REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 9165//2017

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED. NO
DATE: 11 February 2022

S[....] M[....] S[....] **PLAINTIFF**

And

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY **DEFENDANT**

JUDGMENT

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to Case Lines. The date and time for hand-down is deemed to be 10h00 on 11 February 2022.

WEINER, J
Introduction

[1] The plaintiff, S[....] M[....] S[....], instituted action against the defendant, in her representative capacity as the mother and natural guardian of B S[....] (herein after referred to as “B”). The plaintiff claimed damages for the injury caused to B when he allegedly fell into an uncovered manhole on a pavement situated in Setlhobo Street, Molapo, Soweto, Gauteng.[1] Setlhobo Street in Molapo, Soweto is a residential area. There was a four cornered municipal manhole on the pavement of Setlhobo Street. The manhole was not covered, but was surrounded by a raised concrete barrier. B was at the time of the trial, 12 years of age and was 7 years and 4 months of age when the incident occurred.

[3] On 21 November 2016 at 16:00 in the afternoon, B was playing soccer in the street with his friends, while heading home, four streets away. Someone kicked the soccer ball, which was heading towards the manhole; B ran after it, tripped and fell into the manhole injuring his right hand on a brick. It was the plaintiff’s case that the injury was caused by the negligence of the defendant, as it was obliged to maintain the pavement and manhole and ensure that it did not create a dangerous situation. The defendant denied that it was negligent in the manner alleged or at all.

Evidence

[4] Initially, the plaintiff was to be the sole witness in the action. When it was realised that she was not an eye-witness, but a witness after the fact, her counsel decided to call B to testify. He testified that:

(a) He was currently 12 years old and completing grade 7.

(b) He was playing soccer on the 16th of November 2016 with his friends, in Setlhobo street. He was over 7 years old at the time.

(c) At about 16h00, he and his friends were headed home. On the way they were passing the soccer ball between them. He saw that the ball was headed towards the manhole. He ran to save the ball from going in; that was when he tripped and fell into the manhole and his hand was injured.

(d) He was not aware of the depth of the hole but was aware of its existence. He however had not played near it before.

[1] The parties agreed to separate liability and quantum. The case concerns the issue of liability.

[5] Under cross-examination B's testimony contained many concessions. He testified that:

(a) He played soccer about 4 (four) times a week on a field up the road from where the manhole was. He admitted that he walked past the manhole on many occasions when he went to play soccer.
(b) He was aware of the concrete barrier around the manhole and that it was placed around the manhole to caution people about the manhole.
(c) When he and his friends returned home after their soccer match, it was still daylight.
(d) When the soccer ball was heading toward the concrete barrier, he "tripped/stumbled" on his own feet and hit his hand on the concrete barrier when he tried to run after the ball.
(e) His arm then landed in the manhole and hit a brick and was injured.

[6] The defendant did not call any evidence, but argued that there was no negligence on its part and that B was the negligent party. The plaintiff argued that as B was only 7 years old he was *doli incapax* and therefore even an apportionment was not appropriate.

Applicable legal principles - Negligence and causation

[7] In *First National Bank of Southern Africa v Duvenhage*[2], the court repeated the well- known dictum[3] relating to negligence:

> *"Of the three elements that combine to constitute a delict founded on negligence - a legal duty in the circumstances to conform with the standard of the reasonable person, conduct that falls short of that standard, and loss consequent upon that conduct - the last often receives the least attention. Yet it is as essential as the others for without it there is no delictual liability. Indeed, in a recent illuminating note J C Knobel suggests, on doctrinal*

[2] [2006] 4 All SA 541 (SCA).
[3] See *Kruger v Coetzee* 1966 (2) SA 428 (A) 430E-G.

grounds, that loss, and its causal connection, might even be the proper starting point for the enquiry."[4]

[8] The defendant argued that, under cross examination, B conceded that the cause of his fall was that he stumbled over his feet and this caused him to fall, hitting his arm against the concrete barrier and then on a brick in the manhole. The defendant thus argued that B's injury was of his own making. This resulted in the argument as to whether B was *doli incapax* at the time. Authorities were cited by both parties.[5]

[9] To succeed in his claim the plaintiff must, however, first prove that the defendant was negligent. The fact that a minor may be *doli incapax* and thus not accountable, does not automatically render the defendant liable.[6]

[10] The defendant contended that it did not need to rebut the presumption that B was *doli incapax*, as the plaintiff had not discharged the onus of proving that the defendant was negligent and that such negligence was the cause of B's injury.

