IN THE HIGH COURT OF SOUTH AFRICA

(SOUTH EASTERN CAPE LOCAL DIVISION)

CASE NO: 2696/01

IN THE MATTER BETWEEN:

LINDA ENID CUTTING **Plaintiff**

AND

THE NELSON MANDELA
METROPOLITAN MUNICIPALITY **Defendant**

ACTION FOR DAMAGES – PEDESTRIAN INJURED IN CONSEQUENCE OF STEPPING INTO AN UNCOVERED FIRE HYDRANT HOLE IN PAVEMENT WITHIN MUNICIPAL AREA – LIABILITY OF LOCAL AUTHORITY

JUDGMENT

KROON J:

A. INTRODUCTION

[1] Gibaud Street in Sydenham, Port Elizabeth passes through a commercial area of the city. There are factories on either side of the street. In other streets in the area there are shops and residential properties. Alongside Gibaud Street, on the western

side, is a relatively wide pavement which consists of two grass sections divided by a concrete section. On the grass section furthest from the street, but close to the concrete section there is a fire hydrant hole (inaccurately referred to in the pleadings of both parties as a drain). Its depth is approximately 600mm. The edge of the hole is

fitted with a metal frame that provides support for a removable cover. The dimensions of the hole inside the metal surround are 260mm by 340mm.

[2] As at 13 November 1999 the cover over the hole was missing.

[3] On the morning of the date referred to, a Saturday, the plaintiff, then 44 years of age, proceeded to Gibaud Street in a motor car driven by her husband. Their purpose was to meet her sister-in-law who was also to arrive in Gibaud Street in a motor vehicle. The plaintiff's husband, using a driveway giving access to factory premises, drove his vehicle onto the pavement (the plaintiff explained that they did not wish their vehicle to be an obstruction to other vehicular traffic in the street) and parked it with the left hand side opposite the hole. The motor vehicle in which the sister-in-law arrived was also parked on the pavement a distance to the south of the plaintiff's vehicle. The plaintiff alighted from her vehicle and proceeded to the other vehicle to speak to her sister-in-law. Because it was decided that the sister-in-law would accompany the plaintiff, the two of them returned to the latter's vehicle. As the plaintiff stretched out her hand to open the door of the vehicle her left foot tramped into the hole and she fell heavily.

[4] The plaintiff instituted action against the defendant, the local authority in whose area of jurisdiction Gibaud Street is situate, for the recovery of damages arising from the injuries sustained by her in the fall. It was her allegation that the fall was

caused by the negligence of one or more of the servants of the defendant, acting in the course and within the scope of his/her/their employment with the defendant. The defendant resists the claim.

[5] For the purposes of the present proceedings the issues were separated and I have been called upon to determine only the issue whether the defendant is liable for any damage that the plaintiff might have sustained.

A CLOSER DESCRIPTION OF THE SCENE:

[6] The evidence of the plaintiff on this score, read with that of her sister-in-law, Mrs Williams (neither of which was the subject of any serious challenge) proceeded as follows: The grassed portions of the pavement were covered with grass, of some length, as also weeds with flowers. There was also much rubbish in the form of papers including newspapers. The plaintiff was unable to say whether any paper was lying over the hole at the time she tramped into it. What she did say was that it was her impression that her left foot broke through vegetation in finding its way into the hole. Mrs Williams stated that after the incident she looked at the hole and observed that there was a considerable quantity of vegetation that was hanging down into the hole from all sides. With reference to exhibit "A2", one of a series of photographs taken of the scene on a date in February 2000, which depicted some vegetation hanging over the metal frame into the hole, but in which portions of the frame were visible, Mrs Williams said that on the day in question the vegetation was considerably more in extent and no portion of the frame was visible; as it was put by her, "die gat moes toegegroei gewees het van die gras en onkruid". Observations of the hole made by the plaintiff a week later confirmed those of Mrs Williams. The quantity of the grass and weeds was such that it must have taken a matter of months for same to have grown over and closed the hole.

[7] The photographs referred to depict that the grass and other vegetation on the

pavement (save for that immediately next to the wall of the factory premises) had recently been cut, with the result that the hole itself, still then without a cover, was relatively readily discernible. Evidence tendered on behalf of the defendant was to the effect that the defendant did not attend to the cutting of the grass and vegetation on the pavement, but left that task to the occupiers of the properties bordering on the pavement.

