IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT)

Reportable

Case No: 11785/2009

In the matter between:

ADAM RICHARD JAMES Plaintiff

and

THE CITY OF CAPE TOWN Defendant

JUDGMENT DELIVERED ON 14 AUGUST 2013

BOQWANA AJ

Introduction

[1] This is a claim for damages in an action brought by the plaintiff against the defendant in respect of injuries he allegedly sustained when he fell through a broken storm water drain cover on 29 October 2008 at Moray Place, Oranjezicht in Cape Town.

[2] The plaintiff alleges that he fell and was injured as a result of the defendant's sole negligence and in breach of its duty of care in that through its employees the defendant failed to maintain the storm water drain cover in a proper state of repair, it failed to put a suitable barrier in front of the drain cover and it failed

to take any and/or adequate measures to cordon off the drain cover thereby rendering the road dangerous to plaintiff and other members of the public.

[3] The plaintiff claims that he has suffered and will in future suffer shock, pain and discomfort. He further alleges that he will incur future hospital and medical expenses, has suffered in the past and will suffer in future loss of earnings and has suffered in the past and will also suffer in the future loss of amenities of life. The plaintiff initially claimed from the defendant an amount of R 1 808 500.00 for damages which was made up of past hospital expenses in the amount of R10 000.00, future medical expenses in the amount of R623 300.00, past and future loss of earnings in the amount of R825 200.00 and general damages in the amount of R350 000.00. He has since withdrawn his claim in respect of past hospital expenses.

[4] In its plea the defendant admits that it was and is under a duty to exercise reasonable control of the Moray Place road. It also admits that it was and is responsible to take reasonable steps to maintain the road and to maintain the safety of the public on the road. The defendant further admits that it had a duty to take reasonable steps not to expose members of the public to the risk of injury. It however avers that it and/or its employees were not aware that the cover of the drain had been broken. Furthermore it and/or its employees are to a large measure reliant on the public to report broken drains and it and/or its employees were not aware that prior to the plaintiff's fall the drain needed repairs. The defendant further avers that the placement of a 'suitable barrier' in front of the drain would constitute a hazard to the public and would expose the public to the risk of injury. In its reply to the request for further particulars the defendant alleges that it does not have a system in place to specifically investigate and detect broken drain covers owing to budgetary constraints. The defendant accordingly denies liability towards the plaintiff.

[5] In the alternative, the defendant avers that in the event the Court finds that it was negligent, the Court should find that the plaintiff was contributory negligent in that he failed to exercise reasonable skill and care prior to approaching a broken drain cover, he failed to keep a proper look out, and he failed to observe the broken drain cover timeously, adequately or at all. In this

regard, the defendant prays that the plaintiff's claim for damages be reduced by the Court having regard to the degree of negligence of each party in accordance with the provisions of the Apportionment of Damages Act, 34 of 1956, as amended.

[6] The parties agreed that both the merits and quantum of the claim be determined together.

Issues to be decided by the Court

[7] The issues that this Court must determine are:

5.1 whether the defendant was negligent in that it breached its duty to take reasonable steps to maintain the road and/or to take steps to ensure the safety of the public members on the road;

5.2 whether the negligence of the defendant was causally related to the injuries sustained by the plaintiff; and

5.3 whether the plaintiff was contributory negligent in the circumstances and if so, the extent thereof;

5.4 the quantum of damages suffered by the plaintiff.

The evidence

[8] A total of eight witnesses were called to testify at the trial. For the plaintiff five witnesses, namely: Kenneth De Wet ('De Wet'); Lynette Melly ('Melly'), who testified on the merits of the claim; Anna James ('James'), the plaintiff's wife; Dr Shevel, a psychiatrist; and Dr Versfeld, an orthopaedic surgeon who testified in respect of the quantum. The defendant called three witnesses, namely: Kirby King ('King'); Barry Wood ('Wood'), who testified on the merits; and Professor Vlok, who testified as an orthopaedic expert for the defendant.

Inspection in loco

[9] An inspection in loco was also conducted at Moray Place, Oranjezicht and the minutes of the inspection in loco were submitted in Court as an exhibit. The important features observed are as follows. The Moray Place road runs more or less east to west and forms a T-Junction with Upper Orange Street at its western end. The western end of Moray Place is known as Upper Moray Place. On the Northern side of the *cul-de-sac* is a block of flats known as Mandarin Court and on the southern side of the *cul-de-sac* is a block of flats known as Nederburg. De Waal Park is situated on the western side of the T-Junction between Upper Moray and Upper Orange Street. Moray Place is situated in a high density residential area where there are blocks of flats and private homes. A brick staircase affords access from Upper to Lower Moray Place and *vice versa.* At the top of the stairs approaching from Lower Moray Place to Upper Moray Place the storm water drain and its metal/concrete covers are partially visible. The distance from the top of the stairs to the drain cover through which the plaintiff fell is 4.5 paces. The pavement on the northern corner of Mandarin Place (a distance of 17 paces) is 2.6 metres wide. The pavement is narrower and about 1m wide from that point to the end of the *cul-de-sac* in the direction of Upper Orange Street and De Waal Park. There is an electricity pole on the northern side of the *cul-de-sac* about 10 paces from the top of the stairs. The drain cover in question is adjacent to the kerbstone of the pavement and 18cm below the level of the pavement. The original metal cover has been replaced with a concrete type cover. It was recorded at the inspection that the distance from the point marked by the witness, De Wet, in red pen, in exhibit C185 to the drain cover, is 7.5 paces. It was observed that from the balcony of the flat occupied by De Wet there is an unobstructed view of the storm water drain. The distance from a point opposite De Wet's flat to the storm water drain is 29 paces.

Evidence on the merits

Plaintiff's case

[10] De Wet testified that he was 73 years old and has been living in 11 Mandarin Court in Upper Moray Place since 2006. He knew the plaintiff as he saw him walking dogs every day. He would see the plaintiff collecting dogs across the road and also walking down the steps. He had noticed the broken drain cover since 2006 when he moved into the flats as he would walk past it from Pick 'n Pay. Council workers came once or twice a week to clean the stairs due to the vagrants having left the area in a mess. Council workers would park their vehicle next to the drain and it was not difficult to see that the drain was broken.

[11] On the morning of 29 October 2008 De Wet saw the plaintiff standing on the pavement speaking to a woman across the road. The plaintiff stepped off the pavement and fell into the drain. De Wet did not know with which leg went into the drain. The plaintiff had about six dogs with him. The drain had about two to three plates missing. De Wet witnessed the incident from his balcony. Melly and other people helped take the dogs away.

