

**SAFLII Note:** Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)  
REPUBLIC OF SOUTH AFRICA**

Case Number: 56948/2014

**DELETE WHICHEVER IS NOT APPLICABLE**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 1 FEBRUARY 2021

SIGNATURE: .....

**SINAH JULIA KHABU**

First Plaintiff

**O[....] J[....] K[....]**

Second Plaintiff

**M[....] K[...]**

Third Plaintiff

And

**MATLOSANA CITY COUNCIL**

First Defendant

**COENRAAD LOUWRENS STANDER N.O.**

**GERT LOUWRENS STEYN DE WET N.O.**

SOPHIE THABANG KEKANA N.O.

LILY MAMPINA MALATSI-TEFFO N.O.

Second Defendant

NDLOVU PLANT HIRE CC

Third Defendant

---

## JUDGMENT

---

### JANSE VAN NIEUWENHUIZEN J

[1] On 9 March 2013 Tshehla Famen Khabu (“the deceased”) tragically lost his life when the wall of a trench he was working in caved in and buried him in the soil.

[2] The first plaintiff, in her capacity as the wife of the deceased and the second and third plaintiffs, in their capacities as children of the deceased instituted this action claiming damages in the form of loss of support suffered due the demise of the deceased.

[3] The court issued a separation of issues in terms of rule 33(4) and the trial proceeded only in respect of liability.

### ***Locus standi***

[4] Prior to dealing with the merits of the claim, I deem it prudent to address the *locus standi* of each of the plaintiffs.

- [5] Ms Khabu, the first plaintiff, testified that she was married to the deceased for approximately 23 years. Their marriage certificate issued by Home Affairs was submitted into evidence.
- [6] Ms Khabu had a child, O[....] J[....] K[....], the second plaintiff when she met the deceased. The deceased raised the second plaintiff and it appears from a birth certificate admitted into evidence that the deceased must have adopted the second plaintiff at some stage, as the deceased is registered as the father of the second plaintiff in the records of Home Affairs.
- [7] The third plaintiff, M[....] K[....], was born from the marriage between Ms Khabu and the deceased.
- [8] Ms Khabu stated that she was not employed prior to the deceased's death and that the deceased was the sole breadwinner in the family.
- [9] The second and third plaintiffs were also unemployed and the deceased maintained and supported them financially.
- [10] Ms Khabu explained the situation after the deceased's death as follows:
- "There was no-one employed in the household. I was the sole one that needed to keep the fire burning purely by doing some sewing work, alteration for people who normally will bring clothes to repair or to sew."*

- [11] On the aforesaid evidence, I find that all three plaintiffs do have *locus standi*.

### **Defendants**

- [12] The first defendant, Matlosana City Council (“the City Council”), is the owner of the property situated at [...] (“the site”) at which a blocked sewerage pipe had to be repaired (“the work”).
- [13] The second defendant, GS Poultry, conducted business as an abattoir at 20D Radium Street, Uraniaville, Klerksdorp. GS Poultry has since the inception of the matter has been placed in liquidation and the plaintiffs withdrew their claim against GS Poultry.
- [14] The third defendant is Ndlovu Plant Hire CC (“Ndlovu”) which conducts business in excavation work and in the hiring and letting of excavation machinery.

### **Background**

- [15] The background facts are common cause between the parties. GS Poultry a chicken abattoir operated adjacent to the site. During its operations GS Poultry caused chicken waste to wash into the sewerage draining system which led to a constant problem of blocked drainpipes.
- [16] The City Council is responsible for the proper functioning of the sewerage system in its area of jurisdiction, which area includes the property on which the construction work was executed.

- [17] The problem was a regular occurrence and in an effort to alleviate the situation, GS Poultry offered to assist the City Council to unblock the sewerage pipe. GS Poultry's assistance entailed the hiring of an excavator and excavator operator from Ndlovu.
- [18] The City Council, in turn, engaged the services of GTC Plumbing, the employer of the deceased to do the plumbing work on site.
- [19] On 9 March 2013 and during the execution of the construction work, the deceased was in the excavation when one of the walls caved in and buried the deceased in the soil.
- [20] The events of the day will unfold through the evidence of the witnesses referred to *infra*.

### **Evidence**

- [21] In order to place the evidence in perspective, it is apposite to refer to the different role players on the day in question, being:
- 21.1 Mr Theuns van Schalkwyk ("Van Schalkwyk"), the owner of GTC Plumbing and the employer of the deceased;
- 21.2 Mr Thansanqa Nkhuku, a co-employee of the deceased;
- 21.3 Mr Piet Breedt ("Breedt"), an employee of the City Council who represented the City Council on site; and
- 21.4 Mr Matshipe ("Matshipe"), the operator of the excavator.

- [22] As will become apparent *infra* the City Council chose not to call Breedt or Matshipe as witnesses. The witnesses were present, and their evidence would have assisted the court in better understanding what exactly transpired on 9 March 2013. Be that as it may, it is up to the parties to present the evidence they deem necessary to prove their respective cases.
- [23] The evidence of the witnesses is referred to insofar as their evidence is relevant to the issues to be determined herein.
- [24] Nkukhu confirmed that he is employed by GTC Plumbing and that he was present on the day of the incident. Nkukhu explained that his duties entailed the digging of trenches for pipes and the laying of sewerage pipes. Nkukhu testified that the excavator was digging a trench and at the stage when the excavation was so deep that the whole arm of the excavator could go into the trench, the leaking pipe became visible. Nkukhu stated that he got into the bucket of the excavator's arm and was lowered into the trench to measure the pipe. Although both Van Schalkwyk and Breedt were standing at the edge of the excavation, neither of them stopped Nkukhu from entering the trench. When asked whether the operator of the excavator warned him not to go into the trench, Nkukhu answered that he did not hear anything to that effect.
- [25] Nkukhu stated that he considered the trench as being dangerous because the trench was deep and wet from the bottom to the top.

