




# **Delictual liability of South African cities in the execution of their developmental duties: Lessons from case law**

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## **ABSTRACT**

Following its radical transformation, local government is currently mandated to play a broader developmental role. Municipalities (cities) have conferred powers, functions and competences to execute their developmental duties towards their local communities. The duties include contributing to the realisation of human rights and meeting the basic needs of local communities. Municipalities must strive to fulfil these functions within their financial and administrative capacity.

Despite all of these obligations, the majority of South African cities are still failing to fulfil their developmental mandate. This can be observed in the cumulative municipal-related incidents that significantly threaten the lives, health and well-being of local members. As a result of such failures, delictual claims against municipalities for harm sustained by community members continue to grow. Local communities may want to or could resort to instituting delictual claims as a means to obtain redress for their infringed legally protected interests by wrongful and negligent and/or intentional conduct of municipalities. This is because the law of delict's compensatory function is to award damages to prejudiced parties to restore them to their original position before the occurrence of the delict.

This study evaluates and reviews case law that dealt with municipal delictual liability to explore lessons that can be learned to inform both municipalities and potential litigants. Among others, the study found that municipalities no longer enjoy general immunity from delictual actions arising from poor roads or pavements. It also found that the breach of statutory duties by municipalities does not automatically give rise to delictual damages. In addition, municipalities are required to execute their duties as objectively reasonably required considering their administrative and financial capacity. The study also found that as part of the state, municipalities are required to adhere to a higher standard of care than private individuals. Concerning prejudiced parties, the study found that they can only be awarded damages they were able to prove. The study makes recommendations on how municipalities can reasonably execute their duties while adhering to legislative standards. The recommendations could also guide communities in shaping their expectations and

assist potential litigants in proving their cases in delictual actions where they may have valid cause of actions.

**Keywords:** South African cities; municipalities; developmental local government; service delivery; delict; delictual liability; case law; lessons.

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## **LIST OF ABBREVIATIONS**

CBO	Community-Based Organisation
CJLG	Commonwealth Journal of Local Governance
COGTA	Department of Cooperative Governance and Traditional Affairs
DMA	Disaster Management Act 57 of 2008
DWS	Department of Water and Sanitation
IDP	Integrated Development Plan
LGNF	Local Government Negotiation Forum
LGTA	Local Government Transition Act 209 of 1993
MDA	Local Government: Municipal Demarcation Act 27 of 1998
MFMA	Local Government: Municipal Finance Management Act 56 of 2003
MPRA	Municipal Property Rates Act 6 of 2004
MSA	Municipal Structures Act 117 of 1998
NEMA	National Environment Management Act 107 of 1998
NGO	Non-Governmental Organisation
PER/PELJ	Potchefstroom Electronic Law Journal
PTSD	Post-Traumatic Stress Disorder
SAHRC	South African Human Rights Commission
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal

SAPL	Southern African Public Law
SPLUMA	Spatial Planning and Land Use Management Act 16 of 2013
STELL LR	Stellenbosch Law Review
WPLG	White Paper on Local Government 1998
WSA	Water Services Act 108 of 1997
WSS	Water Supply Systems

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# CHAPTER 1 INTRODUCTION

## 1.1 Background

The *Constitution of the Republic of South Africa, 1996* (hereafter *Constitution*) introduced an entirely new local government dispensation that is radically different from the previous apartheid system. Chapter 7 of the *Constitution* is devoted to establishing this new dispensation by outlining among others, the status, objects, developmental duties, and the powers and functions of municipalities/cities.<sup>1</sup> In terms of Chapter 3 of the *Constitution*, local government became a constitutionally protected sphere of government. Currently, there are 257 municipalities that are "established for the whole of the territory of the Republic".<sup>2</sup>

Following the constitutional transformation, municipalities are mandated to play a broader developmental role. This is evident from a reading of sections 152 and 153 of the *Constitution*, together with the human rights duties emanating from the Bill of Rights. According to section 152, municipalities must strive to achieve the objectives provided within their financial and administrative capacities.<sup>3</sup> Section 153 obliges municipalities to structure and manage their administration and budgeting, as well as planning processes to give priority to the basic needs of communities and to promote local socio-economic development. In addition to these duties, municipalities must respect, protect, promote, and fulfil the rights entailed in the Bill of Rights.<sup>4</sup> They are required to adopt reasonable legislative and other measures, within the context of available resources, to contribute towards realising human

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<sup>1</sup> Sections 151-156 of the *Constitution*. In this study, the researcher uses "cities" and "municipalities" interchangeably. As Fuo *et al* point out, although there is no universally accepted definition of a city, it is used to denote a legally recognised municipal government that exercises legislative, administrative, and executive powers in a clearly defined geographical area. See Fuo, Zengerling and Sotto *Climate Law* 39.

<sup>2</sup> Section 151(1) of the *Constitution of South Africa, 1996*. See Rautenbach and Venter *Constitutional Law* 240.

<sup>3</sup> Sections 152(1)-(2) of the *Constitution*. See Rautenbach and Venter *Constitutional Law* 233; *Kruger v Mangaung Plaaslike Munisipaliteit* [2008] ZAFSHC 155 (19 December 2008) para 14.

<sup>4</sup> Section 7(2) of the *Constitution*. See Steytler and De Visser "Local Government" 22-66, 67; Currie and De Waal "Structure of Bill of Rights Litigation" 23; Brickhill and Ferreira "Socio-Economic Rights" 563-565, 573-584.

rights.<sup>5</sup> They must also refrain from taking actions that can violate the rights of communities, adopt and implement measures that protect their rights and prevent third parties from violating them.<sup>6</sup> As a result, protecting human rights and meeting the basic needs of communities are part of the developmental roles of local government.<sup>7</sup>

Moreover, in executing their developmental duties, local government exercises legislative and executive powers that are vested in democratically elected Municipal Councils.<sup>8</sup> As a result of this, they enjoy a certain degree of political, economic and administrative autonomy.<sup>9</sup> Municipalities have the right to govern, on their own initiatives, the local government affairs of their communities.<sup>10</sup> The other spheres of government "may not compromise or impede a municipality's ability or right to exercise its powers to perform its functions".<sup>11</sup> This means that the national and provincial government should not obstruct or interfere in local government matters except as provided for in the Constitution.<sup>12</sup>

To enhance the status of local government's autonomy, Schedules 4 B and 5 B of the *Constitution* list areas in which municipalities have original executive and legislative powers.<sup>13</sup> Municipalities are given powers to make and administer by-laws to ensure that they effectively administer the matters listed in the Schedules.<sup>14</sup> However, the courts have confirmed that the legislative and executive powers and functions of municipalities are not limited to those in Schedules 4 B and 5 B only.<sup>15</sup>

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<sup>5</sup> See Brickhill and Ferreira "Socio-Economic Rights" 563-565, 573-584; see also para 2.3.3 below.

<sup>6</sup> Fuo 2022 *Stell LR* 491.

<sup>7</sup> Section B in the *White Paper on Local Government*, 1998 (hereafter *WPLG*).

<sup>8</sup> See s 151(2) of the *Constitution*.

<sup>9</sup> *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (*Fedsure Life Assurance* case) paras 35-38; *City of Cape Town v Robertson* 2005 (2) SA 323 (CC) paras 58-60; Fuo 2017 *De Jure* 324-327; Mathenjwa 2018 *SAPL* 4-8.

<sup>10</sup> Section 151(3) of the *Constitution*. See Steytler and De Visser "Local Government" 22-43,49.

<sup>11</sup> Section 151(4) of the *Constitution*.

<sup>12</sup> There are exceptions where they must interfere. See s 139 of the *Constitution*; s 106 of the *Local Government: Municipal Systems Act* 32 of 2000 (hereafter *Systems Act*); ss 136 and 137 of the *Local Government: Municipal Finance Management Act* 56 of 2003 (hereafter *MFMA*).

<sup>13</sup> Section 156(1)(a) and Schedules 4B and 5B of the *Constitution*. See s A 2.5 in *WPLG*.

<sup>14</sup> See s 156(1)-(2) of the *Constitution*.

