



**IN THE REGIONAL COURT FOR THE REGIONAL DIVISION
OF KWAZULU-NATAL
HELD AT DURBAN**

Case no:KZN/DBN/RC

1454/2020

In the matter between:

VALERIE MANSFIELD

Plaintiff

and

THE BODY CORPORATE OF INGLESIDE

Defendant

Judgment on merits delivered: 31 MARCH 2022

Introduction

[1] The Plaintiff instituted action for damages against the Defendant pursuant to her having tripped and fallen in the parking area of the Defendant. The matter proceeded on the issue of liability only.

The Pleadings

[2] According to the Particulars of Claim it is alleged that on or about 10 May 2017, the Plaintiff was injured when she fell on the communally used parking area of the Defendant situated at Ingleside Flats, 13 Beach Road, Amanzimtoti.¹

[3] It is further alleged that the cause of her fall was as a result of the negligence by the trustees of the Defendant in one or more or all of the following respects: -

- '4.1 *They failed to ensure that the parking / area / common use area used by pedestrians was safe for pedestrians.*
- 4.2 *They failed to remove a disused metal base plate, with protruding hooks, which constituted a danger to pedestrians.*
- 4.3 *They failed in their Fiduciary duty of care to ensure that the common use area was safe for use by pedestrians.'*²

[4] The Defendant denied the allegations preferred against it. In amplification of such denial pleaded that the Plaintiff's injury was caused by the Plaintiff's negligence in that:

- '2.2.1. *The plaintiff has been a regular visitor to the complex for a number of years, is familiar with the parking area and environment with the complex and is aware of rules of the complex;*
- 2.2.2. *The incident occurred in an area of the communally used parking area which is solely for vehicles, and the plaintiff ought not to have traversed that area on foot;*
- 2.2.3. *The base plate has been in its position, and painted bright red, in excess of twenty years;*
- 2.2.4. *She failed to exercise reasonable care and caution in using the area that was for the sole use of vehicles*

¹ Index to Pleadings, particulars of claim, para 3, page 5.

² Index to Pleadings, particulars of claim, para 4, page 5.

2.2.5. *She failed to indicate the direct cause of negligence, on the part of the defendant, which is denied, which resulted in her fall and subsequent injuries.*

3. *In amplification of the aforesaid denial, first defendant (sic) pleads that:*

3.1 *The defendant denies that it was negligent and/or breached a duty of care towards the plaintiff, as alleged or in any other way;*

3.2 *The first defendant (sic) therefore pleads that the plaintiff's fall was occasioned and/or was as a result of the direct consequence of the plaintiff's negligence and not the defendant's negligence and/or breach of a duty of care;*

3.3 *Alternatively, and in the event that of the Court finding that the defendant was negligent or breached its duty of care, the defendant pleads that the plaintiff was also negligent in one or more of the following respects, namely:*

3.3.1. *The plaintiff ought to have exercised due caution;*

3.3.2. *Had she done so, the plaintiff could and would have avoided injuring herself;*

3.3.3. *The plaintiff has frequented the complex on many occasions previously;*

3.3.4. *The plaintiff failed to take cognisance of her surroundings;*

3.3.5. *As a result of the failure by the plaintiff to exercise the requisite caution, any injuries sustained by the plaintiff would be sustained as a result of the negligence of the plaintiff and not the defendant (sic)...³*

The evidence

[5] Only the Plaintiff testified in the Plaintiff's case. Two witnesses were called in the Defendant's case. In addition, the following evidentiary material were received into evidence:

³ Index to Pleadings, plea, paras 2 and 3, pages 11 and 12.

- (a) Bundle of Photographs – Exhibit “A”;
- (b) Plaintiff’s Second Bundle of Photographs – Exhibit “B” and
- (c) Defendant’s Bundle of Photographs – Exhibit “C”.

Summary of Evidence for the Plaintiff

[6] **Valerie Yvonne Dawn Mansfield** (hereinafter referred to as the Plaintiff), narrated that on the day of the incident she and her companion, Mr Richard Downs (hereinafter referred to as Mr Downs), were on their way to Shoprite situated opposite Ingleside Flats, where she was visiting at around lunch time. They wanted to exit through the pedestrian gate but the key was stuck and the lock would not open. The Plaintiff orated that they realised that the handyman, Mr McGregor, was at the gate as a vehicle was about to go out of the vehicle sliding gate. She explicated that she and Mr Downs walked in the direction of the vehicle gate. Mr Downs walked on her right, slightly ahead of her. As she walked she felt that her foot caught onto something. She explained that she fell on her left arm and face. When she looked back she saw the raised plate which caused her to trip and fall.⁴

[7] The Plaintiff stated that she did not see the plate because it was covered in debris such as leaves and blossoms on it and there was a shadow. She stated that she did not realise that the plate was raised and always thought it was level with the tar mac. She orated that she was wearing flat walking shoes. She denied being unsteady on her feet.

