

SOUTH AFRICA / JUDGMENT

City of Cape Town v Mtyido (1272/2022) [2023] ZASCA 163 (1 December 2023)

[2023] ZASCA 163

COURT

Supreme Court of Appeal

BEFORE

Gorven, Weiner, Goosen, Koen, Kathree-Setiloane

CASE / FILE NUMBER

1272/2022

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1272/2022

In the matter between:

CITY OF CAPE TOWN

APPELLANT

and

NQULELWA MTYIDO

RESPONDENT

Neutral citation: City of Cape Town v Mtyido (Case no 1272/2022) [2023] ZASCA 163 (1 December 2023)

Coram: GORVEN, WEINER and GOOSEN JJA and KOEN and KATHREE-SETILOANE AJJA

Heard: 20 November 2023

Delivered: 1 December 2023

Summary: Delict – widening of pleadings – wrongfulness and negligence – respondent injured as a result of open manhole under control of appellant – open manhole previously reported to an employee of the appellant.

ORDER

On appeal from: Western Cape Division of the High Court, (Erasmus J, Salie-Hlophe and Papier JJ concurring, sitting as a full court of appeal).

The appeal is dismissed with costs, such costs to include the costs of two counsel where so employed.

Koen AJA (Gorven, Weiner and Goosen JJA and Kathree-Setiloane AJA concurring)

Introduction

[1] The respondent, Ms Nqulelwa Mtyido, alleges that on 17 October 2013 while walking along Khwezi Street, in Bardale, Mfuleni, a public road within the municipal area of the appellant, the City of Cape Town, she fell into an open manhole which resulted in her sustaining

injuries to her right ankle. She sued the appellant in the Western Cape Division of the High Court[1] (the trial court) for damages arising from her injuries. The trial court separated the issue of liability from damages. It found that employees of the appellant wrongfully and negligently failed to take steps to prevent the respondent from being injured by the open manhole. It declared the appellant liable for the damages, if any, that the respondent had suffered in consequence of the incident, and also directed that it must pay her costs.

[2] The appellant appealed[2] against the whole of the judgment of the trial court to the full court of the Western Cape Division of the High Court (the full court). The full court[3] dismissed the appeal with costs. This appeal is against the decision of the full court.[4] The appeal turns on an evaluation of the pleadings, the evidence and the probabilities in the light of the pleadings.

Requirements for liability

[3] The respondent's action is founded on the *actio legis Aquilia*. The issue of liability required the respondent to establish conduct which was wrongful and negligent, on the part of employees of the appellant, which caused her to be injured. The respondent bore the onus of proving these requirements.

The evidence

[4] The respondent testified that around 20h00 on 17 October 2013 she was walking along Khwezi Street, Mfuleni, a road perpendicular to Ukubetana Street where she had resided from December 2009, to fetch

water from a tap at a nearby informal settlement, as she was without water at her home. She had never been to that area before and was unaware of any manhole in Khwezi Street. It was becoming dark, but there was a floodlight on a high mast in an adjoining settlement, which provided some light. She walked on the tar road as the pavement was covered with sand and plant growth and she feared she might step on some glass. Suddenly she felt that she was falling and realized her right leg had stepped into a 'drain', which turned out to be an open manhole without a cover. She called for help, and two ladies who she had come across earlier, came to her

assistance. They alerted her husband, who brought his vehicle and took her to the Delft hospital.

[5] The respondent pointed out the location of the manhole in Khwezi Street to representatives of the appellant during an inspection during November 2019. She also identified the location of the manhole on a series of photographs introduced by the appellant (the appellant's photographs). These photographs show a manhole with a cover in place fitted, in the tarred road, flush with the tarred surface. She testified that 'at that stage of the incident . . . this hole was not in this fashion it shows here today' and 'that there is a difference today . . .' She was also referred to three photographs (the respondent's photographs) in respect of which her attorneys had provided written notice in terms of rule 36(10)[5] as 'depicting the scene of the incident.' No objection was raised to this notice thus entitling the respondent to produce the photographs without formal proof thereof. Although she did not know who had captured the respondent's photographs, she was clear that 'these photos depict the area and how it was during that period of this incident'.(Emphasis added)

[6] The respondent's photographs show 'an object' a short distance from the intersection of Ukubetana and Khwezi Streets, which she said 'is the same like this one', referring to a close up photograph of the open manhole she said resulted in her injury. She concluded by stating, 'So hence I say it's

the same manhole.' The close-up photograph of the 'object' shows a manhole partially covered by what appears to be two concrete kerbing stones, similar to those forming the border of the pavement in that area, but still leaving about half of the open manhole exposed. During the trial the appellant conceded that the area shown on the respondent's photographs is the area concerned.

