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**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

**Reportable/Not Reportable
Case no: 12970/2018**

In the matter between:

LIFA MEJE

PLAINTIFF

and

MUNICIPALITY OF CAPE TOWN

DEFENDANT

Coram: JANISCH AJ

Heard: 4 - 5 February 2026 and 16 February 2026

Delivered: 10 March 2026

ORDER

1. The court makes the following order:

- a. The Plaintiff's claim is dismissed with costs, including the costs of counsel on Scale B.
- b. There is no order as to the costs occasioned by the postponement of the trial set down for 27 February 2024.

JUDGMENT

JANISCH AJ:

Introduction

- [1] The Plaintiff, Mr Lifa Meje, is a 27-year-old male who resides in Gugulethu, Cape Town.
- [2] The Plaintiff claims damages from the Defendant, being the City of Cape Town, arising out of an incident which occurred in the early hours of 31 December 2017, very close to his home.
- [3] More particularly, the Plaintiff pleads that he 'was injured when he stepped on a (*sic*) open manhole/drain on the pavement' at the corner of Ngambu Street (previously known as 'NY4') and Gladstone Nqulwana Street (previously known as 'NY8') in Gugulethu. He contends that he sustained fractures of his left tibia and fibula as a result of the incident. As will be discussed below, he fell in the course of chasing after thieves who had just stolen his friend's cell phone.
- [4] The Plaintiff seeks to hold the Defendant liable in delict for damage suffered as a result of this incident on the basis that it was the result of a wrongful and

negligent omission (or omissions) on the part of the Defendant to take steps to prevent the harm from occurring.

- [5] The Defendant denies that it is liable for any such damages. In the alternative, if it is held that the Defendant acted wrongfully and negligently and that the negligence caused or contributed to the incident, then it is pleaded that the Plaintiff's fall and the results thereof were caused by his own negligence, alternatively partly by his own negligence, and in the latter event that such damages are to be apportioned in terms of the Apportionment of Damages Act 34 of 1956.

Separation of issues: Rule 33(4)

- [6] At the commencement of the trial, I was advised that the parties had agreed that there would be a separation of issues in terms of Rule 33(4) of the Uniform Rules of Court. This was described, as is frequently the case, as a separation of merits and quantum. What the parties had in mind was that the hearing should determine the question of liability in principle, including (if it were to be held that the Defendant had conducted itself wrongfully and negligently in relation to what occurred that night), the question of any contributory negligence on the part of the Plaintiff. What stood over was the question of proof of the amount of loss suffered arising from the incident (including the causation of such loss). I made an order to that effect.
- [7] In oral argument, both parties agreed that while determination of the causation of loss (in the form of financial loss) was not part of the present proceedings, I remained at large to make causal findings in relation to the incident itself, i.e. as to what physically transpired on that street corner and any causal link between those events and the alleged omission. More particularly, I could decide whether the Plaintiff did indeed fall after stepping on or in an opening in the pavement surface, as alleged. This would be a necessary part of any finding of liability on the merits, since for example if I were to find that the Plaintiff had

simply slipped and fallen while running on the pavement, without the intervention of any 'open manhole/drain', then there could be no liability on the basis pleaded and the claim would fail.

- [8] There was ultimately no real dispute that the Plaintiff had fallen as a result of his foot being caught in an opening on the pavement while he was running. The issues, as regards liability, were whether the Defendant's conduct (in the form of an alleged omission to cover the opening or otherwise to warn the public about it) could be described as wrongful and negligent, and if so, to what extent (if at all) the Plaintiff was contributorily negligent. These are the aspects that fall to be decided at this stage of the proceedings.

The Material Evidence

- [9] I heard the evidence of five witnesses. The Plaintiff himself testified, as did a friend who had been present on the night of the incident, Mr Luzuko Timakwe. The Defendant called three witnesses: Ms Anel De Bruyn (previously an attorney for the Defendant), as well as two employees in the Defendant's water distribution department, Mr Granville van Harte and Mr Roger Williams.
- [10] I set out below certain key aspects arising from the evidence of each of these witnesses. I should state at the outset that I found all the witnesses to be satisfactory and credible in relation to the evidence presented by them. There were no significant or material disputes of fact, although of course the parties adopted different views as to whether the facts that were proved through these witnesses sufficed to discharge the onus in relation to wrongfulness and/or negligence.

Evidence of the plaintiff

- [11] The Plaintiff testified that he had been living with his mother at No. 2[... N[...] Street, Gugulethu since 2000. Essentially, he had spent almost all of his life there. From an aerial photograph of the suburb, I estimate that this house is

situated some 30 to 40 metres from the street corner where the incident occurred, on the same side of the road.

- [12] When the incident occurred, the Plaintiff was 19 years old. He was on school holiday, having just passed Grade 11.
- [13] On the night of 30 December 2017, the Plaintiff was socialising with a group of friends at the house of one of them. He had arrived there at approximately 18h00. They were planning a braai to be held the following evening for New Year's Eve. He had consumed 'a few beers' (330ml bottles) during the evening. He was however adamant that he was not inebriated.
- [14] In the early hours of the next morning (i.e. 31 December 2017), the Plaintiff and some friends walked to a nearby fuel station to purchase cooldrinks. On their way back, they turned off Ngambu Street into Gladstone Nqulwana Street. The Plaintiff was in the middle of the group which was walking away from the corner where the incident was soon to occur.
- [15] The Plaintiff saw two people coming in the other direction. As they passed the group, they snatched a cell phone from one of the friends at the back of the group. They then fled down Gladstone Nqulwana Street, turning left at the corner into Ngambu Street. The Plaintiff immediately turned and set off after the culprits. He said he was sprinting as fast as he could. He testified that they 'went towards the drain that was opened, and that is when I went into the drain. So, then I fell on the spot.' He said that his 'foot was stuck'. His friends came back and pulled it out. They went to call his mother. He was later taken to hospital where it was ascertained that he had broken his leg in the fall. His leg was set in a cast, and he had to walk with crutches for more than two months.
- [16] As the evidence later showed, what the Plaintiff called 'the drain' is in fact part of something called a 'belltoby'. Its purpose is to give municipal workers access

to valves in water distribution pipes running below the surface. It does not relate to drainage in any way.