<sup>15</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA (CC) (*Blue Moonlight Properties* case) paras 21-97; *Le Sueur v Ethekwini Municipality* (9714/11) [2013] ZAKZPHC 6 (30 January 2013) paras 19-29.

In the *Blue Moonlight Properties* case, the City of Johannesburg argued that it did not have any constitutional duty to provide emergency housing for people evicted from private property because "housing" appears in part A of Schedule 4 as an area of concurrent national and provincial legislative competence.<sup>16</sup> The Court held that the duty in section 26 of the *Constitution* regarding housing falls on the three spheres of government and binds them with an obligation to cooperate towards realising the right.<sup>17</sup> The reasoning of the Court in this case was followed by the High Court in several cases which confirmed that the powers and functions of municipalities are not limited to those expressly listed in Schedules 4B and 5B.<sup>18</sup>

In executing their functions, the *Systems Act* specifies that municipalities can provide services using internal or external mechanisms.<sup>19</sup> A municipal service is provided through an internal mechanism when a municipality utilises a municipal department or a municipal business unit.<sup>20</sup> An external mechanism is utilised when a municipality appoints a service provider to provide municipal services to local communities on its behalf, within its jurisdiction.<sup>21</sup> An external mechanism can be another municipality, another organ of state, a Community-Based Organisation (CBO) or a Non-Governmental Organisation (NGO).<sup>22</sup>

Additionally, municipalities must also facilitate public participation.<sup>23</sup> They need to interact with the local communities they serve to find out their needs and prioritise them.<sup>24</sup> They must structure and manage their "administration, and budgeting and planning processes" to prioritise the needs.<sup>25</sup>

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<sup>16</sup> *Blue Moonlight Properties* case paras 47-57; Fuo "The Courts and Local Governments in South Africa" 108; see more details in para 2.4 below.

<sup>17</sup> *Blue Moonlight Properties* case para 42; Fuo "The Courts and Local Governments in South Africa" 108.

<sup>18</sup> Fuo "The Courts and Local Governments in South Africa" 109; *Le Sueur v Ethekwini Municipality, Nel v Hessequa Local Municipality* (unreported) case number 12576/2013 of 14 December 2015.

<sup>19</sup> Section 76(a)-(b) of the *Systems Act*.

<sup>20</sup> Section 76(a)(i)-(ii) of the *Systems Act*.

<sup>21</sup> Section 11(3)(g) of the *Systems Act*.

<sup>22</sup> Section 76(b)(i)-(iv) of the *Systems Act*.

<sup>23</sup> Bekink *Restructuring (Systemization) of Local Government* 429.

<sup>24</sup> Bekink *Restructuring (Systemization) of Local Government* 429; s 153(a) of the *Constitution*.

<sup>25</sup> Section 153(a) of the *Constitution*.

Moreover, following the transition to constitutional democracy, local government has made significant progress in expanding access to services such as water, electricity, sanitation, and refuse removal. When the *Constitution* was adopted in 1996, only 55% of households had refuse collection services, 59% had access to improved sanitation, 65% had electricity supply and 76% had an improved source of water.<sup>26</sup> As of 2021, it was reported that 88,7% of households had an improved source of water, 89,3% had electricity supply, 84,1% had access to improved sanitation and 62,9% had their refuse collected weekly or less regularly.<sup>27</sup>

Despite the above achievements, recent figures show that the majority of South African cities are struggling to fulfil their developmental mandate. This is evident from numerous reports published by the Department of Cooperative Governance and Traditional Affairs (COGTA),<sup>28</sup> Auditor-General of South Africa reports,<sup>29</sup> and frequent provincial interventions in municipalities.<sup>30</sup> COGTA reported that as of 2022, 66 municipalities in South Africa were dysfunctional, while 107 municipalities were at medium risk, 57 were at low risk and only 27 were stable.<sup>31</sup> The effect of this was apparent in the key findings of the department's 21-year review of local government which indicated that municipalities are dysfunctional, with low level economic development and declining quality of services.<sup>32</sup>

It was found that municipalities are failing to keep up with the rapid population growth as the duty to ensure access to basic services to households intensifies as well.<sup>33</sup> It was further reported that infrastructure is not adequately maintained and

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<sup>26</sup> Pienaar *et al* "Realising Socio-Economic Rights" 113.

<sup>27</sup> Department of Statistics South Africa *General Household Survey*.

<sup>28</sup> COGTA *State of Local Government Report* 13,14,37-42; COGTA *Strategic Plan 2020 to 2025 Revised* 18-21; COGTA *Annual Performance Plan 2022/23 and Updated Strategic Plan 2019-2024*.

<sup>29</sup> Auditor-General South Africa *Consolidated General Report on Local Government* 69,70.

<sup>30</sup> COGTA *State of Local Government Report* 14. See *Premier of the North West Province v Kagisano Molopo Local Municipality* (CIV APP FB 01/2020) [2022] ZANWHC 7 (10 March 2022); Mathenjwa 2014 *Law, Democracy & Development* 178-201.

<sup>31</sup> COGTA *Strategic Plan 2020 to 2025 Revised* 21.

<sup>32</sup> COGTA *Strategic Plan 2020 to 2025 Revised* 23.

<sup>33</sup> COGTA *Strategic Plan 2020 to 2025 Revised* 23.

the increasing demand for it poses challenges.<sup>34</sup> Municipalities are failing to develop local economic strategies and even their strategic plans are outdated.<sup>35</sup>

By May 2021, COGTA had identified 35 municipalities with serious governance challenges for which support, and intervention were being developed.<sup>36</sup> These provincial interventions are provided for in section 139 of the *Constitution* and are invoked when municipalities cannot or do not execute their executive obligations as provided for in the *Constitution* or legislation. In such instances, a provincial government can intervene by taking any appropriate steps to ensure the execution of the obligation.<sup>37</sup> As of January 2023, 33 municipalities have been placed under section 139 interventions,<sup>38</sup> increasing from 23 in 2021.<sup>39</sup> This indicates that municipalities are failing to the point of requiring support and intervention.

As a result, the failures of municipalities in fulfilling their mandate continue to pose significant threats to the life and health of local communities.<sup>40</sup> The rising number of municipal-related incidents result in people's deaths, such as the cholera outbreaks of 2023.<sup>41</sup> Recently, a vector-borne disease, cholera, caused the death of 47 people leaving hundreds affected in the provinces of Gauteng, Free State, North-West, Limpopo, and Mpumalanga.<sup>42</sup> Out of 198 laboratory-confirmed cases across the provinces, Hammanskraal in the City of Tshwane was leading with 176 cases.<sup>43</sup> This shows the failure of municipalities to deliver basic services – water and sanitation services, as well as domestic waste-water and sewage disposal systems as mandated by the *Constitution*.<sup>44</sup> This is in consideration of the report that shows

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<sup>34</sup> COGTA *Strategic Plan 2020 to 2025 Revised* 23.

<sup>35</sup> COGTA *Strategic Plan 2020 to 2025 Revised* 23.

<sup>36</sup> COGTA *State of Local Government Report* 14.

<sup>37</sup> Section 139(1) of the *Constitution*. See Rautenbach and Venter *Constitutional Law* 239.

<sup>38</sup> COGTA 2023 <https://tinyurl.com/4cd33kp3>; see *Premier of the North West Province v Kagisano Molopo Local Municipality*.

<sup>39</sup> Auditor-General South Africa *Consolidated General Report on Local Government* 4.

<sup>40</sup> Auditor-General South Africa *Consolidated General Report on Local Government* 74,82-85.

<sup>41</sup> Naidoo 2023 <https://tinyurl.com/muarswpt>.

<sup>42</sup> Department of Health 2023 <https://tinyurl.com/mr2424tf>.

<sup>43</sup> Department of Health 2023 <https://tinyurl.com/mr2424tf>.

