REPUBLIC OF SOUTH AFRICA

IN THE NORTH GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA,
PRETORIA

13/03/14

CASE No.: 15639/12

(1) REPORTABLE: ~~YES~~/ NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

13/3/14
DATE

SIGNATURE

In the matter between:

JOHN GREEN **PLAINTIFF**

and

C-WAY COMPUTERS CC **DEFENDANT**

J U D G M E N T

HIEMSTRA AJ

[1] On 15 July 2010 at or about 19:00, the plaintiff, Mr John Green, a sixty-year old security officer employed by a security company in Standerton, was dispatched to 20 Princess Street, Standerton in response to an alarm triggered at the premises. The

building at the said address adjoins the building on 22 Princess Street. 22 Princess Street is the property of the defendant. I shall refer to it as the "building". The plaintiff, while conducting an investigation, heard a scraping sound from the building and went to investigate. He climbed onto a veranda in front of the building and fell into a manhole. He broke his leg and ankle and instituted action for damages arising from his injuries against the plaintiff.

[2] Upon request of both parties I ordered that the question of the defendant's liability be separated from the quantum of the plaintiff's damages in terms of Rule 33(4).

[3] The building has a veranda along most of its front facing Princess Street. The veranda is 0.8 m above the pavement level and a set of steps provides easy access to it. Behind the veranda are shop windows and entrances to the building. At the time of the incident in question, there were metal railings at each end of the veranda. At the front of the veranda, metal railings ran for about 1.5 m from the corners. The rest of the veranda was not protected. The building was vacant and in a poor state of repair, in particular the floor surface of the veranda, where many tiles were missing or broken. Towards western end of the veranda, in front of an entrance, was a manhole. The manhole provided access to water pipes running from inside the building to the municipal sewage network. It is common cause between the parties that the manhole is on the premises of the defendant.

[4] The plaintiff testified that he had walked on the veranda to the western railings and looked around the corner. He could not see anything due to long grass on a vacant piece of land next to the building. He turned around to walk back, but fell into the

open manhole. Plaintiff had a torch with him, but did not use it. Counsel for the defendant submitted that the plaintiff had been at least partially responsible for his own misfortune for not using his torch. The plaintiff answered that he did not use it, as it would have exposed him to any delinquent. He also said that if one uses a torch and thereafter switches it off, one suffers a few moments of night blindness. I take judicial notice of the fact that it is dark in Standerton at 19:00 on 15 July.

[5] The plaintiff said that on the evening of the incident he had regarded the buildings on Princess Street 20 and 22 as part of the same building. Counsel for the defendant severely criticised this evidence, as it conflicts with the plaintiff's particulars of claim in which the addresses of both premises are set out. This, according to counsel, makes it clear that the plaintiff knew that there were two addresses and that he had trespassed on the defendant's property. I disagree. At the time of the drawing of the particulars of claim, the plaintiff had established that there are two addresses. He said that when he visited the addresses, he considered them to be one. Photographs of the buildings show that they are adjoining. It is eminently reasonable, especially at night, to consider the buildings as one.

[6] The plaintiff's brother, Mr J.H. Green, who is employed in a different capacity by the same security firm, testified in support of the plaintiff's case. He took photographs of the scene the day after the incident, and also later after the plaintiff had been discharged from hospital. It appears from the later photographs that renovations had at that stage commenced, in that the outside of the building had been painted.

[7] The plaintiff's attorney, Mr Rosier De Ville also testified on his behalf. He said that he had spoken to the sole shareholder of the defendant, Mr Marius Lubbe. The gravamen of his evidence is that Mr Lubbe had admitted to him that he had been aware before the incident that the manhole had no cover. He said that he had immediately thereafter written a letter to his correspondent in Pretoria, setting out the details of this conversation with Mr Lubbe. However, the plaintiff did not discover this letter, and no explanation has been tendered for this omission. I can therefore attach no weight to his evidence in this regard.

[8] Mr Lubbe testified that he had purchased the building from Mr and Mrs Schutte during January 2008 for his computer business. He was unable to renovate and customise the building for his purposes immediately and only commenced therewith in August or September 2010. The building was left unattended and vacant for the whole period. Mr Lubbe testified that he had been aware of the existence of the manhole, but that it had been covered with an iron lid when he purchased the building. He had no reason to further concern himself with it as he had no reason to suspect that the lid would be removed. He said that, in any event, the building was in a quiet part of the business district, with very few passers-by. He had no reason to anticipate that anyone would enter onto the premises, especially at night.

[9] Mr Lubbe said that he had visited the building between the sale and the incident about 3 times. However, he did not go onto the veranda as he entered through steel doors next to the veranda. He did not dispute that the manhole had been open on the night in question, but he did not know when the lid had been removed and by whom. He was asked by his counsel during his evidence-in-chief when he became aware

that the manhole had been open, he said that he could not remember whether it was before or after the incident. However, under cross-examination he was adamant that he only heard about it when the plaintiff visited him at his office and told him about the accident. The implication of his evidence-in-chied is that he might have been aware of the open manhole before the incident, in which case the question arises why he had not taken steps to have it closed. I could have disposed of this issue on the basis that he might have misunderstood the question put by his counsel. However, the same question was put to the defendant in a question submitted on behalf of the plaintiff to the defendant for the purposes of preparation for the trial and he gave the identical response. This is problematic for the defendant, but not necessarily fatal. When weighing up the probabilities in this case, I shall attach due weight to this issue. Even if Mr Lubbe knew about the open manhole, I still have to decide whether there rested a duty on him to ensure at all times that it is closed.

