



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**  
**JUDGMENT**

**Not Reportable**

Case no: 239/2024

In the matter between:

**JOHANNES DIEDERIK LE ROUX N O**  
**(CURATOR AD LITEM FOR NTOMZODWA**  
**PATRICIA OLIFANT)**

**FIRST APPELLANT**

**JOHANNES DIEDERIK LE ROUX N O**  
**(CURATOR AD LITEM FOR JOHANNES BARRY)**

**SECOND APPELLANT**

and

**THE NELSON MANDELA BAY MUNICIPALITY**

**RESPONDENT**

**Neutral citation:** *Johannes Diederik Le Roux NO and Another v The Nelson Mandela Bay Municipality* (Case no 239/2024) [2025] ZASCA 122 (2 September 2025)

**Coram:** HUGHES and MATOJANE JJA and STEYN, VALLY and MODIBA AJJA

**Heard:** 9 May 2025

**Delivered:** 2 September 2025 at 09h45.

**Summary:** Delict – claim for damages – whether the municipality is delictually liable for damages of appellants as a result of the drowning of their minor child that had fallen into an uncovered drain – wrongfulness and causation considered – duty of care – circumstances when an appeal court should interfere in credibility findings made by the trial court, especially where there are mutually destructive versions.

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## ORDER

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**On appeal from:** Eastern Cape Division of the High Court, Makhanda (Bloem, Zilwa and Potgieter JJ, sitting as court of appeal):

- 1 The appeal is upheld with costs, such costs to include the costs of two counsel, where so employed.
- 2 The order of the full court is set aside and replaced as follows:  
'The appeal is dismissed with costs.'

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## JUDGMENT

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**Steyn AJA (Hughes and Matojane JJA and Vally and Modiba AJJA concurring):**

### Introduction

[1] This appeal concerns the tragic drowning of a minor child, Jos-Lynn Heili Olifant ("Jos-Lynn"), in a stormwater drain arising from a tragic incident that occurred in Uitenhage on 13 September 2014, and the subsequent claims for damages instituted by her parents, the appellants, against the Nelson Mandela Metropolitan Municipality (the municipality). The matter comes before us following a decision of the Full Court of the Eastern Cape Division of the High Court, Makhanda (the full court), which overturned the finding of liability against the municipality, made by Eastern Cape Division of the High Court, Makhanda (the trial court). The full court's decision centered on its assessment of the evidence regarding the reporting of the open drain and its application of the legal principles of wrongfulness, negligence and causation.

### Background

[2] The parents of Jos-Lynn, are represented by Mr Johannes Diederik Le Roux (Mr Le Roux), in his representative capacity as the *curator ad litem* for Ms Ntomzodwa Patricia Olifant (Ms Olifant) and Mr Johannes Barry (Mr Barry).<sup>1</sup> They instituted

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<sup>1</sup> I will refer to the parents as the appellants throughout. It has to be stated that there is technically only one appellant, namely Mr J D le Roux, the *curator ad litem*, who acted in a representative capacity for

separate actions against the Municipality, seeking damages for the emotional and psychological trauma caused by their daughter's death. These actions were later consolidated.

[3] The trial court, having heard evidence from both parties, found the municipality liable for the damages claimed. The full court, however, upheld the municipality's appeal, finding that the appellants had failed to adequately establish the elements of wrongfulness and causation, which are essential for a successful delictual claim. The appellants, aggrieved by this decision, now appeal to this Court, with special leave granted by this Court.

[4] On the fateful day Jos-Lynn, the 17-month-old daughter of the appellants, fell into an open drain in Grootboom Street, Greenfields, Uitenhage. This incident resulted in her death. They claimed that the municipality was responsible for, inter alia, the maintenance, upkeep, and inspection of the drains in the area. It was also alleged that the municipality had previously been warned of the danger that the open drain posed. The municipality accordingly had a legal duty to ensure that all drains within its area were covered so as not to pose a hazard to the residents. The appellants relied on ss 152 and 156 of the Constitution,<sup>2</sup> as well as the municipality's relevant by-laws in support of the damages claim. It was further claimed that the municipality's employees were in breach of their legal duties and that such breach was negligent, wrongful, and causally linked to the death of Jos-Lynn.