[8] During the hearing an inspection-in-loco of the scene was held, viz on 2 August 2002. At that stage the hole was covered with a concrete slab (bounded by a metal band) which fitted snugly into the metal frame of the hole. It has an indentation into which an instrument can be fitted to enable the removal of the cover. (The evidence tendered on behalf of the defendant revealed that on receipt of the plaintiff's demand in the matter, made shortly after the photographs were taken, the defendant attended to the placing of the cover over the hole). Further observations included, *inter alia*, the following (which features are also depicted on the photographs): On the wall of the factory premises, at approximately head height, and opposite the fire hydrant hole, is a yellow sign with black lettering reading:

> "NOTICE: WATER METER
> ANY VEHICLE PARKED
> OVER MANHOLE WILL
> BE TOWED AWAY"

Below the sign is a yellow painted cement pillar on which, in red paint, are the letters "FH" (the letters referring to a fire hydrant). The manhole referred to is situate approximately midway between the pillar and the fire hydrant hole. It has a cast iron cover approximately 600mm by 600mm on which is painted a yellow cross. The hole beneath houses a water valve. There was no other sign or indication advertising the presence of the fire hydrant hole. On the contrary, a pedestrian observing the sign and the pillar could, as counsel for the defendant conceded, reasonably assume that they

related to the manhole and would not be alerted that there was a further hole in the area covered by the vegetation.

THE OBLIGATION ON THE DEFENDANT:

[9] In its plea the defendant admitted the following:

> (1) that it constructed the "drains" in Gibaud Street, including the fire hydrant hole;
> (2) that it was under a duty to take all reasonable steps to ensure that such drains were properly maintained;
> (3) that certain drains within its area of jurisdiction may constitute a hazard, if left uncovered;
> (4) that generally it had a duty to ensure that all reasonable steps were taken to carry out inspections of drains in the Port Elizabeth municipal area (to which the rider was added "due regard being had to the available resources").

These admissions were properly made in the light of the authorities referred to below.

[10] The essential question is whether the defendant negligently failed to take such steps as were reasonably expected of it to avert the hazard constituted by the uncovered fire hydrant hole.

[11] The principles applicable are, with respect, neatly summed up in the recent judgment of the Supreme Court of Appeal in *Municipality of Port Elizabeth v Meikle* (case no. 532/2000, unreported) as follows (per *Nugent* JA):

> "[6] The liability of a local authority for omitting to repair or maintain streets and pavements in the exercise of its permissive statutory powers was revisited by this Court in

Cape Town Municipality v Bakkerud 2000 (3) SA 1049 (SCA). A local authority has neither a general duty to maintain and repair, nor immunity from liability if it omits to do so. Consonant with principles relating to liability for omissions generally, as they have been developed in cases like *Regal v African Superslate* (Pty) Ltd 1963 (1) SA 102 (AD), *Minister of Forestry v Quathlamba (Pty) Ltd* 1973 (3) SA 69 (AD) and *Minister van Polisie v Ewels* 1975 (3) SA 590 (AD), a local authority has a duty to act only where the 'legal convictions of the community' demand the recognition of such a duty. After affirming those principles in *Bakkerud*'s case Marais JA went on to say the following at 1059I – 1060B:

> "In my view, it has to be recognised that in applying the test of what the legal convictions of the community demand and reaching a particular conclusion, the Courts are not laying down principles of law intended to be generally applicable. They are making value judgments *ad hoc*."

[7] Ultimately, the enquiry is whether the local authority can reasonably be expected to have acted, and factors that will play a role in that enquiry were identified as follows in *Administrateur, Transvaal v Van der Merwe* 1994 (4) SA 347 (A) at 361H-362B:

> "Ten einde vas te stel of 'n positiewe handeling of late sodanig is dat dit as onregmatig aangemerk kan word, moet gevolglik onder andere die onderskeie belange van die partye, die verhouding waarin hulle tot mekaar staan en die maatskaplike gevolge van die oplegging van aanspreeklikheid in the betrokke soort gevalle, versigtig teen mekaar opgeweeg word. Faktore wat 'n belangrike rol speel in the opwegingsproses is, onder andere, die waarskynlike of moontlike omvang van nadeel vir andere; die graad van risiko van intrede van sodanige nadeel; die belange wat die verweerder en die gemeenskap of beide gehad het in die betrokke dadigheid of late, of daar redelik doenlik maatreëls vir die verweerder beskikbaar was om die nadeel te vermy; wat die kanse was dat gemelde maatreëls suksesvol sou wees; en of die koste verbonde aan die neem van sodanige maatreëls redelikerwys proporsioneel sou wees tot die skade wat die eiser kon lei".

It should also be recorded that the judgment contained the further statement (in para. [9]) that a case must be decided on its own particular facts and in the light of the evidence that is presented.