- [26] When asked why he entered the trench when it was apparently dangerous to do so, he replied that he had no choice as he was ordered to do so and his refusal would have been deemed as him not wanting to work. Later during his evidence when the same question was asked, Nkukhu spontaneously gave the following answer: *"You see, with us we were adamant or in a hurry to finish up the job. We wanted to finish as quick as we can"*. It transpired that the quicker the pipe could be measured, the quicker the correct pipe could be brought on site, thus speeding up the work considerably.
- [27] Mr De Waal SC, counsel for the plaintiffs, then rephrased the question as follows: *"My question is a different one. Perhaps I should just rephrase it, and why did you decide at that particular time when you went down, to go down, to measure, as you say, did you just decide it out of your own or were you told to do so?"*
- [28] Nkukhu reverted to his original answer and stated that he did it purely because he was ordered to do so by Van Schalkwyk.
- [29] The trench was according to Nkukhu more than ten metres deep and the walls were vertical.
- [30] Once the pipe was measured, he was lifted to the ground and the deceased was lowered into the trench. When asked why he did not measure the other side whilst he was in the trench, Nkukhu answered that the deceased was actually the one who volunteered to go down first. When asked why the deceased did not

go first, Nkukhu answered that *"it's purely because I just hurried, ja, hurried up and I was the first one to go down."*

[31] When the deceased was in the trench, he walked to the opposite end to measure the pipe on that side. Nkukhu testified that the deceased had to walk to the other end because the hand of the excavator could not reach that point. According to the evidence the trench was 25 metres in length.

[32] Upon reaching the other side the deceased first had to clear the mud from the pipe before he could measure it. Nkukhu explained that because the pipe was broken, both ends of the pipe had to be measured.

[33] The incident is described by Nkukhu as follows:

*"He (the deceased) was trying to clear the mud around the pipe, opening it up, exposing the pipe itself. Before he could even expose the pipe, as he was standing from his left-hand side the soil caved into on him. He was totally buried by this soil. We couldn't see him anymore."*

[34] Nkukhu thereafter explained the desperate steps that were taken to save the life of the deceased which were all in vain.

[35] During cross-examination by Mr Laka, counsel for the City Council, Nkukhu gave the following reason for the deceased's decision to enter the trench: *"Yes, he said 'we have to hurry up', he needs to go and watch a soccer game between the*



*two Soweto giants: Kaizer Chiefs and Orlando Pirates. They were playing on that day. He was a Pirates fan."*

[36] It appeared during the evidence presented at the trial that the deceased was indeed a huge fan of Orlando Pirates and he was described by Nkukhu as an avid loyal supporter who never missed an Orlando Pirates game.

[37] Mr Hitge, counsel for Ndlovu, asked Nkukhu during cross-examination who instructed the excavator operator to lower him and the deceased into the trench, to which he replied that it was Van Schalkwyk.

[38] It was put to Nkukhu that Van Schalkwyk will deny that he instructed or authorised him and the deceased to enter the trench. Nkukhu insisted that they only entered on the instruction of Van Schalkwyk. It was further put to Nkukhu that Breedts's plan was for one end of the excavation to be shallow, i.e. terraced to enable the workers to enter the excavation. Nkukhu responded that, when he and the deceased entered the trench, it was not terraced.

[39] Mr Hitge proceeded to put Van Schalkwyk's version to Nkukhu. Van Schalkwyk will testify that he saw Nkukhu in the trench when he arrived at the site between 10:00 and 12:00. Van Schalkwyk asked Nkukhu what he was doing in the trench and who instructed him to get into the trench. Nkukhu answered "*nobody did*" and told Van Schalkwyk that he went down out of his own accord to measure the pipe. Van Schalkwyk instructed Nkukhu to immediately exit the trench. Van Schalkwyk ordered all his employees to move to a trailer, which was parked

approximately 20 metres away from the excavation. Nkukhu and the deceased initially complied with his instructions and moved to the trailer.

[40] Whilst at the trailer, some of the workers requested “a money advance” and Van Schalkwyk proceeded to write down their names. Van Schalkwyk told the workers to remain at the trailer until he has discussed the safety situation regarding the excavation with Breedts. Van Schalkwyk will testify that when he looked up he saw Nkukhu, notwithstanding his clear instructions, once again on the edge of the trench. He proceeded to the trench to see why Nkukhu was at the edge of the excavation.

[41] When Van Schalkwyk reached the edge of the excavation he saw the deceased in the trench. Van Schalkwyk instructed the deceased to immediately get out of the trench and scolded him for disobeying his instructions. Van Schalkwyk thereafter had a meeting with Breedts to discuss the safety measures that had to be taken to make the excavation safe.

[42] After the meeting Breedts asked whether a few of Van Schalkwyk’s workers could accompany him to the Municipal stores. Directly thereafter the excavation partially caved in and the deceased was buried under the soil.

[43] Nkukhu denied Van Schalkwyk’s version in its totality.

[44] Willie Renier Du Preez (“Du Preez”), a civil engineer, was called by the plaintiff as an expert witness. Du Preez has been in the industry for 37 years and his experience and achievements are impressive.

[45] To place Du Preez’s evidence in context, he explained that:

*“Excavations are normally a dangerous exercise on any construction site, because of vibrations on the site, excavations on the site, the type of soil that you get on the site, the equipment that’s moving around on the site”*

and

*“Because excavations are done in different types of soil, different conditions on site, it is always a danger and it is seen on all construction sites as a risk. You will find in any risk matrix in any construction site, because it is a risky thing to do. Whether it’s a bridge excavation, culver excavation or pipe excavation, it is always a dangerous activity on site.”*

[46] It is for this reason that strict measures have been put in place by the legislator to ensure, as far as possible, the safety of any person involved in the process. Du Preez explained that there are two methods in the industry to secure an excavation, to wit:

46.1 shoring or bracing, a process of placing temporary support, either steel or wooden beams and boards, in the excavation to prevent collapse; and

46.2 sloping, a process of digging the edges of the excavation at approximately every one and a half metres to a maximum relative to the horizontal plane.

