Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 20691/2011

Before: The Hon. Mr Justice Binns-Ward

Hearing dates: 26-28 and 30 October 2015

Judgment delivered: 5 November 2015

In the matter between:

RHYNARDT BECK Plaintiff

And

BERG RIVER MUNICIPALITY Defendant

JUDGMENT

BINNS-WARD J:

[1] The plaintiff instituted action against the defendant municipality for compensation in respect of the damages allegedly sustained by him as a consequence of flood damage to his residential property at [Erf 1……], [P…….], [W…… C…….].[1] The property concerned is

[1] The plaintiff had actually disposed of the property after the close of pleadings.

situated at the edge of the suburban area of the town at the corner of [D…… H…..] and [B…….] Streets on the south eastern boundary of Piketberg. The property was subject to flooding on three separate occasions in 2007, 2009 and 2011, respectively. The compensation sought by the plaintiff was originally in respect of the consequences of all three of the aforementioned happenings, although it is not clear from the particulars of claim how, if at all, the computation of the sum claimed relates to anything other than the 2011 flood.

[2] The claim was founded on the following allegations:

1. That the defendant was under a duty in law -
    a. to ensure that the stormwater drainage system in the area was effective to drain flood waters and to prevent flooding of premises;
    b. to undertake appropriate construction and maintenance measures to ensure that the road drainage systems functioned optimally at all relevant times; and
    c. to investigate and put in place effective measures should it appear that premises are flooded during the rainy season.
2. That the defendant acted in breach of its aforementioned duty in law by -
    a. failing to provide a drainage system which could effectively dispose of the storm waters; and/or
    b. not maintaining the existing drainage system in adequate order; and/or
    c. failing timeously to put in place measures to prevent a repetition of flooding.
3. That the defendant should have foreseen in the circumstances alleged that the plaintiff could suffer damages and was negligent in having failed to take reasonable steps to prevent such harm from occurring.

[3] The defendant raised a special plea arising out of the alleged non-compliance by the plaintiff with the requirements of s 3 of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002. It also pleaded over and denied liability for the claim in any event. In its general plea, the defendant –

1. admitted that it was under a duty in law to maintain the storm water drainage system in its area of jurisdiction;

2. otherwise denied the plaintiff's allegations as described in paragraph [2].1, above;

3. pleaded that it had in any event discharged its obligations in respect of the maintenance of the storm water drainage system;

4. denied that it had been negligent, as alleged, and pleaded that such damage as the plaintiff might have suffered was the result of the plaintiff's negligence in one or both of the following respects:

    a. that, knowing that his land was low lying and susceptible to natural run-off, he had failed to comply with the National Building regulations by providing for the necessary drainage works in respect of the construction he had undertaken on the property;

    b. failing to provide for drainage works on his property to divert storm water away from his residence.

5. pleaded in the alternative, and in the event of the court finding that the defendant had been negligent in the respects alleged, that such negligence had not been causal of the damage sustained by the plaintiff; further alternatively, that the plaintiff's own negligence had contributed to his loss.

[4] In the course of the judicial case management process the parties obtained a ruling in terms of rule 33(4) of the Uniform Rules directing that the 'merits' be separated from quantum, and that the former be tried and determined before the latter. The separation direction did not, however, define what was comprehended by the 'merits' of the case and made no provision whatsoever for the trial and determination of the special defence raised in the special plea. This was unsatisfactory; cf. *First National Bank - A Division of Firstrand Bank Limited v Clear Creek Trading 12 (Pty) Ltd and Another* [2015] ZASCA 6 (9 March 2015), 2015 JDR 0385 (SCA), at paras 8-14, and the other authority referred to there, notably *Absa Bank Ltd v Bernert* 2011 (3) SA 74 (SCA).

[5] Having regard to the matters involved, the special defence should have been identified for preliminary and special determination before the hearing of the action itself. In addition, the issues to be determined under the label 'merits' should have been expressly delineated. Furthermore, in the context of there being a summary of expert evidence by a single witness on behalf of the plaintiff concerning the design and adequacy of the drainage system and no adumbration of any expert evidence at all concerning the alleged defects in the design of the

building improvements on the plaintiff's property, the parties should have been required by the judicial case manager to submit a detailed list of the disputed issues in the case, including an indication of their respective positions in respect of each issue and the evidence they proposed to lead in support thereof.

[6] As matters transpired, it was only some months after the matter had been declared trial-ready that the plaintiff lodged an application in terms of s 3(4) of the Institution of Legal Proceedings Act for condonation of its non-compliance with the notice requirements prescribed in terms of s 3(1) and (2). The application was opposed. The defendant delivered its opposing affidavit nearly two months later, and barely more than a week before the postponed trial date. The plaintiff elected not to file replying papers. The opposing affidavit was not included in the indexed papers when the court file was submitted for the allocation of a trial judge. Accordingly, when the matter was called for trial before me it came as a surprise that the application was opposed.

[7] In the circumstances described, the parties may consider themselves fortunate that I agreed to proceed with the hearing, instead of remitting the case for further pre-trial case management. I had cause to regret my willingness to do so as the trial proceeded and issues were raised and objections taken – argument concerning the admissibility of the records of rainfall figures for the town of Piketberg during the period 1999-2014 being an example – which plainly concerned matters that should have been sorted out in the pre-trial process. The judicial case management process is in its infancy in this jurisdiction and there is at this stage a noticeable disparity between the levels of scrutiny brought to matters by individual case manager judges before matters are certified as trial-ready. I think it is necessary that a warning is sounded to practitioners, however, that by asking for and obtaining a trial-readiness certificate in circumstances when a matter is in fact not properly prepared for hearing, they run the risk of the allocated trial judge declining to hear the matter and referring it back for further management in terms of rule 37(8).

