



**IN THE HIGH COURT OF ESWATINI  
JUDGMENT**

**CASE NO: 619/2018**

**HELD IN MBABANE**

**IN THE MATTER BETWEEN**

**MCOLISI MABUZA**

**PLAINTIFF**

**AND**

**ESWATINI WATER SERVICE CORPORATION**

**1<sup>ST</sup> DEFENDANT**

**ESWATINI ROYAL INSURANCE CORPORATION**

**2<sup>ND</sup> DEFENDANT**

**NEUTRAL CITATION:**

**MCOLISI MABUZA VS ESWATINI WATER  
SERVICES CORPORATION & ANOTHER (619/2018)  
SZHC – 12 [03/02/2023]**

**CORAM:**

**B W MAGAGULA J**

**HEARD:**

**03/11/2022**

**DELIVERED:**

**03/02/2023**

*Summary – Civil law – law of delict – Plaintiff injured as a result of an open manhole belonging to the 1<sup>st</sup> Defendant– Principle of duty of care considered.*

*Held: 1<sup>st</sup> Defendant was negligent in failing to ensure that the manhole was covered at all times. The defence adduced being that there were periodic inspections was not supported by evidence. There was no record of these inspections. The Defendants witnesses failed to provide the necessary detail, as to the dates on which the last inspections was done, reports of such inspections and steps taken to mitigate possible harm also lacking. The 1st Defendant insured such risk happening with 2<sup>nd</sup> Defendant and the insured risk happened. As such, both Defendants are jointly and severally liable to pay the damages due to the Plaintiff.*

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## **JUDGMENT**

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### **Brief background facts**

[1] By combined summons dated the 16<sup>th</sup> April 2018, the Plaintiff is claiming the following relief against the Defendants.

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| 1.1 Loss of income (3 months)                       | - E13 500.00 |
| 1.2 Payments for assistance in assignments & typing | - E 5 000.00 |

- |     |   |              |
|-----|---|--------------|
| 1.3 | Hospital expenses & estimated future medical expenses | - E 9 500.00 |
| 1.4 | Loss of amenities of life                             | - E15 000.00 |
| 1.5 | Pain and suffering                                    | - E20 000.00 |

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**E63 000.00**

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- [2] The Plaintiff is an adult Swazi male of Nyakeni in the Manzini District and he is 36 years of age. At the time the alleged incident happened he was self-employed, selling airtime next to Galp Filling Station in Manzini. The Defendants are the then Swaziland Water Service Corporation which is now Eswatini Water Service Corporation cited jointly with the then Swaziland Insurance Corporation and now Eswatini Insurance Corporation.
- [3] The basis of the Plaintiff's claim stripped to the bone, is that on the 18<sup>th</sup> July 2017 whilst he was walking on a pavement in Ngwane Street, Manzini he tripped and fell into a manhole. Apparently, it had been constructed and left open by the 1<sup>st</sup> Defendant.
- [4] The Defendants deny the claim. It is controverted through the plea and the oral evidence of two witnesses.
- [5] The court is called upon to determine whether the 1<sup>st</sup> Defendant was negligent in creating and leaving a manhole open along a pedestrian pavement. Secondly, whether the Defendants are liable to pay the damages as claimed in the particulars of claim for the injuries sustained by the Plaintiff.

- [6] During the trial, the parties called their respective witnesses to support their different positions. The Plaintiff was the sole witness. On the other hand, the Defendants' called two (2) witnesses.

## **SUMMARY OF EVIDENCE**

- [7] The evidence led in court has been succinctly captured by the Defendants in their heads of arguments as follows:-

### **MXOLISI FREDDY MABUZA (PW1)**

- 7.1 This witness testified that he is the Plaintiff in the matter;
- 7.2 At the time of the alleged accident, he was 34 years old;
- 7.3 He wrote a letter to the Municipality of Manzini reporting the incident and he was informed that the manhole in question belonged to the 1<sup>st</sup> Defendant;
- 7.4 He explained that the relationship that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant is one of insurance;
- 7.5 The 2<sup>nd</sup> Defendant confirmed the relationship between Eswatini Water Service Corporation and Eswatini Royal Insurance Corporation and undertook to conduct an investigation;
- 7.6 A claim number was allocated to the Plaintiff's claim;

- 7.7 The 2<sup>nd</sup> Defendant communicated in writing to the Plaintiff that they will not compensate the Plaintiff because the manhole was found to have been closed;
- 7.8 The accident occurred in the evening of the 21<sup>st</sup> July 1017 around 6pm, close to the Plaintiff's business, along Ngwane Street;
- 7.9 He had gone to purchase a few things at Galp Filling Station;
- 7.10 Close to the entrance by Galp, a car was hooting at him and greeted him. The Plaintiff waved at the person in the car, subsequent to that he tripped on the open manhole and got injured.
- 7.11 One Mr Simelane, came to assist him after he had screamed. An ambulance was subsequently called which rushed him to the Raleigh Fitkin Memorial Hospital;
- 7.12 His right arm was fractured and his left leg was injured;
- 7.13 The Plaintiff wrote a letter to the Municipality of Manzini, same was acknowledged. However he was informed that the manhole belonged to the 1<sup>st</sup> Defendant;
- 7.14 The Plaintiff stated that it was wrong for the manhole to be located in the middle of the pavement;
- 7.15 The 1<sup>st</sup> Defendant or employees were negligent by leaving the manhole open.