- [17] The Defendant's evidence was that municipal water pipes usually lie a metre or so beneath the road or pavement surface. When leaks occur or pipe maintenance is required, the Defendant must be able to cut off the flow of water through the affected pipes, so as to isolate a section to work on. Valves or stop-cocks are therefore installed at intervals along the pipeline, and are closed and opened as required for these purposes.
- [18] A belltoby is a cast iron structure enabling the Defendant to access an underground valve. It is about 35cm to 40cm in height. It has a wide bell-shaped pedestal which tapers upward into a vertical pipe. It is positioned on a square brick wall built directly above the underground valve position. Its top (i.e. the opening to the pipe) lies flush with the road or pavement surface. In other words, most of the belltoby is underground and not visible.
- [19] Viewed from above, the top of the belltoby has a metal frame of about 14cm square. This frame surrounds the circular opening of the pipe, which is slightly more than 11cm in diameter. The opening is designed to be closed off with a circular removable 'lid', also made of cast iron. This lid is more like a plug, which fits snugly into the pipe opening and rests on a small lip in the pipe a few centimetres below. The lid is turned to fix it in place. When it is in place, the frame and lid create a finish flush with the road or pavement surface.
- [20] When the lid is removed, there is a circular hole in the road or pavement surface with a diameter of just more than 11cm. This gives the Defendant's officials direct access to the valve below, which they can close and open from the surface using a metal rod.

- [21] The belltoby lid is not 'locked' in place. Removing it requires a simple action of twisting and lifting it. This exposes it to vandalism and theft, particularly given its potential value as scrap metal.
- [22] It was common cause that at the time of the incident, there was a belltoby installed under the pavement at the corner of Ngambu and Gladstone Nqulwana Streets. It was also common cause that this particular belltoby lacked a lid at the time. Thus, there was an exposed circular hole in the pavement, some 11cm in diameter. In the absence of debris blocking the pipe (of which there was no evidence at the time), the hole would have opened all the way to the valve a metre or so below the surface.
- [23] Returning to the Plaintiff's evidence, he testified that his home was three houses along from this corner. He was familiar with the area, and he knew of the uncovered belltoby. He said that it had been uncovered for months, maybe close to a year.
- [24] He accepted that there were street lights on the other side of Ngambu Street. He said that it is always bright on that side, but darker on the side where his house (and the belltoby) is situated.
- [25] The Plaintiff said that he was sprinting to get to the culprits. He had been a sprinter in high school and was the fastest of his group of friends. His foot got stuck and he fell forward. In the witness box, he demonstrated himself coming to an abrupt stop. He did not move further after falling.
- [26] In cross-examination, the Plaintiff accepted that he was 1.76 metres tall. At the time of the incident he was wearing size 6 Converse shoes. The parties agreed that the measurement of his left foot was 25 cm in length and 9.5 to 10 cm at its widest point.

- [27] Two physical items were admitted as physical evidence: a specimen of a belltoby and a size 5 Converse shoe. It was demonstrated in the witness box that the shoe, if dropped vertically, not only fitted into the open hole but disappeared entirely down it. Although the Plaintiff said that he wore a shoe size higher than the exhibit, I have no doubt that the toe and forefoot of such a shoe would fit into the exposed hole if inserted at the appropriate angle (essentially with the toe pointing vertically downwards).
- [28] The Plaintiff said that he did not see his foot go into the opening, because he was running and looking at the person he was chasing. He however, felt what happened. Since he was sprinting, he would have been landing on his forefeet rather than striking the ground first with his heel. His toe and forefoot appear to have entered the hole, causing him to fall forwards.
- [29] The Plaintiff accepted that the incident occurred because he was sprinting. He agreed that if he had 'just stepped', his foot would not have gone in. He also agreed that his foot had to 'perfectly land in the middle of that [hole] in order for it to get stuck'.
- [30] The Plaintiff admitted that he was generally aware of the open 'drain', but not in the heat of the moment because he was sprinting. His evidence was as follows:
 '... if I was not chasing someone I think I would be aware. It is just that I wanted to get to someone. So I wasn't aware of the drain, although I knew there is a drain open on the corner, I knew it. I am not going to lie, sir. But it is just that I was chasing someone. So, I wasn't aware at the time. But if I was just ... going to the shop I would have been aware because I am not in a rush of anything'.
- [31] The Plaintiff agreed that he had seen the 'open drain' multiple times, and that he had walked past it '100 times'. He confirmed that he had never notified the Defendant about the missing lid. He did not know whether the Defendant was aware of it. He did not know of anyone else who had been injured in this way,

nor could he refute the proposition that there had been no other claims against the Defendant from people stepping into any belltoby.

[32] The following frank exchange then occurred:

‘MR DE WET: And would you agree with me if I said, because it is very unlikely that anyone would step into that?

MR MEJE: Yes, sir.

MR DE WET: You would agree with that?

MR MEJE: Yes, sir.

MR DE WET: Because of the size of the hole.

MR MEJE: Yes, sir.

MR DE WET: All right and if anyone is walking they wouldn’t be able to step into it as we have explained earlier.

MR MEJE: Yes, yes sir.

MR DE WET: So you would agree with the statement that the chances of anyone getting hurt by stepping into a belltoby are extremely slim?

Mr MEJE: Yes, sir.

MR DE WET: Thank you Mr Meje, because as you stated, it is only because you were sprinting after a thief that your accident happened.

MR MEJE: Yes, sir.’

[33] The Plaintiff accepted that the pavement was about two to two and a half metres wide at the point where the belltoby was situated, and that there was enough space for him to pass on both the left and the right of the belltoby. Various photographs introduced into evidence confirmed this: the open hole was situated in the middle of the pavement, with considerable space on both sides of it for a pedestrian to get around it.

[34] The Plaintiff confirmed that the missing belltoby lid was replaced a few months after the incident. By the time of the hearing, the lid had however again disappeared. The Plaintiff volunteered that the reason for the absence of lids was that they were made of metal, and that people who steal scrap metal take them. As a result, he said, ‘most likely you will find them with no lids’.

Evidence of Mr L Timakwe

- [35] The Plaintiff's other witness was his friend, Mr Timakwe, who also lives in Gugulethu. He gave very similar evidence in relation to what had happened leading up to the incident, including the route that the group was walking when one of them was robbed of his cell phone, and the direction that the Plaintiff ran in pursuit after the cell phone was stolen.
- [36] Mr Timakwe said that he saw the Plaintiff fall at the corner. He and the other friends ran past him chasing the culprits, and then came back to him later. He confirmed that the hole in the pavement was the area where he saw the Plaintiff fall.
- [37] Asked where he had found the Plaintiff on his return, he said he found him sitting on his buttocks and facing in the direction of the petrol station. The Plaintiff's foot was not in the belltoby at the time. He was in pain and did not get up. Mr Timakwe said that he and his friends took the Plaintiff to his house, from where he was transported to the hospital.
- [38] In cross-examination, Mr Timakwe confirmed that he had not reported the missing belltoby lid to the Defendant. He also said that although he had not drunk beer that night, the Plaintiff had.

