



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case number: 4204/2019

In the action between:

MAGDALENA MARIA SCHAEFER

Plaintiff

and

THE CITY OF CAPE TOWN

Defendant

Before: The Hon. Mr Acting Justice Montzinger

Hearing: 21 and 22 August and 24 September 2024

Judgment delivered electronically: 17 February 2025

JUDGMENT

Montzinger AJ

Summary Introduction

1. The plaintiff instituted action against the City of Cape Town (the “City”) claiming delictual damages. The plaintiff’s particulars of claim alleged that on 27 October

2017 she sustained injuries to her knee due to a fall caused by her tripping on an uneven surface of the sidewalk along Victoria Road in Camps Bay, Cape Town.

2. It was further alleged that since the sidewalk was uneven on its surface it was unsafe and posed a danger to pedestrians and that the City, as the municipality, was in control of the sidewalk in Victoria Road and therefore responsible for the proper construction, maintenance, repair and upkeep thereof. The plaintiff also alleged that the City, including its employees and officials, knew or should have known that the uneven surface of the sidewalk could cause pedestrians to trip, fall and injure themselves.
3. Furthermore, in support of holding the City delictually liable it was pleaded that the City owed the plaintiff, as a member of the public, a legal duty to take reasonable steps to ensure the surface of the sidewalk was safe and free of hazards. In addition it was pleaded that since the sidewalk was hazardous the City was required to erect warning signs to alert pedestrians, like the plaintiff, of the hazard and also to implement measures to prevent trips and falls on the sidewalk.
4. The City's defence on the pleadings was to dispute that the incident in fact occurred and that its employees acted negligently or within the scope of their employment. The existence of a legal duty toward the plaintiff was also denied. The City alternatively pleaded that if such a duty existed, it had not been negligently breached. Furthermore, while the City did not dispute its general responsibility to ensure the safety of sidewalks or to erect warnings about potential hazards it denied any negligence in the specific circumstances of the case.
5. Moreover, the City pleaded no knowledge by its employees or officials of the condition of the sidewalk or that they could reasonably have been aware of any defect or an uneven surface on the sidewalk at the time the incident occurred. The City also maintained that its employees took reasonable steps, within the City's means, to maintain the sidewalk and to make sure it was safe for pedestrians to use. In the alternative the City pleaded contributory negligence,

alleging that the plaintiff failed to act as a reasonable pedestrian by not keeping a proper lookout, neglecting to take care of her own safety, and failing to avoid the incident despite being able to do so and that any damages should be apportioned between the parties.

6. By agreement, the issues of liability and damages were separated, and the trial proceeded before me only on the issue of the City's liability.
7. During the trial the parties relied on their respective trial bundles, that were marked as exhibits. The plaintiff's case consisted of her own testimony and that of her friend, Ms. Daleen Botha, who was present when the incident occurred and also took photographs immediately after the incident. These photographs were also marked as exhibits. The City in turn called two witnesses: Mr. Stephen Floris, a senior professional officer in civil engineering responsible for infrastructure within the road reserve, including pavements, and Mr. Branden Abrahams, Head of Roads and Stormwater for District 5, that includes Victoria Road.

The incident

8. While the City initially denied that the incident happened, the evidence overwhelmingly supported the plaintiff's account. The oral, documentary and photographic evidence presented during the trial left no room for dispute that the events that caused the plaintiff's injury, occurred. Further, that on the probabilities it occurred in the manner the plaintiff described. At the closure of the plaintiff's case the City could no longer persist with its denial of the incident. In light thereof, it is unnecessary to undertake a detailed analysis of the evidence to determine whether the incident occurred. A summary of what the evidence established will suffice.
9. On the day in question, the plaintiff collected her friend, Ms. Daleen Botha, from Cape Town International Airport. Ms. Botha had travelled to Cape Town from Pretoria, Gauteng to assist the plaintiff in preparing for her 50th birthday celebration that was due to take place the following day, 28 October 2017.

