IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)

REPORTABLE-
CASE NO. CA149/2010

In the matter between:

ROSE LILLIAN JUDD **Appellant**

And

NELSON MANDELA BAY MUNICIPALITY **Respondent**

JUDGMENT

ALKEMA J

[1] On Sunday morning 6 July 2008 the plaintiff, a 78 year old lady, set off from the Sanctuary, a retirement village in Bingley Street, Central Port Elizabeth, on her way to the Trinity Baptist Church in Dickens Street. She left on foot, and walked alone. She crossed Bingley Street and turned the corner at the Old Austria restaurant into Westbourne Road where she mounted the pavement. A few steps further her foot caught a raised pavement block. She stumbled and fell, thereby sustaining severe injuries, including a cracked sternum.

[2] Soon other church-goers came to her assistance and she was lifted into a

wheelchair. She was taken directly to the Greenacres Hospital, Port Elizabeth. On her discharge on 9 July she was admitted to Echo Foundation Frail Care Center and discharged on 1 August 2008 when she returned to the Sanctuary.

[3] In consequence of the above, the plaintiff instituted a claim out of the Port Elizabeth High Court against the Nelson Mandela Bay Municipality (the defendant) claiming damages. The claim was defended. On 23 March 2010 the High Court (per Chetty J) non-suited the plaintiff and dismissed her claim with costs. The plaintiff appealed against this judgment. This is the judgment on appeal.

[4] At the commencement of the trial and by consent between the parties, the Court split the issues and ordered that the merits of the dispute be determined first. In regard to the merits the only issues before the court were the questions of wrongfulness; and if established, the issue of *culpa* (fault). In respect of the latter, any (possible) contributory negligence on the part of the plaintiff was not pleaded and was not canvassed in either the evidence or in the judgment of the court *a quo*. Therefore, and provided negligence was established on the part of the defendant, the plaintiff would have been entitled to all her damages.

[5] The broad issue in this court is whether the Court *a quo* was correct in dismissing the plaintiff's claim. The narrow issues relate to the requirements of wrongfulness and *culpa.* I shall in the course of this judgment refer to the plaintiff as the appellant, and to the defendant as the respondent.

[6] The law relating to the delictual liability of municipalities based on a failure to take preventative action (*omissio*) had undergone a profound metamorphosis by the turn of the 20th century.

[7] It is not in the scope of this judgment to indulge in a long theoretical analysis of the numerous judgments on this subject, but it is nevertheless helpful (and perhaps unavoidable) to briefly refer to the historical development of this branch of the law and to the general principles applicable to the issues under consideration in this appeal.

[8] It is commonly recognized that an actionable wrong or delict has five elements or requirements, namely; (a) the commission or omission of an act (*actus reus*), (b) which is unlawful or wrongful (wrongfulness), (c) committed negligently or with a particular intent (*culpa* or fault) (d) which results in or causes the harm (causation) and (e) the suffering of injury, loss or damage (harm). These are separate and distinct components of the same delict, each having its own requirements and test. The case under consideration falls under delict, and the five elements referred to above must be established by the appellant to succeed in her claim. This appeal is concerned with the requirements of wrongfulness and *culpa* only. I shall deal firstly with the requirement of wrongfulness.

[9] Because our law does not recognize negligence *"in the air"*, it is now trite that the issue of wrongfulness must be determined anterior to the question of fault. The element of fault is only capable of being legally recognized if the act or omission can be termed as legally wrongful. In the

absence of wrongfulness, the issue of fault does not even arise. These are two separate and distinct elements of the same delict, each requiring its own test and approach, and not to be confused or conflated. See *Administrateur, Transvaal v van der Merwe* 1994 (4) SA 347 (A) at 364.

[10] More recently, in *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) Nugent JA formulated the principle at 441E-442B(para 12) as follows:

"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 recognises as making it unlawful. 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. 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,*** *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."*

[11] What then is the criterion for determining wrongfulness? To answer this question, it is necessary to very briefly go back in history.

