FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: A227/2007

In the matter between:-

MOQHAKA MUNICIPALITY Appellant

and

M. A. MARITI Respondent

HEARD ON: 2 February 2009

CORAM: C.J. MUSI, J et MOLOI, AJ

JUDGEMENT BY: C. J. MUSI

DELIVERED ON:

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[1] This is an appeal against a judgment by the magistrate Kroonstad. The magistrate found that the appellant's act or omission wrongly and negligently caused the respondent to

suffer damages. The magistrate further found that the appellant was 100% negligent.

[2] The respondent made the following allegations in his particulars of claim:

> “1. Die Eiser is MA MARITI, ‘n meerjarige man woonagtig te Symmonsstraat 55B, Kroontad.
>
> 2. Die Verweerder is MOQHAKA MUSIPALITEIT, ‘n Plaaslike owerheid bekleë met regspersoonlikheid ooreenkomstig die betrokke wetgewing handelende met plaaslike owerhede.
>
> 3. Gedurende Februarie 2004 het werknemers van Verweerder handelende in die uitvoering van hulle dienste en pligte met Verweerder sekere herstel werk gedoen aan ondergrondse pype en / of bedrading te Symmonsstraat, Kroonstad.
>
> 4. Sodanige herstel werk het behoef die grawe van slote in Symmonsstraat voor Eiser se woonplek.
>
> 5. Voormelde werknemers het opsetlik alternatiewelik nalatiglik versuim om die betrokke slote tot so ‘n mate te bedek na werk gestaak is die middag van die 18de Februarie 2004 dat Eiser toegaan kon verkry tot sy eiendom met sy motorvoertuig.

6. As gevolg van voormelde versuim deur die werknemers van Verweerder was Eiser verplig om sy voertuig die nag van die 18de tot 19de Februarie 2004 in die straat voor sy woonplek geleë te Symmonsstraat 55B te laat staan. ‘n Inbraak is die betrokke nag in die voertuig gemaak en is goedere gesteel en skade aangerig aan die betrokke voertuig gesteel en skade aangerig aan die betrokke voertuig in die bedrag van R6 364.94.

7. Alternatiewelik het Verweerder se werknemers ‘n regsplig gehad om toe te sien dat enige grondwerke wat hulle uitgevoer het op die voormelde datums en plek in so ‘n mate herstel is dat Eiser kon toegang kry tot sy woonplek met sy voertuig ten einde die voertuig veilig kon toesluit vir die betrokke nag.

8. Ten spyte van sodanige regsplig het hulle geweier en /of versuim om die nodige te doen. Die nodige aanmaning ingevolge die wet op beperking van regsgedinge is aan die Verweerder gestuur maar het Verweerder ten spyte van die verstryking van 30 dae versuim en / of geweier om die geëisde bedrag te betaal.

WESHALWE SMEEK EISER OM VONNIS VIR:

1. Betaling van die bedrag van R6 364.90 plus a tempora morae (sic).
2. Koste in die geding;
3. Verdere en / of alternatiewe regshulp.

[3] The appellant only admitted paragraphs 1 and 2 (the parties) of the particulars of claim. The rest of the allegations were denied. The appellant also pleaded that the respondent was 100% negligent alternatively that he was contributory negligent.

[4] In response to a request for further particulars the respondent stated that his property is fenced and that his vehicle

> "word veilig binne sy erf in die binnekant van 'n omheining toegesluit."

Seemingly there is an enclosure on the property in which the car is parked. He also stated that the quantum was calculated as follows:

Panasonic Car radio	R2 100.00
Sony loudspeakers	R 599.00
Cobra tweeter	R 70.00
Adidas bag	R 695.95
Track suit	R 899.95
Damage to vehicle	R2 000.00

[5] During the trial the parties agreed that only the issue of liability should be adjudicated upon and that quantum should be determined at a later stage. After the magistrate's findings on the merits the appellant admitted the quantum.

[6] The facts of this case are deceptively simple. Only the respondent testified during the trial. He testified that he resides at 54 Symonds Street, Kroonstad. He is employed by the South African National Defence Force. A few days before 18 February 2004, he called the appellant to complain about a damaged water pipe.