[5] The municipality denied that the precautions it took were unreasonable or insufficient. It pleaded that it was entitled to assume that Jos-Lynn was at all relevant times in Ms Olifant's custody and under her control, alternatively in the custody and under the control of an adult person responsible for the care of Jos-Lynn on the day in question. In addition, the municipality pleaded that an adult ought to have been reasonably aware of any uncovered drain in the area and should properly have observed and prevented Jos-Lynn from suffering harm as a result of such an open drain. It was further pleaded that if it was found that the drain was uncovered, it should have been visible to any adult and that such an adult had a duty to ensure that Jos-

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both of the parents. Both parents required the assistance of a *curator ad litem* due to the psychiatric consequences they had suffered when Jos-Lynn died.

<sup>2</sup> The Constitution of the Republic of South Africa, 1996.

Lynn was not left unattended, vulnerable, and exposed to possible harm due to the uncovered drain. In the event that the high court found that the municipality was delictually liable for Jos-Lynn's death, it averred that Ms Olifant's conduct contributed to the harm suffered; she had a responsibility to ensure that Jos-Lynn, by virtue of her tender age, was under the supervision of an adult at all times; and that she ought not to have been left in the care of a 15-year-old child.

[6] At the trial, before Gxarisa AJ, the issue of liability was separated for determination before all other issues. The trial court found that the municipality's employees acted wrongfully and negligently, as they had failed to take steps to ensure that the drain was not left open. This resulted in Jos-Lynn's death. It found that the municipality was liable for damages arising from the death of Jos-Lynn and directed the municipality to pay the appellants' costs.

[7] The municipality was successful in its appeal to the full court. The full court concluded that the appellants had failed to establish liability and that the trial court erred in holding the municipality liable for damages arising from Jos-Lynn's death. The trial court's order was set aside and replaced with an order dismissing the appellants' claims for damages, with costs. I shall return to the findings of the full court later in the judgment.

### **Requirements for liability**

[8] The appellants' action is based on the *actio legis Aquiliae*. For their claim to succeed, they had to establish that the municipality's employees' conduct, albeit by omission, was wrongful and negligent. This would, among other things, entail proving that they failed to act in accordance with the obligations imposed on them by ss 152 and 156 of the Constitution, thereby causing Jos-Lynn's death. The appellants bore the onus of proving all these requirements.

### **Evidence before the trial court**

[9] The following material facts emerge from the evidence led before the trial court. Five witnesses testified in support of the appellants' claim. They were: Ms Olifant, Mr Linden Godolo (Mr Godolo), Pastor Eben Windvogel (Pastor Windvogel), Ms Maria Loff (Ms Loff), and Mr Barry. Their evidence supported and strengthened the

appellants' case, as pleaded, namely that the municipality left the drain in Grootboom Street uncovered and unsecured over a very long period, despite being repeatedly informed, by a number of the witnesses, of the danger it posed. On the day of the tragic incident, Ms Olifant left her daughter with a member of the household, Mr Raymy Loff (Raymy), whilst she went to fetch money from a family member in the area. Mr Barry was home earlier in the day, but he had left to watch rugby elsewhere. To the best of the knowledge of Ms Olifant and Mr Barry, the yard was fully fenced. One could move from the back of the house to the front garden only by going through the house itself. The front door of the house was a stable-style door, and Jos-Lynn was too young to open it.

[10] Ms Olifant testified that the drain had been left open since 2012/2013. There had been a burst pipe in Grootboom Street before, which caused water to pool in the drain. She reported the danger posed by the uncovered drain to the call centre three or four times since 2013. She had made these reports because she was concerned about the safety of the children in the area. The number she dialled was the one printed on the back of the municipal statement of account, which was delivered to their house. After the tragic incident and while they were cleaning the yard for the funeral, both parents noticed that there was a hole in the fence.