[8] The condonation sought by the plaintiff for non-compliance with the Institution of Legal Proceedings Act concerned only that part of his claim that related to the 2007 and 2009 floods. Notice of the intention to institute proceedings had been given timeously in respect of the 2011 flood. The point indicated in a reply by the defendant to a request for trial

particulars that the notice had not complied with the service provisions in s 4(1) of the Act[2] was not persisted with in the opposing affidavit or in oral argument.

[9] The requirements that the plaintiff had to satisfy in order to obtain condonation are set out in s 3(4)(b) of the Act. He was required to satisfy the court that -

(i) the debt had not been extinguished by prescription;

(ii) good cause existed for his failure; and

(iii) the organ of state was not unreasonably prejudiced by the failure.

[10] Ordinarily, it is for a defendant to plead extinctive prescription. In terms of the Prescription Act 68 of 1969 a court is not permitted of its own motion to take notice of prescription.[3] The first of the aforementioned requirements in terms of s 3(4)(b) of the Institution of Legal Proceedings Act, however, would appear to impose an *onus* on an applicant for condonation under the provision to satisfy the court that its claim has not been extinguished by prescription. The reason for this is probably because it is clear from the provisions of s 3(4)(c) that the statutory draftsman had in contemplation that such applications would be brought before the institution of the main proceedings.[4] It is not necessary in the current matter, in which the application was made only after the action had been instituted and the pleadings had closed, to determine the effect on the first requirement of the failure by a defendant to have raised the defence of prescription on the pleadings when raising a special plea of the nature pleaded by the defendant in the current case coupled with a general pleading over. This is because the plaintiff's counsel conceded in argument that the court could not be satisfied that the part of the claim that was based on the 2007 had not prescribed. There was, however, no reason to believe that the claim, insofar as it is based on damages sustained in the 2009 flood, had prescribed.

[11] As to the good cause requirement, it is well-established that the concept of 'good cause' defies generalised definition and is very much dependent on the context of the given case. The notion of 'good cause' in condonation applications in terms of s 3(4), was

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[2] Section 4(1)(b) provides:
A notice must be served on an organ of state by delivering it by hand or by sending it by certified mail or, subject to subsection (2), by sending it by electronic mail or by transmitting it by facsimile, in the case where the organ of state is-
(b) a municipality, to the municipal manager appointed in terms of section 82 of the Local Government: Municipal Structures Act, 1998 (Act 117 of 1998);
(c) ….

[3] See s 17 of the Prescription Act 68 of 1969.

[4] There are other indications in the Act that indicate there is nothing exceptionable about such applications being made after the institution of proceedings to obtain satisfaction of the claim; see, for example the definition of 'creditor', quoted in note 6, below.

discussed by the appeal court in *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA), at para 10-14. With reference to what were described as the second and third of the prescribed requirements - good cause and the absence of unreasonable prejudice - Heher JA, writing for the court, held at para 12 that 'There are two main elements at play in s 3(4)(b), viz. the subject's right to have the merits of his case tried by a court of law and the right of an organ of state not to be unduly prejudiced by delay beyond the statutorily prescribed limit for the giving of notice. Subparagraph (iii) calls for the court to be satisfied as to the latter. Logically, subparagraph (ii) is directed, at least in part, to whether the subject should be denied a trial on the merits'.

[12] There was no doubting on the face of matters that the plaintiff had a triable claim, and that his institution of the action was in *bona fide* pursuit of obtaining its adjudication. It also appeared from the content of the notice given in his attorney's letter of 6 July 2011 that the plaintiff had been in communication with the defendant's representatives about the flooding issue throughout the period after the first flood in 2007.[5] Furthermore, the application was brought at a stage when the matter had been declared trial-ready and the matter actually set down for trial. It was therefore possible to assess the application in the context of the closed pleadings and the summary of expert evidence delivered by the plaintiff in respect of the alleged deficiencies in the municipal drainage system. In the absence of any indication that controverting expert evidence would be adduced by the defendant, the summary of evidence before the court suggested, at any rate from the perspective that the court had before hearing any evidence, that the plaintiff's claim enjoyed an arguable prospect of success. Subject to a consideration of the nature and extent of any prejudice suffered by the defendant as a consequence of the plaintiff's failure to give notice timeously under the Act, there did not seem to be sufficient reason why he should be denied his constitutional right to have the merits of his case tried by a court. I was therefore satisfied that the applicant had satisfied the second of the statutory requirements for condonation, at least in respect of those parts of his claim that had not been extinguished by prescription.

[13] Whether the defendant had been unreasonably prejudiced by the late notice was obviously something especially within its own knowledge. In its opposing affidavit deposed to by the defendant's Projects Engineer: Corporate Capital Projects, the issue of prejudice to was dealt with laconically, as follows:

[5] The defendant's failure to respond to, or even acknowledge, the plaintiff's attorney's letter of 18 February 2010 was unexplained, and falls deplorably short of what members of the public are entitled to expect from the public administration; cf. s 195 of the Constitution.

> Juis omrede die Eiser nie na die 2007 en 2009 vloede kennis aan die Eiser (sic) gegee het van sy voorneme om aksie in te stel teen Verweerder nie, word Eiser (sic) benadeel. Verweerder het eers gedurende Julie 2011 kennis van die voorgenome regsaksie, klaarblyklik ook wat betref die 2007 en 2009 vloede gekry. Die noodwendige gevolg is dat Verweerder benadeel word in sy ondersoeke na die 2007 en 2009 vloede. Voorts verydel dit die doel van die wetgewing soos Eiser dit self beskryf.