[7] On 18 February 2004 he went to work. On his return from work between 21H00 and 22H00 he saw that a trench was dug in front of his driveway. As a result thereof he could not drive his car onto his premises. He could also not park his car at his neighbour's premises because there was no space. He was forced to park his vehicle in the street. The next morning he discovered that one of his vehicle's windows was broken and that the items mentioned in paragraph 4 above were removed from the vehicle.

[8] On 19 February 2004 he and a certain Mr Pretorius assisted by other people closed the trench. Nobody from the appellant came to enquire anything about the closure of the trench.

[9] Before they closed the trench he saw that the water pipe was repaired and according to him the work was completed. All that had to be done was to close the trench. He further testified that the appellant knew about the water pipe problem because it supplied them with water from a water tank.

[10] During cross-examination he stated that he did not think about removing the other items from his car, when he parked it in the street, but he could not remove the car radio and speakers.

[11] Mr Cronje, on behalf of the appellant, argued that the respondent did not allege in his summons that the occurrence of the loss was foreseeable and that the conduct of the appellant was wrongful. He further argued that the respondent did not show a causal link between the appellant's act or omission and the damage.

[12] Mr Khang, on behalf of respondent, argued that there was a legal duty on the appellant to close the trench; that it acted wrongful by not doing so after completing the repair work, that the appellant created a new source of danger by means of its positive act of digging the trench and its failure to eliminate the danger resulted in the damages that the appellant suffered.

[13] The particulars of claim do not allege that the appellant acted wrongful. It is only alleged that the appellant's omission was intentional alternatively negligent. Both these speak to fault and not wrongfulness. It is trite that the plaintiff in a delictual claim must allege and prove that the act / omission of the respondent wrongfully and negligently caused the damage/ loss.

See **Lillicrap, Wassennar & Partners v Pilkington Brothers** 1985 (1) SA 497 A at 496 I to 497 A; **Local Transitional Council of Delmas and Another vs Boshoff** 2005(5) SA 514(SCA) at paragraph [23].

[14] The appellant did not raise an exception to the pleadings in the court a quo. It is in any event clear that the respondent presented and argued its case based on all the elements for delictual liability. The appellant also presented its case along the lines of specifically disputing wrongfulness. The appellant was not prejudiced. Mr Cronje did not allege any prejudice. This matter although not properly pleaded was fully canvassed during the trial. There being no exception raised by the

appellant, in the court a quo, the magistrate was fully justified in continuing with the matter – see rule 17 of the Magistrate's Courts Rules.

[15] The appellant denied that it dug the trench. There is no direct evidence as to who dug the trench. Only the plaintiff testified. He was not discredited as a witness. In fact, his version was not seriously disputed during cross-examination. There is no reason to reject his version. I accept his evidence.

[16] On his evidence the following facts emerge: A water pipe was damaged. He called the appellant to repair the water pipe. The main water supply was disconnected. The appellant supplied them with fresh water. On the day that the trench was dug in front of his gate the water pipe was repaired. It is highly unlikely if not preposterous to postulate that someone else could benevolently repair a water pipe on behalf of the appellant without any mandate. The appellant did not allege that it engaged an independent entity or person to repair the pipe. It

is the appellant's function to supply portable water systems and to render public work relating thereto. See section 84(1)(b) and (n) of the **Local Government Municipal Structures Act**, No117 of 1998.The inference is ineluctable that the appellant's employees, acting in the cause and scope of their employ, dug the trench. The magistrate's finding in this respect is in my view unassailable.

[17] The omission to close the trench was preceded by a positive act of digging it. Mr Cronje correctly argued that the act of digging the trench was not wrongful. The enquiry, unfortunately, does not end there. The omission to close the trench is what is central to the enquiry at this stage. The allegation is that, that conduct was wrongful. Was there a legal duty on the appellant? In **Gouda Boerdery BK v Transnet** 2005 (5) SA 490 (SCA) at paragraph [12] Scott JA said the following:

> "It is now well established that wrongfulness is a requirement for liability under the modern Aquilian action. Negligent

conduct giving rise to loss, unless also wrongful, is therefore not actionable. But the issue of wrongfulness is more often than not uncontentious as the plaintiff's action will be founded upon conduct which, if held to be culpable, would be prima facie wrongful. Typically this is so where the negligent conduct takes the form of a positive act which causes physical harm. Where the element of wrongfulness gains importance is in relation to liability for omissions and pure economic loss. The inquiry as to wrongfulness will then involve a determination of the existence or otherwise of a legal duty owed by the defendant to the plaintiff to act without negligence: in other words to avoid negligently causing the plaintiff harm. This will be a matter for judicial judgment involving criteria of reasonableness, policy and, where appropriate, constitutional norms. If a legal duty is found to have existed, the next inquiry will be whether the defendant was negligent. The test to be applied will be that formulated in Kruger v Coetzee, involving as it does, first, a determination of the issue of foreseeability and, second, a comparison between what steps a reasonable person would have taken and what steps, if any, the defendant actually took. While conceptually the inquiry as to wrongfulness might be anterior to the enquiry as to negligence, it is equally

> so that without negligence the issue of wrongfulness does not arise for conduct will not be wrongful if there is no negligence. Depending on the circumstances, therefore, it may be convenient to assume the existence of a legal duty and consider first the issue of negligence. It may also be convenient for that matter, when the issue of wrongfulness is considered first, to assume for that purpose the existence of negligence. The courts have in the past sometimes determined the issue of foreseeability as part of the inquiry into wrongfulness and, after finding that there was a legal duty to act reasonably, proceeded to determine the second leg of the negligence inquiry, the first (being foreseeability) having already been decided. If this approach is adopted, it is important not to overlook the distinction between negligence and wrongfulness."

[18] Legal duty in relation to wrongfulness should not be confused with duty or legal duty in context of the test for negligence. See **<u>McIntosh v Premier, KwaZulu Natal and Another</u>** 2008 (6) SA 1 (SCA) at paragraph [12].

[19] The question is therefore whether there was a legal duty on the appellant to do something to avoid the risk of harm eventuating. In **Halliwell v Johannesburg Municipality Council** 1912 AD 659 at 672 it was put thus:

> "For the decision of the present dispute it is sufficient to say that where in consequence of some positive act, a duty is created to do some other act or exercise some special care so as to avoid injury to others, then the person concerned is under Roman Dutch Law liable for damage caused to those to whom he owes such duty by an omission to discharge it."

[20] The appellant dug the trench, repaired the water pipe and left the trench open in front of the respondent's driveway. The appellant was informed about the broken water pipe, a few days before it was repaired. The appellant did not inform those affected, especially the respondent, when the water pipe would be repaired. When it became clear that a trench would be dug right across the respondent's driveway rendering access to his premises,by car, impossible no alternative arrangements were made. It should have been clear to the appellant that the

respondent would not be able to gain access to his premises with his car whilst the trench was left open. The appellant should therefore have foreseen that the owner of the house or any person staying there would not be able to drive onto those premises. The result of this could be that those persons would have to find alternative parking for their vehicles or leave them in the street until they could gain access to the premises. The appellants could easily have erected a ramp across the trench to enable the respondent to temporarily gain access to his premises where he could park his car in a safe place. The appellant by its prior conduct created a new source of danger or engaged in activity that is potentially noxious. See **Silva's Fishing Corporation (Pty) Ltd v Maweza** 1957 (2) SA 256 (AD) at 261 E – G, **Halliwell v Johannesburg Municipality Council** (*supra*) at 673. In the circumstances of this case, there was a legal duty on them to take reasonable steps to avoid harm. As pointed out above they did not. In my view, the appellant's omission was wrongful.

[21] In **Minister of Safety and Security and Another v Carmichele** 2004 (3) SA 305 at paragraph [45] Harms JA reaffirmed and elaborated on the well thumbed and oft quoted test for negligence. He stated it thus:

> "[45] The test for determining negligence is that enunciated in Kruger v Coetzee:
>
> 'For the purposes of liability culpa arises if –
>
> (a) a diligens paterfamilias in the position of the defendant-
>
> (i) would foresee the reasonable possibility of his conduct injuring another … and causing him … loss; and
>
> (ii) would take reasonable steps to guard against such occurrence; and
>
> (b) the defendant failed to take such steps'.
>
> But
>
> 'it should not be overlooked that in the ultimate analysis the true criterion for determining negligence is whether in the particular circumstances the conduct complained of falls short of the standard of the reasonable person. Dividing the inquiry into various stages, however useful, is no more than an aid or guideline for resolving this issue.

It is probably so that there can be no universally applicable formula which will prove to be appropriate in every case.'

