

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

**CASE NO.: 1320/2020**

**Reportable Yes**

In the matter between:

**NOMBULELO MZACA**

Plaintiff

and

**KING SABATA DALINDYEBO**

**LOCAL MUNICIPALITY**

First Defendant

**OR TAMBO DISTRICT MUNICIPALITY**

Second Defendant

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**REASONS FOR JUDGMENT**

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**NOTYESI AJ**

**Introduction**

[1] The plaintiff, Ms Mzaca, instituted a delictual claim against the defendants, King Sabata Dalindyebo Municipality (KSD) and O R Tambo District Municipality (ORTDM). The claim emanates from an incident that is alleged to have occurred on 10 January 2019 at York Road, Mthatha, where the plaintiff had tripped and fallen on the pavement at or near Jet Stores, whereafter she slid into a boundary of an open hole that was left without a lid. As a result of that fall, the plaintiff sustained injuries. Sequel thereto, the plaintiff sued the defendants.

[2] She had based her claim on allegations of negligence by the defendants, alternatively the employees of the defendants, who had allegedly left the manhole uncovered.

[3] The defendants, in their plea, disputed the allegations of the plaintiff and averred that KSD had no duty to construct and maintain an underground drainage system and safety measures and consequently, KSD had no obligation to close manholes or pits with lids in order to prevent injuries to road users. Likewise, the ORTDM also denied liability and the obligation to compensate the plaintiff for any damages.

[4] On 4 March 2024, the plaintiff adduced evidence in support of her claim. She was the only witness who testified. Following the closure of the plaintiff's case, the defendants sought for absolution from the instance. Consequent the hearing of the parties' submissions, this Court delivered an ex-tempore judgment. The absolution order was granted. The plaintiff has sought for reasons for the grant of the absolution. Although the reasons for the absolution order are sufficiently provided in the ex-tempore judgment, this Court has deemed it necessary to provide those requested reasons.

### **Issues to be decided**

[5] The question for determination by the court was whether the defendants or their employees were negligent and if so, whether their negligence had caused the damages or injuries suffered by the plaintiff.

### **The facts**

[6] The plaintiff testified that on or about 10 January 2019, she fell on York Road on the pavement at or near Jet Stores. Having fallen, she had one of her legs slide into the boundary of an open hole that was left without a lid. She could not stand up after her fall. Thereafter, she was taken to Umtata General Hospital where it was found, on x-ray, that both her ankles had been fractured. She was referred to Bedford Hospital.

[7] The plaintiff's husband had misgivings about Bedford Hospital. He took her to Port Edward Hospital. She was later admitted to the Port Edward Hospital. The plaintiff had described the hole in which she had slid into as a rectangular hole. She testified that the hole was ringed with an iron. According to the plaintiff, the hole was

open in circumstances where it was apparent that it would have had some sort of a lid and there was no lid. She described the conduct as negligence on the part of the defendants. The plaintiff was cross-examined on her evidence.

[8] During cross-examination, she could not tell this Court the basis of her claim against ORTDM. She readily accepted a proposition by the defendants' counsel that ORTDM is not responsible for stormwater drains. The plaintiff conceded that there is no cause of action against the ORTDM. In this regard, I quote from the transcript –

**Mr Bodlani:** OR Tambo District Municipality has nothing to do with stormwater drains.

**Ms Mzaca:** I do not know anything about that My Lord.

**Mr Bodlani:** And this is regardless of whether there are illegal connections or not.

**Ms Mzaca:** I have no comment.

**Mr Bodlani:** The municipality is not responsible for those pipes – that is, KSD now, not responsible for those pipes. It did not fit them.

**Ms Mzaca:** Yes, I follow.

[9] On questioning by this Court, the plaintiff testified that she is not sure whether the hole belonged to ORTDM or KSD. The plaintiff testified that she had no knowledge regarding the operation of the different municipalities. She had alleged that she is suing both the KSD and ORTDM on the basis that they were municipalities. According to her, the hole was in a public area where people walk about and that is all that she knows. She later changed her version and suggested that the place in which she had fallen, is under the KSD. She provided no basis for this conclusion.

