Case No 451/95

/mb

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter of:

THE CITY COUNCIL OF PRETORIA APPELLANT

and

SWADE JAGER RESPONDENT

CORAM: VAN HEERDEN, F H GROSSKOPF, OLIVIER, SCOTT

et ZULMAN JJA

HEARD: 21 NOVEMBER 1996

DELIVERED: 29 NOVEMBER 1996

J U D G M E N T

SCOTT JA/..

SCOTT JA:

The respondent, a widow in her early seventies, (to whom I shall refer as "the plaintiff") sued the appellant ("the Council") in the Transvaal Provincial Division for damages arising from the injuries she sustained when she fell into a hole approximately 2 metres deep which had been dug in the pavement on the north-west corner of the intersection of Dr Savage Road and Voortrekker Road, Pretoria. The hole formed part of the excavations required for a cable-laying project undertaken at the instance of the Council's electrical engineer. The work was executed by a private contractor under the direction of consulting engineers appointed by the Council.

The quantum of the plaintiffs damages was agreed at R66 000,00. The questions in issue at the trial were whether the servants of the Council were negligent in relation to the damage suffered by the

plaintiff and, if so, whether there was contributory negligence on her part.

It was not in dispute that the possibility of a member of the public being injured as a result of falling into an unprotected hole was reasonably foreseeable. It was furthermore agreed between the parties that although the work was executed by an independent contractor, it did so under the control and supervision of the Council. As to the question of the Council's liability, therefore, the issues were ultimately (i) whether steps had been taken to guard against the harm that occurred and, if so, (ii) whether those steps were reasonable in the circumstances. The court a quo accepted that the Council had required the contractor to take certain steps to guard against the harm and that such steps had been taken, but found that they were inadequate. The plaintiff was held not to have been guilty of contributory negligence. The Council was accordingly ordered to pay damages in the agreed amount of R66 000,00 together with costs of suit.

Leave to appeal was refused by the court a quo (Van der Walt J) and the Council now appeals with leave granted pursuant to a petition to the Chief Justice.

It is necessary at the outset to set out as briefly as the circumstances permit the factual background to the accident.

Dr Savage Road runs approximately east to west. It has four lanes; two for west-bound traffic and two for east-bound traffic. Voortrekker Road runs approximately north to south. The H F Verwoerd hospital, where the plaintiff was employed in the catering department, is on the north-west corner of the intersection.

The cable-laying project involved the digging of a trench down the length of Voortrekker Road on the pavement area on the western side of the road (ie the hospital side of the road). The work proceeded from north to south. On reaching the intersection the excavation was deepened

and broadened to form a hole 3 metres by 3 metres in area and 2 metres deep. The object was to provide enough room to permit the use of a drilling machine to enable the contractors to drill under Dr Savage Road and in this way avoid digging up the road surface. This hole was immediately adjacent to Dr Savage Road and in the mouth of the intersection. Its southern wall was a matter of some 30 centimetres from the kerb which at that point was rounded to accommodate vehicles travelling east in Dr Savage Road turning left into Voortrekker Road.

The trench and the excavated material constituted an obstruction for pedestrians walking on the northern side of Dr Savage Road from west to east who wished to cross Voortrekker Road. To accommodate them the contractors constructed first one and then a second footbridge over the trench. They did this before the hole in question was dug. The use of these footbridges, however, involved something of a detour for pedestrians

intent on crossing at the traffic lights.