[12] In Roman and Roman-Dutch law a distinction between *commissio* and

omissio was drawn to determine wrongfulness. Roman law did not recognize *omissio* as wrongful (LAWSA Vol. 8 Part 1 (2nd Ed) para 65) Roman-Dutch Law only regarded *omissio* as wrongful when there was a negative duty to avoid causing injury to others, and not a positive duty to shield others from injury. See McKerron, *The Law of Delict* (7th Ed.) p.14 and the authorities there cited. In early South African law, more particularly in cases of municipal liability, Roman-Dutch Law continued to regard *omissio* to be unlawful only where a negative legal duty existed to prevent harm to others. See *Halliwell v Johannesburg Municipal Council* 1912 AD 659 at 673, which embedded the doctrine of *"... introduction of a new source of danger ..."* as a tool to establish a negative duty to prevent harm.

[13] In both cases of *commissio* and *omisssio* the conduct (or duty to avoid injury) was labeled as wrongful if it offended the *bonis mores* of society. (LAWSA (*supra*) para 60)

[14] The countless judgments and legal writings on the subject in South African law offer wide ranging aids and criteria for the determination of the *bonis mores* of society, such as the concept of reasonableness, foreseeability, duty of care, harm, public policy and so forth. The list is endless and leaves the reader bewildered and confused. There is, however, one golden thread which runs through all pronouncements in cases of *commissio*, and that is that conduct which is *contra bonis mores* and therefore unlawful, is vested in the legal convictions of society.

[15] The philosophical and jurisprudential ratio for this criterion of wrongfulness is that from times immemorial society recognized that it is

unable to function in an orderly and harmonious manner unless its members adhere to a certain code of conduct which prevents harm to each other. Whilst a breach of such code of conduct is in certain circumstances regarded as merely unethical or immoral, there are other circumstances where a particular breach is regarded as unlawful or wrongful, and which warrants legal interference and protection. Unlawful conduct falls in the latter category, and it is rooted in the legal convictions of the community.

[16] I believe, with respect, that the weight of authority in cases of *commissio* support the doctrine of the legal convictions of society as the main criterion for wrongfulness, and had done so for many years. See, for instance, cases such as *Marais v Richard en 'n ander* 1981 (1) SA 1157 (A) at 1168; *Schultz v Butt* 1986 (3) SA 667 (A) at 679; *Administrateur, Transvaal v Van der Mewe* 1994 (4) SA 347(A) at 358*; SM Goldstein & Co (Pty) Ltd v Cathkin Park Hotel* (Pty) Ltd and Another 2000 (4) SA 1019 (SCA) at 1024.

[17] I recently had the occasion to reflect on the concept of wrongfulness in the context of the use of property rights in neighbour law (*commissio*), and I have nothing further to add. See *Wingaardt and others v Grobler and another* 2010 (6) SA 148 (ECG).

[18] The requirement of wrongfulness in cases of *omissio* followed a slightly different route. As I indicated, early South African Law under the influence of Roman and Roman-Dutch Law only regarded *omissio* as wrongful when there was a negative duty to avoid causing injury. In municipal liability cases, the introduction of a new source of danger was regarded as giving rise

to such a duty.

[19] The turning point came in *Minister van Polisie v Ewels* 1975 (3) 590(A) when the (then) Appellate Division recognized that wrongfulness is also found in circumstances where the legal convictions of the community require a legal duty to shield others from injury, and not only when there was a negative duty to avoid causing injury (at 596H-597G). After *Ewels* (*supra*) it became generally accepted that in all cases of delict an omission may constitute wrongful conduct in circumstances where the legal convictions of the community impose a legal duty to prevent harm. See *Minister of Law and Order v Kadir* 1995 (1) SA 303 at 317C-318A; *van Eeden v Minister of Safety and Security 2003 (1) SA 389 (SCA).*

[20] The result of these decisions, at least on my understanding, was that the criterion for wrongfulness in cases of *omissio* generally was brought in line with those of *commissio* and was uniformly applied in all delictual matters. Except in cases of municipal liability.