[47] Du Preez stated that when soil gets wet, as was the case *in casu*, it will slip much easier because it is in a semi-liquid state. In such circumstances, the reason to adhere to the strict guidelines is self-evident.

[48] Du Preez referred to Construction Regulations, 2003 (“the regulations”) promulgated and published in terms of the Occupational Health and Safety Act, 85 of 1993 (“the Act”) and more specifically to regulation 11 that specifically deals with excavations. A handy extract of the safety measures prescribed for excavations are found in a summary of Du Preez’s evidence and are summarised as follows:

- 48.1 a contractor has to ensure that all excavation work is carried out under the supervision of a competent person who must be appointed for that purpose;
- 48.2 a contractor who performs excavation work must take reasonable and sufficient steps in order to prevent, as far as reasonably practicable, any person from being buried or trapped by a fall or dislodgement of material in an excavation;
- 48.3 a contractor may neither require nor permit any person to work in an excavation which had not been adequately shored or braced;
- 48.4 where shoring and bracing is not necessary because the sides of it were sloped to at least the maximum angle of repose; or
- 48.5 where such excavation will be stable material and the required permission had been given by the appointed competent person.

- [49] A “*competent person*” is, according to Du Preez, either an engineer or if an engineer is not on site a foreman who has the relevant experience and training in excavations. Du Preez also referred to the definition of a competent person in the regulations which describe a competent person in relation to construction works as “*any person having the knowledge, training and experience specific to the work for the task being performed*”.
- [50] A “*contractor*” is defined in regulation 1 as “*an employer, as defined in section 1 of the Act, who performs construction work*” and an “*employer*” is defined in section 1 of the Act as “*any person who employs or provides work for any person and remunerates that person or expressly or tacitly undertakes to remunerate him.*”
- [51] At the time the aforesaid regulations pertained to any excavation that is deeper than one and a half metres.
- [52] It is common cause that the excavation *in casu* was much deeper than one and a half metres and was neither shored nor sloped when the deceased and Nkukhu entered the excavation.
- [53] In respect of the conduct of the operator of the excavator, in lowering Nkukhu into the excavation, Du Preez made it clear that any construction-related machinery is only to be used for the purpose it had been designed for. An excavator should never be used as a mode of transport.

[54] In summary, Du Preez was of the view the excavation was made in a manner which was incorrect, unsafe, unacceptable, unsupervised and without compliance with the regulations. In addition the lowering of persons into an unsafe and very deep exaction with the excavator bordered on reckless conduct.

[55] During cross-examination, Du Preez stated that a competent person needs to be nominated each time an excavation is planned. In other words, someone amongst the various role players on the site on 9 March 2013 had to be nominated as the competent person for purposes of complying with the regulations.

[56] Du Preez was referred to section 14 of the Act that places certain obligations on employees. Du Preez was more specifically referred to subsection (a), which was read into the record, namely:

*“Every employee shall at work-*

*(a) Take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions;*

*(b) As regards any duty or requirement imposed on his employer or any other person by this Act, cooperate with such employer or person to enable that duty or requirement to be performed or complied with;*

*(c) And carry out any lawful order given to him and obey the health and safety rules and procedures laid down by his employer and by anyone authorised by his employer, in the interest of health or safety; and*

*(d) If any situation which is unsafe or unhealthy comes to his attention, as soon as practicable report such situation to his employer or to health and safety Rep for his workplace, as the case may be.”*

- [57] Du Preez agreed that for purposes of the section, Nkukhu and the deceased were employees and GBC Plumbing the employer. Mr Du Preez, furthermore, agreed that, should such employee ignore a lawful instruction not to enter an excavation such employee would be neglecting his or her statutory duties as prescribed in section 14 of the Act.
- [58] Du Preez in response to questions by Mr Hitge relating to the knowledge Ndlovu would have had of the precise type of excavation that would have been done on 9 March 2013, explained that someone needs to explain to the operator of the excavator what is expected of him, what the purpose of the excavation is and where exactly he must excavate. Pertaining to Ndlovu's involvement, Du Preez explained that it should have known what the nature of the works was to send the correct machine. Du Preez referred to Ndlovu as specialist suppliers of excavation machinery.
- [59] The case on behalf of the plaintiffs was closed and the witnesses, Mr Matseng, a co-employee of the deceased as well as Mr Matshipe, the excavator operator were made available to the defendants.
- [60] The City Council presented the evidence of Mr Johannes Pilusa ("Pilusa"), who was the Assistant Director: Sewage Services Division at the time of the incident. Pilusa testified that Breedts was on standby on the weekend of 9 March 2013 and that he received a call from Breedts informing him that someone was buried beneath the soil.

- [61] Pilusa proceeded to the scene and found the emergency services, the South African Police Service and Labour Department at the scene.
- [62] Pilusa explained that Breedt was the senior on the weekend and reported to him directly. With reference to a works order and pro-forma invoice, Pilusa confirmed that GTC plumbing was appointed as a contractor to fix the sewerage pipe on the site. The appointment was in accordance with the Municipal bylaws pertaining to sewage and plumbing.
- [63] According to Pilusa, once a contractor is appointed to do work for the City Council, that contractor, also referred to as the prime contractor, assumes responsibility for the works. *In casu* GTC Plumbing, being the appointed contractor was responsible for the works which included responsibility for the excavator.
- [64] Pilusa explained that Breedt's only responsibility on site was to look after the interest of the City Council. The interest in question was explained as follows by Pilusa:
- "Firstly he needs to focus [on the] interest of the municipality, make sure that no one gets injured, make sure that nobody's property gets damages and again to make sure that anything that is laid underground, things like water pipes, power cables, the same don't get damaged during the process."*