And

'it has been recognised that, while the precise or exact manner in which the harm occurs need not be foreseeable, the general manner of its occurrence must indeed be reasonably foreseeable'.

Further

'In considering this question [what was reasonably foreseeable], one must guard against what Williamson JA called "the insidious subconscious influence of ex post facto knowledge" (in S v Mini 1963 (3) SA 188 (A) at 196 E – F). Negligence is not established by showing merely that the occurrence happened (unless the case is one where res ipsa loquitur), or by showing after it happened how it could have been prevented. The diligens paterfamilias does not have "prophetic foresight". (S v Burger (supra at 879 D).) In Overseas Tankship (UK) Ltd v Morts Dock & Engineeering Co Ltd (The Wagon Mound) 1961 AC 388 (PC) ([1961] 1 All ER 404 Viscount Simonds said at 424 (AC and at 414 G – H (in All ER):

> "After the event, even a fool is wise. But it is not the hindsight of a fool; it is the foresight of the reasonable

> man which alone can determine responsibility.”
> (Footnotes omitted).

[22] When applying the test for negligence, in this case, I must be mindful of the fact that the appellant is a public authority. In assessing the evidence in relation to the appellant’s negligence, if any, I am enjoined to also ensure that:

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

See **Minister of Safety and Security v Van Duivenboden** 2002 (6) SA 431 (SCA) at paragraph [23].

[23] Whether a particular occurrence was foreseeable will depend on the facts and circumstances of each case. The appellant need not have foreseen the actual event or the conjunction of occurrences for it does not have prophetic foresight.

[24] The trench was dug in front of a driveway giving the respondent entry to his premises. The first risk of harm that the appellant ought to have foreseen is that the owner of that particular property would not be able to drive his car onto his premises if he had a car. That being the case, he would have to park his car outside or at a place less safe or a place other than where he normally parked his vehicle.

[25] Theft of, from and or out of motor vehicles is commonplace in South Africa. This kind of theft has become so commonplace that it has created a whole new industry: car-guards. It is impossible now a days to park ones car at shopping malls, shopping centres or other public places without being asked by a car guard or two to look after one's vehicle. The proliferation of car guards is an indication of the extend to which this crime is commonplace in this country. One does not have to refer to the gargets that are fitted on motor vehicles to prevent theft from or out of motor vehicles. The situation is worse at night. In fact Mr Swanepoel on behalf of the appellant in the court a quo

was seemingly acutely aware of this problem. His first question during cross-examination to the respondent was as follows:

> "Mnr Mariti, die aand toe jy nou jou voertuig parkeer, waarom het u nie maar in die buurman se erf gaan toesluit, gegewe die nuwe Suid-Afrika waarin ons deesdae woon nie?"

It is unfortunate but clear that the new South Africa that he is referring to relates to the crime situation in our country.

[26] It would not have been difficult for the appellant to ascertain whether the respondent or any person living at that particular house had a car. It could have done that by asking the neighbours if it did not have access to the premises to see that there is a safe place where the respondent parked his car. In my view a reasonable person in the position of the appellant would have foreseen the reasonable possibility that its omission to close the trench might cause the respondent harm specifically in relation to his motor vehicle because he would not be able to park it at its regular safe place.

[27] In dealing with the second question of the test for negligence I must have regard to the nature and extent of the risk inherent in the appellant's conduct; the seriousness of the damage if the risk materialised and damage followed; the relative importance and object of the appellant's conduct; the cost and difficulty of taking precautionary measures. See **Neethling et al: Law of Delict 5th Ed** at page 131 to 133. Because the appellant is a public authority the factors mentioned in **Duivenboden** *supra* at paragraph [23] will also have to be considered in conjunction with the cost and difficulty factor mentioned above.