## **Cross Examination of PW1**

- 7.16 PW1 was asked to confirm that he reported the accident to the Municipality of Manzini and not to the 1<sup>st</sup> Defendant. He confirmed the statement;
- 7.17 The witness was also asked why he did not immediately report the accident to the 1<sup>st</sup> Defendant upon being advised of the ownership of the manhole by the Municipality of Manzini. His answer was that he reported to the 1<sup>st</sup> Defendant through his Attorneys of record through a letter of demand dated 15 December 2017;
- 7.18 The Plaintiff was asked why he waited 5 months to report the accident to the 1<sup>st</sup> Defendant and he responded that, it was through the advice of the doctor, and also that he wanted to monitor his recovery;
- 7.19 The Plaintiff was asked how come he was able to report to the Municipality, why didn't he do the same upon receiving the information that the manhole belonged to the 1<sup>st</sup> Defendant, he stated that the doctor advised him that the injury might complicate if he increased his mobility.
- 7.20 The Plaintiff confirmed that the accident happened around 6pm;
- 7.21 The witness was asked whether he tripped and fell into the manhole and he stated that he tripped into the hole;
- 7.22 The Plaintiff was asked how big the manhole was and he stated that it was big enough to fit both of his feet;

- 7.23 The Plaintiff was asked that in his examination in chief, he stated that the 2<sup>nd</sup> Defendant had mentioned that they would conduct investigations and revert to him, it was put to him that the information he gave to the court contradicts the contents of the correspondence by the 2<sup>nd</sup> Defendant;
- 7.24 It was put to him that his version was now an afterthought and he answered that it was not an afterthought;
- 7.25 The Plaintiff stated during his cross examination that he doesn't often use the pavement where the alleged accident occurred;
- 7.26 He was asked whether he was distracted and not concentrating to the path when the people in the car greeted him and he was not keeping look out and the answer was in affirmative;
- 7.27 He further explained what he meant in his examination in chief that the Defendants were both liable for the damage he suffered and he stated that he would not have been injured if the manhole was not located in the middle of the pavement;
- 7.28 The Plaintiff was asked whether there will not be any future medical expenses that will arise, he answered that his arm has healed;

## **RE-EXAMINATION**

- 7.29 The Plaintiff was asked whether he knew that he had to write a letter to the 1<sup>st</sup> Defendant the same way he did when he reported to the Municipality and the answer was in the negative;

7.30 The Plaintiff was also asked who is the signatory of the letters by the 2<sup>nd</sup> Defendant and the Plaintiff answered that it was Mr Mphatsi Msweli;

7.31 He was further asked whether he was distracted by the motor vehicle and the person who greeted him and whether he contributed to his injury and the Plaintiff's answer was in the negative.

### **3. THE DEFENDANTS CASE**

The Defendants lead the evidence of 2 witnesses. The 1<sup>st</sup> witness is an employee of the Eswatini Water Service Corporation and the 2<sup>nd</sup> witness is an employee of the Eswatini Royal Insurance Corporation. Both witnesses were actively involved in the matter by virtue of the positions they hold in their respective places of employment.

### **4. THE DEFENDANT'S WITNESSES**

#### **4.1 MAURICE DLAMINI (DW1)**

4.1.1 DW1 testified that he is an employee of the 1<sup>st</sup> Defendant, having been working for the 1<sup>st</sup> Defendant for a period of 29 years. He further told the court that he holds the position of Operations Coordinator in the Central Region (Manzini /Matsapha).

4.1.2 DW1 stated that the relationship of the 1<sup>st</sup> Defendant and that of 2<sup>nd</sup> Defendant is one of insurance.

4.1.3 The witness stated that the Plaintiff never reported the accident to the 1<sup>st</sup> Defendant, he got to learn about the accident through the insurer;



4.1.4 DW1 told the court that the manhole is about 300mm by 250mm and it is unlikely for a person's foot to fit in there. The manhole is now filled with sand as the fire hydrant was relocated to the George Hotel when Manzini Lifestyle Centre was built.

4.1.5 The manhole has always been covered by iron cast which is usually stolen. This material is usually used at scrap yards and that's why the Corporation replaced the coverings of manholes by concrete slap which is movable but cannot be moved by one person.

4.1.6 He explained the procedure followed when reporting an accident involving the 1<sup>st</sup> Defendant. He testified it is the Corporation's policy that an accident is reported within 24 hours so that the Corporation is able to take action;

4.1.7 He informed the court that the manholes around the city of Manzini are inspected religiously by a task team comprising of the Employees of the Municipality of Manzini and the Employees of the Eswatini Water Service Corporation.

4.1.8 DW1 informed the court that no one has ever reported any accident involving falling into their manhole.

5. The Plaintiff closed its case after the testimony of the Plaintiff himself. The Defendant opened its case and led evidence two witnesses, the first witness being Mr Vusi Morris Dlamini.

6. This witness proceeded to tell the court that, as an organization they first learnt of this incident through a correspondence received from the 2<sup>nd</sup> Defendant, who is their insurer.

7. Mr Dlamini continued to tell the court that as someone who is in the maintenance division of the 1<sup>st</sup> Defendant, he is privy of the fact that there is a joint operation between his organization and the city council. He says this joint operation comprises of two employees from each organization and their role is to conduct periodic inspections of the manholes to ensure that they are covered.
8. Mr Dlamini proceeded to inform the court that after receiving the communication from the insurance about the alleged incident, he responded to them and advised that the 1<sup>st</sup> Defendant not received any report directly from the Plaintiff regarding the incident. He said they then went to inspect the site and found the manhole which he referred to as a fire hydrant closed. He told the court that this manhole was previously covered with a cast iron lid which was stolen. It was then replaced with a concrete one. The manhole has been filled with river sand and it was no longer used as a fire hydrant.
9. I must pose at this juncture and note that one may not be sure whether deliberately or inadvertently that this witness did not tell the court who specifically went to inspect the scene of the accident. He made reference to “we” of which the court reasonably assumes the witness was part of the team that went there. But as to who else was there was not mentioned. The witness also did not to tell the court when exactly they went to inspect the manhole.
10. According to Mr Dlamini the manhole is situated 2 meters from the verge of the main road and it’s size is 300mm by 200mm. The witness proceeded to narrate to the court the procedure that is usually followed when accidents of this nature happen, which he called the norm. He said the first post of call is usually to establish the ownership of the manhole. A report is supposed to be made within 24 hours of the accident happening.