[7] The respondent testified that there were no people staying on the opposite side of Khwezi Street, where the storm water pipes are positioned on the respondent's photographs, during October 2013; that 'nothing else happens further down' from the spot where she was injured; that workers were busy preparing that area; that people started staying there only from 2018; and that the tarred road (in Khwezi street) ended at a point somewhere between the manhole and the tap where she was going to fetch the water. A comparison of the appellant's and respondent's photographs also suggest that Khwezi Street was subsequently extended and tarred beyond the point indicated by the respondent. A witness called by the appellant, Mr Welman disputed this, and said the road was already complete in 2013, but simply obscured by sand covering

it. However, this was not put to the respondent in cross examination.

[8] The respondent also called the evidence of Mr Barnabas Zwehile Xwayi (Mr Xwayi). He previously lived across the road from the respondent in Ukubetana Street, but has since retired to the Eastern Cape. His return for the trial was the first time he returned to the area since

2018. He had become aware that the respondent had suffered an injury when he saw her after she was discharged from hospital. He had previously found an open manhole in Khwezi Street which he reported to an employee of the appellant. As this evidence is significant, it is set out verbatim:

‘The year was 2013, but unfortunately I cannot assist the court by giving the specific month because this was quite a while back. I saw these workers who were busy performing the duties on the road so I approached them and asked them how can I be assisted by having this hole closed. So one these gentlemen who were busy working pointed to somebody and said to me: there is the boss, go and put your complaint to him about this hole. And then I approached this one gentleman, I took him to the hole and showed him the hole. He promised me that the hole will be closed.

Now as time went by, like approximately two months now I got word that somebody had fallen into that whole.’

When questioned about the person he spoke to, he said:

‘When I looked at this gentleman I noticed they had the emblem of City of Cape Town on their chests, whatever they had on, on their tops, on their hard hats as well as on the bakkie.’

He also said that he took three poles with some ‘pellets’,^[6] placed the poles into the hole and the pellets around them or over the poles, and used a red-and-white tape in order to warn people about the open hole. However, the people living in the nearby shacks removed these, probably to make fire or use them in some other way. According to the respondent on her return to the area after her hospitalisation, she inspected the area where she had been injured and saw the open manhole with some wood inside it. This observation confirms that Mr Xwayi’s report related to the same manhole as the one which caused the injury to the respondent.

[9] Mr Xwayi could not name the person he reported to. He also did not make any further reports. He initially had some difficulty when testifying, to point to the location of the manhole on an aerial photograph of the area, but after some prompting and having orientated himself somewhat, pointed to the same location identified by the respondent in her evidence.

[10] The appellant adduced the evidence of three of its employees: Mr Ian Quintus Welman, a project manager in the Human Settlements Department of the appellant; Mr Pierre Maritz, the Manager of Reticulation, of the Engineering Department of the appellant responsible for the maintenance of manholes; and Mr Shafodien Hussein Jaffer, an administrative assistant employed by the appellant.

[11] Mr Welman’s evidence related to lighting in the area from the high mast in the adjoining settlement known as Garden City. This evidence was relevant mainly to the issue of contributory negligence on the part of the respondent, an issue not persisted with in this appeal. As a project manager in the Human Settlements Department of the appellant he was

involved with the housing development in that area: he testified that the location where the respondent and Mr Xwayi lived in Ukubetana Street was in phase 3B of the development; Khwezi Street marked the boundary of phase 3B; phase 3B was completed in 2009 with, to the best of his recollection, municipal services having been installed shortly before completion; and the area on the other side of Khwezi Street opposite to phase 3B was phase 5A, which had not been fully developed at that stage. This evidence is consistent with what appears from the respondent's photographs showing some storm water pipes lying on the far side of Khwezi Street, and an aerial photograph of the area dated 19 October 2013 (two days after the respondent's accident) included with the appellant's photographs, showing the area of phase 5A as vacant.

