IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 12869/2016

In the matter between:

ALBERT APRIL Plaintiff

and

WAJID RASOOL First Defendant
BRIGITE BRANDAO Second Defendant

Date: 15 November 2019

JUDGMENT

BOQWANA, J

Introduction

[1] The plaintiff instituted an action against the defendants, for damages in respect of injuries he claims he sustained when he fell through an exposed hole, at approximately 21h00 on 7 May 2016, at the defendants' immovable property (erf 49778 Mitchell's Plain, in the City of Cape Town, Cape Division, Western Cape Province), used as business premises for a takeaway shop or café', known as

"Wajid's Pakistani Chicken Tikka & Takeaways". The defendants are married in community of property and are the owners of the property.

[2] The plaintiff alleged in his particulars of claim that he stepped into a drain and fell whilst walking on the defendants' property. The defendants disputed that the hole in question is a drain, claiming that it is rather a municipal water stop cock ("stop cock"). Both parties' counsel resolved to simply making reference to "a hole" during argument. The takeaway café operates from 10:00 to 22:00 midweek and from 10:00 to 00:00 (midnight) on Fridays and Saturdays.

[3] The plaintiff alleges that he fell and was injured solely as a result of the defendants' negligence, and breach of their duty of care, as they failed to maintain the hole in a proper state of repair, to put a suitable barrier in front of it and to take any and/or adequate measures to cordon it off, as a result of which it constituted a dangerous trap to the plaintiff and other members of the public, as it was not reasonably visible at night.

[4] The parties agreed to separate the merits from the quantum. The issue to be decided by this Court, therefore, is whether the plaintiff fell and, if so, whether this was caused wrongfully, unlawfully and negligently by the defendants.

Plaintiff's evidence

[5] The plaintiff was the only witness who testified in his case. His evidence was that he is 61 years old and has been working as a panel beater at all relevant times. On the night of the alleged incident, which was Saturday 7 May 2016 and at around 19h00, he had visited his brother who lived in the neighbourhood where the defendants' takeaway café is situated. He spent about 45 minutes there, and drank two single whiskeys. He decided to get something to eat. He was not familiar with the area, and his brother's wife accompanied him. They walked to a nearby takeaway café, which was about 3 to 4 minutes' walk. It was his first time visiting this café. There were vehicles parked outside and he walked between the vehicles

and the building (next to the wall). His sister-in-law walked in front of him. He felt his foot going into a hole. The hole had no bricks in it, as was depicted in photographs presented in Court, which had apparently been taken on Sunday 8 May 2016 (i.e. the day after the incident), by the plaintiff's brother. The plaintiff did not know whether the hole he fell in was a drain, or a municipal water stop cock as alleged by the defendants. When he stepped into what he called "the drain" he lost his balance, fell forward and knocked his head. He cannot say for certain whether he hit it against the bonnet of a vehicle, or against the ground. This caused him to be slightly dazed and confused.

[6] He was helped up by his sister-in-law and a person he did not know. He noticed that his fingers were "*standing up at an angle"*. He pulled them up to stop them from swelling, just before he went to hospital. The incident took place at about 21h00. He did not feel pain at that time. After coming back from hospital, he felt pain in his left arm. He had a full cast and a bandage on.

[7] After the fall, he asked his sister-in-law to call the owner of the premises. A person who professed to be the owner came out. The plaintiff showed him the hole and tried to explain what had happened. This person did not want to hear anything. He mentioned the words "*you drunk people must get out of my premises*." He said something about "*you people*". His sister-in-law then called her husband, who came over to them.

[8] The hole was neither filled up, nor were there burglar bars present over the hole (as depicted in the photographs apparently taken by the attorneys in 2017) at the time of the incident. At that time, he could walk closer to the building. He could not recall whether a big flood light, situated at the top front of the canopy of the building, as depicted in the photographs, had been on; if it had been, it had not reflected well. The only light that shone was on the adverts, on the window. There had not been any lighting directly on the ground. The incident occurred underneath the canopy, so, even if the floodlight had been on, it would not have reflected well. As far as the street lights were concerned, the only street light they

checked (after the incident), was on the opposite side of the road; which is quite broad. He could not recall if the flood and florescent lights depicted in the photographs had been there, it had been dark where he walked. The location of the lights, as depicted in the photographs, is not where the incident occurred. The incident occurred around the corner, where it had been dark.

