IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **Civil CASE NO. 598/06**

In the matter between:

SAMSON MACHORA **Plaintiff**

And

MINISTRY OF PUBLIC WORKS & TRANSPORT **1st Defendant**

THE ATTORNEY GENERAL **2nd Defendant**

Coram	**Sey, J.**
For the Plaintiff	**Mr. M. E. Simelane**
For the Defendant	**Mr. S. Khuluse**

J U D G M E N T

SEYJ.

[1] By a combined summons dated at Mbabane on the 15th day of February, 2006, the plaintiff is claiming the following reliefs against the 1st defendant:

a) Payment of the amount of E500 000.00 (Five Hundred Thousand Emalangeni);

b) Costs of suit;

c) Further and / or alternative relief.

[2] The plaintiff is an adult Kenyan male currently operating a handicraft business at Ezulwini within the Hhohho District. The evidence in chief of the plaintiff may be summarised as follows: that on 30th of June 2005, at around 3 p.m. whilst walking along the pavement near the Police Headquarters in Mbabane in a direction heading to the centre of the town, he heard a car braking sharply and there was a commotion from behind. He said everyone ran forward. He also ran and in the process of running away from the commotion he fell into a manhole that had not been covered. The plaintiff told the court that at the material time there was no warning and no signs near the hole into which he had fallen.

[3] The Plaintiff further testified that on the night of the accident he was under extreme excruciating pain because he did not realise that his wrist was broken. The following morning which was 1st July 2005, he went to the

Mbabane Government Hospital for an x-ray and he was told that his hand was broken and that there was a crack in one of the bones. Consequently, a cement cast was put around his wrist and he was incapacitated from the date of the accident up until the 11th of August 2005 when the cast was removed.

[4] It was the plaintiffs further testimony that he was a self employed handicraft businessman who earned a living by selling wood carvings, handicraft and jewellery. He stated that at the time of the accident he had an order to supply assorted handicraft and jewellery worth E150,000.00 to one of his customers in Mozambique but, due to the injuries he sustained, he could not deliver the order. He did state, however, that due to the passage of time he could not get the business people who are based in Mozambique to come and testify on his behalf about the order.

[5] It was the case for the 1st defendants that, in the absence of knowledge that the drainage cover had been removed, they could not reasonably have foreseen the imminent danger that would result due to the lack of the

drainage cover and could not therefore have been expected to take reasonable measures to avert the danger. They have denied liability on the basis that they were unaware of the existence of the hole as all the drainage holes were fitted with manhole covers at the time of construction and that regular inspections by roads inspectors revealed the drainage covers to have been intact.

[6] The defendants led the evidence of Isaiah Mthethwa who is the Principal Roads Engineer under the maintenance department of the Ministry of Public Works. He testified mat amongst his duties he oversees the maintenance of all public roads in the country. He stated that in deciding when to carry out maintenance work on the roads the department relies on monthly reports that are compiled by roads inspectors who would indicate what kind of maintenance work is required to be done on a particular road.

[7] It was Mr. Mthethwa's further testimony that sometime in the year 2005 he recalled doing some maintenance work on the road next to the Mbabane Police Headquarters and that the work done involved the replacement of a

drainage cover along that part of the road. When asked how his department had come to know of the existence of the hole, he testified that it was after the plaintiff had come to notify them that he had been injured as a result of falling into an uncovered drainage hole that they discovered the drainage cover to have been removed. His evidence was that prior to the report of the accident by the plaintiff they were not aware of the existence of the hole as their monthly reports that are compiled by roads inspectors did not reflect that the drainage cover had been removed. He said the report had indicated that the drainage covers were intact.

[8] The witness went on to state that to their knowledge the steel covers remained intact until it was brought to their attention that they had been removed when the plaintiff reported about his accident. It was only then that they, as a department, conducted an inspection of not only the scene of the plaintiff's accident but the whole stretch covered by the Mbabane - Ngwenya freeway and discovered that in most parts the drainage covers had been removed by unknown people for sale at the recycling centre.

[9] It is common cause that the 1st defendants are responsible for the maintenance of the area of land in question. The issue that calls for determination at this stage is whether the 1st defendant is liable to compensate the plaintiff in respect of the whole of the damage suffered by him arising out of the injuries sustained by him in the incident which is the subject of these proceedings. In a bid to determine this question, I shall advert my mind to the fact that the Courts sometimes formulate the inquiry as to negligence in terms of a duty of care. Invariably, the questions then posed are:

a) Would a reasonable man in the position of the defendant have foreseen the harm;

b) Would he have taken steps to guard against it;

c) What were those steps; and

d) Did the defendant take them?