11. Again, I note that this witness did not refer the court to any manual, procedure or regulations where the time frame to report an accident within 24 hours is stipulated.
12. It was part of Mr Dlamini's evidence further that, no one has ever reported falling into this manhole besides the Plaintiff. He also denied that the 1<sup>st</sup> Defendant is liable for the Plaintiff's claim of E63 000-00 Emalangeneni. He elaborated by observing that, where the Plaintiff claim to have tripped and fell, is a one way street situated about 50 meters where the Plaintiff's claims to be stationed and plys his trade of selling airtime. Mr Dlamini vehemently denied that there was any negligence on the part of the 1<sup>st</sup> Defendant, as the manhole was closed with a concrete slab which replaced the cast iron cover which was previously used to close the manhole. It was stolen.
13. In essence that was the evidence of this witness.
14. This witness was subjected to immense cross examination by the Plaintiff's Counsel. The following are the highlights of the cross examination;
  - 14.1 It was made an issue that when a person gets injured how is he expected to know about the procedure of reporting within 24 hours. The response was that once that person that is injured gets to the city council offices then he will be advised of the procedure. Hence, when the Defendant says he went to the city council, Mr Dlamini said he was 100% sure that he was then advised to report the accident to the 1<sup>st</sup> Defendant. He was challenged by the Plaintiff's attorney to provide proof, his response was that Plaintiff went to report to the 2<sup>nd</sup> Defendant (SRIC) instead of the 1<sup>st</sup> Defendant. He also says there is a valve inside the

manhole which signifies that it belongs to the 1<sup>st</sup> Defendant.

15. It was then put to this witness that this procedure is his own hypothesis as nothing in writing which should have informed the public of this procedure of reporting within the 24 hours. This attracted the response that the 1<sup>st</sup> Defendant usually hold road shows where the public is educated about the 1<sup>st</sup> Defendant's procedures.
16. The witness was confronted with a letter that had been written by the Plaintiff's attorneys to the Managing Director of the 1<sup>st</sup> Defendant, against his assertion that the Plaintiff had never reported the accident to the 1<sup>st</sup> Defendant. In response, the witness said the letter had been directed to the Managing Director of the organization not to him as heading the Central Region. He insisted that the report should have been made to the Region where the accident occurred by the Plaintiff.
17. With regard to the date on which the manhole was allegedly covered the witness conceded that he was not sure whether on the 21<sup>st</sup> July 2017, the date on which the accident happened the manhole had been covered or not. The witness attributed his ignorance to the fact that he is not personally the one that covered the manhole.
18. The witness also acknowledged that the theft of the iron cast manholes was rife. Hence, there was a team that had been set up responsible to monitor the manholes. Hence, he could not deny that it was possible that at any particular point, a manhole would remain open. They are only replaced after identification.
19. This witness could also not remember when the inspection of the manhole in issue was made after they had received the report of the accident. However, the witness under cross examination conceded that

they only went to inspect after receiving communication from 2<sup>nd</sup> Defendant.

20. In re-examination the witness said the 1<sup>st</sup> Defendant cannot be blamed for the theft of the iron cast covers. He further explained that the thieves sell the covers at the scrapyard. He told the court that they lose about 30 manhole covers per day. It also came out during re-examination that the Manzini City Council never officially advised the 1<sup>st</sup> Defendant about the accident. That concluded the evidence of Mr Morris Dlamini.

### **Evidence of Mphatsi Msweli**

21. Mr Msweli was the 1<sup>st</sup> Defendants' second witness. He told the court that he was employed by Eswatini Royal Insurance Co-operation as a claims Administrator. His responsibilities include receiving claims and processing them. He has been working for the organization for 13 years 6 months. He continued to narrate that the 2<sup>nd</sup> Defendant as an insurer of the 1<sup>st</sup> Defendant, received a claim from AON (the broker) under cover of which a letter of demand from the Plaintiff's attorneys was attached.
22. The witness further proceeded to tell the court that after consulting with the insured, they communicated the insured's position to the broker. The broker then went to the site and established that the manhole had been covered with a concrete precast slab. The 2<sup>nd</sup> Defendant subsequently wrote a letter to the Plaintiff's lawyers communicating the 2<sup>nd</sup> Defendant's position regarding the liability of the insured.
23. The witness referred the court to the insurance claim form which was part of the discovered documents. The insurance form was admitted in

court as part of the documentary evidence of the Defendants. It was marked as annexure D1 – D2.

24. He also confirmed that as an insurance company they are not involved in the covering of the fire hydrants.
25. This witness was also subjected to immense cross examination by the Plaintiff's counsel and the following came out during the cross examination;
  - 25.1 He confirmed that the insurance policy, covers liability raising from negligence by the 1<sup>st</sup> Defendant. He elaborated that any type of negligence either being an omission or commission is covered by the policy.
  - 25.2 He also confirmed that the insurance cover included the risk of their insured leaving the manholes uncovered and where someone would be injured as a result.
  - 25.3 This witness did not recall when exactly they received the claim form from this broker. But what he could remember is that it was sometime in 2018.
26. Mr Msweli confirmed that 2<sup>nd</sup> Defendant repudiated the claim after receiving communication to the effect that the 1<sup>st</sup> Defendant had gone to the site and established that the manhole was not open but was covered. When asked if he was aware that the accident happened in 2017, the witness said he would not commit to the year. When this witness was asked if he knew the date on which the manhole was

covered, his answer was that according to the 1<sup>st</sup> Defendant the manhole was always covered.

27. When confronted with the pictures which are exhibits P2 and P3 where the manhole appear to have been open and on the other picture covered, the witness acknowledged that he could see the pictures, but he had no comment.
28. The witness emphasized that they repudiated the claim subsequent to the information related to them by their client (1<sup>st</sup> Defendant) which was that the manhole has always been covered. The witness was duly re-examined by counsel for the 1<sup>st</sup> Defendant. Nothing turns out much on the re-examination. The above in a nutshell, captures the evidence of Mr Msweli in court.