[21] Municipal liability cases continued to be premised on the contention that local authorities were empowered, but not obliged, to build and maintain roads and pavements. In the absence of any statutory or common law obligation to maintain roads and pavements, there was thus no legal duty on municipalities to do so. See *Halliwell* (*supra*), *Moulong v Port Elizabeth Municipality* 1958 (2) SA 518 (AD). This line of thinking resulted in what became known as the "*municipal immunity"* doctrine. Municipal liability only arose in particular circumstances such as the introduction of *"a new source of danger."*

[22] The judgment in *Ewels* (*supra*) to the effect that wrongfulness in cases of *omissio* may henceforth also be found in circumstances where the legal convictions of the community impose a legal duty to act, soon found application also in municipal liability cases. What set the chain in motion was *inter alia* a judgment of Thring J in the Cape Provincial Division which went on appeal to the Full Bench of that division and is reported as *Butters v Cape Town Municipality* 1993 (3) SA 521 (C) at 528 I. Thring J held, with reference to, *inter alia Ewels* (*supra*) that the doctrine of municipal immunity no longer forms part of our law and that *"... the same principles of the common law of delict apply to municipalities in this regard as apply to individuals."* On appeal, the Full Bench was unanimous in their agreement with Thring J in this regard.

[23] The correctness of the judgment in *Butters* (*supra*) came, again, before the Full Bench of the Cape Provincial Division in *Cape Town Municipality v Bakkerud* 1997 (4) SA 356 (C). Writing for the Full Bench, Brand J (as he then was) agreed with the correctness of the judgment in *Butters* (*supra*). Having analyzed the case law on the subject including judgments from the Supreme Court of Appeal post *Moulong* (*supra*) such as *Regal v African Superslate (Pty)* 1963 (1) SA 102 (A) which culminated in *Ewels* (*supra*), he came to the conclusion that the doctrine of municipal immunity no longer applies and that municipal liability cases should be decided in accordance with the common law principles of delictual liability which includes an anterior finding of wrongfulness based on the legal convictions of the community.

[24] The Full Bench judgment in *Bakkerund* went on appeal to the Supreme Court of Appeal which resulted in the judgment of Marais JA in *Cape Town Municipality v Bakkerud 2000 (3) SA* 1049 (SCA). The judgment in *Bakkerud* by the Supreme Court of Appeal left no doubt that not only is the concept of wrongfulness an essential , but completely separate, element of liability, but also that wrongfulness is rooted in the legal convictions of the community. The learned Judge said the following at p1056E-H (para 14)

> *"Was there a unifying link in the omissions considered in the cases which would provide a coherent and intelligible* ***principle*** *by which to decide whether more than moral or ethical disapproval was called for and whether a legal duty to act should be imposed? It was not always easy to discern one. In the end, this Court felt driven to conclude that all that can be said is that moral and ethical obligations metamorphose into legal duties when 'the legal convictions of the community demand that the omission ought to be regarded as unlawful'. When it should be adjudged that such a demand exists cannot be the subject of any general rule; it will depend on the facts of the particular case. It is implicit in the proposition that account must be taken of contemporary community attitudes towards particular societal obligations and duties. History has shown that such attitudes are in a constant state of flux."*

[25] The validity of the above statement was affirmed by the Supreme Court of Appeal two years later in *Duivenboden* (*supra*).

[26] The cumulative effect of the authorities referred to in the above overview seems to me to be the following: Firstly, the legal convictions of

the community are now firmly established as the criterion for wrongfulness in all cases of delict. Secondly, for purposes of delictual liability there is no longer any need to distinguish between *omissio* and *commissio,* in that both forms of the *actus reus* may give rise to liability in delict, and in both forms the test for wrongfulness is the legal convictions of the community. Thirdly, in municipal liability cases, the failure on the part of the municipality to repair and maintain roads and pavements will be held to be unlawful only if the legal convictions of the community demand that it takes preventative action on the facts of the particular case.

[27] The above approach, I believe, is in line with the conventional judicial thinking on the broad issue of wrongfulness. It also accords, at least in content, with the issue of wrongfulness in criminal law. Its parameters are already defined in numerous judgments on the subject and it is a concept applied by our courts on a daily basis. As such, I believe, it could not have been, and was not the intention of the Supreme Court of appeal to give content to the meaning of wrongfulness in cases of an *omissio* which is different to that in cases of a *commissio.* In both instances the concept of wrongfulness is rooted in the legal convictions of society. In the former case the question is whether the failure to act offends the legal convictions of the community; and in the latter case the question is whether the particular act offends the legal convictions of the community. More about this later.

