THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1269/2017

In the matter between:

BERGRIVIER MUNICIPALITY **APPELLANT**

and

RHYNARDT VAN RYN BECK **RESPONDENT**

Neutral Citation: *Bergrivier Municipality v Van Ryn Beck* (1269/2017) [2019] ZASCA 38 (29 March 2019)

Coram: Navsa AP, Zondi, Mathopo and Mocumie JJA and Eksteen AJA

Heard: 28 February 2019

Delivered: 29 March 2019

Summary: Delictual claim for damages – whether in prevailing circumstances Municipality had a legal duty to take steps to prevent flooding of property – lack of evidence – negligence, wrongfulness and causation not established.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Saldanha, Yekiso and Savage JJ sitting as court of appeal):

1 The appeal is upheld with costs.

2 The order of the full bench is set aside and is substituted as follows:

'The appeal is dismissed with costs.'

JUDGMENT

Navsa AP (Zondi, Mathopo and Mocumie JJA and Eksteen AJA concurring):

[1] When one is told, in isolation, that a rate payer and resident of a small town, had his house flooded on three occasions encompassing two successive two-year intervals and sustained ostensible extensive damage to his house, due to the municipal storm-water drainage system being unable to cope with heavy rainfall, one's instinctive reaction, is that the local municipality should be held liable to compensate such resident for the damage caused by the last flood. That instinctive reaction, because of the lack of evidence to fix the municipality with liability, dealt with more extensively later in this judgment, has to give way to the compelling opposite conclusion.

[2] The question in this appeal is whether the appellant, the Bergrivier Municipality (the Municipality), established, in terms of the Local Government Municipal Structures Act 117 of 1998, should be held liable for damages allegedly sustained by the respondent, Mr Rhynardt Van Ryn Beck, as a result of the flooding, during 2011, of his residential property, situated at 31 Buitenkant Street, Piketberg, Western Cape (the Property), at the foothills of the Piketberg Mountain. The property is situated within the jurisdiction of the Municipality.

[3] At the outset, the trial court (Binns-Ward J), had regard to the issues presented by counsel on behalf of the parties for adjudication. They were as follows:

'. . . word die Hof versoek om 'n bevinding te maak ten aansien van die volgende:

7.1 Die nalatige verbreking al dan nie van Verweerder se regsplig;
7.2 Indien so bevind, of daar 'n kousale verband is tussen die beweerde skade en sodanige verbreking van die regsplig;
7.3 Of Eiser nalatig was ten opsigte van sy eie skade en tot welke mate.'[1]

In respect of negligence and whether the respondent had established a legal duty on the part of the Municipality, the court held as follows:

'[N]otwithstanding the sympathy I have for the plaintiff and his family for the trauma and financial loss that they have experienced as a result of the successive flooding of their home, I consider that the plaintiff has fallen short of discharging the onus to establish the existence of the alleged duty in law on the part of the defendant or its negligent breach. In the circumstances the appropriate order would be one absolving the defendant from the instance with costs.'

[4] In respect of causation, the following was the comprehensive basis for the conclusion reached by the trial court:

'The Plaintiff's counsel submitted that if the chute constructed by the defendant after the 2011 flood had been built after the 2009 flood the damage to the plaintiff's property would, at the very least, have been lessened. At first blush the argument might appear attractive, but it does not bear scrutiny in the context of the evidence, or rather, lack thereof in the particular case.

It may be accepted that the damage to the plaintiff's property occurred as a consequence of the inability of the catch pit and drainage pipe at the bottom end of De Hoek Street to divert the volume of water streaming onto De Hoek Street. The water that was not drained into the catch pit would be that which would be pushed around the corner at the bottom on De Hoek Street and into the plaintiff's driveway off Buitenkant Street. To ascertain whether the chute would have made any difference to the extent of the damage to the plaintiff's property one would need evidence of the maximum capacity measured in units – say cubic feet of water per minute – of the catch pit, an informed estimate, measured in the same units, of the volume of water bearing down De Hoek Street, and also evidence of the maximum capacity of the chute to divert water that could not be accommodated by the catch pit. Such evidence would establish whether the amount of water that the combined drainage facility of the catch pit and

[1] The court is requested to make a finding in respect of the following:
7.1 Whether there was a negligent breach of a legal duty on the part of the defendant.
7.2 If found that this is so, whether there is a causal connection between the alleged damage sustained and such breach.
7.3 Whether the plaintiff was himself negligent in respect of the damages he sustained and if so to what extent. (My translation.)

the chute could not accommodate was materially less than that which in fact probably poured past the catch pit and round the bend into the plaintiff's property.

When I put these considerations to the plaintiff's counsel during argument, he submitted that it was for the defendant to have adduced such evidence. His submission in that regard appeared to be predicated on an assumption that the evidence that had been led established what he called *"a prima facie case"* against the defendant. It is indeed so that if a plaintiff who bears the onus establishes a *prima facie* case, an evidential burden falls on the defendant to lead evidence to rebut it, failing which the *prima facie* case will be sufficient to establish the claim. The mere fact that the drainage system was unable to cope with the flood in question and that the plaintiff's property was damaged as a result does not, however, as I have sought to explain, amount, without more, to a *prima facie* case. Nor does the defendant's construction of the chute and its putting in place the related measures described earlier, without more, establish that the defendant could by relatively cheap means have done something that would have effectively averted the harm.'