[12] In cross-examination De Wet stated that he saw the plaintiff walking from the De Waal Park side to the flats and he crossed over the road (which was on the opposite side of the drain with the broken cover). According to De Wet the plaintiff stepped on to the pavement and spoke to a woman. He then stepped off the pavement again. He stepped without looking. De Wet was not certain as to what distracted the plaintiff. He testified that the plaintiff must have had something on his mind or was distracted by the dogs or by the woman he was talking to or must have forgotten about the broken drain. He also testified that the drain could easily have been visible to a reasonable person crossing the road towards the grid. He stated that the plaintiff had often walked across that road. De Wet further testified that he never reported the broken drain to the Council because it did not worry him as he never walked on the road but used the pavement. He knew that there was a procedure to call the Council if something was broken but it had nothing to do with him. He further testified

that Council workers who cleaned the steps must have seen the broken drain as they parked their vehicle next to it. He conceded that he considered the broken drain dangerous and stated that not a lot of people walked in that area. .He testified that there was no vegetation growing around the drain.

[13] Melly testified that she was 64 and a half years old and lived in a block of flats in Moray Place, Oranjezicht, flat no. 9. She testified that she knew the plaintiff from walking dogs and because he was a friendly person who talked to everybody. On the day of the incident she was talking to a neighbour and she watched the plaintiff come up the stairs. A lady from across the road approached her vehicle to put cases in the boot as if she was going on holiday. This lady greeted the plaintiff. The plaintiff wanted to get off the pavement to talk to the lady and he fell into the broken drain with his left leg. The plaintiff screamed, and was in such pain that he could not walk. Melly helped take the dogs to their owners' houses.

[14] Melly testified that the drain had a big hole in the cover that had grass growing around it and one could not have spotted it very easily. She noticed the broken cover immediately when she moved in her flat ten years ago. She noticed the drain because her dogs used to sniff around there and would stop near the pole that was close to the drain. She testified further that the City Council used to clean the stairs and they parked their truck right next to the drain so the cleaning hose could reach the stairs. According to her, Council workers had to walk to the back of the truck to turn the tap on and attach the hose. Occasionally they would trim the branches of the hedge that existed in that area.

[15] In cross-examination Melly testified that she knew that the defendant had to be contacted about the broken drain, she however did not report the drain because the Council truck came there every week. It was put to Melly that a number of people across the City of Cape Town had reported broken drains and other defects and their complaints were attended to as recorded in a document produced by the defendant, therefore her version that the cover had been broken for five years had been far-fetched and improbable. Melly stated that she did not phone the defendant because she did not have money to

make a phone call as she was unemployed and dependant on her relatives for her living expenses. She also testified that 90 percent of the telephone booths did not have telephone directories or the books were torn apart. She did not know that the defendant had a toll-free number that people could use to call and report broken drains. When it was put to her that there was no record of a complaint of this particular broken cover whilst there were hundreds of complaints from around the City of Cape Town, she testified that people living in her neighbourhood were poor. It was put to her that the defendant sometimes used independent contractors in different areas of the defendant to do the work. She responded by stating that the truck had the Council's name written on the doors.

[16] Melly testified that the plaintiff had emerged from the bottom of Moray Place to Upper Moray Place on the morning of the incident. According to her the plaintiff came up the stairs every morning and proceeded to De Waal Park. She testified that the plaintiff had five or six dogs with him on leashes on that particular day. When it was put to her that her version differed from De Wet's regarding the direction from which the plaintiff emerged, she testified that De Wet was a sickly man and was not always clear in that he would tell a story today and in two days' time the story would be different. Melly was emphatic that the plaintiff had never walked from the direction drawn by De Wet, i.e. from the park to the stairs. She stated that she had known the plaintiff since 2003 when she moved into the area.

Defendant's case on the merits

[17] King testified that he was employed by the defendant at the Ebenezer depot as the operational and functional manager. He managed all complaints regarding storm water, signs and roads around Cape Town and surrounding areas. He testified that there was an electronic system whereby defects like broken grids were recorded. Teams would be assigned to attend such defects and would replace grids if they were broken. The Council relied on the public to report a broken grid which reports would be recorded. Council workers working in a particular area, especially from the Roads Branch, who picked up a particular defect, would report it for King's department to attend to. The

Western Cape Directory contained telephone numbers which the public could call to report defects. He testified that the defendant became aware of the broken drain in question when the insurance section sent information regarding the broken drain cover to him on 11 November 2008 *via* email. The information came to light on receipt of the public liability claim. On the same day he went to Moray Place and inspected the area after which he compiled a report and instructed his team to go and fix the broken cover. The drain was repaired on 14 November 2008. He took a photograph identified as C193 on 11 November 2008. The scribbling at the back of the photograph represents the investigations. Complaints from various areas and in respect of many other defects were reported far and wide within the City but there was no record of a complaint from Moray Place before the plaintiff lodged a claim. King stated that the defendant had a good system for the recording of defects and that while it was not codified, it worked well.

[18] A photograph taken by King on 11 November of the broken drain 2011 showed that there was one piece missing together with a piece that rests on the existing frame. There was also a yellow mark indicating a fire hydrant. There was grass around the drain but it was low. The grid was visible if one walked from the westerly direction or from the staircase towards the grid, so was the yellow painted area. He testified further that the defendant uses private contractors for some departments such as cleaning.

[19] In cross-examination King conceded that it was the duty of the defendant to replace broken covers. He further confirmed that it was not costly to replace such covers and that the procedure was a simple one. Although there was no written codified system of reporting defects, it was expected of all employees to report them. In regard to the allegation that the storm water drain cover had been broken for many years, King mentioned that because the rust was still brown and not dark and no dirt collected around the cover, the drain could not have been broken for a long time. He however conceded that no examination was carried out to determine how long the cover had been broken and therefore could not dispute the evidence given by the plaintiff's witnesses. King did not know whether Council employees regularly attended the area to

do maintenance, or where they parked their vehicles when they did so, or whether they parked next to the drain in question, as he was not from the cleansing department. He further conceded that it could not be ascertained from the documents reflecting complaints whether they were reported by the employees or members of the community. According to him, if Council employees were engaged in work in the vicinity and failed to report the defect, the system would have failed in that instance.

[20] Wood testified that he was currently employed by the defendant as a manager in catchments, storm water and river management in the roads and storm water department and has been working for the defendant for 27 years. He was responsible for long term planning of the storm water infrastructure. He testified that there were 180 000 catchments which had grids within the City of Cape Town. The defendant is spending R70 million a year for the maintenance of its infrastructure. Maintenance refers to replacement of items like missing or damaged covers and the cleaning of storm water pipes. According to Wood there was a high propensity of theft of covers particularly iron grids. The cost of replacing covers and frames was in the region of R7 million. If inspectors were to be put in place every day they would be traversing huge areas which would be quite costly for the defendant. The defendant conducts inspections on average once every five years. In 2009 the cost of conducting inspections was R2 million and it took 6 months to complete. According to Wood that kind of inspection is just too infrequent when one considers the problem of theft in Cape Town and if the defendant had to put people on the road every single day it could cost between R250 and R300 million to finance an inspection programme that could particularly detect theft.