The nature of the prejudice to which the defendant allegedly would be exposed were the claim in respect of the 2009 flood entertained was not specified. In its reply to the plaintiff's request for trial particulars the only complaint specified by the defendant in respect of the non-complaince with the Act was the alleged non-compliance with the service of notice requirements prescribed in s 4(1). As already noted, the defendant did not persist with that complaint. It is not self-evident that the defendant would be unreasonably prejudiced by the lack of notice because it is apparent that the defendant's officials were aware of the flooding at the time it took place and visited the plaintiff's property to view the damage.

[14] The purpose of the notice required to be given by 'creditors'[6] in terms of the Institution of Legal Proceedings Act is to alert organs of state to matters of which they might not have had notice so that they may investigate the facts giving rise to a claim while the history is still fresh. As mentioned, in the factual context of the current matter it is apparent that the defendant's officials had direct knowledge of the incident giving rise to the 2009 claim and had been able to inspect the premises at the time. It was therefore not surprising that the deponent to the opposing affidavit did not provide any particulars of how the defendant could be said to have been unreasonably prejudiced. He would probably have been hard-pressed to do so.

[15] The contention in the opposing affidavit that granting condonation to the plaintiff would subvert the objects of the Act was misplaced. The object of the Act is not to keep *bona fide* claimants out of court on technical procedural grounds. It is to balance the interests of claimants with those of organs of state, which in the nature of things frequently face claims in circumstances in which the functionaries who have to decide whether to concede or contest them have no personal knowledge of the events upon they are based and therefore need timeous notice in order to be able to establish the relevant facts. The objects of the Act would in no manner be thwarted were condonation to be granted in the current case. On the contrary, to have denied condonation in the circumstances of the institution of the current

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[6] In terms of s 1 of the Act:'*"**creditor**" means a person who intends to institute legal proceedings against an organ of state for the recovery of a debt or who has instituted such proceedings, and includes such person's tutor or curator if such person is a minor or mentally ill or under curatorship, as the case may be*'.

action would have been to ignore the purpose of the balance between the parties' interests that the condonation provisions of the Act are designed to strike for reasons of justice and fairness.

[16] For the aforegoing reasons an order was made granting condonation to the plaintiff for his non-compliance with the Institution of Legal Proceedings Act in respect of the claim based on the 2009 flood. Costs were reserved for later determination so that they could be decided with regard to what happened during the trial. My impression at the time I made the condonation order was that the defendant had acted unreasonably in declining to waive compliance with the Act and in opposing the condonation application. Nothing in the subsequent conduct of the trial altered that impression. In the circumstances the defendant will be ordered to pay the plaintiff's costs in the application; cf. *Madinda* supra, at para 30.

[17] As mentioned, I was not satisfied with the vague definition of the issues separated in terms of rule 33(4) for hearing at the first stage. I therefore directed that counsel should, with specific reference to the numbered paragraphs in the pleadings, draw up a detailed description of issues requiring to be determined in the first stage trial. The resultant document, entitled '*Opsomming van Geskilpunte waaroor die Hof moet beslis*' was put in as exhibit 'A'. Its import is summed up in paragraphs 6 and 7, which it is convenient to quote in reverse order:

> 7 ….word die Hof versoek om 'n bevinding te maak ten aansien van die volgende:
>
> 7.1 Die nalatige verbreking al dan nie van Verweerder se regsplig;
>
> 7.2 Indien so bevind, of daar 'n kousale verband is tussen die beweerde skade en sodanige verbreking van die regsplig;
>
> 7.3 Òf Eiser nalatig was ten opsigte van sy eie skade en tot welke mate.
>
> 6 Wat die nexus tussen handeling (of versuim) en gevolg betref, word hof (sic) nie versoek om oor die spesifieke skade of bedrae soos uiteengesit in par 17 en 19 te beslis nie maar word net versoek dat hof (sic) beslis òf vloedskade as gevolg van Verweerder se beweerde onregmatige en nalatige optrede veroorsaak is, alternatiewelik deur Eiser se nalatige optrede, alternatiewelik of Eiser en Verweerder skade moet verdeel in terme van die Wet op Verdeeling van skade (sic) nr.34 van 1956.

[18] Turning now to the substantive issues identified for adjudication in this stage, I must say at the outset that the difficulty I have had with this matter – as I shall illustrate below - is the paucity of relevant evidence.

[19] The plaintiff purchased his property in 2005 from a developer, who had acquired the land at that edge of the urban area of Piketberg from the defendant municipality for the purpose of subdivision and residential development. The plaintiff's property was thus

appropriately zoned in terms of the applicable zoning scheme for housing development. The plaintiff took occupation of the house built for him on the property during 2006. Buitenkant and De Hoek Streets had been laid out before the development of the plaintiff's property. It is not apparent on the evidence that was adduced whether the subdivision and development of the land on which the plaintiff's property stands had been in contemplation when the roads were laid out. Nothing in the evidence suggests that additional provision was made for the erven to be developed along the outer side of Buitenkant Street when the land was subdivided. (The provisions of the Land Use Planning Ordinance 15 of 1985 empower a local authority to require that adequate services are afforded in respect of subdivided property before any part of it is transferred and the subdivision thereby confirmed.[7] The Ordinance also empowers a local authority to impose, as a condition of approving a subdivision, a charge to provide for the expense to be incurred by the local authority in respect of the infrastructural demands of the ensuing development of the subdivided land.[8] These matters, which might have had some bearing on the defendant's witnesses' evidence about the Municipality's financial constraints, were not explored in the evidence, however.)

