



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

CASE NO. 1057/2020

In the matter between:

NOSISI BASHMAN

PLAINTIFF

And

**NELSON MANDELA
METROPOLITAN
DEFENDANT**

MUNICIPALITY

JUDGMENT

GQAMANA J:

- [1] The plaintiff, Ms *Nosisi Bashman* instituted damages claim against the defendant, Nelson Mandela Bay Metropolitan Municipality. The plaintiff's complaint is that, she fell in an open storm water drain and injured herself. Accordingly, she alleges that the defendant had a legal duty of care to warn members of the public including her of the hazards posed by an open storm water drain and therefore its failure to do so was wrongful and negligent. At the commencement of the trial, parties agreed to an order in terms of Rule 33(4) of the Uniform Rules of Court to separate merits and quantum

and, to proceed only in respect of the issues of negligence and liability. The draft Order which the parties had prepared in that regard was then made an order of court and the matter proceeded on the separated issues.

- [2] The plaintiff's case as formulated in the particulars of claim is that, on 24 July 2019, she was walking at Msimka Street, New Brighton, in the evening at approximately 20h00, when she fell into and was trapped in an open storm water drain injuring her right elbow. As a result of such incident, she sustained a supracondylar fracture of the right elbow and she had to be admitted at hospital for treatment of same. Plaintiff attributes the blame for such incident on the negligence of the defendant and its employees. It is further pleaded that the defendant would have foreseen the reasonable possibility of its failure to cover the storm water drain would have cause injury to members of the public including the plaintiff and that it had a legal duty of care and to ensure that the storm water drain was covered at all times and that there were no adequately warnings drawing members of the public, including the plaintiff's attention to the hazards presented by the uncovered storm water drain. The nature and extent of the injuries sustained by the plaintiff are for the purposes of adjudication on the separated issues not relevant.
- [3] Leaving aside the special plea which was raised by the defendant and which has since been disposed of by the Order and judgment of *Majiki J*, otherwise the defendant admitted the presence of a storm water drain/manhole at the area as alleged in the plaintiff's particulars of claim. However, it pleaded that it had no knowledge of how the incident occurred and accordingly, same was denied. The defendant also pleaded that, in the event that the court finds that the plaintiff fell into a storm water drain, such incident was caused by a cyclist who collided with the plaintiff, alternatively caused the plaintiff to take evasive action. Accordingly, the defendant could not be held liable, in that the injuries sustained by the plaintiff were not caused by it.
- [4] Further the defendant admitted that it had a duty of care to take reasonable measures to ensure that the storm water drain would not pose a danger to the members of the public and that it had indeed taken all such measures within its available resources

including financial capability to ensure that the storm water drains were securely covered.

- [5] In this matter the onus is upon the plaintiff to prove her claim. Three witnesses, namely, the plaintiff, *Thembakazi Notshoba* (plaintiff's cousin) and Mr *Mngqushu* testified to support the plaintiff's case, and in addition there were fourteen photographs which were handed as exhibit A. The defendant also called two witnesses, namely, Messrs *Jack Strydom* and *Ashley Stowman*.
- [6] The plaintiff was the only witness that testified on how the incident occurred. Her testimony is that she was walking at Msimka Street on the road surface on her way to catch a taxi home. The area was dark because there were no streetlights and she was unfamiliar with it. Suddenly a cyclist approached her from the front in high speed and to avoid a collision with the cyclist, she jumped into the pavement and stepped into an open storm water drain. An open storm water drain is depicted in photograph 14. The plaintiff stepped into it on her right leg and fell on her right elbow injuring her arm. She cried and called her cousin, Ms *Notshoba* for help. Her cousin was walking behind her and she came and lifted her. Her cousin also arranged for the transport to take the plaintiff to Dora Nginza hospital. At the hospital an X-Ray was performed and discovered that she had fractured her arm and she was then transferred to Livingstone hospital for further management and treatment of her injuries.
- [7] Under cross-examination, she testified that she stepped into the storm water drain with her right leg and then fell on her right elbow and was trapped inside the open storm water drain. She admitted that, she chose to walk on the road surface and not on the pavement/ sidewalk. When grilled about that, her response was that people would often walk on the road and she also prefers to walk on the road instead of the pavement. She conceded that, nothing prevented her from walking on the pavement. Furthermore, she admitted that she did not see the cyclist coming and only saw it for the first time when it was already close to her. In order to avoid a collision with it, she decided to move out of the road to the pavement, and stepped into an open storm water drain and fell. She was unaware that there was an open storm water drain in