Evident of Ms A De Bruyn

- [39] Ms De Bruyn is currently a manager at a forensic services company. In the period from 2017 to 2018 she was an attorney working for the law firm that represented the Defendant at the time in this matter.
- [40] Ms De Bruyn was called to prove certain photographs contained in the trial bundle. These were photographs taken by her on a site inspection on 24 October 2018, almost 10 months after the incident. Present was Mr George

Boult, an investigator, who had subsequently passed away. The photographs depict the general area and the belltoby in question, which at that time had a lid. There were also photographs with a measuring tape to show the diameter and depth of the hole, which was clogged with debris.

[41] Ms De Bruyn confirmed that she took these photographs with her mobile phone and forwarded them to a file on her computer. She sent some of them to the Plaintiff's attorneys.

[42] In cross-examination, she was asked various questions about what was depicted in the photographs. Some of the photographs included her foot and the foot of Mr Boult placed over or around the belltoby hole. One of these pictures shows Mr Boult's toe and forefoot partially in the open hole, and some show his heel depressed into the open hole. She could not say what Mr Boult's shoe size was, but accepted that he had 'big feet'. She accepted that the relevance of the photographs was that they showed the size of the hole compared to her foot size.

Evidence of Mr G van Harte

[43] The Defendant's first witness, Mr Van Harte, is a senior superintendent at the Hillstar Waterworks Depot, part of Region 4 of the Defendant's services network which includes Gugulethu. He has 30 years' experience working for the City, of which the last 10 have been in his current position.

[44] His responsibilities are to deal with burst pipes, water leaks, meter related issues and generally the water infrastructure in his area. There are a number of employees working from his depot in various capacities and levels of responsibility, who deal with repairs and infrastructure-related incidents.

[45] He explained the nature, purpose, dimensions and installation of a belltoby, as already set out above.

- [46] Mr van Harte testified that the purpose of the belltoby lid is to protect the valve that is in the hole, and to ensure that it does not get full of sand which would make access difficult for response teams. He did not link the purpose of the lid to removing a tripping or falling hazard.
- [47] He confirmed that it was generally possible for persons to remove the lid with their hands. Vandalism of the Defendant's infrastructure had become prevalent in the last 10 years, with people stealing lids to sell at the scrapyard. To address this, the Defendant had started to use polymer/plastic lids to replace missing metal lids.
- [48] The Defendant also has fire hydrants linked to the water pipes, which are accessed through larger covered holes in the road or pavement surface. These are to be distinguished from manholes, which are part of the stormwater system.
- [49] When asked how the Defendant becomes aware of any missing covers (whether of a belltoby or a fire hydrant), Mr van Harte said that it relies on reporting from the public. The Defendant was busy rolling out a mobile application which allowed the public to report any service issues, but there was also a toll-free number and an SMS line that the public could use. When a call involving water distribution in his region is logged through that system, it is forwarded to the depot and a team is sent out to do the repair. The Defendant's targeted response time to attend to repairs is 29 days. There is however, a prioritisation exercise: for example, a burst pipe will be attended to more quickly than a missing cover.
- [50] Mr van Harte heard about the present incident from the Defendant's public liability claims department. He requisitioned a SAP database search in respect of incidents in the area of the incident for a five-year period from 2017. The

search results were put into evidence. They showed a number of calls in relation to Ngambu Street, mostly in relation to leaks but also raising issues with meters and interruption of water supply. None of these entries related to the missing belltoby lid – nor, indeed, to any other missing lids. He had not been personally aware of the missing lid.

[51] Mr van Harte stated that in the 30 years that he had been working for the Defendant, he had knowledge of various public liability claims, including people falling in holes or hurting their feet in open hydrants. Such hydrant covers measure 25cm by 30cm, or 30cm by 30cm. He had never come across anyone being injured in a belltoby.

[52] He confirmed that a missing fire hydrant cover would get preference in relation to repair over a missing belltoby lid. He explained this as follows:

‘We would rather do the hydrant first because they get injured in the hydrant because it’s deep down and you can actually fall with your whole body in it but not in a belltoby and that’s why we never had any injuries on the belltoby’.

[53] In cross-examination, Mr van Harte was unwilling to accept that the mere fact that he had never seen a complaint of a person tripping or falling into a belltoby does not mean that it was impossible that this occurred. He said he could only answer for what he had received on his desk.

[54] He estimated that there are approximately 90,000 belltobys in the Defendant’s network.

[55] Mr van Harte was unable to explain how it occurred that this particular belltoby lid was replaced after the incident when there was no report of this on the SAP spreadsheet that he drew. He suggested that a member of the community may have removed a lid from another belltoby and placed it there. He later accepted that it could have been one of the Defendant’s teams that replaced it.

- [56] Questioned again about the purpose of a belltoby lid or cover, he confirmed that it was to keep dirt from going into the hole, so that it was easily accessible. He did not agree that it was to prevent people from injuring themselves. He did however later accept that when a member of the public reported an open manhole, this would be for safety reasons.
- [57] Mr van Harte made it clear that unless a missing belltoby lid was reported, the Defendant would not know about it. The only source of such notifications was the public.
- [58] The SAP schedule evidenced the fact that repair or maintenance teams would have been present in Ngambu Street on various occasions in the months prior to the incident. Mr van Harte also accepted that water meter readers would have walked the street to read meters monthly for the purpose of formulating accounts. He also acknowledged that routine street cleaning occurs in the Defendant's areas of responsibility.
- [59] He accepted that there was no proactive maintenance programme in respect of the Defendant's infrastructure. Everything operates by responding to reports from members of the public. His depot met its service targets in responding to such reports, and the storeroom was always adequately stocked with necessary equipment.
- [60] Mr van Harte confirmed that maintenance teams do not drive around with a spare supply of belltoby lids in case they happen to come upon a missing one in the course of their duties. In each case, they must requisition a lid to perform a particular replacement job.
- [61] Finally, as regards the positioning of this equipment, Mr van Harte said that it was usually more convenient to install belltobys on sidewalks to allow access to

the infrastructure, since it would be difficult if there were cars parked over the cover in a road. However, ultimately a belltoby has to be installed wherever the pipe is laid, whether that is below the road or the pavement.