[28] It is unnecessary to yet again engage in a discussion on the meaning of delictual wrongfulness, but I nevertheless believe it is prudent to make the following brief observations.

[29] First, the test is objective and not dependent on the court's personal views of what the community's legal convictions **ought** to be. The question to be determined is what the community's **actual prevailing** legal convictions are. See *Bakkerud* (*supra*) at 1057B-C (my emphasis).

[30] Second, the legal convictions to be determined are those of the community in which the principle is to be applied. In municipal liability cases, the norms and values and legal convictions of the various communities will differ dramatically from place to place and also from time to time. See *Duivenboden* (*supra*) at 444B-E; *Bakkerud* (*supra*) at 1060B-D

[31] Thirdly, the legal convictions are required to be worthy of legal protection (either in delict or in criminal law). Conduct (or failure to perform) which is regarded as merely unethical or immoral and not worthy of legal protection, is therefore not labeled as wrongful. *Duivenboden* (*supra*) at 442B-E (para.13); *Wingaardt* (*supra*) para 50.

[32] Finally, the legal convictions of any community must by necessary implication also be informed by the values and norms of our society as embodied in the 1996 Constitution. *Duivenboden* and *Wingaardt* (*supra*).

[33] With respect, I believe the judgments in *Bakkerud* and *Duivenboden* (*supra*) should be read and interpreted against the above background. In particular, at the risk of repetition, I do not believe it was intended by either of the above judgments that the long established principles pertaining to delictual wrongfulness should have a different content in cases of an *omissio.*

[34] If I am correct in the above assumption, then there is one issue in *Duivenboden* which I respectfully suggest should be clarified at some stage in the future. It is this:

[35] The learned Judge of appeal suggests at 442 B in *Duivenboden* (*supra*) that the question to be asked when enquiring into wrongfulness is whether, *"... as a matter of legal policy ..."* the omission ought to be actionable. That the issue is a matter of legal policy is confirmed by the learned Judge of Appeal at p 444 para 16 where he states:

> *"The very generality in which the legal principles have been expressed in the various decisions to which I have referred is an emphatic reminder that, both in this country and abroad, the question to be determined is one of legal policy, which must perforce be answered against the background of the norms and values of the particular society in which the principle is sought to be applied."*

[36] The question which arises is whether the determination of delictual wrongfulness is a matter of legal policy or a matter of substantive law. The distinction is not merely academic or pedantic.

[37] Did the Supreme Court of Appeal intend that wrongfulness in cases of *commissio* should be treated any differently to cases of *omissio*? I do not think so.

[38] The point came before the Full Bench of the Cape Provincial Division in the first reported judgment of *Bakkerud* (*supra*) referred to above.

[39] It was conceded by the appellant (the municipality) in that case that in view of the judgment in *Ewels* (*supra*), the wrongfulness of an omission by a municipality to repair a street or pavement is to be determined with reference to the legal convictions of the community. However, it was contended that the decisions of the Appellate Division upholding the doctrine of municipal immunity and establishing the only exceptions in the doctrine of *introducing a new source of danger* such as *Moulong* (*supra*), were based on legal policy in that the doctrines reflected the legal convictions of the community and, consequently, the Full Bench was bound by those decisions of the Appellate Division as to what the legal convictions of the community dictate.

[40] In a strong and convincing judgment of the Cape Provincial Division in *Bakkerud* (*supra*) at p.369F *et seq* Brand J (as he then was) dispelled the above contention and held that the establishment of the doctrines of *municipal immunity* and *introduction of a new source of danger* were matters of substantive legal principle and not of legal policy, notwithstanding that these doctrines were essentially concerned with the issue of wrongfulness. (It must be borne in mind that these doctrines were then used as the test for wrongfulness, which test has now been replaced by the legal convictions of the community).

[41] The above findings of Brand J (as he then was) were not upset on appeal to the Supreme Court of Appeal in *Bakkerud* (*supra*), and nor were they questioned in *Duivenboden* (*supra*) or in any other judgment from the Supreme Court of Appeal. The matter remains an enquiry into delictual

wrongfulness (whether *commissio* or *omission*) and, if established, and only if; a second and further enquiry into *culpa*.