that area and there were no warning signs of it. She did not collide with the cyclist and she was adamant that had the drain been securely covered, she would not have been injured. She was squeezed about the contradictions between the information contained in the reply to the trial particulars and her testimony. It was recorded in the reply to the trial particulars that she was walking on the sidewalk.¹ In addition she was given a hard time about the contradictions of her testimony and the information contained in the expert reports of Ms *Grobler*, the physiotherapist, Mr *Zandre Jubelius*, the Occupational Therapist; Mr *Tom*, the Industrial Psychologist and the hospital records of Dr *Theunissen* from Livingstone hospital. From the outset, I must mention that there was no agreement between the parties on the status of these reports and the hospital records. The closest one finds about the documents is that they are what they purport to be, but the contents thereof was not admitted.² In any event the plaintiff attributes these contradictions to the language barriers during the consultations with the abovementioned experts. It was not disputed that the plaintiff's highest standard of education was grade 10 / standard 8. Further the plaintiff was put to task that, despite her choice to walk on the road but she did not keep a proper look out because she only saw the cyclist when he was close to her.

- [8] The plaintiff's cousin was of no assistance to the court on how the incident happened because she did not see it. She was alerted to it when the plaintiff cried for help after she had already fell. Her cousin's version is that the plaintiff's body, both legs were inside the open storm water drain and she had to lift her out and it is then that she noticed that plaintiff's arm was wiggling. She confirmed that when the plaintiff fell, she was walking behind her at a distance of +- 15 to 20 metres. Of importance, she corroborated the plaintiff's version that, there were no street lights in the area where the open storm water drain was. Further, she confirmed that the storm water drain was not covered for a long time before the incident and that the defendant must have been aware of it because the latter's employees used to sweep and collect rubbish bags weekly from the same street and also one of the ward councillor's house is directly opposite the scene. Granted, there were contradictions between the testimony of the plaintiff and her cousin, on the nitty gritty because according to her cousin,

¹ Index to pre-trial notices, p 18, para 2.2.

² Index to Pre-trial Notices, p 32, para 5.

the plaintiff was standing with both legs inside the storm water drain. In contrast the plaintiff's version was that, she stepped into open storm water drain with her right leg and fell. Her cousin's version also contradicted the evidence of the photographer, Mr *Mngqushu*. According to the plaintiff's cousin the storm water drain was only securely covered in the middle of 2021, but according to Mr *Mngqushu* when he visited the scene for the second time, to take the photographs, *inter alia*, exhibit A1-13, the storm water drain was covered. Objectively photographs 10 and 13 show a covered storm water drain and photos are real evidence and they don't lie. In addition, it is evident from such photographs that the cover lids were inserted at different times.

- [9] The defendant's witnesses also confirmed that objectively if one looks at the photographs, the cover lids of the storm water drain were indeed inserted at different times. Both of them testified that, there are no records of a report or a complaint of an open storm water drain in Msimka Street. Mr *Stowman* further testified that he became aware of the alleged open storm water drain when he was contacted by defendant's legal services and he went to the area on 20 August 2020, but he did not see any open storm water drain. He also enquired from other employees including Mr *Strydom* about a report or complaint of an open drain and nobody had information about it. Photograph number 14 was only sent to him by the defendant's legal services on 31 August 2020 and it was only then that he managed to locate the relevant storm water drain. It was securely covered with both lids. Both the defendant's witnesses under cross-examination could not dispute that the relevant storm water drain was open on 24 July 2019. They merely maintained their position that there were no records that the municipality attended to close the relevant storm water drain. The undisputed evidence is that the cover lids were inserted at different times and it was the duty of the defendant to maintain and ensure that the storm water drains were securely covered.

- [10] Both counsel were in agreement that, in so far as there are contradictions on the disputed facts, the correct approach is that which is articulated in *Stellebosch*

Farmer's Winery Group Ltd and Another v Martell & Cie SA and others,³ at para 5 that:

“The technique generally employed by the courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues, a court must make a finding on (a) the credibility of the various factual witnesses, (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’s candour and demeanour in the witness box; (ii) his bias, latent and blatant, (iii) internal contradiction in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b) a witness’s reliability will depend, apart from the factors mentioned under (a), (ii), (iv) and (v) above, on (ii) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c) this necessitates an analysis and evaluations of the probability or improbability of each party’s version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it.”