[20] As appears from the basis of the plaintiff's case, described earlier, the central factual issue in the matter is the adequacy and effectiveness of the municipal drainage system that serves the area of the town in which the plaintiff's property is situated and the extent of the defendant's legal obligations in that regard. It is convenient therefore to consider that question first because, if determined adversely to the plaintiff's allegations, it will be dispositive of the claim.

[21] It was not in dispute that flooding occurred at the plaintiff's property on 24 December 2007, 23 and 26 June 2009, and on a date in April 2011. The extent of the flooding in 2009 and 2011 was captured in photographs taken by the plaintiff on those occasions, which are contained in exhibit B. It is not necessary to go into detail, for it is manifestly apparent from the photographs that the municipal drainage system at and near the intersection of De Hoek and Buitenkant Streets in the vicinity of the plaintiff's property had been completely overwhelmed by the volume of storm water on both occasions, with the result that the plaintiff's property was very badly flooded. That physical damage was caused to the building and its appurtenances on each occasion as a result of the flooding is also clearly evident from the photographs, and confirmed in the oral evidence of the plaintiff.

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[7] See s 27(1) read with s 42(1) of the Ordinance.
[8] See s 42(2) of the Ordinance.

[22] The photographs put in by the plaintiff showing the level of flood water inside his house and in his backyard in 2009 testified to the very considerable volume of water that must have entered his property. The water level against the back wall in the yard reached a level of more than 0,75m above ground level. The force of the water buckled the roller garage doors and shifted them out of their frames. The extent of the flooding in 2011, while also serious, was reportedly not quite as severe as that in 2009. It is not clear, but this may have been due to some alterations that the plaintiff had himself effected after the 2009 flood to try to lessen the effect of water run-off into his property. No evidence was adduced, however, to enable an assessment of the efficacy of these alterations in the circumstances of the 2011 flood.

[23] The intersection of De Hoek and Buitenkant Streets is at a low lying spot. Both roads slope downwards to the point at which they converge almost directly outside the plaintiff's property. The evidence established that it was principally down De Hoek Street that the floodwater bore down on the plaintiff's property. De Hoek Street runs down the mountainside from the Main Street for a distance of 250 metres to the corner with Buitenkant Street. The fall of De Hoek Street from Main Street to Buitenkant Street was determined by Mr Wernher Simon, an expert who testified for the plaintiff, as 45 metres. This confirms that the gradient slopes steeply down to the plaintiff's property.

[24] According to the rainfall figures for Piketberg obtained by the plaintiff from AgriOorsig,[9] the 2007 annual rainfall was the third highest during the period 1999-2012, even if one disregards the unusually high out-of-season rainfall of 40mm in December of that year. Annual rainfall in the area, according to the figures provided, varied during the 13-year period between a low of 208mm and a high of 473mm. The average was 287mm. The total rainfall in 2007 was recorded as having been 408mm. No flooding problems at the plaintiff's property occurred during the wet winter months. Similarly, no problems manifested during

[9] The defendant objected to the production of the rainfall records (which also included records compiled by Boland Agri) tendered in evidence by the plaintiff. The plaintiff's counsel then applied from the bar for their admission in terms of s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988. I granted that application. It appeared to me that, having regard to their apparent source, the records had probably been compiled in the ordinary course by an agricultural organisation that would have every reason to keep an accurate record of, and no reason to misrepresent, the information. It also appeared to me to be quite likely that if direct evidence were to be insisted upon a number of witnesses would need to be called. There was no indication that the defendant would have any basis to challenge the evidence of such witnesses. I would be surprised if the defendant did not itself maintain or have ready access to rainfall figures and therefore considered that if so minded the defendant would be in a position to adduce rebutting evidence if the records tendered by the plaintiff were obviously inaccurate in any relevant respect. My impression was borne out by the subsequent testimony by the witnesses called by the defendant that the Municipality's planning took into account recurrence intervals of weather events. It obviously could not do this without keeping or having ready reference to meteorological records. I was thus satisfied that the admission of the evidence was in the interests of justice.

the even wetter year of 2008, when the highest annual rainfall for the 13-year period was measured, including 146mm in the month of July alone. These considerations suggest that the drainage system was ordinarily able to cope.

[25] The rainfall that caused the flooding in December 2007 appears to have occurred in what might be described as cloudburst conditions. It was put to the plaintiff by the defendant's counsel that 40mm of rain had fallen within the space of two hours.[10] The plaintiff was away on holiday at the time and therefore not able to testify directly as to the conditions. The uncontroverted evidence of Mr Johannes Engelbrecht, who is currently the Engineer: Projects at the defendant municipality and in 2007 held the position of the Assistant Civil Engineer, was that the flooding had occurred in exceptionally stormy conditions that had caused flooding and wind damage throughout the town. He related that, amongst others, some of the bigger retail outlets in the centre of the town had also experienced flooding and several roofs had been blown off. Trees had also been uprooted in various places. A local disaster had been declared and the defendant had employed additional staff and enlisted the assistance of outside agencies such as the police to deal with the consequences of the exceptional weather.