[8] She further testified that there are no warning signs or markings to warn people about it. The Plaintiff estimated the height of the plate to be between 4 to 5

⁴ Exhibit “A”, page 1.

centimetres off the ground. According to the Plaintiff the plate is situated the area where people would commute to get to their vehicles. People would meet up there and have conversations in the parking area. According to the Plaintiff the plate that she fell over had what she described to be an arm attached to it which was previously used to prevent cars from parking in the area to prevent the trailer from being stolen. The boom gate was removed and the plate remained fixed to the tar.

[9] The Plaintiff explained that at the time of the incident she was fit and was attending gym 4 times a week. On the morning of the incident she and Mr Downs went for a 5km walk and after returning from the walk then went to the beach and thereafter at about lunch time decided to get lunch at Shoprite. It came to light that they had used the pedestrian gate during the course of the morning, explicating that the key got stuck on two occasions. The Plaintiff described that on both occasions it was a struggle to open the gate. It was elicited that prior to the date of the incident, they had encountered problems with the gate.

[10] The Plaintiff confirmed that the vehicle had a vehicles only sign.⁵ According to the Plaintiff she had seen people use that gate when the pedestrian gate was not working.

Summary of Evidence for the Defendant

[11] **Jennifer Elizabeth Arnold** (hereinafter referred to as Ms Arnold), testified that she a trustee and chairperson of the Defendant for approximately 13 years. She described the colour of the base plate to be red.⁶ According to Ms Arnold, the base plate was in that position for approximately 20 years. She explicating that

⁵ Exhibit "C", page 3.

⁶ Exhibit "A", page 1.

the two hooks on the base plates had a metal plate sign “no parking” attached to it with the primary function being to stop people from parking in that area as per the red demarcation.⁷ Ms Arnold stated that pedestrians are not permitted to use the motor vehicle gate as per the sign on the gate.⁸ A pedestrian’s use of the motor vehicle gate would therefore be regarded as unauthorised. Ms Arnold testified that she never received any complaint or report about the pedestrian gate being inoperable, and had the gate been faulty, she or her staff would have been able to assist. Ms Arnold confirmed that had the Plaintiff or Mr Downs sought assistance on the day and proceeded in the direction of the building, they would not have encountered the base plate. According to Ms Arnold the terrain is flat. She estimated the height of the base plate to be in the region of about 1 – 1.5 centimetres off the ground. To her knowledge, no-one else had ever tripped over the base plate or lodge a complaint concerning the base plate.

[12] **Avril Anne Rose** (hereinafter referred to as Ms Rose, testified that at the time of the incident she was an owner in the block as well as trustee. She was testifying in her current capacity as chairperson of the trustees. She described the cleaning regime of the complex, explaining that it is cleaned on a daily basis. The photo exhibits depicted the general cleanliness of the area.⁹

[13] Ms Rose explained that she observed the Plaintiff on the day of the incident who appeared to be unstable on her feet as she was assisted by Mr Downs. She confirmed that there were no prior incidents of tripping and falling.

⁷ Exhibit “C”, page 9.

⁸ Exhibit “C”, page 3.

⁹ Exhibit “B”, pages 1, 3 and 4.

Principal submissions on behalf of the Plaintiff

[14] It was submitted that the Plaintiff is a credible and honest witness. It was argued that it is highly conceivable that someone could trip over a raised plate. There was nothing preventing the Plaintiff from walking in that vicinity. The plate was removed after the incident as it constituted a danger / tripping hazard as per the concession by Ms Arnold. The Plaintiff argued that it had discharged the onus.

[15] In considering whether the Plaintiff should be held to be contributorily negligent, because she did not keep a proper look-out, it was argued that the degree of her contribution would be in the region of 20% to 30% liability and that the degree of liability should be apportioned at 70% to 80%.

