SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No. 08/31219

DATE:02/08/2010

In the matter between:

LINDEO UBISSE Plaintiff

and

ENVIRO-FILL (PTY) LIMITED Defendant

MEYER, J

[1] This is a delictual action for damages arising from injuries sustained by the plaintiff when a large twenty eight ton Tana G290 compacter, which, it is common cause, was operated by an employee of the defendant, Mr. Loverboy Mfazwe, who at the time acted within the course and scope of his employment with the defendant, drove over her legs at the Rooikraal General Waste Disposal Site in Germiston during the late afternoon on 13 October 2005. I directed that the issue of the defendant's liability be determined first and that the question of *quantum* of damages stand over for later determination.

[2] In her particulars of claim the plaintiff avers that the negligence of Enviro-Fill or of its employees or of its operator of the compacter caused her injuries. The plea denies liability and avers that the plaintiff was solely or contributorily negligent. Paragraph 8.3 of the plea amplifies the defendant's denial of liability and introduces a defence that the plaintiff was granted access to the Rooikraal General Waste Disposal Site at her own risk. It reads:

> '8.3 During or about 2003/2004 an informal arrangement was entered into between the Defendant and the community leaders of the adjacent squatter camps to enable the Defendant to perform its functions and to allow the informal reclaimers to do informal waste picking / reclaiming on the following conditions:
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> 8.3.1 No formal waste picking / reclaiming will be allowed;
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> 8.3.2 Informal waste picking / reclaiming will be permitted on condition that:
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> 8.3.2.1 The reclaimers belong to an informal body consisting of a chairperson and committee members / leaders;
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> 8.3.2.2 The committee will be responsible to arrange and organize its members to ensure they follow the rules set by the committee;
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> 8.3.2.3 Access to the premises will be allowed for purposes of informal waste picking / reclaiming during specified hours in the mornings and afternoons through pedestrian gates erected specifically for that purpose;
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> 8.3.2.4 All reclaimers will enter the premises at their own risk;
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> 8.3.2.5 The said committee / reclaimers will be responsible for their own safety and will adhere to all rules made by the committee to ensure their safety;
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> 8.3.2.6 No waste picking / reclamation will be allowed at or near the compactor used to compact the waste; and
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> 8.3.2.6 In the event of the informal reclaimers not following the aforesaid rules or causing any damage to the fence, the informal reclaiming operation would be terminated.
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> 8.4 Plaintiff was granted access to the premises on the conditions set out above.'

[3] The Ekhuruleni Metropolitan Municipality ('EMM') is the owner of the Rooikraal General Waste Disposal Site ('Rooikraal' or 'the landfill'). General waste is received at Rooikraal where it is leveled, compacted, and covered with a minimum of one hundred and fifty millimetres soil on a daily basis. This process is called waste disposal by landfill. Mr. Pieterse, who was called as a witness for the plaintiff, is EMM's executive manager of landfill sites. He testified that EMM is the holder of a

permit in terms whereof the provision and operation of Rooikraal as a waste disposal by landfill site were authorised.[1] The waste disposal site permit issued to EMM was not introduced in evidence and I have accordingly not had sight of the conditions included therein, but Mr. Pieterse's unchallenged evidence is that the *Minimum Requirements for Waste Disposal by Landfill (2nd Ed. 1998)* published by the Department of Water Affairs and Forestry ('the Minimum Requirements') applied to the operation of Rooikraal in terms of the permit. It appears from the Preface to the Minimum Requirements that the prescribed minimum requirements for the management and operation of a landfill

> '… address the rule, while still making provision for defensible deviation where site specific factors are such that the rule cannot or need not be applied. Such deviation could involve either an increase in standards or a relaxation, and would have to be properly researched, motivated and recorded, so that it is indeed defensible.'

[4] Enviro-Fill (Pty) Ltd ('Enviro-Fill'), which is the defendant, was the successful tenderer to manage and operate Rooikraal as a commercial undertaking. It did so until the end of December 2007. The contractual relationship between Enviro-Fill and EMM was governed by the provisions of a written contract, which was also not introduced into evidence. Mr. Pieterse's uncontradicted evidence is that Enviro-Fill assumed all responsibilities in connection with the operation of Rooikraal and was obliged to obtain insurance to cover itself and EMM against liability arising from the operation of the landfill. Enviro-Fill was aware that the Minimum Requirements applied to the management and operation of Rooikraal.

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1 It is to be noted that a landfill permitting system was provided for in terms of s. 20(1) of the Environment Conservation Act 73 of 1989 ('ECA'), which section prohibited the establishment, provision, or operation of any disposal site without a permit issued by the Minister of Water Affairs and Forestry and subject to the conditions contained in such permit. This provision of the ECA has been repealed by the Waste Act 59 of 2008, which Act, except for a few provisions, commenced on 1 July 2009.

[5] Thousands of people in South Africa earn a living by picking up waste on landfills. People go onto landfills and search through the waste for recyclable items, such as iron or copper, that may be recovered or reclaimed from the waste. Items found are sold to dealers in such recyclable materials. The Minimum Requirements[2] acknowledge this occurrence and distinguish between 'uncontrolled salvaging' and 'controlled reclamation' at landfills. It is *inter alia* stated that uncontrolled salvaging at the working face of a landfill is unacceptable for safety and health reasons and because it interferes with the proper operation of the facility. It is recognised that it is usually very difficult to eliminate salvaging once it takes place at a landfill and that any attempts to achieve this usually involve confrontation and the need for ongoing policing. It is also recognised that, because landfills represent an important resource base for a sector of the population, informal salvaging cannot be eliminated. A minimum requirement is, however, stated to be that informal salvaging should be 'formalised and controlled' to minimise safety and health risks.

[6] Section 10.4..4 of the Minimum Requirements states that

> '[i]t is a Minimum Requirement that any reclamation operation be formalised in the Operating Plan. This would include regular consultation with and registration of reclaimers and the provision of appropriate safety measures. Safety measures would include the separation of reclamation from compaction and covering activities, and the provision of safety clothing. Details and guidelines regarding the above are included in Appendix 10.3.'