Evidence of Mr R Williams

- [62] Mr Williams is the Regional Operations Manager for Region 4 within the Defendant's water distribution section. Mr Van Harte reports indirectly to him. He has been in that position for 7 of his 12 years with the Defendant.
- [63] He said that there are approximately 90 000 belltobys in the Defendant's total area of operation, of which approximately 32 000 are found in Region 4. As regards to the extent of the water distribution infrastructure, there are approximately 11 000 km of pipelines, of which 3 500 km are found in Region 4.
- [64] Mr Williams testified that there is currently no job position or designation dedicated to (physical and routine) inspection of the water infrastructure.
- [65] Asked what hypothetically would be required to perform such a function, he said that one would need a worker together with a person at a handyman level who could act as a driver, together with a vehicle. At the Defendant's current rates, such a team would cost approximately R6 400 per day. The job description would involve walking the pipelines to check for any non-conformities. Assuming that the team was able to inspect 20 km of pipeline every day, it would take 175 days to cover the full distance of the pipeline in Region 4, at a total cost of approximately R1.2 million.
- [66] Mr Williams said that this is not done because there is already a backlog of service requests and that additional costs would have to be budgeted to create these new positions.

[67] The biggest challenges the Defendant faced in meeting its objectives, particularly in Region 4, were the existence of 'hot spots' where law enforcement was required to accompany teams to enable them to perform repairs without being attacked, as well as vandalism of infrastructure.

[68] Mr Williams said that the majority of public liability claims of which he became aware in relation to water distribution were where a burst pipe had caused flooding in a residential area. He was not aware of any claim involving a belltoby. He stated as follows:

'The Belltoby, it gives us access to the isolating valve and just the general size of, if I look at the size and the hole is so small that, you know, causing damage. It is normally installed in a road surface which is flat and the chances of someone getting hurt in a Belltoby, it is very small.'

Requirements For A Delictual Claim

[69] The Plaintiff's claim for compensation for loss suffered as a result of his fall is made in delict.

[70] A delict is the act of a person that in a wrongful and culpable way causes harm to another. Typically, a person's personal loss lies where it falls. However, liability for such loss can be attributed to another person where the following requirements are established (*cf. Telematrix (Pty) Limited t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) in paragraph 12*):

- (a) Conduct on the part of the Defendant (in the form either of an act or an omission);
- (b) Wrongfulness of that conduct on the part of the Defendant;
- (c) Fault (intention or negligence) on the part of the Defendant in relation to that conduct;
- (d) The existence of loss or damage; and
- (e) A causal connection between the conduct and the loss or damage.

Conduct / the omission

- [71] The conduct of which the Plaintiff complains takes the form of omissions. This is pleaded *inter alia* as the Defendant's failure to warn members of the public about the danger of the open belltoby lid, its failure to take reasonable steps to ensure that members of the public (the Plaintiff in particular) are safe, and its failure to take steps to ensure that the 'manhole/drain' (i.e. the belltoby) is not a danger to the public (the Plaintiff in particular).
- [72] In essence, the case for the Plaintiff is that the Defendant omitted to cover the belltoby hole in the pavement, or to take steps to warn pedestrians (and the Plaintiff in particular) of the danger of that hole.
- [73] The evidence established the existence of such conduct. It was not disputed that at the time of the incident, there was an exposed hole in the pavement which had not been covered by the Defendant. It was also apparent that the Defendant in fact put no signs or other mechanisms in place to draw the attention of users of the pavement to the existence of the hole and warn of any danger arising from it.

Causation and loss

- [74] Items (d) and (e) (causation and loss) stand over for future determination, provided liability in principle is demonstrated. As stated, however, one causal aspect does arise at the present stage, namely whether the Plaintiff fell as a result of an encounter with the open belltoby hole.
- [75] The Plaintiff's evidence to this effect was not seriously challenged. It was entirely possible, given the relative size of the shoe and the hole, that the toe and forefoot of his shoe entered the open hole in the action of sprinting, causing the Plaintiff to trip and fall forwards, as he testified. No alternative cause of the fall was put to him by the Defendant. I found the Plaintiff's evidence on this point to be fair and reliable. In the circumstances, I consider

that the causal link between the open belltoby hole and the fall was satisfactorily established.

Wrongfulness and negligence

- [76] The judgment in the separated case turns on whether the proved omissions on the part of the Defendant were wrongful, and if so, whether the Defendant was culpable in this regard (i.e. whether it was negligent – in which event the question of contributory negligence also arises).
- [77] I deal fully with these aspects below. At the outset, I point out that the wrongfulness enquiry is the sequential precursor to any fault enquiry (*Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) in paragraph 9). Unless it is found that a particular omission is wrongful, it is irrelevant whether the Defendant acted with negligence in relation to the loss. The first question therefore whether the situation is one in which the law of delict in principle requires action (*Bakkerud (supra)* in paragraph 9, relying on *Administrateur, Transvaal v Van der Merwe* 1994 (4) SA 347 (A) at 364G). As a matter of legal policy and the legal convictions of the community, in the absence of wrongfulness the law turns its face against the use of a delictual action to render the Defendant liable for any loss-causing conduct (see *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 (1) SA 1 (CC) in paragraph 21).

The law on wrongfulness in the context of an omission

- [78] The basic question in establishing wrongfulness is whether, according to the legal convictions of the community, and having regard to all relevant factors, the Defendant infringed the Plaintiff's rights in an unreasonable manner. Put differently, was the Defendant's conduct *vis-à-vis* the Plaintiff reasonable according to the legal convictions or feelings of the community? (*Coronation Brick (Pty) Limited v Strachan Construction Co (Pty) Limited* 1982 (4) SA 371 (D) at 380E).

[79] As stated in *Country Cloud* (*supra* in paragraph 20):

‘Wrongfulness ... functions to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether ‘the social, economic and other costs are just too high to justify the use of the law of delict for the resolution of the particular issue’. Wrongfulness typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirable or overly burdensome to impose liability.’

[80] What is wrongful is a question of legal policy. This is informed by a wide range of relevant factors, including the nature and possible extent of the harm; the degree of risk that the harm may materialise; the extent to which such harm was actually foreseen or reasonably foreseeable; the cost and effort required to take steps to prevent the loss; the probability of success of preventative measures; the nature of the relationship between the parties; the interests of the parties in relation to the relevant act or omission; economic considerations relating to the prevention of the harm and the proportionality of such costs to the harm; and other policy issues, including the values of the Constitution (Neethling, Potgieter & Visser *Law of Delict* (6th edition) p. 38 and the cases referred to in footnotes 25 to 29).

[81] A useful formulation of the import of the wrongfulness criterion is the following dictum of Schippers J (as he then was) in *Kruger v MEC, Transport & Public Works for the Western Cape* [2015] ZAWCHC 158 in para 41 (relying on *Loureiro v Invula Quality Protection (Pty) Limited* 2014 (3) SA 394 (CC) in paragraph 53)):

‘Reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant’s conduct. Instead, it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.’