- [12] Mr Welman could not provide exact details of the services installed as he had not brought the relevant documents with him. Furthermore, much of the development handover was attended to by consultants on behalf of the appellant. Mr Welman confirmed that car traffic in that area, especially Khwezi Street 'would be minimal' and not 'congested at any point in time during a day.' In contrast, Mr Maritz testified it was a 'high travelled road', but his observation might have related to the traffic position at the time of the trial and not October 2013.
- [13] Mr Martiz testified that there were roughly 192 000 manholes under the appellant's control during 2013. The appellant's C3 system is used to record reports of missing manhole covers, whether reported by the public or when discovered by its employees. This system reflected that nine missing covers were recorded for the Mfuleni area during the period from 1 August 2013 to 31 October 2013. A manhole cover cannot be replaced without it being recorded on the system with a reference number. Where a complaint of a missing manhole cover is received, the appellant endeavours to replace the missing cover within three hours. There was no record of a manhole cover missing in Khwezi Street during 2013, or thereafter on the system.
- [14] Mr Maritz inspected the manhole in question in Khwezi Street on 11 February 2020. The appellant's photographs show the condition of the manhole around that time. He identified the cover on the appellant's photographs as the heavier 2A type installed on roads as they are able to carry the load of vehicles. It has an additional hinge feature which would make it difficult to remove the lid, as it requires specialised knowledge of the workings of the hinge mechanism. If this type of manhole cover is required to be replaced, then the frame of the manhole in which the cover sits would also need to be replaced. That would result in the tarred surface around the manhole being disturbed as the new frame has to be set in concrete. The concrete would be clearly visible if the frame of the manhole had been replaced. He opined that as this manhole as it existed at the time of his inspection, had a fitted cover in situ, and the tar around the manhole appearing on the appellant's photographs had seemingly never been disturbed, that it could not have been left open without a cover since it was first installed. He did however state in re-examination, in response to the question whether one can replace 'that manhole without – with simply

replacing a cover in a manner that you cannot see', that 'it is highly unlikely that you will get the perfect fit . . .' (Emphasis added).

- [15] He testified, with reference to an aerial photograph of Khwezi Street dated 22 February 2014, that an open manhole at the point indicated by the respondent and Mr Xwayi, would cause severe problems within hours due to the volume of sand in the area which would fill up the manhole and block the sewerage flow. In his view it was therefore unlikely that the manhole in Khwezi Street was uncovered for months.[7]
- [16] Mr Jaffer testified that he had examined the C3 system records and could not find a record of a missing manhole cover in Khwezi Street being reported, or a missing cover being replaced, during the whole of 2013, or during the period from 2014 until 2020. There was only one report of a missing manhole cover in Ukubetana Street during September 2014.

The findings of the trial court and full court

- [17] The trial court accepted the evidence of the respondent and that of Mr Xwayi as credible and probable. Mr Xwayi was viewed as independent and not showing any bias.
- [18] With regards to the appellant's witnesses, the trial court found that Mr Maritz's opinion that the manhole cover had never been missing, as the manhole found there at the time of the trial was the original one because the tar around the manhole was homogenous with the rest of the surroundings, was inadmissible. This was because Mr Maritz had not been qualified as an expert, and the provisions of Uniform rule 36(9) had not been complied with. In the alternative it

found that Mr Maritz's evidence would in any event be irrelevant, because he was simply giving evidence on an issue the Court had to decide.

- [19] It further concluded that Mr Maritz's reliance on the records drawn from the C3 system to substantiate the point that no cover was reported missing or was replaced in Khwezi Street during 1 January 2013 to 31 December 2013, was dependent on human intervention. This implied that it is fallible, and that whatever was sought to be inferred from the records on the C3 system did not negate the direct credible evidence of Mr Xwayi that he had reported the missing manhole cover to an employee of the appellant. It concluded that the only reasonable explanation why there was no record of the missing manhole cover on the C3 system was either because the appellant's employee to whom Mr Xwayi made the report never forwarded the complaint to the relevant department, or that it was possibly incorrectly recorded on the C3 system.
- [20] As to when the cover examined by Mr Maritz on 22 February 2020 was installed, the trial court concluded that it was any time after 31 December 2013. The records of missing and replaced covers in Khwezi or Ukubhethana Streets after 31 December 2013 were not made available, and Mr Jaffer was not clear and certain in his evidence, as he said that he thought that he had looked at the records 'from 2013 up until the current.' The trial court observed that the appellant's witnesses testified without having the facts 'to back up their bald

assertions', and that this could have been avoided if, with all the resources available to it, the relevant records were available for reference to be made thereto. Finally, it concluded that the version of the respondent was not 'equipoised' with that of the appellant but was more probable than that of the appellant.