<sup>44</sup> Department of Water and Sanitation *Green Drop Report* 9,10; COGTA *Strategic Plan 2020 to 2025 Revised* 21; Naidoo 2023 <https://tinyurl.com/muarswpt>.

that 102 out of 115 (more than 88%) wastewater treatment systems are in a critical state.<sup>45</sup>

Although the causes of municipal failures to effectively fulfil their developmental duties are diverse, ranging from a lack of adequate funding, poor revenue collection, and a lack of adequate skills, some failures are a result of negligence. This study focuses on the failures of municipalities as a result of negligent or intentional wrongful conduct which consequently lead to delictual claims for damages.

Delictual liability has a long history in South Africa, from Roman law to Roman-Dutch law.<sup>46</sup> Its development has also been extended beyond the Roman-Dutch limits.<sup>47</sup> The development takes place in a manner that promotes the spirit, purport and objects of the Bill of Rights in the *Constitution*.<sup>48</sup> The development is apparent as South African courts continue to consolidate the law in delictual liability cases.<sup>49</sup> A general position in the law of delict is that damage or harm rests where it falls, that is, everyone bears the damage/harm they suffer unless it can be attributed to another.<sup>50</sup> Therefore, delictual liability concerns damage suffered by a person as a result of a wrongful act or omission of another, for which the person is entitled to compensation.<sup>51</sup> For delictual liability to ensue, five elements must be present namely a) conduct, b) wrongfulness, c) fault (intent or negligence), d) causation and e) harm.<sup>52</sup> The absence of any of the delictual elements voids delictual liability.<sup>53</sup>

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<sup>45</sup> Department of Water and Sanitation *Green Drop Report* 9,10.

<sup>46</sup> *Nkala v Harmony Gold Mining Company Limited* 2016 (5) SA 240 (GJ) paras 193-198; *RH v DE* 2014 (6) SA 436 (SCA) paras 16-18; Neethling and Potgieter *Law of Delict* 8.

<sup>47</sup> Roman-Dutch law is characterised as being "dynamic and ever-changing" as so to accommodate the changing modern societies. Our courts have not escaped their constitutional responsibility to develop common law which is being done by keeping up with the ever-changing modern societies; see *Nkala v Harmony Gold Mining Company Limited* paras 193-198; *RH v DE* paras 16-18; Neethling and Potgieter *Law of Delict* 8.

<sup>48</sup> Section 39(2) of the *Constitution*. See *DE v RH* 2015 (5) SA 83 (CC) para 16.

<sup>49</sup> *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (1) SA 461 SCA para 12; *Judd v Nelson Mandela Bay Municipality* (CA149/2010) [2011] ZACPEHC 4 (17 February 2011) paras 12 and 18.

<sup>50</sup> *Telematrix (Pty) Ltd v Advertising Standards Authority* para 12.

<sup>51</sup> Neethling and Potgieter *Law of Delict* 3.

<sup>52</sup> Neethling and Potgieter *Law of Delict* 4.

<sup>53</sup> Neethling and Potgieter *Law of Delict* 4.

The law of delict is governed by those general elements or principles.<sup>54</sup> The flexibility and pliancy of these general principles make it easier to accommodate new situations and changing circumstances as they only need to be adapted or applied in a newer way.<sup>55</sup> This is an important trait of the law of delict that directly relates to the developmental mandate of municipalities. As stated already, municipalities are required to prioritise the basic needs of local communities.<sup>56</sup> However, these needs continuously change and differ from one community to another.<sup>57</sup> The law of delict accommodates a community's dynamic needs and values and recognises them as the legal convictions of that community.<sup>58</sup> The same legal convictions of a community may influence the imposition of delictual liability on a municipality.<sup>59</sup>

If a municipality commits a delict against a community member or a juristic person, a delictual action can be instituted to hold the municipality delictually liable.<sup>60</sup> However, there needs to be a legally reprehensible conduct that caused harm or damage which can be attributed to the municipality on the basis of negligence or intent. A potential litigant would be entitled to a form of redress, compensation, provided the elements are met.<sup>61</sup> The compensatory function of the law of delict attempts to put the prejudiced party back into the original position they would have been had the delict not occurred.<sup>62</sup>

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<sup>54</sup> See para 3.2 below.

<sup>55</sup> Neethling and Potgieter *Law of Delict* 5.

<sup>56</sup> See para 1.1 above.

<sup>57</sup> See para 1.1 above; see also para 3.2.2 below.

<sup>58</sup> See para 3.2.2 below.

<sup>59</sup> See chap 4 below. For the purposes of civil claims for damages, a municipality as part of the state is regarded as being on an equal footing with a private individual who is a party to the matter. See Peté *et al Civil Procedure: A Practical Guide* 38.

<sup>60</sup> Municipalities are regarded as persons, legal subjects with separate legal personalities confirming their legal capacity to institute legal proceedings or have legal proceedings instituted against them. See s 2 of the *Systems Act*; Heaton *South African Law of Persons* 3-4; Neethling and Potgieter *Law of Delict* 27; Van der Walt and Midgley *Principles of Delict* 90.

<sup>61</sup> See *Carelse v City of Cape Town* [2019] 2 All SA 125 (WCC) para 2,86.

<sup>62</sup> See chap 3 below.

Disputes regarding delictual liability are more likely to be resolved in competent courts as proven by several cases brought to courts against municipalities.<sup>63</sup> This dissertation aims to analyse the jurisprudence of courts regarding the relevant cases that have been decided and also determine how they can guide municipalities as well as potential litigants in the evolution of delictual liability insofar as local government is concerned. The lessons that could be drawn from these cases should assist in establishing the standard that municipalities must adhere to when executing their developmental duties towards local communities. The cases would also be used to demonstrate what potential litigants need to prove in delictual claims against municipalities. Against this background, the question that this dissertation seeks to address is: What lessons have emerged from case law on the delictual liability of South African cities in the execution of their developmental duties that can guide municipalities and potential litigants?

## **1.2 Research objectives**

The primary objective of this study is to explore lessons that have emerged from case law that dealt with the delictual liability of South African cities in the execution of their developmental mandate that can guide municipalities and potential litigants.

The subsidiary objectives are:

- To contextualise the developmental mandate of South African local government.
- To discuss the powers and functions of local government and the mechanisms that can be used to perform their functions.
- To provide an overview of the status quo of South African cities vis-à-vis their developmental mandate and the impact on local communities.
- To discuss the underlying theory of the South African law of delict.

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<sup>63</sup> See *Botes v Ekurhuleni Metropolitan Municipality* (2011/32313) [2024] ZAGPJHC 788 (22 August 2024); *SMS v City of Johannesburg Metropolitan Municipality* (9165/2017) [2022] ZAGPJHC 55 (11 February 2022); *Skenjana v Buffalo City Metropolitan Municipality* (EL 434 /2020) [2022] ZAECELLC 35 (29 November 2022); *Boshoff v City of Cape Town* (7407/16) [2019] ZAWCHC 17 (27 February 2019); *Van Zyl v Siyancuma Municipality* (655/2016) [2019] ZANCHC 19 (29 March 2019).

- To critically analyse the jurisprudence of superior courts in South Africa (Supreme Court of Appeal and the High Court) regarding municipal delictual liability.
- To conclude with findings and relevant recommendations on how the jurisprudence emanating from superior courts can be utilised as a guide by municipalities and potential litigants in delictual liability.

### **1.3 Study outline**

Chapter 1 of this study provides a brief background contextualising the topic under discussion. Chapter 2 discusses the developmental mandate, powers and functions, and the status quo of South African cities. Chapter 3 sets out the legal framework for the law of delict in South Africa and contextualises the principles in relation to municipalities. Chapter 4 reviews and evaluates High Court (HC) and Supreme Court of Appeal (SCA) cases dealing with municipal delictual liability. Chapter 5 concludes with recommendations for municipalities and potential litigants concerning municipal delictual liability.

### **1.4 Research methodology**

The study is a desktop-based literature evaluation of national legislation combined with a case law review of the jurisprudence of HC and SCA cases concerning municipal delictual liability. The research was carried out by an analysis of primary and secondary sources of law. The *Constitution*, legislation and case law were primary sources utilised in this research. The sources relate to the aspects of developmental local government, the law of delict and municipal delictual liability in the execution of the developmental mandate. Secondary sources include scholarly books, journal articles, research reports, theses, internet sources and government documents. These sources are relevant in establishing the delictual liability of South African cities when executing their developmental mandate.