THE EVIDENCE:

[12] That the fire hydrant hole *sans* cover constituted a danger to pedestrians, who might sustain injury, indeed serious injury, should they step into it, was not in dispute.

[13] It was also not in dispute that it was reasonably foreseeable that pedestrians would frequent the area and be exposed to the danger constituted by the hole, although it can be accepted that the volume of pedestrian traffic to be expected in the area was not particularly large.

[14] The evidence tendered on behalf of the defendant (*per* the only witness called on its behalf, Mr Flanagan, the assistant divisional head of the defendant's roads and stormwater division) reflected the following:

> (1) The functions of his division embraced, *inter alia*, responsibility for looking after the conditions of roads within the municipal area, including the pavements and verges;
>
> (2) Associated divisions included those responsible for water, sewage, electrical and gas reticulation, and the defendant's fire department.
>
> (3) The various divisions made use of manholes and other types of holes, including holes situate on pavements, over which covers constructed of metal were placed; fire hydrant holes were closed with cast iron covers;
>
> (4) Systematic theft of metal covers over the various types of holes has been a problem, particularly over the last few years (the reason being that same can be disposed of for value to scrap metal dealers); there was, however, limited precedent in respect of the theft of the smaller cast iron covers over fire hydrant holes;
>
> (5) The missing cast iron cover over the fire hydrant hole in question, (probably stolen), was replaced (as recorded earlier, in February 2000 after receipt of the plaintiff's demand) with a concrete cover with a metal band around its edges as this would have less attraction for thieves;
>
> (6) A programme has been adopted in principle in terms of which cast iron covers over fire hydrant holes will, as and when they go missing or are

damaged, and depending on the availability of funds, be replaced with metal banded concrete covers; a plastic cover (of still lesser values to thieves) is not feasible as they would require to be locked and are in any event liable to jam, thereby hampering access in an emergency; metal banded concrete covers cannot be hinged (also liable to jam) or locked for the same reason; the cost of fixing hinges and locks to the various types of holes in the city (including fire hydrant holes) would in any event be "astronomical"; Flanagan's "guesstimate" of the number of fire hydrant holes in the city was the figure of 30 000; although it was not within his knowledge he would estimate the cost of manufacture of a metal banded concrete cover to be between R50 and R60, to which should be added the cost of placing the covers *in situ* (as against which the sale of the existing metal covers would yield some funds); the total sum involved in replacing all the metal covers over fire hydrant holes in the city would constitute a relatively small item in the city's total budget; no study had in

fact been done of what such a programme would cost nor a feasibility study in respect of replacing the metal covers over a period of time; there was no reason why there could not be a programme for a metal cover over a fire hydrant hole to be replaced when the yearly inspection of that hole, referred to below, took place (an answer he sought to withdraw during reexamination by a reference to alleged financial restraints, an attempt that was unconvincing in the light of his earlier evidence, detailed above);

(7) Since 1993 the payment of rates (the source of revenue for attending to what was referred to as "street furniture", including holes used for various purposes) has fallen increasingly into arrears, and at present the arrears stand at some R800 million;

(8) With the merger of the Port Elizabeth municipality with adjacent municipalities to form the defendant metropole the extent of the maintenance required for street furniture has increased;

(9) Since 1994 there has been a moratorium on the recruitment of new staff;

(10) The defendant relies on municipal staff and members of the public to

report damaged or missing street furniture (but the public is not a ready source of such information);

(11) For the purposes of the functions of the roads and stormwater division, the city is divided into three sections, each with teams of employees and two superintendents in charge; included in their duties is observation and reporting of damaged or missing street furniture; on receipt of a report a complaint form is filled in by a staff member and the complaint is attended to; the superintendents use vehicles to traverse the roads in their respective divisions and it is hoped that each road is so travelled once every six weeks, without, however, the superintendent being expected to alight from his vehicle (the extent of the roads rendering this time-consuming exercise not feasible) the result of which is that the superintendent might miss the fact that something is amiss with a fire hydrant hole (as it was put by Flanagan: hopefully a superintendent would in his peripheral vision see that a cover is missing from a fire hydrant hole, but then it would have to be visible and not overgrown with vegetation as the one *in casu*; if he drove along a street and

saw that the street was clean and nothing apparently wrong with a stormwater drain, he would simply drive on);

(12) A street such as Gibaud Street has a street sweeper assigned to it, to sweep the street (and, presumably, the verges) on a daily basis, excluding Saturdays and Sundays; he also has to see that stormwater drains are not clogged up; if he observes anything untoward, he is expected to report same to a superintendent (but problems arise from the fact that some of the sweepers are not literate and the condition of fire hydrant holes are not embraced in their field of responsibility; it was in fact admitted that unless the sweeper had a need to traverse a particular section of the pavement - and an absence of items there which required to be swept up would remove such a need - he could readily fail to observe anything untoward with a fire hydrant hole in that section);

(13) The fire department of the defendant, in whose specific province the maintenance of fire hydrant holes falls, has a system in place in terms of

which the fire hydrant holes throughout the city are inspected. However, while this system is operated throughout the year, the result in practice is that a particular fire hydrant hole is only inspected once a year and only then is necessary attention given to it. Thus, e.g., the defendant's records reveal that the fire hydrant hole in question was inspected in July of each year.