10. As it was Ms. Botha's first visit to Cape Town, the plaintiff decided to give her a brief tour of the city by taking a Red Bus tour. This tour is a well-known Cape Town City tourist attraction that allows tourists to experience the City by making use of Hop on-Hopp off loops. They parked the plaintiff's car at the V&A Waterfront and embarked on the tour that included stops at the Central Business District, Table Mountain, and Camps Bay.
11. Around 17:30 the plaintiff and Ms Botha disembarked at Victoria Road in Camps Bay. They enjoyed a short stroll along the beach, took photographs, and visited a nearby restaurant for a drink with the intention to catch the last Red Bus back to the V&A Waterfront. The last bus was scheduled to depart at approximately 18:00 from Victoria Road. They therefore had about 30 minutes to complete their activities.
12. As mentioned, at the restaurant the plaintiff and Ms Botha both consumed a single alcoholic drink. When they were done, they settled the bill and were descending the stairs from the restaurant almost directly opposite the pedestrian crossing when they saw the Red Bus, that they were about to take, driving past them in the direction of the Victoria Street bus stop. As this was the last bus to make it back to their car that was parked at the V&A Waterfront, they accelerated their walk, crossed the pedestrian crossing and continued to walk toward the Red Bus stop. Although walking briskly, they did not break into a run.
13. After having crossed the pedestrian crossing and approximately some 30 metres in the direction of the Red Bus stop, as they walked along the sidewalk, the plaintiff's left foot caught on the raised edge of a paving brick, causing her to trip, lose her balance, and fall forward onto her hands and left knee. The plaintiff's left knee hit the corner of another raised paving brick. The plaintiff testified that she knew immediately that she had been seriously injured and that she had possibly broken her kneecap because afterwards she could push her finger right through it. The pictures that were taken of her knee immediately after the fall and also during and after surgery left no doubt that the plaintiff was seriously injured as a result of the fall. The plaintiff subsequently learned that the injury caused her to

sustain a comminuted *patella* fracture to her left knee. This meant the *patella* was shattered into three or more pieces. Ms. Botha corroborated the plaintiff's account of the incident.

14. The plaintiff described herself as a prudent and cautious pedestrian. As a resident of Stellenbosch she frequently walked and exercised, by running on pavements in that town that had exposed roots and broken paving. She was therefore accustomed to identifying and avoiding hazards on sidewalks. She testified that she had no reason to expect the sidewalk along Victoria Road to be uneven or dangerous.
15. Having found that the plaintiff's evidence had established that the incident had in fact occurred in the manner as testified by the plaintiff, the next step is to determine whether the plaintiff has established the other requirements of a delict. In doing so I will first provide a summary of the law applicable to a delictual claim, and the legal position with regards to a local municipality's duty to repair roads and sidewalks.

The Law: Establishing delictual liability

16. The elements a plaintiff must establish, on a balance of probabilities, to hold a defendant liable for delictual damages are trite. Our law recognises five elements and if a plaintiff fails to establish one of these the claim cannot succeed¹.
17. The five elements a plaintiff, seeking to succeed with a claim in delict must establish² are: (1) the conduct (either act or *omission*); (2) wrongfulness; (3) fault (typically negligence); (4) causation; and (5) that harm was suffered. Without the convergence of all these elements delictual liability will not ensue³. I will briefly expand on each of these requirements without providing an exhaustive analysis.

¹ *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA)

² *MTO Forestry (Pty) Ltd v Swart* NO 2017 (5) SA 76 (SCA) [12].

³ F D J Brand 'Aspects of wrongfulness: A series of lectures' (2014) 25 *Stellenbosch LR* 451 at 455; *Ibid* at 451

18. First, conduct can take the form of a *commission*, e.g. where the defendant actively did something like starting a fire or an *omission*⁴, e.g. the failure to do something like the failure to exercise proper control over a fire⁵. An *omission* can also be committed where the defendant was under a legal duty, by virtue of its ownership or control of the property to take preventative action but failed to do so⁶.
19. Second, the wrongfulness enquiry depends on considerations of legal and public policy and focuses on *'the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability'*⁷. Wrongfulness typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirable or overly burdensome to impose liability⁸. In this particular instance the legal position is that a negligent *omission*, as in this case, is only wrongful if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm⁹.
20. On how a court should consider the issue of wrongfulness Schippers J in *Kruger v MEC*¹⁰, after having considered earlier judgments on the issue, concluded that when a court considers the issue of wrongfulness, the question is always whether the defendant ought reasonably and practically to have prevented harm to the plaintiff¹¹. Schippers J also emphasised that in every case a court must consider and balance *inter alia* the following factors: the foreseeability and possible extent of harm; the degree of risk that the harm will materialise; constitutional obligations; the breach of a statutory duty; the interests of the defendant and the community; who has control over the situation; the availability of practical preventative measures and their prospects of success; whether the