[28] On the facts of this matter it is, in my view, clear that a reasonable person in the position of the appellant would have taken reasonable steps to guard against the occurrence of the damage. The appellant knew in advance about the water pipe burst. It supplied fresh water. One assumes that when inspection was done to see where the source of the problem was the appellant would have been aware that a trench would have to be dug in front of the respondent's driveway. It could

have informed him timeously of when the trench would be dug so that he could make alternative arrangements. If the necessity to dig the trench at that particular place only arose on the day then one would expect a reasonable person to close the trench as soon as the repair work was done or alternatively to put a temporary ramp over the trench so that the respondent could get access to his premises. Getting a make-shift ramp to cover the trench would not have been that much costly or an inconvenience. The appellant must have been engaged in this kind of activity in the past and it is in my view not unreasonable to expect it to have the necessary equipment to make such ramp or to acquire such equipment. What makes it even worse in this case is that the appellant had completed the work and all that was left to do was to close the trench. No evidence was led by the appellant as to why the trench was not closed after the repair work was done or why a temporary structure was not erected over the trench to give the respondent access to his premises. Although the appellant was engaged in an important activity a reasonable person would foresee that harm could eventuate if the respondent's car was stolen or goods stolen

from it. No warning signs were placed at or near the trench. Mr Cronje on behalf of the appellant conceded that a reasonable person in the position of the appellant would have foreseen that the respondent might drive his car into the trench but argued that such person would not foresee that another person would steal goods from the car. I have already dealt with the foreseeability part of his argument. The fact that the concession is made in relation to the respondent driving into the trench is a clear indication that the appellant ought to have taken reasonable steps to guard even against such harm. There was no evidence or suggestion that any preventative steps would have necessitated changing or abandoning priorities or would have been strenuous on the appellant's budgetary or other resources. It did not take any steps to guard against any kind of harm. In my view, the appellant was negligent.

[29] I now consider the issue of causation in order to determine whether the appellant's negligence caused the harm that the respondent suffered. Causation is the causal link between the

conduct of the appellant and the result suffered by the respondent.

[30] Causation involves a two stage enquiry. The first stage is the *"but – for"* or *condicto sine qua non enquiry*. This is a factual enquiry. In terms of this test the appellant would only be held liable for the respondent's damage only if the respondent's damage would not have happened *"but – for"* the negligence of the appellant. See **International Shipping Co Pty Ltd v Bentley** 1990 (1) SA 680 (A) at 700 E to 701 F. In **Duivenboden** *supra* at paragraph [25] however, it was pointed out that:

> "plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather that an exercise in metaphysiscs."

This was also the sentiments of Lord Hoffman in **Express Car Company (Abertillery) Ltd v National Rivers Authority** [1998] EV LR 396 where he said that:

> "I doubt whether the use of abstract metaphysical theory has ever had much serious support and I certainly agree that the notion of causation should not be overcomplicated. Neither, however, should it be oversimplified".

[31] It seems to me that the respondent only had to show that the appellant's wrongful and negligent act was probably a cause of the harm that he suffered. The wrongful omission of the appellant must be a substantial factor in bringing about the damage or harm. The respondent therefore only has to show that it is more likely than not that the harm would have happened as opposed to showing that the harm would certainly have happened in the manner that it did. In **Barnard v Santam Bpk** 1999 (1) SA 202 (SCA) at 214B the Supreme Court of Appeal quoted with approval the dictum in **The Council of the Shire of Wyong v Shirt and Others** 146 CLR 40 (HCA),where it was said that:

> "A risk of injury which is quite unlikely to occur… may nevertheless be plainly foreseeable. Consequently, when we speak of a risk of injury as being "foreseeable" we are not making any statement as to the probability or improbability of its occurrence, save that we are implicitly asserting that the risk is not one that is far-fetched or fanciful".

[32] In this case the appellant was responsible for the digging of the trench and it wrongfully and negligently omitted to close it. But for the trench the respondent would have driven his car onto his yard and parked it safely under lock and key on his premises. His car would not have been parked outside overnight and the goods therein would therefore not have been stolen.

[33] The second stage of the enquiry is one of legal causation. Applying only the *"but – for"* test might lead to boundless liability and have unfair and unjust outcomes. Legal causation is a means of ensuring that the outcome is just and fair. It is a matter that is determined by considerations of policy. Even though the factual enquiry might be satistified or proved legal

causation is a way of determining whether a party should be held liable or be absolved from liability.

[34] In **mCubed International v Singer** (118/08) [2009] ZASCA 6 at paragraph [27] it was said that:

> "The issue of legal causation or remoteness is determined by considerations of policy. It is a measure of control. It serves as a "longstop" where right minded people, including judges, will regard the imposition of liability in a particular case as untenable, despite the presence of all other elements of delictual liability."

