

**IN THE GAUTENG HIGH COURT, PRETORIA**

**(REPUBLIC OF SOUTH AFRICA)**

Date: 28 November 2014

Case No: 838/2013

Date of hearing: 20,21,22&23 October 2014

Not reportable

Not of interest to other judges

In the matter between:

**P[...] P[...]**

Plaintiff

and

**PROJECTPROP (PTY) LTD**

First Defendant

**LELOKO HARTBEESPOORTDAM ASSOCIATION**

Second Defendant

**JUDGMENT**

**JANSE VAN NIEUWENHUIZEN J**

[1] The plaintiff claims damages from the defendants in respect of injuries he sustained at the premises of the defendants.

**BACKGROUND**

[2] On 31 December 2011 the plaintiff accompanied by his two minor children, respectively aged 5 and 7 years, attended a new years' eve party at Leloko Estate, Hartbeespoortdam ("the Estate"). It is common cause

that the first defendant is the developer of the estate whereas the second defendant is the Home Owners Association of the Estate.

[3] It is furthermore common cause and/or not denied that the plaintiff fell into a man hole on the property and sustained certain injuries as a result thereof.

## **ISSUES IN DISPUTE**

[4] At the conclusion of the trial, two issues remained in dispute, to wit:

- i) whether the 'defendants are exempted from liability due to a disclaimer notice allegedly being present at the entrance of the estate on the night in question; and if not
- ii) whether the defendants' negligence, if any, caused the plaintiffs damages.

## **DISCLAIMER NOTICE**

[5] Much of the evidence led on behalf of the defendants, pertained to the presence of the disclaimer notice on the evening of the incident.

[6] During address, Mr Keet, on behalf of the defendants, however conceded, that an open man hole would create a risk situation, which would not be covered by a general disclaimer notice, such as the one posted at the entrance to the Estate.

[7] This concession is well made and in line with the approach followed in *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ).

[8] In view of the aforesaid concession, I do not intend to deal with the evidence pertaining to the disclaimer notice.

## **NEGLIGENCE**

[8] In order to find on the issue of negligence, a finding on the facts of the matter is necessary.

[9] The version of the plaintiff and his witness, Mr Shelton Vallance is to the effect that a manhole lined with bricks were left uncovered on a portion of grass close to the swimming pool area where the new years' eve function was held.

[10] The witnesses on behalf of the defendants allege, first of all that the manhole was not lined with bricks and secondly that the hole was property cordoned off with danger tape attached to four poles also referred to

during the trial as “droppers”.

## **EVIDENCE**

[11] In view of the dispute between the parties, a short summary of the relevant evidence will suffice.

[12] The plaintiff testified in respect of the events that unfolded on the night of the incident. In short, he decided to attend the function at the Estate because a firework display was going to be held for the children. His wife was indisposed and he attended the function with his two boys as stated *supra*. He admitted to having a few beers during the course of the evening, but denied that he was intoxicated.

[13] The fireworks display was at 21:00 and the plaintiff decided at approximately 23:00 to return home.

[14] The lawn on which the manhole was situated, led to the parking area. The plaintiff held one boy's hand and carried the other one over his shoulder and proceeded over the lawn to the parking area.

[15] He suddenly fell into the manhole and had to shield the boy on his shoulder from sustaining injuries. His whole body up to his armpits was in the hole and when trying to stand, he felt his one leg buckling underneath him. Although he shouted for help, he did not receive any and proceeded to his car.

[16] He was eventually taken by Mr Vallance to a certain Dr. Robbertse, who attended to his injuries.

[17] The plaintiff referred to photos, taken by Mr Vallance the next day, which photos depict the manhole he fell in. On the photos the manhole is lined with bricks, uncovered and without any warning signs.