In order to explain the reason for this it becomes necessary to describe the scene in a little more detail. What was referred to in evidence as the "pavement" on the northern side of Dr Savage Road (and west of Voortrekker Road) is a strip of land several metres wide between the northern edge of the road and a precast concrete wall on the boundary of the hospital premises. The area is unmade save for a cement or concrete strip which serves as a path and which, judging from the photographs tendered in evidence, is closer to the wall than the road. The area between the path and the road is covered mainly with grass but does not appear to be particularly even. At the intersection the concrete wall surrounding the hospital premises has a splayed corner. The cement path follows the direction of the wall. In other words, before reaching Voortrekker Road it turns towards the north at an angle of presumably 45 degrees for some

distance before again turning 45 degrees to proceed north and parallel with Voortrekker Road. At a point several metres from the first turn of 45 degrees the contractors provided a walkway for pedestrians leading from the path and at approximately right angles to it. That walkway led to the footbridges over the trench and provided access to the western side of Voortrekker Road in the vicinity of the traffic lights. According to the contractor the second bridge over the trench was constructed after it appeared that a single bridge was inadequate to accommodate the number of pedestrians using the facility. In short, therefore, pedestrians walking from west to east on the northern pavement of Dr Savage Road were obliged, in order to reach the traffic lights, to turn half-left for several metres before turning sharply to the right and then over the trench to the traffic lights. A short cut by some 5 to 10 metres would have been to leave the cement path at the point where it makes a half turn to the left and to

walk instead across the unmade part of the pavement to Dr Savage Road and from there in the roadway itself to the traffic lights.

The excavation of the hole immediately adjacent to Dr Savage Road increased the volume of excavated material piled up on the pavement. It is clear from one of the photographs taken at the scene after the accident that anyone walking from west to east on the northern pavement of Dr Savage Road would have been confronted by a sizeable mound of earth immediately ahead. As I have said, to reach the traffic lights a pedestrian would either have had to go to the right and walk on the road itself or go to the left and take the route which is described above. Whether the route to the left was obstructed by excavated material or not was one of the questions in issue at the trial and I shall return to this aspect later.

According to the contractor, Mr Rosa, the hole in question was dug about a week to ten days prior to the accident on 24 April 1992. The

attempt to actually drill under Dr Savage Road commenced, however, only on Tuesday 21 April 1992. It appears that difficulties were encountered by reason of the presence under the road surface of blocks which in the past had supported tramlines. Drilling was suspended on Thursday 23 April 1992 and the sub-contractor engaged to execute this work removed his drill for use elsewhere. No work was carried out in the immediate vicinity of the hole on the day of the accident. The consulting engineers' representative, Mr Lowne-Hughes, testified that he visited the site each day while drilling was in progress, ie from Tuesday to Thursday. On Friday 24 April 1992 shortly before lunch, he attended a meeting on site with the contractor in order to discuss the problem with a view to finding a possible solution. Ultimately the drilling operation was abandoned and it became necessary to dig up the surface of Dr Savage Road after all.

On the day of the accident (Friday 24 April 1992) the plaintiff

worked a shift from 6 am to 2 pm. After completing her shift she left the hospital grounds and in the company of two colleagues, Mrs Lamprecht and Mrs Nagel, walked along the cement path on the pavement on the northern side of Dr Savage Road from west to east in the direction of Voortrekker Road. Her intention was to cross Voortrekker Road at the robot controlled intersection and catch a bus on the eastern side of that road. On reaching the heap of excavated material the plaintiff and her companions crossed the unmade section of the pavement in order to walk in Dr Savage Road as far as the traffic lights. The three women walked in the road in single file with the plaintiff someway behind the other two. As she proceeded past the hole adjacent to the kerb she became aware of vehicles approaching from behind in the lefthand lane, ie the lane in which she was walking. She said she moved closer to the kerb and put her left foot on the kerb between the road and the hole. The next thing she said that happened was that she fell into

the hole. She was unable to say whether her foot slipped or precisely how she came to fall.

At the trial it was sought on behalf of the plaintiff to establish that no measures whatsoever had been taken to guard against the danger of pedestrians falling into the hole. The plaintiff herself testified that there was no path or gap between the excavated material and the concrete wall to the left. She said she had looked but the way was blocked by soil piled up from the excavations. Her evidence was that she had been compelled to take the same route as the one she took on the day of the accident for approximately two weeks. During this period, according to her, there was no fence or warning barrier around the excavations. Her evidence was supported by her two companions. They went even further. Mrs Lamprecht testified that the fence was put up only about a week after the accident; Mrs Nagel said this was done about two weeks after the accident.