[9] According to him, it was not unreasonable to walk next to the wall, as there were vehicles parked at the roadside. There was no signage to warn the public. He was not inebriated and was not stumbling on his feet, he is a social drinker. He pointed out that he is an older man and not into heavy drinking like younger people. He had been injured before, in December 2015, when he broke his arm whilst falling off a "*wheely bin*". He had never suffered any injuries before that. Before the incident he had been wearing a buddy brace, with no sling, but his arm was fine, it did not affect his ability to walk properly, nor did it contribute to his fall on 7 May 2016.

[10] He then left the defendants' premises. His brother called an ambulance, which he was informed would take too long to arrive; he then called his daughter, who lived approximately 30 to 45 minutes away from that location, to come and fetch him. She took him to Karl Bremer Hospital, where he was medically treated.

[11] I deal with the rest of the plaintiff's evidence, particularly in cross examination, where relevant in my analysis of certain parts of the judgment.

Defendants' evidence

[12] The defendants called two witnesses: the first defendant and Hassim Saleem. The first defendant testified that he is a sole member in Wajid's Pakistani Chicken Tikka and Trading CC. The business traded at No.2 Admirals Drive [Strandfontein] at the time of the incident. The hole, which is the subject matter of these proceedings, is not a drain but a stop cock. It was there when he and the second defendant bought the property. The burglar bars depicted in the

photographs had been put there because somebody knocked out the window with a vehicle. He put the bricks in the hole to hide the copper tap and pipes below it from thieves. A week before the alleged incident he had also put bricks on the hole, because a lid had been stolen. On the day of the alleged incident, the plaintiff, one lady and a certain Norman Adams, who is a known heavy drinker and a frequent visitor of the takeaway café, always seeking handouts, came to the shop. They were under the influence of alcohol and they started swearing at him. Mr Adams was banging the door hard and causing a scene, whilst the first defendant stood inside. They left the premises and walked over to the other side of the road, to another shop. No one came to tell him about the fall. The first defendant went to sit in his bakkie, which was parked opposite the takeaway café. Mr Adams, the plaintiff and the lady knocked on the bakkie's and swore as they were walking. The plaintiff had a sling around his neck and arm. None of the three mentioned that someone had fallen and had been injured.

[13] There was a good deal of bright lighting at the premises that night: a big spotlight at the top of the building, two florescent lights under the canopy, another light above the door, light coming from inside the building through the glass and the street lights. The stop cock lid was replaced but its position was never changed. He had seen the plaintiff, the day before the incident, coming from the opposite shop with Mr Adams. Mr Adams always came to ask for boerewors and money. The plaintiff came to the shop on Sunday, 8 May 2016, and made allegations that he had fallen the previous night.

[14] Mr Saleem was called as a second witness for the defendants. He testified that he has been working at the takeaway shop since 2012 and was working on the night of the alleged incident. The plaintiff was swearing and Mr Adams and a certain lady stood by him. They left; he did not see where they went. They came back Sunday lunchtime and started swearing again.

[15] The spotlight and the florescent lights were working on 7 May 2016. The lights were bright. The bricks depicted on the photographs, taken on 8 May 2016,

were in the same position on the day of the alleged incident. He did not witness the alleged fall.

Issues

[16] The first issue to be determined is whether the defendants owed members of the public generally, and the plaintiff specifically, a duty of care. Secondly, whether the plaintiff fell at the defendants' premises. If indeed he did, the next question would be whether such was caused by the defendants, in one or more of the respects alleged by the plaintiff, namely that (a) the defendants constructed, or allowed a hole to exist; and/or (b) they failed to cover the hole with a suitable lid; and/or (c) failed to erect warning signs to warn the public of the existence of the hole; and/or (d) failed to erect a barrier around the hole; and/or (e) failed to illuminate the hole; and/or (f) the hole constituted a dangerous trap which was not reasonably visible at night.