[82] It follows from the above authorities that wrongfulness is determined by reference to the facts of the actual matter in issue, rather than hypothetically.

As stated in *Premier, Western Cape v Faircape Property Developers (Pty) Limited* 2003 (6) SA 13 (SCA) in paragraph 41:

‘... there cannot be wrongfulness (a breach of a legal duty) in the air: “it is as well to remember that conduct which is lawful to one person may be unlawful towards another” - per Harms JA in *S M Goldstein & Co (Pty) Ltd v Cathkin Park Hotel (Pty) Ltd and Another* [2000 (4) SA 1019 (SCA) at 1024F–G]. The test for determining whether conduct is wrongful in so far as a particular plaintiff is concerned, said Harms JA,

‘involves a value judgment by applying in the light of all the circumstances the general criterion of reasonableness. The criterion is based upon considerations of morality and policy and the court’s perception of the legal convictions of the community.” [at 1024F–G]

See also *BOE Bank Ltd v Ries* [2002 (2) SA 39 (SCA) at 47A–B] where Schutz JA stated that ‘the Court has to be persuaded that the defendant owes a legal duty and not only a moral duty to the plaintiff. This involves forming a value judgment’ (my emphasis).’

[83] The same point was emphasised in *Country Cloud* (*supra* in paragraph 19) as follows:

‘The issue is not whether the department’s conduct was wrongful in some general sense, or wrongful towards [the party with which the department contracted]. It is whether its conduct was wrongful vis-à-vis [the plaintiff].’

[84] In relation to conduct taking the form of an omission, the general rule is that a failure to prevent harm arising from the omission is not wrongful. Wrongfulness will only be present where, in the particular circumstances, there is a duty on a person to act positively to prevent such harm, and this was not done. Whether such a duty exists is, once again, a function of the legal convictions of the community (*Minister van Veiligheid en Sekuriteit v Geldenhuys* 2004 (1) SA 515 (SCA) in paragraph 24), which in turn involves considerations of reasonableness. As stated in *Van Eeden v Minister of Safety and Security (Women’s Legal Centre Trust, as amicus curiae)* 2003 (1) SA 389 (SCA) in para 9:

‘A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm. The Court determines whether it is reasonable to have expected of the defendant to have done so by making a value judgment based, *inter alia*, upon its perception of the legal convictions of the community and on considerations of policy. The question whether a legal duty exists in a particular case is thus a conclusion of law depending on a consideration of all the circumstances of the case and on the interplay of the many factors which have to be considered.’

- [85] The need for an evaluation of wrongfulness, particularly in the context of omissions, is based on an aversion towards converting every perceived moral or ethical obligation into a legal obligation and thereby creating a legal regime that is more onerous than society is prepared to bear (*Bakkerud (supra)* in paragraph 10). Account must therefore always be taken of contemporary community attitudes towards particular societal obligations and duties (*Bakkerud (supra)* in paragraph 14).
- [86] Delictual actions against local authorities based on an alleged omission to remove or warn the public about a hazard in public infrastructure such as roads or pavements are well-known to the courts. In this context, considerations of wrongfulness play a central role.
- [87] For a long time, the prevailing view was that municipalities enjoyed a degree of immunity from liability, based on a failure to repair or warn about hazards in public infrastructure, unless there was some statutory obligation to repair or the hazard was caused by an active step (i.e. a commission) by the municipality. As pointed out in *Bakkerud (supra)* in paragraphs 25 to 27), however, the courts have moved away from this more rigid approach towards one which requires the question of legal policy to be answered on the facts of each case, having regard to all relevant factors. Neither a general immunity for municipalities nor a blanket obligation to repair exists, and the decision is an *ad hoc* one.

[88] This approach aligns with the principle (as addressed above) that the wrongfulness of conduct or an omission is not determined 'in the air' but with reference to the actual conduct and resultant harm.

[89] What this means, for the present case, is that the court must determine the wrongfulness *vis-à-vis* the Plaintiff (and no-one else) of the Defendant's omission to repair or warn about the specific open belltoby hole on the pavement where the Plaintiff fell. Put differently, is it reasonable to impose liability on the Defendant for the harm to the Plaintiff arising from its conduct in relation to that particular belltoby hole (*cf. Kruger (supra)* in paragraph 41)?

[90] The Court in *Bakkerud (supra)* in paragraphs 28 to 31) addressed the framework in which such decisions are made in the context of municipality claims as follows:

[28] 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 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.

[29] 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 the roads and pavements.

[30] 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 tremor and spanning a road entirely. The variety of conceivable situations which could arise is infinite.

[31] *Per contra*, it would, I think, be going too far to impose a legal duty upon all municipalities to maintain a billiard table-like surface upon all pavements, free of any subsidences or other irregularities which might cause an unwary pedestrian to stumble and possibly fall. It will be for a plaintiff to place before the court in any given case sufficient evidence to enable it to conclude that a legal duty to repair or to warn should be held to have existed. It will also be for a plaintiff to prove that the failure to repair or to warn was blameworthy (attributable to *culpa*). It is so that some (but not all) of the factors relevant to the first enquiry will also be relevant to the second enquiry (if it 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 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.'

[91] In that case, it was held that there was 'just enough' evidence to show that the municipality was under a legal duty either to repair certain holes in an urban pavement or to warn the public of their presence. The evidence was that the pavement abutted on residences in a densely populated suburb and was in constant use. There were two holes in close proximity to one another and they were not shallow. There was also a nearby pole with a wire cable that had the effect of 'shepherding a passer-by in the direction of the holes', and the pavement was relatively narrow. The holes had been there for many months.

The municipality had not presented any evidence. These factors together sufficed to establish a legal duty.

[92] On the other hand, in *Municipality of the City of Port Elizabeth v Meikle* [2002] JOL 9525 (A), it was held that a failure on the part of the municipality to repair a manhole cover that was not lying flush with the pavement surface (it protruded by 1 cm), and on which the plaintiff had tripped, was not wrongful.

[93] The evidence was that the municipality had no particular measures in place to ensure that manhole covers remained flush with the pavement. There were teams that periodically swept the pavements and cleared the stormwater system, but the protruding manhole cover was not seen as significant enough to report.

[94] The court had regard to the fact that the manhole was situated in a commercial area where relatively large numbers of pedestrians could be expected. At the same time, it was one of 200 000 such manholes under the municipality's control, and there was some evidence of constraints on the municipal finances.