[18] During cross-examination the following was put to the plaintiff:

- i) the plaintiff being approximately 1, 96 metres in length, could not have fell into the manhole up to his armpits, as the manhole is only 60 to 70 centimetres in depth;
- ii) the photos do not reflect the manhole as it was on the night of the incident and taken atleast six months after the incident;
- iii) the manhole that existed on the night of the incident was not lined with bricks and was cordoned off with danger tape;
- iv) the plaintiff was completely under the influence of alcohol, which caused him not to notice the danger tape;
- v) the plaintiff did not enter in his own vehicle, but entered with a resident of the estate certain Mr

Bull;

vi) There was danger at the top of the lawn (at the parking area) and at the bottom of the lawn (swimming pool side);

v) there was a yellow construction site board at the parking area;

vi) the plaintiffs children were not with him during the function, but was left at the house Mr Bull;

vii) during the function, the plaintiff was in the company of a lady thought to be his girlfriend;

viii) after the plaintiff fell into the manhole, a number of people offered their assistance;

ix) two witnesses spoke to the plaintiff, but he was so intoxicated that he did not realise what had happened and said: *"This is nothing. I'm not injured."*

x) lastly, it was put to the plaintiff that the area was well lit and that he should have seen the danger tape.

[18] The plaintiff readily conceded that:

(i) the manhole could be 60-70 centimetres;

(ii) the photos could have been taken more than six months after the incident;

(iii) if there was a danger tape, he did not see it, it was dark;

iv) he did not notice the yellow construction site board at the parking area.

[19] The remainder of the defendants' version was denied by the plaintiff.

[20] Mr Vallance testified next. He confirmed that he received a *subpoena* to appear in court and was not there out of his own volition. He further testified that, although he was friends with the plaintiff at the time, they no longer have any contact.

[21] He confirmed that his kids and those of the plaintiff were at the swimming pool area during the course of the evening. He did see the yellow construction site board. He admitted that both he and the plaintiff had a few drinks during the course of the evening.

[22] He denied that there was a fence between the parking area and the lawn and denied that there was a danger tape around any portion of the lawn.

[23] He testified that he took the photos of the manhole the next day at the request of the plaintiff..

[25] When he left the event, he heard the plaintiff calling for help in the parking area. He saw that the plaintiffs leg was injured and drove with the plaintiff and his children, in the plaintiffs car to the consulting rooms of Dr. Badenhorst.

[26] During cross examination, Mr Vallance reiterated that he did not want to get involved in the trial and was only at court because the attorneys acting on behalf of the plaintiff, told him to be at court.

[27] He stated that in his opinion, the plaintiff was under the influence of alcohol.

[28] Dr Badenhorst was the last witness that testified on behalf of the plaintiff. He testified that the plaintiff had a severe laceration on his left lower leg, approximately 12 centimetres in length. The cut was deep and the "*tib and fib*" was visible. He cleaned the wound and stitched the laceration in layers.

[29] When asked to remark on the condition of the plaintiff and Mr Vallance, Dr Badenhorst stated that both were in shock, but fully conscious and that he did not observe signs of intoxication.

[30] He conceded that the wound could have been caused by poles .He removed gravel and plant material from the wound and cannot recall any cement or brick in the wound.

[31] The defendants' first witness was Mr van Zyl. He attended the function and was at that stage working at the state for eight years. He testified that, due to the fact that construction-work was still in process at the swimming pool are, certain areas were cordoned off with poles and danger tape.

[32] He strenuously denied that the photos taken by Mr Vallance, were taken the day after the incident. He pointed to various structures on the photos that were, according to him, only constructed some time after the incident.

[33] He testified that he personally erected the poles and the danger tape around the manhole. The manhole was not lined with bricks at that stage.

[34] He couldn't confirm that the plaintiffs children were at Mr Bull's house during the course of the evening. He was of the opinion that the plaintiff was not sober. He was not aware of the incident and only learnt of the incident the next day.

[35] During cross examination, Mr van Zyl confirmed that he was involved in the development of the Estate and is currently a director of the first defendant. He, furthermore, confirmed that documentary proof in respect of the construction of the structures on the Estate did exist. He could not explain why the documents

were not discovered by the Defendants.

[36] Although he was certain exactly when the lawn was planted, he could not indicate when a freestanding street light that appears on the photos was erected without having regard to the invoices and proof of payment of the item.

[37] When questioned about the number of people at the party and their individual states of sobriety, Mr van Zyl admitted that he was involved in the spit braai and fireworks and that he did not concentrate on each and every guest attending the function. I pause to mention, that there were three individual groups at the swimming pool area. The plaintiff was part of Mr Bull's party, which was attended by approximately ten males, some females and children.

[38] Mr van Zyl was not introduced to the plaintiff and had no personal contact with the plaintiff during the cause of the evening.