[17] The defendants deny that the incident occurred, and that there was any unlawful conduct, omission and/or negligence on their part. Firstly, they deny that they owed the plaintiff any duty of care to ensure that the business premises were safe. According to them that duty is owed by a shopkeeper which in this instance is a close corporation, Wajids Pakistani Chicken Tikka and Trading CC, which has not been cited as a party in these proceedings. They submit further that the duty of care is only upon a shopkeeper to take reasonable steps, as part of a system to detect potential hazards and eliminate them, in an attempt to make its business premises safe.

[18] Secondly, should it be found that they owed a duty of care to the plaintiff and the public, the defendants allege that they would not have not foreseen the "utterly" remote possibility that a pedestrian would walk right against the particular wall of the building, and trip in or over the "tiny" hole, that was filled and levelled out by bricks. Notwithstanding that, although the bricks were inserted in the hole to hide the copper pipes and tap, the fact that they had levelled out the

surface (by putting bricks in the hole) was in any event reasonable and constituted sufficient steps to prevent a person from tripping in/over the hole.

[19] Thirdly, in the event they were found to have been negligent, they allege that the plaintiff was contributorily negligent, in that he was (a) heavily under the influence of alcohol and/or narcotic drugs that had drastically influenced his mobility and stability; and/or (b) he was not supposed to walk along the particular area and more particular right against the building wall; and/or (c) he did not keep a reasonable and proper lookout where he was walking; and/or (d) he was dragging his feet whilst he was walking instead of raising them like a normal reasonable person would do; and/or (e) his own negligence contributed to the alleged incident.

Evaluation

Did the defendants owe a duty of care to the plaintiff and members of the public?

[20] The defendants argue that only the shopkeeper, and not the owner, owes a duty of care to members of the public. I disagree with this proposition. The fact that in the cases that the defendants have made reference to, a shopkeeper was found to have been liable, does not oust the owner's own liability. A finding as to who owes a duty of care would depend on the particular circumstances of the case. In *ZA v Smith* 2015 (4) SA 574 (SCA), the owner was pertinently held liable for not putting up warning signs or fencing to protect customers from falling. It was found, at para 21:

> "*Apart from the fact that both respondents were in control of a property, which held a risk of danger for visitors, the second respondent, with the knowledge and consent of the first respondent, as owner of the property, allowed members of the public, for a fee, to make use of a four-wheel-drive route, designed to lead directly to the area which proved to be extremely dangerous*." (Own emphasis)

[21] The fact that the court, in that case, was not asked to decide on the particular issue does not sway the issue in favour of the defendants. Equally, in cases where

shopkeepers had been found liable, such as *Checkers Supermarket v Lindsay* 2009 (4) SA 459 (SCA), cited by the defendants, the courts were not particularly dealing with that question. Interestingly, though, at paragraph 5 of *Checkers Supermarket*, the court prefaces Stegmann J's quote by stating the following: "...[*t*]*he duty of a supermarket owner/keeper to persons entering its supermarket at all times during trading hours is aptly espoused by Stegmann J as follows…"* (Own emphasis). This clearly is not supportive of the defendants' argument. There is accordingly no basis to suggest that only the shopkeeper, in this case the CC, and not the defendants, owed the plaintiff a duty of care.

[22] A defendant who is in control of the property upon which a hazard exists is under a duty to warn a plaintiff of the nature of the hazard and the risk involved, by issuing appropriate warnings of the hazard. Failure to do so involves a wrongful omission. See *Neethling, Potgieter and Visser, Law of Delict, 7th Edition 2015* , at page 57; *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) , at par [11].