[95] The court concluded as follows (in paragraphs 11 and 12):

‘Clearly there is a risk of harm occurring if a manhole cover on a pavement protrudes above the level of the surrounding surface, but there is no evidence to suggest that the risk is unduly high. Nor, in my view, would one expect that to be so, for a one centimetre impediment on a city pavement is by no means unusual. The manhole cover was clearly visible to pedestrians on the pavement who, while not being required to walk with their eyes glued to the ground, can nevertheless be expected to keep a general lookout as they walk.

...

In my view the risk that the manhole cover presented was not sufficiently significant to require that steps should have been taken to avoid it. It was but one feature of city pavements that pedestrians ought reasonably to expect. Albeit that the manhole was in the centre of the pavement it was clearly visible

from a considerable distance and did not present itself as a trap to the unwary. In my view the risk of harm occurring was relatively slight and the appellant was justified in not diverting limited public funds to eliminate the risk altogether.'

[96] In *Meikle*, reference was made to *Wenborn v Cape Town Municipality* 1976 (1) SA 25 (C). In that case, the local authority was found liable for loss suffered after a pedestrian tripped over a protruding water meter cover on a pavement. It was held that, although a 'borderline case', the projection 'did constitute a real danger, having regard to the fact that it was situated on a well made up busy sidewalk outside a large department store'.

[97] It is apparent that the court in *Meikle* was prepared to adopt a less stringent approach towards wrongfulness than in *Wenborn*, by placing a greater emphasis on the ability of the public to see the impediment and the fact that such hazards are '*by no means unusual*'. This is indicative of the fact that what constitutes wrongful conduct may change with the passage of time, with the legal convictions of the community having to be considered in the light of the evidence led in the case before the court at the time.

[98] The Defendant also referred me to the recent judgment of this court in *Schaefer v City of Cape Town* [2025] ZAWCHC 46, also involving a fall on an uneven surface in an urban pavement. This was not a case where the injury was directly associated with infrastructure installed in the sidewalk such as a manhole cover, but it was caused by the raised edge of a paving brick protruding above the rest of the pavement surface.

[99] The court held that there had not been wrongfulness by reference to the following factors (paragraph 35):

- (a) That the protrusion was minor and did not pose a significant or unusual threat. This was supported by the fact that it had not been reported and had not caused injury before. There was no pattern of incidents or

complaints suggesting a 'chronic danger'. A 'small, visible irregularity is often not wrongful if it can be easily avoided by a pedestrian taking a normal degree of care';

- (b) The local authority had a number of priorities and could not achieve a state of pristine infrastructure at all times. Thus, although it had constitutional obligations to provide services, it was entitled to manage its finite resources. The evidence was that it would cost R2.1 million per year to appoint a dedicated inspector of the sidewalks in the region where the event occurred, which exceeded the whole region's budget for pavements and cycleways;
- (c) The fact that the authority controlled the sidewalk had to be viewed against the fact that it had no reason to know about the localised defect; and
- (d) The authority, given the scale of its infrastructure, could not be required to patrol constantly for every minor pavement defect.

[100] On that basis, it was held that it would be undesirable and unduly burdensome to impose liability on the local authority in this instance (i.e. the plaintiff did not establish wrongfulness).

Analysis of wrongfulness in the present case

[101] Against this background, I turn to consider the evidence before me with a view to determining whether the Defendant's omission was wrongful, i.e. whether it is reasonable to impose liability upon the Defendant for the harm caused to the Plaintiff resulting from that omission.

[102] The following facts appear to me to be significant in relation to the wrongfulness enquiry.

- (a) The hole in the pavement as a result of the loss of the belltoby lid was relatively small in size. It was a circle of just more than 11cm in

diameter. This is considerably smaller than the length of a typical adult's foot, although slightly wider than the width of the Plaintiff's foot.

- (b) The hole was flush with the pavement, i.e. nothing protruded above pavement height. Therefore, the only way in which the hole could interfere with a pedestrian's step would be if a part of that person's foot went into the hole and caused the person to stumble.
- (c) Although it is possible (as the photographs admitted in evidence showed) that in the course of taking an ordinary step during walking, a part of a pedestrian's foot (the heel or the forefoot) could go slightly into the hole, that would require the foot to be set down perfectly vis-à-vis the hole. Most contact between a shoe and the hole would not result in any part of the shoe going into the hole, although a smaller size shoe would be more likely to go partly in.
- (d) The hole was situated in the middle of the pavement, with a space of approximately a metre on either side of it, giving a pedestrian plenty of space to walk past it. A pedestrian would not be channelled or shepherded in the direction of the hole by other street furniture.
- (e) The hole was easily visible to the naked eye. There was also no evidence that the pavement was one that was regularly thronged with pedestrians, making it difficult for them to see it as they moved along. If anything, the photographs suggested that the pavement was in a fairly quiet suburban neighbourhood, with no commercial buildings or premises nearby that would attract large crowds of pavement users. The pavement was also adequately lit at night.
- (f) The Defendant, a large municipality which clearly faces regular public liability claims, had no record of any claim ever being made against it arising out of a person falling at an open belltoby hole, despite having approximately 90 000 of these installed across the municipal area. This in circumstances where it was recognised that belltoby lids are regularly removed by vandals or scrap metal thieves, and having regard to the

Plaintiff's own evidence that 'most likely you will find them with no lids'. There was also no evidence of any other injury occurring at this specific belltoby hole.

- (g) The Defendant did not regard the risk of any harm arising to a member of the public from any open belltoby hole as being significant. Its concern in relation to lids on belltobys was, in anything, related to protection of the infrastructure. It had no pro-active programme of monitoring missing lids.
- (h) Despite the existence of different channels to report municipal issues to the Defendant, neither the Plaintiff nor any other member of the public had reported this particular belltoby hole, despite the fact that it had been in that state for up to a year.
- (i) The manner in which the injury occurred in the present case seems to have been closely tied to the unusual and extreme behaviour of the Plaintiff at the time. He accepted that, had he been walking on the sidewalk, he would not have been affected by the hole. What led to a fall in this case was that he was sprinting while pursuing the thieves, and therefore adopting a gait that involved him landing on each stride with his toe and forefoot pointing vertically downwards. It was only because of this, and the extremely unfortunate fact that he happened to bring his toe and forefoot down perfectly on the open hole, that his foot went deeply enough into the hole to cause him to fall.

[103] Applying the various factors identified in the authorities discussed above to the facts of this case, the position in relation to wrongfulness is as follows.

[104] First, as regards the nature and possible extent of the harm, this amounted to physical harm to the Plaintiff as a result of a fall caused by the open hole (together with the sequelae of such harm). It would not be unreasonable in principle to expect a person to take steps to prevent that type of harm.