As already stated, only cases from the HC and SCA that dealt with municipal delictual claims are reviewed and evaluated. None of these cases reached the Constitutional Court, therefore, only the jurisprudence of these superior courts (SCA and HC) is

analysed. The study excludes Magistrate Court (MC) cases due to the absence of jurisdiction in most cases because of the monetary value of the claims. In those cases where the MC did have jurisdiction, the matters were appealed, and the courts, therefore, did not lay down binding judgments. The HC and SCA cases are selected based on their relevance and usefulness to this study in illustrating how the courts apply the law of delict in delictual claims against municipalities. Lessons emerging from this exercise should be able to guide municipalities and potential litigants. The lessons should assist in establishing the standard that municipalities must adhere to when executing their developmental duties towards local communities. They should also demonstrate what potential litigants need to prove when instituting delictual actions against municipalities.

## **CHAPTER 2 LOCAL GOVERNMENT IN DEMOCRATIC SOUTH AFRICA**

### **2.1 Introduction**

To contextualise this study, this chapter discusses some important aspects of local government reform in South Africa. The study focuses on the delictual liability of municipalities for harm that could arise from negligent and/or intentional wrongful conduct when executing their powers and functions. In achieving this objective, the following discussion is divided into five parts. The first part outlines key historical features of local government in South Africa. The second part discusses the developmental duties of local government that arise from its legal mandate. The third part discusses the status of local government and evaluates the powers and functions of municipalities in relation to their developmental duties. The fourth part briefly discusses the mechanisms that local government can utilise to carry out its developmental duties. The last part considers the status quo of local government with regard to its developmental mandate and the resulting impact on communities.

### **2.2 Key historical features of South African cities**

The history of local government in South Africa is well documented and, therefore, needs not to be recounted in detail.<sup>64</sup> However, in order to comprehend the nature of the current mandate as well as the powers and functions of local government, a brief discussion of key historical features relevant to developmental local government is required.

Prior to the new constitutional dispensation, local government lacked constitutional status and protection.<sup>65</sup> As a result, it was not recognised as a self-governing institution and was governed by legislation that was passed by empowered

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<sup>64</sup> Mathenjwa *Supervision of Local Government* 17-35; Steytler and De Visser *Local Government Law of South Africa* 1-22; Schwella *et al South African Governance* 79-90.

<sup>65</sup> Steytler and De Visser *Local Government Law of South Africa* 1-4.

provincial councils.<sup>66</sup> As one of the subjects under provincial jurisdiction, local government was subjected to the laws of provincial councils.<sup>67</sup> Additionally, local government experienced immeasurable control from provincial councils.<sup>68</sup> Therefore, local government was a creature of statute.<sup>69</sup> As such, it could not possess any rights and powers unless conferred upon by provincial legislatures, either expressly or impliedly.<sup>70</sup> Provincial councils thereby controlled all municipal actions through their legislative authority, and their conduct was reviewable by courts.<sup>71</sup> This included the powers of local government to pass by-laws.<sup>72</sup>

Local government predominantly served as the provincial government's administrative arm and was ranked as the lowest tier of government.<sup>73</sup> The case of *CDA Boerdery (Edms) Bpk en Andere v Nelson Mandela Metropolitan Municipality*<sup>74</sup> concisely states the position of local government under the old dispensation as follows:

Municipalities were therefore at the bottom of a hierarchy of law-making power: constitutionally unrecognised and unprotected, they were by their very nature 'subordinate members of the government vested with prescribed, controlled governmental powers'.<sup>75</sup>

Moreover, apart from being creatures of statute, local government consisted of diverse, racially isolated, and fragmented institutions whereby the majority of people (blacks) were forcefully removed to their "own areas" as established by the

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<sup>66</sup> Section 85(vi) of the *Union of South Africa Act, 1909*; Steytler and De Visser *Local Government Law of South Africa* 1-4; Rautenbach and Venter *Constitutional Law* 236; *CDA Boerdery (Edms) Bpk en Andere v Nelson Mandela Metropolitan Municipality* 2007 (4) SA 276 (SCA) para 33.

<sup>67</sup> Section 85 of *Union of South Africa Act, 1909*; s 84 of the *Republic of South Africa Act* 32 of 1961; Rautenbach and Venter *Constitutional Law* 236; *CDA Boerdery v Nelson Mandela Metropolitan Municipality* para 33.

<sup>68</sup> Mathenjwa *Supervision of Local Government* 32-33; Rautenbach and Venter *Constitutional Law* 236.

<sup>69</sup> Steytler and De Visser *Local Government Law of South Africa* 1-4,8.

<sup>70</sup> Steytler and De Visser *Local Government Law of South Africa* 1-4,8.

<sup>71</sup> *Fedsure Life Assurance* case para 31; Steytler and De Visser *Local Government Law of South Africa* 1-8.

<sup>72</sup> *Fedsure Life Assurance* case para 31; Steytler and De Visser *Local Government Law of South Africa* 1-8.

<sup>73</sup> Steytler and De Visser *Local Government Law of South Africa* 1-8; *CDA Boerdery v Nelson Mandela Metropolitan Municipality* 2007 para 33.

<sup>74</sup> 2007 (4) SA 276 (SCA).

<sup>75</sup> *CDA Boerdery v Nelson Mandela Metropolitan Municipality* para 33.

minority (whites) government.<sup>76</sup> The racial segregation can be ascribed to the application of apartheid at the time to those different communities.<sup>77</sup> Subsequent to the established strict residential segregation, regulatory measures and policies to govern "own areas" had to be put in place to govern the separate residences.<sup>78</sup> The *Group Areas Act* 41 of 1950 perpetuated this segregation by formally introducing a pass system that restricted blacks from urban areas and further reserved a feasible revenue base for white municipalities, as well as industrial and commercial development in specific areas.<sup>79</sup> Black people were then moved to areas that were classified as "non-white".<sup>80</sup>

In terms of revenue collection, it was self-generated from charging property taxes as well as levies when services were delivered.<sup>81</sup> However, the revenue collection only benefited white municipalities with small areas and a small population as the minority.<sup>82</sup>

In terms of finances and infrastructure, white municipalities were stronger and well-built compared to the unmaintained and disadvantaged black local authorities.<sup>83</sup> The segregation policies ensured that white municipalities were not financially burdened by bearing the responsibility of maintaining the black local authorities.<sup>84</sup> As a result, black local authorities were left financially strained while occupying unsustainable large areas.<sup>85</sup> Since development was only reserved specifically for "white areas", the "non-white areas" remained underdeveloped and neglected.<sup>86</sup> Therefore, white municipalities had proper infrastructure because development could only occur in

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<sup>76</sup> Ismail and Mphaisha 1997 *Occasional Papers: KAS 7*; Steytler and De Visser *Local Government Law of South Africa* 1-8; Bekink *Restructuring (Systemization) of Local Government* 47-48; Section A of the *WPLG*.

<sup>77</sup> Steytler and De Visser *Local Government Law of South Africa* 1-9; s A of the *WPLG*.

<sup>78</sup> Bekink *Restructuring (Systemization) of Local Government* 47-48; s A of the *WPLG*.

<sup>79</sup> Section A of the *WPLG*; Bekink *Restructuring (Systemization) of Local Government* 47-48.

<sup>80</sup> Section A of the *WPLG*; Bekink *Restructuring (Systemization) of Local Government* 47-48.

<sup>81</sup> Section A of the *WPLG*; Bekink *Restructuring (Systemization) of Local Government* 48.

<sup>82</sup> Section A of the *WPLG*; Bekink *Restructuring (Systemization) of Local Government* 48.

<sup>83</sup> Section A of the *WPLG*; Bekink *Restructuring (Systemization) of Local Government* 47

<sup>84</sup> Section A of the *WPLG*; Bekink *Restructuring (Systemization) of Local Government* 47.