[26] The plaintiff's expert witness, Mr Wernher Simon, who has broad experience in the design and construction of drainage systems, testified that it was customary for such systems to be designed and built with a capacity to deal with a certain extremity of situations determined from local knowledge and historical records. The norm, according to Mr Simon, would be to provide capacity to deal with a once in 50-years flood. There was no evidence to establish how conditions in the December 2007 weather occurrence compared to a once in 50-years flood event. Certainly, the daily rainfall figures mentioned in the expert opinion evidence summary delivered in terms of rule 36(9) in respect of the evidence of Wernher Simon and the figures in the tables of rainfall figures recorded for Piketberg by Boland Agri for the years 2012-2014 that were put in by the plaintiff suggest that rainfalls of around 40mm had been recorded on a number of days over the period from 2007 to 2014. These indicators were not determinant of the likelihood of flooding, however, because the intensity of the rainfall is more significant than the total fall in a 24-hour period in testing the capacity of a drainage system: 25 mm of rain within the scope of an hour will present a far greater

[10] The defendant's witness, Mr Engelbrecht, testified that 20-25mm had fallen within the space of an hour. The summary of the opinion evidence of Mr Simon, who was called by the plaintiff stated that the recorded rainfall on 24 December 2007 (presumably referring to a 24-hour period) was 36mm. The sources from which these measurements were obtained were not identified in the evidence. Mr Engelbrecht's testimony in this respect was not attacked in cross-examination.

challenge to a drainage system than the same amount of precipitation more or less evenly spread over a 24-hour period. There was also no evidence to establish the path of the flow of water that flooded the plaintiff's house on that occasion, although it seems probable, in the absence of any evidence that it had on that occasion taken an exceptional route, that it would have come mainly down De Hoek Street. The low lying position of the plaintiff's property rendered it naturally vulnerable to flooding and thus, if the drainage system's capacity was exceeded in the exceptional weather conditions, the resultant occurrence of flooding at the plaintiff's property is not cause for surprise.

[27] The claim being entertained in the action does not include anything arising out of the 2007 flood and accordingly, the evidence concerning it was relevant only by way of background. As I understood the position, it was adduced by the plaintiff in an endeavour to indicate the existence of an alleged duty on the municipality to have taken pre-emptive steps to avoid a recurrence of the flooding before the 2009 and 2011 events, which gave rise to the claims actually being prosecuted in the action. Suffice it to say that the apparently exceptional nature of the December storm leaves me in considerable doubt, in the context of the demonstrated ability of the system to handle the wet winters of 2007 and 2008, whether the defendant could reasonably have been expected to implement improvements to it. I would need at the very least to be satisfied, in the context of the evidence given by Mr Simon, that the December 2007 flood, which, as I have related, appears to have occurred after rainfall of exceptional intensity, had been caused by precipitation of an intensity less than that which could be expected to give rise to a once in 50-years flood event. There was no such evidence.

[28] As it was, the Municipality did engage the services of a consulting engineer to investigate and report on drainage issues throughout the whole urban area of Piketberg. This was because periodic flooding is a problem in a number of areas in the town. The investigation was in progress when the 2009 flood occurred. The consulting engineer's investigation has reportedly resulted in the production of a so-called 'master-plan' for the general upgrading of the town's drainage amenities. The plaintiff appears not to have identified the existence of the master plan in the course of exacting discovery from the defendant with the result that there was no meaningful evidence as to its content. According to the uncontroverted evidence led for the Municipality, however, the constraints on the defendant's budget in any event make it impossible for the Municipality to implement all of the provisions of the master plan - which would require the expenditure of many millions of rand - other than gradually.

[29] The Municipality's officials who gave evidence pointed to the smallness of the municipality and the effect of the burden of the statutory duty on it to provide running water and sewerage to all of its inhabitants. They explained that capital expenditure had to be 'prioritised' accordingly.[11] There is indeed a duty on all local authorities to provide basic municipal services to everyone resident within their respective jurisdictions, irrespective of whether they are ratepayers or not.[12] The evidence in this respect called to mind the observations of Schreiner JA in *Germiston City Council v Chubb & Sons Lock And Safe Co (SA) (Pty) Ltd* 1957 (1) SA 312 (A)[13] at 323C-E:

> The second point, which appears from the *African Realty Trust* case [[14]] at p. 179 and in *Reddy's* case [[15]] at p. 299, quoting *Brink's* case,[[16]] and which is most important for this case, is that in deciding what measures are reasonably practicable regard must be had to the total requirements and resources of the local authority and not merely to the means of providing protection to an individual landowner. I assume that in particular circumstances there may have to be a special treatment by the local authority of the risks to a particular small area or even to a single stand in a township. In regard to flooding for instance the risk might conceivably be so grave and so pressing that there might conceivably be a legal and not merely a moral duty upon the municipality to give it precedence over other drainage problems. But apart from such a possibility the position of any one plaintiff in regard to protection against flooding owing to roadmaking cannot be dealt with in isolation from the requirements of the whole area and the resources available to meet them.

(I have already remarked, above, on the absence of any pleaded allegations or evidence concerning the circumstances in which the local authority approved the subdivision and whether the conditions of subdivision included, or reasonably should have included, requiring a financial contribution by the developer for the purposes of infrastructural enhancement.)

[30] The current case is a so-called omission case; one in which the delict arises out of a wrongful and negligent failure to have done something, rather than the case where the damage is caused by an act of commission by the wrongdoer. In *City of Cape Town v Bakkerud* 2000 (3) SA 1049 (SCA), at para 31, the Supreme Court of Appeal held, in the context of a case arising out of a local authority's omission to maintain roads and pavements in good condition:

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[11] Municipal councils are required by statute to adopt a capital and an operating budget annually; see s 17(2) of the Local Government: Municipal Finance Management Act 56 of 2003.
[12] See, for example s 73 of the Local Government: Municipal Services Act 32 of 2000, read with the definitions of '*basic municipal services*' and '*local community*' in s 1 of the Act.
[13] *Germiston City Council v Chubb & Sons Lock And Safe* also concerned a claim against a local authority arising out of a flooding incident.
[14] *Johannesburg Municipality v African Realty Trust Ltd.*, 1927 AD 163.
[15] *Reddy and Others v Durban Corporation* 1939 AD 293.
[16] *Breede Rivier (Robertson) Irrigation Board v Brink* 1936 AD 359.