Consequently, the following order was made:

'1. Subject to the provisions of paragraph 2, below, the defendant is absolved from the instance with costs.

2. The defendant is ordered to pay the plaintiff's costs occasioned by its special plea of non-compliance with the requirements of s 3 of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 and in the associated application for condonation.'

[5] This appeal by the Municipality, with the leave of this court, is directed against the order of the full bench of the Western Cape Division of the High Court, which overturned trial court's order. The full bench made the following order:

'(1) The appeal is upheld with costs.

(2) The respondent is liable for the proven damages sustained by the appellant during the 2011 flooding. The quantification and the apportionment (if any) of such damages stands over for later determination.

(3) The respondent is also ordered to pay the costs of the proceedings thus far in the court *a quo*.'

The detailed background is set out hereafter.

[6] The respondent had purchased the property in 2005 from a developer who had acquired the land at the urban edge of Piketberg. The land on which the property is situated was subsequently zoned for housing development. A house was built on the property, which the respondent took occupation of during 2006. The Municipality had

provided the respondent with a certificate of occupation in accordance with the provisions of s 14(1)*(a)* of the National Building Regulations and Building Standards Act 103 of 1977.[2] The property is located on the south-eastern boundary of the suburban area at its lowest point at the corner of Buitenkant and De Hoek Streets. These two streets, which are material to the dispute between the parties, were laid out before the respondent's property was developed.

[7] De Hoek Street separates the residential area from farmland that stretches all the way up the mountain slope. The street has a steep gradient of 45mm:122mm. It stretches down the mountainside from the main street higher up for a distance of 250 metres before it reaches the respondent's property. De Hoek and Buitenkant Streets both slope downwards to the point where they converge at the respondent's property. The Municipality had removed part of the curb of the pavement alongside the respondent's property in front of his garage to allow vehicular access to the property.

[8] It is common cause that the respondent's property was flooded on three separate occasions, namely December 2007, June 2009 and finally during April 2011.[3] During 2007 whilst the respondent and his family were away on vacation, Piketberg experienced a cloudburst accompanied by gale force winds, which led to flooding and extensive damage to residences and businesses. He was informed of this and returned home to deal with the effects of the flooding. The respondent testified before the trial court that a number of rooms of his house were damaged as was his furniture. His swimming pool had been flooded. He witnessed sheep droppings in the flooded areas of his house, ostensibly carried there from the adjacent farmlands by floodwater.

[9] The respondent did not take any photographs of the flood damage in 2007. He testified that in that year, shortly after the flooding had occurred, municipal officials

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[2] Section 14(1)*(a)* of the National Building Regulations and Building Standards Act 103 of 1977 reads as follows:
'A local authority shall within 14 days after the owner of a building of which the erection has been completed, or any person having an interest therein, has requested it in writing to issue a certificate of occupancy in respect of such building –
(a) issue such certificate of occupancy if it is of the opinion that such building has been erected in accordance with the provisions of this Act and the conditions on which approval was granted in terms of section 7, and if the certificates issued in terms of subsection (2) and, where applicable, subsection (2A), in respect of such building have been submitted to it.'

[3] The property was sold by the respondent after the close of pleadings.

inspected the property and undertook to take the necessary steps to ensure that the drainage system would, in future, prevent flood damage. I shall, in due course, deal with the Municipality's denials of the alleged undertaking and with the evidence adduced on its behalf.

[10] As recorded by the trial Judge the extent of the flooding during 2009 and 2011 was captured in photographs taken by the respondent. It is clear that the municipal drainage system at and near the intersection of Buitenkant and De Hoek Streets had been completely overwhelmed by the sheer volume of storm-water run-off on both occasions, with the result that the respondent's property had been very badly flooded.

[11] The trial court noted that the flooding had caused physical damage to the building and its appurtenances on each occasion. The respondent, with reference to the photographs, testified to that effect. The volume of water that entered the property in 2009 was considerable. The water level against a wall in the backyard reached 0.75 metres above the ground. The force of the water was such as to cause the garage doors to shift out of their frames. The extent of the flooding in 2011 was severe but not as severe as in 2009.

[12] In respect of the flooding in 2009, the respondent described how the water had flowed not only down De Hoek Street but also from the adjacent farms over the Municipal street catch pits nearest his house and onto the gravel road next to the back of his house and onto his property. Water had also flowed across his driveway into the front of his residence and garage. His backyard was flooded as well as his swimming pool. There was cattle dung on his property, once again indicating that water had flowed from the adjacent farmlands. The photographs the respondent presented showed muddied waters gushing over from the farmlands into De Hoek Street and across the catch-pit in De Hoek Street. Debris from vegetation carried over by flood waters was visible on the respondent's property.

[13] The respondent, his father and others who had assisted in an attempt to avert further flooding, dug a trench on the adjacent farm property to divert the water. It proved ineffective. Another municipal inspection followed upon the 2009 flooding. The respondent was adamant that municipal officials once again undertook to do what was

necessary to avert flooding in the future. This included, so he said, improving the storm-water drainage system and ensuring regular maintenance of catch-pits and trenches.