[7] Appendix 10.3 of the Minimum Requirements *inter alia* reads:

> '*Formalisation and control of on-site reclamation*
> Any waste reclamation operation on a landfill must be formalised and controlled. The activity must therefore be included in the Operating Plan. Where informal salvaging or waste reclamation takes place on a landfill site, the first step in formalising the process would entail the identification of leaders and the formation of a committee with whom to

2 Section 10.4.4 and Appendix 10.3 of the Minimum Requirements.

communicate. Thereafter, all reclaimers must be registered and controlled by the leaders of the committee, who would be accountable to the Permit Holder. Alternatively, proper contracts can be set up.'

Method of controlled on-site reclamation

Waste reclamation and sanitary landfilling are not compatible activities, as reclaimers require access to the waste while sanitary landfilling aims at confining it. Also, having reclaimers working in the vicinity of heavy machinery is unsafe. Waste reclamation must therefore be separated from waste compaction and covering activities.

…

Where reclamation has to take place on the landfill itself, it must be operated using two working areas or cells. In one, waste can be deposited and spread for reclamation purposes, whilst in the other, waste remaining after reclamation may be compacted and covered. The size of the working areas and the frequency with which they are alternated would depend on numerous factors and would have to be optimized on a site specific basis.

Health and safety aspects

In terms of the Occupational Health and safety Act, 1993 (Act 85 of 1993), the operator of the landfill is responsible for the safety and well being of the waste reclaimers on the site. The operator must therefore ensure that the reclaimers, as a minimum, wear suitable protective clothing, in particular industrial gloves and boots with protective soles. They should also wear highly visible tunics. If this equipment is provided by the Permit Holder, it could also become an effective means of identification and of ensuring that reclaimers are registered.

Ongoing communication with reclaimers

In order for controlled reclamation to work in an efficient and safe manner, it is essential for the reclaimers to understand and to adhere to the system in operation at the landfill. Regular meetings must therefore be held between the landfill operators and the reclaimers or their representatives, in order to educate them and negotiate with them where applicable. At this forum, health and safety issues should receive the highest priority.'

[8] Informal and uncontrolled salvaging was of the order of the day at Rooikraal. The only income of thousands of people who lived in the vicinity of Rooikraal was made through informal salvaging there. The plaintiff had been one of the reclaimers at Rooikraal. All attempts at eliminating informal salvaging failed and only resulted in confrontation, including a shooting incident during the year 2001 or 2002, which convinced Mr. Pieterse that the salvaging at Rooikraal should be formalised and controlled.

[9] EMM's landfill permit did not authorise reclamation at the landfill nor did the agreement between EMM and Enviro-Fill permit such activity. Mr. Pieterse, on behalf of EMM, arranged with Enviro-Fill to formalise and control the salvaging at Rooikraal in order to permit reclaimers onto the landfill. EMM applied for permission to allow controlled reclamation at the landfill, presumably as an amendment to its existing permit.[3] Mr. Pieterse was unable to say whether such permission was obtained.

[10] Mr. Pieterse testified that EMM, in terms of its arrangement with Enviro-Fill, was responsible for the erection of an approximately five kilometre perimeter wall at a cost of R300.00 per metre to enclose the landfill and to control access to the landfill through lockable pedestrian gates. This facilitated the implementation of specific times during the day when approximately four to five hundred reclaimers were permitted onto the landfill only at certain times of the day.

[11] The reclaimers at Rooikraal were from townships to the north and to the south of Rooikraal, Windmill Park and Villa Lisa or Holomisa. Mr. Enoch Nthombeni, who was Enviro-Fill's site supervisor at the landfill, was, according to Mr. Pieterse, responsible for the identification of leaders and the formation of a committee with whom Enviro-Fill could communicate. It should be mentioned that this is, in terms of the Minimum Requirements, the first step in formalising the process of salvaging at a landfill. It appears from the evidence of Mr. Pieterse and of Mr. Maqolo Sifaya, who was called as a witness for Enviro-Fill, that leaders from amongst the two community

3 S. 10.4.4 of the Minimum Requirements *inter alia* reads: 'Should the Permit Holder wish to allow controlled reclamation at a general waste disposal site, however, permission can be obtained as part of the Permit Application or as an amendment to an existing Permit. In this case, guidelines and Minimum Requirements are provided, in order to ensure safe and controlled working conditions. Notwithstanding, it is noted that responsibility for the safety of any reclaimers on the site vests with the Permit Holder, who will be required to enter into an indemnity agreement with the Department.'

groups were identified. The committee of leaders was called Masakhane ('the committee').[4]

[12] Mr. Nthombeni had monthly or bi-monthly meetings with the committee members. Mr. Nthombeni, according to the evidence of Mr. Sifaya, *inter alia* discussed health and safety issues with the committee members from time to time at these meetings. Before the implementation of these measures the reclaimers were ignorant of the inherent dangers which reclamation on the landfill posed to their health and safety. It seems that Enviro-Fill accordingly also implemented the minimum requirement of ongoing communication with reclaimers or their representatives. Mr. Pieterse testified that he, representing EMM, in turn had monthly meetings with representatives of Enviro-Fill, including Mr. Nthombeni, in order for EMM to monitor the process and that safety measures were *inter alia* discussed at such meetings.

[13] It is a minimum requirement that reclaimers 'must be registered and controlled by the leaders or committee, who would be accountable to the Permit Holder' once the leaders amongst them had been identified and the committee had been formed, or alternatively for 'proper contracts' to be set up. Mr. Pieterse and Mr. Sifaya testified that the arrangement which Mr. Nthombeni had made with the committee was that its committee members were responsible for ensuring adherence by the reclaimers to certain rules that had been agreed upon between Mr. Nthombeni and the committee members and to sanction those who acted in violation thereof. The

4 The committee, according to Mr. Sifaya, initially had sixty committee members – thirty representing community members from Windmill Park and thirty representing community members from Villa Lisa – but the number was reduced to 24 members representing community members from each township during 2007. Mr. Sifaya was the leader of the community group to which the plaintiff belonged and he was the chairperson of Masakhane from 2003 until 2007.

arrangement was that the committee members would control, instruct, and supervise the reclaimers. The committee members reported to Mr. Nthombeni.