A medical superintendent at the hospital, Dr Oosthuizen, also gave evidence on behalf of the plaintiff. She said she had gone to the site shortly after the accident had occurred and had seen no fence or warning tape. She did not specifically look to see if there was a walkway adjacent to the concrete wall but her impression was that the whole pavement area was covered with soil from the excavations.

This evidence was in sharp contrast to that adduced on behalf of the Council. Mr Esterhuizen, an official photographer in the Council who has since retired, testified that on a Friday afternoon he was taken to the scene of an accident which he understood had occurred shortly before and was requested by officials in the electrical engineers' department to take a number of photographs. These were subsequently handed in as exhibits. Mr Esterhuizen was unable to recall the date but he did recall that it was a Friday afternoon and that the photographs were taken between

approximately 3 pm and 4 pm. Various other witnesses called on behalf of the council, including the contractor, Mr Rosa, and the consulting engineers' representative, Mr Lowne-Hughes, both of whom were present, confirmed, however, that the photographs were taken on the afternoon of 24 April 1992.

These photographs were an important feature of the trial and much of the evidence was adduced with reference to them. I pause to attempt a brief description. They show in general the hole into which the plaintiff fell and the trench as being cordoned off by a surrounding fence about 1½ metres in height and comprising metal fence-poles driven into the ground and connected by several strands of wire around which red and white warning-tape had been strung in a zigzag configuration. Photographs of the fence where the plaintiff fell into the hole, ie the side adjacent to Dr Savage Road, show the fence at that point as having 5 poles; 2 close

together and approximately opposite the western side of the hole; 2 close together and approximately opposite the eastern side, and one driven into the narrow strip of earth between the kerb and the southern wall of the hole at a point approximately midway between the eastern and western walls. These poles were connected by about 4 strands of wire around which red and white warning-tape had been strung in a large zigzag configuration and below that a much smaller zigzag configuration. Another photograph taken from the west looking east appears to show an opening or gap in the region of a little more than a metre in width between the splayed corner of the concrete fence and the heap of excavated soil. A shadow cast by the wall makes it difficult to see the nature of this opening but it does seem to show the pile of excavated soil protruding at least partly onto the cement path adjacent to the splayed section of the wall. I should mention at this stage that the plaintiff and her companions when shown these photographs denied

that they reflected the situation as it existed at the time of the accident.

Finally there is a photograph of a nurse having just crossed one of the

footbridges over the trench walking in the direction of Voortrekker Road.

Dr Oosthuizen identified her as an administrative nurse in her seventies

who had since retired.

The witnesses called by the Council included Mr Oelofse, an

electrical engineer in the electricity department of the Council, and his

senior, Mr Schoeman, who was then assistant-chief distributions engineer. They explained that although the work had been given to a private contractor and had been executed under the immediate supervision of private consulting engineers the importance of proper safety precautions for the public was such that they both visited the site from time to time to ensure that the Council's safety requirements were being met. They both testified to having observed the warning fence in place around the

excavations not only on several occasions prior to the accident but also on the afternoon of the accident when the photographs were taken. Mr Lowne-Hughes confirmed the importance placed by the Council on safety measures for the public and that this was constantly stressed at site meetings. He testified that he had visited the site on a regular basis to ensure infer alia that the Council's safety requirements were being complied with. As previously mentioned, he had attended a site meeting on the morning of the accident with Mr Rosa. Subject to one reservation he confirmed that in the afternoon when he returned to the site the position with regard to the fence and the walkway was unchanged. The reservation related to whether in the morning the smaller of the two zigzag configurations on the fence adjacent to the hole had been present. Mr Maphosa, one of the contractor's foremen, testified that he had repaired the fence after the accident but could not recall whether he had added any

strands of wire or tape when doing so. He said that at the time of the accident work was in progress south of Dr Savage Road. On hearing a commotion he had gone to investigate and was one of the persons who had helped the plaintiff out of the hole. He said that he recalled that the middle pole had been knocked over but that after the lapse of some three years he was no longer able to remember whether the side of the hole had given way or whether the pole had merely been pushed over. His evidence was in the main corroborated by Mr Mthabo who was also a foreman employed by the contractor.