### **Analysis of the evidence before court**

29. Having listened to all the 3 witnesses that gave evidence the following in a nutshell are my observations:-
  - 29.1 The Defendants' through cross examination of the Plaintiff and through the evidence of their own witnesses could not point a different picture, other than that the accident did happen.
  - 29.2 The pictorial evidence submitted by the Applicant showing an open manhole which was published in the newspapers could not be explained by any of the witnesses.
  - 29.3 The receipts from the hospital, Raleigh Fitkin Memorial Nazarene Hospital, reflect that the Plaintiff was at some point in July 2017 a patient.

29.4 In exhibits P2 and P3 the Plaintiff is seen with a plastered arm on a sling, depicting that he was injured.

30. This then leaves the court to make a finding of fact that indeed the manhole was left uncovered.
31. The relevant question that needs to be answered is whether the injuries occasioned to the Plaintiff were indeed caused by the manhole that had been left open. The Plaintiff's testimony was that he tripped and fell into the manhole. There is no any other evidential material before court that pinpoints otherwise. The pictorial evidence in the form of the caption published in the newspaper depicts the Plaintiff pointing out to the manhole to the news reporters. To me, it is unlikely that the Plaintiff would fake injuries especially that his arm had been fractured. It is also improbable that during the same period he would have receipts that show that he was admitted at the Nazarene Hospital in Manzini.
32. It is possible though that he may have been fractured elsewhere, not necessarily through the manhole. However, likelihood of the Plaintiff concocting a story that he tripped into the manhole is unlikely on a preponderance of possibilities and the circumstances of this matter.
33. The lack of detail and depth regarding the inspection as narrated by Mr Morris Dlamini does not appear to help the situation. Mr Dlamini did not state with who he was with when they made the inspection. And on what date. Clearly, by the time they made the inspection they already knew that there was a complaint from the Plaintiff, even if it came through the insurance. Therefore a formal report should have been made. Pictorial evidence could have been captured reflecting what they found at the scene. Nothing of that sort was adduced in court.



34. The other disturbing aspect is that PW1 (Mr Morris Dlamini) told the court that, a joint team does routine inspections on the infrastructure. If this happened periodically, then reports of such inspections should have been made and documented. The processes which they follow when they do the inspections should be documented. What do they inform? In those reports, the court would have been assisted with the detail specifically relating to the accident in question. No such was handed by the 1<sup>st</sup> Defendant. To give the 1<sup>st</sup> Defendant a benefit of doubt, let me assume for one reason or the other, inadvertently or otherwise the reports were not made and the pictures not captured. What about calling the members of the joint team to court to give testimony regarding to the dates on which they inspected the manhole and what they found. Who was there? What did they observe? At least their own firsthand information could have assisted the court on the state of the manhole prior and after the accident. The 1<sup>st</sup> Defendant in its wisdom, decided not to call any of the inspectors, but contended itself with Mr Morris Dlamini who gave evidence in general terms regarding the inspection that was made subsequent to the accident. He also gave in general and in vague terms pertaining to the routine inspections that are done by the joint team. This was not helpful to the court as it lacked the necessary depth which could have portrayed a clearer picture of what the position of the manhole immediately before and after the accident. The court is left with one version of the Plaintiff. In the absence of any other contradictory version, the court is persuaded and there is nothing in the court's hands that would prevent the court from accepting the Plaintiff's version.
35. The evidence of Mr Msweli was candid, in my view. He told the court what he knows and what he did in as far as the processing of the claim is concerned. He was clear about the reason why 2<sup>nd</sup> Defendant repudiated the claim. It was based on the 1<sup>st</sup> Defendant's unsupported version that they inspected and found the manhole closed. Unfortunately this version is hearsay coming from Mr Msweli. He did not form part of the team that inspected the manhole. Hence, the

court is not persuaded that 2<sup>nd</sup> Defendant could take a position to repudiate the claim based on a version that they were told by their own client. Obviously, their own client would be inclined to tell them what is favorable. What about if it turns out that the allegation that the manhole was closed at the time of the accident is not supported by facts. As there are no dates, no reports no particulars as to who did the inspection. So their entire justification for repudiating the claim collapses right there.

### **The Law**

36. The Plaintiff's claim is based on injuries that was suffered subsequent to him tripping and falling onto a manhole situated on a public pavement<sup>1</sup>. According to his evidence the tripping was caused by the manhole which was left open by the 1<sup>st</sup> Defendant. This presupposes that by enlarge the claim fall under rule of law break of delict.
37. A renowned author of the **PQR Boberg**, 1984, **The law of delict** volume 1 Acquilliar liability at page 274 relates an inquiry which needs to determine negligence in terms of a duty of care. The author outlines this in a form of questions, which he articulates as follows;
- 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?*
  - d) Did the Defendant take them?*
38. The above questions are what the Defendants' needed to answer successfully to dispel the claim. I will revert to this issue later on, when I apply the law to the facts.
39. Even before I get into an analysis of whether the Defendants have been able to answer the above questions as articulated by Boberg one must not lose sight of another important aspect of the law pertaining

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<sup>1</sup> See paragraph 6 and 7 of the Plaintiffs particulars of claim at page 4 and 5 of the book of pleadings.

to this matter, which is the *onus*. The Plaintiff has the *onus* to allege and prove that the 1<sup>st</sup> Defendant in particular, was negligent in it's conduct or omission. **See Kruger Vs Coetzee 1966 (2) SA 428 (A) at 330 E - F.**

40. In the matter of **Honikman Vs Alexandra Palace Hotels (Pty) Ltd 1962 (2) SA 404 (c)**. The court formed the view that it is not enough to simply allege without detailing the grounds of negligence. The court proceeded to state that the Plaintiff must establish the following grounds;

40.1 That a reasonable person (*diligens paterfamilias*). In the position of the Defendant would foresee the reasonable probability that the conduct would injure another person.