See **P.Q.R. Boberg, 1984, The Law of Delict Volume 1 Aquilian Liability at 274.**

[10] The same author at page 284 of his book supra outlines the test for negligence by quoting the remarks expressed by **Holmes JA** in **Kruger vs. Coetzee 1966 (A) at 430** where he enunciated the position as follows:

> For the purposes 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.

[11] In **CAPE TOWN MUNICIPALITY v PAINE 1923 AD 207,** the defendant municipality owned a sports ground on which it had erected a grandstand for the use of spectators. The municipality let the sports ground to the Young Men's Christian Association for use for sporting activities on certain terms, one of which was that the municipality remained responsible for keeping the ground and all structures thereon in repair 'as far as they deem

it necessary'. The plaintiff, a spectator at a sporting function, was injured when he stepped on the grandstand and his foot went through the woodwork. His action against the municipality succeeded in the trial court. Dismissing an appeal, the Appellate Division held that, notwithstanding the absence of contractual privity between the municipality and spectators, the municipality had a duty to spectators to take reasonable care to ensure that the grandstand remained safe for their use. This duty the municipality had negligently failed to discharge, and it was accordingly liable to the plaintiff.

[12] **INNES CJ** at page 26 of the said judgment , held, inter alia, as follows:

"It has repeatedly been laid down in this court that accountability on unintentioned injury depends upon culpa - the failure to observe that degree of care which a reasonable man would have observed. I use the term reasonable man to denote the diligens paterfamilias of Roman law - the average prudent man. Every man has a right not to be injured in his person or property by the negligence of another, and that involves a duty on each to exercise due and reasonable care. The question whether, in any given situation a reasonable man would have foreseen the likelihood of harm and

governed his conduct accordingly, is one to be decided in each case upon a consideration of all the circumstances. Once it is clear that the danger would have been foreseen and guarded against by the diligens paterfamilias, the duty to take care is established and it only remains to ascertain whether it has been discharged. Now, the English courts have adopted certain hard and fast rules governing enquiries into the existence of the duty of care and the standard of care required in a particular case. Speaking generally, these rules are based upon considerations which, under our practice, also would be properly taken into account as affecting the judgment of a reasonable man; and the cases which embody them are of great assistance and instruction."

[13] Another case on this point is that of **Halliwell v Johannesburg Municipal Council 1912 AD 659.** Acting under permissive powers, the J Municipal Council laid tramlines in streets under its control. The spaces between and adjacent to the rails it filled with concrete blocks (cobbles) which, although they were originally rough, became smooth with the passage of time and traffic. When H, driving in a one-horse drawn cart, turned from Eloff Street into De Villers Street, his horse slipped on the cobbles and H was thrown out of the cart. He sustained a fractured wrist, for which he claimed 75 pounds damages from the J Municipal Council. A Magistrate's

judgment in favour of H was reversed by the Provincial Division and reinstated by the Appellate Division. The highest Court held that, although the Council had not acted negligently in laying the cobbles, it had thereby introduced into the roadway a new danger which should have been foreseen and guarded against. It was the Council's omission to take reasonable steps to guard against that danger which rendered it liable to H.

[14] In this case at hand, the essential question is whether the 1st defendant negligently failed to take such steps as were reasonably expected of them to avert the hazard constituted by the open manhole into which the plaintiff fell. However, in a bid to determine the said question, I shall first embark upon a detailed analysis of the evidence led during the trial.

[15] It is trite law that negligence is a question of fact, and must proved by the party alleging it. It is the plaintiff's testimony that he fell into a manhole that had not be covered and he has alleged that it was the responsibility of the 1st defendant to ensure that the drainage hole always had covers. Furthermore,

the plaintiff alleged that the 1st defendant knew of the existence of the hole and foresaw the imminent danger that would result due to the lack of the drainage covers, but was negligent in that they failed to take reasonable precautions to guard against any danger befalling the plaintiff. A copy of The Swazi Observer, dated Tuesday July 5, 2005, showing the open manhole into which the plaintiff had fallen, was produced by the plaintiff and admitted in evidence as Exhibit 4 .

[16] The evidence tendered on behalf of the 1st defendant, ***per*** Mr. Mthethwa, the only witness called on their behalf, reflected the following:

(1) As the Principal Roads Engineer, under the maintenance department of the Ministry of Public Works, he oversees the maintenance of all public roads to see that they are in good condition;
(2) That in the year 2005 he was still in the same position and he recalls maintaining the road next to the Mbabane Police Headquarters.

(3) In deciding when to carry out maintenance work on the roads the department relies on monthly reports that are compiled by roads inspectors who will indicate what kind of maintenance work is required to be done on a particular road;

(4) Systematic theft of steel covers over the various types of holes has been a problem, the reason being that same can be disposed of for value to scrap metal dealers;

(5) The witness admitted that the hole covers were not secured to the ground and susceptible to be unlawfully removed.