Principal submissions on behalf of the Defendant

[16] The Defendant highlighted the following concessions made by the Plaintiff:

- (a) The Plaintiff and Mr Downs used the pedestrian gates twice on the day before the incident;
- (b) The Plaintiff tripped over the base plate because she was not looking where she was going, in other words, she was not keeping a proper look-out;
- (c) The Plaintiff tripped on the base plate in circumstances where it was a flat area on a bright and sunny day;
- (d) The Plaintiff noticed the existence of the base plate for the past 8 years;
- (e) The decision to make unauthorised use of the motor vehicle gate was made out of own volition and as such the Plaintiff asserted the risk of making that decision;

- (f) The Plaintiff made the decision to use the motor vehicle gate notwithstanding the signs on the gate;
- (g) Both the Plaintiff and Mr Downs had the option of reporting the position regarding the faulty gate but opted to take the unauthorised option instead;
- (h) Had the Plaintiff taken the decision to go back into the building, she would have avoided the base plate and the entire incident in totality;
- (i) The Plaintiff admitted that she failed to seek the assistance of Mr McGregor who was in the immediate vicinity of the incident;
- (j) The reason why she failed to seek assistance was because she had already made the decision to make the unauthorised use of the motor vehicle gate;
- (k) From the time that the base plate was erected the Plaintiff had never tripped.

[17] The Defendant highlighted the *diligens pater familias* test of reasonable foreseeability. In this regard, it was argued that the court is to take into consideration the duration of how long the base plate was in that position which had not previously caused any problems; this incident being a solitary incident over the period of existence. It was mooted that had there been previous incidents then it could be argued that this incident could be foreseeable; however, on these facts, it was not foreseeable that the base plate caused a hazard which is reasonable. It was removed because it became apparent that at that juncture it was foreseeable that it could cause a hazard.

[18] It was argued that the Plaintiff in the circumstances had not discharged the onus in terms of how the cause of action has been framed by the Plaintiff. The Plaintiff decision, it was argued, led to her own downfall in the circumstance. It was submitted that Defendant contributed between 10% to 15 % of the negligence.

Common cause facts

[19] It is common cause that:

- (a) The Plaintiff tripped and fell on the base plate on the date as set out in the particulars of claim.

Issues in dispute

[20] The main issues in dispute is whether the Plaintiff tripped and fell due to the negligence of the Defendant.

Issues to be determined

[21] The crisp issue for determination is whether the Defendant is solely liable for the injuries sustained by the Plaintiff as a result of the incident and whether there was any contributory negligence on the Plaintiff's part.

Legal Principles

[22] It is trite that the onus of proving negligence on a balance of probabilities rests with the Plaintiff.¹⁰

[23] In a full bench decision in *Hammerstrand v Pretoria Municipality*¹¹ it was said:

'The mere fact of a person having fallen into an excavation which has been lawfully dug by another raises no manner of presumption of negligence on the part of the latter; for, in spite of the defendant having taken all reasonable precautions the plaintiff may have fallen into the excavation through gross

¹⁰ *Medi-Clinic Ltd v Vermeulen* 2015 (1) SA 241 (SCA) at para 16 'The plaintiff bore the onus of proving that the defendant's nursing staff were negligent.' See also *Goliath v MEC for Health, Eastern Cape* 2015 (2) SA 97 (SCA) '[8] The general rule is that she who asserts must prove', *Arthur v Bezuidenhout and Miemy* 1962 (2) SA 566 (A) at 574H and 576G; *Sardi v Standard and General Insurance Co Ltd* 1977 (3) SA 776 (A) at 780CH and *Madyosi v SA Eagle Insurance Co Ltd* 1990 (3) SA 442 (A) at 444D-G.

¹¹ 1913 TPD 374 at 376-7.

carelessness on her own part. There is, therefore, no reason to depart from the ordinary rule of law that he who alleges negligence must prove it.'

[24] In **Kruger v Coetzee**¹², Holmes JA formulated the test to be applied on negligence. It is trite that a Defendant is negligent if a reasonable person in his position would have acted differently and if the unlawful act causing damage was reasonably foreseeable and preventable.

[25] The question to be asked is whether a *diligens paterfamilias*, would

- (a) have foreseen, as a reasonable possibility or the likelihood of accidents of this nature occurring and
- (b) taken reasonable measures to guard against their occurrence.¹³

[26] In **Peri-Urban Health Board v Munarin**¹⁴ it was held that:

'In general, the law allows me to mind my own business. Thus, if I happen to see someone else's child about to drown in a pool, ordinarily I do not owe a legal duty to anyone to try and save it. But sometimes the law requires me to be my brother's keeper. This happened, for example where the circumstances are such that I owe him a duty of care, and am negligent if I breach it. I owe him such a duty if a diligens pater familias that notional epitome of reasonable prudence, in the position in which I am in, would:

- (a) Foresee the possibility of harm occurring to him; and*
- (b) Take steps to guard against this occurrence.*

Foreseeability of harm to a person, whether he be a specific individual or one of a category, is usually not a difficult question,

¹² 1966 (2) SA 428 (AD).