The test for legal causation is not a strict one; the test is flexible and supple. Therefore the

> "existing criteria of foreseeability , directness etc. should not be applied dogmatically but in a flexible manner so as to avoid a result which is so unfair or unjust that it is regarded as untenable".

See **mCubed International** *supra* at paragraph [31]; See also **Standard Chartered Bank of Canada v Nedperm Bank Ltd** 1994 (4) SA 747 A at 765 A – B.

[35] The issue of legal causation is complicated in this matter by the fact that the independent and deliberate actions of the thief or thieves has, strictly speaking, nothing to do with the appellant's negligence in not closing or covering the trench. However the risk that the appellant created is of the kind that forced the respondent to park his car outside. The Criminal act of theft is in my view within the risk zone that was created by the appellant whilst the appellant should have foreseen the risk eventuating.

[36] Foreseeability is however not an overriding consideration. It is but one of the factors that need to be considered together with factors such as the presence of a *novus actus* interveniens; legal policy, reasonableness, fairness and justice. See **Road Accident Fund v Sauls** 2002 (2) SA 55 (SCA) at paragraph [12]. Even where the damage or harm was unforeseeable, which is not the case here, a party may still be held liable by using the flexible approach to legal causation. See **Smit v Abrahams** 1994 (4) SA 1 (AD) at 19 C – D. In **Smit v Abrahams** *supra* the defendant was held liable for the

expenses that the plaintiff incurred for hiring a car after his vehicle was damaged in a collision caused by the negligence of the defendant. Botha JA at 15 E – F emphasised that the question is:

> "of daar 'n genoegsame noue verband tussen handeling en gevolg bestaan".

[37] The *novus actus* of the thief was not of the kind that would break the causal chain between risk created and harm or damage suffered. Theft out of a motor vehicle under these circumstances is not an abnormal or unexpected event in the light of human experience. See **in Cubed International** at paragraph [30]. Theft out of motor vehicle when a car is parked in the street at night is as already discussed above a familiar fact of life and not abnormal or extraordinary. In **OK Bazaars (1929) Ltd v Standard Bank of South Africa Ltd** 2002 (3) SA 688 (SCA) at paragraph [33] Nugent JA put it thus:

> "I have already drawn attention to the fact that the test for legal causation is, in general, a flexible one. When directed

> specifically to whether a new intervening cause should be regarded as having interrupted the chain of causation (at least as a matter of law if not as a matter of fact) the foreseeability of the new act occurring will clearly play a prominent role… If the new intervening cause is neither unusual nor unexpected and it was reasonably foreseeable that it might occur, the original actor can have no reason to complain if it does not relieve him of liability."

In my view the *novus actus* in this matter was also reasonably foreseeable. The causal chain was in my view not broken.

[38] In **Stansbie v Troman** [1948] 2 K.B 48 the salient facts where that a contractor carrying out decorations in a house was left alone by the householder's wife. During her absence he closed the front door without locking it. During his absence, a thief entered the house and stole property from the house, the value of which the householder claimed from the decorator. Tucker LJ, with whom Somervell LJ and Roxburgh J agreed, said the following:

> "the act of negligence itself consisted in the failure to take reasonable care to guard against the very thing that in fact happened. The reason why the decorator owed a duty to the householder to leave the premises in a reasonably secure state was because otherwise thieves or dishonest persons might gain access to them; and it seems to me that if the decorator was, as I think he was, negligent in leaving the house in this condition, it was as a direct result of his negligence that the thief entered the front door, which was left unlocked and stole these valuable goods".

[39] **Hart and Hanore: Causation in the Law 2nd Edition** 1985 at 284 close their discussion on foreseeability and risk with the following prophetic words:

> "To some extent therefore, the law is in transition from a stage at which liability was based almost exclusively on negligently causing harm to one in which it is based not merely on causing harm but also on exposing others to a risk of harm by providing other persons or things with the opportunity of doing harm".