[14] Only persons who belonged to one of the identified community groups were permitted onto the landfill to undertake reclamation. Reclaimers were permitted to undertake reclamation only from 7:00 – 9:30 am ('the morning reclamation shift') and from 3:00 to about 5:00 pm ('the afternoon reclamation shift'). These two 'rules' are common cause. Other 'rules' that were put to the plaintiff as having been agreed upon between Mr. Nthombeni and the committee members were that reclaimers would not be permitted onto the landfill barefoot or wearing a dress; the committee members would look after the safety of the reclaimers; the reclaimers would enter the landfill at their own risk; and that the reclaimers would not be permitted to undertake reclamation close to or in front of or behind the compactor.

[15] The plaintiff testified that it was not known to her that the committee members negotiated with Mr. Nthombeni, although she knew that they reported problems to him. She had been undertaking reclamation at Rooikraal for about twelve years prior to the accident in question, and, as far as she was concerned, the reclaimers had been known and Enviro-Fill accepted them by ending up permitting them onto the landfill. Apart from the rule that only those who belonged to one of the identified community groups would be permitted onto the landfill and the one pertaining to the times of day when reclamation would be permitted, the plaintiff denied that any other rules were applicable to the reclaimers. She was not informed of those rules and had no knowledge of them. Committee members, according to the plaintiff, supervised the reclaimers on the landfill without laying down rules and without looking after their safety. Mr. Sifaya testified about the manner in which the

committee members exercised supervision and control of the reclaimers, and how their safety was ensured. His evidence in this regard, however, was not foreshadowed in the cross-examination of the plaintiff.[5]

[16] There is a contradiction about what form the rules took which were agreed upon between Mr. Nthombeni and the committee members. Enviro-Fill's counsel put it to the plaintiff that Mr. Sifaya would testify that she knew the rules although they were not recorded on paper. Mr. Sifaya, however, testified that some of the rules were recorded and kept by the secretary of the committee and the others not. There is also some contradiction and apparent uncertainty about the precise content of certain of the rules. In conflict with what was put to the plaintiff and Mr. Pieterse by Enviro-Fill's counsel, Mr. Sifaya testified that the rules permitted a reclaimer to undertake reclamation close to, in front of, and behind the compacter, as long as a two metre distance was kept from the compacter. Also contrary to what was put to the plaintiff, Mr. Mfazwe, who operated the compacter on the landfill and called as a witness for the defendant, testified that there was no dress code for reclaimers apart from safety shoes. Mr. Pieterse was also cross-examined on and Mr. Sifaya mentioned further rules with which the plaintiff was not confronted when she was cross-examined by Enviro-Fill's counsel.[6]

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5 Mr. Sifaya testified that committee members performed duties as so-called 'security officers' and the names of the security officers on duty appeared on a notice board. Their duties included the enforcement of the rules, the opening and locking of the gates at the beginning and ending of the morning and afternoon reclamation shifts whereby access to the waste disposal site by reclaimers was controlled and ensuring that pregnant, minor, intoxicated, and persons without safety shoes did not enter the landfill, and the supervision of the reclamation and cleaning activities. They kept an eye on the reclaimers from both community groups and took care that they were not injured. Initially, thirty security officers were on duty during each shift, but this number was later reduced to fifteen per shift, one supervisor in charge of the security officers and seven on duty at each of the reclamation and cleaning activities. The committee members did not wear particular clothes to identify them. Breaches of the rules were met by sanctions.

[17] The plaintiff's evidence that she for one was unaware of the negotiations between the committee members and Mr. Nthombeni and that she was not informed and had no knowledge of the rules, apart from those that I have mentioned, is, on the totality of the evidence, accepted. It was merely put to the plaintiff that Mr. Sifaya would testify that she knew the rules. Mr. Sifaya testified that the rules were from time to time discussed at the meetings which the committee members had with Mr. Nthombeni and that committee members, in turn, would report to the community members what had been discussed at such meetings. This was not put to the plaintiff nor was she confronted with any particular occasion when she would have been informed of the applicable rules. It was put to Mr. Pieterse by Enviro-Fill's counsel that the arrangement which Mr. Nthombeni had made with the committee was that the reclaimers would be registered at one of the community groups. Whoever join a group would be introduced to Mr. Nthombeni. Rules were explained to reclaimers during registration and it was expected of them to promise adherence to the rules. This was also not foreshadowed in the cross-examination of the plaintiff. Mr. Sifaya also did not mention any occasion when the plaintiff had been so registered, introduced to Mr. Nthombeni, had the rules explained to her, and when she had promised adherence to the rules.

[18] The following remarks of Claassen J in *Small v Smith*[7] are apposite:

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6 Mr. Pieterse and Mr. Sifaya testified that the rules included that children, pregnant women, intoxicated persons, and persons without safety shoes were not permitted onto the landfill, and no food might be taken from the waste. Mr. Sifaya mentioned further rules when he was cross-examined, namely that no person was allowed to sleep over at the landfill; no fires were allowed on the landfill; and people were not allowed to climb onto the compacter or onto municipal and other trucks.

7 1954 (3) SA 434 (SWA), at p 438. Also see: *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC), para 63.

> 'It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness, and if need be, to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved.'

[19] Mr. Sifaya conceded that the rules were often not adhered to, especially during the afternoon reclamation shifts, that reclaimers often got closer than two metres to the compacter, and he said that the strictness with which they were enforced varied from committee member to committee member. Mr. Mfazwe also conceded that scores of reclaimers surrounded the compacter - close to its sides, front and back - at any given time. The plaintiff testified that many people often worked in close proximity to the compacter and that young people sometimes even took rides on the compacter.