[11] Mrs M. Marx was, together with her deceased husband, Mr Schutte, the previous owner of the building. She and her late husband had conducted two businesses from the building, namely a glass works and a courier business. The entrance to the glass business was on the veranda right behind the manhole. The courier business did not have a door on the street front, but an entrance for vehicles, which was closed with steel gates. She said that the manhole had always been covered. However, it had been stolen on several occasions. Each time they had merely contacted the municipality, which immediately replaced the lid free of charge. Later the municipality discontinued this service and they had to purchase new lids. Mrs Marx was shown the photographs of the building taken before the renovations had been effected by Mr Lubbe and was shocked by its dilapidated state.

[10] The plaintiff alleges that the defendant is liable on the grounds of his omission to ensure that the manhole was covered. The point of departure is that an omission is not considered wrongful unless there was duty to act positively. The law is reluctant to assume too readily the existence of a legal duty to act positively.[1] This principle was succinctly stated in *Van Eeden v (formerly Nadel) v Minister of Safety and Security*[2] as follows:

"An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. 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."

Our law reports are replete with dicta around the concept of reasonableness, and a complete analysis by me will not add to the existing learning on the topic. Reasonableness is a value judgment the court is called upon to make, based on the legal convictions of the community. The question is whether the defendant ought reasonably and practically to have prevented harm to the plaintiff. Courts are required to balance several factors:

(a) foreseeability and the possible extent of harm; (b) the degree of risk that the harm will materialise; (c) the interests of the defendant and the community; (d) constitutional obligations; (e) who was in control of the situation; (f) the availability of practical preventative measures and the chances of success; (g) whether the cost of preventing the harm is reasonably proportional to the harm and (h) whether or not other practical and effective remedies are available.[3]

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[1] LAWSA, 2nd edition, Volume 8, Part 1, para 58
[2] 2003 (1) SA 389 (SCA) par 9
[3] LAWSA, supra, par 65 at page 102, together with the authorities referred to.

[12] In deciding this case, I shall consider those of the above factors that find application to the present facts.

Foreseeability and the possible extent of the harm

[13] The question is not whether it was foreseeable that the plaintiff or another security officer might fall into the manhole during an inspection at night. The question is whether it was foreseeable that anyone might fall into the manhole at any time. An open manhole generally creates a dangerous situation. I say 'generally' because it is not always dangerous. It depends on its locality and whether people would in the normal course of affairs, or even only occasionally find themselves in its vicinity. If it is on a sidewalk where pedestrians normally walk, it would certainly be foreseeable that someone might fall into it, even in daylight. In the present case it was on private property on the veranda of a derelict building where few people would find the urge or necessity to enter. The veranda was closed off on both ends with railings, so that it could never be used as a short cut anywhere. The building was clearly empty and abandoned. Not even burglars would have any interest in it. It also provided no shelter from the elements.

[14] Not only must it have been foreseeable that persons would find themselves near the manhole. The owner must also have foreseen that the lid might be stolen or removed for some reason. Mrs Marx, the former co-owner, testified that during their occupancy of the building, the lid had been stolen several times. That was her personal experience, but I do not believe anyone would necessarily anticipate regular theft of such a cover. Mrs Marx did not say whether or not she had informed Mr Lubbe of the thefts.

[15] Mr Lubbe saw the covered manhole when he inspected the building before he purchased it and I accept that it must have appeared completely innocuous. He said that he had walked over it towards the entrance. The law does not require special prescience from the owner of such a potentially dangerous structure.

[16] As far as the possible extent of the harm that had to be foreseen in order to found an action based on an omission, it is clear that the harm, if it occurred, could be considerable, as was the case in the present matter.

The degree of risk that the harm will materialise

[17] This is closely connected to the general foreseeability factor. For the reasons set out above, I am of the opinion that the risk that someone would fall into the manhole in the present circumstances was remote.

The interests of the defendant and the community

[18] It is not in the interests of the defendant or the community that they be saddled with liability for omissions where they had no duty to act positively. Mr Lubbe was an unsuspecting purchaser of a building which posed no obvious dangers to the public.

The availability of practical preventative measures and the chances of success; whether the cost of preventing the harm is reasonably proportional to the harm and whether or not other practical and effective remedies are available

[19] These factors are conveniently considered under one heading. There are obvious preventative measures that can be taken. The obvious one is to ensure that the manhole is covered at all times. Whether that is practical and reasonably proportional to the potential harm, is not obvious. To achieve this, the premises will have to be guarded 24 hours per day. In view of what I have already found, namely that the probability that the harm would materialise is remote, I do not believe that it is reasonable or proportional to require from the defendant to take such measures.

[19] In the circumstances, I find that the defendant has not acted wrongfully.

In the result, the plaintiff's claim is dismissed with costs.

J HIEMSTRA

ACTING JUDGE OF THE HIGH COURT

Date heard:	5 March 2014
Date of judgment:	13 March 2014
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