SWAZILAND HIGH COURT

CIVIL CASE NO. 2324/06

BETWEEN

MINAH SIBHENYA VILANE ... PLAINTIFF

AND

MANZINI CITY COUNCIL ... DEFENDANT

CORAM: , AGYEMANG J

FDR THE PLAINTIFF: D. NZIMA

(ESQ)

FDR THE DEFENDANT: D MANDA
(ESQ)

JUDGMENT

In this action the plaintiff has sued the defendant for the following reliefs:

1. Payment of the sum of E317,000.00;
2. Interest thereon at the rate of 9% per annum calculated from the 13th March 2005;
3. Costs of suit.
4. Further and/or alternative relief.

It is the case of the plaintiff that on the fifteenth day of March 2005, she was returning from Kwaluseni when she fell into a rough pothole while walking on the pavement near the bus rank which is near the Down Town Butchery at Manzini. She testified that it was late afternoon, about 5:00 pm and while visibility was good, she found herself in the rough pothole which she described as being about twenty to thirty centimetres deep and thirty to forty-five centimetres wide.

The plaintiff further testified that she sustained injury to her leg and received treatment when she was picked up by bystanders, placed in a taxi and sent to the Manzini Nazarene Hospital. She recounted that as part of the treatment which included an injection and X-ray filming, her broken ankle was encased in Plaster of Paris for six weeks following which she used crutches for ten weeks. She described the excruciating pain from her injury and alleged that long after the incident and up till the time she gave evidence in court, she still had pain. She furthermore indicated that she could not, since the incident, run, carry heavy loads such as a bucket, or walk a distance without undergoing pain that resulted from her ankle swelling from such activity and from cold. She alleged that at the time she sustained injury, she was a final year B. Com Degree student at the University of Swaziland, Kwaluseni Campus. The plaintiff recounted that she wrote her final examinations in pain and that she could not avail herself of group study as she could not climb stairs to participate. In spite of this, she passed the examination.

The plaintiff alleged that at the time she sustained the injury, she was unemployed, although she had been promised employment as a sales representative and debt

collector at an outfit known as Hiwpos Investments and that her employment was to commence in May 2005, after her examinations.

She alleged that it was to be for a period of twelve months with three months as probation time. She averred that she could however not take up the employment until August because of the injury and even so, she was laid off after two months when her employer told her to go and take care of her health. The plaintiff acknowledged during cross-examination though that she had since the first day of October 2006, been in employment with an outfit known as Sakhele Facilities Management. The plaintiff further testified that apart from the initial treatment, she also received treatment for pain from one Dr. Wawswa. Although she produced no receipts which she said had been misplaced, she estimated that she spent about E6,000 in medical bills.

The plaintiff averred that the injury she had sustained when she fell into a rough pot hole in a pavement, with its consequential pain and suffering and pecuniary loss, was the direct result of the negligence of the defendant which being the authority tasked with the maintenance of roads and pavements in Manzini, failed to carry out its obligation. She thus sued the defendant for the aforesaid reliefs made up of E6,000 for medical expenses, E46,000 for future medical bills, E2,500 for pain and suffering, and E60.000 for loss of employment with Hiwpos Investments.

The case of the plaintiff was supported by three witnesses: the bystander who helped her up after her fall and went with her to the hospital in a taxi, the taxi driver, and the medical doctor who attended to her on that day. Corroborating the evidence of the plaintiff in every material particular, the first witness added that the pothole in which the plaintiff fell was caused by the separation of cement blocks. The taxi driver testified that he had been called to the scene of the plaintiffs accident from where he picked her and sent her to the Nazarene Hospital. He added that he returned to take the plaintiff to her home later and found her leg encased in Plaster of Paris. According to the last witness, an orthopaedic surgeon who at the material time was employed at the Manzini Nazarene Hospital, he indeed treated the plaintiff who sustained a fracture of her left ankle on the fifteenth day of

March 2005. He confirmed that he had placed the plaintiff's leg in Plaster of Paris.

At the close of the plaintiffs case, the defendant which denied each and every averment of the plaintiff regarding its liability, elected not to adduce evidence. Learned counsel for the defendant made an application for absolution from the instance.

In his three-pronged submission, learned counsel contended that the plaintiff on whom the onus of proof of the matters she asserted lay, had not adduced evidence to establish any act or conduct of the defendant that caused her injury. Citing the case of ***Dlamini Philisiwe v. Town Council of Mbabane, Civil Case No. 240/1987 (Unreported),*** learned council contended that the claim should fail for that reason.