- [65] During cross-examination Pilusa agreed that it was the City Council's obligation to unblock blockages in the main sewerage systems. Pilusa, furthermore, agreed that only employees from the City Council or an authorised plumber may work on the municipal sewerage system. Pilusa confirmed that GTC Plumbing was an authorised plumber that performed sewage duties on behalf of the City Council, i.e. as a representative of the City Council.
- [66] Pilusa testified that the City Council was aware of and authorised the excavation on the site in order to reach the broken sewerage pipe. It was put to Pilusa that his evidence contradicts the allegation in the City Council's plea that the excavation was unauthorised. Pilusa could not explain the contradiction.
- [67] Pilusa agreed that one of Breedt's responsibilities on the day in question was to make sure that the excavation is made in the correct place. When asked why it was necessary for Breedt to make sure that nobody gets injured, Pilusa said because the site was on municipality property. Pilusa, however, did not agree that Breedt was in control of the City Council's property on the day and insisted that the contractor, GT Plumbing, was in control.
- [68] It was put to Pilusa that Breedt was in fact in control of the site on 9 March 2013, which Pilusa denied. Pilusa did, however, agree that he was not there on the day and would not know what factually happened as far as Breedt's involvement is concerned. It was put to Pilusa that only Breedt will be able to tell the court exactly what his involvement was on the day.

- [69] Pilusa then gave a totally different reason for Breedt's presence on the site on 9 March 2013 and testified that Breedt was purely there "*on compassion or humanitarian grounds*". Pilusa expanded on this new explanation and stated that Breedt had *inter alia* to inspect the excavation to make sure it is safe to enter for plumbing purposes. Pilusa agreed that the City Council knew the excavation would be deep and therefore dangerous.
- [70] Pilusa testified that Breedt had more than 15 years' experience in sewage drainage and confirmed that Breedt was the competent person for purposes of the regulations.
- [71] It was put to Pilusa that Van Schalkwyk would testify that Breedt was in total charge on the day of the operation, he was the responsible and competent person as well as the site supervisor. This was denied by Pilusa. The first defendant did not call any further witnesses and closed its case.
- [72] Van Schalkwyk testified on behalf of Ndlovu. Van Schalkwyk testified that GTC Plumbing is a plumbing business that renders services for malls, complexes, etc. The deceased was in GTC Plumbing's service since 1995, had an excellent work record, was a loyal worker and was well versed in the plumbing business. On 9 March 2013, GTC Plumbing was the main contractor for the laying of the sewerage pipe, whilst the City Council was the main contractor for the excavation and Breedt oversaw the whole project.

- [73] Van Schalkwyk testified that he attended a site meeting on 8 March 2013, the day before the excavation. Breedt and a certain Magoro was present on behalf of the City Council and there was also a representative of GS Poultry. Ndlovu was not part of the meeting.
- [74] Van Schalkwyk stated that safety precautions were discussed at the meeting because no excavation had previously been done on the site. No one was aware of what would happen to the ground that was supposed to be excavated. Van Schalkwyk testified that he drew Breedt's attention to the fact that an excavation deeper than one and a half metres would entail that the excavation must be sloped or shored.
- [75] Breedt acknowledged that it is his responsibility to make sure the excavation is safe and undertook to implement the necessary safety measures. The City Council had to provide the material for the works, and GTC Plumbing only provided the manpower. Van Schalkwyk did not interact with the operator of the excavator. Breedt instructed the operator of the excavator because he had the municipal plans and knew where the pipe was and how deep the excavation needed to be.
- [76] According to Van Schalkwyk, the trench was approximately four metres deep and was not sloped. The excavation was, according to Van Schalkwyk's observation, approximately 25 metres in length, was wet, unstable and appeared to be dangerous. Van Schalkwyk was adamant that he did not instruct any of his employees to enter the excavation. He testified that it was a standing rule that

he is the only person who will give instructions to his employees to enter. They will not take instructions from anyone else.

[77] Once the representative from the City Council tells him that the excavation is safe, he will first do his own investigation to ensure the excavation is safe before he will allow his employees to enter. If the trench was sloped the workers could easily walk into the trench, but if the trench is shored they have to use stepladders to gain access.

[78] Apparently a power cable was damaged during the excavation and the work was stopped to attend to the problem. Van Schalkwyk deemed the situation to be dangerous and instructed his workers to assemble at a trailer that was parked some 20 metres from the excavation.

[79] After the electricity problem was sorted out Van Schalkwyk proceeded to Doringkruin where he had another project to attend to. Van Schalkwyk only returned to the site between 11:00 and 11:30. Van Schalkwyk repeated the version that was put to Nkhuku in respect of what transpired after his return to the site.

[80] It appears that notwithstanding Van Schalkwyk's earlier instructions, his employees were, upon his return, once again close to the excavation and he instructed them for a second time to move to the trailer. Once back at the trailer, Van Schalkwyk told his employees to "*stay put*" and informed them that he is

going to discuss the way forward with Breedt. Before he could leave, the employees asked for the money advances and he first attended thereto.

[81] During his discussion with Breedt, Breedt requested that some of Van Schalkwyk's employees accompany him to the City Council's yard. After that Van Schalkwyk testified that he heard a "*dowwe plofgeluid, 'n dowwe slag*".

[82] Mr Hitge then asked Van Schalkwyk if had an opportunity to observe his employees before he spoke to Breedt. This question prompted Van Schalkwyk to state that he saw all his employees at the trailer prior to collecting a pen and paper to note the money advances.

[83] Mr Hitge then proceeded as follows:

MR HITGE: *And now you've done the station, the writing up work. Did you have occasion to see where Mr Nkhuku was after doing this, the writing up work?*

MR VAN SCHALKWYK: *After I finished with the writing, I then saw that Mr Nkhuku was standing next to, or at the trench."*

[84] Van Schalkwyk then changed his previous version of events and testified that this happened before he spoke to Breedt.

[85] Be that as it may, Van Schalkwyk testified that he walked to Nkhuku to find out what he was doing at the edge of the trench. As he walked closer he was "*shocked*" to find the deceased inside the trench and asked him what he was

doing in the trench. The deceased answered that he wanted to measure the size of the pipe on his own. Van Schalkwyk ordered the deceased to immediately exit the trench and testified that he was a bit angry that the deceased did not adhere to his instructions. Van Schalkwyk had no idea how the deceased got into the trench.