> …it would, I think, be going too far to impose a legal duty upon all municipalities to maintain a billiard table-like surface upon all pavements, free of any subsidences or other irregularities which might cause an unwary pedestrian to stumble and possibly fall. It will be for a plaintiff to place before the court in any given case sufficient evidence to enable it to conclude that a legal duty to repair or to warn should be held to have existed. It will also be for a plaintiff to prove that the failure to repair or to warn was blameworthy (attributable to *culpa*). It is so that some (but not all) of the factors relevant to the first enquiry will also be relevant to the second enquiry (if it be reached), but that does not mean that they must be excluded from the first enquiry. Having to discharge the *onus* of proving both the existence of the legal duty and blameworthiness in failing to fulfil it will, I think, go a long way to prevent the opening of the floodgates to claims of this type of which municipalities are so fearful.

The principle expressed in those remarks applies equally in the circumstances of the current case, where the wrongfulness of the defendant's conduct is alleged to have lain in its omission to have provided and appropriately maintained a drainage system that could have coped with the floodwaters and thereby pre-empted the flooding of the plaintiff's property.

[31] The remarks reflect a recognition that courts must be cautious to avoid fixing local authorities with duties in law on a blanket-rule basis (i.e. 'opening the floodgates' to liability) and that claims such as the current one must be carefully adjudicated with regard to their peculiar facts. The Supreme Court of Appeal has emphasised that municipalities should in practice be protected from unrealistically wide exposure to delictual liability in respect of omissions by virtue of the burden on plaintiffs in such cases 'to discharge the *onus* of proving both the existence of the legal duty and blameworthiness in failing to fulfil it'. This highlights the extent to which plaintiffs bringing such claims are required to prepare their cases with care to establish a proper evidential basis for both the existence of the alleged legal duty to have acted and of fault or blameworthiness on the part of the municipality for having failed to do so. In determining whether the legal convictions of the community – which, as explained in *Bakkerud* are not the same thing as its moral convictions[17] – ought to require the defendant to have provided greater drainage capacity involves the court in having to make an *ad hoc* value judgment.[18] It thus behoves a plaintiff who hopes to succeed in such a case to provide the court with a sufficiently detailed and contextually relevant factual basis to do so.

[32] In the current case I am willing to assume in the plaintiff's favour that the legal convictions of the community would hold that the defendant ought to have provided drainage in the developed area in which the plaintiff's property was situate with an ability to deal with the so-called once in 50-years flood. The evidence has not established that the drainage

[17] *Bakkerud* supra, at para 14-17
[18] *Bakkerud* supra, at para 27.

provided did not satisfy that requirement. The evidence furthermore did not establish that in calculating the postulated capacity, the municipality should have made provision for floodwaters pouring onto De Hoek Street from the surrounding farm lands other than in accordance with their natural flow. The evidence in the current case suggests, as will be described presently, that the flood of water that emitted from the farmlands was not the natural flow, and that it was instead due to human agency on private land combined with neglect and inadequate provision by a different municipality. That points the finger of liability rather in those directions, rather than at the defendant.

[33] The evidence as to the 2009 flood demonstrated that the flood waters that invaded the plaintiff's property ran mainly from the neighbouring farm land. The photographs taken by the plaintiff depict the muddy water running off the smallholding of his neighbour, one van Niekerk, into De Hoek Road, along which it then bore down on the plaintiff's house. The agricultural origins of the water were borne out by the residue of kraal manure and the like that was deposited in and around the plaintiff's house and yard when the waters subsided. Indeed in a letter by the plaintiff's attorney to the Municipality, dated 18 February 2010, reference was made to the damage to the plaintiff's property having been caused '*ten gevolg van stormwater, wat vanuit die kleinhoewe en De Hoekstraat sy woonhuis letterlik oorstroom het*'.

[34] That the flood water had poured over the agricultural land was also borne out by the emergency remedial measures that the plaintiff and his father implemented by digging a shallow furrow on the neighbouring farmer's land to divert the water from running onto the road and lead it into the lower lying area in the direction of the N7, to which the drainage system off De Hoek Street ordinarily took the street water run-off. The plaintiff testified that he had also opened the cover of a catch pit (referred to by the plaintiff as a 'gulley') on the side of De Hoek Street between the place where the flood water was pouring onto De Hoek Street and the corner with Buitenkant Street. He did this to try to assist the drainage of the water by facilitating an increased flow into the depression. He said that it had also been necessary to probe the 450 mm drain pipe[19] which took the water from the catch pit with rods to unblock it. This was hardly surprising in my view having regard to the amount of mud that appears to have been carried with the flood waters into the catch pit. The mud is graphically

[19] I have used the drain pipe dimension given in the rule 36(9) summary of the evidence of Mr Wernher Simon.

evident in the photograph taken by the plaintiff of the opened catch pit.[20] In the peculiar circumstances I do not consider the evidence that the catch pit and the pipe draining it were silted up demonstrates a lack of proper maintenance by the Municipality. Photographs showing the gate into catch pit in Buitenkant Street[21] cluttered with debris at the time of the flood must also be judged with regard to the circumstances. It is not unlikely that a heavy flood of water from the adjoining farmlands would carry such debris to the entrance to the catch pit. The question is should the defendant have provided for the flood that emanated from the farmlands.