[42] In many fields of the law of delict, our courts have developed the common law to the extent that it recognizes that the particular nature of a particular act may be regarded as unlawful. For instance, assault and murder are usually regarded as unlawful acts under delict and criminal law, and so is the publication of words which are *per se* defamatory. However, the legal convictions of the community also recognize certain defined grounds of justification for acts which may otherwise be wrongful, such as self-defence or the defence of others in cases of assault or murder, and the truth and public interest in cases of defamation, all of which may nullify the wrongfulness of the act. I can see no reason in logic or in principle why the law of municipal liability may not develop in the same manner.

[43] The essential constitutional function of all local authorities in South Africa is to serve its communities. Such service is not only restricted to the provision of basic and essential services such as water, sanitation, safety and electricity, but also includes the maintenance of roads and pavements. However, the failure to render certain services, including failure to repair and maintain the infrastructure, may be justified in certain defined grounds such as the financial constraints of the particular municipality, its lack of resources, capacity and access to skills and qualified staff, and so forth. Each case must be assessed having regard to its own particular facts and circumstances, but I nevertheless see no reason why the courts may not in time to come formulate general guidelines and grounds of justification for a departure from such guidelines in assessing wrongfulness in municipal

liability cases, as it does in other cases of delict. This, I believe, will be in line with the development of the law of delict in general. And this can only happen if wrongfulness is treated as a legal principle. I therefore believe with great respect, that the reference of Nugent JA to *"legal policy"* must be interpreted and understood against this background.

[44] I now turn to apply the above principles to the facts of this case in order to determine whether or not wrongfulness was established. The narrow question, as I said, is whether the legal convictions of the community served by the respondent municipality require the latter to properly maintain its pavements to prevent an occurrence experienced by the appellant. If so, the failure to do so constitute wrongful conduct on the part of the municipality.

[45] The incident occurred in the municipal area of Port Elizabeth known as Central or Richmond Hill, which falls under ward 5. It is a high density middle class residential area covered by residential flats, a number of churches, retirement villages (including the Sanctuary where the appellant resides), restaurants, the Russel Road Technicon and the Oval Sport Ground. It carries heavy vehicular and pedestrian traffic and boasts a number of schools, shops and a shopping area. It is an older and an established area of Port Elizabeth with many streets lined by old and big trees. All streets are tarred and all pavements are paved. It is described in the evidence as a *"high density risk area."*

[46] The evidence show that at the time of the incident the total budget of the respondent municipality was R8 billion, of which R2.5 billion was earmarked for *"operating costs"* which include, as I understand the

evidence, costs of repair and maintenance to roads and pavements. In regard to pavements alone, there were 1,400 kilometers of sidewalks in the municipal area with 32 kilometers of sidewalks under construction at the time. The total budget for new sidewalks during the year in question was R35 million. There is no suggestion whatever that the respondent municipality lacked either the financial means, manpower, capacity or skills to repair and maintain the sidewalks under its jurisdiction.

[47] The evidence shows that the respondent municipality has for many years successfully maintained its infrastructure including its roads and pavements. Its witnesses readily acknowledged that part of its responsibilities related to the upkeep and maintenance of pavements. It is not suggested that the ratepayers expect anything else from the municipality.

[48] The respondent admitted in its plea that *"... it has a responsibility for maintenance and upkeep of the specific sidewalks/pavement and it owed a duty of care to the community and the Plaintiff as well."* In all these circumstances I am satisfied that the appellant has established the element of unlawfulness. The concession was correctly made and I have no doubt that having regard to the nature and identity of both the respondent municipality and the community it serves, and to the particular circumstances described above, that the legal convictions of the community imposes a legal duty on the municipality to keep its pavements, including the one which caused the appellant to stumble and fall, in a proper state of repair. I therefore believe that the appellant has established the requirement of wrongfulness.