¹³ *Sea Harvest Corporation v Ducan Dock Cold Storage* 2000 (1) SA 827 (SCA); *Alberts v Engelbrecht* 1961 (2) SA 644 (T) at 646D; *Gordon v Da Mata* 1969 (3) SA 285 (A) at 289H.

¹⁴ 1965 (3) SA 367 (A)

but when ought I to guard against it? It depends on the circumstances of each particular case and it is neither necessary nor desirable to attempt a formulation which would cover all cases. For the purposes of the present case, it is sufficient to say, by way of general approach, that if I launch a potentially dangerous undertaking involving the foreseeable possibility of harm to another, the circumstances may be such that I cannot reasonably shrug my shoulders in unconcern but have certain responsibilities in the matter – the duty of care.

In assessing the standard of care required a reasonable man should have foreseen the real possibility of harm and ex post facto knowledge is not sufficient. The mere possibility of harm is not enough; a reasonable person must foresee a reasonable possibility of harm.'

[27] The principles are further articulated in ***Brauns v Shoprite Checkers (Pty) Ltd***¹⁵ pertaining to the duty of care, where it was held that:

'The diligens pater familias in the position of the Defendant would have foreseen and guarded against the reasonable possibility of the Plaintiff slipping and falling on the quantity of water which had found its way onto the floor of its supermarket and injuring herself in the process. This is something which our courts have consistently stated in analogous situations over the past fifty years or more. Like anyone else who walks in a walkway where the general public not only has access, but indeed is invited to enter to walk on it, the Plaintiff was entitled to expect that he or she could walk on it safely.'

[28] A further seminal consideration is whether the standard is unrealistic and impossible.¹⁶ In the ***Hammerstrand v Pretoria Municipality***¹⁷ it was held :

¹⁵ 2004 (6) SA 2011 (ECD).

¹⁶ *Hammerstrand v Pretoria Municipality (supra)* at 377; *Turner v Arding & Hobbs Ltd* (1949) 2 All ER 911 (KB); *Monteoli v Woolworths (Pty) Ltd* 2000 (4) SA 735 (W) at para [45].

¹⁷ *Hammerstrand v Pretoria Municipality (supra)* at 377.

'But the law does not set impossible demands in such cases; it does not make any extravagant demands upon a person. It is entitled to assume that others will also take reasonable care of themselves, will keep their eyes open, and will not take risks of which they are or ought to be aware.'

[29] The matter of **Cape Town Municipality v Bakkerud**¹⁸ deals with public being obliged to take care of its own safety where Marais JA held that:

'[28] A minuscule and underfunded local authority with many other and more pressing claims upon its shallow purse, and which has not kept in repair a little used lane in which small potholes have developed which are easily visible to and avoidable by anyone keeping a reasonable look-out, may well be thought to be under no legal duty to repair them or even to warn of their presence. A large and well-funded municipality which has failed to keep in repair a pavement habitually thronged with pedestrians so densely concentrated that it is extremely difficult to see the surface of the pavement, or to take evasive action to avoid potholes of a substantial size and depth, may well be under a legal duty to repair such potholes or to barricade or otherwise warn of them. There can be no principle of law that all municipalities have at all times a legal duty to repair or to warn the public whenever and whatever potholes may occur in whatever pavements or streets may be vested in them.

[31] ...It will be for a plaintiff to place before the court in any given case sufficient evidence to enable it to conclude that a legal duty to repair or to warn should be held to have existed...Having to discharge the onus of proving both the existence of the legal duty and blameworthiness in failing to fulfil it will...go a long way to prevent the opening of the floodgates to claims of this type of which municipalities are so fearful.'

¹⁸ 2000 (3) SA 1049 (SCA) 1060 -1061, See also *Stewart v City Council of Johannesburg* 1947 (4) SA 179 (W), where Price J said: "The ordinary pedestrian does not proceed along a sidewalk with his eyes glued to the ground. He does not expect to walk into excavations and obstructions on a paved sidewalk." This was approved in *Wenborn v Cape Town Municipality* 1976 (1) SA 25 (C) at 29E.