<sup>85</sup> Section A of the *WPLG*; Bekink *Restructuring (Systemization) of Local Government* 48.

<sup>86</sup> Section A of the *WPLG*; Bekink *Restructuring (Systemization) of Local Government* 48.

those areas.<sup>87</sup> With access to very limited revenue collection, blacks mostly spent their money in white municipalities to sustain themselves.<sup>88</sup>

This racial segregation led to a fragmented, dysfunctional and unequal local system which subsequently led to enormous inequalities between the respective inhabitants and development in their areas.<sup>89</sup> As a result, service delivery was also provided unequally.<sup>90</sup> The aftermath of this era was noted in the *Fedsure Life Assurance* case in which Kriegler highlights the terrible living conditions of black communities due to racial inequalities:<sup>91</sup>

The apartheid city, although fragmented along racial lines, integrated an urban economic logic that systematically favoured white urban areas at the cost of black urban and peri-urban areas. The results are tragic and absurd: sprawling black townships with hardly a tree in sight, flanked by vanguards of informal settlements and guarded by towering floodlights, out of stone throw reach. Even if only a short distance away, nestled amid trees and water and birds and tarred roads and paved sidewalks and street lit suburbs and parks, and running water, and convenient electrical amenities...we find white suburbia.<sup>92</sup>

These continuous racial injustices and inequalities that subsequently led to a poor standard of living for the majority of people fuelled protests and mobilisation against the system.<sup>93</sup> The system started to collapse and to salvage the situation, the minority government of the time attempted to redirect some of the revenue collection to the black local authorities, however, it was already too late.<sup>94</sup> The racial injustices and inequalities severely damaged and affected the majority of the population. As such, a complete transformation of the entire system was imperative. The reaction was justified because the system has resulted in racial inequalities in

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<sup>87</sup> Section A of the *WPLG*; Bekink *Restructuring (Systemization) of Local Government* 48.

<sup>88</sup> Section A of the *WPLG*; Bekink *Restructuring (Systemization) of Local Government* 48.

<sup>89</sup> Bekink *Restructuring (Systemization) of Local Government* 47.

<sup>90</sup> Steytler and De Visser *Local Government Law of South Africa* 1-9; Ismail and Mphaisha 1997 *Occasional Papers: KAS* 7.

<sup>91</sup> *Fedsure Life Assurance* case paras 121, 122; see *City of Council of Pretoria v Walker* 1998 (2) SA 363 para 19, 46.

<sup>92</sup> *Fedsure Life Assurance* case para 122.

<sup>93</sup> Section A of the *WPLG*; Bekink *Restructuring (Systemization) of Local Government* 25, 48; see Fuo *Local Government's Role in Achieving the Transformative Constitutional Mandate* 95.

<sup>94</sup> Section A of the *WPLG*.

accessing municipal services, poor standards of living that led to massive poverty and the disruption of spatial, social, and economic environments.<sup>95</sup>

The need for transformation could no longer be overlooked. The system of the time needed to be changed to establish a uniform system, that is capable of serving people fairly and democratically.<sup>96</sup> The Local Government Negotiating Forum (LGNF) set the transformation process in motion.<sup>97</sup> The goal was to establish a local government system that provides equal and acceptable services to all communities to create a concept of one municipality and one tax base.<sup>98</sup> To better regulate the process, the *Local Government Transition Act 209 of 1993* (hereafter *LGTA*) was promulgated to detail the content of the progressive transformation and restructuring process.<sup>99</sup> The goal was to utilise the *LGTA* as an instrument to properly restructure local government from a racially discriminative system to a new uniform and democratic system.<sup>100</sup>

The first recognition of local government as an autonomous branch of government was during that process through the *Interim Constitution of the Republic of South Africa Act 200 of 1993* (hereafter the *Interim Constitution*).<sup>101</sup> However, it was through the final adoption of the 1996 *Constitution* that significant changes to the local government landscape came about.<sup>102</sup> Furthermore, the framework and

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<sup>95</sup> Preamble of the *Systems Act*; *Fedsure Life Assurance* case para 1; see Fuo *Local Government's Role in Achieving the Transformative Constitutional Mandate* 97.

<sup>96</sup> Section A of the *WPLG*; Ismail et al *Local Government Management* 58-61; Bekink *Principles of South African Local Government Law* 25.

<sup>97</sup> Bekink *Restructuring (Systemization) of Local Government* 52.

<sup>98</sup> Bekink *Restructuring (Systemization) of Local Government* 52.

<sup>99</sup> Preamble of the *Local Government Transition Act 209 of 1993*; see Bekink *Principles of South African Local Government Law* 53.

<sup>100</sup> Bekink *Restructuring (Systemization) of Local Government* 53. The process had to take place in three phases (pre-interim, interim, and final phase) as per the *LGTA*, which this study will not explore in detail as they are already well-documented – see Steytler and De Visser *Local Government Law of South Africa* 1-10-22; *Executive Council of Western Cape Legislative v President of the Republic of South Africa* 1995 (4) SA 877 paras 6, 162(e) and (f); Bekink *Restructuring (Systemization) of Local Government* 50; s A of the *WPLG*.

<sup>101</sup> Section 174(3) of the *Interim Constitution*. See Steytler and De Visser *Local Government Law of South Africa* 1-12, 1-26. This also included giving local government new status, powers, and functions, laying the groundwork for what was to come - see ss 174 and 175 of the *Interim Constitution*; schedule 4 of the *Interim Constitution*; Fuo *Local Government's Role in Achieving the Transformative Constitutional Mandate* 98; Steytler and De Visser *Local Government Law of South Africa* 1-26; *Fedsure Life Assurance* case para 126.

<sup>102</sup> Bekink *Restructuring (Systemization) of Local Government* 64.

programme regarding the radical transformation of the existing local government are detailed in the *WPLG*.<sup>103</sup> These transformative changes are discussed below.

## **2.3 The developmental mandate of municipalities in South Africa**

### *2.3.1 Introduction*

One of the profound changes introduced by the *Constitution* was the recognition of local government as a distinct sphere of government, but also as one with a developmental mandate. The paragraphs below show that this mandate requires all municipalities to provide a variety of goods and services to communities. It is through municipalities' wrongful and culpable conduct in the execution of this mandate that they may infringe on the rights of community residents, which could lead to delictual claims for damages.<sup>104</sup> The developmental mandate is evident from several constitutional provisions that have been given further effect through legislation and policies, all of which are discussed below.

### *2.3.2 The constitutional objects and developmental duties of local government*

The most direct developmental role of local government in terms of the *Constitution* is found in section 152 which obliges every municipality to ensure the fulfilment of the listed set of objects. The objects include providing democratic and accountable government for local communities, ensuring sustainable provision of services, promoting social and economic development, promoting a safe and healthy environment, as well as encouraging local communities' involvement and participation in local government matters.<sup>105</sup> Local government must strive to achieve the above objects within its financial and administrative capacity.<sup>106</sup>

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<sup>103</sup> Foreword in *WPLG*.

<sup>104</sup> See *Harding v Nelson Mandela Bay Metropolitan Municipality* (2446/2022) [2023] ZAECQBHC (5 December 2023); *DB v The City of Cape Town* (11730/2015) [2019] ZAWCHC 167 (1 February 2019); *SMS v City of Johannesburg Metropolitan Municipality*; *Skenjana v Buffalo City Metropolitan Municipality*; *Van Zyl v Siyancuma Municipality*; *Boshoff v City of Cape Town*.

<sup>105</sup> Sections 152(1)(a)-(e) of the *Constitution*. See Introduction/Executive Summary in *WPLG*; Rautenbach and Venter *Constitutional Law* 233; Van der Waldt "Municipal Management: An Orientation" 4; Mathenjwa *Supervision of Local Government* 56.

<sup>106</sup> Section 152(2) of the *Constitution*. See Rautenbach and Venter *Constitutional Law* 233.