⁴ *Steenberg v De Kaap Timber (Pty) Ltd* 1992 (2) SA 169 (A)

⁵ *Simon's Town Municipality v Dews and Another* [1992] ZASCA 165; 1993 (1) SA 191 (A) 194C-E

⁶ *Minister of Forestry v Quathlamba (Pty) Ltd* 1973 (3) SA 69 (A)

⁷ *Loureiro & others v Invula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC) para 53;

⁸ *Country Cloud Trading CC v MEC, Department of Infrastructure Development* [2014] ZACC 28; 2015 (1) SA 1 (CC) paras 20-21.

⁹ *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 12

¹⁰ *Kruger v MEC, Transport & Public Works for the Western Cape and Another* (10067/2011) [2015] ZAWCHC 158 (29 October 2015) ("*Kruger v MEC*")

¹¹ Referring to: *Administrateur, Transvaal v Van Der Merwe* [1994] ZASCA 83; 1994 (4) SA 347 (A) at 361G-H; *Carmichele v Minister of Safety and Security and Another* [2000] ZASCA 149; 2001 (1) SA 489 (SCA) para 7

cost of preventing the harm is reasonably proportional to the harm; and whether or not there are other practical and effective remedies available¹².

21. Third, the issue of fault (negligence). As paraphrased in *Butise*¹³ this element of delictual liability normally resolves itself by embarking on a threefold enquiry. The first is whether the harm was reasonably foreseeable. The second is whether the *diligens paterfamilias* would have taken reasonable steps to guard against such occurrence. The third is whether the *diligens paterfamilias* failed to take those steps. The answer to the second enquiry is frequently expressed in terms of a legal duty¹⁴. Furthermore, in respect of the element of negligence a plaintiff must also establish that the negligent conduct was such that the law recognises it as wrongful¹⁵.

22. Fourth, there is causation. This requires a consideration of two further enquiries. First, factual causation: the “but-for” test that express itself in the form of a question would the harm have occurred “but for” the municipality’s omission? If, for instance in the context of this matter, the sidewalk was in disrepair for a long period and no warning signs were present, it may be shown that had there been a repair or warning, the plaintiff would not have been injured. Legal causation is concerned with the consideration whether, in law, the municipality’s negligence is linked closely enough to the harm suffered¹⁶.

23. Fifth, is harm or damages that requires the plaintiff to prove that personal injuries were suffered and this related into losses in form of example medical expenses, loss of earning capacity, or general damages for pain and suffering.

¹² *Kruger v MEC* par 43; Schipper J relied on the academic writings of: Van der Walt and Midgley *Principles of Delict* (3rd ed 2005) 85 and the authorities they relied on to compile the factors to be considered.

¹³ *Butise v City of Johannesburg and Others* 2011 (6) SA 196 (GSJ) (“*Butise*”) par 11

¹⁴ A restatement of what was articulated in *Kruger v Coetzee* 1966 (2) SA 428 (A) and 430E-G

¹⁵ *Trustees, Two Oceans Aquarium Trust v Kantey and Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) para 10; *Loureiro and Others v Invula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) para 54. Also: *Kruger v MEC, Transport & Public Works for the Western Cape and Another* (10067/2011) [2015] ZAWCHC 158 (29 October 2015) par 38 (“*Kruger v MEC*”)

¹⁶ *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700 E-I; Joubert et al (eds) *The Law of South Africa* (2nd ed 2005) Vol 8 Part 1 p 234 para 129.