[86] Upon a question from the court as to how it was possible for the deceased to enter the trench, Van Schalkwyk changed his earlier version that the trench was vertical without any sloping and testified that the trench was not straight down but actually had steps that enabled a person to walk into the trench. Van Schalkwyk further testified that the excavator was at that stage on the other side of the trench and was switched off. Shortly thereafter Van Schalkwyk testified that he could only guess where the deceased actually entered the trench.

[87] Van Schalkwyk testified that the deceased acknowledged his instruction and that he believed that the deceased would immediately vacate the trench because *“he is not a person that would not adhere to instructions”*.

[88] Somewhat surprisingly it appears that the employees once again disobeyed Van Schalkwyk’s instructions. Upon a question of what he did after he admonished the deceased, Van Schalkwyk testified as follows: *“It became worse, M’Lady, because at that stage I wanted to get everyone away from the trench and at that stage I was also trying to get Mr Breedt and they wanted to go back to the trench”*.

- [89] Van Schalkwyk then returned to his earlier version in respect of his conversation with Breedt and the sound he heard whilst speaking to Breedt. According to Van Schalkwyk the time period between his last instructions to the deceased and when he heard the “*dowwe slag*” was approximately ten minutes. The excavation caved in in the middle of the trench where Van Schalkwyk saw the deceased the last time. The deceased had had a mere 12 metres to walk to get out of the trench. It would have taken the deceased less than a minute to exit the excavation if he used the steps that were created whilst excavating.
- [90] Van Schalkwyk was referred to the employer’s report that was completed in compliance with the Compensation for Occupational Injuries and Diseases Act. Van Schalkwyk’s attention was *inter alia* drawn to the question that requires a short description of how the accident occurred. Van Schalkwyk confirmed that the following answer was provided: “*Entered trench without instruction/permission, and wall of excavated area collapsed*”.
- [91] During cross-examination Van Schalkwyk confirmed that both the deceased and Nkhuku were disciplined and trustworthy employees who had always, prior to 9 March 2013, adhered to his instructions.
- [92] Confronted with his evidence that his employees time and again went back to trench against his strict instructions to remain at the trailer, Van Schalkwyk

changed his version and testified that it was only the deceased and Nkhuku who kept on returning to the trench.

[93] Turning to Van Schalkwyk's evidence that upon finding Nkhuku in the trench, he immediately wanted to know how he got in whereas on his own version, the most logic place to enter is at the steps, Van Schalkwyk answered that electricians were busy at the other end of the trench. Upon further questioning, Van Schalkwyk responded by saying he did not look at that end because his attention was focussed on Nkhuku.

[94] Van Schalkwyk could not say who instructed the operator of the excavator to lower Nkhuku into the trench. Van Schalkwyk explained that the operator sat in a glass-encased box and would not have heard any instructions given to him. When asked how the operator knew that he had to immediately lift Nkhuku from the excavation, Van Schalkwyk said it is most probably because he, at that stage, spoke in a loud voice.

[95] When asked why the deceased would remain five minutes in the dangerous excavation if he could, after Van Schalkwyk's admonishment, get out within a few seconds, Van Schalkwyk could not give a plausible explanation. When asked why the deceased would want to measure a pipe in the middle of the excavation whereas the evidence is that the pipe was at the end of the excavation, Van Schalkwyk said that he assumed the pipe might have broken and that pieces were lying in the middle of the trench.



- [96] It was further put to Van Schalkwyk by Mr De Waal that the steps he referred to in his evidence were never mentioned to Nkhuku. Mr Hitge objected and stated that it was put to Nkhuhu. In view of the aforesaid, I deem it prudent to refer to the version put to Nkhuku in this regard in detail, namely:

MR HITGE: *Mr Van Schalkwyk will also testify that Mr Breedt's plan was for one end of the excavation to be shallow, terraced and from that end, the workers in the end would enter the excavation. That would be the entrance, if I can put it that way.*

*And that from that shallow end, that is where the workers would, in the end, have entered the trench once they were authorised to do so."*

MR NKHUKU: *No, M'Lady that was not the pattern that was used. It was just digged (sic), because he was in a hurry. He just wanted to see the job done."*

#### **Evaluation of evidence**

- [97] Nkhuku's evidence was straightforward and given in a spontaneous manner. The only time the flow of his evidence became constricted was when counsel directed his evidence in a certain direction. He spontaneously testified that "they" were in a hurry on the day in question. The deceased wanted to get the work done as quickly as possible and indicated that he will go down in the bucket of the excavator to measure the pip. Nkhuku, was, however, closer and was the first one to be lowered into the trench.

- [98] The deceased was Nkhuku's senior and he ordered Nkhuku to get out of the trench so that the deceased could measure the pipe on the other end of the trench. It follows logically and makes sense that upon Nkhuku's return to the

top, the deceased would immediately have entered the bucket to measure the pipe on the opposite end of the trench.

[99] It was on all accounts important to measure the pipe as soon as possible. As set out *supra*, the sooner the correct pipe is brought to the site, the sooner the work could be executed.

[100] In the result, I accept Nkhuku's evidence insofar as it pertains to the manner and the time, the deceased entered the trench.

[101] Nkhuku's evidence that he and deceased were instructed by Van Schalkwyk to enter the trench is, in view of the enthusiasm with which he and the deceased both wanted to measure the pipe, improbable. During his evidence, the fact that Van Schalkwyk instructed them to enter the trench was not part of Nkhuku's initial spontaneous narrative, but was rather extracted from him by pertinent questions posed to him.

[102] Insofar as the person responsible for the safety of the excavation is concerned, it is not in dispute that Breedt was right next to the spot where Nkhuku and the deceased was lowered into the trench. It is also not in dispute that Breedt was in control of the excavator and that he directed the operator of the excavator where and how deep to dug. Taking the above into account, the only reasonable conclusion is that Breedt instructed the operator of the excavator to lower Nkhuku and the deceased into the trench.