(6) He also testified that the manhole was the responsibility of the 1st defendant and he went on to explain that prior to the report of the accident by the plaintiff they were not aware of the existence of the open manhole as their monthly reports that are compiled by roads inspectors did not reflect that the drainage cover had been removed.

(7) That on receipt of the plaintiff's report that he had been injured, the 1st defendant attended to the placing of the cover over the hole. The witness testified that it was only then that they, as a department, conducted an

inspection of not only the scene of the plaintiff's accident but the whole stretch covered by the Mbabane - Ngwenya freeway and discovered that in most parts the drainage covers had been removed by unknown people for sale at the recycling centre.

[17] In my view, the conclusion that flows from the evidence detailed above is that there is a real possibility that the manhole in question may not have been inspected, or even any observation made of it, for substantial periods of time, stretching possibly over a number of months. Although Mr. Mthethwa had alluded to the existence of monthly reports compiled by roads inspectors, the Court, however, was not availed the opportunity of seeing any of these reports. In this regard I must state that I am not impressed by Mr. Mthethwa's postulation that the cover could have been ***in situ*** at the time that his department carried out the routine road maintenance in the area and that the theft had happened in a space of three weeks after their monthly reports.

[18] The evidence adduced by the plaintiff was that he fell into the manhole on June 30, 2005. It is worthy of note that the photograph in Exhibit 4, which was taken on July 5, 2005, depicts that the hole itself, still then without a cover, was relatively readily discernible. No report that the cover was missing was received by the 1st defendant, a fact confirmed by Mr. Mthethwa; therefore, either the fact of the missing cover was not observed by any of the 1st defendant's roads inspectors or, if observed, it was not reported.

[19] I am constrained to conclude that the steps taken by the 1st defendant, which embraced only monthly reports (if those reports in fact occurred) to avert the danger, did not comply with the test referred to in **Kruger** v **Coetzee** (supra). Moreover, in terms of the authorities cited earlier, it was incumbent on the 1st defendant to have put a system in place where effective observation of an uncovered drainage hole was a more regular occurrence. This they omitted to do and it is no defence that the cover was stolen. See **Van Eeden (formerly Nadel)** v **Minister of Safety & Security 2002 4 All SA 346 (SCA)** where the Court held as follows:

> " an omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm."

[20] I am inclined to agree with the submissions of counsel for the plaintiff that the expression "duty of care" is used in two senses i.e. apart from connoting wrongfulness it is invoked in the context of negligence to convey the factual conclusion that a reasonable man would have foreseen and guarded against harm in the circumstances. More particularly it serves to distinguish between the foreseeable and unforeseeable plaintiff, giving expression to the notion that negligence is relative to those persons to whom harm was reasonably foreseeable and not to others. See: **P.Q.R. Boberg, 1984, The Law of Delict (supra) Volume 1 at page 31.**

[21] It is interesting to note that over the past decade in South Africa, the question of a municipality's liability for damages suffered in consequence of a wrongful and negligent omission to repair or maintain roads or pavements within its jurisdiction has received consideration in a number of matters similar to the present case. See **Port Elizabeth Municipality v Smit 2002 (4) SA 241 (SCA); Municipality of the City of Port Elizabeth v Meikle 2002 JOL 9525 (SCA); Cutting v The Nelson Mandela Metropolitan Municipality (2696/01) [2002] ZAECHC 18 (6 August 2002).**

[22] Judging from the conspectus of the totality of the evidence adduced in the present instance, it appears to me established beyond disputation that the 1st defendant owed the plaintiff a duty of care to ensure that the manhole which was erected in the middle of a foot path was covered at all times. The 1st defendant should have foreseen the reasonable possibility of a pedestrian in the position of the plaintiff falling into the gaping manhole and injuring his person and should have taken reasonable steps to guard against such

occurrence. I hold the same to be a fact and I also find that the 1st defendant's failure to take steps to cover the open manhole was negligent.

[23] On a balance of probabilities, I am satisfied that the plaintiff has discharged the onus of proving the 1st defendant's negligence . In the circumstances, I find that the 1st defendant is liable to compensate the plaintiff in respect of the whole of the damage suffered by him arising out of the injuries sustained by him in the incident which is the subject of these proceedings. I so hold.

[24] I now turn to the question of quantum of damages. The plaintiffs claim for damages was advanced under a number of heads, namely, pain and suffering, loss of income, loss of enjoyment of amenities of life and future medical expenses. The plaintiff is 44 years old and is a businessman dealing in handicraft. According to his evidence, he has suffered severe pain on his right wrist and which said pain lasted for three months. It is also in evidence that due to the incapacitation, the plaintiff could not use his right hand as

well as enjoy the amenities of life. He testified that as he is right handed he could not drive his car, he could not write properly or eat properly because he could not use a spoon. Also he could not wash up and dress up properly, fasten a tie and do all other things that a person with a right hand would normally do. Moreover, he could not carry on his trade of polishing artifacts or jewellery.