[20] Mr. Mfazwe testified that the committee members supervised and also participated in reclamation during the afternoon reclamation shifts. Mr. Sifaya said that this is the position at present, but that it was not the position at the time when the plaintiff was injured. The evidence of Mr. Mfazwe is more probable. When he testified in chief, Mr. Sifaya was pertinently asked whether the committee members (supervisors) also participated in the reclamation activity when they were on duty and he only mentioned that those on duty between 7:00 – 9:00 am did not participate, and that they were given the opportunity to undertake reclamation from 9:00 – 11:00 am. It was not suggested by anyone who testified at the trial that supervisors that had been on duty during the afternoon reclamation shifts were similarly accommodated. The plaintiff testified that the reclaimers and committee

members alike were undertaking reclamation. Her evidence in this regard is probable insofar as the afternoon reclamation shifts were concerned.

[21] It is undisputed that the minimum requirement that reclaimers had to wear highly visible tunics, was not implemented by Enviro-Fill. Mr. Pieterse testified that the issuing of suitable protective clothing and 'highly visible tunics' would amount to great expense. I find this difficult to accept. Visible tunics are commonly worn by parking attendants, street sweepers, and the like. Mr. Pieterse, in any event, conceded that no quantification of the costs involved had been done.

[22] The Minimum Requirements warn that 'having reclaimers working in the vicinity of heavy machinery is unsafe' and prescribe as a minimum requirement the use of two working areas or cells, one where waste is deposited and spread for reclamation purposes and the other on which the waste remaining after reclamation is compacted and covered. Mr. Sifaya testified that the reclaimers previously used to go onto the landfill after the security officers in attendance had gone off duty at about 5:00 pm when they then dug open waste that had been compacted and covered with pickaxes in search of recyclable items. The reclaimers accordingly did not work in the vicinity of heavy machinery. However, since the process of formalising and controlling the salvaging at Rooikraal had been implemented, the minimum requirement of the use of two working areas or cells had not been implemented. To this day the reclamation activities and compaction and covering activities with the 28 ton compacter take place on a single working area or cell of less than the size of a rugby field. Trucks deliver the waste onto the working area. The compacter, according to the evidence of Mr. Pieterse and of Mr. Mfazwe, throughout the day and

at any given time moves forward and backward within a maximum range of fifteen metres at slow speed.

[23] Compliance with the prescribed minimum requirement of using two working areas at Rooikraal was, according to Mr. Pieterse, 'practicably impossible' or 'very difficult'. He proffered as a reason for this practical impossibility or difficulty that the reclaimers wanted to pick items from the incoming waste stream immediately after it had been deposited onto the landfill. However, this could logically also be achieved by the use of two working cells. A further reason given by him is that the waste must be covered by the end of each working day due to the noise emanating from the premises which could cause a disturbance after working hours. The implementation of two working cells would result in not all the waste having been processed by the end of a day. This reason too seems to me to be speculative. Mr. Pieterse conceded that no quantification of any of the costs of compliance with the Minimum Requirements had been done.

[24] It appears from the evidence of Mr. Pieterse that the landfill premises are vast. They are surrounded by a five kilometer perimeter wall. A picture of the physical lay-out of Rooikraal is also gleaned from the evidence of Mr. Mfazwe. The main disposal area or site comprised four cells that were next to each other and they were numbered one to four. Mr. Mfazwe was unable to give an accurate estimation of the size of each cell other than to say that each one was bigger than the size of two soccer fields. Waste was worked on a particular area of a cell on a given day, unless it rained, in which event the compacter was moved onto and operated on what was called 'the wet area'. Practically it seems to me that the landfill could be operated by using two working areas or cells.

[25] Mr. Pieterse's unsubstantiated statements of the difficulties and exorbitant costs involved in implementing a separation of the waste reclamation activity from the waste compaction and covering activities and of issuing the reclaimers with highly visible tunics has little probative value. EMM, as I have mentioned, applied for permission to allow controlled reclamation at Rooikraal. If a defensible relaxation of the Minimum Requirements had been included in the application then one would have expected Mr. Pieterse's evidence to have elucidated this fully. These are matters that also fall within the peculiar knowledge of Enviro-Fill or its employees. Enviro-Fill placed no evidence before me in relation to any such difficulties or exorbitant costs.

[26] The evidence and the probabilities overwhelmingly refute the allegations in Enviro-Fill's plea of an arrangement that only informal reclamation or waste picking would be permitted. The converse has been proved. It appears from the evidence that EMM and Enviro-Fill implemented certain of the prescribed minimum requirements and others not.

[27] In its plea Enviro-Fill *inter alia* alleges that an informal arrangement was entered into between it and the community leaders of the adjacent squatter camps that all the reclaimers would enter the premises at their own risk and that the plaintiff was granted access to the premises *inter alia* on such condition. The evidence does not establish such *consensus* between the plaintiff and Enviro-Fill. I have accepted the plaintiff's evidence that she was not informed of these terms or conditions and that she had no knowledge thereof. I should also mention that Mr. Sifaya testified that these terms were also displayed on notices at the gates giving access to the landfill. The plaintiff was, however, not confronted with this aspect of Enviro-Fill's

defence and it can also not be inferred that she knew or must have realised that they contained conditions relating to her access and use of the premises. The plaintiff's evidence is that she cannot read or write, and there is no reason to doubt her on this.