[23] In *Hawekwa Youth Camp* v *Byrne* [2010] 2 All SA 312 (SCA), at para 22, the court held:

> *"The principles regarding wrongful omissions have been formulated by this Court on a number of occasions in the recent past. These principles proceed from the premise that negligent conduct which manifests itself in the form of a positive act causing physical harm to the property or person of another is prima facie wrongful. By contrast, negligent conduct in the form of an omission is not regarded as prima facie wrongful. Its wrongfulness depends on the existence of a legal duty. The imposition of this legal duty is a matter for judicial determination involving criteria of public and legal policy consistent with constitutional norms. In the result, a negligent omission causing loss will only be regarded as wrongful and therefore actionable if public or legal policy considerations require that such*

omission, if negligent, should attract legal liability for the resulting damages…"
(Own emphasis)

[24] The plaintiff has referred to a number of decisions dealing with the duty of care, including the oft quoted judgment of *Brauns v Shoprite Checkers (Pty) Ltd* 2004 (6) SA 211 (E), where the plaintiff, whilst shopping at the defendant's shop, fell on a slippery surface on the floor. It emerged that there was water on the floor at the place where she fell. It was found out that the water had been there for half an hour or longer before the plaintiff's fall, and that the defendant had been made aware of the potential hazard to customers, but had taken no steps to warn customers of the water on the floor, or to have the water cleaned up. The defendant was found to have been negligent and liable for the damages of the plaintiff. There the court said, at 217 E-G:

> "*This is also something which our Courts have constantly stated in analogous situations over the past 50 years or more. Like anybody else who walks in a walkway where the general public not only has access but indeed is invited to enter and walk on it, the plaintiff was entitled to expect that she could walk on it with safety*."

[25] In another well-known decision, that of *Probst v Pick 'n Pay Retailers (Pty) Ltd* [1998] 2 All SA 186 (W), the court said, at 200 D-F*:*

> *"As a matter of law, the defendants owed a duty to persons entering their shop at Southgate during trading hours, to take reasonable steps to ensure that, at all times during trading hours, the floor was kept in a condition that was reasonably safe for shoppers, bearing in mind that they would spend much of their time in the shop with their attention focused on goods displayed on the shelves, or on their trolleys, and not looking at the floor to ensure that every step they took was safe."*

See also *Stewart v City Council of Johannesburg* 1947 (4) SA 179 (W) at page 184, where it was held that pedestrians do not walk with eyes glued to the ground, they do not expect to walk on excavations and obstructions on a paved sidewalk. "*The ordinary pedestrian walks normally looking ahead at about eye-level*."

[26] The defendants submit that although a patron is invited to the business premises in order for the business to make money, the *dicta* in relation to municipalities in *Bakkerud* supra, at paras 27 to 31, is equally applicable. There the court held that a small local authority with a small budget cannot be compared to a large and well-funded municipality, and may well be under no legal duty to repair small potholes which are easily visible. It remarked: "*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…A reasonable sense of proportion is called for. The public must be taken to realise that and to have a care for its own safety when using the roads and pavements*."

[27] The context differs between these two scenarios. The defendants' premises are used for a business run for profit. Secondly, the defendants have no public responsibilities spread out over sizeable areas of the community; their case concerns only one business premises. In my reading of *Bakkerud*, it did not lay down a general rule to be applied in every small undertaking or premises housing such an undertaking's business. Courts still have to make a value judgment.

[28] In my opinion, the legal convictions of the community, in this context, would require of the defendants as owners of premises where patrons are invited, to ensure that the hole is not hazardous, or to take appropriate steps to cover it sufficiently, or to warn the public about it, or to erect a barrier or boundary line preventing members of the public from walking into the hole.

Negligence

[29] The test for negligence in these kinds of matters is well established. As was set out by Holmes JA in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430 E-H:

> *"For the purposes of liability culpa arises if –*
>
> *(a) a diligens paterfamilias in the position of the defendant –*
>
> *(i) <u>would foresee the reasonable possibility</u> 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.*
>
> *This has been constantly stated by this Court for some 50 years. Requirement (a) (ii) is sometimes overlooked. Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down."* (Own emphasis)

[30] Before delving into the issue of negligence, the issue of whether the plaintiff did in fact fall in the hole is placed in dispute. I deal with it first.

Did the plaintiff fall in the hole situated at the defendants' property?