24. A significant amount of case law suggest that I am not bound by any logical progression to consider the elements and a court is at liberty to address any element out of sequence if that element (once found wanting) is dispositive of the dispute. Hence, there is no absolute requirement that the court strictly move from conduct, to wrongfulness, to fault, etc. The court may determine an “easier” or “obvious” element first. The essential point is that all elements must be satisfied to grant the plaintiff relief. If any single element is not established, that ends the inquiry.
25. Considering the context of this case I will briefly expand on a municipality’s duty to repair roads and sidewalks.

A Municipality’s duty to repair roads and sidewalks

26. The case law¹⁷ confirms that there was a time that a doctrine of immunity was accepted in our law that municipalities were not liable for mere omissions on their part to construct, maintain or repair roads and streets, unless they have introduced a new source of danger into the roadway concerned¹⁸. However, such doctrine has been abolished in various judgments and the position now is that the same principles of the common law of delict apply to municipalities as apply to individuals¹⁹.
27. Therefore, the legal position now is, as confirmed in judgments like *Meikle*²⁰, that regarding a local municipality’s duty to maintain and repair roads or sidewalks that a local authority has no general duty to maintain and repair these, nor does it have immunity from liability if it fails to do so. In respect of a municipality’s duty to warn of defects in a pavement or sidewalk our courts have also persistently recognised that a municipality, as a local authority tasked with managing public

¹⁷ *Cape Town Municipality v Butters* 1996 (1) SA 473 at 477 B - E

¹⁸ See for example: *Moulang v Port Elizabeth Municipality* 1958 (2) SA 518 (A)

¹⁹ See decisions such as: *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 596H-597C, *Fourie v Munisipaliteit van Malmesbury* 1983 (2) SA 748 (C) at 753 G-H, *Van der Merwe Burger v Munisipaliteit van Warrenton* 1987 (1) SA 899 (NC) at 906J-908E and *Rabie v Kimberley Munisipaliteit and an Ander* 1991 (4) SA 243 (NC) at 258H

²⁰ *Municipality of the City of PE v Meikle* [2002] JOL 9525 (A) (“*Meikle*”)

roads and sidewalks, generally bears a legal duty to ensure that infrastructure under its does not pose an unreasonable risk of harm to pedestrians²¹.

28. Still, liability in delict is not automatic as it must be considered on a case-by-case basis, and a plaintiff always attracts the onus, on the probabilities, to establish all the elements of a delictual claim²².

Conclusion on the law

29. Having regard to the law the plaintiff must prove on a balance of probabilities that there was a defect in the sidewalk of Victoria Street and that it was the specific nature of the defect caused her fall and injury. The plaintiff must also prove that the City was responsible for that stretch of sidewalk and either knew or should reasonably have known of the hazard. In respect of wrongfulness and negligence and applying *Kruger v Coetzee* the plaintiff must establish the answer to the question: Would a reasonable municipality, like the City, have foreseen the risk of harm and taken steps to avert it? Lastly, since I'm not concerned with the damages inquiry, the plaintiff must establish factual causation by providing evidence that *but for* the municipality's failure to fix or warn of the defect, she would not have been injured and that in respect of legal causation that the type of harm must be within the realm of what is reasonably foreseeable or differently stated that the *omission* was closely linked to the injury.

Evaluation of the law and the evidence

30. Having considered the evidence, I am satisfied that the plaintiff established, on a balance of probabilities, that the incident occurred in the manner she described. Her testimony, corroborated by that of Ms. Botha, presented a coherent and credible account of the events leading to her fall. I am also satisfied that the injury to the plaintiff's knee was directly caused by the incident as described.

²¹ *Mouton v Municipal Council of Beaufort West* 1977 (4) SA 589 (C) ("*Mouton*"); *Vergottini v City Council of Cape Town* 1983 (1) SA 287 (C) ("*Vergottini*"); and *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) ("*Bakkerud*")

²² *The National Employers' General Insurance v Jagers* 1984 (4) SA 437 (ECD) at 440D- 441A

Accordingly, the plaintiff has discharged the burden of proving that she fell and that her injury resulted from the fall on the sidewalk in Victoria street.

