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IN THE HIGH COURT OF SWAZILAND

SANDILE KENNETH DLAMEVI

v

CITY COUNCIL OF MBABANE

Civil trial Case No 2255/97

Coram	S W Sapire CJ
For plaintiff	P Dumeith
For Defendant	H H Currie

Judgment

(18/09/98)

This is an action for damages. The plaintiff claims E252 000.00 from the Defendant, to compensate him for injuries sustained in circumstances described hereunder. The parties have agreed that the question of the defendant's liability, if any, and any possible apportionment be determined before any assessment is made of the amount of the award.

On Saturday the 19th July 1997 the Plaintiff was taking a postprandial, early afternoon stroll along Warner Street in the company of two companions.. The group was leisurely window shopping ambling on the left-hand pavement moving from the direction of Allister Miller Street towards the Mbabane post office. The Plaintiff was walking closest to the street, and was obliged to move to almost the edge of the pavement to give way to pedestrians approaching from the opposite direction. His evidence is that while

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walking on a path close to the kerb, and at a point opposite the entrance to a men's outfitting shop he tripped over the stump of a metal standard, projecting calf high from the surface of the pavement. This accident caused the plaintiff injury to his leg. The question for decision is whether the Mbabane city council is liable to compensate the plaintiff by way of damages for the injury so sustained by him.

Attached to the summons is a photograph of the scene of the accident taken later on the same day. The original photograph, which is exhibit "A", is much clearer. It meaningfully depicts the pointing out the offending projection, and the surrounding area.

Gauging from the photograph and the plaintiffs own evidence I have difficulty in accepting that the stump constituted a hidden obstacle to the reasonably cautious pedestrian using the pavement in broad daylight. While it is not expected of a pedestrian using the pavement, that his eyes should be "glued" to the surface on which he is walking, he is nevertheless obliged to keep a proper lookout. The reasonable pedestrian would certainly have seen the pole from which the "No Parking" sign used to hang, and could not have expected to be awarded damages if he had walked into the pole and so caused himself an injury.

The stump being smaller is less obvious, but nevertheless conspicuous. It was painted a different colour

to the surface of the pavement and was likely to catch the eye because of this. It was only a meter or so from the pole, which would probably have caught the attention of the pedestrian keeping a proper look out. He should also not have missed the projecting stump of the standard, which was in the immediate vicinity. The plaintiff led evidence of a witness who claims that he had seen other people stumbling over the projecting stump. This evidence, extremely vague in itself, and incapable of being tested, does not establish that the projection was not obvious, or should not have been obvious, to the reasonable pedestrian. There was however no evidence that the Defendant municipality knew of these incidents, if they had indeed occurred. This evidence does little to advance the Plaintiff's case.

Having said all this the fact remains that the projecting metal remained in place and was a source of potential danger to those pedestrians who passed that way and failed

to keep a proper look out. The possibility of such a person sustaining injuries as the plaintiff did should have presented itself as sufficiently real to the person who cut the stanchion, to give rise to a duty to take precautionary steps to avoid it. The simple expedient of removing the offending projection, as was done after plaintiff's accident, should have been resorted to.

Considerable time was devoted to explaining the presence of the projecting stump. It was common cause that the stump was the sawed off standard which had supported a garbage basket. On an inspection in loco the parties pointed out similar garbage bins still in use on the streets of Mbabane. Each structure consists of a bin of metal mesh which is supported clear of the ground on lateral axles borne by vertical stanchions planted in the ground. The structures were coloured with the characteristic luminescent orange paint often used by the defendant. As such they were clearly visible. Their construction and emplacement at various points could not by any stretch of imagination be considered the introduction of a potential source of danger. It is therefor of little consequence as to who actually erected the bins.

At some time before plaintiffs accident a decision was taken to remove a number of the bins because of deterioration in their condition. The bins were removed from the supporting stanchions, which were cut off at calf height, leaving the stumps projecting from the ground where they had been implanted. There is evidence that the dismantling of the structure was carried out, by individuals connected with the business of the "Key Bar" which is conducted alongside the men's outfitter, as can be seen in the photograph to which I have referred. It has not been proved that they were acting as servants of, or agents for the defendant. If it was negligence to cut the stanchion leaving a calf high projection on the pavement such was not he negligence of the defendant. Neither can it be said that the defendant introduced a potential source of danger by itself leaving the projecting metal in place.

It is clear that the Defendant's servants removed the severed bin from the pavement where it lay after being taken down

On what used to be the test for negligence arising from an omission the defendant would not be liable to the plaintiff. I was referred to the decision in CAPE TOWN MUNICIPALITY v BAKKERUD 1997 (4) SA 356 C, in which it was held that, and here I quote the headnote.