[21] In cross-examination Wood testified that the entire expenditure of the City of Cape Town was in the region of R30 billion. He however conceded that no financial viability study was done for the purposes of putting in place an inspection programme. He further conceded that it was the duty of every employee of the defendant to report faults and defects picked up during their

regular day-to-day work and employees would be failing in their duty if they did not do so.

Evidence on quantum

[22] James testified that she was 65 years old and was married to the plaintiff who was 45 years old. They lived in Orange Street, Gardens together with their two grandsons and niece. She testified that she worked for Mr and Mrs Solomons as a domestic worker at Sea Point, six days a week from Monday to Saturday. In 1983 the plaintiff was involved in a serious motor accident and suffered a severe brain injury. He became epileptic as a result of the injury and has a speech impediment. Before the fall of 29 October 2008 the plaintiff was very active, walking all over the City from Sea Point to Camps Bay and to the mountains. He was always busy and never used to sit down. He was also involved in life-saving and would walk daily to the life saving venues.

[23] She testified that the plaintiff was a dog-walker who exercised the dogs in return for remuneration having been inspired to do this by Mrs Solomons. The plaintiff walked dogs' every day of the week from Monday to Friday. This work was physically demanding as some of the dogs were big in size. The plaintiff's business became successful after it was reported in the newspapers. The plaintiff loved dogs and at some stage he had 17 dogs he looked after and earned income from this business.

[24] On the day of the incident, James was in Sea Point when the plaintiff phoned and informed her that he had broken his leg and was being treated at Somerset Hospital. The plaintiff was hospitalised for two days. His left leg, from his foot up to the thigh, was in a cast for about six months. The leg was extremely painful. He had to slide with his buttocks to get around the house and had to be pushed on a Pick 'n Pay trolley by his nine year old grandson until somebody organised a wheelchair.

[25] Since the accident the plaintiff still suffers from a terrible backache, and his knees and ankle are not strong anymore. His body is entirely skew with him leaning to his left side when he walks. After the accident James tried to help by walking the three remaining dogs as the owners of the other dogs made

alternative arrangements. After the cast was removed from the plaintiff's foot, James forced the plaintiff to walk the three remaining dogs again as she could not cope. One morning as he went to walk the three dogs, his leg gave in and one of the dogs got free and was almost knocked down by a vehicle. That dog was taken by its owner and only two dogs remained in the care of the plaintiff. The plaintiff now walks only three dogs. He is not able to cope and for the first three months this year James had to walk the dogs but this presents difficulties as she has to walk the dogs in the morning before going to work and the homes where she collects the dogs are far. The plaintiff has to take a taxi to collect one dog, which costs him R120 and another that costs R400 per month. According to James, the accident had brought a financial set-back to them as a family. At the time of the accident the plaintiff made R 5 850.00 per month from walking ten dogs but now he only makes R 2 080. 00 per month from walking three dogs. Before the accident the plaintiff worked long hours walking dogs in Higgovale, Oranjezicht and Vredehoek and this visibility helped his dog-walking business grow. His business operated under the name of *'Who Let the Dogs Out'.* In respect of each dog a contract was concluded which included an indemnity clause. All payments were made in cash, which was spent on the running expenses of the household and entertainment. This income dramatically improved their quality of life, especially helping with school uniforms and books for their grandchildren.

[26] In cross-examination James testified that she had been married for seven years to the plaintiff before the incident happened and she monitored his epilepsy. She also testified that the plaintiff had been walking dogs for eight years before the incident. She conceded that dogs had always been coming and going and that contracts that the plaintiff had with the owners of the dogs were not fixed. Before 2008 he also had a dog crèche where people would leave their dogs with him to keep at De Waal Park until the afternoon. He would charge R300 or R350 per dog in this crèche. He opened the crèche mainly for his love for animals but there was no fun in sitting all day. She conceded that the plaintiff was physically fine to run the crèche. James mentioned that the plaintiff was in receipt of a state pension grant. She

conceded that the plaintiff has always had memory problems and has even before the accident suffered from depression, anxiety and stress disorders.

Expert evidence

[27] Dr Shevel testified that he qualified as a psychiatrist in 1984 and had extensive experience in the assessment of brain damage for personal injury claims. He examined the plaintiff on 12 December 2011 and compiled a report dated 5 January 2012. Clinically the plaintiff presented with a marked speech impediment in the form of dysarthria, which is a difficulty with pronouncing words, finding the right words in conversation and understanding conversation adequately. Consequent to the 1983 accident the plaintiff sustained injury to the frontal lobes of the brain which caused him to be very disinhibited over and above the problems with his speech. The plaintiff presented with very childlike and concrete thought patterns with limited conceptual idiomatic and lateral thinking abilities. He presented with a few social boundaries and his answers to questions were tangential and circumlocutory. In the opinion of Dr Shevel one would have to be very cautious about the plaintiff's ability to testify, he did not believe that the plaintiff would fully understand questions and be able to fully answer questions put to him and was also very susceptible to stress and pressure.

[28] Dr Shevel diagnosed the plaintiff to be suffering from a reactive or secondary depression as a result of the injuries that he suffered from the accident. According to Dr Shevel prior to the accident the plaintiff appears to have functioned reasonably well within his limitations. Dr Shevel was quite surprised that the plaintiff had been able to engage in the level of work he did prior to the accident and he seemed to have coped well because of the structure that was created for him by his wife. Dr Shevel did not think that the plaintiff would be able to rebuild his business from an emotional and a cognitive point of view. The plaintiff suffers from secondary reactive depression after the accident with decreased motivation, drive, sleep disturbances, fatigue, low energy levels and irritability. Dr Shevel was of the opinion that the plaintiff was not capable of much intellectual type of work. He could do physical work as long as it was structured and there was very little

new learning or initiative required and he has a routine to follow and there was sympathy or empathy from the environment. He recommended that the plaintiff undergoes treatment in the form of antidepressant medication psychiatric monitoring and psychotherapy.

[29] In cross-examination Dr Shevel testified that he would not be surprised if the plaintiff's wife was acting as his surrogate frontal lobes. When it was put to him that the plaintiff's wife testified that there was no change regarding the plaintiff's psychiatric condition after the 2008 accident, Dr Shevel testified that that he did not speak to the plaintiff's wife but stated that the wife does not have medical training.