31. Mr Eia, who appeared for the plaintiff and Mr de Wet who appeared for the City agreed that up to this point that the element of conduct in the form of an *omission* has been established. Although there also seem to be agreement that causation was not in issue, I will not determine the element of causation having regard to my conclusion on the elements of wrongfulness and negligence. These two elements are where the parties significantly depart from each other.

Wrongfulness

32. To establish this element the plaintiff relied mostly on case law. Although there was some attempt to challenge the City's witnesses to extract evidence to support the plaintiff's case, it did not yield the desired result. In fact, Mr Eia's heads of argument contain mostly an exposition on the law and very little references to evidence lead at the trial that established this element. Strong reliance was placed on jurisprudence suggesting that municipalities, in control of sidewalks, owe a legal duty²³ to keep them safe or to warn pedestrians about potential hazards. As I have stated, the legal position is now well established on that issue.
33. The plaintiff did try to rely on a conclusion that pedestrians in a busy tourist area like Victoria Street, Camps Bay justifiably expect the sidewalk to be in a reasonably safe condition and that the City's failure to remove or warn of the protruding brick is wrongful in light of its statutory and common-law obligations.
34. Having regard to the legal position in cases of *omission*, as the case before me, liability arises only if the municipality has a legal duty to act positively to prevent the harm. This is a public-policy determination aimed at preventing "limitless liability."

²³ The word 'duty of care' was used in the heads of argument on behalf of the plaintiff.

35. I will now do an analysis of wrongfulness under the framework described by Schippers J in *Kruger v MEC* having regards to the evidence in this matter.

35.1 I am satisfied that the evidence showed that the protruding brick or bricks were minor and did not appear to have posed a significant or unusual threat (unlike, for example, an open manhole or large pothole). There was no evidence that the City was informed or otherwise on notice of the defect. A sidewalk defect that had not been previously reported, and that has not resulted in other incidents, suggests the risk of serious harm was relatively low. The plaintiff's own account indicates that this was a single instance of harm occurring after protruding paver caught her foot while walking briskly; no pattern of incidents or complaints suggests a chronic danger. Although some minor harm might be "foreseeable" in the abstract, since any sidewalk irregularity can cause a stumble, there is no indication that a significant or *serious* harm was likely enough to demand an immediate response from the City, especially in the absence of prior reports. A small, visible irregularity is often not wrongful if it can be easily avoided by a pedestrian taking a normal degree of care, as in this case. This diminishes the wrongfulness of the City's omission.

35.2 I am also satisfied that having regard to the evidence I can conclude that the sidewalk was reasonably wide. The plaintiff testified that on the day it was generally busy with pedestrians. The witnesses for the City also confirmed that generally the sidewalk of Victoria Road is relatively busy with pedestrians on a daily basis. Notwithstanding the high foot traffic, the City's evidence was unchallenged that over a lengthy period, no other complaints or accidents were reported. The photographs indicated the protrusion of the pavers was visible in the form of a raised edge rather than a hidden pit. A pedestrian exercising ordinary caution could have noticed or avoided it. With no evidence of previous incidents although the protrusion was visible the risk of harm was modest rather than imminent or unavoidable. Consequently, the degree of risk

was not so high that the municipality's failure to intervene at once is regarded as wrongful.

- 35.3 The City's broader duties certainly include ensuring safe and reliable infrastructure while balancing resource allocation for myriad public needs. The Constitution does place an obligation on local government to provide services in a sustainable manner. However, our courts have repeatedly held that these obligations do not make the municipality an *insurer* of absolute safety on every road or sidewalk. The City must also pursue other constitutional mandates (housing, sanitation, water, electricity, policing, etc.). Courts have acknowledged from time to time that municipalities cannot achieve a state of perpetual "pristine" infrastructure at all times. While the City is constitutionally required to maintain sidewalks, it is also entitled, indeed, required, to manage its finite resources. A single, minor protrusion neither unreasonably violates its constitutional obligations nor automatically means its conduct is wrongful.
- 35.4 As articulated in *Bakkerud* and subsequent case law, that while the City must take reasonable steps to repair defects no specific statute imposes a strict obligation on it to keep sidewalks in perfect repair at all times. Instead, the obligation is to maintain reasonably safe sidewalks, subject to its resource and operational constraints.
- 35.5 Mr Abrahams testified on behalf of the City and confirmed that every year there is a budget allocation for resurfacing of roads, which would include the sidewalks of the specific road being resurfaced. There was nothing more that the City could have done with its available resources. He testified that the City is responsible for over 1500 kilometres of sidewalk in district 5 alone, the area that include Victoria Road. The total kilometres of sidewalk within its jurisdiction amount to approximately 18 690 kilometres. Mr Abrahams' evidence was further that it would cost the City approximately R 2.1 million, per year, to appoint someone to inspect just district five's sidewalks and road surfaces. This exceeds district