[14] According to the respondent, he had regularly contacted municipal officials thereafter, in an attempt to persuade them to fulfil their ‘undertakings’. In support of this assertion he produced letters from his attorneys sent in December 2009 and in February 2010 demanding that maintenance be undertaken. There had been no response from the Municipality.

[15] In relation to the flooding in 2011 the respondent testified that the water had flowed onto his property from the upper reaches of De Hoek Street and the farmlands. The pattern was the same as in 2009. There was vegetation and cattle manure that had been carried over to his property and there was similar damage to the property as on the prior occasion.

[16] As noted by the full bench, the respondent, during the trial, tendered a set of rainfall figures which he had obtained from Agri-Oorsig, an agricultural organisation. The total monthly rainfall figures for the years 1999-2012 were provided as well as daily rainfall figures for 2012-2014. This was objected to by the Municipality but admitted by Binns-Ward J on the basis of the exercise of his discretion, in terms of s 3 of the Law of Evidence Amendment Act 45 of 1998. The statistics indicated that in December 2007 the total montly rainfall was 40 mm. In May 2009 it was 47 mm and in April 2011, 33 mm. It must be appreciated that rain can fall intensely in a very limited time period and that the monthly and daily statistics must be assessed in that light. In short, rain-fall statistics do not provide a complete or accurate picture of the nature and intensity of the rain that caused the flooding. I shall deal more fully with this aspect in due course. It was common cause that in 2007 there had been a sudden cloudburst followed by intense rainfall accompanied by gale force winds within a short space of time. In short, the storm that led to the flooding in 2007 could rightly, at least on the face of it, be regarded as a freak storm.

[17] Mr Werner Simon, a qualified technical engineer who has a National Diploma in Civil Engineering from the Cape Peninsula University of Technology testified at the

trial on behalf of the respondent. He has extensive practical experience and worked for the better part of his career as a site agent and surveyor and has experience in the upgrading and maintenance of roads, canals, storm-water pipelines, paving and general construction work.

[18] In relation to the flooding complained of, Mr Simon testified that the Municipality's drainage system was inadequate to deal with the volume of water that had fed into De Hoek Street. He stated that blockages within the drainage system further impeded its effectiveness.

[19] It is common cause that subsequent to the flooding that took place during 2011, the Municipality effected substantial changes to the storm-water drainage system in the vicinity of the respondent's property and particularly in relation to the intersection of De Hoek and Buitenkant Streets. A single catchment pit was converted into a double catch-pit. In addition, an open v-chute was constructed to lead water away from the property. This is what Binns-Ward J was referring to in the passage from the trial court's judgment set out in para 4 above. Mr Simon took the view that the improved system was now adequate to deal with *normal* rainfall, if it was not obstructed in any way. In support of his view he pointed out that there had been no flooding during the rainfall on 13 August 2012 (43 mm), 3 June 2013 (46 mm) and & July 2014 (38 mm). These are the total monthly figures for each of the respective months. These statistics accord with those recorded for the days on which the flooding of the respondent's house occurred.

[20] According to Mr Simon, when one is dealing with a steep gradient such as that of De Hoek Street, there is a proven method of reducing the velocity of the flow of the water, namely, the use of dissipaters built onto the road surface. The material parts of Mr Simon's evidence, in respect of how the Municipality ought to have planned to avoid flooding of residential properties such as the respondent's, is usefully set out in para 30 of the judgment of the full bench as follows:

'[T]hat is a good question you know your design is *you actually design your roads and your services for the one in fifty year flood supposedly. I don't know if they done that* I don't know who designed it I don't know who constructed the road at the services but that is what you use. Obviously you use your history of all your other roads next to it the adjacent roads and

so forth you don't go from first principles and design everything again, you use what you've got on your system and so forth.

. . .

[D]aar moes al vantevore vloede gewees het, iemand moes bewus gewees het dat daar water afkom maar nee ek sou nie. Die kundiges wat dit ontwerp het moes 'n bietjie hulle werk beter gedoen het . . . dink ek . . . 'n fantastiese idee want dit sal in die toekoms baie skade – ek sal nie sê daar sal nie weer skade wees nie, maar dit sal baie van die skade in die toekoms verhoed. That's taking our surface water away out of the road reserve.'[4] (My emphasis.)

[21] Mr Simon's evidence, at first blush, indicates that he was of the view that the flooding in 2009 and 2011 depicted in the photographs and testified to by the respondent, could be regarded as a one-in-fifty-year flood, which is the standard he testified that municipalities and development actors are obliged to adhere to and plan for. A careful examination of the evidence, however, reveals that Mr Simon accepted that, where you have floodwater running down the mountain side from different directions down a steep gradient to the extent testified to, the storm-water drainage system that was in place, would be overwhelmed. He accepted that thunderstorms could cause a greater volume of rain to fall within a very limited period and that too would have a severe impact on the capacity of the storm-water drainage system to cope. Mr Simon readily accepted that the ability of a drainage system to cope with a downpour has to be seen against the intensity of the flow of the water at a given time. So, for example, rainfall over a shorter period with high intensity would have greater impact on the storm-water drainage system. He appears to have accepted that the mountain-side fire that occurred shortly before the last flood, would have impacted on the flow of the water on the basis that there would be less vegetation to decrease the velocity of the flow of the water. The evidence adduced on behalf of the Municipality, referred to later in this judgment, was that there had been such a fire. Added to that is the velocity of the water as it made its way down the steep gradient. Furthermore, Mr Simon's evidence in relation to whether the municipality planned for a one-in-fifty year flood referred to in para 20 above was, at best, equivocal.

