

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

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

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DATE

Case no. **2021/4396**

In the matter between:

THUBAKGALE THOMAS

APPLICANT/ PLAINTIFF

And

THE JOHANNESBURG ROAD AGENCY (PTY) LTD
DEFENDANT

RESPONDENT/

Coram: Thupaatlase AJ

Date of hearing: 30 November 2021 – in a ‘virtual Hearing’ during a videoconference on Microsoft Teams digital platform.

Date of Judgment: 28 March 2022

This judgment is deemed to have been handed down electronically by circulation to the parties' representatives via email and uploaded onto caselines system.

JUDGMENT

THUPAATLASE AJ

- [1] This an application for default judgment. The plaintiff, a 35-year-old (at the time of the incident) issued summons against the defendant, Johannesburg Road Agency on 08th January 2021 for delictual damages. The damages were sustained because of the plaintiff falling into an open storm water drain resulting in a fractured left ankle. The plaintiff claims payment of the sum of R 1 990 770.00 being the damages resulting from such injuries.
- [2] The defendant is a private company incorporated in terms of the laws of the Republic of South Africa. The defendant is in terms of its founding statute responsible for the design, construction, maintenance, repair, and development of road network and infrastructure, including bridges, culverts, traffic lights, manhole covers, storm water, signage, and the like in Johannesburg.
- [3] The defendant is an organ of State and as a result plaintiff had to comply with the statutory requirements of Section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the Act). After this step, the plaintiff issued summons. The plaintiff duly complied with the statutory prescripts of the Act.
- [4] Summons was served in terms of the Uniform Rules of Court (the Rules) by handing a copy to an employee of the defendant. The employee as described in the return of service is employed in the legal department of the defendant. Despite proper service the defendant company failed to enter an appearance

to defend. The plaintiff, as it was entitled and obliged to do if it wished to exercise that entitlement, applied, pursuant to Rule 31(5) of the Rules for default of judgment.

[5] The issue for determination before this court is the quantum. As stated above the issue of merits doesn't arise as the defendant has chosen not or neglected to participate in this matter.

[6] The amount claimed is for general damages and in, addition, the defendant to pay the costs of the plaintiff as follows:

1. Dr Marin – Orthopaedic Surgeon, and RAF4,
2. Burger Radiologists Inc. - Radiologists
3. Davies – Occupational Therapist
4. Peverett – Industrial Psychologist, and
5. Clemans, Murfin and Rolland – Actuaries

[7] Further, that the defendant to pay the plaintiff's taxed or agreed party and party costs, on the high court scale including costs of counsel, the costs to include the reasonable preparation/qualifying and reservation fees and expenses of the expert.

[8] The plaintiff submitted evidence by submitting an affidavit in order to quantify his claim. There was no oral evidence presented. He was from his errands and fell into uncovered storm water drain. The storm water drain was not covered. There was no sign to alert members of the public of the danger created by an open storm water drain. He was injured as result.

[9] The plaintiff was taken to the Chris Hani Baragwanath hospital for medical treatment. The treatment which administered is fully explained in the various medical reports that have been handed as part of the application for default judgment. The plaintiff was admitted in hospital from the 20th of May 2018 and was discharged on the 03rd of July 2018. During the period of his admission various medical procedures were performed on him.

- [10] Upon his discharged from hospital the plaintiff was given crutches to alleviate pressure on his left leg. He was also prescribed pain relief medication. This was to help him deal with the pain is still felt on his leg.
- [11] As result of the injuries suffered the plaintiff started to experience pain and discomfort in the left ankle especially during inclement weather. And the left ankle became weaker and that has difficulty standing for long periods, walking long distances, and lifting heavy objects. He also suffers swelling and stiffness if he undertakes any activity that places pressure on the left ankle.
- [12] The question of liability is not an issue given the fact that this is an application for default judgment. The court will, however for the sake of completeness deal with law regarding liability. It is not in dispute that the defendant owed the plaintiff a duty of care. The defendant is in terms of its founding law obliged to maintain road infrastructure including storm water drain system of the city of Johannesburg.
- [13] In casu the defendant omitted to ensure that the storm water drain was covered nor to alert the members of the public to the fact that it was uncovered. The legal convictions of the community impute liability on the defendant. In the case of *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) the court concluded that wrongfulness is also found in circumstances where the legal convictions of the community required a legal duty to shield others from injury. Since the case of *Ewels* it has become trite law and generally accepted that that in all cases of delict omission may in appropriate circumstances constitute wrongful conduct in circumstances where legal convictions of the community impose a legal duty of care to prevent harm. The principle was enunciated in the cases of *Minister of Law-and-Order v Kadir* [1994] ZASCA 138; 1995 (1) SA 303 (SCA) and *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA)
- [14] As a result of the principle established in *Ewels* case it was decided in *Cape Town Municipality v Bakkerud* (311/97) [2000] ZASCA] 174; 2000 (3) SA 1049 (SCA) that the doctrine of municipal immunity no longer forms part of our law. The court arrived at this conclusion after considering a plethora of cases had been decided earlier.

- [15] The court concluded that as follows at para. 27 *“While the Court a quo’s conclusion that it was open to it to re-visit the general or relative immunity of municipalities and, if justification existed, to jettison the notion, was therefore correct, I think that having done so, it was wrong to substitute for it what amounts to a blanket imposition upon municipalities generally of a legal duty to repair roads and pavements. In my view, it has to be recognised that in applying test of what the legal convictions of the community demand and reaching a particular conclusion, the Courts are not laying down principles of law intended to be generally applicable. They are making value judgments ad hoc”*.
- [16] The value judgment can be made on the available facts. It is incumbent on the defendant when called upon to answer allegations of this nature to also place before court such factors that will enable the court to make such value judgment. As observed at paragraph 32 of *Bakkerud* *“In the present case there is little in the way of evidence to go on when t comes to deciding whether or not it should be held that the municipality was under a legal duty either to repair these holes or to warn the public of their existence and that its failure to do neither was negligent”*.
- [17] The court is mindful that the defendant is responsible for the infrastructure of one of the biggest municipalities in the country. By failing to defend the action the defendant was unable to place evidence before court as to long the storm water drain had remained opened and what challenges if any prevented prompt action to avert the danger it posed to the public.
- [18] I am satisfied that the defendant owed the plaintiff a legal duty to maintain and repair the storm water drain on the pavement and which the defendant was negligent in not doing.
- [19] The defendant’s act resulted in the plaintiff falling into the uncovered stormwater drain and consequently a serious injury. A reasonable entity for the maintenance of the stormwater drain, the defendant in this case, in the circumstances would have at least taken steps to do so therefore was negligent in the circumstances and consequently liable to pay damages as claimed.

Quantum

- [20] The claim by the plaintiff is based on three legs namely, general damages in the amount of R 500 000.00, loss of past and future income in the amount R 673 410.00 and future medical expenses in the amount of R 817 369.00.
- [21] In respect of general damages the plaintiff submitted the medical evidence of Dr Marin who diagnosed the plaintiff with a right Webber B2 left ankle fracture with painful instrumentation, with restricted range of movement of the ankle and degenerative changes of the ankle joint.
- [22] The court accepts the evidence presented by the plaintiff which has not been contradicted. In the premises judgment is granted in favour of the plaintiff as set out in the order marked as "X".

THUPAATLASE AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing: 30 November 2021

handed down on: 28 March 2022

For the Applicant: Adv: Mr M Jorge 081 246 8884

Instructed by: Mr T. Karabis 083 377 8320