[28] Enviro-Fill's counsel submitted that Enviro-Fill was exempted from liability for negligence by virtue of a contract that was entered into between Enviro-Fill and Masakhane in terms whereof it was agreed that members of Masakhane, of whom the plaintiff was one, would enter the premises at their own risk and that the defendant would not be responsible for their safety. Enviro-Fill bears the *onus* of proving a valid contract in terms of which liability for negligence was excluded.[8] Such *onus* has not been discharged. I have mentioned Mr. Pieterse's unchallenged evidence that Enviro-Fill, through its site supervisor, Mr. Nthombene, identified leaders from the squatter communities and that the leaders formed a committee. The plaintiff was merely a resident or member of a squatter community from whom the leaders were identified. The legal basis upon which the leaders or committee could conclude an agreement with Enviro-Fill that was binding on the plaintiff has not been established nor has it been established that the 'informal arrangement' was intended to create enforceable legal rights and obligations. This defence must accordingly fail.[9]

[29] I now turn to the accident at Rooikraal in which the compacter's rear steel spiked drum roller ('rear drum')[10] was reversed onto the plaintiff's legs. Mr. Mfazwe

8 *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA), at p 991C – D.

9 It is therefore not necessary to consider other aspects of this defence, such as the language of the disclaimer or exemption on which Enviro-Fill relies and whether the plaintiff's cause of action falls within the ambit thereof.

10 The large twenty eight ton Tana G290 compacter is depicted on exhibits 'A' and 'C1 – C4'.

testified that he had been operating the compacter at Rooikraal for about eight years prior to the accident, seven days a week from 7:00 am until 5:30 pm, and some days even until 7:00 pm if there was a backlog. He was a truck driver before and it seems that he was properly qualified to operate the compacter. At about 5:00 pm on 13 October 2005, Mr. Mfazwe was operating the compacter on cell number three of the landfill. Waste in front of the compacter formed a slope and it was pushing the waste forward and upslope. People shouted at Mr. Mfazwe to stop, which he did. There were two ladies in front of the compacter whom he did not see since his vision was obstructed by the waste that the compacter was pushing at the time. Moments later while he was reversing the compacter, people also shouted. One of them was Mr. Sifaya, who ran closer to where he was seated on the compacter. Mr. Mfazwe immediately stopped the compacter when he heard the shouting. He was told that the compacter had driven onto a person and that he must drive the compacter forward, which he did. Mr. Mfazwe did not see the plaintiff while the compacter was reversing.

[30] Mr. Sifaya testified that he was not on duty as a committee member (supervisor) during the afternoon shift when the plaintiff was injured. He and many other people were undertaking reclamation behind the compacter immediately before the accident took place. Mr. Sifaya was about 4 – 5 metres away from the rear end of the compacter when it started reversing. He took his bag and moved away from the path of travel of the compacter. Once he was clear of its way he put his bag down and then noticed the plaintiff lying on the ground about one metre from the rear end of the approaching compacter. He and other reclaimers shouted and waved their hands in the air. Mr. Mfazwe stopped the compacter immediately. Its rear drum had driven onto the plaintiff's legs. He and other reclaimers told Mr. Mfazwe that the

compacter had driven onto a person and that he should move the compacter forward. Mr. Mfazwe complied. Mr. Sifaya did not notice the plaintiff before he had seen that she was lying on the ground immediately behind the compacter. People ran away after the accident. Mr. Sifaya was one of the reclaimers who rendered assistance to the plaintiff. He assumed the responsibility of supervisor. Her trousers were cut loose from the wire. Mr. Nthombeni was informed of the incident.

[31] The plaintiff testified that at a stage when the compacter was moving forward and away from her and while she was crossing its path behind it at a distance of about 20 – 30 metres, the right leg of her trousers got caught up in a wire that she could not see, because she was walking on a surface that was full of litter. She bent to loosen the wire and noticed that the compacter was reversing towards her. She struggled to loosen the wire and she flung herself to the ground at a stage when she realised the compacter was very close to her. She stretched her hand out to a fellow reclaimer for assistance, to no avail. People shouted to alert the operator of her presence on the ground behind the compacter. The compacter continued reversing with its rear drum over her one leg, stopped, and moved forward over her other leg[11] while the people were shouting. It then stopped a distance away. She was assisted by a friend and by Mr. Sifaya.

[32] In terms of the classic test for negligence laid down in *Kruger v Coetzee*[12] liability in delict based on negligence is proved if:

'(a) a *diligens paterfamilias* in the position of the defendant –

11 I have a difficulty with the logic of this aspect of the plaintiff's evidence, but, it seems to me, nothing turns on it.

12 1966 (2) SA 428 (A), at p 430E – F.

(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.'

[33] Enviro-Fill occupied, controlled and managed Rooikraal as a general waste disposal site, which is indisputably and obviously a hazardous environment involving risks to the health and safety of those who enter upon it. The Minimum Requirements, in the absence of evidence to the contrary, alerted the defendant's employees in no uncertain terms that '[u]ncontrolled salvaging at the working face of the landfill is unacceptable, for both safety and health reasons' and 'having reclaimers working in the vicinity of heavy machinery is unsafe.' Safety measures were implemented and discussed at monthly meetings to, in the words of Mr. Pieterse, prevent an incident like the present one from occurring. Mr. Pieterse conceded that the occurrence of an incident such as the present one where the compacter had driven onto a person was a possible one and foreseeable. The compacter was operated amidst the reclaimers without its operator having proper vision ahead of and behind it.[13] Its operator knew that reclaimers unseen by him might be in close proximity to and in the way of the moving compactor. Enviro-Fill's counsel put it to the plaintiff that it was very dangerous to undertake reclamation activities in front of or behind the compacter, because of its constant forward and backward movements. The inherent dangers and the reasonable possibility of a reclaimer being injured as a result of having reclaimers working in the immediate

13 This is demonstrated by the evidence that Mr. Mfazwe was unable to see the reclaimers in front of the compacter immediately before the compacter had driven over the plaintiff. Mr. Mfazwe also did not see the plaintiff behind the compacter at any time before the compacter had driven onto her. It is undisputed that the operator was always unable to see anything immediately behind the compacter when it was driven backwards. When reversing, the operator was reliant on the compacter's reverse hooter signaling that it was reversing, using the rear view mirrors fitted on both sides of the compacter, and turning his head and looking over his shoulders. This, however, did not give him proper rear vision.

vicinity of the compacter or operating the compacter amidst them were, or at the very least, ought to have been foreseen by Enviro-Fill or its employees.