(14) The water, electricity and sewage departments of the defendant also have teams of employees led by superintendents assigned to various sections of the city, and, again, it is expected that if anything untoward with a fire hydrant hole is noted, it will be reported. These departments do not, however, have, as it was put, concentrated programmes of maintenance operations in that problems with water, electricity or sewage reticulation are in practice reported expeditiously and are then attended to.

ASSESSMENT:

[15] The conclusion that flows from the evidence detailed above is that there is a real possibility that a fire hydrant hole such as the one in question in Gibaud street

may not be inspected, or even any observation made of it, for substantial periods of time, stretching possibly over a number of months. Indeed, the evidence of the plaintiff and Mrs Williams as to the condition of the vegetation surrounding and over the hole confirms that that is what in fact occurred. In this regard I am not impressed by Flanagan's postulation that the cover could have been *in situ*, that the vegetation could have grown over the cover and that, possibly a day before the incident, the cover could have been removed with the vegetation falling back into place so as to cover the aperture. And even after the incident, and notwithstanding that the plaintiff's foot and leg had tramped a hole in the vegetation and notwithstanding that, as the photographs depict, the area had at same stage been mowed, no report that the cover was missing was received by the defendant, a fact confirmed by Flanagan; therefore, either the fact of the missing cover was not observed by any of the defendant's employees or, if observed, it was not reported.

[16] In terms of the authorities cited earlier, it was incumbent on the defendant, by reason of the features referred to in paras. [12] and above [13], and as was in fact admitted by the defendant (para. [9] above), to take reasonable steps to avert the danger that an open fire hydrant hole should be a potential cause of serious injury to a pedestrian. Notwithstanding that the theft of the metal covers of such holes has only isolated precedent, that the pedestrian traffic in Gibaud Street is not all that voluminous and the financial constraints on the defendant's operations referred to by Flanagan (as against which may be added the factor, which is a distinguishing feature between the present case and that of *Meikle*, that the fire hydrant hole, overgrown as it was by grass and vegetation, was not discernible and not to be expected by a pedestrian traversing the area, and therefore the risk of harm eventuating was not relatively slight), I am constrained to conclude that the steps taken by the defendant to avert the danger (which embraced only one inspection annually that was certain to reveal that a cover was missing, and a system where metal covers, attractive to thieves, were replaced by other, less attractive, covers, only as and when they were reported as missing, if that report in fact occurred) did not comply with the prescription referred to above. The defendant could, and should, have put a system in place where effective observation of a fire hydrant hole was a more regular occurrence. By way of example, it may be mentioned that, as was canvassed during

the hearing, it could have been made part of the street sweeper's duty to check the condition of the fire hydrant holes on his beat and in fact to clean the immediately surrounding area of the holes, a proposal to which, Flanagan admitted, there would have been no obstacle. Such a system, apparently easily implemented, would have gone a long way to ensure that uncovered fire hydrant holes would not constitute a potential danger to pedestrians. I am also not satisfied that the defendant’s financial constraints were such as to preclude it from instituting a more progressive programme of replacing the metal covers. On the other hand, if the dangerous condition of the hole in question had been observed by an employee or employees of the defendant, but had not been reported, other causative negligence on the part of such employee(s) would have been present.

[17] I find therefore that the plaintiff has established her cause of action against the defendant.

CONTRIBUTORY NEGLIGENCE:

[18] In its amended plea the defendant contended that the plaintiff was partly to blame for the incident on the basis that her own negligence contributed to the happening thereof. The argument of the defendant's counsel in support of the contention was but faint. Suffice it to record that the defendant failed to discharge the onus resting on it in this regard.

ORDER:

[19] The following order will accordingly issue:

(1) It is declared that the defendant is liable to compensate the plaintiff in respect of the whole of the damage suffered by her arising out of the injuries sustained by her in the incident which is the subject of these proceedings.

(2) The costs of the proceedings to date will be reserved.

(3) The remainder of the proceedings are postponed to a date to be arranged.

F. KROON
Judge of the High Court