[4] There must have been floods before. Someone must have been aware that water would come down from there, but no, I would not. The experts who designed it should have done their work a little better…I think…a fantastic idea because it would prevent such damage in future. (My translation.)

[22] As to the planning and the steps the Municipality ought to have taken, the following are the material parts of Mr Simon's evidence:

'Normale omstandighede, ja. Maar ons het 'n – ek weet nou nie die geskiedenis van watter datums en watter jare nie, maar jy het twee vloede gehad, en jou eerste vloed wat plaasgevind het in 2009, het vir jou tog 'n aanduiding gegee daar is 'n probleem. En twee jaar later het jy weer nog 'n vloed gehad, wat sê daar is weer 'n probleem. So dink u nie dat daar moes daadwerklik werk gemaak geword het deur die owerhede en sê, luister ons het 'n probleem in die area, kom ons sorteer dit uit voor die volgende vloede. Wat hulle wel gedoen het na die tweede vloed, is daar verbeterings aangebring.'[5]

[23] Mr Simon could not, in the absence of more detailed available information concerning the rainfall during the flood periods, determine the quantity, in cubic metres or by any other measure, of water that the storm-water drainage system, at relevant times, had to cope with, nor was the court afforded any insight into what the velocity of the water was as it careered toward the respondent's house. In relation to what is set out in para 19 above and taking into account what is set out at the beginning of this paragraph, one is unable to conclude what the true classification of the floods in question were, nor is one any the wiser about what kind of storm-water drainage system or adaptations would be required to avert floods of the kind experienced by the respondent. Even Mr Simon's evidence concerning the cost of R1 million that might be incurred to address the problem, is less than convincing. Its viability is affected, not only by the factors set out above but, also, by his less than emphatic assertions in that regard, more particularly on whether it would be the complete answer to potential future flooding. It also appears that at the time of the 2011 flood, blockages in the municipal storm-water drainage system was caused by vegetation being swept into it from the farmlands by the ferocity of the flow of the water.

[24] The Municipality tendered evidence in support of its case, that it could not be held liable for the flooding and that to do so in the circumstances of the case, would be to impose too heavy a burden on municipal authorities country-wide, which it

[5] Normal conditions, yes. But we had a – I don't know the history on which dates and during which years, but you had two floods, and the first flood you had in 2009, surely must have given you an indication that there is a problem. And two years later you had yet another flood, which tells you again that there is a problem. Would you not consider that the authorities had to make work of it and say, listen, we have a problem in the area, let us sort it out before more flooding. What they did do, was to make improvements after the occurrence of the second flood. (My translation.)

substantiated, our law did not countenance. The Municipality also took the view that the flow from the adjacent farmlands fell within the jurisdiction of another authority, the West Coast District Municipality, and it was the latter's responsibility and it could thus not be held responsible for the damage caused.

[25] Mr Johannes Breunissen testified in support of the Municipality's case. At material times he had been the Municipality's manager of civil services. He had accumulated twenty two years' experience with the Municipality. Mr Breunissen had no involvement in dealing with the aftermath of the 2007 and 2009 flooding of the respondent's property. He did, however, inspect the respondent's property after the flooding in 2011.

[26] It was Mr Breunissen who, after the 2011 flood, had been responsible for effecting the improvements to the drainage system in the vicinity of the respondent's property. The double catch-pit and the v-chute were his idea. He described these steps as 'short-term planning'. Mr Breunissen stated that the cost of upgrading the drainage system for the whole of Piketberg would be in the region of R200 million. That was beyond the Municipality's means and all it could do was to deal with 'hotspots' as best it could, within budgetary constraints. Piketberg, he explained, was a small municipality with a small rates base.

[27] According to Mr Breunissen the drainage system was well maintained. He testified that there were other low-lying areas in Piketberg which were even more susceptible to flooding, because of water flowing down the mountainside. He explained that a mountain-fire during April 2011 had contributed to the rapidity of the water flow in that there had been no vegetation to impede the flow of the water. He testified that the adjacent farmlands fell within the jurisdiction of the West Coast District Municipality and blamed the farmers for not cutting and maintaining adequate contours on their farmland along the mountainside in order to avoid flooding.

[28] In relation to the improvements made to the drainage system in the vicinity of the respondent's property, Mr Breunissen said the following:

‘Ek sê nie dit is die oplossing nie, wat ek wel sê is hy kan weer oorstroom. Daai kanaaltjie kan ook geblok word met 'n tak of iets wat daar afkom, hy kan toemaak en hy kan weer oorspring. So dit is ‘n sagte oplossing wat net gedoen is, dis nie 'n permanente oplossing nie.’

[29] Mr Breunissen was adamant that he had given no undertakings to the respondent, after the 2011 flooding of his property, in respect of improvements to be made to the drainage system. According to him, the latest improvements were made at minimal cost to the Municipality as it entailed using existing municipal stock of bricks, sand and cement.

[30] Responding to Mr Simon’s claim that an underground pipeline costing R1 million would go a long way to avoiding a repeat of the flood damage, Mr Breunissen said that the Municipality simply did not have the money to install such a pipeline. He testified that the Municipality also had other priorities such as informal housing settlements, which were even more susceptible to flooding.