"The doctrine of prior conduct (based on the conclusion that liability under the lex Aquilia could n ever result from an omission alone, except where the person sought to be held liable had by prior conduct created a potential risk of harm to others, in which case the law imposed a duty I to take precautions to prevent the danger from materialising) was rejected in Minister van Polisie v Ewels 1973 (3) SA 69 (A). In

the Ewels case the Court held that, although there was no general legal duty to take positive action to prevent harm to others, the stage had been reached where a failure to take positive action would be regarded as wrongful in certain circumstances. Those circumstances were where not merely the moral, but the legal convictions of the community would view the failure to take positive action as a wrongful omission which could A give rise to an action for damages. The circumstances in which a failure to take positive action could give rise to a claim for damages were not confined to cases involving prior conduct. (Paragraph [30] at 366E-H.)

In a series of cases decided between 1912 and 1958 the Appellate Division held that in South B African law municipalities were immune from liability for failure to construct, maintain or repair roads and pavements, except where, by prior conduct, the municipality had constructed or repaired a street or pavement in such a way as to create a new source of danger which would otherwise not have existed In this latter instance the municipality would be liable because it would have legally been obliged to guard against the danger it had created. (Paragraph [17] at 362A-B/C.)

In an appeal to a Full Bench of a Provincial Division from a decision in a magistrate's court awarding damages to the respondent for bodily injuries sustained when she had stepped into a hole in a pavement, the appellant municipality argued that, despite the decision in the Ewels case, the Appellate Division decisions holding municipalities immune from liability for failure to D repair streets and pavements were still binding because those decisions had been based upon policy considerations, that is that those decisions reflected the legal convictions of the community, and that the Provincial Division was bound by those decisions as to what the legal convictions of the community dictated. It was argued in the alternative that the legal convictions Eof the modern community still required municipal immunity from delictual liability for the non-repair of streets and pavements, the underlying policy consideration being the financial inability of municipalities to accept such liability.

Held, as to the first argument, that the fact that the Appellate Division decisions had been based, not on policy considerations, but on an interpretation of the Roman and Roman-Dutch Flaw was highlighted by the Court's finding that if the legal convictions of the community regarded the results of the application of the common-law principles as unfair, those common-law principles had to be changed by the Legislature. (Paragraph [40] at 370C/D-F.)

Held, accordingly, that in the post-Ewels era, the decisions of the Appellate Division in the 'municipality cases' were no longer binding. (Paragraph [42] at 371C.) G

Held, further, as to the appellant's alternative argument, that the near-universal condemnation by writers of the unsatisfactory results flowing from the doctrine of municipal immunity from liability for omissions and the 'fine spun' distinctions flowing from judicial attempts to contain its scope was unanswerable. Those unsatisfactory results and distinctions should not be H perpetuated, particularly not on the basis that they were dictated by the legal convictions of the community. (Paragraphs [44] and [45] at 371F/G-H/I and 371I - 372B, paraphrased)

Held, further, that a finding that the legal convictions of the community required municipalities to keep streets and pavements in a safe condition did not mean that a municipality would ipso Ifacto be liable for damages resulting from its failure to comply with its legal duty: a claimant would still have to establish fault (Paragraph [47] at 372F/G-G/H.)the doctrine of prior conduct (based on the conclusion that liability under the Lex Aquilia could ever result from an omission alone, except where the person sought to be held liable had by prior conduct created a potential risk of harm to others, in which case the law imposed a duty to take precautions to prevent the danger from materializing) was rejected by the Appellate Division in Minister van Polisie v Ewels 1973 (3) SA 69 (A)."

In that case (Ewels) the court found that a policeman in whose custody a person detained at the police station was, had a duty to take positive steps to prevent a third person , such as an off duty policeman, from assaulting the detainee and causing him harm. I am not sure that that descision is authority for a general revision of what the law was previously said to be although it seems generally to be regarded as such. It does however illustrate that there are cases where the relationship between the persons concerned may create a duty in law to take positive action to prevent harm befalling another.

The facts of Bakkerud so closely resemble those of the present case that I am persuaded that reasoning by analogy the outcome should be the same

In the present case the municipality knew that the bins had been dismantled and that the stumps had been left in the pavement. The defendant's own witness says that he refered the matter to the apposite department for attention because he considered the projecting stumps to constitute a source of danger. Having regard to the ease with which the obstacles were later removed thus preventing further harm from occurring, the defendant can properly be considered negligent in failing to do so earlier.

The Plaintiff himself was at fault in not paying sufficient attention to the surface of the pavement before him. As in the case quoted it would be fair to make an apportionment of the blame and I do so on the basis that the parties were equally at fault. Accordingly any damages which it may be found or agreed that the plaintiff has suffered should be reduced by 50%. in making an award in respect thereof

I do not make any order as to costs at this stage.

S W Sapire, CJ