five's annual budget for footways, verges and cycleways, which is R 1, 129, 000.00.

- 35.6 With regard to whether the broader community interest require the court to impose liability in this instance, I am not persuaded on the evidence that it does. Imposing a duty to fix every stretch of sidewalk, especially those never reported to the City, could divert public resources from more pressing infrastructure or social services. The theme of the City's witnesses were that while the City aims to maintain a safe environment it must also manage its budget responsibly. Coupled with the aforementioned is the consideration that pedestrians also share a responsibility to keep a reasonable lookout for ordinary sidewalk irregularities. On balance, forcing the City to maintain an impractically high standard (i.e., "billiard-table" sidewalks) or to face liability for every minor defect would be neither reasonable nor in the best interest of the broader community.
- 35.7 While it so that the City exercised control over the Victoria Road sidewalk at the time of the incident and continuing to do so, the control does not impose an absolute duty. It was not in dispute that the City exercises control over the sidewalk since it owns and manages the infrastructure. However, control alone, does not impose automatic liability. This is especially so, where the City had no reason to know about the localised defect.
- 35.8 Could the City have readily prevented this incident by either warning or repairing the protruding brick? Probably, yes, if the City had known about, it could have replaced or levelled the brick at minimal cost. In fact, the evidence was that the City did fix the sidewalk soon after the incident that involved the plaintiff. However, the fixing of the sidewalk was done as soon as the incident involving the plaintiff came to the City's knowledge. I am satisfied that this indicate to me that had the City knew about the defective sidewalk it would have implemented its processes to rectify it. However, on the evidence the City' did not have prior

knowledge. Could the City have done more to discover the hazard? Given the scale of the City's infrastructure I cannot find that in this instance the City had a duty to patrol constantly for every minor sidewalk defect. Prior notice, would have been the catalyst for the City to act. In this instance there was none.

35.9 Having regard to the issue of proportionality. The City possibly implementing a system of large-scale sidewalk inspections *vis-à-vis* the need to prevent a single incident, is evidently disproportionate. The evidence was not challenge that the City is responsible for thousands of kilometres of sidewalks. To proactively maintain every stretch at near-perfect levels would entail exorbitant costs. The plaintiff did not lead evidence to persuade me that one protruding brick in one location, if never reported, justify major citywide daily inspections at a potentially unsustainable expense.

36. This is one of those cases where wrongfulness operates as a *brake on* liability as I am of the view that having regard to the facts of this case that it is undesirable and overly burdensome to impose liability on the City in this instance"²⁴.

37. Hence, the plaintiff failed to establish the element of wrongfulness on the criterion that it must be reasonable (in a policy sense) to hold the City liable. I therefore find that the City's conduct in this instance is thus not wrongful. While this should be the end of the matter I will also consider, in any event, whether the element of negligence has been established.

Negligence

38. It is under the negligence element where the plaintiff's case really never leaves the starting blocks. To establish this element the plaintiff had to present evidence to establish that a reasonable municipality in the City's position (i)

²⁴ *Country Cloud* para 20

would foresee the risk of injury from the defect (the protruding paver); and (ii) would take reasonable steps (repair or warn) to prevent it; but (iii) that the City failed to take such steps.

39. Doing a *Kruger v Coetzee* analysis of the evidence I find that the plaintiff could not succeed in proving negligence. I will address each of the *Kruger v Coetzee* requirements in turn.