[105] Second, as regards the degree of risk that the harm may materialise, the evidence showed that this risk was very low. The harm was (as the Plaintiff admitted) only caused because of how he was sprinting at the time, and because his toe and forefoot (unusually coming down vertically towards the ground rather than after landing on the heel and rolling forward, as would be the case with a normal gait) landed perfectly in the hole. His unusually high speed must also have been a factor in the fall.

[106] Third, as regards the foreseeability of harm, there was no evidence that harm to a pavement user was in fact foreseen by the Defendant. Nor was it suggested to any of the Defendant's witnesses that such harm was in general foreseeable. The fact that there was no evidence of any prior event of damage in respect of any belltoby across the municipality supports the conclusion that it was not foreseeable. But of course, since one is not considering wrongfulness 'in the air', the question is a more pointed one: was damage of the type actually suffered by the Plaintiff, in those extreme circumstances, foreseeable? If ordinary damage from a belltoby hole is not typically foreseeable, the possibility of damage from a fall at a belltoby hole on a pavement as a result of a person sprinting and landing on the forefoot is an *a fortiori* case.

[107] Associated with this factor is the clear evidence that the open hole had not been reported by anyone (including the Plaintiff) to the Defendant for up to a year. This suggests that the members of the community in that area who used the pavement daily did not view the absence of a lid on the belltoby as a significant source of risk to such users.

[108] Fourth, as regards the cost and effort required to guard against the loss, it is questionable whether the Defendant is right that what would necessarily be required is the hiring of dedicated staff to conduct standing pipeline inspections. Checking whether belltoby lids are in place could possibly be included in the routine duties of existing staff who are present in the area for other purposes. Having said that, however, although the Defendant's witnesses agreed that

there are water meter readers and street cleaners who work periodically in the neighbourhood, there was no interrogation as to whether a belltoby inspection could sensibly be added to their working duties. It is for the Plaintiff to establish the factual basis of wrongfulness, not for the Defendant to disprove it.

[109] Fifth, as regards the probability of success of such preventative measures, it seems clear that if the Defendant were to implement a system of inspections and pro-active lid replacements, such a system would be effective as the replacement of a lid would remove the hole entirely. There was also no suggestion that the cost of replacing covers was itself prohibitive.

[110] Sixth, as regards constitutional issues, it is so that in terms of section 152(2) of the Constitution, a local authority must strive, within its financial and administrative capacity, to achieve its mandated objectives set out in section 152(1). These include to ensure the provision of services to communities in a sustainable manner (sub-paragraph (b)) and to promote a safe and healthy environment (sub-paragraph (d)). While the Defendant acknowledged in its plea a general legal duty to protect the community against harm caused by its conduct in providing public roads, the constitutional objectives reflected above cannot impose an absolute legal duty to prevent every kind of potential harm to every member of the public, and the Plaintiff made no such submission. In my view, the authorities referred to above relating to delictual liability of municipalities adequately balance the respective risks and interests of the parties. I do not think that the existence of the constitutional provisions referred to above warrants the adjustment of the delictual balance in favour of members of the public.

[111] Placing all these factors in the balance, I am of the view that the legal convictions of the community would not be such as to find it reasonable to impose liability on the Defendant for the harm actually caused to the Plaintiff as a result of its failure to replace the belltoby lid on that particular pavement corner, or to provide some form of barricade or warning.

[112] It is highly significant in this regard that there was little to no evidence that the open hole, which was small but clearly visible in the middle of a wide pavement and did not protrude above the surface, presented a material tripping risk, even to the anticipated typical user of the pavement. While the facts show that there was indeed a risk to a person who was sprinting on the pavement, not looking where he was placing his feet, even then the risk of loss was very low, because the runner's foot would have had to land perfectly in the hole at a vertical angle to cause a fall – a highly improbable event. The fact that there was no precedent for damage as a result of a hazard of this nature, and the fact that the community itself had not seen fit to raise the alarm and call for a repair, also supports this conclusion. The passive approach of the affected community towards the issue also provides a direct window into the legal convictions of the community as regards omissions of this nature.

[113] The fact that the damage in the present case was caused as a result of the Plaintiff engaging in what may be described as extreme or unusual behaviour on the pavement plays a material role in a finding that the omission in this case was not wrongful. If the loss had been caused as a result of the ordinary or predictable use of the pavement, the legal convictions of the community would be more likely to treat it as reasonable for the Defendant to compensate the victim. But because wrongfulness is not determined “in the air” but having regard to the actual circumstances of the loss-causing event, that scenario is not before me. Foreseeability of harm resulting from an unusual or extreme use of the pavement is far lower, and the risk of such harm occurring is plainly also very limited. The undesirability, as a matter of principle, of saddling a municipality with the consequences of losses caused in this way is evident.

[114] These factors, in my view, outweigh the fact that the damage caused was in the nature of a personal injury and that it would have been possible to remove the risk entirely if there had been a replacement of the lid.

[115] I therefore find that the Plaintiff has not established that the Defendant's omission was wrongful for purposes of the delictual claim.

[116] I should however stress that the value judgment in this matter that the omission was not wrongful vis-à-vis the Plaintiff, in the context of the actual loss suffered by him, does not establish a general principle that the Defendant can never reasonably be held liable for loss caused as a result of a pavement user making contact with an exposed belltoby hole. Each case will turn on its own facts and on the specific evidence that is led. A scenario which I have not had to consider, for example, involves the possible harm caused to small children using or playing on the pavement, for whose small feet the open belltoby hole may present a much greater hazard. It is apparent that the risk of such a loss-causing event occurring may be more severe than that of an adult using the pavement for walking, and that the legal convictions of the community may be more inclined to permit the Defendant to bear liability for the harm resulting from its omission in that context.

[117] Moreover, it may well be that an open belltoby cover of the same size would present an enhanced risk capable of giving rise to a finding of wrongfulness where, for example, it is situated on a narrow pavement or in a place where there is such a large amount of foot traffic that ordinary users are unlikely to notice it easily, and damage arises.

[118] My finding as to wrongfulness on the facts of this matter is therefore not to be viewed as a licence for the Defendant to simply disregard the prevalence of missing belltoby lids in its area of responsibility, and to consider itself immune to claims in delict as a result of any damage caused by such holes, irrespective of the circumstances.

Negligence

[119] Given the approach I have adopted above towards wrongfulness, it is unnecessary for me to deal with the issues of negligence. For the sake of completeness, however, I will briefly set out my views in this regard.