[11] Pastor Windvogel, who stays near the open drain, gave evidence that he had lodged numerous complaints with the municipality about the open drain in Grootboom Street. He even complained to the ward councillor. Ms Loff, who resided in the same house as the appellants, testified and confirmed that she too reported the uncovered drain by calling the call centre on more than one occasion. Mr Godolo, who resided in Grootboom Street, also confirmed that the said drain remained uncovered for many years. He often witnessed children playing near the drain and would chase them away out of concern for their safety. On the day of the incident, one of the children informed him that a child had fallen into the drain. When he investigated this report, he found Jos-Lynn's body floating in the drain and he retrieved her body from the drain.

[12] The municipality, in seeking to rebut the evidence led by the appellants, called one witness, Ms Nokonwaba April (Ms April). She was employed as the municipality's Acting Senior Superintendent for Roads and Waterworks. She stated that the drain

was indeed open during an inspection on the day of Jos-Lynn's drowning. According to her, she was called to the scene on the day of the incident and upon her arrival, she observed that there were four open drains in the nearby vicinity. She noticed that water had pooled in the drain in which Jos-Lynn drowned.

[13] Ms April testified that the municipality never received any complaints about the open drain, as alleged by the appellants' witnesses. She referred to a record compiled by the call centre, documenting complaints logged for the period from 1 January 2014 to 30 September 2014. Significantly, this record was limited to a different street, Mielies Street, and not Grootboom Street, where the drowning occurred.

[14] During cross-examination, Ms April was confronted with the fact that the drowning of Jos-Lynn was not even recorded as a complaint in the September 2014 record. She explained that they believed that she had drowned in the Mielies Street drain, and that is why they concentrated on Mielies Street, because the drain is opposite the house where the child was living. She reluctantly conceded that the incident had actually occurred in Grootboom Street and not Mielies Street.

[15] The trial court concluded that Ms Olifant and Mr Barry and their witnesses were credible witnesses, who corroborated each other to the extent that the drain in Grootboom Street had been left open and unrepaired for an extended period of time before the tragic incident. It concluded, based on the aforesaid evidence, that the appellants had discharged the onus of proving that the municipality was delictually liable for the damages arising from the death of Jos-Lynn.<sup>3</sup>

### **The full court**

[16] The full court, however, concluded on the very same evidence that the appellants had failed to prove the delictual elements of wrongfulness and legal causation. Much reliance was placed by the municipality on the fact that Raymy was not called as a witness and that Ms Olifant conceded that she could have taken her

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<sup>3</sup> The following order was issued:

1. That the defendant is held liable for damages arising from the death of Jos-Lynn Heile, the deceased.
2. That the defendant is to pay the costs of the trial, including costs of two Counsel, as well as reserved costs.'

daughter with her when she left their home. Without dismissing the trial court's credibility findings or making any adverse findings of its own, regarding the credibility of the appellants' witnesses, the full court disregarded the evidence of the appellants' witnesses and relied on the documentary evidence produced by the municipality as sufficient to refute the evidence of the appellants' witnesses. The full court held in part: 'It was during cross-examination that Ms April testified, based on the computer-generated document, that the municipality did not receive complaints about the uncovered drain. Since *the plaintiffs and their witnesses had no proof of their calls to the municipality about the uncovered drain and since the municipality produced documentary evidence which did not support the evidence that calls were made to the municipality about an uncovered drain, I am unable to find that the calls were made.* The evidence is in favour of a finding that the calls were probably not made.' (Emphasis added.)

### **Submissions before this Court**

[17] Before this Court, the appellants argued that the full court misinterpreted the evidence of the municipality's witness and the legal principles relating to the delictual elements of wrongfulness, negligence and causation. It was argued on behalf of the appellants that the record produced by the municipality related to complaints lodged with the municipality in relation to Mielies Street and not Grootboom Street where the incident occurred. Furthermore, they contended that the document covered a 9-month period, starting on 1 January 2014 and ending on 30 September 2014. In addition, it is contended that the full court was mistaken in its finding that the municipality produced documentary proof that no complaints had been lodged, especially in circumstances where the trial court made no adverse findings concerning the credibility of the appellants' witnesses. Thus, they contended the full court erred in rejecting the evidence of the appellants' witnesses and in finding that complaints regarding the uncovered drain were in all probability not made to the municipality.