[25] The plaintiff was a good witness and I am satisfied that he did not exaggerate the extent of his disability. Be that as it may, in arriving at any figure, I need to have regard to comparable awards of general damages in other cases as well as take into consideration the steady diminution in the purchasing -power of money.

[26] In **Molefi** v **Minister Van Wet and Ord 1992 (4) QOD G3-10;** the plaintiff sustained multiple bruises and lacerations, lunate dislocation of wrist requiring first a closed reduction followed by an open reduction. Hospitalized for two weeks, unable for some months to walk, to use his arm, to wash

himself or to drive a car. He suffered considerable pain over an extended period. His wrist was slow to heal and was still occasionally painful at the time of trial. In 1992 he was awarded general damages of R15 000.00. According to **The Quantum Year Book 2011,** by **Robert Koch,** the current value of the damages is R51 000.00.

[27] In **MABVORO AND ANOTHER** v **MUZA 1985 3 QOD 498 (Z),** the plaintiff as a result of being struck down by a motor vehicle sustained a fracture of the right wrist plus cut above the eye which left an ugly scar. He had been rendered unconscious for some hours. His leg and wrist were placed in plaster cast and he was discharged from hospital after 15 days still in a plaster cast and in considerable pain. After six weeks the plaster on his wrist was removed. He was awarded R15 000.00. Again, According to **The Quantum Year Book 2011,** by **Robert Koch** the current value of the damages is R137 000.00. At this stage, I must state mat I take judicial notice of the fact that the currency in RANDS (R) is equivalent to our EMALANGENI (E).

[28] In the Swaziland case of **Lyrists Bruna and Others** v **Swaziland Royal Insurance Corporation 1987-1991 (1) 313 at page 318** the learned **Rooney J** held that:

> "The lack of local judicial awards for damages for personal injuries presents a serious problem for the courts when they are obliged to make an assessment of general damages for pain and suffering. In **Sadomba** v **Unity Insurance Co (Ltd) 1978 (3) SA 1094, Pittman J** referred to this problem at 1096. In Rhodesia at that time, there were not so many judicial awards that an accepted scale could be said to have been established for a particular kind of injury. He said "I think it is clear that as monetary compensation for pain and suffering must not be judged subjectively according to the race, or social or economic standing of the particular claimant, a Court awarding such damages must bear in mind the general economic status of this country and attempt to establish and apply a scale of awards which is generally appropriate, whatever the status of the particular member of the

population it is applied to may be. It is well known that awards for pain and suffering which in Rhodesia would be regarded as extravagant, are frequently made in wealthy countries like the United States of America. Although no doubt to a lesser degree, awards in the United Kingdom or South Africa could also be inappropriate here."

[29] In this case at hand, the plaintiff herein has claimed the sum of E300 000.00 in respect of damages for pain and suffering which rendered him incapacitated for a while in his daily activities. Taking all the foregoing into account and bearing in mind that the plaintiff is a businessman in woodcarvings, handicraft and jewellery and mat he could not use his hand whilst he had a cement plaster cast around his wrist and hand, I am satisfied that the amount of E300 000.00 he has claimed is a fair sum and will meet the justice of the case.

[30] Under loss of income, the plaintiff has claimed El 50 000.00 in respect of an order he should have supplied to a customer in Mozambique. The

plaintiff came across as truthful and I believe him. Moreover, this piece of evidence was not controverted under cross-examination even though defence counsel had the opportunity of disproving the testimony of the plaintiff. In respect of future medical expenses the plaintiff testified that he is not completely healed up because he does experience some pain when it is cold and that he uses a lotion which costs about El20.00 to rub on his wrist. I agree with the submission of plaintiff's counsel that a sum of El 000.00 would be sufficient under this head.

[31] In the result, therefore, the damages to be awarded under the heads are as follows:

Pain and suffering	E300 000.00
Loss of income	El50 000.00
Future medical expenses	E 1 000.00
Loss of enjoyment of amenities of life	E 30 000.00
	E481 000.00

[32] For all the foregoing reasons, I have come to the conclusion that the plaintiffs action must succeed- I therefore hereby enter judgment for the plaintiff and I make the following order: -

The 1st defendant be and is hereby ordered to pay the plaintiff-

1. The sum of E 481 000.00.
2. Costs of suit.

DELIVERED IN OPEN COURT IN MBABANE ON THIS 6th DAYOF JUNE,2011

M.M. *SEY(MRS)*
JUDGE OF THE HIGH COURT