As one of the specified objects, local government has to be a democratic and accountable government for local communities.<sup>107</sup> From democracy, accountability is bred, and therefore, local government should account to local communities regarding their actions and decisions.<sup>108</sup> Accountability in this context entails the justification of conduct by the local government in the execution of their developmental mandate and taking responsibility thereof.<sup>109</sup> This process enhances community participation and involvement, which is an important instrument in fulfilling the mandate.<sup>110</sup> This suggests that a lack of accountability would hinder progress towards developmental local government and its realisation towards communities.<sup>111</sup>

Furthermore, local government has to ensure sustainable provision of services to local communities.<sup>112</sup> Considering their broader developmental role that extends beyond the provision of services, service delivery remains a cardinal function of municipalities.<sup>113</sup> Service delivery can be defined as:

The distribution of basic communal needs and services, notably housing, water and sanitation, land, electricity, and infrastructure, which local communities have taken for granted and become dependent on for their daily existence.<sup>114</sup>

The *Systems Act* defines "basic municipal services" as municipal services that are "necessary to ensure an acceptable and reasonable quality of life and if they are not provided, public health or safety or the environment would be endangered".<sup>115</sup> Therefore, municipalities must ensure a minimum level of access to these services.<sup>116</sup> Failure to do so would jeopardise the communities' quality of life. For example, when

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<sup>107</sup> Section 152(1)(a) of the *Constitution*. See s 4(2)(b) of the *Systems Act*; Steytler and De Visser *Local Government Law of South Africa* 1-23, 5-8; Rautenbach and Venter *Constitutional Law* 233.

<sup>108</sup> Sections 1(d), 41(c) of the *Constitution*. See Adonis 2021 *Journal of Public Administration* 290-292.

<sup>109</sup> Sikhakane and Reddy 2011 *African Journal of Public Affairs* 86.

<sup>110</sup> Sikhakane and Reddy 2011 *African Journal of Public Affairs* 85.

<sup>111</sup> Adonis 2021 *Journal of Public Administration* 289.

<sup>112</sup> Section 152(1)(b) of the *Constitution*. See Steytler and De Visser *Local Government Law of South Africa* 5-8.

<sup>113</sup> *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) para 34.

<sup>114</sup> Reddy 2016 *The Journal for Transdisciplinary Research in Southern Africa* 1.

<sup>115</sup> Section 1 of the *Systems Act*.

<sup>116</sup> Section 73(1)(c) of the *Systems Act*.

a municipality fails to ensure a minimum supply of water to about 90 villages consisting of more than 140 000 households, as is the case in Free State, an acceptable or reasonable quality of life is not experienced.<sup>117</sup> Even more so, when the municipal offices are also without water.<sup>118</sup>

Additionally, local government is to promote social and economic development.<sup>119</sup> The *Systems Act* states that community development must be promoted and undertaken.<sup>120</sup> Municipalities play an important role when it comes to creating a favourable and enabling regulatory environment for socio-economic development, especially for informal traders.<sup>121</sup> For instance, in the case of *Amoah v KSD Municipality*, the municipality demolished containers of informal traders who offered services to the public and in doing so, they contravened their own by-laws by not following the set-out procedures.<sup>122</sup> This impacted the informal traders' livelihood and consequently their standard of living by hindering their social and economic development.

Moreover, local government must promote a safe and healthy environment.<sup>123</sup> Local government must execute this duty in a manner that allows local members to live and work under conditions that do not harm their mental and physical health.<sup>124</sup> Furthermore, it must protect local communities against life-threatening environmental conditions such as floods.<sup>125</sup> This is due to the fact that a safe and healthy environment is essential to an adequately maintained standard of living.<sup>126</sup> A maintained and improved quality of standard of living directly speaks to developmental local government.

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<sup>117</sup> See Semela 2024 <https://tinyurl.com/mu7r6kp3>.

<sup>118</sup> See Semela 2024 <https://tinyurl.com/mu7r6kp3>.

<sup>119</sup> Section 152(1)(c) of the *Constitution*.

<sup>120</sup> Section 4(2)(g) of the *Systems Act*.

<sup>121</sup> *Amoah v KSD Municipality* (348/2019) [2023] ZAECMHC 41 (15 August 2023) para 49.

<sup>122</sup> See *Amoah v KSD Municipality* (348/2019) [2023] ZAECMHC 41 (15 August 2023) paras 25.1, 29. See more details of the case in chap 4 below.

<sup>123</sup> Section 152(1)(d) of the *Constitution*.

<sup>124</sup> Du Plessis 2011 *SAJHR* 293-294; Fuo *Local Government's Role in Achieving the Transformative Constitutional Mandate* 135; Du Plessis 2015 *PER/PELJ* 1865.

<sup>125</sup> Fuo *Local Government's Role in Achieving the Transformative Constitutional Mandate* 135; see *Bergrivier Municipality v Rhynardt Van Ryn Beck* 2019 (4) SA 127 (SCA).

<sup>126</sup> Steytler and De Visser *Local Government Law of South Africa* 5-9.

Apart from the fulfilment of the above objects, local government is further mandated to execute specific developmental duties. Local government is currently development-focused,<sup>127</sup> going above and beyond the mere provision of services. According to section 153 of the *Constitution*, a municipality is mandated to "structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community".<sup>128</sup> A municipality must promote the social and economic development of the community as mentioned above.<sup>129</sup> Additionally, a municipality must participate in national and provincial development programmes.<sup>130</sup>

Developmental local government must structure all its processes to meet the needs of local communities as well as promote social and economic development.<sup>131</sup> This indicates that policies, by-laws, plans and programmes must be development-focused to ensure that the needs of communities are prioritised. If circumstances exist to suggest that the basic needs of local communities have not been prioritised and that development was not promoted, those actions would be in contravention of these developmental obligations.<sup>132</sup> Such actions and steps taken by municipalities must be objectively evaluated.<sup>133</sup>

### *2.3.3 Human rights duties of local government*

Besides the duties from Chapter 7 of the *Constitution*, municipalities also have duties in terms of the Bill of Rights. They are co-responsible with national and provincial government to realise the socio-economic rights listed in the *Constitution*.<sup>134</sup> This means that local government must adopt reasonable legislative and other measures,

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<sup>127</sup> Steytler and De Visser *Local Government Law of South Africa* 1-15.

<sup>128</sup> Section 153(a) of the *Constitution*. See Mathenjwa *Supervision of Local Government* 57; Steytler and De Visser *Local Government Law of South Africa* 5-8.

<sup>129</sup> Section 153(a) of the *Constitution*. See Steytler and De Visser *Local Government Law of South Africa* 5-8; Mathenjwa *Supervision of Local Government* 57.

<sup>130</sup> Section 153(b) of the *Constitution*. See Steytler and De Visser *Local Government Law of South Africa* 5-8; Mathenjwa *Supervision of Local Government* 57.

<sup>131</sup> Section 153 of the *Constitution*.

<sup>132</sup> Bekink *Restructuring (Systemization) of Local Government* 109; see *Kgetlengrivier Concerned Residents v Kgetlengrivier Local Municipality* 2023 (2) All SA 452 (NWM).

<sup>133</sup> Bekink *Restructuring (Systemization) of Local Government* 109.

<sup>134</sup> Section 7(2) of the *Constitution*. See also *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (hereafter *Grootboom* case) para 19-20.

within the context of available resources, to contribute towards realising these socio-economic rights,<sup>135</sup> the right of every citizen to have access to conditions that enable them to gain access to land on an equitable basis;<sup>136</sup> the right of everyone to an environment that is not harmful to their health or wellbeing;<sup>137</sup> the right to have access to adequate housing and not be arbitrarily evicted from their homes;<sup>138</sup> the right of access to healthcare, sufficient food and water, and appropriate social assistance for those who are unable to support themselves or their dependants;<sup>139</sup> and the right to education.<sup>140</sup> Local government must refrain from interfering with the enjoyment of these rights,<sup>141</sup> and should adopt and implement measures that protect the rights of people as well as prevent third parties from violating their rights.<sup>142</sup> These rights must be promoted by encouraging their realisation as well as taking positive measures to ensure their fulfilment.<sup>143</sup>

The Constitutional Court confirmed the above-mentioned in the *Grootboom* case where a community required adequate basic shelter or housing after it was evicted from the private land it occupied.<sup>144</sup> It was emphasised that the state is obliged to take reasonable legislative and other measures within its available resources and achieve the realisation of section 26 of the *Constitution*.<sup>145</sup> It was further held that there are powers and functions that are allocated to all the spheres of government and, therefore, governmental spheres must co-operate with one another (co-operative governance) when executing their constitutional tasks.<sup>146</sup> Regarding housing, it was acknowledged that the function is shared by the national and provincial government but it was further held that local government is obliged to

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<sup>135</sup> Schwella *et al South African Governance* 181.