[30] In Pretoria **City Council v De Jager**¹⁹, Scott JA, stated that:

'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 The Law of South Africa 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 materialises; (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 the considerations (a) and (b) with (c) and (d).'

[31] For the purposes of liability, it is trite that *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 person or 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.

[32] It is trite that Section 1(1)(a) of the Apportionment of Damages

¹⁹ 1997 (2) SA 46 (A) at 55H; See also *Cape Metropolitan Council v Graham* 2001 (1) Sa 1197 (SCA) at para [7].

Act²⁰ gives a discretion to the trial court to reduce a Plaintiffs claim for damages suffered on a just and equitable basis and to apportion the degree of liability. Where apportionment is to be determined, the court is obliged to consider the evidence as a whole in its assessment of the degrees of negligence of the parties. In this instance, in order to prove contributory negligence, it was necessary to show that there was a causal connection between the tripping and the conduct of the Plaintiff as a deviation from the standard of the *diligence paterfamilias*.

Discussion

[33] It is apparent that the definitive questions posed in *Kruger v Coetzee* (*supra*) have to be answered against the Defendant. In order to avoid liability, it is trite law that the Defendant must produce evidence to disprove the inference of negligence on his part, failing which he/she risks the possibility of being found to be liable for damages suffered by the Plaintiff. Of seminal importance that the Defendant denied that it was responsible for the acts of the trustees; however, Ms Arnold during her testimony conceded that the Body Corporate is liable for the acts of the Defendant.

[34] Where the Defendant had in the alternative pleaded contributory negligence and an apportionment, the Defendant would have to adduce

²⁰ 34 of 1956. Section 1(1)(a): 'Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such an extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.'

Section 1(1)(b): 'Damage shall for the purpose of paragraph (a) be regarded as having been caused by a person's fault notwithstanding the fact that another person had an opportunity of avoiding the consequences thereof and negligently failed to do so.'

evidence to establish negligence on the part of the Plaintiff on a balance of probabilities.²¹ The question which then arises, is whether there was contributory negligence on the part of the Plaintiff which would justify a reduction of the Defendant's liability in terms of the Apportionment of Damages Act No. 34 of 1956?

[35] During cross-examination it came to light that it was a clear sunny day in May. The Plaintiff described it as a moderately hot day. The Plaintiff confirmed that the terrain where the plate was situated is flat.²² The plaintiff also confirmed that she had noticed the base plate before. The Plaintiff conceded that she was not looking down when her foot caught the base plate. Although Ms Rose testified that she observed the Plaintiff being unstable, she conceded that the Plaintiff and Mr Downs could have been walking as a romantic couple.

[36] The Plaintiff conceded that they had no intention of calling for assistance at the time when Mr Downs was struggling with the gate. She further conceded that she would have avoided the path of the base plate had she rather sought assistance.

²¹ *Johnson, Daniel James v Road Accident Fund* Case Number 13020/2014 GHC paragraph 17, confirming *Solomon and Another v Musset and Bright Ltd* 1926 AD 427 and 435; ***Nkateko v Road Accident Fund 73865/17 [2022] ZAGPPHC 69 (9 February 2022)*** referred to ***FOX vs RAF*** (A 548/16) [2018] ZAGPPHC 285(26 APRIL 2018) at para 13 where the full bench held that : "Where the defendant had in the alternative pleaded contributory negligence and apportionment, the defendant would have to adduce evidence to establish negligence on the part of the plaintiff on the balance of probabilities, *Johnson, Daniel James v Road Accident Fund* case Number 13020/2014 GHC paragraph 17, confirming *Solomon and Another v Musset and Bright Ltd* 1926 AD 427 and 435."

²² Exhibit "B", page 3.

[37] It can be accepted that the base plate was in existence for at least 8 years on the Plaintiff's version and 20 years according to Ms Arnold. Ms Arnold stated that the base plate was red and noticeable. Ms Arnold refuted that the debris would camouflage the base plate making it hard to see in the shade. She did however concede that the "dapple effect", like a leopard could camouflage the base plate. Although Ms Rose testified about the cleaning regime, she conceded that leaves would continue to fall thus estimating the area to be 95% spotless. She stated that the tree does not shed a lot of leaves. Ms Rose explained that the area would have been cleaned between 10am and 11am on the day, which would render the build-up as minimal by the time the incident occurred.