[10] Regarding her falling, the plaintiff testified that she was walking along the pavement. It was during the day and the visibility was clear. She tripped as she was walking and fell down. Her falling was not as a result of a hole. She does not know what caused her to trip. According to her, the area is a bit sloppy. Subsequent to her falling, she slid to the boundary of the open hole which was a distance from where she tripped.

[11] That was the case for the plaintiff. The defendants applied for absolution from the instance.

### **The applicable law**

[12] To obtain a judgment holding the defendants liable to pay delictual damages, the court in *Minister of Safety & Security v Van Duivenboden*<sup>1</sup> stated that the plaintiff must prove, on a balance of probabilities, that the act(s) or omission(s) of the defendants were wrongful and negligent and have caused the loss. The approach in our law to the plaintiff's claim is not controversial. It is trite that in order to succeed in her delictual claim for damages, the plaintiff must establish that the wrongful and negligent conduct of the defendants or their employees, acting within the course and scope of their employment, had caused her harm.<sup>2</sup>

[13] In *Kruger v Coetzee*<sup>3</sup> it was held –

‘For the purposes of liability culpa arises if –

(a) a diligens paterfamilias in the position of the defendant (or his employees)

(i) would foresee the reasonable possibility of his (their) conduct injuring another in his person or property and causing him patrimonial loss; and

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<sup>1</sup> *Minister of Safety & Security v Van Duivenboden* 2002 (6) SA 431 SCA at para [12]; LD obo AD v Member of the Executive Council responsible for the Department of Health [2021] JOL 49623 (ECM) at para 2.

<sup>2</sup> *KX v Member of the Executive Council for Health, Western Cape* [2021] JOL 51401 (WCC) at para 3.

<sup>3</sup> *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E.

(ii) would take reasonable steps to guard against such occurrence;

and

(b) the defendant (or his employees) failed to take such steps.'

[14] In *Naude NO v Transvaal Boot and Shoe Manufacturing Co*<sup>4</sup> it was held –

“Although the onus of proving negligence is on the plaintiff, the plaintiff does not have to adduce positive evidence to disprove every theoretical explanation which is exclusively within the knowledge of the defendant, however unlikely, that might be devised to explain (his paraplegia) in a way which would absolve the defendant and his employees of negligence.’

[15] In *Monteoli v Woolworths (Pty) Ltd*<sup>5</sup> the court confirmed that the onus, nevertheless, remains with the plaintiff. The defendant has an evidential burden to show what steps were taken to comply with the standards to be expected.

[16] In *Minister of Safety & Security & Another v Carmichele*<sup>6</sup> where the court confirmed that causation has two elements –

- ‘1. The factual issue to be established on a balance of probabilities by the plaintiff by using the “but for” test would involve the mental elimination of the wrongful conduct in the posing of the question as to whether upon such hypothesis, the plaintiff’s loss would have ensued or not;
2. The legal causation, namely whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is a juridical problem and considerations of policy may play a part in the solution thereof.’

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<sup>4</sup> *Naude NO v Transvaal Boot and Shoe Manufacturing Co* 1938 AD 379 at 392(3).

<sup>5</sup> *Monteoli v Woolworths (Pty) Ltd* 2000 (4) SA 735 (W) at 127.

<sup>6</sup> *Minister of Safety & Security & Another v Carmichele* 2004 (3) SA 305 (SCA)

[17] In the *Member of the Executive Council for Health, Eastern Cape v DL obo AL*<sup>7</sup> Molemela P, dealing with the test for causation held-

‘The test for factual causation is whether the act or omission of the defendant has been proved to have caused or materially contributed to the harm suffered. Where the defendant has negligently breached a legal duty and the plaintiff has suffered harm, it must still be proved that the breach is what caused the harm suffered. In the present matter, the question is whether the brain damage sustained by AL would have been averted if the hospital staff had properly monitored the mother and foetus and had acted appropriately on the results? If so, factual causation is established and one is left with only wrongful conduct without proof that it caused the harm suffered.’