Could the City foresee the risk of injury from the defect (the protruding paver)

40. As foreshadowed, the City was unaware of the protruding pavers.
41. In respect of foreseeability I could not find on the probabilities that there were prior complaints about the sidewalk and that the City had actual or constructive notice of the defect. If the hazard was small and had not existed for a long time (as the plaintiff could not show otherwise), the City also could hardly foresee a real risk. The high foot traffic with no evidence of other incidents strongly suggests that on the probabilities the risk of harm was minimal or sporadic.
42. Mr Floris, who testified on behalf of the City, further explained that there are various avenues through which the public can notify the City of any potential dangers or defects in sidewalk or roads. These include, a telephone number, e-mail address, WhatsApp number and physical walk-in service centres. Mr Floris explained further that the Rate Payers' Association and Ward Councillors informs him daily of any defects or dangers in the Camps Bay vicinity. Mr Floris testified further that in addition to reactive maintenance, the City also does proactive maintenance within its available resources. The evidence was that the City had planned programs to inspect its infrastructure to ensure that everything is functioning, especially before the festive season of every year. I could not find a basis to reject this evidence tendered on behalf of the City.
43. The evidence of Mr Floris was further that as the superintendent of district five, that covers the Victoria Road sidewalk, he would have been the responsible person to receive notifications regarding any defects in the sidewalk. He

confirmed that the City was not aware of any defects in Victoria Road sidewalk prior to the plaintiff's incident. This was also confirmed by the City's notification log system. This evidence could not be disputed by the plaintiff.

44. Given the evidence of a lack of prior complaints, the minor nature of the protrusion, and the absence of similar incidents prior to the plaintiff's fall, a reasonable municipality in the City's position would not have foreseen a realistic (and thus actionable) possibility of a serious fall. The plaintiff thus failed to prove the first requirement of negligence.

Did the City take reasonable steps to prevent (repair or warn) the injury

45. I have already found that there was no realistic possibility that the sidewalk in Victoria Road would cause a pedestrian to experience a serious fall. I therefore do not have to venture any further and speculate whether the City would have acted diligently had it known about the condition of the sidewalk prior to the plaintiff's fall.
46. Although the City's evidence revealed multiple channels through which hazards could be reported to it and how once reported, the City conducts repairs or provides warnings to the public, it does not mean that the City would actually have been prudent in this instance. The plaintiff having failed to establish the first leg of the *Kruger v Coetzee* test could therefore not convince me that the second leg of the test was present.

Did the City failed to take such steps

47. The third leg of the test for negligence is also problematic. The plaintiff did not present evidence in this instance that the City's conduct was unreasonable in the manner in which it managed the potential risk associated with the sidewalks under its control. Apart from the evidence that was led by the City of the measures it took and still takes to manage the risks of defective sidewalks that may cause harm, the plaintiff did not lead evidence to suggest any additional

and practical measures that the City should have adopted to prevent the risk and that would have been proportionate to the risk in question.

48. Had the City received a complaint or discovered a plainly dangerous defect prior to the plaintiff's fall and failed to rectify it, the situation would have been different. But here, the plaintiff did not prove the existence of a mechanism by which the City could have known or lead evidence to convince me that the City could have implemented other measures beyond universal, constant sidewalk checks. The plaintiff did not establish that a reasonable municipality would necessarily have discovered or repaired the protrusion sooner. The evidence rather established that the municipality took steps proportionate to its budget and resource constraints.

49. The plaintiff's own acceptance that sidewalks can have minor irregularities supports the notion that the municipality could not foresee a serious accident from such a minor defect.

50. Therefore, the plaintiff has not shown, on a balance of probabilities, that the protruding paving brick was present for such duration or that it was so conspicuous that the City would, as a reasonable municipality, have repaired or warned pedestrians of it.

Conclusion

51. It follows that the plaintiff's claim should be dismissed. I find no reason why costs should not follow the result.

52. In the circumstances I make the following order:

“The plaintiff's claim is dismissed with costs, with counsel's fees to be taxed on scale B”

A MONTZINGER
Acting Judge of the High Court

Appearances:

Applicant's counsel:

Mr. P Eia

Applicant's attorney:

Batchelor & Associates

Respondent's counsel:

Mr. M De Wet

Respondent's attorney:

Regal Brown Inc