- [21] The full court concluded that the trial court had not misdirected itself in any manner, including its findings on the facts, credibility and the reliability of the witnesses, which would justify it interfering with its findings. It concluded that the respondent's version was materially corroborated, reliable and not characterized by contradictions and improbabilities. Whatever contradictions there were, were raised and considered by the trial court in a fully reasoned judgment and dismissed. It concluded that even if the 'expert opinion evidence' of Mr Maritz was not excluded,[8] that this evidence would nevertheless 'not trump' the evidence of the respondent and Mr Xwayi. Accordingly, there was no basis to interfere with the trial court's findings and its acceptance of the respondent's version.
- [22] The appellant contends that the full court erred by not finding that the trial court: failed to have regard to the evidence in its totality; failed to ensure that the conclusions reached accounted for all the evidence; failed to distinguish probabilities and inferences from conjecture and speculation; failed to properly consider the probabilities; failed to draw inferences only from objectively proven facts; and failed to follow the approach to factual disputes as stated in *Stellenbosch Farmers Winery Group Ltd and Another v Martell Et Cie and Others*[9] (Martell) in regard to irreconcilable versions.

Analysis

- [23] A court of appeal will generally not interfere with findings of credibility made by a trial court, because the trial court would have had the benefit of observing the witnesses when testifying, unless those finding are clearly wrong. Similarly, an appeal court will not lightly interfere with the factual findings made by a trial court. As was said in *Mashongwa v Passenger Rail Agency of South Africa (Mashongwa)*:[10]

'It is undesirable for this court to second-guess the well-reasoned factual findings of the trial court. Only under certain circumstances

may an appellate court interfere with the factual findings of a trial court. What constitutes those circumstances are a demonstrable and material misdirection and a finding that is clearly wrong. Otherwise trial courts are best placed to make such findings.'

- [24] The full court correctly concluded that there was no basis to interfere with the trial court's findings on credibility. During argument before us the appellant's counsel conceded that the credibility of the respondent and Mr Xwayi could not be impugned.[12] The concession was correctly made. The respondent and Mr Xwayi were both single witnesses in regard to the issues on which they

testified,[13] but they gave their evidence in a clear and satisfactory manner, without hesitation, and without exaggeration. They did not contradict

themselves and there were no contradictions between their evidence and the established facts. Their evidence was reliable.

[25] The appellant however argued, accepting that the respondent and Mr Xwayi were credible and reliable witnesses, that their evidence was nevertheless improbable, and that they might be mistaken. It argued that the more probable inference to be drawn from the evidence that the tar around the manhole as it existed at the time of the trial did not show any disruption or a concrete inlay, and that the C3 system did not contain any record of a manhole cover being reported missing

and/or being replaced in Khwezi Street during October 2013, or thereafter, is that the manhole in Khwezi Street had not been open

and without a cover in October 2013.

[26] That conclusion firstly, would contradict the direct evidence of both the respondent and Mr Xwayi and reflect negatively on their credibility, which is not only beyond reproach, but has been accepted to be such by the appellant. Second, it is dependent on that inference being the most probable inference to be drawn from what is circumstantial evidence relating to the frame of the manhole not being set in concrete, and the C3 system not containing any reference to a missing manhole cover in Khwezi Street in 2013 or beyond.

[27] The inference sought to be drawn by the appellant is not the most probable inference that could be drawn. There are also other equally

probable inferences that could be drawn. The probability of the inference which the appellant wishes to draw, was also not established, as the trial court had found. Other inferences could include that the manhole as it existed at the time of the trial, was fitted after December 2013, as the trial court concluded, when the roads for phase 5A were completed or tarred/retarred, some of which

seemingly occurred in the five months subsequent to the respondent having sustained her injuries. The detail of whether the manhole,

which was in situ at the time of the trial, is the original manhole, or how it came to exist in the condition shown on the appellant's photographs, is not within the knowledge of the respondent, but peculiarly within the knowledge of the appellant. As the trial court remarked, the appellant would have the records. This should include when the road infrastructure was finally put in place as part of the civil construction work. The appellant had an evidentiary onus to place this evidence before the trial court if it wished it to infer, as the most probable inference, that the frame of the manhole cover in Khwezi Street had never been replaced, and if it wished to negate the respondent's direct credible evidence that she had suffered her injuries at that manhole.[14]

[28] Much of the evidence was not seriously disputed.[15] What ultimately remained in dispute for resolution, was which one of two mutually conflicting versions should prevail: the version of the respondent that her injuries were caused when she stepped into the open manhole in Khwezi Street, after the open manhole had previously been reported to the appellant; or the version of the appellant that it had no knowledge of an open manhole in Khwezi Street, and, that as a matter of probability, the manhole pointed out by the respondent in Khwezi Street did not have a missing cover during October 2013.