[18] In an application for absolution from instance, the question that the court must consider is whether the plaintiff has adduced evidence upon which a court, applying its mind reasonably or carefully, could or might find for the plaintiff; in other words, the real question is whether the plaintiff has made out a prima facie case.<sup>8</sup>

### **Evaluation of evidence and submissions**

[19] The plaintiff admitted that after she fell, she tried to stand up, but could not. It was only at that stage that she realised that she had been injured. What is clear is that the plaintiff did not know the stage at which she was injured. There are three instances in which the plaintiff’s injuries could have occurred. The first is at the time of her tripping as she was walking along the pavement. At this stage, her tripping is not linked to the open hole or manhole. The second is at the stage when she slid, but before she could reach the boundary of the hole. She could have been injured and fractured at that stage. The third stage is when her legs hit the boundary of the hole. She could have been injured and fractured. In respect of the first and second stages, the hole had no role, both factually and legally. For any injuries that could have been

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<sup>7</sup> *Member of the Executive Council for Health, Eastern Cape v DL obo AL*

<sup>8</sup> *Mazibuko v Santam Insurance Co Ltd and Another* 1982 (3) 125 (A) at 132H-133A; *Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *R v Shein* 1925 AD 6 at 9; *Claude Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409 G-H

sustained at that stage, both KSD and ORTDM could not be held responsible for the injuries and resulting damages. On this ground alone, the plaintiff failed to make out a case against both defendants. This Court had no evidence regarding the cause of the plaintiff's injuries.

[20] I agree with Mr *Bodlan*'s submission that it is trite law that where the defendants had breached a legal duty and the plaintiff has suffered harm, it must still be proved that the said negligence caused the harm suffered. In respect of causation, two elements must be established; the first is the factual issue, the answer to which can be determined by applying the 'but for' test. This entails the asking question whether but for the negligent conduct of the defendants, the injury or harm would have occurred. In the case of positive conduct on the part of the defendants, the negligent conduct is mentally removed to determine whether the relevant consequence would still have occurred. The second issue; is the legal causation which answers the question of whether the wrongful act is linked sufficiently closely to the harm suffered, if the harm is too remote, then there is no liability.

[21] Mr *Melane* who appeared for the plaintiff, could not submit to the contrary or persuade this Court to the contrary and instead, in my view, he correctly conceded the legal position. Mr *Melane* had sought to overcome the difficulties in the plaintiff's case by submitting that the presence of the hole and the fact that the plaintiff had slid to the hole was sufficient enough to establish a prima facie case. I disagree. The uncontroverted evidence is that the plaintiff fell on her own and slid into and stopped by the boundary of the hole. There is no evidence regarding the stage at which the injuries were suffered.

[22] More significantly, the plaintiff has not made out any case against the defendants. The plaintiff had a duty to establish that the hole belonged to one of the municipalities and that such municipality was negligent when leaving the manhole open. In this regard, the plaintiff was unconvincing and she was generalising, merely contending herself that it is the duty of the municipality to ensure that the manhole is always covered or closed. That cannot be enough to make out a case. In my view, the plaintiff's case was poorly investigated and brought to court with insufficient facts

to sustain a case or establish a cause of action against the defendants. In all the circumstances set out above and the evidence presented, the Court was satisfied that the application for absolution should succeed.

### **Conclusion**

[23] On a proper analysis of the evidence and having considered the submissions by the parties, this Court was satisfied that the plaintiff had failed to establish a prima facie case and concluded that absolution from the instance should be granted. The general rule is that costs should follow the event and accordingly, there were no basis to depart from the general rule. The defendants were awarded costs.

### **Order**

[24] In the circumstances, the following order was granted –

1. The defendants are absolved from the instance with costs.

**M NOTYESI**  
**ACTING JUDGE OF THE HIGH COURT**

### **APPEARANCES:**

Counsel for the Appellant	:	Adv Melane
Instructed by	:	Mgxaji Zazaza Attorneys Mthatha

Counsel for the Respondent	:	Adv Bodlani SC & Adv Z Mashiya
Instructed by	:	Jolwana Mgidlana Inc Mthatha

Heard on	:	04 March 2024
Judgment Delivered on	:	18 June 2024