[103] It was never put to Nkhuku that either he or the deceased gave instructions to the operator of the excavator to lower them into the trench. Considering their position as workers on the site it would, in any event, have been highly improbable that they had the authority to issue instructions to the operator of the excavator.

[104] Even in the event that Breedt was a mere bystander and did not instruct the operator of the excavator to lower Nkhuku and the deceased into the trench, Breedt was still the person who had to make sure that no one enters the trench until it is safe to do so. His failure to do so is, for present purposes, significant.

[105] The failure by the City Council to call Breedt and Matshipe strengthen this probability. As stated *supra* both Breedt and Matshipe were made available to the City Council to call as witnesses. In conducting the defence of a defendant, I can hardly imagine that counsel will not present evidence that would strengthen the defendant's defence.

[106] The only logical conclusion is that neither Breedt nor Matshipe was called, because their evidence would have had an adverse effect on the City Council's defence. In the premises, I draw a negative inference from the City Council's failure to present the evidence of Breedt and Matshipe. [See: *Galante v Dickson* 1950 (2) SA 460 AD]

[107] Van Schalkwyk's evidence was for the most part self-serving and an attempt to exonerate himself. Mr De Waal suggested that the pending Police and Labour Department Investigation might explain his absolute insistence that he told his employees, according to his version, at least three times to move away from the excavation. Bearing in mind that, on his own version, the deceased was a loyal and trustworthy employee who worked for him for the better part of 12 years and had never before the day in question disobeyed his instructions, his version that deceased did it twice on the 9<sup>th</sup> of March 2013, is highly improbable and simply does not make any sense.

[108] The convoluted sequence of events given by Van Schalkwyk also does not make sense. If one is to believe Van Schalkwyk's version of events, it took the deceased, from the moment Van Schalkwyk arrived on the scene, approximately 20 minutes to do one simple task, measure the pipe on the opposite end of the excavation. Van Schalkwyk could not give a plausible explanation for his version that the deceased was in the middle of the excavation when the soil caved in, whereas the deceased's only urgency was to measure the pipe at the end of the trench.

[109] Van Schalkwyk's version that the excavation was already terraced was only given after he was asked how it was possible for the deceased to have entered the excavation without being lowered in the bucket of the excavator's arm. The version that was put to Nkhuku was that Breedts "*planned*" to terrace the excavation at one end so that workers "*would*" be able to walk in. If Breedts had already executed his plan, it does not make sense that it was necessary for

Nkhuku to be lowered into the trench in the bucket of the excavator. To walk 25 metres along the trench to safely enter at the other end would have made more sense.

[110] Viewing the evidence in its totality, Breedt permitted both Nkhuku and the deceased to enter the excavation whilst it was patently dangerous to do so. Breedt, furthermore, instructed or at the very least allowed the operator of the excavator to lower Nkhuku and the deceased into the excavation.

[111] The evidence of Pilusa did not take the matter any further.

### **Legal Principles**

[112] In order to succeed with their claim the plaintiffs' need to prove that the damages claimed by them was caused through a wrongful and negligent act of the first and/or third defendant. [See: *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 (4) SA 901 N]

### **Wrongfulness: Act or Omission**

[113] Liability depends on the wrongfulness of the act or omission of a defendant. *In casu*, the plaintiffs rely on the liability of the first defendant for an omission and on the conduct of the third defendant. The first defendant's liability would only arise if the first defendant had a legal duty towards the plaintiffs to act.

[114] In *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 SCA liability arising from an omission was explained as follows:

[12] *Negligence, as it is understood in our law, is not inherently unlawful – it is unlawful, and thus actionable, only if it occurs in circumstances that the law recognizes as making it unlawful.<sup>1</sup> Where the negligence manifests itself in a positive act that causes physical harm it is presumed to be unlawful, but that is not so in the case of a negligent omission. A negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm.<sup>3</sup> It is important to keep that concept quite separate from the concept of fault. Where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability – it will attract liability only if the omission was also culpable as determined by the application of the separate test that has consistently been applied by this court in *Kruger v Coetzee*,<sup>4</sup> namely, whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it. While the enquiry as to the existence or otherwise of a legal duty might be conceptually anterior to the question of fault (for the very enquiry is whether fault is capable of being legally recognised), nevertheless, in order to avoid conflating these two separate elements of liability it might often be helpful to assume that the omission was negligent when asking whether, as a matter of legal policy, the omission ought to be actionable.”*

[115] In determining whether a legal duty exists in the present factual matrix it is important to have regard to the regulations applicable to excavations of this nature. It is common cause between the parties that the regulations did apply to the works that led to the tragic death of the deceased.

[116] The evidence, furthermore, established that the City Council was the “contractor” for purposes of the regulations, in that it “employed” the operator of

Ndlovu to do the excavation and “employed” GT Plumbing to repair the sewerage pipe. In both instances, the operator and GT Plumbing were to be remunerated for the work provided. Breedt’s conduct will for present purposes be attributed to the City Council.

[117] In *Pienaar and others v Brown and Others* 2010 (6) SA 365 (SCA) the owner of the house affixed a balcony to his house, without submitting plans for approval by the local authority. In so doing the owner breached section 4(1) of the National Building Regulations and Building Standards Act 103 of 1977 which makes the submission and approval of plans a prerequisite for any building work.