[29] The test to be applied in deciding between mutually destructive versions was stated, amongst others in *National Employers' General v Jagers*[16] (Jagers) as follows:

‘... in any civil case ... the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. ... [W]here there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with the consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes and is satisfied that his evidence is true and that the defendant's version is false. ... I would merely stress however that when in such circumstances one talks about the plaintiff having discharge the onus which rested upon him on a balance of probabilities one really means that the Court is satisfied on the balance of probabilities that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities.’

[30] In reaching a conclusion on the contradictory versions, the trial court, following *Martell and Jagers*, made findings on the credibility of the various factual witnesses, their reliability, and the probabilities. Its approach cannot be faulted. It found that the probabilities based on credible evidence, favoured the respondent's version. Even if the probabilities

could be said to be evenly balanced, then based on the credibility of the respondent and Mr Xwayi, the respondent still discharged the onus[17] of proving that her injuries resulted from her having stepped into the open manhole in Khwezi Street, which previously had been reported to the appellant.

[31] There is no basis to find that the full court erred in accepting the trial court's findings of fact, and in endorsing its

conclusion.

Wrongfulness

[32] Accepting the factual findings made by the trial and full court, the appellant then confined its argument to the legal issue whether the respondent had established wrongfulness.

[33] The appellant argued that the finding of the full court that the appellant owed 'a legal duty to protect the public from suffering any physical harm by the infrastructure through which it provides services', and its reliance on *Democratic Alliance and Another v Masondo and Another*[18] as authority for that proposition, were incorrect. It pointed out that *Mashongwa*[19] held that wrongfulness does not flow from a breach of a public duty alone, but that a breach of a public duty is simply one of the factors that a court must consider in order to ascertain wrongfulness. The appellant also drew attention to the caution expressed in *Municipality of Cape Town v Bakkerud*[20] that:

'It is tempting to construct such a legal duty on the strength of a sense of security endangered by the mere provision of a street or pavement by a municipality but I do not think one can generalise in that regard. It is axiomatic that man-made streets and pavements will not always be in the pristine condition in which they were when first constructed and that it would be well – nigh impossible for even the largest and most well-funded municipalities to keep them all in that state at all times. 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.'

The appellant also argued that the respondent had not 'lead any evidence relevant to the discreet element of wrongfulness' as pleaded, and that it would be unreasonable[21] to impose liability for the respondent's injuries on the appellant, given the facts and circumstances of the case.

[34] It would be wrong however to confine the respondent's case as regards wrongfulness to what was pleaded. The allegations in the respondent's particulars of claim[22] regarding wrongfulness, and also negligence, can rightly be criticised as being of a general nature, terse, not fact specific and

unhelpful. The respondent's case, both as regards wrongfulness and negligence, became more specific during the evidence, when it emerged that she would contend that the open manhole had been reported, some two months prior to her being injured, to an unidentified employee of the appellant who promised to have it covered, but that nothing was done to do so, resulting in her suffering injury.[23]

[35] This evidence by Mr Xwayi was introduced without any objection from the appellant. The evidence was fully canvassed during cross examination. The issues for adjudication accordingly came to be widened[24] beyond what was contained in the particulars of claim, to include inter alia: whether the appellant had prior knowledge of the

potentially dangerous situation posed by an open manhole in Khwezi Street; whether that knowledge gave rise to a duty of care owed to the respondent to prevent her from being injured; and whether the appellant negligently breached that duty by failing to close the manhole.

[36] It is trite law that a legal duty may arise where a defendant has prior knowledge of a potentially dangerous situation.[25] In casu, it is not suggested that a legal duty arose simply because the open manhole was under the control of the appellant. The respondent's

case was that a legal duty of care arose specifically because the appellant had knowledge of the existence of the open manhole which was reported to its employee, and did nothing to cover the manhole.

[37] Ultimately, whether a duty of care arises, a breach of which would constitute wrongfulness, depends on the legal convictions of the community. As it was put in *Le Roux v Dey*: [26]

‘... what is meant by reasonableness ... concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.’

[38] The appellant relied on *Du Plessis v Nelson Mandela Metropolitan Municipality* [27] where numerous complaints of a hole which posed a danger had been made to the municipality, and ignored. It argued by contrast, that in this appeal, the single report by Mr Xwayi of the open manhole to an unknown employee of unknown authority, on an unknown occasion, was insufficient for prior knowledge of the dangerous situation posed by the exposed manhole to be ascribed to the appellant, to give rise to a duty of care.

