, that the protocol was from 2024 and although there were specific processes in place during 2019 he could not state exactly what they were and how they were different from the present policy. The reporting process has been the same since 2010.

[9] If an open manhole was found then it would be barricaded. Something would be put around it. He stated that tape would have required poles and was not generally used to cordoned off. They work with the councilors in the area and have meetings with them and also receive telephone calls from them. It was possible that it could have been reported to his department. It should then have been recorded under public complaints which are all captured.

[10] The next witness was Siyanda Ngwenya who is employed as a technician with Defendant and was employed as such during 2019. He went to investigate the damage seven months after the incident. This was because of the insurance claim. He checked the system but could not find that it was reported. He noticed that it was then covered with a lid. They only became aware of it on 13 June 2019 and it was repaired by 19 June 2019. The road inspector inspected it and he had to determine the damage. He had pictures but did not know where it was. It was explained to him that it was not far from the tavern. He could not say if a report was made but did not find such. He only went there months after it was covered. They rely mostly on the public to report. That was the case for Defendant.

[11] It was submitted on behalf of Plaintiff that the evidence of Plaintiff was largely uncontested and the fact that the manhole was left open for months and had been cordoned off with tape at some stage. This was also visible on the

photographs. Plaintiff did not exaggerate his evidence and his evidence was also corroborated by Ms. Madubane. The evidence of Plaintiff was truthful and should be accepted.

[12] The witnesses of Defendant had no personal knowledge of the incident and they relied on protocol that was established in 2024 and had no direct evidence as to what the position was in 2019. They denied that they had any knowledge of the uncovered manhole and did not have any report from a councilor. Mr. Govender could not explain the red tape which was visible on the photographs indicating that it must have been cordoned off at some stage and claimed that the manhole was discovered by them. It was submitted that the only defence is that they had no knowledge of the manhole being open. There was no documentary evidence produced by any of the two witnesses who did not have personal knowledge of this manhole.

[13] It had to be accepted that it was dark, the manhole had previously been cordoned off, there was a high crime rate, there was loadshedding and that Defendant was responsible to cover the manhole and further that Defendant did not discharge the onus of proving any contributory negligence on the part of Plaintiff.

[14] It was submitted on behalf of Defendant that it was not a blanket liability for municipalities but that it had to be considered case by case and Plaintiff bears the onus on a balance of probabilities to establish his claim. Plaintiff had to prove that there was conduct, either an act or an omission, wrongfulness, negligence, causation and that harm was suffered. Defendant was not aware of it and therefore no negligence can be attributed to it. It has a vast network of roads with limited resources to attend to. Its proactive approach is that road inspectors do inspect the roads and manholes at times. It also relies on the public to report. The single inspector had to cover a road network of about 1 500km and Defendant could not have foreseen the harm in question. There was thus no negligence on its part.

[15] It was further submitted that if it was found that Defendant was negligent Plaintiff was contributory negligent, that he knew about the manhole and the danger it posed and went past it three to four times a week. He should have taken action to avoid the manhole. It was therefore submitted in the circumstances that Plaintiff was also negligent and that there should be an apportionment between the parties on an equal basis.

[16] As Plaintiff's action is based on *actio legis aquiliae* he had to prove that Defendant's employees conduct albeit by omission was wrongful and negligent. It is therefore wrongfulness, negligence, causation and contributory negligence. I was referred to the decision in Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 SCA that legal causation is determined by considering the omission and whether the omission is the legal cause of the harm suffered. It was further the contention that Defendant had to prove contributory negligence.

[17] The evidence which is uncontested is that the manhole was left open for some months. It is also not disputed that Plaintiff fell into the manhole and sustained certain injuries. Defendant also admits it had a duty of care. The defence of Defendants is mainly that they were unaware that the manhole was open and that they inspected it every six months and had inspected it six months before the incident occurred. The evidence of Plaintiff that he reported it to the councilor who stated that he had previously reported the open manhole was also not disputed. The persons who conducted the inspections on behalf of Defendant were not called as witnesses. Nor was any documentary evidence produced as to the reporting indicating that no report was made in respect of this open manhole. The defence of Defendant was basically that as it inspected it at intervals, received no report about the open manhole. It has limited resources. This was only raised in argument. If it knew about the open manhole it would have done something about it.

[18] In the case of Johannes Diederick Le Rloux NO v The Nelson Mandela Municipality [2025] ZASCA 122 it was held that municipal employees conduct albeit

by omission could be wrongful and negligent. In that case a manhole was also left open for a long period of time. Despite being informed of it, it was not repaired which led to the death of a young child. The municipality therein also raised the defence that it never received complaints and that there was no record thereof. They did produce certain records to indicate that it was never reported. It was held in paragraph 19 of the judgment that if the municipality failed to ensure that the drain was properly covered and failed to prevent injury then such failure would be wrongful. It had a duty to do some act or exercise some special care to avoid injury, otherwise it would be liable for damages caused when it owes such duty caused by an omission.

[19] In the present matter it is therefore uncontested that Defendant, has a duty to ensure that the manhole is covered but it failed to do so. It is uncontested that it was open for some time which was a danger to the community. The photographs also indicate that there was danger tape over it at some stage. By failing in its duties it was accordingly negligent and therefore liable for any damages which any person would have suffered due to being injured as a result of the open manhole. The fact that Defendant may have limited resources which was not the evidence led by Defendant but was submitted is not a defence to its duty to ensure that the manholes are covered.

[20] Plaintiff was a good witness whose demeanour was good and he gave his evidence straight forward and conceded issues at times. I accept his evidence.

[21] Defendant's witnesses were also truthful but they had no personal knowledge of the manhole. They also produced no documents that it was not reported. The fact that it had been inspected during January 2019 was also hearsay. They were therefore unable to testify about the manhole and conceded that it may have been reported.

[22] On the issue of contributory negligence it is clear that Plaintiff was aware of the open manhole as it has been there for some time. He however stated that it was previously covered with danger tape and was therefore visible. However on the evening in question due to loadshedding it was very dark and he was unable to see it as the tape had been removed. It would accordingly appear to me that in these circumstances it cannot be found that Plaintiff was also negligent in the circumstances. It was never during cross examination clarified with Plaintiff as to why he did not walk in the road and not on the pavement if he knew that the manhole was open. He did testify that it was dangerous in the area, that he was scared as it was pitch dark and wanted to obtain a candle. In the circumstances taking into account the evidence and the conditions that evening it cannot be found that there was contributory negligence by Plaintiff.

Accordingly the following order is made:

Order:

1. Defendant is to compensate Plaintiff 100 per cent for any proven or agreed damages.
2. Defendant is to pay the costs of the action.

P C BEZUIDENHOUT J.

JUDGMENT RESERVED ON: 28 OCTOBER 2025

JUDGMENT HANDED DOWN ON: 5 NOVEMBER 2025

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