### **Wrongfulness**

[18] The appellants argued that the municipality had knowledge of the open drain and omitted to repair it over an extended period of time. Whether it had a legal duty to take preventative action is to be determined by the established facts. Brand JA in

*Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd*,<sup>4</sup> defined the criterion of wrongfulness as follows:

'It is sometimes said that the criterion for the determination of wrongfulness is "a general criterion of reasonableness", ie whether it *would be reasonable to impose a legal duty on the defendant* (see eg *Government of the Republic of South Africa v Basdeo and Another* 1996 (1) SA 355 (A) at 367E - G; *Gouda Boerdery BK (supra)* in para [12]). Where that terminology is employed, however, it is to be borne in mind that what is meant by reasonableness in the context of wrongfulness is something different from the reasonableness of the conduct itself which is an element of negligence. It concerns the reasonableness of imposing liability on the defendant (see eg Anton Fagan '*Rethinking wrongfulness in the law of delict*' (2005) 122 SALJ 90 at 109). Likewise, the "legal duty" referred to in this context must not be confused with the "duty of care" in English law which straddles both elements of wrongfulness and negligence (see eg *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 27B - G; *Local Transitional Council of Delmas v Boshoff* 2005 (5) SA 514 (SCA) in para [20]).' (Emphasis added.)

[19] Municipal immunity is irrelevant; the municipality's liability turns on ordinary delictual principles. Accordingly, I do not consider it necessary to deal with the doctrine of 'municipal immunity' since it is trite that the doctrine no longer forms part of our law.<sup>5</sup> Whether a breach of a legal duty arises, which would constitute wrongfulness, depends on the legal convictions of the community, as articulated in *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* (*Le Roux v Dey*)<sup>6</sup> and *Minister of Police v Ewels (Ewels)*.<sup>7</sup> The municipality's statutory and common law duty to maintain public infrastructure is uncontroversial; its failure to act would be wrongful if the legal convictions of the community deem it so. Simply put, if the municipality failed to ensure that the drain was properly covered and failed to prevent injury, then such failure would be wrongful.

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<sup>4</sup> *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) para 11.

<sup>5</sup> *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) para 26.

<sup>6</sup> *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as amici curiae)* [2011] ZACC 4; 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC) (*Le Roux v Dey*).

<sup>7</sup> *Minister van Police v Ewels* 1975 (3) SA 590 (A) (*Ewels*).



[20] In *Minister of Safety and Security v Van Duivenboden (Van Duivenboden)*<sup>8</sup> Nugent JA said:

‘When determining whether the law should recognise the existence of a legal duty in any particular circumstances what is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms. Where the conduct of the State, as represented by the persons who perform functions on its behalf, *is in conflict with its constitutional duty to protect rights in the Bill of Rights, in my view, the norm of accountability must necessarily assume an important role* in determining whether a legal duty ought to be recognised in any particular case.’ (Emphasis added.)

In *Za v Smith and Another*,<sup>9</sup> Brand JA comprehensively defined the approach to adopt in determining wrongfulness in a case of an omission and this Court would accordingly give due consideration to public and legal policy considerations in its determination of wrongfulness.<sup>10</sup>

[21] The question of whether there is a legal duty to avoid the risk or harm eventuating in our law was affirmatively answered in *Halliwell v Johannesburg Municipal Council* as follows:<sup>11</sup>

‘For the decision of the present dispute it is sufficient to say that where, in consequence of some positive act, a duty is created to do some other act *or exercise some special care so as to avoid injury to others*, then the person concerned is under Roman Dutch law liable for damage caused to those to whom he owes such duty by an omission to discharge it.’ (Emphasis, added)