40.2 Such a reasonable person would take reasonable steps to guard against such occurrence.

40.3 The Defendant failed to take reasonable steps.

41. In another decision of the Supreme Court, of South Africa<sup>2</sup>, the court stated the following consideration that needs to be taken when accessing a delictual claim of negligence;

41.1 The degree and extent of risk created

41.2 The gravity of the possible consequences.

41.3 The utility of the actors conduct.

41.4 The burden of eliminating the risk.

### **The Defendants' Arguments**

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<sup>2</sup> Cape Metropolitan Council Vs Graham 2001 (1) SA 1197/SCA.

42. The Defendants in their argument, to be precise the 1<sup>st</sup> Defendant, argues that in as much as it admits and concede that the manhole in question was created by it and it is its responsibility. However, it denies that the injuries that were sustained by the Plaintiff were occasioned through the danger that had been posed by the manhole. Mr Morris Dlamini pointedly stated that first, the size of the manhole is so small that the feet or foot of the Plaintiff could not have been able to fit into that hole. Second, when “they” inspected the manhole after receiving the report of the incident they found that the manhole had been closed. Third, there was sand inside the manhole which would have made it impractical for someone to trip and incur injuries.

### **The Defendants’ Defence**

43. On the legal aspect, through the submissions made by Miss Nkonyane and through the heads of arguments that she articulately drafted, Defendants argue as follows:-

- 43.1 In as much as the Plaintiff in his pleadings alleged negligence, but he failed to prove the ground of negligence.
- 43.2 The 1<sup>st</sup> Defendant would not have foreseen that the iron cast cover would be stolen, and that a person in the position of the Plaintiff would trip and fall into the manhole.
- 43.3 The 1<sup>st</sup> Defendant’s employees exercised their duty of care by conducting routine inspections of the manholes around the city. They worked collectively with the Municipality employees. That demonstrates that they acted within reasonable care and skill.
- 43.4 The evidence of Morris Dlamini showed that the manhole was at all times been covered, and the 1<sup>st</sup>

Defendant would have known if the manhole was open through their inspection routines of the manholes around Manzini.

44. The Defendant's defence stripped of all the frills is as follows;

44.1 The 1<sup>st</sup> Defendant denies that the incident happened. The basis being that there is a joint team comprising of employees from the 1<sup>st</sup> Defendant and those of the Manzini City Council, who routinely do inspections of the manholes and ancillary infrastructure to check for theft and to ensure that the manholes are maintained and that they are covered.

44.2 The argument therefore is that if this manhole in question had been left open for one reason or the other, the inspections would have flagged it and picked it up. It would have then been recovered. Hence, there was no negligence.

45. This evidence unfortunately suffers from the flaw that there is no depth in it. The alleged inspection is not pointed to any particular period whether before or after. The Plaintiff both in its pleadings and evidence he gave before court was specific on the date on which he got injured as a result of the manhole. He stated that this was the evening of the 18<sup>th</sup> July 2017.

46. Yet both witnesses that were called by the Defendants' were not forthcoming as to whether the periodic inspections of the manholes were in fact done on the 18<sup>th</sup> July 2017 or the day before. This would have given an accurate impression to the court of the period on which the manhole in question was inspected and on the state it was found.

47. The evidence of the employees or even one of them who did the inspections would have been helpful. Especially the once that were dispatched to do this inspections either on the 17<sup>th</sup> July 2017 which is the previous day or on the day which the alleged accident happened, which is the 18<sup>th</sup> July 2017. This would have provided a more pointed and credible evidence as to the status of the manhole prior to the Plaintiff getting injured.
48. There was no explanation proffered, why the employees on the ground could not come to court to give an account of the status of the manhole during the aforementioned period. In the absence of this account from the relevant employees that were tasked with the periodical maintenance and inspection, the court is left with one version on the status of the manhole on the 18<sup>th</sup> July 2017. That of the Plaintiff. The court is then hamstrung to consider this evidence, in the absence of any other evidence that pointedly controvert the status of the manhole on the 18<sup>th</sup> July 2017.
49. On a preponderance or probabilities, it is therefore the finding of the court that indeed the manhole was left open on the aforesaid date.
50. The other leg of the Defendant's defence is that the size of the manhole which was said to be 300mm by 200mm, even if it was left open could not have caused the Plaintiff to trip and get injured because it is impossible that his feet could have got into the manhole.
51. The shortcoming of this narrative by the 1<sup>st</sup> Defendant's witness Mr Morris Dlamini is that it assumes that for the injury to have occurred, the entire feet of the Plaintiff should have been completely immersed into manhole.
52. This line of reasoning is at tangent with the Plaintiff's account. The latter said the open manhole caused him to trip and fall. It is the extent of the injuries eventually incurred that make Mr Dlamini's narrative incredible. The Plaintiff actually said the tripping made him to fall and broke his arm not necessarily

his feet. It therefore does not necessarily follow that the injury suffered by the Plaintiff was inflicted directly by the manhole itself. It is the consequence of the tripping through the open manhole that caused him to fall. Through the falling, he hurt his other limbs not specifically his feet. Although he says his leg was injured as well.

53. Considering the documentary evidence that was submitted before court, being exhibit **“B2”** which is the newspaper article that appears to have been published on the 21<sup>st</sup> July 2017, 3 days after the accident happened portrays a picture of the Plaintiff standing next to an open manhole. This again flies in the face of the Defendants’ assertion that this accident could not have happened. First, because the manhole was closed, according to their investigations. Second, because the size of the opening could not have accommodated the foot of the Plaintiff.
54. That hole as it appears on the picture is clearly opened and there is no visible sand inside it. It is very much possible that the foot or feet of the Plaintiff could have got into it and caused him to trip and be injured. In-fact, the likelihood of him getting injured on the leg is probable. On the picture, he clearly appears to have his right arm plastered.
55. The above apparent observations were not controverted during cross examination of the Plaintiff. Specifically, the fact that he was injured and that the manhole as of 21<sup>st</sup> of July 2017 was opened. Then the question would be at what point was this manhole closed with the concrete slab if on the 21<sup>st</sup> July 2017, 3 days after the Plaintiff had been injured it was still open. He took a picture standing next to an open manhole. This then leads me to the conclusion that even if this manhole was subsequently closed, but as of the 21<sup>st</sup> July 2017 it was open. This then begs for an explanation with regard to the allegations of maintenance and inspections being periodically carried out. Whatever period within which the inspections were carried out, there is no evidence that in the window of the period immediately preceding the occurrence the inspection was done.