[31] Mr Breunissen testified that after the 2007 flash-floods the Municipality had commissioned a hydrological study and that a master plan was then developed. The plan would lead to a more detailed design followed by implementation. It was not executed because of a lack of funds. The master plan, he explained, identified problems in the storm-water drainage system but did not provide details. Mr Breunissen could not say whether the storm-water drainage system in the vicinity of the respondent’s property was mentioned in the master-plan. The master-plan did not form part of the Municipality’s discovered documents.

[32] Mr Breunissen confirmed that there had been no further flooding but that was, so he said, because there had been no further storm-water that had come over the farmlands. He claimed that the West Coast District Municipality had also effected improvements within their jurisdiction. They had repaired a retention wall on a farm and opened up trenches for the water to flow towards the N7 drainage system. It appears from Mr Breunissen’s testimony that the total budget for Piketberg was approximately R6 million. Thus, the R1 million Mr Simon testified would be required to provide a possible solution for intense rain that might fall in Piketberg, has to be seen against that background.

[33] The last witness to testify was Mr Johannes Engelbrecht, employed as a project engineer by the Municipality. He recalled the flood in 2007. He was informed that various buildings in the town had been flooded and had seen the extensive damage that had been done, with one building's roof having been blown off. A disaster had been declared. Additional staff and even the police were employed to deal with the aftermath. He visited the respondent's property shortly after the flooding had occurred.

[34] Mr Engelbrecht conceded that the respondent had called at the Municipality's offices on several occasions to complain about the damage to his property. He had merely referred the respondent to the Municipality's insurance department. He was emphatic in his denial of undertakings made to the respondent about improvements to be effected to the drainage system in the vicinity of his house. Under cross-examination he testified that all he had said was that they were waiting for finance to upgrade the roads.

[35] In relation to the flooding in 2009 Mr Engelbrecht testified that accompanied by Mr Arthur Willemse he had visited the respondent's property shortly thereafter, and had traced the flow of the water. The remnants of vegetation on the respondent's property indicated the flow from the adjacent farmlands. He had not visited the property in 2011 because he had been busy elsewhere. He had not been involved in effecting the improvements to the drainage system in the vicinity of the respondent's home after the 2011 floods. He accepted that the Municipality had been provided with photographs by the respondent after the 2011 flood. He had no knowledge of photographs having been provided in relation to the flooding in 2009.

[36] Mr Engelbrecht testified that De Hoek Street did not feature at all in the hydrological report referred to above. According to him, maintenance reports received by the Municipality indicated that regular maintenance of the drainage system had been conducted.

[37] The relevant and material parts of the reasoning and conclusions of the trial court are set out in paras 3 and 4 above. The full bench was cognisant of the repeated warnings by this court, in cases such as *Cape Town Municipality v Bakkerud* 2000 (3)

SA 1049 (SCA) that courts should be cautious not to expose Municipalities to unrealistic expectations in relation to an asserted duty to act, and that care should be taken to ensure that plaintiffs prepared and conducted their cases with diligence so as to discharge the evidentiary burden they bore. It had regard to the evidence that the drainage system in the vicinity of the respondent's house was hopelessly inadequate to deal with the floodwaters in any of the years in question. The full bench took into account that it must have been clear that the water in the first two floods had emanated from the farmlands and that this had repeatedly been brought to the attention of the Municipality but that nothing had been done to address his concerns. It pointed to what is considered to be Mr Simon's essentially un-contradicted evidence that the standard to be met by Municipalities and developers is a one-in-fifty-year flood.

[38] At the end of para 53 of the judgment of the full bench the following appears:
'In my view, there was sufficient evidence on record to have placed a legal duty on the respondent municipality to have ensured that its drainage system was able to cater for flood waters that would have emanated from the adjacent farmlands. It had not done so.'

[39] The full bench went on to consider whether the trial court was correct in concluding that there was a paucity of evidence in relation to whether the improvements made after the 2011 flooding would have made a material difference. It said that a properly qualified expert could have considered the improvements against an educated estimate of the water cascading into the drainage system as improved after the 2011 flood and have been of assistance to the court. It recognised that the respondent had failed to present such evidence.

[40] However, with reference to the decision of the Constitutional Court in *Lee v Minister of Correctional Services* [2012] ZACC 301; 2013 (2) BCLR 129 (CC); 2013 (2) SA 144 (CC) the full bench held that there was sufficient evidence to find that there was a duty to reduce the risk of damage. The full bench went on to state the following:
'It was apparent that given the prior incidents of flooding at the appellant's property the respondent should have appreciated the risk of flooding at the property. On its own version however, it took no steps prior to the improvements post the 2011 flood to prevent flooding at the appellant's property. With regard to the adequacy of the improvements made by the respondent in *casu*, on the recommendation of its own senior civil engineer Breunissen,