[35] Mr Engelbrecht testified that the path of erosion created by the water as it rushed over the agricultural lands showed that the flood had originated from a farm which he said belonged to 'the NG Kerk' high up on the slopes of the mountain. He said that the cultivated land on the NG Kerk's property had not been properly contoured, which had resulted in a concentration of water that had breached a berm or suchlike barrier at the lower part of the farm and resulted in the water rushing down the slope over the lower agricultural land. As I understood his evidence, it was to the effect that the resultant force of the accumulated water was that the run-off took a different path to that which it ordinarily would have done in accordance with the lie of the land and, instead of running down into the ditches alongside the entrance road (apparently an extension of Long Street[22]) to the town off the N7 national road (which was outside the defendant's jurisdiction and within the area of the adjoining West Coast District Municipality), it carved a line down to the place at which it emerged onto De Hoek Street, as depicted in the photographs taken by the plaintiff.[23] Matters were not assisted, apparently, by the fact that the ditches alongside the provincial road that joined the N7 to the town were of inadequate capacity and had not been kept clear. These ditches would have channelled away any water that followed the natural run off route from the high lying wheat fields in the area of the source of the problem. The uncontroverted evidence was to the effect that the capacity of the ditches under the jurisdiction of the District Municipality has since been increased and measures have been implemented to keep them clear.

[36] It would have been helpful had there been, as there often is in cases of this nature, some detailed evidence concerning the contours and fall of the land in the vicinity. So, if the

[20] See the photograph at exhibit B28, and note the heavily muddy character of the flood water apparent in several of the other photographs.
[21] See photograph B 39. It is not clear in any event, what, if any, role the catch pit in Buitenkant Street played in the flooding. Certainly, the actions of the plaintiff and his father at the time in seeking to alleviate the effects of the flood were directed at the catch pit in De Hoek Street.
[22] See photograph B100, on which some street names are endorsed, and the aerial photograph at B103.
[23] See photographs

adjoining farm land had sloped down onto De Hoek Street one might have expected the defendant to make provision for this when providing a drainage system for the adjoining developed areas, for it would seem likely, if that were the situation, that the construction and paving of De Hoek Street would in such a situation have had the effect of diverting and concentrating the natural flow of water towards erven in the vicinity of the plaintiff's property. Unfortunately, there was no such evidence. All that there was to go by is the impression given by the photographs in exhibit B. The general impression from the aerial photographs is that the agricultural land slopes away from the town in the direction of the N7, which can be seen running horizontally across the top of exhibit B103 - in the form in which that document was bound into the exhibit bundle (with the caption running vertically from the bottom to the top of the right hand side of the page). The paths of what appear to be two streams can be discerned running down the mountain slopes and across the land before converging and running under the N7. This suggests that the water from the surrounding lands would drain towards the streams in the ordinary course; that is away from the town and towards the N7. The drain from the catch pit in De Hoek Street also runs towards the N7, which suggests that in that area too the natural slope of the land is away from the developed area and towards the N7. Indeed, the emergency channel dug by the plaintiff and his father also followed that direction, no doubt to capitalise on the slope of the land.

[37] The plaintiff's evidence suggested that the characteristics of the flood in 2011 were essentially the same as that of 2009. His evidence in this respect was supported by that of Mr Jacob Johannes Breunisen, the defendant's manager: technical services. Breunisen had not been involved in the 2007 and 2009 floods. He did, however, attend the scene at the time of the 2011 flood. Breunisen's evidence was that the 2011 flooding had been the result of a flash flood caused by water running off the mountain from the same area as had happened in 2009. He said that the amount of run-off in heavy rainfall on that occasion had been greater than would ordinarily have been the case because the mountainside had been denuded of vegetation in a veld fire. The vegetation would have lessened the force of the downward flow of the run-off water.

[38] Breunisen also testified that the run-off water in 2011 had flowed into De Hoek Street only because of extraneous factors that had diverted it from the route it would ordinarily have taken. Breunisen referred in this respect to what he termed 'incorrectly cut' contours on the farmlands on the mountain slope and the inadequacy of a barrier –which he indicated, marked 'B', on the aerial photograph, exhibit B103 – on the lower side of the extension to

Long Street which linked the town to the N7 national road. As already mentioned, the extension road and its appurtenances fell under the jurisdiction of a different local authority. The purpose of the barrier would appear to have been to divert any flow of water down the mountain that went beyond the extension road into the ditches that run alongside that road to drain water off in the direction of the N7. Breunisen indicated by way of the arrows endorsed on exhibit B103 how, having breached the aforementioned barrier, the water proceeded through the property of Van Niekerk, mentioned earlier, and into De Hoek Street at the same place as it had done in 2009.