56. That omission to close the manhole within that period or on the date on which the Plaintiff was injured would directly speak to the duty of care, which is the legal requirement in a delictual claim such as this one.
57. Exhibit P3, is a picture that was also submitted before court, reflecting a person standing next to the manhole. This person who is standing next to this manhole is not identified. However, the manhole that appears there clearly appears to be a round concrete manhole cover. The manhole cover itself it is inscribed with the words “infrasec Swazi”. The court take cover judicial notice that it is the manufacturer of the concrete cover. There is also a date there. It is not immediately clear whether is the 16<sup>th</sup> or 18<sup>th</sup> of June 2017. None of the witnesses that came to court spoke to the significance of this date. Is it the date on which the concrete cover was manufactured or installed? It is not clear. Whether this manhole is the one that covered the square manhole which appeared on exhibit P2 that was also not explained. Therefore, this covering does not help in the defence of the Defendants, because even if it covered the same manhole, the absence of the date on which it was covered was not mentioned. Even if it was the same square shaped covered in the round concrete covering, it was clearly done after the accident had already happened. This can be deduced from the fact that the pictures shows the Plaintiff post the accident standing next to an open manhole. It therefore does not make a difference.

### **Second Defendant's Defence**

58. The 2<sup>nd</sup> Defendant's as the insurer's defence in a nutshell, is that it received a report from it's client that the manhole was covered. That is why it repudiated the claim. When one scrutinizes part of the documentary evidence being public liability report, which was admitted to court as exhibit D2. There is also a portion on the form which deals with details of the accident where it is supposed to be stated fully how it occurred. What is stated there is that it is not applicable, since the accident was never reported to Swaziland Water Services Co-operation (the 1<sup>st</sup> Defendant).



59. There is also a part on the form, where the full data of the personal injuries are supposed to be captured. In exhibit D2, it is reflected that the complainant claims he tripped and fell into a manhole or fire hydrant. Where it deals with the names and witnesses of the accident, it is captured that there was none, since the matter was never reported to the 1<sup>st</sup> Defendant.
60. It appears that there was so much emphasis on the accident not being reported to the Swaziland Water Services Co-operation. However, there was no basis that was submitted from the prescribed period, within which an accident is supposed to be reported to the 1<sup>st</sup> Defendant. Mr Morris Dlamini kept on stressing that it should have been reported within 24 hours. But no cogent support of this requirement in terms of regulations or rules submitted before court. I therefore hold that the over emphasis of the non-reporting of the accident within 24 hours, in the absence of rules or regulations imposing the time frame is without basis. Yet, it is clear that, the accident was reported, albeit (*italics*) the letter of demand. It was still a report that was done. I therefore do not comprehend how the insistence on the 24 hours assist the 1<sup>st</sup> Defendant's case.
62. It also appears that the repudiation of the claim was premised on the version of the 1<sup>st</sup> Defendant being that the manhole was closed. That assertion is also not supported by empirical evidence. Infact, the evidence adduced before court points otherwise. It clearly depicts an open manhole.
63. In the decided case **of Alik Enterprises Vs Punky Mhlongo and another, Civil Case 1983/10** at paragraph 38 **Author J** penned the following dicta;

*“The concept of negligence is that a person is blamed for an attitude or conduct of carelessness, thoughtlessness or imprudence because by giving insufficient attention to his actions he failed to adhere to the standard of care legally required of him. The judicially accepted criterion in establishing whether a person has acted carelessly and thus*

*negligently is the objective standard of a reasonable person, the bonus parterfamilias”.*

64. This then leads me to the question that must be answered in relation to the matter at hand. Should the 1<sup>st</sup> Defendant be blamed for the conduct of carelessness, thoughtlessness or imprudence by giving insufficient attention, in ensuring that its infrastructure (the manhole) that caused injury to the Defendant, was closed at all times? Did the 1<sup>st</sup> Defendant adhere to the standard of care legally required of it in the circumstances?
65. It is common cause that the manhole belongs to the 1<sup>st</sup> Defendant. It is also common cause that the 1<sup>st</sup> Defendant on it's own version, said it periodically maintains it's infrastructure. This it is said as to ensure that any stolen manhole covers are replaced with concrete onus. This gives an impression that the 1<sup>st</sup> Defendant acknowledges that if a manhole is left open, it may be a source of danger to members of the public. The crucial question though, is how often is periodical maintenance? What is meant by periodical inspections? The 1<sup>st</sup> Defendant had an opportunity to give evidence and address the above questions pointedly. But it chose to coin the explanation in the manner that it did. Their responsive plea was described as periodical maintenance. How often is periodical maintenance? That is misty. Is it daily, hourly or weekly?
66. Why is this important? This would have assisted in the analysis and application of the concept of the duty of care to the specific factual circumstances of the 1<sup>st</sup> Defendant. For instance, is it expected of the 1<sup>st</sup> Defendant to immediately replace a manhole cover after it has been stolen within 3 hours, half a day or a day?
67. In my view, it would be unreasonable to expect the 1<sup>st</sup> Defendant to replace a manhole for instance after a few hours, because the replacement covers may have to be transported from the depot or wherever they are stored in site. Those are some of the considerations that the court could have taken into

consideration if sufficient facts had been placed before it pertaining to the periodic inspections.