[34] Whether a reasonable person in the position of Enfiro-Fill would have taken any steps to prevent the occurrence of the foreseeable harm to the reclaimers and whether the steps actually taken are to be regarded as reasonable or not depends upon a consideration of all the facts and circumstances of this case and ultimately involves a value judgment. Reasonable steps are not necessarily those which would ensure that foreseeable harm does not eventuate. Guidelines, particularly in relation to the question whether the reasonable person would have taken any steps or measures to prevent foreseeable harm, are considerations such as:

> '(a) the degree or extent of the risk created by the actor's conduct;
> (b) the gravity of the possible consequences if the risk of harm materialises;
> (c) the utility of the actor's conduct; and
> (d) the burden of eliminating the risk of harm.'[14]

[35] It is not presently necessary to review the many authorities dealing with these considerations. Generally, considerations (a) and (b) are balanced with considerations (c) and (d).[15] By way of illustration: the high risk of serious injury might in a given case outweigh the utility which an actor provides and the difficulty and costs involved in eliminating the risk so that the reasonable person would in the circumstances have taken reasonable steps to prevent the risk of harm. In other circumstances the reasonable person might refrain from taking steps to prevent the occurrence of foreseeable harm if the utility an actor provides or the difficulty and

14 These principles are enunciated in *Ngubane v South African Transport Services* 1991 (1) SA 756 (A), at pp 776G – 777J; *Pretoria City Council v De Jager* 1997 (2) SA 46 (A), at pp 55I – 56E; and *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA).

15 *De Jager (supra),* at p56B-C.

high costs of precautionary measures outweigh the say low incidence of injury with not serious probable consequences. Considerations (c) and (d) may in a given case not be relevant to the question of whether a reasonable person would have taken steps to prevent the occurrence of foreseeable harm[16] and they may in certain circumstances be relevant '… in determining whether the steps taken to avert the risk of injury were reasonable.'[17]

[36] The conduct of Enviro-Fill's employees in having reclaimers working in the immediate vicinity of the compacter or of operating the compacter amidst them, created a high risk of serious injury. This occurrence was the first one in which a reclaimer had been injured by the compacter. Such an incident, however, was obviously almost certain to happen, sooner or later. The high risk of serious injury that prevailed in this instance would have prompted a reasonable person in the position of Enviro-Fill to take steps to prevent the occurrence.

[37] It is accepted that Enviro-Fill took measures or steps to guard against the foreseeable harm to reclaimers. I have mentioned earlier on in this judgment that access onto the landfill was controlled through the erection of a perimeter wall with lockable gates; rules that governed the reclamation activities were agreed upon between Enviro-Fill's site supervisor and the leaders (committee members) of the communities where the reclaimers resided; the committee members were made responsible for enforcement of the rules and to supervise and control the reclamation

16 In *Ngubane (supra),* Kumleben JA held on the facts of that case that the '… risk – in fact the near certainty – of serious, if not fatal injury' resulting from the act complained of – considerations (a) and (b) - would have prompted the reasonable person to take steps to prevent the occurrence (p. 777D) and the precautions which would have prevented the occurrence in that case are unrelated to difficulties of costs and requirements of public utility - considerations (c) and (d) (p. 778F – G).

17 *Ngubane (supra)*, at pp. 777I – 778A. See also: *De Jager (supra)*, at p 56C – E.

activities; and the committee members were advised of health and safety issues. The question is therefore whether the steps that had been taken to avert the risk of injury would have been regarded by the reasonable person as being sufficient in the circumstances.

[38] The rules agreed upon between Enviro-Fill and the committee were not properly recorded, there was uncertainty about the precise content of at least some of the rules, the effectiveness with which they were brought to the attention of all the reclaimers is doubtful,[18] they were often not adhered to, and the strictness with which they were enforced varied. Notably, the implementation of the rule that permitted reclaimers to undertake reclamation in front of and behind and in close proximity to the moving compacter as long as a two metre distance away from it was kept, if such was indeed the rule, did not effectively minimise the obvious risk of danger to the reclaimers and would not have prevented the plaintiff from being driven over by the compacter. It has not been established that the plaintiff acted in violation of such rule.

[39] A large volume of waste was worked on a relatively small working area by the compacter and by hundreds of reclaimers at the same time. The compacter was at any given time operated amidst and in close proximity to the reclaimers even though the operator did not have proper vision ahead of and behind the compacter, and this state of affairs on the landfill also prevailed at the time when the plaintiff was injured.[19] Committee members, when on duty as security officers during the

18 The plaintiff for one was not informed and had no knowledge of the rules, apart from the one pertaining to the times of the day when reclamation was accepted.

19 The day on which the accident occurred - 13 October 2005 – was, according to Mr. Sifaya, a somewhat unusual day at Rooikraal. The compacter was serviced and did not operate in the morning and there were accordingly more people undertaking reclamation during the afternoon shift.

afternoon reclamation shifts, also undertook reclamation, which, of necessity, derogated from effective supervision. There is every reason to believe that the supervisors were also poverty stricken and needed to take whatever they deemed of value upon seeing it, as Mr. Pieterse testified about the reclaimers generally. The plaintiff's predicament went unnoticed until it was too late to assist her or to alert the operator timeously. Enviro-Fill is taken to have been actually aware, in the absence of evidence to the contrary, through its site manager and its operator, who, it is common cause, were both always present at the landfill when reclamation was undertaken, of the inadequacies of the precautionary measures and of the state of affairs on the landfill, and in particular at the time when harm befell the plaintiff.

[40] Complying with the prescribed minimum requirement of using two working areas or cells, one where waste was deposited and spread for reclamation purposes and the other on which the waste remaining after reclamation is compacted and covered, would have eliminated the risk to which the plaintiff was exposed and prevented this occurrence. This measure, in the absence a motivated defensible deviation which is absent in this matter, is one that the reasonable person in the position of Enviro-Fill would have considered reasonable in all the circumstances.