[22] I am mindful of this Court’s dictum in *MTO Forestry (Pty) Ltd v Swart NO (MTO Forestry)*, where the importance of making a distinction between wrongfulness and negligence was emphasised:<sup>12</sup>

‘Despite a number of judgments of this court pointing out that *wrongfulness and negligence are indeed separate elements of a delict*, there has been a debate in academic circles as to whether it is important in the determination of liability for the two elements to be kept apart. This commenced in 2006 with an article written by Professor Johan Neethling, a respected

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<sup>8</sup> *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 21.

<sup>9</sup> *Za v Smith and Another* [2015] ZASCA 75; 2015 (4) SA 574 (SCA) para 15.

<sup>10</sup> The ‘policy and legal convictions of the community’ referred to by Brand JA are those stated in *Loureiro v Invula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC) para 53.

<sup>11</sup> *Halliwell v Johannesburg Municipal Council* 1912 AD 659 at 672.

<sup>12</sup> *MTO Forestry (Pty) Ltd v Swart NO* [2017] ZASCA 57; [2017] 3 All SA 502 (SCA); 2017 (5) SA 76 (SCA) (*MTO Forestry*) para 17.

academic, who expressed the view that certain factors such as foreseeability and preventability of harm are relevant for the determination of both wrongfulness and negligence, so that a degree of conflation of these two elements is inevitable – and that if a degree of overlap can be accepted ‘without negating the distinctive functions of wrongfulness and negligence as separate elements of delict’ it would not be a bad thing. A riposte by R W Nugent to the effect that conflation of the two elements is always a bad thing, was swift. F D J Brand, also entered this academic duel, and the debate continued for some years. However, the cases that I have already mentioned, and further decisions both in this court – such as *Steenkamp*, *Fourway*, *Roux v Hattingh* and *Za v Smith* – as well as in the Constitutional Court – such as *Le Roux v Dey* – (this list is not meant to be exhaustive) led me to comment in *Pauw v Du Preez* “(t)hat *wrongfulness and negligence are two separate and discreet elements of delictual liability which, importantly, should not be confused, can now be accepted as well established in our law*, academic criticism from certain quarters notwithstanding”. Subsequently the Constitutional Court’s judgment in *Country Cloud* essentially re-affirmed what I had said and justified the comment of F D J Brand, that the debate on the issue was “rather sterile”.’ (Emphasis added and footnotes omitted.)

### **Negligence and foreseeability**

[23] On behalf of the municipality it has been submitted that the trial court conflated negligence with wrongfulness and causation. The municipality’s submission on this aspect is flawed and it shows a misunderstanding of the interplay between wrongfulness and negligence. Foreseeability (a negligence element) informs whether a legal duty exists (wrongfulness), particularly where the risk is as obvious, as here. It is however necessary to analyse the failure of the municipality to have taken preventative steps by covering the drain or cordoning it off, and to determine whether the harm was foreseeable and whether the municipality ought to have acted and prevent the harm caused. The test for negligence as defined in *Kruger v Coetzee*<sup>13</sup> is: ‘For the purposes of liability *culpa* arises if –

- (a) a *diligens paterfamilias* in the position of the defendant –
  - (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
  - (ii) would take reasonable steps to guard against such occurrence; and
- (b) the defendant failed to take such steps.

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<sup>13</sup> *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-H.

This has been constantly stated by this Court for some 50 years. Requirement (a)(ii) is sometimes overlooked. Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case.’

The test for negligence is therefore well established. However, in omission cases, some overlap between wrongfulness and negligence is inevitable. For instance, foreseeability – a negligence concept – may inform whether a legal duty exists (wrongfulness), particularly where the risk is obvious (such as an open drain in a residential area). This overlap does not conflate the elements but reflects the practical reality that policy considerations (wrongfulness) and reasonable conduct (negligence) are interdependent in omissions.