68. In as much as maybe it is taking it too far to have expected the 1<sup>st</sup> Defendant to replace all the cast iron covers at once, just because they were being stolen. The cost effective nature of that response would be another consideration. According to the evidence of Mr Morris Dlamini, the 1<sup>st</sup> Defendant had a joint team which was responsible for maintaining and monitoring the infrastructure including the manholes. The joint team was formed as a responsive measure to the theft of the cast iron manhole covers. One would have then expected that this joint team had a plan and a process of carrying out the maintenance and monitoring. This is exactly what failed to come out of the evidence of DW1. The intervals on which this monitoring was happening. This would have then assisted the court in gauging whether the turnaround time of the monitoring was proportionate to the risk posed by the theft. A consideration of what befell the Plaintiff in the evening of the 18<sup>th</sup> July 2017, is now apposite.
69. A manhole was left open on a public pavement along Ngwane Street in Manzini. When last did the 1<sup>st</sup> Defendant's employees inspect that manhole? There is a void in the evidence placed by the 1<sup>st</sup> Defendant to answer this question. Mr Morris Dlamini failed to be specific in his evidence, as to when last was this particular manhole inspected before the date of the accident. One would have expected that in an institution of the 1<sup>st</sup> Defendant's magnitude, there would be records of the inspections detailing those that were found open and those that were intact or whatever findings. If that had been done, then those reports would have been retrieved and placed before court to show that probably 6 hours before the accident, the manhole had been covered or open. That information would have enabled the court to appreciate the adequacy and reasonableness of the steps that were taken by the 1<sup>st</sup> Defendant to foresee and guard against the harm that befell the Plaintiff.

70. The court has in hindsight the practicability of replacing the manhole covers within extreme short time frames of them being stolen. For instance, if the accident happened around 8pm. Let's say for arguments sake the 1<sup>st</sup> Defendant had adduced evidence that at 4pm, 4 hours earlier the very same manhole had been inspected and it was found to be covered. It would have been unreasonable to expect the 1<sup>st</sup> Defendant to have covered and replaced the manhole within 4 hours. Maybe it would have been expected to take certain measures to alert unsuspecting members of the public that there is a manhole that was open. Through condoning off that portion of the pavement and putting the appropriate warnings to alert members of the public of the source of dangers would have been another mitigation measure.
71. It is exactly the failure to adduce the detail of this periodical inspections that has led this court to the conclusion that the 1<sup>st</sup> Defendant failed to observe that degree of care, which a reasonable institution of it's calibre would have been expected to observe in the circumstances. Again, I use the term reasonable institution to denote the *diligens parterfamilias*, which simple means the average prudent person.
72. The 1<sup>st</sup> Defendant has failed to show that in the factual circumstances of this matter, this danger was unforeseeable and impossible to guard. On the other hand a consideration must be made of the fact that every man has a right not to be injured in his person or property by the negligence of another. That involves a duty to exercise due and reasonable care. The court is also alive of the reasoning made by **Innes CJ** in the matter of **Cape Town Municipality Vs Paine 1923 AD 207 at page 26** of that judgment where the court commented as follows;

***“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 parterfamilias, the duty to take care is established and it only remains to ascertain whether it has been discharged”.***

73. It is trite law that negligence is a question of fact and must be proved by the party alleging it. It is the Plaintiff's testimony that he fell into a manhole that had not been covered. He has alleged that it was the responsibility of the 1<sup>st</sup> Defendant to ensure that the fire hydrant always had covers.
74. It is the finding and conclusion of this court that in light of the evidence before it, the 1<sup>st</sup> Defendant knew of the existence of the risk associated with the theft of the cast iron covers. As such, it was therefore foreseeable to the 1<sup>st</sup> Defendant that imminent danger would result if the manholes remained uncovered. Especially in light of the rampant theft that was prevailing in the city. It was therefore negligent of the 1<sup>st</sup> Defendant to fail to take reasonable precautions to guard against any danger arising from the manholes remaining open. The copy of the newspaper article which has been admitted as evidence before court, clearly shows an open manhole to which the Plaintiff fell into.
75. My conclusion flows from the lack of evidence showing when had the routine inspection been done. Before the occurrence of the accident. My view, is that there is a real possibility that the manhole in question may not have been inspected for a considerable period of time prior to the accident. If that had happened, Mr Morris Dlamini would have told this court when last was the inspection done and what was the observation of those that inspected it. To tell the court that periodical inspections were done by the joint team without unpacking what periodical is, is insufficient to rebut the Plaintiff's evidence. It is therefore my finding that the general reference to periodical inspections, is not concomitant with the duty of care that is placed on the 1<sup>st</sup> Defendant. It is further my finding that the 1<sup>st</sup> Defendant had the burden of mitigating or even eliminating the risk, especially since it had already been identified. This is risk associated with the theft of the manhole covers. It's response to this risk was therefore not intandem with the degree and extent of the prevalence of the theft.

### **Quantum of damages**

76. In the matter before court the Plaintiff has claimed a total sum of Sixty Three Thousand (**E63 000.00**) Emalangeneni in respect of damages for loss of income, payments for assistance in writing and typing assignments, hospital expenses estimated future medical expenses, loss of amenities and pain and suffering. The Plaintiff argues that he was incapacitated for a period of time and he was therefore hamstrung in executing his daily activities.
77. The Plaintiff has argued that the Defendants have not disputed this claims, both in the pleadings and also in their oral testimony before court. The Plaintiff argues therefore that the Plaintiff's claim in respect of the quantum of damages remained uncontroverted by the Defendants. As such this court ought to grant it as it stands. I disagree with this line of argument, unfortunately I cannot entirely agree with this argument. The onus is on the Plaintiff to prove through empirical evidence that he indeed suffered the quantum of damages he claims. The finding that the 1<sup>st</sup> Defendant was negligent is one thing. It is also another that the Plaintiff incurred the claimed financial loss. He must go further and demonstrate that through the negligent conduct of the 1<sup>st</sup> Defendant the quantum of damages especially in respect of those that are quantifiable, was indeed incurred by him. The Plaintiff's claim for damages was advanced under a number of headings. Loss of income, payments for assistance in assignments and typing, hospital expenses and estimated future medical expenses, loss of amenities of life and pain and suffering.