As to the walkway to the left of the excavated material, Mr Rosa testified that when the hole in question was dug the quantity of excavated material was such that it encroached onto the cement path adjacent to the splayed section of the concrete wall. He said that it accordingly became necessary to make use of the area between the concrete

wall and the cement path as a walkway for pedestrians. He explained that the walkway at this stage was partly cement and partly soil. The latter he described as "flat and level". Both Mr Schoeman and Mr Oelofse confirmed the existence of this walkway on the afternoon of the accident when the photographs were taken. They both considered it to be usable and adequate. Although Mr Esterhuizen's photograph showing the walkway was not taken at the most appropriate angle he testified that he remembered it well. Mr Lowne-Hughes confirmed the existence of the walkway. As the representative of the consulting engineers, he was a regular visitor to the site. He testified that on no occasion when visiting the site, that is to say after the hole had been dug, did he ever find the walkway to have been blocked and he considered it to have been adequate for pedestrians. The last occasion on which he visited the site was the very morning of the accident when he himself used the walkway. No work was in progress in

the immediate vicinity on that day. There was accordingly no reason for the situation to have changed after his visit in the morning.

In the light of the evidence adduced by the Council, Van der Walt J found himself obliged in the first place to accept that at the time of the accident the excavations had been fenced off and that the fence between the hole in question and Dr Savage Road had had the general appearance of the fence shown in the photographs as described above. In my view the learned judge was quite right in coming to this conclusion. Given the safety specifications which it was not in dispute were written into the cable-laying contract and the extent of the supervision to which the work was subjected, it is inconceivable, I think, that the contractor could have been permitted to leave the excavations exposed without any warning fence for any length of time, let alone the period suggested by the plaintiff and her witnesses. Also of significance in this regard is a letter written by Mrs

Lamprecht to the Council some 3 months after the accident and signed both by herself and Mrs Nagel in which was said: "Daar was 'n diep gat en daar was me baie lyne omgespan nie". Mrs Lamprecht's explanation that the word "baie" was a mistake and Mrs Nagel's explanation that she signed the letter without reading it were far from satisfactory.

Turning to the question of the walkway, Van der Walt J appears to have accepted its existence as described by Mr Rosa but to have held that it was inadequate, particularly for use by elderly persons such as the plaintiff. Referring to the walkway, the learned judge said:

> "Dit is gelyk gewees. Hoe gelyk dit vir 'n bejaarde dame is met hoehakskoene of met minder hoehakskoene wat daar loop, hoe begaanbaar dit is, soos die getuies gese het, is 'n subjektiewe oordeel.
>
> Dit is baie moontlik dat eiseres en haar vriendinne dit as onbegaanbaar vir hulle doel beskou het. En waarom ek dit se, is dat ek kan my skaars indink dat hulle, wat bejaard is, willens en wetens vir veertien dae lank, of tien dae lank, sou verkies om oor die sypaadjie in die besige Dr. Savageweg in die straatvlak te stap, as hulle 'n ander pad gehad het wat bruikbaar was.

Dit is dus my mening en ook my bevinding dat daar onvoldoende voorsiening vir deurgang gemaak was, alhoewel daar 'n deurgang mag gewees het. Die afleiding is sekerlik geregverdig dat die stadsraad 'n sementstrook lê omdat die sypaadjie andersins nie maklik begaanbaar is nie.