[38] Ms Arnold conceded that the Defendant would be held responsible if the property was unsafe. As a trustee, Ms Arnold explained that it was her duty to ensure that the property is well cared for, maintained and safe. She was unable to explain why the base plate was not removed when the boom was removed as she was not part of that decision. Ms Arnold confirmed that the base plate could have been unbolted. Ms Arnold, under cross-examination conceded that the Defendant realised that the base plate was dangerous and that more people could fall, which informed the decision to remove the base plate after the incident. It came to light that the plate was not in the parking area itself. It was situated roughly half way between the pedestrian and vehicle gates. Ms Arnold conceded that the area where the incident occurred was therefore not solely used for vehicles as people could walk there. Interestingly, Ms Arnold herself during cross-examination, acknowledged that she had also previously walked towards the vehicle gate.

Conclusion

[39] The Defendant had a duty to produce evidence to disprove the inference of negligence on its part in order to avoid liability. It is trite that the test is an objective one. In light of the place where the base plate was situated, namely between the pedestrian gate and the vehicle gate, it is apparent when considering the entirety of the evidence that objectively, the base plate could constitute a danger to a person traversing in that path of travel which beckons the question whether the likelihood of such harm occurring was remote and whether a *diligens paterfamilias* in the position of the Defendant should have taken steps to prevent such harm.

[40] Although the duration of the existence of the base plate is disputed, it is evident that the Plaintiff was aware of its existence. It is also not disputed that it was raised off the ground, although the extent of its protrusion is disputed. The pictures of the base plate indicate hook-like protrusions jutting out from the plate. Of seminal importance are the following concessions made by Ms Rose that:

- (a) the base plate may have been obscured from view because of what was referred to as the “dapple effect”;
- (b) there would have been a minimal build-up of residue resulting from leaves having been shed, despite the cleaning regime;
- (c) the Defendant would be held responsible if the property was unsafe;
- (d) that the Defendant realised that that the base plate was dangerous and that more people could fall, which informed the decision to remove the base plate after the incident and
- (e) that the area where the incident occurred was not solely used for vehicles as people could walk there.

[41] Having regard to the entirety of the evidence, when the four considerations *identified by Professor J.C. van der Walt (supra)* are balanced, I am satisfied on a balance of probabilities that the Plaintiff successfully established *culpa* on the part of the Defendant.

[42] The Plaintiff's actions ultimately determine the degree of liability on the part of the Defendant. In considering the extent of such departure, the court takes into consideration the concessions made by both parties. In addition, and of pivotal importance is that this incident appears to have been a solitary instance since the existence of the base plate.

[43] It is trite that the mere possibility of harm is not enough. The legal position is that the law does not set any extravagant demands upon a person. The authority cited earlier clearly establishes an assumption that the Plaintiff should have taken reasonable care of herself. As such the Plaintiff ought to have kept a proper look out and should, as a reasonable person have foreseen a reasonable possibility of harm which presented in the circumstances of this case.

[44] In turning to the contributory negligence on the part of the Plaintiff, the court took the following factors into account:

- (a) That it was a clear day;
- (b) The landscape where the plate was situated is flat;
- (c) The Plaintiff had noticed the base plate prior to the incident;
- (d) The Plaintiff conceded that she was not looking down when her foot caught

onto the base plate.

(e) The Plaintiff could have negotiated a different path of travel;

(f) The Plaintiff could have opted to seek assistance.

[45] The Plaintiff testified that she only noticed after she had fallen that she had tripped over the base plate. I am satisfied that the foregoing factors, on a balance of probabilities are sufficient to establish that there was contributory negligence on the part of the Plaintiff. It is my view that a person acting reasonably would not have tripped and fallen in circumstances such as was encountered by the Plaintiff as she was clearly not looking where she was going. On the Plaintiff's own version, she and Mr Downs hastened towards the vehicle gate and negotiated a path of travel not ordinarily intended for pedestrians. Consequently, the Plaintiff's conduct justifies a departure from the standard of the *diligence paterfamilias*.

[46] In the result the following order is made:

Order:

1. The Defendant is liable to pay the Plaintiff 40% of the damages which the Plaintiff may prove arising from the incident which occurred on 10 May 2017.
2. The issue of costs is to stand over for later determination.

P ANDREWS
Regional Magistrate: Durban

APPEARANCES:

FOR THE PLAINTIFF:

Mr J Bloch

FORTHE DEFENDANT:

Adv. B Jackson

Instructed by:

Venns Attorneys

DATES OF HEARING:

28 February 2022

DATE OF JUDGMENT:

31 March 2022