[30] Dr Versveld is an orthopaedic surgeon in private practise, having qualified in 1978. Prior to entering private practise he was the head of department at the University of the Witwatersrand. He carried out an assessment on the plaintiff on 09 November 2011 and compiled a report dated 25 February 2012. The plaintiff told him that he had suffered a compound fracture of the left tibia and injuries to the left knee, left ankle and lower back. The plaintiff complained of pains and needles around the fracture site, which was on the upper calf of the left side, and the plaintiff told him that he had a tendency to fall. Since the accident, his knee clicks and sometimes it feels like it will give away. This happens about every month or two. The left knee bothers the plaintiff when he does too much walking. He is skew since the incident and leans to the left hand side. He gets back pain particularly from walking and uses Myprodol to reduce the pain from time to time. Dr Versfeld's findings were that the plaintiff's left knee measured a half a centimetre more in circumference than his right, his left ankle measured 1.5 cm more in circumference than did the right, his left ankle measured 1cm more than did his right, and his left leg was in 4 degrees of valgus when compared to the right. There was a 15 degree external rotation of the left tibia, a 5 cm long scar over the anterior aspect of the left tibia and evidence of collateral instability of the left knee. His Lachman test for cruciate instability was mildly positive. The plaintiff's range of movement on his knee was for dorsiflexion 10 degrees on the right and 5 degrees on the left and plantarflexion was 40 degrees on the right and 30

degrees on the left, his range of subtalar movement was reduced on the left side when compared to the right and there was tenderness on the left lateral malleolus. The left leg was 2 cm shorter than the right. The tibia was palpably thickened on the left side when compared to the right and there was evidence of a 15 degree external rotation deformity of the left tibia.

[31] In regard to his low back there was tenderness over L5/S1 inter space. There was evidence of marked muscle spasm to the right of his lumbar spine and the plaintiff was leaning to the right side. The range of extension on his lumbar spine was limited by pain and his left leg was 2 cm shorter than the right leg. There was evidence of decreased sensation over the left foot and the left inner calf. X-rays conducted by Morton & Partners showed that there was osteophyte formation along the superior and inferior aspect of the patella which was an indication of early degeneration of the knee joint. On the x-rays there were also degenerative changes noted between the tibia/fibula joint space and a joint effusion noticed by the radiologist which was indicative of the swelling on the joint. There were also early osteo-arthritic changes noted in the medial and lateral tibiotalar joint space. The healing situation around the fractured tibia looked quite immature after four years which was very unusual after so long.

[32] According to Dr Versfeld it would be reasonable to make provision for treatment of the plaintiff's tibia symptoms at a cost of approximately R200 per annum on an ongoing basis for this purpose. In regard to the left knee Dr Versfeld suggest that provision be made for treatment which is likely to include the taking of anti-inflammatory agents, physiotherapy, the wearing of a knee support and visits to an orthopaedic surgeon. For this, he suggested that it would be reasonable to allow a sum of R 2 800 per annum on an on-going basis. In a longer term it is probable that the plaintiff's left knee will deteriorate and he will require a total replacement. Such a procedure is likely to entail a period of hospitalisation of approximately 10 days at a cost of R168 000.00 at today's prices and a period of disability of approximately 12 weeks. Following such a procedure the plaintiff is likely to require conservative treatment at a cost of approximately R 3 300 per annum on an ongoing basis. In relation to

the left ankle, conservative treatment, joint ankle replacement surgery after twenty years and conservative treatment thereafter would be required. About half of the patients with fractured tibia will have knee injury. It can be reasonably deduced symptoms emanate from ankle injuries are from the incident.

[33] In relation to the lower back it is reasonable to make provision for treatment of the symptoms. This treatment is likely to include anti-inflammatory agents, physiotherapy, the wearing of a lumbar support, the wearing of a shoe raise, facet blocks and visits to an orthopaedic surgeon. In the longer term (approximately 20 years), it is possible that the plaintiff's lumbar spinal symptoms will deteriorate to the point where surgical intervention becomes necessary. This intervention is likely to take a form of a posterior spinal fusion. In Dr Versfeld's opinion the plaintiff will not be able to manage a physical demanding activity of dog handling as he did before because of his instability and the fact that he gets tired very quickly when he does try to walk very long distances.

[34] In cross-examination it was put to Dr Versfeld that there was no suggestion of any injury to his left knee or ankle from the Somerset Hospital's attendance certificate, Dr Versfeld responded that if one considered that the plaintiff probably arrived and left in a cast there would have been no way of knowing whether or not he had a knee or an ankle injury. When it was put to him that he failed to consider non-ossifying fibroma which was above the knee, as an alternative Dr Versfeld testified that non-ossifying fibromas had nothing to do with the accident as they were asymptomatic and so they did not need treatment. He conceded however that he did not detect effusion of the knee and if he did he would have recorded it. He testified that it was unlikely that one would have arthritis on the left knee only and not on both knees. One knee had arthritis whilst the other one did not have and that must be due to injury. Dr Versfeld conceded further that he did not take x-rays done for the lower back but that his findings that a fusion might be necessary were not only based on what he was told by the plaintiff but were also based on his clinical findings.

[35] Professor Vlok testified for the defendant that he is currently in private practise in spinal surgery and orthopaedics. He had extensive experience in orthopaedic surgery having worked as a Registrar in the Department of Orthopaedic Surgery at Tygerberg Hospital in South Africa in 1973 and becoming a specialist and following through the ranks until he became head of department. He also worked as an academic and received many accolades and awards. He examined the plaintiff on 14 February 2012 and during the examination he observed that the plaintiff spoke with a slur which was as a result of the head injury he suffered in 1983. The plaintiff told him that he had suffered several arm and leg fractures and was in a coma for six months as a result of the 1983 accident. The plaintiff preferred not to talk about that accident. He told him that he walked dogs, that he fell in a drain and was eight months in a plaster and that it took eleven months before he could walk again. The plaintiff still complained of pain in his left tibia down to his ankle and lower back. The lower back pain however came later on, although he could not remember when, but it was quite a while later.

[36] Professor Vlok found that the right leg was 1 cm shorter than the left leg. The left leg had a scar anterior over the left tibia where an open fracture had healed. There was a large scar to the lateral aspect that is secondary to a previous dog bite. The left knee and ankle were clinically normal with normal movements. With examination of the plaintiff's back there were normal movements and he was neurologically intact. There were clear fresh dog bites on his front right arm and an old scar over his left elbow. His left heap is indicative of a slight shortening of external rotation, but still within normal bounds. Professor Vlok took x-rays for the plaintiff's pelvis when he noticed the leg discrepancy. From the x-rays the pubic element was slightly superiorly placed with exostotic deformity of the lateral aspect of the right iliac bone. There was slight degenerative change of the left patella formal joint. It was not clear what pain the plaintiff had before this fall. The pain he suffered as a result of the fractured tibia that restricted him for many months needed to only be controlled symptomatically and with time will disappear. The plaintiff's knee and ankle had normal range of movement and were stable. The plaintiff's back movements were full and he was neurogically intact. There was a slight

degenerative change in the patella formal joint that Professor Vlok could not connect to the injury he sustained by falling in the drain. The spondylitic changes could be expected from an adult person and 20 percent of the people had this. According to Professor Vlok those degenerative changes were most probably secondary to the plaintiff's previous fractures that he sustained during his accident in 1983. No details pertaining to this are available. Professor Vlok did not foresee any need for further treatment secondary to the left tibia fracture. According to him the plaintiff was fit to live a normal social life as he did before the fall. He could still work as a dog handler as he did before and the fresh dog bites attest to the fact that he was still active. The tibia and fibula fractures had healed. According to Professor Vlok, the healing process of the fractured tibia was complete and virtually hundred percent consolidated. Professor Vlok testified that normal people do get osteoarthritis changes due to normal wear and tear and causes could be due to genetic factors or trauma.