[49] The question may well be asked why this judgment has taken so much

time and effort to come to this conclusion in the light of the above concession on the pleadings. The answer is that both parties in the presentation of evidence and in argument both before the court *a quo* and before this court, failed to recognize the distinction between the elements of unlawfulness on the one hand; and *culpa* on the other, and conflated the two concepts to the extent that it became difficult to recognize when they were dealing with the one or the other. I was accordingly of the view that the concession was made and accepted without fully appreciating the difference and the true meaning and content of wrongfulness. It therefore became necessary, in my respectful view, to deal extensively with these two issues.

[50] I now proceed to the second stage of the enquiry, namely whether or not the appellant has established the element of fault. She relies on the form of *culpa* and not on direct intent.

[51] The leading and classical case often referred to as the test for *culpa* is *Kruger v Coetzee* 1966 (2) SA 428(A). In this case Holmes JA described the test as follows at p.430E-G:

> *"For the purposes of liabity **culpa** arise if-*
>
> *a) a **diligens paterfamilias** in the position of the defendant-*
>
> *i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and*
>
> *ii) would take reasonable steps to guard against such occurrence; and*
>
> *(b) the defendant failed to take such steps. This has been constantly stated by this court for some 50 years. Requirement (a)*

> *(ii) is sometimes overlooked. Whether a* ***diligens paterfamilias*** *in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstance of each case."*

[52] More than 50 years elapsed since the above *dictum,* and it remains good law to this day.

[53] The relevant facts to which the above test must be applied can be summarized as follows:

[54] The incident occurred on 6 July 2008. It was caused by a raised pavement block. It was well known by municipal officials that tree roots from large trees such as those adjacent to the pavement in question, may cause raised concrete blocks. It is common cause that the trees in question caused the uneven and raised concrete slabs. The evidence disclose that the concrete slab which caused the appellant to fall, was raised by approximately 50mm, and that the uneven state of raised pavement blocks in the particular area had existed for approximately 1 year prior to the incident. The area has since been leveled and the roots removed.

[55] The respondent municipality had at all relevant times a particular procedure in place in dealing with repairs and maintenance of its pavements. It is called a *"complaints system"* and operates in the following manner:

[56] Whenever a complaint or report (either telephonically or written) is received from a member of the public, a City Councilor, official or

employee, it is recorded on a *"Complaint Form"* and sent to the Department of Infrastructure and Engineering. It is there dealt with by the Roads and Stormwater Division of the Department. It then goes through a lengthy procedure which is unnecessary to repeat, and which includes an inspection and assessment of the damage, a decision on the method of repair and the issue of a job card to a foreman with instructions to repair, supervision of the works and inspection of repairs. In addition to members of the public, municipal official and employees such as the superintendents from the Roads and Stormwater Depots doing their rounds, designated cleaners, rubbish collectors and rangers are all required to report defects, damage and potential dangers to the Infrastructure and Engineering Department.

[57] The aforesaid complaints system dealing with maintenance and repairs has been in place for over 40 years, during which period it operated effectively and satisfactorily. Obviously, because no municipality is required to maintain a *"billiard top smoothness"* to its roads and pavements, the respondent has a policy that it will only repair raised pavements if the blocks or some individual concrete slabs are raised by more than 25mm. In this case, as I said, the block causing the appellant to stumble was raised by 50mm.

[58] The success of the respondent's complaints system was, of course, not only dependent on the system itself, but also on a diligent and competent exercise and implementation of the prescribed procedures by its employees. The evidence that it operated successfully over many years, show not only that the system is effective, but also that it has always been diligently and successfully implemented.

[59] The evidence shows, however, that since 2007 this was no longer the case. For approximately one year before the incident the pavement blocks in the particular area became uplifted by roots without being repaired. There is evidence that during the preceding year other pedestrians also stumbled and fell without any complaints being received by the Roads and Stormwater Division.

[60] The evidence further discloses that a City Councilor, Mr Davis, witnessed the incident on 6 July 2008. He telephoned Mr Tony Arthur of the Roads Department and reported the incident. Notwithstanding, no complaint form was completed and the operating procedures of the system were not followed. On 17 July 2008 Mr Davis followed his telephone complaint up with a letter recording the incident and requesting remedial action. A complaint form was still not completed.