[40] In legal terms the transition to liability based on exposing a party to risk of harm did not take long. In **<u>Chappel v Hart</u>** [1998] HCA 55 a medical negligence matter that was decided by the High Court of Australia McHugh J in his minority judgment set out the legal position as follows:

> "Before the defendant will be held responsible for the plaintiff's injury, the plaintiff must prove that the defendant's conduct materially contributed to the plaintiff suffering that injury. In the absence of a statute or undertaking to the contrary, therefore, it would seem logical to hold a person causally liable for a wrongful act or omission only when it increases the risk of injury to another person. If a wrongful act or omission results in an increased risk of injury to the plaintiff and that risk eventuates, the defendant's conduct has materially contributed to the injury that the plaintiff suffers whether or not other factors also contributed to that injury occurring. If, however, the defendant's conduct does not increase the risk of injury to the plaintiff, the defendant cannot be said to have materially contributed to the injury suffered by the plaintiff. That being so, whether the claim is in contract or tort, the fact that the risk eventuated at a

> particular time or place by reason of the conduct of the defendant does not itself materially contribute to the plaintiff's injury unless the fact of that particular time or place increased the risk of the injury occurring." (Footnotes omitted).

[41] The House of Lords **in Chester v Afskar** [2004] UKHL 41 also dealt with a medical negligence case. Although the majority in this case did not agree with the conclusions of Mc Hugh J in the **Chappel v Hart** case none of the Lords found any fault with his reasoning as set out above.

[42] If one looks at the facts of this particular case against this background it is clear that the appellants negligent act increased the risk of harm being done to the respondent. It is because of the appellant's conduct that the respondent had to alter his course and park his car outside – after he could not get parking space at his neighbours house. The duty of the appellant in the light of the facts of this case included having to take preventative or evasive steps against theft out of the respondent's vehicle. It is the failure to take these steps that

allowed the thief easy access to the respondent's car. It is the appellant's functions and powers to supply portable water systems. It must also provide municipal public works relating to the supply of portable water systems. The preamble to the **Local Government Municipality Structure's Act**, supra reads as follows:

> "Whereas there is fundamental agreement in our country on a vision of democratic and developmental local government, in which municipalities fulfil their constitutional obligations to ensure sustainable, effective and efficient municipal services, promote social and economic development, encourage a safe and healthy environment by working with communities in creating environments and human settlements in which all our people can lead uplifted and dignified lives;"

See also section 41 (1) of **the Constitution**, 1996.

[43] The municipal public works relating to the repair of the water pipe in this case was not rendered efficiently. After the pipe was repaired and the problem therefore solved the appellant left the trench open. In fact the appellant did not return the next

day to close the trench. The respondent with the help of others had to close the trench. It is my judgment that the appellant acted unreasonably. Public policy dictates in my view that where the negligent omissions or actions of a municipality is sufficiently causally linked to the damage or harm suffered by a party that municipality should be held liable. Obviously the facts and circumstances of each case must be considered on its own merits. I also don’t think that fairness and justice requires the appellant to escape liability under these circumstances. Municipalities should not be allowed to do their work with impunity fuelled by the knowledge that Courts are generally slow to impute responsibility or liability on them for their negligent actions. Considerations of public policy fairness, reasonableness and justice dictate that where a municipality acts in this negligent manner without due regard to the proprietary interest of those that they are enjoined to serve it should be held liable for the damages that result from its negligent conduct. It exposed the respondent to damages that he would otherwise, in all likelihood, not have been exposed to.

[44] The appellant specifically pleaded that the respondent was negligent or contributory negligent by, inter alia, not removing some of his goods from the motor vehicle in order to mitigate the foreseeable harm/loss. The respondent could not give any explanation as to why he did not remove the Adidas bag and the tracksuit from the car. If he did, he would not have suffered any loss in relation thereto. He should have foreseen the possibility of these things being stolen from the car and should have taken reasonable steps by removing them from the car- to guard against it. He failed to take such steps. In my view he was negligent in relation to those items. The magistrate erred by not finding that the respondent was negligent in relations to those items. The amount of damages should be adjusted accordingly.

[45] The respondent was substantially successful and there is no reason why the costs should not follow the result in this matter.

[46] I accordingly make the following order:

a) The appeal on the merits is dismissed

b) The appellant is ordered to pay the respondent an amount of R4 769.00 plus interest a tempora morae.

c) The appellant is ordered to pay the respondents costs in respect of the proceedings in the court a quo and of this appeal.

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C.J. MUSI, J

I concur

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K.J MOLOI, AJ

On behalf of the Applicants: Adv. P. R. Cronje
Instructed by:
Naudes
BLOEMFONTEIN

On behalf of the Respondent: Mr M. Khang
Instructed by:
Mphafi Khang Inc.
BLOEMFONTEIN

/AR