[11] The defendant relied on the case *Cape Town Municipality v Bakkerud*[7] ('*Bakkerud*')where the court held that:

"…[I]t 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),

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[4] *Duvenhage* at para [1].
[5] The cited cases included *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A); *Eskom Holdings Limited v Jacob Johannes Hendriks obo Jacques Justin Hendriks* [2005] 3 All SA 415 (SCA).
[6] *Mangolele v Road Accident Fund* (A542/2017) [2019] ZAGPPHC 208 (13 June 2019).
[7] 2000 (3) SA 1049 (SCA).

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."[8]

[12] The defendant submitted that the plaintiff had failed to discharge the onus that the it had a legal duty to repair or to further warn pedestrians of the existence of the manhole. B was aware of the manhole and the concrete barrier, which he conceded was there to warn people of the manhole; he saw the manhole; he ran towards it to save the soccer ball from going into the manhole; he stumbled and injured himself. The fact that there was an uncovered manhole was not the cause of B's injury.

[13] In *Bakkerud*, Marais JA recognised that in applying the test of what the legal convictions of the community demand and reaching a particular conclusion, the Courts are not laying down principles of law intended to be generally applicable. They are making value judgments ad hoc.[9] Each case is dependent upon its own facts. There is no blanket provision that every obstacle on a pavement must be removed.

[14] As stated by Goosen J in *October v Nelson Mandela Bay Metropolitan Municipality*[10]:

"Significantly, the Court in that matter [Bakkerud] did not assert a general legal duty upon local authorities to maintain roads and pavements, but found that the existence of the legal duty is a matter to be determined in the particular circumstances of the matter. It is therefore for the plaintiff in any particular matter to establish both the existence of the legal duty (in this instance to repair a road surface or drain cover or warn of its state of

[8] At para [31].
[9] At para [27].
[10] (CA 173/2008) [2008] ZAECHC 205 (12 December 2008).

disrepair) and that the failure to do so was blameworthy in the circumstances."[11]

[15] The present case is distinguishable from some of those relied upon by the plaintiff. In *Cutting v The Nelson Mandela Metropolitan Municipality*[12] for example, the manhole was not visible and was covered with weeds and grass - there was no warning that it existed. The plaintiff, in that case, was unaware of the area where the manhole was situated. In the present case, the opposite was true.

[16] It is worthwhile to repeat what Gorven AJA in *AN v MEC for Health, Eastern Cape*,[13] stated in dealing with the principles relating to delictual liability:

> *'It is worth briefly sketching the legal landscape governing such a claim. I]n order to be liable for the loss of someone else, the act or omission of the defendant must have been wrongful and negligent and have caused the loss.*
>
> *Wrongfulness involves the breach of a legal duty. The legal duty in the present matter arose when the mother was admitted to the hospital in labour. The staff … had a duty to monitor the condition of mother and foetus and act appropriately on the results. They negligently failed to do so, in breach of that legal duty. Their conduct was thus wrongful. But this, in and of itself, has never been sufficient to found delictual liability. The wrongful conduct must cause the wronged person to suffer loss. The first step in proving this is to prove that the wrongful conduct … caused the … damage. The appellant accordingly bore an onus to prove this. Wrongfulness should not be conflated with factual causation.*
>
> *The test for factual causation is whether the act or omission of the defendant has been proved to have caused or materially contributed to the harm suffered. Where the defendant has negligently breached a legal duty and the*

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[11] At para [10].
[12] *Cutting v Nelson Mandela Metropolitan Municipality* (2696/01) [2002] ZAECHC 18 (6 August 2002).
13 *AN v MEC for Health, Eastern Cape (585/2018) [2019] ZASCA 102; [2019] 4 All SA 1 (SCA) (15 August 2019) (footnotes omitted) at paras [2]- [4]*

plaintiff has suffered harm, it must still be proved that the breach is what caused the harm suffered' [emphasis added]

[17] Thus, even if the plaintiff had proved negligence/ breach of a legal duty, which I do not believe she did, in the circumstances of this case, I am unable to find that the plaintiff has proved causation. Based upon the version of B, *the harm would nevertheless have ensued, even if the omission had not occurred. ...'*[14]

[18] In regard to costs, and in view of the disparate financial positions of the parties, in my discretion, no order for costs will be made.

Accordingly, I make the following order:

The plaintiff's claim is dismissed.

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S E WEINER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

APPEARANCES:

Counsel for the plaintiff:	Advocate N Ralikhuvhane
Attorney for the plaintiff:	MN MKANSI Inc.
Counsel for the defendant:	Advocate M Bester
Attorney for the defendant:	RIC MARTIN Inc.

Date of hearing:	18 January 2022
Date of judgment:	11 February 2022

[14] *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC); 2016 (2) BCLR 204; [2015] ZACC 36 para [65].