[11] Mr Niekerk, counsel for the defendant, argued that in the light of all the contradictions exposed during cross examination, the plaintiff has failed to discharge the onus and to prove her claim.

[12] In *casu*, wrongfulness of the defendant’s conduct would arise if it had a legal duty to act positively to prevent harm to the plaintiff⁴ and in the case of an omission, wrongfulness is not presumed. Recently in *The Memorable Order of Tin Hats v Kenneth Paul Els* (488/2021) [2022] ZASCA 99 (22 June 2022) at para 18 Hughes JA said:

“An omission per se is not wrongful unless it is considered to go against legal policy or public considerations, which dictate that a plaintiff be compensated for the loss suffered as a result of the omission. Thus, the

³ 2003 (1) SA 11 (SCA).

⁴ See *Van Eeden v Minister of Safety and Security* 2003(1) SA 389 (SCA) 395

approach alluded above, involves a further enquiry, that being whether there was a legal duty that gave rise to delictual liability. Put, differently an omission does not necessarily attract liability, only if it was culpable would it do so.”

[13] Notwithstanding the contradictions mentioned above, it is common cause that there is a storm water drain in the area where the incident occurred. Photograph number 14 depicts an open storm water drain, with only one cover lid instead of two. That photograph was taken in August 2020 by the witness Mr *Mngqushu*, an independent person. The defendant had a legal duty to ensure that the storm water drain was covered and/or to alert members of the public, including the plaintiff of the hazards that could be posed by an uncovered storm water drain. The plaintiff's cousin testified that she resides in that area and that the relevant storm water drain was open for a considerable period of time of more than a year before this incident. The employees of the defendant were aware of such, because they used to clean and sweep that street weekly and others would collect rubbish bags weekly in the same street. The plaintiff was unfamiliar with the area. Further there were no street lights in the area where the storm water drain was. An uncovered storm water drain in a pavement and dark area would pose hazard to the pedestrians and members of the public. There were no warning signs of such danger and that, such failure by the defendant to warn the members of the public including the plaintiff presented the risk of injury to them. The photographer, Mr *Mngqushu* testified that, he attended the scene again to take more photos and he observed that the storm water drain was properly covered. The defendant's witnesses also confirmed that by looking at the photographs objectively, it appears that the lids were inserted at different times. Despite the contradictions, the plaintiff's evidence passes the test, if one has regard to all the probabilities.

[14] I agree with Ms *Ntsepe*, counsel for the plaintiff, that the judgment in *Mahlasela v Nelson Mandela Bay Municipality 2021 JOL 51657 ECP*, relied upon by the defendant is distinguishable on facts. The parties as mentioned earlier above did not agree upon the status of the expert reports and the hospital records. None of those experts was called to testify and to rebut the plaintiff's version of events and that there

was a language barrier. Accordingly, not much weight can be attached to such documents, they are what they purport to be and the context thereof was not admitted.

[15] The plaintiff's evidence is the only evidence before me describing how the incident occurred. Therefore, the plaintiff is a single witness. Moreover, I am acutely aware that, although her version remained uncontroverted but that, does not translate into the truth merely because of her say-so without further ado. The plaintiff as the party who bears the onus, her evidence must be credible to the extent that her uncorroborated evidence satisfy the court that on probabilities it is the truth.⁵ In weighing the evidence of a single witness, a court is required to consider its merits and demerits and decide whether, despite any shortcomings or defects in the evidence, it is satisfied that the truth has been told.

[16] The plaintiff's evidence was that the storm water drain was open; she stepped into it and fell when she had to avoid a collision with a cyclist. Sequalae thereto she injured herself. Her cousin's testimony was that the storm water drain was open for a considerable period. It was not disputed that there were neither streetlights nor warning signs in the area alerting the plaintiff and/or the members of the public about the potential danger that could be posed by the open storm water drain. The fact that the defendant could not find any report or complaint of such open storm water drain in its system does not absolve it. Both its witnesses could not dispute as a fact that on 24 July 2019, the relevant storm water drain was not covered. Neither did they dispute the plaintiff's cousin's evidence that there are defendant's employees who used to work and collect refuse bags weekly in the same street and area. The plaintiff was unfamiliar with that area because she does not reside there. Regarding the contradictions between the plaintiff's evidence and the response to the trial particulars such cannot be attributed to plaintiff, but at best to the attorney who drafted such document. The plaintiff's version was consistent with her particulars of claim and supported by the photographs as far as the presence of an open storm water drain in that area. The presence of the uncovered storm water drain in a pavement where members of the public are expected to walk on posed a danger and the defendant

⁵ *Botha v Kirk Attorneys (EC 257/2016) 2019 ZAECELHC (22 January 2019)*.

failed to take positive steps to prevent such harm. The defendant admitted that it had a duty of care to take reasonable measures.