[31] The plaintiff was the only witness who testified about the fall. The defendants submit that his version should be approached with serious caution, as it contained several contradictions both in pleadings and during his testimony. They rely on the decision of *Daniels v General Accident Insurance Co Ltd* 1992 (1) SA 757 (C) at 759-760 which stated: "…*although there is apparently no 'cautionary rule' in civil cases as in criminal matters where proof beyond reasonable doubt is required, the single witness, more particularly where he is one of the parties, must be credible to the extent that his uncorroborated evidence must satisfy the Court that on the probabilities it is truth*." (Own emphasis)

[32] To the extent that it is sought to be argued that a single witnesses' evidence cannot be credible on its own, I disagree. Yes, like any other witness, a single witness' credibility must be tested and version examined on a balance of probabilities. There is no requirement that a single witness' evidence ought to be corroborated for it to be accepted.

[33] The evidence of the plaintiff was criticised by the defendants' counsel as being inconsistent. In the first instance, the defendant's counsel pointed out discrepancies which existed between the initial and the amended particulars of

claim. When this was raised with the plaintiff in cross examination, he testified that he was not the drafter of the particulars of claim, and he had never seen them. The fact that allegations contained in the particulars of claim were amended cannot on its own be an indicator of the plaintiff's unreliability as a witness.

[34] The second criticism relates to the medical records. The plaintiff was referred to medical records. He was questioned about the contents of the Outpatient Attendance Form, including the recordal of his arrival at the hospital, being during the early hours of the morning of 8 May 2016, and that he was a panel beater who earned an income of R1500. It was put to him that if he had been in pain, he would have been given much stronger medication, would not have crossed the road to purchase food and then only arrive at the hospital four hours after the alleged fall, and that he is misleading the court by alleging in his particulars of claim that he earned R20 000 at the time of the incident. It was further put that the medical records did not record that he actually broke his arm (humerus) as a result of the incident.

[35] As regards the question of why the time of 00:51 is recorded as the time he received medical treatment, the plaintiff testified that his brother called an ambulance, but was told it would take too long to arrive and was advised to rather use private transport. He had to phone his daughter, who lived 30 to 45 minutes away, to come and fetch him, as he did not have access to a motor vehicle. When he arrived at the hospital he had to wait for his turn to be assisted. This, to me, is a reasonable explanation.

[36] It may possibly be unfair to criticise the plaintiff on documents he did not author. The plaintiff testified that he could not speak on behalf of the medical practitioners who treated him. These alleged discrepancies do not disprove that the plaintiff was injured. In fact, they may well support his version that he had reason to visit the hospital that night and that it had to do with injuries, whether to the extent alleged or not (that is in any event a different question).

[37] The first defendant and Mr Saleem did not see the fall. They were inside the shop and cannot dispute the plaintiff's version that he fell in the hole on the defendants' premises. In fact, they conceded that they would not have known if someone had fallen outside. It also appears that, based on the defendants' version, there was a confrontation between the plaintiff and the first defendant, which, according to the defendants, had nothing to do with the alleged fall. It is peculiar that the plaintiff, who is a stranger in the area, would, unprovoked, simply insult the first defendant for no apparent reason. It further makes no sense for him to go to the defendants' premises the following day to confront them about the fall. I agree with the plaintiff's counsel: why would the plaintiff target the defendants' shop (a small operation) if all this was about, was to extract funds from the defendants, whom he hardly knew?

[38] The plaintiff's version is in my view corroborated by a number of objective facts, being, *inter alia*, his visit at the shop on the day of the incident which is confirmed by the defendants, the existence of the exposed hole, the visit to the hospital and his visit to the defendants' premises on the Sunday following the incident. The probabilities therefore favour the plaintiff as regards the fall.

[39] The defendants' counsel argued that the Court should draw a negative inference from the fact that the plaintiff did not call various witness who, it is submitted, could have corroborated his version, namely: his sister-in-law with who he allegedly walked, on the day of the incident; the medical staff (of the hospital in which he was treated) and Mr Adams, who the defendants claim was with the plaintiff on both the previous day and the day of the alleged incident. The reason proposed for this, is that he knew that the evidence of these witnesses would expose unfavourable facts about his case, or even sink it.

[40] Failure to call his sister-in-law does not make the plaintiff's evidence less cogent, in my opinion. As to Mr Adams, it is the defendants who should have called him if they wished to do so, as they would have wanted him to strengthen their case. The plaintiff did not mention that he walked with Mr Adams, the

defendants did. Same applies with the medical practitioners. As submitted on behalf of the plaintiff, the evidence of medical practitioners would ordinarily be seen to be more relevant at the quantum stage of the case (should it get there). Accordingly, if the defendants wanted them called to explain some discrepancies they picked up between the records and the plaintiff's version, it was open to them to have them called.