Simons' evidence was to the effect that it would have significantly improved the situation in the event of the flood of a similar nature of 2009 or 2011. Despite the almost ambivalence and prevarication of both Breunissen and Engelbrecht, it was the very comment of Breunissen that was significant, who accepted that the improvements would have *"grootendeels"* made an impact on the flood waters. They both maintained though that the improvement had not been tested, despite the claims by the appellant himself that there had been heavy rains as evidenced in the rainfall statistics since 2011. Significant in my view was that no expert evidence had been called by the respondent to rebut the opinion of Simon other than the self-serving views of its own employees. The witnesses for the respondents also claimed that there had been improvements made on the adjacent farms and that could well have contributed to the lack of further flooding after 2011. Moreover, counsel for the appellant, correctly in my view, pointed out that any expert evidence lead by either of the parties with regard to the capacity of the improvements would have been based to a large measure on speculation as it would have depended on the accuracy of information available with regard to the intensity of the flooding at the particular time and based on the amount of rainfall over a specific period of time. The amount of water that flowed into De Hoek Street would also depend on the amount of water that would have dissipated on the farmlands. If anything, such expert evidence would have been no more than a general indication as to the amount of water that would have entered De Kort Street from the farmland. What is however also significant is the fact that Breunissen himself had recommended that a second catch-pit with a deeper access to it be provided and an open v-chute which was apparent from the photographs would have on the basis of common sense allowed for a greater amount of water to have been drained out of De Kort Street to the trenches running toward the N7. That, coupled with a raised driveway in front of the appellant's property would in my view and on the evidence, have had a material impact on the amount of water that would have flowed into the appellant's property in 2011. Mindful too that the flooding in 2011 was significantly less than that of 2009 as testified to both by the appellant and Breunissen himself.

In application of the considerations referred to in the majority decision in Lee, I am of the view that the concerns raised by the court *a quo* with regard to the nature of further expert evidence that the appellant was required to have tendered was not entirely warranted. The appellant, in my view had sufficiently established with the evidence of Simon and the very concessions by Breunissen and Engelbrecht that would have materially impacted on the 2011 flood. Furthermore, in application of the requirements set out by Holmes JA in *Kruger v Coetzee*, referred to above, I am satisfied that the conduct of the respondent was negligent in having failed to have taken reasonable and the very cost effective steps such as the improvements it made in 2011, after the flood in 2009.'

[41] Consequently, the full bench made the order referred to at the commencement of this judgment. It is against that order and the conclusions on which it was based that the present appeal is directed. The full bench's reliance on what it considered to be Mr Breunissen's concession that the recent improvements would 'grotendeels' have made a difference, has to be seen in the light of the concluding part of his evidence under cross-examination. The following is the material exchange containing that evidence:

'En daarom stel ek dit aan u, as dieselfde ding gedoen is in 2007 en 2009, wat iemand sy werk gedoen [het] soos wat u dit gedoen het in 2011, dan mag ons dalk nie die probleem gehad [nie], want u stelsel is definitief beter as wat die ou stelsel was. - - - Dit is – dis nie waar nie, dit kan nogsteeds oorstroom het, niemand het daai stelsel getoets [soos dit was nie].
Ek sal die res dan maar aan argument oorlaat. U Edele, ek het geen verdere vrae nie.'[6]

[42] The respondent had received compensation from his insurance company in relation to the 2007 and 2009 floods. Thereafter his insurers were no longer willing to provide him with insurance cover. He was, of course, not precluded, provided there was no other bar, from suing the Municipality for damages.[7] The trial court correctly recorded that it was not entirely clear from the respondent's particulars of claim whether he was claiming damages in respect of the flooding that occurred during 2007 and 2009. Before us, counsel on his behalf, submitted that he was claiming damages only in respect of the flooding that occurred during 2011. It bears repeating that the respondent's particulars of claim alleged a breach of a legal duty by the Municipality, in that:

'[N]ie voldoende dreineringstelsels te voorsien wat stormwater doeltreffend kan verwyder nie en/of, nie die bestaande dreineringstelsels voldoende in stand te hou nie en/of; nie betyds maatreëls in plek te stel om herhaling van oorstromings te voorkom nie.'[8]

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[6] And therefore I put it to you that if the same thing had been done in 2007 and 2009, where someone had done his work like you did it in 2011, then we might not have had that problem, because your system is definitely better than the old system used to be. – That is – it is not true. It could still have flooded, no-one tested that system as it was. I will leave the reset to argument. Your honour, I have no further questions. (My translation.)

[7] In this regard, see the discussion on *res inter alios acta* in J Neethling and JM Potgieter *Neethling-Potgieter-Visser Law of Delict* 7 ed (2014) at 239 para 4.8.2.

[8] Drainage systems that could effectively remove storm-water were not provided; and/or were not properly maintaining the existing storm-water drainage systems; and/or precautions were not timeously put in place to prevent repeated flooding. (My translation.)

[43] The respondent's claim against the Municipality is essentially one based on omission. As pointed out by J Neethling and JM Potgieter *Neethling-Potgieter-Visser Law of Delict* 7 ed (2014) at 58-59, with reference to the decision of this court in *Minister of Safety and Security v Geldenhuys* 2004 (1) SA 515 (SCA) at 528 that, as a general rule, liability follows only if the omission was in fact wrongful, and this will be the case only if (in the particular circumstances) a *legal duty* rested on a defendant to act positively to prevent harm from occurring and that a defendant failed to comply with that duty.