In die omstandighede en dit ter syde, want dit is nie heeltemal verbandhoudend nie, kon eiseres haarself as genoodsaak gesien het om van die pad gebruik te maak en het sy van die pad gebruik gemaak."

The court a quo did not reject the evidence of the Council's witnesses regarding the existence of the walkway. Nor in the light of the totality of the evidence, including the photographic evidence, would such a finding, in my view, have been justified. Instead, the approach adopted by Van der Walt J was to accept for the purpose of his judgment the Council's version as to the existence of the walkway and to find that on that version the plaintiff was justified in believing that she was obliged to use the road. The difficulty I have with this approach is that it was never the plaintiff's case that the walkway was too uneven for her to use or, for that

matter, that she was unaware of its existence or did not know where it led to. Her case was that she actually looked but that the way was totally blocked by excavated material. Indeed, the plaintiff and her two companions all testified that there was no gap between the excavated material and the wall. They said that the excavated material extended right up to the wall. All three denied that the photograph showing the walkway reflected the position as it existed at the time of the accident. Mrs Lamprecht, in particular, testified that everyday they had looked to see if the way next to the concrete wall had been cleared so that they could walk there. In short, they did not testify that they used the road because the alternative route was too uneven or unsuitable or that they did not know that it existed; they said that they used the road because they looked and there was no other way. Once it is accepted therefore that the walkway existed, it necessarily follows from the evidence of the plaintiff that she

must have elected not to use it for a reason other than the one she gave. There can be no justification for inferring that her real reason for not using the walkway was its unevenness as opposed, for example, to a desire simply to take a short cut.

In any event, the finding of the trial judge that the walkway was unsuitable or too uneven for elderly pedestrians such as the plaintiff, was in my view, not justified on the evidence. Both the engineers in the employ of the council, Mr Schoeman and Mr Oelofse, expressed the view that the walkway was adequate, as did Mr Lowne-Hughes and Mr Rosa. The latter conceded that the earth section of the walkway would not have been as even as the cement strip, but that concession was self-evident and of little consequence. There was no evidence to suggest that the plaintiff was wearing high heels or footwear that compelled her to walk on a hard surface. On the contrary, on her own version she walked over the unmade

section of the pavement area to reach the road. Mr Rosa's evidence was that the overwhelming majority (which he described as 99%) of pedestrians - and there were many - used the walkway. Inevitably there were the few he said, who took the short cut. When this happened he asked them to go round the other way. On the basis of Mr Rosa's evidence it is clear that the walkway was much used and presumably well trodden. There was no question of the plaintiff being required to walk on freshly-turned earth. Merely because the walkway provided was not entirely of cement does not mean that it was inadequate as a temporary measure.

It follows that in my view the plaintiff failed in her attempt to establish both that the excavation was unfenced and that, in the absence of an alternative route, she was obliged to take the route she did.

The court a quo found that the Council had failed to take reasonable measures to guard against the danger created by the excavation

not only because it had failed to provide an adequate walkway but also because of the inadequacy of the fence. The fence was held to have been inadequate on the simple ground that it had not prevented the plaintiff from falling into the hole. The conclusion that the Council was obliged to provide a fence of a type that would prevent such an occurrence was based, at least partly it would seem, on the rinding that by reason of the inadequacy of the walkway the plaintiff had regarded herself as obliged to take the route she did. That route was undoubtedly dangerous because of the close proximity of the hole to the road. In this Court counsel for the plaintiff contended that even accepting that the walkway was adequate, the Council remained obliged to provide a fence that was of such a nature as to physically prevent pedestrians from falling into the hole as it was reasonably foreseeable that at least some pedestrians would take the short cut to the traffic lights.