[39] Every case will depend on its own facts. The date when the report was made might not be a specific date, but it is not indeterminate. Mr Xwayi said it was just more than two months before the respondent returned home from hospital after she had been treated for her injuries. The person to whom he reported might not be identified by name, but he was clearly an employee of the appellant, of some seniority, as he wore a shirt and hat and drove a bakkie with the appellant's emblem displayed thereon, and was acknowledged by the team of workers as ‘the boss’ and the one to whom Mr Xwayi should make such a report. Mr Xwayi spoke to this person. This person did not refer him to anyone else, nor did he decline to assist. Instead, he assumed responsibility for the situation and undertook to close the hole. As much as one has an appreciation for the difficult task the appellant has, to manage processes to replace missing manhole covers, the process can only be improved by allowing members of the public to report missing covers to a responsible employee of the appellant, for remedial steps to be

initiated.

- [40] The present is not a case, as the appellant suggested, of unreasonably extending delictual liability simply because the respondent might be deserving of some sympathy.[28] Ultimately, wrongfulness depends on considerations of public and legal policy in accordance with constitutional norms and the reasonableness of imposing liability on the appellant.[29] The legal convictions of the community require that where the appellant had knowledge of an open manhole, the failure to cover the hole within a reasonable time, resulting in possible injury to a member of the public, would be wrongful.
- [41] Whether the appellant had knowledge of the open manhole, or not, is a question of fact. Obviously, the possibility for false claims always exists, but the legal convictions of the community do not dictate that because some claims might be fraudulent, therefore genuine claims should for that reason alone be disallowed. In the present instance, where the credibility of the respondent is not impugned, difficulties in deciding whether the claim might be false and contrived do not arise.
- [42] The appellant was critical during argument of Mr Xwayi not following up on his initial report, that he had not complained more than the one time that he did, and that he had not advised his neighbours, including the respondent, of the danger posed by the open manhole. But why should he? Mr Xwayi did not present as a sophisticated person well versed in matters of municipal administration. He completed a standard 4. In the spirit of discharging a self-imposed public duty, he took the trouble of reporting a dangerous situation to an employee, designated by the workers working in the area as the 'boss'. This person did nothing to dispel the belief harboured by Mr Xwayi that he was a person to whom he could report. As a matter of legal policy, the legal convictions of the community would view what Mr Xwayi did as sufficient to bring the existence of this danger to the attention of the appellant. If an employee in authority chooses not to give adequate attention to such reports, or fails to escalate such report to the appropriate persons through the correct channels, then the issue is one of better education and ongoing training of the appellant's employees being required. That is, if such education is in fact required, because on the facts of this matter, what happened cannot be ascribed to a lack of knowledge of procedures. The workers referred Mr Xwayi to their 'boss' and the 'boss' did not try to avoid the complaint but promised to deal with it. Either he simply neglected to do so, or having done so, there was a breakdown in communication elsewhere.
- [43] Counsel argued that if liability was imposed on the appellant that it would open the floodgates to open ended claims, and that this court should place a 'brake on liability.'[30] I disagree with that argument. Every claim must obviously be scrutinised carefully and dealt with on its own facts. Mr Xwayi's

evidence that he reported the open manhole is either true or not – there is no scope for a mistake. The appellant has accepted that Mr Xwayi was a credible witness. That he made the report can therefore be accepted as the truth.

[44] To summarise, the legal convictions of the community dictate that liability should be conferred on the appellant. The fear of endless liability is misplaced. It has not been established that the full court was misdirected in upholding the finding of the trial court that the omission to take steps to have prevented injury being occasioned to the respondent by her stepping into the open manhole, was wrongful.

Negligence

[45] As regards negligence, following on the finding that Mr Xwayi had reported the existence of the danger posed by the open manhole cover to an employee of the appellant who was obliged to act on such report, the fact that the employee apparently did not do so, or alternatively having reported it, an unknown employee failed to record it on the C3 system and failed to react thereto appropriately, constitutes negligence. The well known test for negligence in *Kruger v Coetzee*[31] is satisfied. The appellant's employees simply failed to do what objectively was reasonably required. The appellant is directly

alternatively vicariously liable for their negligence.