Analysis

Negligence

[37] The jurisprudence on the subject of the municipality negligence in South Africa has developed a great deal. Several cases deal with the subject and reference is often made to the decision of the Supreme Court of Appeal in **Cape Town Municipality v Bakkerud 2000 (3) SA 1049 (SCA).** Marais JA held that a general legal duty could not be imposed upon all municipalities to maintain roads and pavements but that a plaintiff must place before the Court sufficient evidence to enable the Court to conclude that a duty to repair existed or that the public had to be warned existed and a failure to effect repairs or to warn the public was blameworthy. In the case of **Judd v Nelson Mandela Bay Municipality (CA149/2010) [2011] ZAECPEHC 4 (17 February 2011)** the Court emphasised the point that in such cases, the failure on the part of the municipality to repair and maintain roads and pavements would be held to be unlawful only if the legal convictions of the community demanded that preventative action had to be taken on the facts of the each case.

[38] *In casu*, the defendant has admitted that it had a legal duty to exercise reasonable control and to take reasonable steps to maintain the Moray Place and to take reasonable steps to ensure the safety of the public. The issue that remains to be determined is whether the defendant was negligent in failing to take reasonable steps to maintain the road, and more specifically to repair the broken drain cover or warn the public about it.

[39] In **McIntosh v Premier, Kwazulu Natal & Another 2008(6) SA 1 (SCA)** the following was said at paragraph 12:

> "As is apparent from the much quoted dictum of Holmes, JA in *Kruger v Coetzee* 1966(2) SA 428 (A) at 430 E – F, the issue of negligence itself involves a two-fold enquiry. The first is: was the harm reasonably foreseeable? The second is: would the *diligens paterfamilias* take reasonable steps to guard against such occurrence and did the defendant fail to take those steps? The answer to the second enquiry is frequently expressed in terms of a duty. The foreseeability requirement is more often than not assumed and the enquiry is said to be simply whether the defendant had a duty to take one or other step, such as drive in a particular way or perform some or other positive act, and, if so, whether the failure on the part of the defendant to do so amounted to a breach of that duty." (Own emphasis)

[40] The defendant has raised the defence that it or its employees were not aware that the storm water drain cover was broken as it was largely reliant upon the public and its employees who report such defects to it. The defendant also claimed that it did not have a budget to assign any inspectors to identify broken drains.

[41] King went to great lengths to demonstrate that the defendant had a system in place where complaints or reports from the members of the community or employees of the defendant were recorded. In doing so he sought to demonstrate that scores of defects were reported from different parts of the City, even around the time of the incident, but that there was no notification about the broken drain cover from Moray Place in their records.

[42] King did however make a number of concessions during his cross-examination. He confirmed that it was the duty of the defendant to replace

broken drain covers. He also claimed that replacing broken drain covers were a simple process and was neither costly nor time consuming. He explained that a drain cover was a standard item stocked by the storage department of the defendant. The issue in the circumstances was therefore not whether the defendant could afford the repair of defective drains. The defence is based on budgetary constraints and in the reasonableness and affordability of employing inspectors to patrol regularly around the City to check for defective roads, drains, pavements and the like. The defendant claimed that it had no resources for such inspections.

[43] Mr Salie on behalf of the defendant referred to a number of decisions including that of **October v Nelson Mandela Metropolitan Municipality CA 173/2008, unreported**. There, the Court found that the documents produced on behalf of the municipality demonstrated the existence of a reporting system. The Court however found that the fact that the report was made to the municipality gave rise to the duty of care on the part of the municipality to ensure that the defective catch pit did not occasion harm to the residents in the area and members of the public. It found that the enquiry however did not end there. It held that the appellant was also required to establish that the failure to remedy the defect or to take such other steps as may avoid potential harm to members of the public in the circumstances was also blameworthy. The assessment of that question would require a balancing of competing considerations. The Court stated further at paragraph 18:

‘The appellant was required not only to establish the existence of a duty of care but also that the failure to remedy the defect or to take such other steps as may avoid potential harm to members of the public was blameworthy in the circumstances. Culpability on the basis of a negligent failure to act or to act timeously necessarily involves an assessment of the nature of the precautions that can be taken to guard against the harm envisaged and whether such precautions are reasonable having regard to the particular circumstances of the case. (see *Cape Metropolitan Council v Graham* **2001 (1) SA 1197** *(SCA)* at par 7) This involves a value judgment which seeks to balance competing considerations, including the degree or extent of the risk created by the actor's conduct; the gravity of the possible consequences if the risk of harm materialises; the utility of the actor's conduct; and the burden of eliminating the

risk of harm. (see also *Ngubane v South African Transport Services* **[1990] ZASCA 148***;* **1991 (1) SA 756** *(A) at 776H – J; Pretoria City Council v De Jager* **1997 (2) SA 46** *(A) at 55H - 56C.*)' (Own emphasis)

[44] The Court held further at paragraph 19:

'Although the Respondent is not "a miniscule local authority" its ability to address reported defects in its infrastructure and to take precautionary measures must of necessity involve an assessment of the scope of the task, the resources available to it and the time period within which it can reasonably be expected to deal with such matters. In order to effect such an assessment a court must have placed before it such evidence as would enable a fair and reasonable evaluation of the circumstances of the omission upon which reliance is placed to found negligence. The Appellant bore a full onus in this regard. Accordingly she was required to adduce evidence which founded the ground of negligence upon which she relied.'

[45] The broken drain cover in this case was situated a few paces from the staircase connecting Lower an Upper Moray Place. Pedestrians, some of whom were elderly who needed access to the blocks of flats, shops or De Waal Park were expected to walk up and down the staircase. The defendant disputed that Moray Place is situated in a high density area. That may be so, if compared to the inner part of the City. The area is however not an isolated place at all but is in a residential area with blocks of flats. Pedestrians walking up the stairs to Upper Moray place would in all probabilities encounter the broken drain cover in their path. The broken drain cover, whether it had only one or two grids missing, presented a danger to those using the stairs from Lower to Upper Moray Place. As appears from the inspection in loco minutes the drain is partially visible as one approached the top of the stairs. I am persuaded that the broken drain cover would indeed constitute a trap to an unwary pedestrian who sought to cross the road by stepping off the pavement, especially if the person was not familiar with the surroundings and the area.