The Council was obliged to take no more than reasonable steps to guard against foreseeable harm to the public. Whether in any particular case the steps actually taken are to be regarded as reasonable or not depends upon a consideration of all the facts and circumstances of the case. It follows that merely because the harm which was foreseeable did eventuate does not mean that the steps taken were necessarily unreasonable. Ultimately the inquiry involves a value judgment. Nonetheless, over the years various considerations have been isolated which serve as useful guides, particularly in relation to the question whether any steps at all would have been taken by a diligens paterfamilias. Four such considerations are identified by Professor J C Van der Walt in LAWSA vol 8 para 43 as influencing the reaction of a reasonable man in a situation involving foreseeable harm to others. They are: "(a) the degree or extent of the risk created by the actor's conduct; (b) the gravity of the possible

consequences if the risk of harm materializes; (c) the utility of the actor's conduct; and (d) the burden of eliminating the risk of harm" (see Ngubane v South African Transport Services 1991 (1) SA 756 (A) at 776G -777J where reference is made to various cases and authorities in which one or more of these considerations have been considered). In general, the inquiry whether the reasonable man would have taken measures to prevent foreseeable harm involves a balancing of considerations (a) and (b) with (c) and (d).

In the present case the work undertaken at the instance of the Council was clearly necessary and in the interests of the citizens served by the Council. It must also be accepted that the steps taken to guard against the possibility of harm to pedestrians included the provision of an alternative walkway which was adequate for its purpose as well as the erection of a warning fence of the kind previously described. Applying the

considerations referred to above to the question whether in the present case a warning fence would have been regarded by the reasonable man as being sufficient in the circumstances the correct approach, I think, involves balancing "the magnitude of the risk" (ie (a) and (b)), as reduced by the precautionary measures actually taken, against the difficulty or expense of having to provide in circumstances such as in the present case a fence or barrier of such a nature as to physically prevent pedestrians from falling into an excavation of this type.

It is a matter of common experience that the municipalities of larger towns and cities are regularly obliged to undertake road works involving the digging of holes and trenches in roadways and pavements. There are few such works that are not fraught with some danger. This much is known to the public and municipalities are entitled to expect some reasonableness on the part of pedestrians once their attention has been

drawn to the work in progress and the existence of danger. No doubt there are situations in which something more than a mere warning fence is required. The circumstances may be such as to require a protective barrier of the kind suggested by counsel which would all but exclude the possibility of a pedestrian falling into an excavation. But I think it would be unrealistic and expecting too much of municipalities with pressing and more worthy demands being made on their generally limited financial resources to have to incur the expenditure of establishing in every case a protective barrier of such a kind as to physically prevent pedestrians from gaining access to or falling into holes or trenches of the kind with which this case is concerned.

Once it is accepted in the present case that a walkway was provided for the public it follows that there would have been no reason for pedestrians such as the plaintiff to have to walk on the road or venture near

the hole in question. It must be accepted too that the public was adequately warned of the danger. The photographs show that the warning fence with its brightly-coloured red and white tape was clearly visible for all to see. There remained, of course, the risk to the few pedestrians who ignored the walkway and chose to take the short cut. To guard against that risk the Council would have had to provide protective barriers of the kind contended for on behalf of the plaintiff. The same, however, would have to apply to all similar situations. Given the precautionary measures taken or caused to be taken by the Council in the present case, the nature of that risk does not in my view justify the obvious expenditure which the duty to provide such barriers would impose on the Council in the present and similar circumstances. To hold the contrary would be to set up a standard for municipalities which in my view would be wholly unreasonable.

It follows that merely because the nature of the fence was such

that it did not prevent the plaintiff from falling into the hole does not mean that the Council failed to take reasonable precautions in the circumstances, and the appeal must accordingly be upheld.

In the result the following order is made:

(1) The appeal is allowed with costs.

(2) The order of the court a quo is set aside and the following order is substituted:

"Absolution from the instance is granted with costs of suit."

D G SCOTT

VAN HEERDEN JA
F H GROSSKOPF JA-Concur
OLIVIER JA
ZULMAN JA