He asserted also, that the plaintiff had failed to set out the duty of the defendant that it had breached giving rise to liability. He contended that the duty laid upon the defendant to construct and maintain roads et al which was set out in S. 67 of the Local Government Act No. 8 of 1969 was prescriptive. He urged the court to find that in such a circumstance and in line with decided cases, as ***Moulang v. Port Elizabeth Municipality1958 (2) SA 518,*** the defendant a municipal authority empowered to inter alia construct and maintain roads, was not, where no evidence had been adduced to show that it had introduced a new source of danger that did not exist but for its act, guilty of any wrongdoing where all it did was to fail to maintain a road or pavement such as the one on which the plaintiff sustained her injury.

He further averred that the plaintiff failed to tender receipts showing money she had expended, a medical report showing the extent of her injuries and other documentation such as the contract of the employment which she alleged she lost, in evidence. He contended thus that the plaintiff failed to adduce evidence to support her claim for the various sums of money claimed for medical expenses, loss of employment and future earnings.

In his reply, learned counsel for the plaintiff asserted that the plaintiff had indeed led sufficient evidence in proof of her case. The following issues arise for determination:

5. Whether or not the plaintiff has adduced evidence on the negligent conduct of the

defendant;

6. Whether or not the defendant is liable for the claim

It is an uncontroverted fact that the plaintiff sustained injury while using a pavement under the control of the defendant, a municipal authority. The evidence she gave in court without more, was that she fell into a rough pothole and that the said phenomenon obtained because the defendant which had the duty to maintain same had failed to do so. The plaintiff led no evidence of any conduct or the act of the defendant which resulted in the presence of the pothole in the pavement. She simply relied on the omission of the defendant to perform its alleged obligation of maintaining the pavement, to found liability. But it is trite learning that when a party grounds an action in negligence, the act relied on as constituting a breach of the duty of care which the defendant had towards the plaintiff, had to be set out and proven. As aforesaid, the plaintiff failed to do so save to rely on the alleged duty of the defendant to maintain the pavements in Manzini.

There is no gainsaying that the defendant had power of control which included the right to maintain such structures and works as the pavement on which the plaintiff sustained injury, but it is not correct to say that it had the duty to do so, the breach of which would found liability in negligence. This is because the statute that empowered the defendant to have control and oversight responsibilities over the said pavement in the use of the permissive "may" instead of the mandatory "shall" merely prescribed the defendant's responsibilities in the municipality.

The relevant portion of S. 67 of the Local Government Act No. 8 of 1969 reads: "(4) A council may-

(a)Make, construct, alter, repair, maintain, improve, or widen all roads, streets,

bridges, public open spaces ...vested in the council or under its control..." It was held in *Moulang v. Port Elizabeth Municipality* (supra), that where municipalities that have permissive powers to construct or maintain streets are not by statute required to keep them in repair, failure so to do does not found liability against them unless there is evidence adduced to show that they introduced a new source of danger which resulted in the

plaintiffs injury. The said case appears to be on all fours with the present case. The plaintiff pleaded that the defendant had dual or alternative duties, first to maintain the pavement and/or to warn users of the danger of using the pavement in its impaired state. The plaintiff also asserted that the defendant introduced a new source of danger by constructing and failing to maintain the pavement.

The defendant's denial in pleading of such duty to maintain the pavement, its assertion that the pavement was in fact in good condition, and further, that it had not constructed the pavement, brought the plaintiffs allegations to issue as matters to be proved. The plaintiff thus assumed the burden of persuasion which was to adduce evidence of the dual or alternative duties she alleged and of the factual matter of introducing a new source of danger which she relied on. Failure to do this was to fail in her case.

The plaintiff did not lead evidence on the fact of the defendant having constructed the pavement or its alleged duty to maintain the pavement or to warn users of an alleged danger, it thus remained an assertion in pleading. Nor did she rely on any specific conduct or act of the defendant by which it breached its duty of care towards the plaintiff, but apparently on the power laid on the defendant by statute to maintain the road which it allegedly omitted to carry out.

Instead of pleading facts to support her assertion that the defendant introduced a new source of danger and leading evidence on such, the plaintiff relied on the alleged failure to carry out its duty as amounting to the introduction of a new source of danger. That was untenable, in that the plaintiff attempted to circumvent the burden of proof of what she asserted, that is, the introduction by the defendant of a new source of danger, which was the circumstance in which she could ground liability and rather, called upon the court to assume that fact in issue from the proof of another fact in issue being the failure of the alleged duty of the defendant to maintain the pavement.

The plaintiff in failing to adduce evidence of factual matters constituting a new source of danger introduced by the defendant in a case of this nature, failed to make a case against the defendant from which liability may spring against a municipal authority empowered by

statute, but not placed under a duty to maintain works such as the pavement on which the plaintiff sustained injury.

It is my view then that the plaintiff failed in her duty to adduce sufficient evidence to meet the burden of proof on the preponderance of the probabilities.

The defendant's application for absolution from the instance is thus hereby granted.
The plaintiff's claim fails, and is accordingly dismissed with costs.

DATED THE 28m DAY DF NOVEMBER 2DD8

MABEL AGYEMANG

HIGH COURT JUDGE