[39] Although it was put in cross examination to the plaintiff that no workers were present at the Estate on the 1st of January 2012, Mr van Zyl concede that it could be possible that workers were employed to clear up after the function. The relevance of the workers is due to the fact that a worker appears on the photos taken by Mr Vallance.

[40] He was not aware of the summons that was issued in the matter and was not involved in the drafting of the plea. He confirmed that the plea was not drafted on his instructions.

[41] Mr van Zyl testified that danger tape was erected, by him personally and a certain Mr van der Men/ve, at the eastern side of the lawn, cordoning the lawn off from a paved walkway. The walkway in question, leads to the swimming pool area.

[42] When asked why the manhole was not covered, Mr van Zyl testified that it would have been difficult to cover the manhole and that, in his opinion, enough steps were taken to alert guests to the danger created by the open manhole.

[43] On the photos taken by Mr. Vallance, the manhole was uncovered without any poles or danger tape around it. Mr van Zyl, having testified in detail about all the safety measures that were in place at the Estate during the construction phase, could not explain why the manhole on the photos was uncovered and did not have warning signs alerting visitors to the danger associated with the open manhole.

[44] In view of the defendants' version, Mr van Zyl admitted that the poles would have bended and the danger tape would have torn when the plaintiff fell into the open manhole.

[45] Mr van der Merwe was the next witness on behalf of the defendants. Mr van der Merwe testified that he was the Security Manager at the Estate on the day of the incident and that he is still so employed.

[46] He confirmed Mr van Zyl's version pertaining to the state of the manhole on the day of the incident. He further testified that the whole lawn was cordoned off with danger tape. According to Mr van der Merwe the lawn was laid shortly before the incident and the danger tape was erected around the lawn to prevent visitors from walking on the lawn.

[47] He testified that it was not possible to fall into the manhole without realising that there was danger tape around the manhole.

[48] He testified that he observed the plaintiff in the company of two friends around midday on 31 December 2011. According to Mr van der Merwe, the plaintiff was under the influence of alcohol because he was walking around with a beer bottle in his hand.

[49] He testified that the incident happened right in front of his eyes and that he asked the plaintiff whether he was "OK", to which question the plaintiff reacted positively.

[50] In Mr van der Merwe's opinion, the plaintiffs sobriety state is the sole reason that he fell into the manhole.

[51] Under cross examination, Mr van der Merwe testified that he was unaware of the action that was instituted and only gave his version of events after the plea was filed. He confirmed that he and Mr van Zyl erected the danger tape around the lawn.

[52] He also confirmed that he was not introduced to the plaintiff and that approximately 30 - 40 people attended the three different parties. He conceded that the plaintiffs children might have been at the function.

[53] Mr van der Merwe testified that the plaintiff fell over the danger tape and that the poles were bent and a bit skew. He denied the seriousness of the plaintiffs injury and said that Dr Badenhorst must have lied when he testified that the laceration on the plaintiffs leg was approximately 12 centimetres in length. According to Mr van der Merwe, the plaintiffs shin was a bit bruised with minimal bleeding.

[54] Lastly Ms Immelman testified on behalf of the Defendants. She is Mr van der Merwe's partner and was present at the new years' eve party on 31 December 2011.

[55] She testified that she observed the plaintiff when she arrived at the function at approximately 21:00. She stated that the plaintiff was not sober and that he and the other people attending Mr Bull's party did not walk straight.

[56] She recalled the danger tape between the lawn and the parking area, but could not recall any danger tape between the lawn and the pavement at the swimming pool area.

[57] Ms Immelman testified that, whilst walking on the lawn to the parking area she saw the plaintiff standing in the manhole. She asked him whether, he was hurt. She further testified that the plaintiff got out of the manhole on his own.

[58] The plaintiff smelled of alcohol and was not sober. She did not see any children in the vicinity of the plaintiff.

[59] During cross examination and with reference to the photos, Ms Immelman testified in detail when each structure was erected.

[60] She was adamant that only the manhole was cordoned off with the danger tape, and not the lawn. Ms Immelman further testified that Mr van der Merwe was walking right behind her when she saw the plaintiff in the manhole.

[61] She does not know how the plaintiff fell into the manhole, but saw that the poles were bent and the danger tape broken.