Foreseeability

[41] The defendants submit that the general layout of the premises, the position and size of the hole, the quality of illumination, the manner in which patrons park their vehicles, the general conduct of the patrons and the fact that the first defendant had placed bricks in the hole to level out the surface, all indicate that it is improbable that a reasonable person in the position of first defendant would have foreseen that a person could trip and fall as a result of the hole. They contend that the videos taken by the parties (recently during the course of the hearing of the matter), show that there is no space to walk along against the wall, where the hole is situated; none of the members of the public were viewed walking between the vehicles and the building; three florescent lights and a spotlight observed in the photographs were working; lights illuminate the hole itself and they were bright, Mr Saleem testified that the lights were as bright as a day-night cricket game on that day; the hole is smaller than an average person's hand; both the first defendant and Mr Saleem testified that there were bricks in the hole on the day of the alleged incident, that their position did not change during the days that followed, and this is confirmed by photographs taken a day later; taking the plaintiff's pleaded version, if the property was properly illuminated, he would not have tripped and fallen. Therefore, the *diligens paterfamilias* in the position of the defendants would not have foreseen the reasonable possibility that the hole could cause a person's fall.

[42] It is not disputed that a hole existed on the defendants' premises. The defendants alleged that the lid they had placed on the hole was in the past

frequently stolen. This, in the first instance, shows that they had been aware of the danger for a while. A picture taken recently shows a hole with a black cover and next to it a blue covered drain. From the earlier photographs, taken immediately after the incident the hole appeared to be much bigger, around the time of the incident than the area now covered by a black lid/cover. The lid/cover is smaller and there appears to be cement covering the rest of the area. There are also burglar bars running over it, which were previously not there. Two bricks could fit in the hole, as depicted in the photograph taken a day after the incident. I therefore do not accept, especially without any measurements taken, that the hole is smaller than an average person's hand.

[43] The defendants base the element of foreseeability mainly on illumination. Aside from the fact that the viewing of the place by attorneys was done years after the incident, the state or brightness of the lights as they currently appear cannot be said to be a confirmation of what the lighting was like at the time of the incident. Bulbs and fluorescents may have been changed after the incident, to illuminate or better illuminate the place. The only evidence to rely on is that of the witnesses in relation to the condition of the lights on 7 May 2016. It bears mentioning that even if the place was well lit on that day, as alleged by the defendants, that would not absolve them of their duty of care towards a member of the public, as a person can fall and trip even in broad daylight, as has happened in a number of cases before the courts, including those that the parties have referred to in their arguments.

Were reasonable steps taken to prevent members of the public from falling?

[44] The defendants aver that they took additional safeguards, by placing bricks on the hole after the lid was allegedly stolen, and they checked that the bricks were there on the day of the incident. The plaintiff testified that the bricks were not there when he fell, but suddenly on Sunday when his brother went to take photographs, there were bricks placed on the hole.

[45] I agree with the plaintiff's counsel, that if the hole was indeed covered with bricks before the incident, they could also have easily been removed, by thieves, in

the same way as they would the lid, for purposes of stealing copper. The defendants tried to give an impression that they had checked the bricks on the day of the incident, or even hours before the incident. That, however, is implausible. The first defendant testified that the lid was stolen several times before. When asked when he first noticed that it was stolen, he could not say. He, however pertinently remembered putting bricks in the hole a week before the incident as if there was a particular event that would help register this in his memory or as counsel for the plaintiff put it, as if he had foresight to note his actions in case a claim of this nature were to be instituted. It is likely that the bricks were placed in the hole after the incident, following the plaintiff's report to the first defendant of the incident.

[46] Mr Saleem, who was apparently sitting in court when the first defendant testified, seemed to tailor his evidence to that of the first defendant.