[41] Even disregarding the minimum requirement of using two working areas or cells, reasonable measures required to provide adequate safeguards against harm to the reclaimers in this instance do not require imaginative thought. Mr. Mfazwe testified that the defendant employed three persons to direct the trucks that had delivered waste onto the landfill. They were called 'spotters' and wore reflective Enviro-Fill overalls. The employment of persons who were not allowed to also

undertake reclamation when on duty, dressed in reflective clothing, similar to the 'spotters', and always positioned in front of and at the back of the compacter using flags (commonly used at sporting events) or signal boards (used to direct aeroplanes) or any other method to alert the operator timeously when it was unsafe to drive or when it was necessary to stop immediately, would have prevented the occurrence in which the plaintiff was injured. Enviro-Fill, in other words, could and ought to have exercised more direct supervision and not merely have left the reclaimers to their own devices. These measures would hardly have involved additional costs for Enviro-Fill when the costs saved by the reclaimers performing cleaning duties for it is considered, or, it would not have involved unreasonable additional costs.[20]

[42] The utility that Enviro-Fill provided was a landfill, which was indispensable and clearly in the interests of the public and particularly those served by EMM, and also reclamation, which advanced the socio-economic interests of thousands of poor people from the nearby townships, who, according to the evidence of Mr. Sifaya, had no other source of income. The social value of permitting reclamation is beyond question. It should, however, also be borne in mind that Enviro-Fill managed and operated Rooikraal as a commercial undertaking, assumed all responsibilities in connection with its operation, and was obliged to obtain insurance for liability arising from the operation of the landfill. Enviro-Fill, in the absence of evidence to the contrary, must be taken to have accepted the risk of liability where injury or death occurs to a reclaimer at Rooikraal. Also, the speculative difficulties and costs

20 Mr. Sifaya testified that Enviro-Fill previously employed people to clean the landfill from windblown waste and waste that fell off trucks. It was arranged between Mr. Nthombeni and the committee that the reclaimers would perform such cleaning duties in return for longer hours during which they were permitted to undertake reclamation.

involved in eliminating the risk of serious injury do not outweigh the other considerations which required Enviro-Fill to have taken adequate precautions to prevent the risk of serious inury in this instance.

[43] The steps that had been taken by Enviro-Fill to avert the risk of injury were inadequate, flawed, not adhered to, and insufficient to reduce the high risk of serious injury that occurred in this instance. Such measures would not have been regarded by the reasonable person in the position of Enviro-Fill as being sufficient in the circumstances. Enviro-Fill's employees did not exercise that degree of care which the circumstances demanded in allowing reclaimers to work in the immediate vicinity of the compacter or of operating the compacter amidst them at the time when harm befell the plaintiff without adequate precautions having been in place. The plaintiff has discharged the *onus* of proving negligence on the part of Enviro-Fill's employees.

[44] Enviro-Fill's counsel submitted that the conduct of Enviro-Fill was not wrongful. It is trite that negligent conduct giving rise to loss, unless also wrongful, is not actionable.[21] If the conduct is not wrongful '[t]he defendant enjoys immunity against liability for such conduct, whether negligent or not.'[22] The ground of negligence which is pertinent and sufficiently raised in the pleadings or canvassed at the trial essentially narrows down to the conduct of Enviro-Fill's employees in allowing reclaimers to work in the immediate vicinity of the compacter or of operating the compacter amidst them at a time when it was unsafe and when adequate

21 See: *Gouda Boerdery BK v Transnet* 2005 (5) SA 490 (SCA), para 12.

22 *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA), para 12.

measures to guard against the risk of harm were not in place. The negligent conduct which caused harm to the plaintiff seems to me to have taken the form of a positive act and is *prima facie* wrongful. The result will in my view not be any different if the negligence of Enviro-Fill's employees is viewed to have been in the form of an omission.

[45] The omission will be wrongful if Enviro-Fill or its employees were under a legal duty to act positively to prevent the harm suffered by the plaintiff.[23] Whether or not the existence of a 'legal duty' should be accepted depends on whether '… public or legal policy considerations require … that legal liability for the resulting damages should follow.'[24] An acceptance that the omission on the part of Enviro-Fill or its employees is wrongful is not without '… any precedent …' and does not '… extend delictual liability to a situation where none existed before …'.[25] Where one is in control of a potentially dangerous situation or thing one would usually be under a duty to take care to prevent harm from materialising. It can hardly be contended that in exercising control, Enviro-Fill ought not reasonably and practically have prevented harm to the plaintiff.[26] Unlike the reclaimers, Enviro-Fill, as a landfill operator in the stead of the local authority (EMM), through its employees, had the know-how or was reasonably expected to know that reclamation at landfills could endanger the health and safety of the reclaimers and how to provide appropriate safety measures. The

23 See: *Van Eeden (formerly Nadel) v Minister of Safety & Security* 2003 (1) SA 389 (SCA), para 9.

24 *Two Oceans Aquarium Trust (supra)*, para 12.

25 *Two Oceans Aquarium Trust (supra)*, para 12.

26 See: *Colman v Dunbar* 1933 AD 141, at p 157; *Graham v Cape Metropolitan Council* 1999 (3) SA 356 (C), at pp 369I – 370D, and *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA), at p 1203E – G.

reclaimers, who are of the most disadvantaged persons in our society, were entirely reliant upon the person in control of the landfill to ensure that reasonable precautions were taken to provide a safe environment for them. This is borne out by the evidence of Mr. Sifaya, who testified that the reclaimers were ignorant about the inherent dangers and safety and health risks until Mr. Nthombeni, who he considered knowledgeable about such issues, discussed them with the committee members. In my view a legal duty was owed towards the reclaimers, including the plaintiff, by Enviro-Fill or its employees to take reasonable precautions and the negligent omission on their part is also wrongful.