[62] According to Ms Immelman, the plaintiff only had a scuff mark on his ankle. She also testified that Dr Badenhorst lied when he testified about the extent of the plaintiffs injuries.

[63] When the court asked Ms Immelman to clarify the plaintiffs exact position in the manhole, she testified that the plaintiff must have walked backwards before he fell in, because the danger tape was behind his back.

## **EVALUATION OF WITNESSES AND EVIDENCE**

[64] The plaintiff on various occasions became emotional in the witness stand, especially when he testified that his children could also have been hurt.

[65] He was extremely upset during cross examination when it was put to him that he had deserted his children and that he was heavily intoxicated on the night in question. As stated.*supra* the plaintiff readily made several concessions.

[66] Although the plaintiff is clearly an extremely emotional and excitable person, he did not come across as being dishonest. The plaintiffs evidence is, in any event, to a large extent corroborated by the evidence of Mr Vallance and Dr Badenhorst.

[67] Mr Vallance and Dr Badenhorst do not have any personal interest in the matter. They both made a favourable impression and I do not hesitate to accept their evidence.

[68] Prior to dealing with the evidence presented on behalf of the defendants, it is disconcerting that various portions of the defendants' version that was put to the plaintiff, was not confirmed by the three witnesses called on behalf of the defendant.

[69] Although none of the three witnesses saw the plaintiff entering the Estate in Mr. Bull's vehicle, this was put as a fact to the plaintiff. None of the witnesses could confirm that the plaintiffs children were left at Mr. Bull's house, yet again this was put as a fact to the plaintiff.

[70] Surely these versions were obtained from the defendants' witnesses. This clear disparity between the version put to the plaintiff and the testimony of the witnesses on behalf of the defendants, already places a question mark on the reliability of their evidence.

[71] As a witness, Mr van Zyl created a good impression on the court. The same could not be said of Mr van der Merwe and Ms Immelman. Instead of merely conveying the events of the evening, their evidence was tailored to put the plaintiff in the worst possible light. The fact that they did not hesitate to call Dr Badenhorst a liar, does not stand them in good stead.

[72] There are various contradictions between the evidence of the three witnesses. Where exactly the danger tape was erected, is but one. Mr van der Merwe testified that he saw the plaintiff fell into the manhole whereas Ms Immelman testified that he was walking behind her and that she saw the plaintiff standing in the manhole. Mr van der Merwe testified that the danger tape was torn, whereas Ms Immelman testified that the plaintiff was with his back against the danger tape.

[73] How the plaintiff could have walked backwards before he fell into the manhole, is inconceivable. The plaintiffs evidence that he had his children with him and therefore did not become intoxicated, is probable and makes sense. Why would he, on the defendant's version, leave his children behind when he decided to leave the function. The plaintiffs children were, according to Mr Vallance, in the plaintiffs vehicle when they drove to Dr Badenhorst. How and when did the children get into the vehicle, if they were not in the plaintiffs company?

[74] I do not intent to deal with all the discrepancies and improbabilities in the evidence presented on behalf of the defendants. Suffice to say that the version of the defendants is rejected.

[75] In the premises, I find that the man hole was on the evening of 31 December 2011 as depicted on the photos taken by Mr Vallance.

## **APPLICABLE LEGAL PRINCIPLES**

[76] It is trite law that a person who creates a situation which could cause a foreseeable injury to another person's property or person, should take reasonable steps to guard against such occurrence. [See *inter alia* \ *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 SCA) Once a party fails to take such reasonable steps, such party is negligent and liable for the damages suffered by the injured person.

[77] The onus is on the plaintiff to allege and prove the requirements set out *supra*. In view of the factual findings *supra*, I am satisfied that the plaintiff proved the defendants' negligence on a balance of probabilities.

## **ORDER**

In the premises I grant the following:

1. The defendants are liable to pay to the plaintiffs proven damages.
2. The defendants are ordered to pay the costs of the suit, which costs include the costs of Mr Vallance and Dr Badenhorst as contemplated in paragraph 2 of the "Tariff of Allowances payable to witnesses in a Civil Case."

(GNR 394 of April 2008 published in GG 30953.

**N Janse van Nieuwenhuizen**

**Judge of the Gauteng High Court, Pretoria**