[120] Negligence refers to the blameworthy conduct of someone who has acted wrongfully. It is tested against the standard of the *diligens paterfamilias* or reasonable person. It exists where a *diligens paterfamilias* in the position of the defendant (i.e., in the present case, a reasonable organ of state) would foresee the possibility of his conduct injuring another in his person or property and causing him patrimonial loss, and would take reasonable steps to guard against such occurrence; and where the defendant failed to take such steps (*Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-G).

[121] Foreseeability and the reasonable probability of harm, and the prospects of guarding against or preventing such harm, are factors that play a role in both the wrongfulness and negligence enquiries. The difference, as per the *dictum* of Schippers J in *Kruger v MEC, Transport and Public Works* (*supra*), is that negligence goes to the reasonableness of the defendant's conduct, rather than to the reasonableness of imposing liability on it per se.

[122] What must be foreseeable is a reasonable possibility of harm. In *Standard Chartered Bank of Canada v Nedperm Bank Limited* 1994 (4) SA 747 (A) at 658G, the following was stated:

'In delict, the reasonable foreseeability test does not require that the precise nature or the exact extent of the loss suffered or the precise manner of the harm occurring should have been reasonably foreseeable for liability to result. It is sufficient if the general nature of the harm suffered by the plaintiff and the general manner of the harm occurring was reasonably foreseeable. (See Burchell *Principles of Delict* at 92 ff and the authorities there cited.)'

[123] Important in this regard is the degree of probability of the manifestation of harm. The greater the possibility that damage will occur, the easier it is to establish that such damage was foreseeable, and vice versa.

[124] The courts have recognised that in assessing the foreseeability of damage, regard may be had to how the person in question may reasonably expect others to conduct themselves. For example, in *Kruger v Carlton Paper of South Africa (Pty) Limited* 2002 (2) SA 335 (SCA), it was held that although loss through contact with an open electrical terminal under the defendant's control was generally foreseeable, the conduct of the plaintiff (an employed electrician) causing him to suffer loss, which involved him squeezing between a wall and the terminal, was not something that a reasonable person would have foreseen (see paragraph 19). It was described as an act of gross negligence, if not out-and-out recklessness (paragraph 15). And in *Stratton v Spoornet* 1994 (1) SA 803 (T), it was held that the conduct in question, involving a child climbing a pylon and venturing to the point of touching a live cable, was so unlikely that the harm was not reasonably foreseeable. It was also stated (at 811B) that '[t]he very fact that an accident of this general kind has never occurred is, in my view, a cogent and compelling pointer to the conclusion that this kind of harm does not fall within the realm of reasonable foreseeability'.

[125] As regards the question of whether the reasonable person would take precautionary steps to prevent the harm, relevant factors are the nature and extent of the risk, the seriousness of the damage if the risk materialises, the relative importance and object of the defendant's conduct and the cost and difficulty of taking precautionary measures (see generally Neethling *et al op. cit.* pp 145-147 and the cases referred to there).

[126] Turning to the facts of the present case, the Defendant did not actually foresee injury arising as a result of this open belltoby hole, because it was not in fact aware of this missing lid. It was however generally aware that belltoby lids go missing in its area of responsibility as a result of theft or vandalism. But even

though it knew generally of such circumstances, there was no evidence that it foresaw the risk of injury in general occurring as a result of holes being left open and unguarded. On the contrary, the evidence of the Defendant's witnesses was that the chances of a person getting hurt in such a small hole were very small.

[127] I do not think that this evidence should be rejected. The mere existence of an open hole, 11cm in diameter, in a pavement does not (on the evidence led before me) necessarily give rise to a high or material probability that damage will occur, especially where the hole is visible, easily avoided by a normal pavement user, and not situated in a very busy area. It is not unreasonable to conclude that most pavement users would not get entangled with such a hole. Indeed, the Plaintiff's own evidence was that if he had been walking, he would not have stepped in the hole.

[128] What makes this case unusual, however, is once again that the damage was not caused as a result of what may be regarded as typical pedestrian behaviour. It cannot be ignored that the harm that actually ensued was the result of a very unfortunate and unusual set of circumstances involving a person sprinting as fast as he could after a thief, not looking where he was stepping, and landing with his forefoot pointing vertically downwards in the hole at the perfect angle. I do not think that a reasonable local authority would have foreseen such an injury occurring as a result of its not filling a belltoby hole in the pavement.

[129] I therefore am of the view that even if the Defendant's conduct had been held to be wrongful, I would not, on these particular facts, have held that its failure to repair this particular belltoby hole was negligent, because the necessary degree of foreseeability of harm was not shown to be present.

[130] I should however again stress that in reaching this conclusion, I am not suggesting that the Defendant might not be found to have acted negligently on other facts and in relation to other types of injury that may be proved to have occurred in other cases. Moreover, it is not necessary for me to deal with the question as to whether a reasonable local authority would have done more to prevent such risks occurring than merely reacting to complaints from the public.

[131] I also, of course, need not deal with the issue of contributory negligence.

CONCLUSION AND COSTS

[132] For the reasons given above, I conclude that the Plaintiff has not established that Defendant is liable for any loss arising out of his fall. His claim must therefore be dismissed.

[133] I see no reason why costs should not follow the result.

[134] This outcome makes it unnecessary for me to address the question as to whether a particular costs order should be made in respect of the evidence of Ms de Bruyn. The Defendant had contended that the Plaintiff was unreasonable in not admitting the authenticity of the photographs of which she was the photographer. I have my doubts as to whether the Plaintiff can be criticised for not making such admissions, particularly since he was then able to extract information from Ms de Bruyn as to the contents of the photographs in cross-examination. However, since those costs will be covered by the general order as to costs, I do not express a view in that regard.

[135] Finally, there is the question of the costs of an earlier postponement of the trial in February 2024, apparently following the late filing by the Defendant of a notice in terms of Rule 36(10) to rely on the aforementioned photographs, as well as notice of the intended use of the physical belltoby in evidence.

[136] Neither party provided me with all the facts necessary to place me in a position to determine liability for these wasted costs. While the Defendant was clearly late in giving the notices just before trial, having regard to the nature of the disputes and the fairly anodyne nature of what is depicted in the photographs, I also cannot conclude that a postponement was necessarily warranted.

[137] In the circumstances, I am unable to apportion blame for the wasted costs. It seems appropriate that I should therefore make no order as to costs.

[138] In the premises, I make the following order:

- (a) The Plaintiff's claim is dismissed with costs, including the costs of counsel on Scale B; and
- (b) There is no order as to the costs occasioned by the postponement of the trial set down for 27 February 2024.

M W JANISCH

Acting Judge of the High Court

APPEARANCES:

For the Plaintiff: L Gabriel

Instructed by: Kruger & Co

For the Defendants: M de Wet

Instructed by: Fairbridges Attorneys