[46] There was undisputed evidence presented on behalf of the plaintiff that suggested that the drain cover had been broken for many years. The defendant could not dispute that its employees on a weekly basis attended to

clean the stairs connecting Lower and Upper Moray Place where they parked their service vehicle right next to the broken storm water drain. These employees had a duty to report the broken drain cover to the defendant, so that steps could be taken to repair it or warn the public. King confirmed that it was incumbent upon all employees of the defendant to report defects they came across during the course of their duties and if they did not do so they would be failing in their duty.

[47] This failure by the employees to report the broken drain was indicative of the fact that the system of reporting did not always work and defects could go unreported by the employees of the defendant and the members of the public.

[48] In regard to the burden of preventing the risk of harm, the defendant's case is in many respects distinguishable from those matters where prevention was regarded as burdensome to the miniscule resources of a municipality. In this matter, King testified that replacing a drain would not have been expensive and was a simple process in that the drain covers were readily available in the storage department. The grid had been broken for many years and therefore the defendant had sufficient time to repair it. The issue of the budget being available to appoint inspectors to pick up defects becomes irrelevant because the defendant's employees who visited the area on a weekly basis must have or ought to have seen the broken drain and reported it. Their failure to do so amounted to the failure of the defendant's own reporting system. The defendant could not blame members of the community for failing to report the broken drain in the circumstances where its own employees frequented the area on a weekly basis. It is reasonable for members of the community to assume that they need not take any steps to report the drain when the defendant's employees cleaned in that very vicinity and parked in that area. In my view it is irrelevant that those workers may have been private contractors as suggested by the defendant. The fact remains that the trucks had the defendant's name on and the workers wore Council uniforms. That was not disputed by the defendant. In fact, no evidence was adduced to show that the workers who cleaned in that area were private contractors. Even if they were, they would be carrying out their duties on behalf of the defendant. It would be

absurd not to require private contractors to report defects they come across during the course of their duties as that would defeat the whole purpose of the reporting system especially because they are said to be deployed in many parts of the City.

[49] In my view evidence was adequately adduced on behalf of the plaintiff to show that the defendant's conduct was blameworthy. The plaintiff did not need to produce evidence showing that the defendant could afford to hire inspectors as Mr Salie advanced in order to prove negligence against the defendant. It is the defendant that raised the issue and not the plaintiff. In any case, the plaintiff would not have any access to the defendant's financial records. It is the defendant that had to produce such evidence to substantiate its defence. Wood attempted to do so but at the end conceded that an investigation had not been done on the financial viability of hiring inspectors. From Wood's evidence it appeared that an inspection is actually conducted by the defendant, but it is only once every five years.

[50] I am satisfied that the plaintiff has been able to show that the defendant had breached its duty to maintain the road and to have taken reasonable steps to protect the public given the fact that the storm water drain cover had been broken for many years prior to the plaintiff falling through it. The employees of the defendant were aware or ought reasonably to have been aware in the light of their frequent visits to and maintenance of the area (which knowledge must be imputed on the defendant), given the place and position of the broken drain and given the fact that replacing the drain was said to be a simple and an inexpensive process. No evidence was led as to why placing a barrier to warn the public would constitute a safety hazard. The defendant was therefore negligent and its negligence led to the plaintiff's fall into the broken drain cover.

<u>Causal link between negligence and injuries</u>

[51] It is not disputed that the plaintiff fell through storm water broken drain cover on 29 October 2008. Melly testified that the plaintiff fell on his left leg and could not walk. The plaintiff was treated at the Somerset Hospital according to

James. The only records from the Somerset Hospital where the plaintiff was treated are the discharge/ referral letter showing that the plaintiff was admitted on 29 October 2008 and discharged on 31 October 2008 and the attendance certificate. The said letter read with the attendance certificate record diagnosis as the compound left tibia fracture and treatment obtained as nil and wash out and further treatment as AKPOP. The plaintiff was assessed by Dr Versfeld only in 2011. The question the Court must assess is whether defendant's negligence caused the injury to the plaintiff's left knee, left ankle, his back ache and the compound fractured left tibia.

[52] There is evidence that after the fall the plaintiff has not been able to walk the dogs as before, due to his injured left leg. There is also evidence that before the fall he was generally fit, active and strong and could manage up to 17 dogs since he started his business eight years before. There is no evidence that he complained of any pain, and discomfort on his left knee, ankle and on his back before the 2008 accident. There is also no evidence that he was involved in any further accident after the 2008 fall. Dr Versfeld testified that half of the patients who had a fracture of the tibia would also have a knee injury. According to him a reasonable deduction could be made that a knee injury to a patient who reportedly had a good knee before the accident occurred as a result of the accident.

[53] With regard to the ankle injury Dr Versfeld testified that although there were no good statistics on the percentage of patients suffering a fracture of the tibia also suffering an ankle injury, there were definite forces affecting the ankles from the actual fracture and the plaintiff has had symptoms from the time of the incident which points to the relationship between this injury and the accident. According to Dr Versfeld a reasonable deduction should be made that the symptoms of the ankle injury emanated from the incident. In regard to the back ache, it would have been caused by the cast which was above the knee and also bent on the knee, this would have put a lot of stress on the plaintiff's back.

[54] In his examination in chief, on the other hand, Professor Vlok disputed that the left knee, ankle and back injuries were linked to the accident. He suggested

that the symptoms were most probably associated with old injuries that occurred prior to the 2008 incident. The degenerative change he noted on the patella femoral joint to the left knee had nothing to do with the tibia fracture and could be attributed to old injuries. The lower back pain, according to Professor Vlok, also had nothing to do with the 2008 incident, it most probably resulted from old injuries. Professor Vlok also stated that the tibia fracture on the left leg had healed and stated that the pain will disappear over time. Although he was of the view that the right leg was the shorter leg and not the left leg, he disputed that the difference in leg length had anything to do with the accident.