[44] While conceptually the inquiry as to wrongfulness might be anterior to the enquiry as to negligence, it is equally so that without negligence the issue of wrongfulness does not arise, for conduct will not be wrongful if there is no negligence. Depending on the circumstances, it may be convenient to assume the existence of a legal duty and to consider, first, the issue of negligence. It may also be convenient when the issue of wrongfulness is considered first, to assume negligence. So, too, in a particular case one might assume both wrongfulness and negligence and consider causation first.[9]

[45] Before us, counsel for both parties were of the view that the case turned on the question of wrongfulness. In my view, the problem faced by the respondent is that the evidence presented fell short of establishing any one of the aforesaid elements so as to land the Municipality with delictual liability. The trial court was rightly concerned about the paucity of evidence.

[46] To begin with, no evidence was tendered to explain the concept of a once-in-fifty-year flood, which, according to Mr Simon, is the standard which municipalities have to adhere to in designing and establishing storm-water drainage systems. Mr Simon referred to it without explaining it. A search of internet sites for one's own edification, reveals that it does not translate simply into a flood that occurs only once in 50 years, but is one that has a two per cent probability of occurrence in any given

[9] See *Gouda Boerdery BK v Transnet Ltd* 2005 (5) SA 490 (SCA) at 499B-D, *Hawekwa Youth Camp & another v Byrne* [2009] ZASCA 156; [2010] 2 All SA 312 (SCA); 2010 (6) SA 83 (SCA) at 91F and *Van Vuuren v Ethekwini Municipality* [2017] ZASCA 124; 2018 (1) SA 189 (SCA) para 18. See also L T C Harms *Amler's Precedents of Pleadings* 9 ed (2018) at 270.

year.[10] The trial court was not provided with the legal basis for a one-in-fifty-year flood being the standard that municipalities have to plan for. Simply put, the trial court was not told whether it was based in legislation or in provincial or national government policy. Neither do we know the key aspects of the standard, including its scope and content.

[47] We have no evidence to indicate the measure of the intensity of the rainfall that would constitute such a flood, either in cubic metres per second or measured in any

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[10] A 100-year flood is a flood event that has a 1% probability of occurring in any given year. The 100-year flood is also referred to as the 1% flood, since its annual exceedance probability is 1%, or as having a return interval of 100-years. The 100-year flood is generally expressed as a flow rate (m^3/s). Based on the expected 100-year flood flow rate in a given stream or river, the flood's water level can be mapped as an area of inundation. The resulting floodplain map is referred to as the 100-year floodplain, which may be very important in how close to the stream buildings or other activities are allowed. A common misconception exists that a 100-year flood is likely to occur only once every 100 years. In fact, statistically, there is an approximately **63.4 %** chance of **one or more** 100-year floods occurring in any given 100-year period. The **Probability** (P_e) of one or more of a specifically sized flood occurring during any return interval, exceeding the specifically sized flood severity, can be expressed as: $P_e = 1 - \left[1 - \left(\frac{1}{T}\right)\right]^n$

…where P_e is the probability, T is the return interval of a given storm (e.g. 100-year, 50-year, 20-year, etc.), and n is the number of years. The exceedance probability P_e is also described as the natural, inherent, or hydraulic risk of failure when, e.g. when referring to dams, bridges, etc. However, the expected value of the number of 100-year floods occurring in any 100-year period is 1. In other words, 100-year floods have a 1% chance of occurring in any given year (P_e = 0.01), 10-year floods have a 10% chance of occurring in any given year (P_e = 0.1), 50-year floods have a 2% chance of occurring in any given year (P_e = 0.02), etc. The percent chance of an *x-year* flood occurring in a single year can be calculated by dividing 100 by *x*. (http://aed.co.za/wp/flood-lines/ accessed 19 March 2019.)
See also Zelda Els' thesis for the degree of Master of Natural Sciences at Stellenbosch University at 17.
(http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=11&ved=2ahUKEwj1vdLH5Y3hAhUqUBUIHRKbD8MQFjAKegQIARAC&url=http%3A%2F%2Fscholar.sun.ac.za%2Fbitstream%2Fhandle%2F10019.1%2F17803%2Fels_data_2011.pdf&usg=AOvVaw0mE1xTMW_44_LnIH2kZ_K3 accessed on 19 March 2019.), and the National Oceanic and Atmospheric Administration and the United States Geological Survey, which are stated to be her sources.
Of course, none of these parameters, assuming them to be accurate and applicable, were explored during the trial.

other way. On the evidence presented in the court below, we have no way of knowing what type or extent of storm-water drainage system would be required in order to ward off the damaging effects of a one-in-fifty-year flood or of the floods in question. From Mr Simon's evidence, highlighted in para 21 above, one is unable to say whether the pre or post 2011 storm-water drainage system in front of the respondent's house was designed to handle a one-in-fifty-year flood. Furthermore, on the limited statistical and other evidence, we have no way of knowing whether the rainfall and the consequent flow and velocity of the water leading up to the flood on any one of the three occasions was less or greater than would be required to qualify as a one-in-fifty-year flood. What we do have, is Mr Simon's evidence that he could not say whether the improved storm-water drainage system effected after the 2011 flood, would have avoided the flood damage on any one of the three occasions. His evidence about what would be required to avert the damage is also unclear. We also have no idea of the likely cost of a storm-water drainage system in the vicinity of the respondent's house that would ward off damage such as that caused by the flood on each one of the three occasions.