[61] The inter-office memorandae and e-mails following Mr Davis' letter of 17 July show a confusion by municipal officials of the nature and place of repairs. Effectively, nothing was done. Eventually, on 25 August 2008, a complaint form was completed and the procedures were set in motion. The repairs were effected and completed only on 19 September 2008.

[62] The fact that the need for remedial work was evident for approximately one year before the incident, coupled with the manner in which the complaint was treated immediately after the incident on 6 July 2008, in my view, show conclusively that an otherwise effective complaints system and its remedial procedures were implemented in a negligent and incompetent

manner.

[63] It is conceivable that many occasions may arise where, notwithstanding an adequate complaints and repairs system, complaints are either not received or repairs not carried out, either timeously or at all. Examples such as an unforeseen thunderstorm causing damage, or acts of vandalism come to mind. Depending on the facts, those circumstances may not give rise to the requirements of either unlawfulness or *culpa,* or either. However, in cases of this nature, the municipality will place facts before the court which may either justify the wrongfulness or demonstrate the absence of reasonable foreseeability or any other element of *culpa*. In this case, however, no facts or explanation of any nature whatsoever were placed before the court to explain why the otherwise adequate and successful system did not work.

[64] It is true that there is no causal relationship between the incident in question and the failure to act on the complaint by Mr Davis, in that the complaint was lodged after the incident occurred. However, as remarked earlier, the fact that the defects and need for repairs had existed for a considerable period prior to the incident, coupled with the negligent and incompetent manner in which the complaint was handled and the absence of any explanation why the system failed in circumstances where it operated successfully for many years, all lead to the inescapable conclusion that the system was not implemented with the necessary care and skill and that the municipality was negligent in this regard.

[65] Applying the test for negligence in *Kruger* (*supra*), it is clear that the

incident was reasonably foreseeable if the procedures were not followed, and that the municipality could reasonably have taken steps to prevent the occurrence by ensuring that its system and procedures are properly enforced. It failed to take these steps for at least one year prior to the incident, and the manner in which the subsequent complaint was treated shows that even after the incident the correct procedures were either not followed at all, or not followed properly. I am satisfied that the appellant, on the facts of this case, proved the requirements of *culpa*.

[66] The trial court dismissed the appellant's claim on the basis that the respondent municipality's system operates efficiently and that the appellant had not proved it employed a deficient system. It seems that the appellant's counsel in the court *a quo* sought to attribute the negligence to the use of a system which was *"woefully deficient,"* and that the judgment is based on the efficiency or otherwise of the system and not on how the system was implemented.

[67] In his analysis of the evidence dealing with the manner in which the complaint was treated, the learned trial Judge, correctly in my view, concluded that the municipal officials were remiss in the implementation of the system and unduly delayed repairs. He found, however, that *"... an isolated instance of dilatoriness on the part of* ***Msila*** *cannot be the yardstick by which to judge the defendant's operating system ..."* Although this is a correct statement, the fallacy of the argument is that the negligence does not lie in the use of a perceived deficient operating system (which it is not), but in the negligent manner in which an otherwise efficient system was operated. It is not the operating system which is judged, but its

implementation. Even an isolated instance of negligent operation of the system constitutes negligence and is sufficient to prove *culpa.* I am therefore of the respectful view that the court *a quo* misdirected itself in focusing on the effectiveness of the system rather than on the manner of its implementation.

[68] I therefore propose that an order in the following terms issue:

1. The appeal succeeds and the order of the court *a quo* is set aside and is replaced with an order in the following terms:

   "1.1 The ruling of this court is that the defendant is liable to pay the plaintiff such damages caused by the incident on 6 July 2008 as the parties may agree or the plaintiff may prove.

   1.2 The defendant is ordered to pay the costs of the trial, including the costs reserved on 23 February 2010."

2. The respondent is ordered to pay the costs of this appeal.

I agree :

_____

DAWOOD J

I agree :

_____

BOQWANA AJ

It is so ordered :

_____

ALKEMA J

Heard on	:	06 December 2010
Delivered on	:	17 February 2011
Counsel for Appellant	:	Adv. Nepgen
Instructed by	:	De Villiers & Partners
Counsel for Respondent	:	Adv. Menti
Instructed by	:	Ketse Nonkwelo Incorporated