[55] In cross – examination Professor Vlok conceded that the tibia on the left was shorter than the right, although he still maintained the right leg was the shorter leg, which was the reason why he measured the pelvis. Professor Vlok also conceded that there was no radiological evidence of any other pre-accident fractures. According to him there was evidence of the osteoarthritis associated with the patella joint. Professor Vlok conceded that the osteoarthritic changes were only in the left knee and ankle and there were no such signs on the right knee and ankle. He however maintained that osteoarthritis could be due to genetic factors or trauma. In this regard he could not completely rule out the possibility that arthritic changes in this instance were due to the accident. He also could not exclude or argue with the possibility that osteoarthritis would progressively get worse over time, and when it became severe it would require surgery and after that surgery medication to alleviate symptoms would be necessary. Professor Vlok also conceded that one had to be physically fit to manage the amount of dogs that the plaintiff handled and to be able to control unruly dogs. He also conceded that given the injuries that were claimed to have been suffered by the plaintiff, it would be reasonable to expect that he would be unable to manage a group of dogs like he did before but could only manage only two dogs. He also conceded that it was reasonable that the plaintiff needed to take a taxi to fetch the dogs after the accident. He also conceded that in the absence of traumatic events besides the accident, it could be concluded that the pain and discomfort that the plaintiff suffered on his knee, ankle and back were due to the fall into the drain

where he suffered a fracture. Professor Vlok mentioned that if the plaintiff did have a 20 percent chance of requiring back surgery it would not only be due to his soft tissue injury but also to spondylolysis.

[56] In the final analysis of the expert evidence presented by Dr Versfeld and Professor Vlok, I am of the view that the evidence presented by Dr Versfeld was the more convincing and objective and was more logical reasoning and accorded more with the probabilities. Professor Vlok's concessions were far – reaching, such that at the end not much of a dispute existed between Dr Versfeld's conclusions and Professor Vlok's concessions. Dr Versfeld also took the time to re-examine the plaintiff on the morning of the trial to make sure that it was the left leg that was shorter than the right leg. Professor Vlok declined an invitation by the plaintiff's counsel to re-measure the plaintiff's legs. In the absence of any evidence to the contrary, the Court finds that the compound fractured left tibia and injuries to the left knee, left ankle and the back resulted from the plaintiff's fall through the drain cover on 29 October 2008, and were caused by the negligence of the defendant.

[57] Dr Shevel's evidence was also presented in a logical, objective and convincing manner. It is persuasive in my view that the plaintiff suffered from the secondary reactive depression since the accident. Logical and objective factors have been presented in this regard. James' evidence is that of a layperson and the Court cannot attach the same weight as it would of an expert. Prior to the accident the plaintiff had found employment in a niche area of the dog walking market and it was something he could enjoy within his limitations. It seems logical that because he was not active after the accident, could not walk the dogs anymore, was dependent on his wife for support financially, which was not the case before, his drive and motivation amongst others, would decrease. I am therefore convinced based on Dr Shevel's opinion that the plaintiff has developed a significant secondary type depression.

Contributory negligence

[58] The onus is on the defendant to prove that the plaintiff was contributory negligent. The plaintiff did not testify owing to his mental condition. Mr Salie argued that no medical evidence was advanced as to why the plaintiff was unable to testify, and particularly that no MRI scans were done to determine his ability to testify and the Court ought to draw a negative inference in this regard. According to him, the plaintiff ought to have testified on issues such as general damages, on whether he sustained injury on his knee and ankle and on future loss of income. In the absence of the plaintiff's evidence, Mr Salie submits that the Court could not make a finding on the issues pleaded, save for general damages/loss of earning capacity in the event of a breach of duty and negligence proven.

[59] In light of Dr Shevel's uncontradicted evidence regarding the plaintiff's mental condition, I am unable to draw any adverse inference from the plaintiff's failure to testify. I am satisfied that based on Dr Shevel assessment of the plaintiff's condition which I referred to above, there were good reasons placed before Court on why the plaintiff was not called to testify.

[60] De Wet and Melly gave two opposing versions regarding the direction from which the plaintiff came, the visibility of the broken drain cover and the route that the plaintiff normally used to walk the dogs. Save for those differences their evidence was largely corroborative in many other respects. In dealing with the differing versions the Court would have to evaluate which version was the more probable and test the actions of the plaintiff based on the objective standards of a reasonable person. The Court would also have to look at other factors such as the credibility of the witnesses, the impression they created in Court as well the Court's own assessment of the scene from the inspection in loco.

[61] It seems to be common cause that the plaintiff walked a group of dogs on leashes at Moray Place every day. He used the same road for a number of years. The drain cover had been broken for many years. It may well be that he was aware of the drain cover. Mr Corbett conceded that if Melly and De

Wet had observed the broken drain cover the plaintiff must have also observed it in the past, but on that particular day he was not attentive. It is possible to have knowledge of a hazard but one could be distracted and lose concentration. People do not walk looking down all the time. I accept that a reasonable pedestrian would not ordinarily expect to step off the pavement into a broken drain cover. I also do accept that a person walking dogs may have his view obscured by the dogs in front of him. However, a person who was familiar with the road and who had observed the drain on previous occasions would tend to be more careful, not only for his own safety but also for the safety of the dogs. The fact that the drain cover was partially concealed as one approached the top of the staircase, would pose a bigger risk to a person who had no prior knowledge of the broken drain cover. Whilst I, accept that the plaintiff might have been distracted by the lady who he was having a conversation with, he could have been more careful given the fact that he was walking the dogs for whose safety he was responsible, and that of his own. In the circumstances I find that the plaintiff was also negligent. Having said that, the defendant bears a greater degree of fault in that it failed to discharge its admitted duty to maintain the road or warn the public and its actions placed the public in danger. In my view the defendant is 80 percent liable for the damages proved. In this regard all damages awarded to the plaintiff are to be reduced by 20 percent.

Quantum

[62] By agreement the parties decided that it was not necessary for the actuary to be called to testify as an expert witness. They further agreed that for the purposes of the calculation of the claim for loss of earnings and future expenses the expert report of Mary Cartwright Consultants CC was admitted, save for factual assumptions.

Loss of earnings

[63] James testified that the plaintiff earned an amount of R 5 850.00 per month at the time of the accident. After the accident he could only walk about two dogs and earns R 2 080.00 per month and had to take a taxi to collect dogs at an

amount of R520 per month. According to the actuarial calculations the plaintiff's earnings at the time of the incident were R3500.00, and would have increased to R4739 per month on 1 January 2013. According to the actuarial report the amount of R4739 per month would have remained the same but for inflationary increases as depicted in paragraph 4.3 of the actuarial report. The earnings recorded in the actuarial report do not accord with the evidence given by James on loss of income. Loss of income would accordingly require recalculation based on the proven uninjured and injured earnings. The defendant disputes that there was any loss of income. It submits that the plaintiff was in a position to conduct a dog crèche as he had done prior to 2008, as this did not require any amount of physical exertion. There is no conclusive expert evidence that the plaintiff was physically strong to run a crèche. To address the concern raised by James regarding premises to run the dog crèche, Mr Salie suggests that the crèche could be run for 9 months in the year at De Waal Park, when there was no rain. This in my view is based on pure speculation and is not backed by any medical evidence. This submission must therefore be rejected.