[46] Enviro-Fill's counsel submitted that if such a duty was cast upon Enviro-Fill, it trusted fulfillment of that duty to Masakhane, which was to ensure the avoidance of harm. Counsel submitted that Enviro-Fill accordingly duly fulfilled its duty and cannot be held responsible for what Masakhane might have failed to do. This argument is fatally flawed. The committee and the reclaimers at all times remained under the direction of Enviro-Fill's site supervisor, Mr. Nthombeni. Enviro-Fill or its employees were personally at fault.

[47] The result, however, will be no different even if there was such delegation of Enviro-Fill's duty to the committee. The test for negligence in such a case was set out by Goldstone AJA in *Langley Fox Building Partnership (Pty) Ltd v De Valence*[27] as follows:

> 'In my opinion, it follows from the aforegoing that in a case such as the present, there are three broad questions which must be asked, viz:
> (1) would a reasonable man have foreseen the risk of danger in consequence of the work he employed the contractor to perform? If so,
> (2) would a reasonable man have taken steps to guard against the danger? If so,

27 1991 (1) SA 1 (A), at p. 12H-J.

(3) were such steps duly taken in the case in question?

Only where the answer to the first two questions is in the affirmative does a legal duty arise, the failure to comply with which can form the basis of liability. …

It follows from the aforegoing that the existence of a duty upon an employer of an independent contractor to take steps to prevent harm to members of the public will depend in each case upon the facts. It would be relevant to consider the nature of the danger; the context in which the danger may arise; the degree of expertise available to the employer and the independent contractor respectively; and the means available to the employer to avert the danger. This list is in no way intended to be comprehensive.'[28]

[48] The first two questions must be answered in the affirmative and the third one in the negative. Enviro-Fill should for the same reasons that I have mentioned in paragraphs 38 and 39 *supra* reasonably have foreseen the risk of harm to reclaimers in consequence of requiring them and the committee members to ensure their own safety and should accordingly have taken adequate precautionary measures, such as more direct supervision, instead of leaving the reclaimers to their own devices.

[49] The plaintiff in the alternative seeks to hold Enviro-Fill vicariously liable for the conduct of its operator of the compacter, who is alleged to have negligently caused the accident with the plaintiff. It is not necessary to decide this issue in the light of the findings that I have made. Nevertheless, it appears that Mr. Mfazwe followed the method of work accepted by his employer by operating the compacter forward and backward amidst the reclaimers notwithstanding his inadequate and limited vision to the front and to the rear and his knowledge that reclaimers unseen by him might be in close proximity to and in the way of the moving compacter. Otherwise he would not have been able to perform his duties. Mr. Mfazwe did not see the plaintiff at any time prior to reversing the compactor onto her when she was lying on the ground. The reasons for not seeing her were probably the fact that she was not required to

28 Also see: *Chartaprops 16 (Pty) Ltd and Another v Silberman* 2009 (1) SA 265 (SCA), paras 42 – 43.

wear any highly visible garment and the inadequate and limited vision to the rear. It was, in my view, rather Enviro-Fill or its employees that were at fault in allowing reclaimers to work in the immediate vicinity of the compacter or of having the compacter operating amidst them at a time when it was unsafe while adequate measures to guard against the risk of harm were not in place.

[50] Enviro-Fill's counsel submitted that there was contributory negligence on the part of the plaintiff. It was, as I have mentioned earlier in this judgment, put to the plaintiff that it was very dangerous to work in front of or behind the moving compacter and that the reclaimers were not allowed to work in front of or behind or close to the compacter. She was confronted with having disobeyed this prohibition. It was put to her that Mr. Sifaya would testify that she had gone close to the rear end of the compacter to pick up an item. When it reversed she started to run away and that was when her trousers got hooked by a steel wire. The plaintiff denied this and so did Mr. Sifaya when he testified. He testified that he did not see the plaintiff until the stage when she was lying on the ground about a metre behind the reversing compacter immediately before it reversed onto her.

[51] I have referred to the plaintiff's evidence that the stage when the right leg of her trousers got caught up in a wire was when the compacter was moving forward and away from her and while she was crossing its path behind it at a distance of about 20 – 30 metres. Mr. Mfazwe testified that the maximum distance the compacter was driven forward or backward at any given time was 15 metres and he accordingly disagreed with the plaintiff's estimation that she crossed behind the compacter at a distance of about 20 – 30 metres at the time when she was caught up by the wire. Had she been that far away from the compacter it would not have driven

onto her legs. Mr. Pieterse corroborates Mr. Mfazwe on this aspect. It is not uncommon for honest and credible witnesses to err when they estimate distances. The plaintiff probably crossed the compacter's path behind it at a distance closer than that estimated by her.

[52] There seems to be no reason to disbelieve the plaintiff's uncontroverted evidence that she had always ensured not to work too close to the compacter. She at the time of the accident crossed the path of the compacter at what she considered to be a safe distance. The only reason why she was not able to get away timeously from the reversing compactor was that she had been trapped by a wire which she was unable to free herself from.

[53] I am satisfied that the plaintiff's presence and undertaking of reclamation in the vicinity of the compacter cannot be ascribed to negligence on her part. This was the method accepted and endorsed, if not introduced, by Enviro-Fill. A reclaimer, on the evidence before me, could not reasonably have been expected to have appreciated all the inherent dangers and safety risks or to have devised a safer system. It has also not been proved that the dangers and safety risks were brought to the plaintiff's notice, properly or at all. It is in all the circumstances accepted that the plaintiff took reasonable precautions for her own safety. Contributory negligence on her part has not been proved.

[54] Enviro-Fill's counsel requested that the issue of costs be reserved and that the parties be permitted to address me thereon once the issue of liability was determined. My order herein will accommodate this request.

[55] In the result, the following order is made:

(a) It is declared that the defendant is liable to the plaintiff for such damages as might be agreed upon or proved in consequence of the event that is the subject-matter of this claim.

(b) The costs of determining the issue of liability are reserved for determination at a date and time to be arranged with my clerk.

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P.A. MEYER
JUDGE OF THE HIGH COURT

2 August 2010