[24] Given the grave risk posed by the open drain, it is not unreasonable to have expected the municipality to take preventative steps to either repair the drain or to secure the site to no longer pose a risk to the members of the community. The municipality failed to do so.

[25] The legal convictions of the community require that where the municipality had knowledge of the open drain, a failure to attend to and cover it would be wrongful. Such knowledge of the danger posed, coupled with the failure to take appropriate remedial action, constitutes negligence and gives rise to delictual liability.<sup>14</sup>

[26] A careful analysis of the evidence led at the trial reveals two mutually conflicting versions: the version of the appellants and their witnesses that the drain was uncovered and that reports were made to the municipality over a period of time that it posed a danger to the residents in the area, and the version of the municipality that it had no knowledge of the uncovered drain in Grootboom Street which could be potentially harmful, or that it had received any reports of the uncovered drains.

[27] Neither the trial court nor the full court made any adverse credibility findings against the appellants’ witnesses. Accordingly, the only factual finding that could have

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<sup>14</sup> *Van Vuuren v eThekweni Municipality* [2017] ZASCA 124; 2018 (1) SA 189 (SCA) (*Van Vuuren*) paras 21 and 24.

been made by the full court, based on the facts, was that reports regarding the open drain were made and that the municipality had knowledge of the danger posed by the open drain in Grootboom Street. The full court was misdirected in its evaluation of the evidence presented at the trial, it did not have the benefit of seeing and hearing the witnesses testifying and should have accepted the factual findings that were made by the trial court in the absence of identifying a clear misdirection by the trial court. It furthermore erred on the facts when it regarded the documentary evidence presented by the municipality as sufficient to refute the evidence presented by the appellants.

[28] The municipality was highly critical in its submissions to us of the fact that the appellants' witnesses did not keep a record of their complaints over the years. It is difficult to comprehend why there would be a need for anyone to keep generally a reference for such an excessively long period. Once a complaint has been made, the duty to act shifts to the party to whom the complaint was made, in this instance the municipality. There is no basis for this criticism of the appellants' witnesses, given the facts of this case. There was equally no evidence led by the municipality that as a practice, they ask members of the public to keep reference numbers until the complaint has been attended to.

### **Causation**

[29] It was submitted on behalf of the municipality that the full court correctly overturned the decision of the trial court since the municipality was not the cause (legally or factually) of Jos-Lynn's drowning. In *Minister of Pensions v Chennell*<sup>15</sup> Denning J stated the following:

' . . . the test of causation is to be found by recognising that causes are different from the circumstances in or on which they operate. *The line between the two depends on the facts of each case.*' (Emphasis added)

On the facts and the probabilities, as accepted in this matter, the most reasonable inference is that Jos-Lynn's death could have been prevented if the municipality had acted timeously and in accordance with their duty to repair or attend to the open drain.

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<sup>15</sup> *Minister of Pensions v Chennell* [1946] 2 All ER 719 (KB) at 721; also see *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34-35 defining causation and more recently being confirmed in *De Klerk v Minister of Police* 2021 (4) SA 585 (CC) para 77.

[30] It is trite that causation involves two distinct enquiries: factual causation, which is present if the wrongful act caused the harm; and legal causation, which is whether the act or omission is linked to the harm suffered and is not too remote. The established facts overwhelmingly show that the open drain was the direct cause of the harm that ensued, resulting in a direct nexus between the municipality's failure to fulfil its legal duty by covering the open drain timeously and the death of Jos-Lynn from drowning in the drain. In my view, the aforesaid findings constitute factual causation. Nugent JA in *Van Duivenboden* made it clear:<sup>16</sup>

'A plaintiff is not required *to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss*, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics.' (Emphasis added.)

[31] The full court did not engage in a detailed analysis of the elements of causation nor did it engage in an analysis of the applicable criteria of factual and legal causation. It relied on its finding on wrongfulness as a basis for the finding that causation was not proved. In doing so it was misdirected. I can find no policy consideration, nor were we referred to any, that would allow for the municipality to escape liability for the harm it caused given the facts of this case.