[118] In determining whether the mere breach of a statutory obligation makes the omission unlawful, the court held as follows:

*“[15] As already indicated Pienaar did not submit any plans for the balcony in question as he had done previously when he did alterations and additions to his house in 2002. He did not make enquires from his builder, Classen, as to whether plans were required for undertaking this type of work. Consequently, the question that arises is whether this failure rendered Pienaar liable in damages arising from the collapse of the balcony. In the way the case has been pleaded it does not appear that the plaintiffs are relying on the breach per se as creating liability or providing them with a right to claim damages. How one goes about determining whether the statute provides for such a right of action was alluded to by Cameron JA in *Olitzki Property Holdings v State Tender Board* [2001] ZASCA 51; 2001 (3) SA 1247 (SCA) at para 12 where he said:*

*‘Where the legal duty the plaintiff invokes derives from breach of a statutory provision, the jurisprudence of this Court has developed a*

*supple test. The focal question remains one of statutory interpretation, since the statute may on a proper construction by implication itself confer a right of action, or alternatively provides the basis for inferring that a legal duty exists at common law. The process in either case requires a consideration of the statute as a whole, its objects and provisions, the circumstances in which it was enacted, and the kind of mischief it was designed to prevent.'*

[16] *On a proper reading of the Act there is nothing to suggest that a failure to comply with its requirement would necessarily lead to liability. On the facts of this case what makes it particularly problematic is that on the available expert evidence it is not the failure to submit plans that caused the balcony to collapse, but the manner in which it was fixed to the wall. It is unnecessary to consider whether in other circumstances a failure to submit plans for approval may ground a claim for damages. In this case it cannot do so because there is no causal link between that failure and the collapse of the balcony."*

[119] *In casu*, all the witnesses were *ad idem* that digging a trench of approximately four to six metres deep created a dangerous situation. The regulations were specifically drafted to ensure that the dangerous situation is safely managed. The causal link between the death of the deceased and the conduct prohibited by regulations are manifest, to wit:

119.1 the failure to take reasonable steps, i.e. shoring or sloping, in order to prevent the deceased from being buried by the fall of the soil in the excavation; and

119.2 permitting and/or not prohibiting the deceased from entering the excavation that had not been adequately shored or sloped.



[120] I have no doubt that the caving in of the excavation was the “*mischief*” the regulations were designed to prevent. The regulations created a legal duty, which was breached by the City Council and consequently renders its omission to comply with the regulations unlawful.

[121] Even if the regulations in itself did not create a legal duty, will it in any event be reasonable to compensate the plaintiffs in the prevailing circumstances, i.e. will it be reasonable to impose a legal duty on the City Council?

[122] In *Olizki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 SCA at paragraph [12], the determination of reasonableness was defined as follows:

*“[12] The determination of reasonableness here, in turn, depends on whether affording the plaintiff a remedy is congruent with the court’s appreciation of the sense of justice of the community. This appreciation must unavoidably include the application of broad considerations of public policy determined also in the light of the Constitution and the impact upon them that the grant or refusal of the remedy the plaintiff seeks will entail.”*

[123] Would justice demand that the plaintiffs should be compensated for the loss suffered as a result of the deceased’s demise? The first plaintiff has been left to fend for herself financially due to the tragic death of the deceased. The two children of the deceased are without the benefit of a father who provided for their everyday needs including a safe place to stay, food and the other necessities of day to day living.

[124] The loss is totally unnecessary. Had the City Council complied with their duty of care towards the deceased, the family would not have been left destitute.

[125] In my view justice demands that the City Council should be held liable for the loss the plaintiffs have suffered as a result of its omission.

[126] In the premises, I am satisfied that Breedts failure was unlawful for purposes of a claim in delict.

[127] In respect of the conduct of Matshipe, it is trite that negligence that manifests itself in a positive act that causes physical harm is presumed to be unlawful.  
[See: *Minister of Safety and Security v Van Duivenboden, supra*]

[128] Should it be found that Mashipe's conduct was negligent, wrongfulness will follow.

### **Negligence**

[129] Once the legal duty has been established, the question whether Breedts and/or Matshipe were negligent arises.

[130] In *Van Duivenbodem supra* the test was formulated as follows:

*"[23] The classic test for negligence as set out in Kruger v Coetzee 47 has since been quoted with approval in countless decisions of this Court: whether a person is required to act at all so as to avoid reasonably foreseeable harm, and if so what that person is required to do, will depend upon what can reasonably be expected in the circumstances of the particular case. That enquiry offers considerable*

*scope for ensuring that undue demands are not placed upon public authorities and functionaries for the extent of their resources and the manner in which they have ordered their priorities will necessarily be taken into account in determining whether they acted reasonably. “*

[131] Would a reasonable person in Breedt’s position have foreseen the reasonable possibility that his omission would injure the deceased and cause patrimonial damage to the plaintiffs? Van Schalkwyk testified that he alerted Breedt the previous day that precautions need to be taken should the excavation be deeper than one and a half metres.

[132] Both Nkhuku and Van Schalkwyk testified that the soil was wet and the excavation looked patently dangerous. Du Preez testified that wet soil is, due to its liquid nature, more unstable and caused a greater possibility of sliding. Breedt has, according to Pilusa, 20 years’ experience in maintaining sewage infrastructure, which includes the activities that were performed on 9 March 2013.

[133] In view of the patent danger and Breedt’s experience, I am of the view that a reasonable person in Breedt’s position would have foreseen the reasonable possibility that without shoring or sloping, the walls of the excavation might cave in.

[134] The reasonable steps to be taken to prevent the wall of the excavation from caving in, is prescribed in the regulations and according to Du Preez’s evidence,

standard practice in the industry. A reasonable person in Breedt's position would have instructed Matshipe to slope the trench as the excavation proceeded. If sloping was not the preferred method, a reasonable person would have obtained the necessary material to shore the excavation prior to allowing anyone to enter the trench.

[135] Breedt failed to take any of these steps. There is no evidence on record that the steps would be overly burdensome. In the premises, Breedt's omission on the day in question falls short of the conduct of a *diligens paterfamilias* and he was negligent.

[136] Would a reasonable person in Matshipe's position have foreseen the reasonable possibility that his conduct would injure the deceased and cause patrimonial loss to the plaintiffs? Matshipe is on all accounts an experienced excavator operator.

[137] This would entail that Matshipe would have known that an excavator's arm is not suitable for transporting persons. The inherent danger of lowering someone into a trench that is four to six metres deep is obvious. It is an extremely dangerous move. Being an experienced operator Matshipe would no doubt have gained knowledge of the type of terrain in which an excavation is done. Matshipe would have seen that the soil being removed by the excavator is wet.