<sup>136</sup> Section 25(5) of the *Constitution*. See Fuo 2022 *Stell LR* 490.

<sup>137</sup> Section 24 of the *Constitution*.

<sup>138</sup> Section 26 of the *Constitution*. See Fuo 2022 *Stell LR* 490.

<sup>139</sup> Section 27 of the *Constitution*. See Fuo 2022 *Stell LR* 491.

<sup>140</sup> Section 29 of the *Constitution*. See Liebenberg and Pillay *Socio-Economic Rights in South Africa* 80-87; De Visser 2003 *Law, Democracy and Development* 201; Fuo 2022 *Stell LR* 490.

<sup>141</sup> Steytler and De Visser *Local Government Law of South Africa* 9-14.

<sup>142</sup> Fuo 2022 *Stell LR* 491.

<sup>143</sup> Steytler and De Visser *Local Government Law of South Africa* 9-14.

<sup>144</sup> *Grootboom* case para 3-5.

<sup>145</sup> *Grootboom* case para 21.

<sup>146</sup> *Grootboom* case para 39; see *Blue Moonlight Properties* case para 42; Fuo "The Courts and Local Governments in South Africa" 108; Steytler and De Visser "Local Government" 22-72,73.

ensure sustainable provision of the service to local communities.<sup>147</sup> Moreover, courts have continued to confirm that municipalities are also responsible for realising environmental rights and housing rights even though these matters fall outside of Schedules 4B and 5B of the *Constitution* as discussed in detail in paragraph 2.4 below.<sup>148</sup> As such, the same ought to apply to all the socio-economic rights in the *Constitution*.

On the contrary, municipalities are failing to ensure service provision and this continues even before the courts as demonstrated in the following cases: *Kgetlengrivier Concerned Residents v Kgetlengrivier Local Municipality*,<sup>149</sup> *Mazibuko v City of Johannesburg*,<sup>150</sup> *Blue Moonlight Properties case*, *Joseph v City of Johannesburg*.<sup>151</sup> These cases called for judgment on the action or inaction of municipalities concerning access to water, a healthy environment, sanitation services, electricity, housing, and basic services which are needed for human health and well-being.<sup>152</sup> The cases indicate that municipalities continue to contravene their human rights duties by not executing them.

#### 2.3.4 *White Paper on Local Government*

The broad constitutional mandate of local government is also captured in the *WPLG*. Although the *WPLG* informed the law as is, it is no longer the first point of reference. It aimed to give effect to the constitutional mandate and was the precursor to the *Systems and Structures Act* as well as the developmental mandate entrenched in local government law. Developmental local government in the *WPLG* is defined as "the central responsibility of municipalities to work together with local communities to find sustainable ways to meet their needs and improve the quality of their lives".<sup>153</sup> This definition emphasises the need for local government to commit to finding

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<sup>147</sup> *Grootboom case* para 39.

<sup>148</sup> *Blue Moonlight Properties case*; *Le Sueur v Ethekekwini Municipality*; *Nel v Hessequa Local Municipality*.

<sup>149</sup> *Kgetlengrivier Concerned Residents v Kgetlengrivier Local Municipality* 2023 (2) All SA 452 (NWM).

<sup>150</sup> *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

<sup>151</sup> *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC).

<sup>152</sup> Du Plessis 2015 *PER/PELJ* 1855-1856.

<sup>153</sup> Section B of the *WPLG*.

sustainable ways to meet people's social, economic and material needs, as well as improve their standard of living.<sup>154</sup> It further states that developmental local government must represent local communities, protect their human rights, and meet their basic needs.<sup>155</sup> To achieve this, local government's efforts and resources must be aimed at improving the quality of life of local communities, especially the marginalised or excluded, particularly women, disabled people and impoverished people.<sup>156</sup>

The *WPLG* also establishes four characteristics to identify what developmental local government means. Firstly, developmental local government is expected to maximise social development and economic growth by utilising its powers and functions.<sup>157</sup> This suggests that local government must execute their developmental duties by meeting the basic needs of impoverished people and also promote the social and economic well-being of local communities.<sup>158</sup> Secondly, municipalities must ensure that the relationships between all role players in the development processes including service providers are properly coordinated.<sup>159</sup> This is because different agencies actively contribute to this development and as a result, poor coordination from lack of vision and leadership will undermine the efforts.<sup>160</sup> Thirdly, Municipal Councils are required to promote democracy by playing a central role.<sup>161</sup> Apart from and in addition to representing community needs, the Council must also promote the involvement and participation of communities in municipal programmes.<sup>162</sup> The last feature of developmental local government is that municipalities must be "leading and learning" when it comes to the development processes.<sup>163</sup> This indicates that new ways must be established to ensure that

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<sup>154</sup> Section B of the *WPLG*.

<sup>155</sup> Section B of the *WPLG*.

<sup>156</sup> Section B of the *WPLG*.

<sup>157</sup> Section B of the *WPLG*. See Fuo *Local Government's Role in Achieving the Transformative Constitutional Mandate* 112.

<sup>158</sup> Section B of the *WPLG*.

<sup>159</sup> Section B of the *WPLG*.

<sup>160</sup> Section B of the *WPLG*.

<sup>161</sup> Section B of the *WPLG*.

<sup>162</sup> Section B of the *WPLG*.

<sup>163</sup> Section B of the *WPLG*.

societies are built, economies are sustained, environments are protected, personal safety is improved and poverty is eliminated.<sup>164</sup>

Moreover, the *WPLG* envisages certain outcomes that developmental local government ought to achieve, even though the outcomes may be susceptible to the circumstances at that relevant time.<sup>165</sup> These include the provision of household infrastructure and services such as water, local roads, refuse collection, stormwater drainage, sanitation and electricity; the creation of liveable and integrated cities; local economic development as well as community empowerment.<sup>166</sup> As indicated below in paragraph 2.6 of this chapter, the outcomes are still a work in progress and yet to be achieved even up to this day.

### *2.3.5 Observations regarding local government's mandate*

The above discussion shows that municipalities have a broad developmental mandate which requires them to satisfy the diverse socio-economic and environmental needs of communities. In the case of *Joseph v City of Johannesburg*, the Constitutional Court expressed that service delivery remains the cardinal function of municipalities.<sup>167</sup> This suggests that service delivery is an essential way in which municipalities execute their developmental mandate. The service delivery duties of municipalities are set out in detail in the framework and sector-specific local government legislation that was enacted to give effect to the ideals listed in the *Constitution*.<sup>168</sup>

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<sup>164</sup> Section B of the *WPLG*.

<sup>165</sup> Section B of the *WPLG*.

<sup>166</sup> Section B of the *WPLG*.

<sup>167</sup> *Joseph v City of Johannesburg* para 34.

<sup>168</sup> Framework local government legislation is the *Systems Act* and the *Local Government: Municipal Structures Act* 117 of 1998 (*Structures Act*). Sector-specific legislation that have a bearing on the regulation of local government matters among others include the: *Water Services Act* 108 of 1997 (*WSA*), *National Environmental: Waste Act* 59 of 2008 (*Waste Act*); *National Environmental Management Act* 107 of 1998 (*NEMA*), *National Environmental: Air Quality Act* 39 of 2004 (*Air Quality Act*), *Disaster Management Act* 57 of 2008 (*DMA*), *Local Government: Municipal Finance Management Act* 56 of 2003 (*MFMA*), *Municipal Property Rates Act* 6 of 2004 (*MPRA*), *Local Government: Municipal Demarcation Act* 27 of 1998 (*MDA*), and the *Spatial Planning and Land Use Management Act* 16 of 2013 (*SPLUMA*).