[32] Legal causation is determined by considering the omission and whether the omission is the legal cause of the harm suffered as a result of the death of Jos-Lynn. Her death was directly connected to the municipality's wrongful and negligent conduct. Thus, legal causation was proved.

### **Contributory negligence**

[33] The municipality, in argument before this Court, persisted in claiming that if this Court finds that it is liable, then this Court should find that the parents of Jos-Lynn were also negligent. It was submitted that they had a responsibility to take care of her and leaving her in the care of a 15-year-old child contributed to the harm caused. Reliance was placed on *Stedall and another v Aspeling and another (Stedall)*<sup>17</sup> in

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<sup>16</sup> *Van Duivenboden* above fn 8 para 25.

<sup>17</sup> *Stedall and another v Aspeling and another* [2017] ZASCA 172; 2018 (2) SA 75 (SCA).

support of this contention. In my view, *Stedall* is distinguishable. The facts are remarkably different: the Stedalls were private homeowners when a child, visiting their home with her mother, fell into the pool at their private residence, moreover wrongfulness was never established. In this case, the evidence shows that the municipality failed in its legal duty to ensure public safety in securing the drains under their control.

[34] It is not unreasonable in many lower income households to have an older child being entrusted with the care of younger children. The full court erred in its finding that nothing was known about Raymy, the evidence of Ms Olifant was clear that she had previously left Jos-Lynn in the care of Raymy without any problems. Thus, the municipality has failed to establish contributory negligence on the part of Ms Olifant, by her in leaving Jos-Lynn in the care of a 15-year-old child, who was staying with them, for a short while.

## **Conclusion**

[35] Since the municipality had a complaints system in place to deal with complaints, it is clear that the municipality could not solely rely on the public to draw their attention to hazardous drains: it has employees working in the area, attending to water leaks, electricity, sanitation or the like, and they are obligated to report any open drains or any other hazardous items for these to be attended to. In fact, the four open drains in Mielies and Grootboom Street on the day in question are indicative that the employees had failed in their duty to report these drains. It is inescapable that a legal duty was owed by the municipality to avoid negligently causing harm to persons in the same position as Jos-Lynn on the day of her demise.<sup>18</sup>

[36] It is trite that the powers of an appeal court to overturn factual findings by a trial court are restricted.<sup>19</sup> A court of appeal will not likely interfere with credibility findings of the trial court in the absence of an irregularity or a misdirection.<sup>20</sup> The full court, in the absence of any adverse findings made against the appellants' witnesses or any

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<sup>18</sup> *Van Vuuren* fn14 at para 29.

<sup>19</sup> *Beukes v Smith* [2019] ZASCA 48; 2020 (4) SA 51 (SCA) para 22.

<sup>20</sup> *S v Livanje* [2019] ZASCA 126; 2020 (2) SACR 451 (SCA) paras 18-25.

misdirection by the trial court in evaluating the evidence of the said witnesses, ought to have accepted the credibility findings of the trial court.

[37] The full court erred in its findings that the appellants had not established wrongfulness, negligence and causation. Its findings rested on a flawed re-assessment of the evidence presented at the trial and an unjustified dismissal of the municipality's statutory duties, considering the facts of this case. The appeal against the judgment of the full court accordingly succeeds. There is no reason why the costs of the appeal should not follow the result.

### **Order**

[38] In the result, I make the following order:

- 1 The appeal is upheld with costs, such costs to include the costs of two counsel where so employed.
- 2 The order of the full court is set aside and replaced as follows:  
'The appeal is dismissed with costs.'

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E J S STEYN  
ACTING JUDGE OF APPEAL

## Appearances

For the Appellants:	H J van der Linde SC with N Barnard
Instructed by:	Lessing, Heyns & Van der Bank Attorneys Inc, Kariega Webbers Attorneys, Bloemfontein
For the Respondent:	A Byleveld SC with V Madokwe
Instructed by:	McWilliams & Elliot Inc, Gqeberha Honey Attorneys Inc, Bloemfontein.