[138] Du Preez testified that a 21-ton excavator is normally used in deep excavations. One would assume, deeper than one and a half metres. This would entail that Matshipe is no doubt aware of the safety precautions that should be taken when excavating deeper than one and a half metres. Matshipe would in all probability in the past have been requested to slope an excavation. He would have noticed that without sloping the excavation is shored.

[139] His direct involvement in the industry pertaining to excavations leads to the reasonable inference that he would have foreseen the reasonable possibility of danger if a person is lowered into a four to six-metre trench that has not been sloped or shored.

[140] In the result, a reasonable person in Matshipe's position would have foreseen the reasonable possibility that his conduct would cause the deceased's death.

[141] A reasonable person in Matshipe's position would not have lowered the deceased into the excavation and Matshipe in doing so, was negligent.

### **Causation**

[142] In *Van Duivenbodem supra*, Nugent JA postulated the test as follows in paragraph [26]:

*"[26] A plaintiff is not required to establish the causal link with certainty but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based*

*upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics.”*

[143] It is clear from the evidence that Breedt’s failure to shore or slope the excavation created a dangerous situation. The dangerous excavation in itself did not result in the deceased’s death. Breedt could still, on the evidence, have shored the excavation which would have removed the danger.

[144] In instructing the operator of the excavator or in allowing the operator of the excavator to lower the deceased into the patently dangerous excavation causally links Breedt’s conduct to the ultimate demise of the deceased.

[145] Breedt’s conduct was in my view both factually and legally the cause of the deceased’s death which in turn resulted in the loss suffered by the plaintiffs.

[146] In respect of Matshipe, the same facts give rise to the factual and legal causation in respect of Breedt’s conduct and establish causation between Matshipe’s conduct and the demise of the deceased.

### **Vicarious liability**

[147] Having established that the conduct of both Breedt and Matshipe was wrongful and negligent and caused the loss suffered by the plaintiffs, the next question is whether the first and third defendants can respectively be held vicariously liable for their conduct.

[148] Vicarious liability is established when:

148.1 the person that committed the delict was an employee of the defendant;

148.2 the employee performed the delictual act in the course and scope of his/her employment; and

148.3 the scope of the employee's duties at the relevant time.

[See: *Amler's Precedent of Pleadings*, Harms, 7<sup>th</sup> edition at page 390]

[149] The evidence establishes all three requirements in respect of Breedt's conduct and the City Council is vicariously liable for the loss suffered by the plaintiffs as a result thereof.

[150] The question whether Ndlovu can be held vicariously liable for the loss suffered by the plaintiffs as a result of Motshipe's conduct is somewhat more problematic.

[151] Factually it is common cause that Ndlovu was not engaged to do the excavation, but merely supplied the 21-ton excavator and operator at an agreed price. The agreement of hire was entered into between GS Poultry and Ndlovu.

[152] As mentioned *supra* GS Poultry undertook to obtain an excavator to assist the City Council in performing the works. On the strength of the aforesaid facts, Ndlovu denies that Matshipe was acting within the course and scope of his employment with Ndlovu on the day in question. Matshipe was performing services for the City Council and not Ndlovu. Ndlovu, furthermore, had no control over Matshipe on 9 March 2013. Matshipe was under the sole control of Breedt.

- [153] The facts are akin to those in *Midway Two Engineering & Construction Services v Transnet Bpk*. 1983 (3) SA 17 SCA. Midway was trading as labour brokers and hired drivers of heavy vehicles to Transnet. Midway, therefore, derived a financial benefit from the contract between the parties. Transnet, however, managed and controlled the drivers in the same manner in which it managed and controlled its own drivers.
- [154] The issue of control played an important role in *Midway supra* and the court held that Midway was not vicariously liable for the negligent conduct of the drivers who were performing their duties under the direct control and on instructions of Transnet.
- [155] From the moment that Matshipe arrived on site, he was under the control of Breedt. Breedt instructed Matshipe where and how deep to excavate. Whether Breedt instructed Matshipe to lower the deceased in the bucket of the excavator into the trench or merely allowed him to do so does not detract from the control Breedt exercised over the work performed by Matshipe.
- [156] Bearing the test in *Midway supra* in mind, I am satisfied the plaintiffs have established, on a balance of probability, that the City Council is vicariously liable for Mathipe's conduct.
- [157] Is it relevant that Matshipe was hired by GS Poultry and not the City Council? I believe not, the fact that Matshipe was under the control of the City Council via Breedt, justifies a finding on policy considerations that the City Council should



be held vicariously liable for Matshipe's conduct. [See: *Messina Associated Carriers v Kleinhaus* 2001 (3) SA 868 SCA]

[158] In excavating the trench Matshipe also furthered the "*business*" or interest of the City Council, namely in complying with its constitutional imposed duty to deliver services to the community. [See: *F v Minister of Safety and Security and Others* 2012 (1) SA 536 CC at 134 C-E]

### **Costs**

[159] Costs should follow the result.

### **ORDER**

[160] In the premises, I grant the following order:

1. The first defendant is held liable for the plaintiffs' agreed or proven damages.
2. The first defendant is ordered to pay the plaintiffs' costs.
3. The claim against the third defendant is dismissed with costs.

---

**N. JANSE VAN NIEUWENHUIZEN**  
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION, PRETORIA**

**DATES HEARD PER COVID19 DIRECTIVES:**

2<sup>nd</sup> to 6<sup>th</sup> of November 2020.

**DATE DELIVERED PER COVID19 DIRECTIVES:**

1 February 2020

**APPEARANCES**

*Counsel for the Plaintiffs:*

Advocate De Waal SC

*Instructed by:*

Adams and Adams Attorneys

*Counsel for the First Defendant:*

Advocate S. Laka

*Instructed by:*

Labethe Attorneys

*Counsel for the Third Defendant:*

Advocate M.G. Hitge

*Instructed by:*

Meyer, Van Sittert and Kropman Attorneys