[64] Mr Corbett, who appeared for the plaintiff contends that the contingency deduction of 10 percent on the uninjured earnings and 30 percent for the injured earnings should be applied. In respect of the uninjured earnings he argues that the plaintiff had built up a successful business as a dog walker which had been in existence for some eight years prior to the accident and there was a potential to expand the business as he at some stage had a business partner. Further, by all accounts the plaintiff's services were sought after and he was dedicated to the dogs. The ordinary vicissitudes of life such as illness, accident and/or unemployment which would have in any event occurred should be taken into account.

[65] Mr Salie on the other hand submits that the Court should apply a contingency pre-morbid deduction in the region of 40 percent and a 20 percent deduction in the post-morbid. He argues that the contingency must be higher than 10 percent because there were no fixed contracts with the dog owners, walking

dogs was a luxury and dog owners could terminate verbal contracts sporadically.

[66] In my assessment of the factors presented by both parties, I have no doubt that the plaintiff was a relatively active young man, whose services were well sought after and had been built a sustainable business over a period of eight years. It is likely that given the demand for his services and success over a period of eight years, his business would have grown even further. His epilepsy was reasonably well controlled, although it may have been a risk. As long as he had the support and was monitored by his wife he did well. There was no evidence that the epilepsy could worsen in the future as long as it was monitored. The plaintiff's business may well have suffered from the economic downturn given the fact that 'dog walking' was a luxury as Mr Salie argued. It is also not clear what would happen if the plaintiff's wife were to predecease him. The plaintiff may also struggle to walk the dogs, if at all, a few years before he is due to undergo surgery. Having regard to both positive and negative factors, I am of the view that a fair balance should be undertaken. I therefore find that contingency deductions amounting to 15 percent should be applied on the calculation of uninjured earnings and 25 percent on injured earnings.

Future Medical Expenses

[67] I am not going to repeat evidence regarding future medical expenses as shown by Dr Versfeld and Dr Shevel. The capital values in respect of future medical expenses appear in the actuarial report, save for the adjustments in regard to the future surgery that the plaintiff would need to undergo. Dr Shevel was of the opinion that the plaintiff would require anti-depressant medication for three and a half years costing R600.00 per month at the total cost of **R26 700.00,** psychiatric monitoring costing R1000.00 every two months over the period of three and a half years costing **R22 300.00** and a psychotherapy costing R1800.00 per session for twenty sessions costing a total of **R38 900.00.** Dr Shevel's evidence was not challenged by the defendant save to submit that it was contradicted by the James evidence who is not an expert.

The total in respect of the psychiatric and psychotherapy costs therefore is **R87 900.00.**

[68] I have already dealt at length with Dr Versfeld's and Professor Vlok's evidence, which in my view indicate that the plaintiff would require treatment and surgery in regard to his injuries in the future. Dr Versfeld testified in cross-examination that there was an 80 percent chance that the plaintiff would require a left knee replacement operation in approximately 20 years time. Similarly there was an 80 percent chance that he would need a left ankle replacement operation and a 20 percent chance of a spinal fusion surgery, which means all those costs had to be adjusted accordingly. The plaintiff's counsel has made those adjustments in his submissions. The following treatment for the orthopaedic injuries would be required: conservative management of the tibia at the cost of R200 per annum, at a total cost of **R5000;** conservative management of the left knee costing R2800.00 per annum, until age 64 in the amount of **R 47 900;** an 80 percent chance of a knee replacement operation, costing R 168 000.00, at the age of 64 at a total cost of **R86 240.00** (i.e. R 107 800 – 20 percent); conservative management of the knee following surgery costing R 3 300.00 per annum at a total cost of **R 26 100.00;** conservative management of the left ankle, costing R 2800.00 per annum, until age 64 at a total cost of **R 47 900.00**; an 80 percent chance of a left ankle replacement operation, costing **R 116 000.00** at the total cost of **R59 520.00** (i.e. R74 400 – 20 percent). I note that the figure in Mr Corbett's submission is R59 200. This in my view is incorrect as the capital value was R74 400 and not R74 000; conservative management of the left ankle following surgery costing R 3000.00 per annum at a total cost of **R 23 700.00**; conservative management of the back, costing R 4800.00 per annum, until age 64 at a total cost of **R 82 100.00**; a spinal fusion surgery costing R 136 000.00 at a cost of **R 17 460.00** (i.e. R87 300 – 80percent) and conservative management of the back following surgery costing R 4200.00 per annum at a total cost of **R 33 200.00.** The total for the future medical costs is **R517 020.00**. The Court applies no contingency deductions on this amount.

General Damages

[69] The plaintiff is 46 years old. He was an active, physically fit individual who was actively involved in sport and relatively young. He was not only affected in his left leg but his image of himself has changed. He worries about his short leg and how others perceive him. Not only that, he took considerable pride in his achievements of being a dog handler given his intellectual limitations and epileptic challenges. His quality of life and engagement in physical activities have been substantially affected. Both parties have referred to a number of reported decisions dealing with this issue. Upon due consideration thereof, I am of the view that an amount **R 200 000.00** would be a just and equitable amount to be awarded to the Plaintiff in respect of general damages.

[70] In the circumstances I make the following order:

1. The defendant was negligent and such negligence resulted in the plaintiff's injuries;

2. The plaintiff was contributory negligent by no more than 20 percent of his damages;

3. 80 percent of the damages is apportioned against the defendant;

4. The plaintiff is awarded an amount of **R 413 616.00** in respect of future medical expenses;

5. The plaintiff is awarded the following amounts in respect of loss of future earnings, which are to be calculated by the actuary on the following assumptions:

    5.1 that, but for his injuries, the plaintiff would have continued to earn R5 850.00 per month as a dog handler in his business until the retirement age of 65;

    5.2 that the plaintiff would have received inflationary increases in his earnings;

5.3 that, now that the plaintiff has been injured, the plaintiff will continue to earn the net amount of R1 560.00 until the retirement age of 65 years;

5.4 that the future increases will be in line with inflation;

5.5 that a contingency deduction of 15 percent be made against 'uninjured earnings';

5.6 that a contingency deduction of 25 percent be made against 'injured earnings'; and

5.7 that all such amounts be reduced by 20 percent.

6. An amount of **R 160 000.00** is awarded as general damages;

7. The defendant is to pay costs to the plaintiff , including the qualifying costs of the expert witnesses being:

7.1 Dr G A Versfeld, orthopaedic surgeon

7.2 Dr R Visagie, radiologist

7.3 Dr P Bell, radiologist

7.4 Dr D Shevel, psychiatrist

7.5 Mary Cartwright Consultants CC, actuary

N P BOQWANA

Acting Judge of the High Court

APPEARANCES:

FOR THE PLAINTIFF : Advocate P A Corbett

INSTRUCTED BY : Malcolm Lyons &Brivik Inc., Cape Town

FOR THE DEFENDANT: Advocate M Salie

INSTRUCTED BY : Adriaans Attorneys, Cape Town