[17] On the issue of negligence the test is that set out in *Kruger v Coetzee*.⁶

“For the purposes of liability culpa arises if:

- (a) a diligens paterfamilias in the position of the defendant;*
 - (i) would foresee the reasonable possibility of his conduct injuring another in his personal property and causing him patrimonial loss; and*
 - (ii) would take reasonable steps to guard against such occurrence; and*
- (b) the defendant failed to take such steps.”*

[18] The storm water drain was left open for a considerable period of time. There were no warning signs of the hazard posed by such open storm water drain. The defendant must have foreseen the reasonable possibility of harm that was posed by an open storm water drain with no warning signs of the presence of such danger. The defendant should have taken reasonable steps to prevent the harm either by ensuring that the storm water drain was covered and/or by placing warning signs of such danger to alert the members of the public thereto. The defendant took no such steps although it has pleaded that all the necessary reasonable measures to ensure that the storm water drain was securely covered. No evidence was led on what measures the defendant took. The highest point of the defendant’s defence was that, it could not find any report or complaint of an open storm water drain in the relevant area found in its reporting system. The defendant further pleaded that the plaintiff’s injuries were caused by the collision with the cyclist. Not a shred of evidence led to support such allegation.

[19] In a civil case, a plaintiff is required to prove her case no higher than on a balance of probabilities. The probabilities are determined upon the facts and an element of experience on common sense. It calls for a sensible retrospective analysis of what could have occurred based upon the evidence and what can be expected to occur in the ordinary course. On the totality of evidence, the plaintiff has established on the

⁶ 1966 (2) SA 428 (A) at 430 E.

balance of probabilities the wrongfulness and the negligence of the defendant. Having said that, the plaintiff, however, also contributed to the incident and the injuries sustained consequent thereto. On the plaintiff's own version, she made a choice to walk on the roadway and not on the sidewalk or the pavement. Had she been walking on the pavement she would not have encountered an approaching cyclist. She voluntarily and conscientiously chose to walk on the road way instead of the pavement because, on her version she liked to do so. Every action has consequences. Having made such a choice, she failed to keep a proper lookout. Her own evidence was that when she first saw the cyclist, it was close to her. Had she kept a proper lookout, she would have seen the cyclist earlier and would have been able to move swiftly out of the way. Based on these facts the plaintiff was also contributory negligent.

[20] Ms *Ntsepe* argued for costs of two counsel. I am not persuaded that this case warrants employment of two counsel. The issues involved herein were not unique or complex. This was the run of the meal case so to say. However, on the costs in general, there is no reason why the plaintiff should not be awarded her costs as a substantially successful party, and these costs include the reserved costs, if any, which were occasioned by the postponement of the matter, on 7 June 2022. On the aforesaid date, the defendant sought and an amendment to its plea and to introduce a defence of contributory negligence after having heard the plaintiff's evidence. The application for such amendment was granted because the issue was fully canvassed through the plaintiff's evidence. In the light of such Order the plaintiff requested time to consider the amendment. The matter was then postponed with costs reserved. The postponement was mainly caused by the defendant's belated amendment.

[21] In the circumstances, the following Order shall be issued:

1. The defendant is held liable for 90% of such damages that the plaintiff may prove arising from the incident that occurred on 24 July 2019.
2. The defendant is ordered to pay the plaintiff's costs.

N GQAMANA

JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Plaintiff : *Ms N L Ntsepe and Mr Mbenyane*

Instructed by : Magqabi Seth Zita Attorneys
Gqeberha

Counsel for the Defendant : *Mr D Niekerk*

Instructed by : Goldberg & De Villiers Inc.
Gqeberha

Dates heard : 6, 7 and 23 June 2022

Date judgment delivered : 27 September 2022