SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 29 March 2019

STATUS Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

***Bergrivier Municipality v Van Ryn Beck* [2019] ZASCA 38**

Today the Supreme Court of Appeal (SCA) upheld an appeal by the Bergrivier Municipality, the appellant, overturning an order of the full bench of the Western Cape High Court, Cape Town, in terms of which Mr Van Ryn Beck, the respondent, had been granted relief against the Municipality in respect of flood damage to his house in Piketberg.

The respondent, had instituted a claim for damages against the appellant after his house was flooded in December 2007, June 2009 and April 2011. His claim for damages related only to damages sustained to his house during the 2011 flood. His claim was on the basis that the appellant had a legal duty to ensure that its storm-water drainage system was designed and maintained to so as to avert flood damage that might be caused by storm-water run-off.

Mr Simon, an expert witness testified on behalf of the respondent. He contended that the standard that the appellant had to uphold when building and maintaining storm-water drainage systems is the one-fifty-year flood standard. However, he readily accepted that the ability of a drainage system to cope with a downpour has to be seen against the intensity of the flow of the water at a given time.

Mr Simon was unable to provide evidence of the quantity, in cubic metres or by any other measure, the storm-water drainage systems had to cope with at the relevant times. He provided no explanation or details of the one-in-fifty year standard, including its content and scope.

The Municipality argued that it could not, in the circumstances of the case, be held liable. This, it contended, would impose too heavy a burden on municipal authorities

country-wide. Mr Breunissen, an expert witness who testified on behalf of the appellant indicated that improvements had been made to the storm-water drainage system near the respondent's property after the 2011 flood. It was common cause that no further flood damages was sustained after the improvements had been made. Mr Breunissen testified that, to upgrade the entire Piketberg storm-water drainage system, would cost up to R200 million. This is an expense beyond the means of the appellant.

The SCA noted that there was a paucity of evidence to prove any of the elements for a delictual claim. Firstly, no evidence was tendered to explain the concept of a one-in-fifty year flood. Furthermore, there was no evidence to indicate the measure of the intensity of the rainfall that would constitute a one-in-fifty year flood or what would be required of a storm-water drainage system in order to ward off the effects of such a flood. There is also no evidence to indicate whether the any one of the three floods were less or greater than would be required to qualify as a one-in-fifty year flood.

The court cited the well-known test for negligence as was set out in *Kurger v Coetzee* 1966 (2) SA 428 (A), which provides that the onus is on a plaintiff to establish that a reasonable person in the position of the defendant:
'(a) Would foresee the reasonable possibility that the conduct (whether an act or omission) would injure another person's property and cause that person patrimonial loss;
(b) would take reasonable steps to guard against such occurrence; and
(c) that the defendant failed to take such reasonable steps'
On the evidence presented, or rather the lack thereof, no finding of negligence could be made.

Wrongfulness was also not established. The test for wrongfulness is whether a particular infringement of interest is unlawful according to the legal convictions of the community. Taking into account the restricted budget of the appellant and its other sociological concerns, especially relating to more indigent communities, particularly those in informal settlements, wrongfulness was not established.

Finally, there was also no evidence on which a finding could be made that, even if the Municipality had provided for a one-in-fifty year flood, that the floods in all the years, including 2011, could be averted.

The SCA cautioned that this should not be seen as municipalities being given licence to ignore fulfilling their obligations to residents and justifying it by merely asserting budgetary constraints.

The appeal was upheld with costs.