Conclusion

[46] An appeal is not a fresh rehearing of the disputed issues. It is for the appellant to show that the full court had committed a material misdirection affecting the outcome it reached - only then could this court interfere. No basis has been advanced before the full court or this court to support the conclusion that the trial court had been guilty of any misdirection which would affect the outcome of the trial.

[47] The full court also confirmed the trial court's judgment that there was no basis for finding contributory negligence on the part of the respondent. Before us the appellant did not argue for a finding of contributory negligence. According to its notice of appeal it simply sought an order replacing the order of the trial court with an order that the appellant is not liable for the damages that the respondent suffered in consequence of the accident which occurred on 17 October 2013, with no alternative of an order determining contributory negligence on the part of the respondent, should it be unsuccessful. The conclusion in the appellant's heads of argument asked that the appeal against 'the whole of the judgment (except the finding as to contributory negligence) of the Full Court' be upheld. There was however no such finding of contributory negligence by the full court, or the trial court.

[48] The appeal against the judgment of the full court accordingly falls to be dismissed. There is no reason why the costs of the appeal should not follow the result. Both parties employed two counsel. It is appropriate that the costs should include the costs of two counsel where so employed.

Order

[49] The appeal is dismissed with costs, such costs to include the costs of two counsel where so employed.

P A KOEN

ACTING JUDGE OF APPEAL

Appearances

For appellant: P Botha SC with A du Toit

Instructed by: MHI Attorneys, Bellville.

Webbers Attorneys, Bloemfontein.

For respondent: H McLachlan with L Gabriel

Instructed by: Kruger & Co Attorneys, Goodwood.

Phatshoane Henney Inc, Bloemfontein.

[1] Dolamo J.

[2] Leave to appeal was dismissed by the trial court with costs. On petition leave to appeal was granted to the full court of the

Western Cape Division of the High Court.

[3] Per Erasmus J, with Salie-Hlophe and Papier JJ concurring.

[4] Special leave to appeal was granted by this court on 10 November

2022. The costs of the application for leave to appeal to the SCA were directed to be costs in the appeal.

[5] The notice in terms of rule 36(10) was served on 4 February 2019, that is more than one year prior to the trial commencing.

[6] Presumably Mr Xwayi meant 'pallets.'

[7] There was however no evidence whether the sewerage flow had been blocked or not, or whether the sewerage service was indeed in place and used yet.

[8] This issue can be disposed of briefly as follows: Rule 36(9) was not complied with. However, the evidence that a manhole, if replaced, would show the concrete surround was factual. What inference was to be drawn from the manhole at the time of the trial not having such concrete surround was for the trial court to decide - not isolated to that fact, but in the light of all the circumstances of the case. The conclusion of both courts that it is irrelevant what inference Mr Martiz drew from the facts because that is what the trial court had to decide, is

correct.

[9] Stellenbosch Farmers Winery Group Ltd and Another v Martell Et Cie and Others 2 003

(1) SA 11 (SCA) para 5 held: 'On the central issue, . . .there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by the courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the

credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's findings on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness – box, (ii) his bias, latent and blatant, (iii) the internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra-curial statements or actions,

(v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'

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[10] Mashongwa v Passenger Rail Agency of South Africa

[2015] ZACC 36; 2016 (3) SA 528 (CC).

[11] Ibid para 45. See also *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) 645E-F; *Santam Bpk v Biddulph* 2004 (5) SA 589 (SCA) para 5; *Minister of Safety and Security & Others v Craig and Others NNO*

[2009] ZACC 97; 2011 (1) SACR 469 (SCA) para 58.

[12] This was part of a more general concession that no adverse credibility finding should be made against any of the witnesses.

[13] The respondent was criticised, because her evidence that she stepped into the manhole in Khwezi Street was disputed, for not calling the evidence of the two ladies who had come to her assistance, or her husband who came to collect her there, as she bore the onus of proving the incident, and there was no suggestion on the record that they were not available to testify. But, as has been held in *Rand Cold Storage and Supply Co Ltd v Alligianes*

[1968] 2 All SA 241 (T) at 243: 'It is axiomatic that a party need not, and cannot be blamed if he does not, call all the witnesses who may give pertinent evidence; he is entitled to take the risk of offering less than all the evidence available to him if he is of the opinion that what he has offered would suffice to one. He may of course in the result be shown as having been too confident but that is something different from being found to have deliberately suppressed evidence unfavourable to him – which is the conclusion sought to be drawn here. In *Brand v Minister of Justice and Another*, 1959 (4) SA 712 (AD), it is said at p 715: "this statement does not, however, mean any more than that, if, in the absence of the testimony of the witness in question, the evidence is otherwise equally balance, the onus

will come into effect of operation. The statement in question does not mean that any greater obligation to call the witness rests upon the onus – bearing party: it merely means that, if he does not call the witness, he runs the risk of the onus of proving decisive against him. “ In this matter, the evidence was not evenly balanced, but it favoured the respondent.