[48] It is for a plaintiff to allege and prove the defendant's negligence.[11] The onus is on a plaintiff to establish that a reasonable person in the position of the defendant:
(a) Would foresee the reasonable possibility that the conduct (whether an act or omission) would injure another person's property and cause that person patrimonial loss,
(b) would take reasonable steps to guard against such occurrence, and
(c) that the defendant failed to take such reasonable steps.[12]

[49] It is now well established that, whether in any particular case, the precautions taken to guard against foreseeable harm can be regarded as reasonable or not depends on a consideration of all the relevant circumstances.[13] As stated above, the 2007 flood was one that everyone appears to have accepted as having been the result of a freak storm, causing wide-spread devastation. In the absence of any reliable data in relation to the nature and intensity of the storm in respect of 2011, it is difficult to see how the respondent could discharge the onus. The obvious questions that arise

[11] *Eversmeyer (Pty) Ltd v Walker & another* 1963 (3) SA 384 (T) and also *Amler op cit* fn 8.
[12] *Kruger v Coetzee* 1966 (2) SA 428 (A) and *Amler op cit* fn 8.
[13] *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA) at 1203.

are, what in these unknown circumstances could reasonably be foreseen and what reasonable steps could have been taken to prevent the flooding. These questions were not addressed.

[50] As to wrongfulness, it is determined objectively, taking into account all the relevant facts and circumstances and the consequences that ensued.[14] The general norm to be employed in determining whether a particular infringement of interest is unlawful, is the legal convictions of the community. In *Lee*, the Constitutional Court referred with approval to the decision of this court in *Minister van Polisie v Ewels* 1975 (3) SA 590 (A), where it was held that our law had reached the stage of development where an omission is regarded as unlawful conduct when the circumstances of the case are of such a nature that the legal convictions of the community demand that the omission should be considered wrongful.[15]

[51] When the circumstances presented are as vague as described above and particularly where the Municipality is restricted by budgetary and sociological concerns and where it has demands in relation to indigent, informal settlement communities, one might rightly ask how a court can hold that the legal convictions of the community compel the conclusion that the Municipality should be held liable. The trial court, with reference to the decision of this court in *Bakkerud*, was rightly concerned about fixing local authorities with liability on a blanket basis and about being cautious in imposing too onerous a duty on such authorities. It considered the very limited budget of the Municipality and took into account the greater need to deal with the plight of informal settlement communities in relation to the consequences of flooding. In my view, the full bench erred in being too dismissive of such concerns.[16] This should not be seen as municipalities being given licence to ignore fulfilling their obligations to residents and justifying it by merely asserting budgetary constraints.

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[14] See *Neethling-Potgieter* fn 6 at 33. See also *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC).
[15] See also the discussion in *Neethling-Potgieter* fn 6 at 36-37.
[16] As to the interplay of factors to be taken into account in defining unlawfulness, see *Neethling* et al at 73 et seq and especially at pages 76-77. In includes a consideration of preventative measures that could be taken and the probability of success of those measures and whether the public interest would be served by imposing legal duty as well as considering whether a multiplicity of actions could result.

[52] It must be borne in mind that it was not the respondent's case that the building plans in relation to his property ought not to have been approved, since he lived at the confluence of two flood water channels, at the foot of a very steep gradient, and/or that the developer and the Municipality ought, in light thereof, to have conferred and agreed on design measures to avoid flood damage of the kind that occurred.[17] I interpose to state that it does not appear that any of the respondent's neighbours suffered flood damage of the kind experienced by him. That, however, was not the case the Municipality was called upon to meet.

[53] Lastly, the trial court held that, on the evidence, the respondent had failed to show that the Municipality could, by relatively cheap means, have brought about improvements to the storm-water drainage system that would have averted the flood. As stated above, the paucity of evidence goes beyond that conclusion. One is left with no idea of the intensity of the rain that caused the flood and, further, what it would take, in the circumstances, if anything, to avoid the consequences suffered by the respondent. The reliance by the full bench and the respondents before us on paras 44 and 46-47 of the majority decision of the Constitutional Court in *Lee* is misplaced. The Constitutional Court, in that case, was critical of this court's too strict adherence to logic in its approach to causation and postulated that certainty is not required but that a plaintiff only had to establish that the wrongful conduct was probably a cause of the loss, which dictated a common sense approach. Having regard to the paucity of evidence and what is stated above, the dicta referred to do not assist the respondent.

[54] Like the trial court, we too have a degree of sympathy for the respondent. It is likely that he was restricted in the presentation of his case by financial considerations. However, he did employ an expert who, judging by his qualifications and experience, ought to have been able, if so directed, to place sufficient evidence at the disposal of the trial court to enable a more informed decision.

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[17] In this regard, see the policy of Cape Town City Council, para 10.3 and 10.4 in relation to building plan approvals involving steep gradients. This too was not explored. (https://www.westerncape.gov.za/assets/departments/transport-public-works/Documents/floodplain_and_river_corridor_management_policy.pdf accessed 19 March 2019).

[55] For all the reasons set out above, it follows that the appeal must succeed. The following order is made:

1 The appeal is upheld with costs.

2 The order of the full bench is set aside and is substituted as follows:

‘The appeal is dismissed with costs.’

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M S Navsa

Acting President

Appearances:

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	E G Cooper Majiedt Inc., Bloemfontein
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