### **Loss of income**

78. The Plaintiff's claim is E13 500-00 for loss of income. In as much as the Plaintiff was a good witness and I am satisfied that he did not exaggerate the extent of his injuries. However, in so far as the proof for his loss of income is concerned, he failed dismally to adduce proof that he lost this amount. He told the court that he was in the business of selling airtime, which he sold opposite the Galp Filling Station. It is common cause, that the sale of airtime include stocking and re-selling. He could have been more precise in the amount of profits that he makes per month and support it with documented evidence. There are wholesalers of airtime and data being MTN, Eswatini Mobile and Eswatini Post and Telecommunications Corporation, companies

keep records of the airtime and data they sell to their vendors. In the event the Plaintiff needed those record, his supplier could have availed it to them and he could have presented it in court. In the event those services providers were reluctant, there are processes of this court to subpoena witnesses to come to court to give evidence. This type of evidence could have been accurate and more detailed. I am disinclined to thumb suck an award under this heading. How would the court know that what the Plaintiff is claiming is actually what he lost? How can the court just order 1<sup>st</sup> Defendant to pay E13 500-00 based on what? What about if he lost E15 000-00 or he lost E1 500-00 the onus was on the Plaintiff to adduce proof of such damages. He dismally failed and I will accordingly dismiss the claim under this heading.

### **Payment for assistance in typing assignments**

79. The Plaintiff claims E5 000-00 for the assistance he was given whilst he could not use his hand to type his assignments. He told the court that he was studying and as much he struggled to type his assignments in light of the injuries. The court is cognizant of the fact that informal assistance of such a nature may have not been documented. However, the detail as to the person who assisted Plaintiff would have been easily made. That person who gave assistance could have been called to court. Even if he did not produce a receipt, just to give an account to court that he did infact render the service for a fee, would have justified the pecuniary loss. No such evidence was led. As such again Plaintiff failed to prove the damages under this heading. I will accordingly dismiss it as well.

### **Hospital expenses and estimated future medical expenses**

80. Under this heading the Plaintiff claimed E9 500-00. He did furnish records being four receipts as part of his evidence to proof the claim of hospital expenses. The pecuniary loss incurred total to sum of E135-00. There are no any other receipts that are before court for consideration. I am hamstrung to consider any other amount outside what has been proved. The claim in respect of estimated future medical expenses should have been supported by an expert witnesses from the medical profession. Whether as a matter of fact the Plaintiff will be incurring future medical expenses and for how long is

the realm of experts. No such witness was called by the Plaintiff. In the matter of **Musa H. Vilakati Vs Swaziland Government Case No 1858/2009** His Lordship **T.L Dlamini J** at paragraph 56 of his judgment warned the Plaintiff in that matter and made a guidance to future litigators in similar claims that supporting medical documents and evidence of qualified medical practitioner are necessary in a claim of this nature. I cannot agree more. I align myself fully with the reasoning of my brother.

81. In the Musa Vilakati case (supra), no medical documents had been furnished to the court as proof that the Plaintiff had been injured and whether the injury was permanent in nature. In as much as in the matter at hand the Plaintiff has proven successfully that he had been injured and there is documentary evidence to that effect, being the receipts from Raleigh Fitkin Memorial Hospital in Manzini. Also the pictorial evidence depict him having a cast in his arm, tied in a sling, clearly showing that he had been injured. However, there are no medical records showing the extent of his injuries especially that they are long term which would attract future medical expenses as claimed.
82. In the absence of this expert medical testimony, I am not inclined to entertain the balance of the claim under this heading I will only allow the actual loss he has proved in the amount of E135-00 (One hundred and thirty five Emalangeni only).

### **Loss of amenities of life**

83. The Plaintiff has claimed E15 000-00 under this heading. His evidence is that during his period of constrained mobility, he could not enjoy the amenities of life. He said he was a sports person and having been injured in his arm, he could not participate to the full extent of his sporting activities. I will accordingly allow the amount claimed of E15 000-00 Emalangeni.



## **Pain and suffering**

84. It is common cause that if he was injured to the extent that he fractured his arm and had to be plastered, he must have suffered considerable pain. The court will allow the amount of E20 000-00 as claimed.

## **CONCLUSION**

85. On a balance of probabilities, I am satisfied that the Plaintiff has discharged the onus of proving the 1<sup>st</sup> Defendants negligence. In the circumstances I find the Defendants to be jointly liable, the one paying the other to absolved.
86. The Plaintiff in his prayers has claimed for his costs at a punitive scale. The motivation for the higher scale for costs has not been made. Both in the pleadings and in the evidence he adduced before court. I will therefore not waste the courts time to consider this as there is absolutely no factual justification why the costs should be at a punitive scale. I will award the costs at an ordinary scale.
87. In the result, the damages are awarded as follows;
- 87.1 Loss of amenities E15 000-00 (Fifteen Thousand Emalangeni).
  - 87.2 Pain and suffering E20 000-00 (Twenty Thousand Emalangeni).
  - 87.3 Hospital expenses E135-00 (One Hundred and Thirty Five Emalangeni)

**TOTAL E35 135-00 (Thirty Five Thousand One Hundred and Thirty Five Emalangen).**

87.3 Interest at the rate of 9% per annum from the date of summons

87.4 Cost of suit at an ordinary scale.

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**BW MAGAGULA**

**JUDGE OF THE HIGH COURT OF ESWATINI**

For the Plaintiff	Miss Lindiwe Ngcamphalala Khumalo Ngcamphalala
For the Defendants	Miss Nkonyane Magagula & Hlophe Attorneys