[39] Having noted how the flood waters had rounded the bend at the bottom of De Hoek and pushed up into the lower reach of Buitenkant Street from where they were able to pour into the plaintiff's property, especially down the paved driveway, which was entered via a lowered section in the street side kerbing, Breunisen arranged for the defendant to put in place certain ameliorating measures. These measures comprised converting the single catch pit into a double catch pit[24] and constructing a brick and concrete chute at the junction of De Hoek and Buitenkant Streets, which appear to have been designed to catch and divert water running down De Hoek Street that overshot the double catch pit.[25] Breunisen also had a small ramp built up at the entrance to the plaintiff's driveway to lessen the vulnerability of the property to inward flow down the driveway.[26] The plaintiff testified that he had been informed upon enquiry when the aforementioned work was being done that the cost thereof ran to approximately seven or eight thousand rand. Breunisen explained that the work had been financed out of the portion of the defendant's operating budget that was under his administration and thus had not required a capital allocation. He described the measures that he had arranged to be put in place as a 'soft solution' and made it clear that he would be hesitant to claim that it would be sufficient to avert the flooding of the plaintiff's property in the circumstances of the 2009 and 2011 floods. He pointed out that, amongst other considerations, the chute would in those circumstances be vulnerable to becoming blocked in the same way that the catch-pit had been. That the plaintiff's property is considered by the defendant to remain vulnerable to flooding notwithstanding the measures put in place by Breunisen is borne out by the fact that it is treated as one of the flooding 'hot spots' at which

[24] See the photographs at exhibit B85-87.
[25] The appearance and position of the chute are depicted in the photographs at exhibit B84, 88 and 89.
[26] The ramp and associated channel are depicted in the photographs at exhibit B73, 74 and 79.

the defendant provides temporary sandbag protection whenever significant precipitation has been forecast by the weather services.[27]

[40] Breunisen testified that the West Coast District Municipality had made relevant improvements along the extension road since 2011 and that there had not been a recurrence of the circumstances of the 2011 flood. He accordingly resisted the inference suggested by the plaintiff's counsel that the simple and cheap improvements he had effected in 2011 explained why the plaintiff's property had not again been flooded in the ensuing four years up to the date of the trial. He stated that in those circumstances the effectiveness of the improvements had 'not been tested'. The plaintiff's counsel submitted that if the chute constructed by the defendant after the 2011 flood had been built after the 2009 flood the damage to the plaintiff's property would, at the very least, have been lessened. At first blush the argument might appear attractive, but it does not bear scrutiny in the context of the evidence, or rather, lack thereof in the particular case.

[41] It may be accepted that the damage to the plaintiff's property occurred as a consequence of the inability of the catch pit and drainage pipe at the bottom end of De Hoek Street to divert the volume of water streaming onto De Hoek Street. The water that was not drained into the catch pit would be that which would be pushed around the corner at the bottom on De Hoek Street and into the plaintiff's driveway off Buitenkant Street. To ascertain whether the chute would have made any difference to the extent of the damage to the plaintiff's property one would need evidence of the maximum capacity measured in units – say cubic feet of water per minute ('cusecs') – of the catch pit, an informed estimate, measured in the same units, of the volume of water bearing down De Hoek Street,[28] and also evidence of the maximum capacity of the chute to divert water that could not be accommodated by the catch pit. Such evidence would establish whether the amount of water that the combined drainage facility of the catch pit and the chute could not accommodate was materially less than that which in fact probably poured past the catch pit and round the bend into the plaintiff's property.

[42] When I put these considerations to the plaintiff's counsel during argument, he submitted that it was for the defendant to have adduced such evidence. His submission in that regard appeared to be predicated on an assumption that the evidence that had been led

[27] The sandbagging protection is illustrated in the photograph at exhibit B84.
[28] Compare *New Heriot Gold Mining Company Limited v Union Government (Minister of Railways and Harbours)* 1916 AD 415, in which it appears from the judgment on appeal that it was possible to adduce technical evidence of this nature even 100 years ago.

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

[43] The plaintiff's counsel also cited LAWSA, Second Edition, vol.9, at para 839 and 843 in support of his argument in this respect. Paragraph 843 contains the following passage:

> When a party has peculiar knowledge of a fact he or she is not for that reason saddled with the burden of proving that fact; peculiar knowledge affects the quantum of the evidence expected from the party but does not affect the incidence of the burden of proof. If such party fails to adduce evidence, in other words, to transmit his or her knowledge to the court, the inference which is the least favourable to the party's cause may be drawn from the proven facts.

In my judgment, the considerations mentioned earlier concerning the capacity of the catch pit and the chute, as well as the calculation of an educated estimate of the volume of water probably issuing onto the road from the farmland and that running down from the higher reaches of De Hoek Street, are matters upon which any appropriately qualified expert should be able to pronounce and support with the necessary calculations. The law reports contain examples of other cases in which such empirical evidence has been tendered.[29] Having regard to the onus on the plaintiff to establish all of the elements of the Aquilian action, including causation, I consider that it was incumbent on the plaintiff to have adduced the evidence that I have postulated. It was not of a character that it could be said to have been peculiarly within the knowledge of the defendant.

[44] For the reasons traversed in the aforegoing discussion of the case, and notwithstanding the sympathy I have for the plaintiff and his family for the trauma and financial loss that they have experienced as a result of the successive flooding of their home, I consider that the plaintiff has fallen short of discharging the onus to establish the existence

[29] See Note 28. Other examples are to be found in *Germiston City Council v Chubb & Sons Lock and Safe Co (SA) (Pty) Ltd* supra, at 318H-319A, in the quotation of the description of evidence in the judgment of the court a quo in *Administrator, Natal v Stanley Motors Ltd and Others* 1960 (1) SA 690 (A), at 693E-F, and in *Johannesburg City Council v Television & Electrical Distributors (Pty) Ltd and Another* 1997 (1) SA 157 (A), at 163E-H.

of the alleged duty in law on the part of the defendant or its negligent breach. In the circumstances the appropriate order would be one absolving the defendant from the instance with costs.

[45] The following order is made:

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

A.G. BINNS-WARD
Judge of the High Court