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In this matter, the evidence was not evenly balanced, but it favoured the respondent.

[14] The evidence of Mr Jaffer suggested that a situation could arise where workers ‘reserved the stock from their store but it is not specific that it is – what will happen if say for instance they draw 10 drain covers or sorry 10 manhole covers it is not always specific to a specific job they would then ja replace those covers.’ As much as Mr Welman said it was the original manhole, he had no records with him and did not express any basis for coming to that conclusion.

[15] This included: that the respondent suffered an injury to her ankle when she stepped into an open manhole; that the manhole pointed out by the respondent, as corroborated by Mr Xwayi, is the one situated in Khwezi Street; that the respondent’s photographs of the manhole shows it as having been left open and still being open when photographed; that the manhole cover in the same area, depicted on the appellant’s photographs, shows a manhole with a cover as it existed more than six years after the incident, on an undisturbed tar surface in Khwezi Street; and that some further infrastructural work was carried out after October 2013 in the general area in respect of Khwezi Street in respect of phase 5A of the

development.

[16] National Employers' General v Jagers National Employers' General v Jagers National Employers' General v Jagers 1984 (4) SA 437 (E) at 440D – 441A.

[17] National Employer General v Jagers (supra).

[18] Democratic Alliance and Another v Masondo and Another

[2002] ZACC 28; 2003 (2) SA 413 (CC) para 17

[19] Mashongwa para 28.

[20] Municipality of Cape Town v Bakkerud

[2000] ZASCA 174; [2000] 3 All SA 171 (A) paras 28 and 29.

[21] This was with reference inter alia to Minister of Safety and Security v Van Duivenboden 2002 (6) SA 341 (SCA) para 12.

[22] As regards wrongfulness it was alleged that the appellant owed a legal duty to members of the public and to her in particular: to ensure that areas within its jurisdiction and/or under its control and to which members of the public had unrestricted access were free of any dangers and/or potential dangers; to ensure that adequate measures were taken in all areas within its jurisdiction and/or under its control

to which members of the public had unrestricted access to safe guard members of the public against any dangers and/or potential dangers; and to take reasonable precautions to warn members of the public of any dangers and/or potential dangers in all areas within its jurisdiction and/or under its control to which the members of the public had

unrestricted access. As regards negligence, the respondent alleged that the appellant breached the duty of care alleged.

[23] It was wrongly argued by the respondent before the trial court that these further grounds of wrongfulness and negligence, were not required to be pleaded because they constitute evidence and 'one does not plead evidence.' It should have been pleaded. It is the how and when and to whom the open manhole was reported to result in the appellant having knowledge thereof and allegedly giving rise to a duty of care, that would constitute evidence that need not be pleaded. But that it will be contended that such a duty existed and that the breach thereof would be relied upon as constituting wrongfulness, should be pleaded.

[24] Shill v Milner 1937 AD 105.

[25] Van Vuuren v Ethekwini Municipality 2018 (1) SA 189 (SCA) para 21 and 24.

[26] Le Roux v Dey (Dey) [2011] ZACC 4; 2011 (3) SA 274 (CC) para 122.

[27] Du Plessis v Nelson Mandela Metropolitan Municipality

[2009] ZAECGHC 54 paras 11 and 12.

[28] South African Hang and Paraglyding Association and Another v Bewick [2015] ZASCA 34; 2015 (3) SA 544 (SCA) para 3.

[29] Dey para 122.

[30] Country Cloud Trading CC v MEC, Department of Infrastructure Development [2014] ZACC 28; 2015 (1) SA 1 (CC) par 20. The facts in the present appeal are also distinguishable from what prevailed in BE obo JE v Minister of the Executive Council for Social Development, Western Cape [2021] ZACC 23; 2021 (1) BCLR 1087 (CC) paras 1, 2, 10 and 25 as to whether there could be a legal duty to ensure the safety of each and every childcare facility. In the present appeal, the legal duty is confined to one manhole that was uncovered which had been reported to the appellant.

[31] Kruger v Coetzee 1966 (2) SA 428 (A) at 430E held that. 'For the purpose of liability, 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.'

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