[47] It may be argued that not every hazard may be detected as early as it occurs, and be fixed up soon thereafter; the remarks of the Court in *Probst v Pick 'n Pay* are, however, apt:

> *"The duty on the keeper of a supermarket to take reasonable steps is not so onerous as to require that every spillage must be discovered and cleaned up as soon as it occurs. Nevertheless, it does require a system which will ensure that spillages are not allowed to create potential hazards for any material length of time, and that they will be discovered, and the floor made safe, with reasonable promptitude."*
> (Own emphasis)

[48] Even if the bricks were placed on the hole, the question is whether that would constitute a reasonable measure to avert a potential danger. Based on my observation of the photos, the bricks were loose, not cemented, uneven and slightly below the top of the hole. They covered part and not the entire hole. The placing of the bricks in the manner they appear on the photographs, may even constitute a hazard by itself. So, the argument that the hole was covered with bricks does not absolve the defendants of their duty to take reasonable steps to prevent members of

the public from falling. It bears mentioning that the covering with bricks, based on my understanding of the defendants' evidence, was not done as a precautionary measure to protect customers, it was done to prevent the theft of the copper. Further, from the defendants' version, members of the public were also not supposed to walk where the hole was situated, which was close to the wall.

[49] As it was held in *Holm v Sonland Ontwikkeling (Mpumalanga) (Edms) Bpk* 2010 (6) SA 342 (GNP) at paras 31 and 32: *"…the defendant should have reasonably foreseen that members of the public might walk along the water's edge [wall in this case] and even dive into the dam, albeit that it was negligent to do so, and should have taken the easy and inexpensive precautions available to it to avert the potential danger, and that it could not, in the circumstances of the case, rely on the principle that one is entitled to assume that others will not act negligently… Steps could have been taken by the defendant, at negligible cost and with minimum effort, by simply displaying a warning sign at the volleyball court, of the danger of diving into the dam due to the shallow water level, alternatively, erecting a railing adjacent to the volleyball court at the water's edge..."* (Own emphasis)

[50] Therefore, steps could have included displaying a warning sign or placing a barrier around the area where the hole is situated, which calls for no expensive effort. The *diligens paterfamilias* in the position of the defendants would have taken reasonable steps to guard against someone falling as a result of the hazard. The defendants failed to take any steps, as it ought to have done, to prevent harm to any of its visiting patrons.

Contributory negligence

[51] I thought about this issue - of whether it was foolish of the plaintiff to walk where he did. The place where the plaintiff walked does not strike me as a very unusual place to walk in. I imagine that even those that park their vehicles there could walk in that passage. I do not think it is reasonable to compare the state of the premises, as it is now, to what it might have been in 2016. There is, for

instance, a burglar bar constructed to prevent vehicles from knocking out the window, according to the first defendant. It should be expected that the space to walk through would be much less now than it was then. The fact that no members of the public could be seen walking in that area recently, is not a reasonable comparison.

[52] I am also not convinced that a bright light would draw the hole to the attention of an unsuspecting person who is not familiar with the area, or who was visiting the defendants' premises for the first time.

[53] As to the plaintiff being under the influence of alcohol. His evidence that he only had two single whiskeys could not be controverted. The evidence given on behalf of the defendants regarding his drunken state was a bit sketchy. Indeed, as a food outlet that opens until midnight on Fridays, it can be expected that some visiting patrons would have consumed alcohol; it is moreso that the defendants should have ensured that reasonable steps are taken to guard against the occurrence of harm.

Conclusion

[54] For these reasons, it follows that the plaintiff must succeed in his claim against the defendants.

[55] Accordingly, I make the following order:

1. The defendants are ordered to pay the plaintiff's damages, to be proved or agreed, arising out of having fallen at the defendants' property on 7 May 2016;
2. The defendants are ordered to pay the plaintiff's costs of the trial (including preparation and appearances) on the merits component of the proceedings, up to and including the date of this order.

3. The defendants' liability, as mentioned in paragraphs 1 and 2 above, shall be joint and several liability, the one paying the other to be absolved.

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N P BOQWANA

Judge of the High Court

Appearances

For the Plaintiff: Adv. J P Steenkamp

Instructed by: Kemp & Associates, Bellville

c/o Heyns and Partners, Cape Town.

For the Defendants: Adv A Walters

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