The most prominent local government framework legislation is the *Systems Act*. Sections 73-94 of the *Systems Act* focus solely on service delivery and municipalities are compelled to deliver basic services as a matter of priority. The *Systems Act* defines "basic municipal services" as services that "are necessary to ensure an acceptable and reasonable quality of life and if they are not provided, public health or safety or the environment would be endangered".<sup>169</sup> Municipalities must ensure a minimum level of access to these services in a sustainable manner.<sup>170</sup>

The constitutional duties of municipalities such as the realisation of socio-economic rights of communities and sustainable provision of services to communities among others require municipalities to develop and maintain critical infrastructure. Where municipalities fail to maintain or repair such infrastructure, it could create dangerous conditions that threaten people's health and well-being.<sup>171</sup> When those dangerous conditions result in damage or harm, a citizen's trajectory of life could be altered, either temporarily or permanently.<sup>172</sup> The harm can dictate the manner in which they are going to continue to live, resulting in deprivation of amenities of life. In some instances, the harm is so detrimental that the person can no longer go to work, changing their standard of living and economic conditions.<sup>173</sup> As such, municipalities need to build sustainable societies where people's health and well-being as envisioned by the *Constitution* and legislation become a reality in which people operate rather than it being a normative ideal.<sup>174</sup>

To enable municipalities to execute their developmental duties, municipalities have been given greater legislative, executive, administrative and fiscal autonomy. This elevated status of municipalities, together with their functions are discussed in the paragraphs that follow.

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<sup>169</sup> Section 1 of the *Systems Act*.

<sup>170</sup> Sections 73(1)(c) and 73(2)(c)-(d) of the *Systems Act*.

<sup>171</sup> See *Cronje v Nelson Mandela Bay Metropolitan Municipality Uitenhage* (800/09) [2010] ZAECPHC 58 (16 September 2010) paras 9 and 17; *DB v The City of Cape Town* para 1; *Judd v Nelson Mandela Bay Municipality* para 1; *Van Zyl v Siyancuma Municipality* para 1.

<sup>172</sup> *DB v The City of Cape Town* paras 3 and 7.

<sup>173</sup> *DB v The City of Cape Town* para 3.

<sup>174</sup> Du Plessis 2015 *PER/PELJ* 1865.

## 2.4 Status, powers, and functions of local government

Under the new constitutional dispensation, local government was restructured, establishing new autonomous municipalities.<sup>175</sup> As a result, local government was given a new legal status with its systems transformed according to the values provided in the *Constitution*.<sup>176</sup> The transformation of local government was based on the principles of democracy, social justice and respect for human rights.<sup>177</sup>

The transformation was achieved through a new vision that abandoned the previous system of divided governmental power in a hierarchical manner.<sup>178</sup> Instead, interdependency between local government and the other spheres of government was established.<sup>179</sup> Currently, local government is constitutionally recognised as a fully-fledged sphere of government.<sup>180</sup> Local government is no longer a competence of provincial government<sup>181</sup> and ceased serving as a mere administrative agency of national or provincial government.<sup>182</sup> Local government is currently an inviolable institution that possesses the autonomy to formulate its own distinctive identity, subject to constitutional limitations.<sup>183</sup>

Chapter 7 of the *Constitution* is exclusively assigned to local government matters. Currently, local government "has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the *Constitution*".<sup>184</sup> The *Constitution* provides that the other

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<sup>175</sup> *CDA Boerdery v Nelson Mandela Metropolitan Municipality* para 4.

<sup>176</sup> See s 1 of the *Constitution*. *CDA Boerdery v Nelson Mandela Metropolitan Municipality* para 4.

<sup>177</sup> Klare 1998 *SAJHR* 153; Pieterse 2005 *SAPL* 161; Fuo 2013 *Obiter* 84; Fuo 2013 *PER/PELJ* 221.

<sup>178</sup> *City of Cape Town v Robertson* paras 58-60; see *CDA Boerdery v Nelson Mandela Metropolitan Municipality* para 38.

<sup>179</sup> *City of Cape Town v Robertson* paras 58-60; see *CDA Boerdery v Nelson Mandela Metropolitan Municipality* para 38.

<sup>180</sup> *Fedsure Life Assurance* case paras 26, 34-38; *City of Cape Town v Robertson* paras 50-60. The constitutional provisions that pertain to local government cannot be altered without an amendment of the *Constitution* itself – see Freedman 2014 *PER* 569; Christmas and De Visser 2009 *CJLG* 111; *City of Cape Town v Robertson* para 60; Fuo 2022 *Stell LR* 489.

<sup>181</sup> Steytler and De Visser *Local Government Law of South Africa* 1-15; *Fedsure Life Assurance* case para 38.

<sup>182</sup> Steytler "Entrenching Decentralised Government" 183,187.

<sup>183</sup> *City of Cape Town v Robertson* paras 58-60; see *CDA Boerdery v Nelson Mandela Metropolitan Municipality* para 38; Rautenbach and Venter *Constitutional Law* 237.

<sup>184</sup> Section 151(3) of the *Constitution*. See Steytler and De Visser "Local Government" 22-43,49; Rautenbach and Venter *Constitutional Law* 234, 237.

spheres of government "may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions".<sup>185</sup> This means that as a sphere of government which has powers and functions defined in the *Constitution*, the powers of municipalities cannot be curtailed by national or provincial government except as stipulated in the *Constitution*.<sup>186</sup> Their powers are entrenched in and are protected by the *Constitution*. These can only be restricted in line with the *Constitution*.

Currently, as a protected distinct sphere of government, local government exercises legislative and executive powers to govern local government affairs through Municipal Councils.<sup>187</sup> A Municipal Council is a political structure that is democratically elected based on an electoral system.<sup>188</sup> When governing its local government affairs, a Municipal Council has the right to impose rates and other taxes, levies and duties, pass by-laws and budgets, as well as raise loans.<sup>189</sup>

Also, a municipality has executive authority in respect of and the right to administer the local government matters listed in Schedule 4B and 5B of the *Constitution*, and any matter assigned to it by national or provincial legislation.<sup>190</sup> The matters listed in Schedules 4B and 5B of the *Constitution* include beaches and amusement facilities, local amenities, municipal parks and recreations, municipal roads, public spaces, refuse removal, refuse dumps and solid waste disposal, street trading, electricity and gas reticulation, stormwater management systems in built-up areas

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<sup>185</sup> Section 151(4) of the *Constitution*. See Rautenbach and Venter *Constitutional Law* 234.

<sup>186</sup> *Fedsure Life Assurance* case para 37; Bekink *Principles of South African Local Government Law* 63-66.

<sup>187</sup> Section 151(2) of the *Constitution*. See *Fedsure Life Assurance* case para 26.

<sup>188</sup> Sections 151(2) and 157(2) of the *Constitution*. See Schwella *et al South African Governance* 175; s 1 of the *Systems Act*.

<sup>189</sup> Section 160(2) of the *Constitution*.

<sup>190</sup> Sections 156(1)(a) and (b) of the *Constitution*. See Rautenbach and Venter *Constitutional Law* 243; Schwella *et al South African Governance* 176.

and trading regulations.<sup>191</sup> They are considered original powers and functions of municipalities because they are sourced from the *Constitution*.<sup>192</sup> As already mentioned, municipalities are given powers to make and administer by-laws to ensure that they effectively administer the matters.<sup>193</sup> However, the by-laws adopted should not conflict with national or provincial legislation as they will be declared invalid – except if the national or provincial legislation is inoperative.<sup>194</sup>

It should be noted, however, that the courts have confirmed that the legislative and executive powers and functions of municipalities are not limited to matters in Schedules 4B and 5B of the *Constitution*.<sup>195</sup> In the *Blue Moonlight Properties* case, the City of Johannesburg argued that it did not have any constitutional duty to provide emergency housing for people evicted from private property because "housing" appears in part A of Schedule 4 of the *Constitution* as an area of concurrent national and provincial legislative competence.<sup>196</sup> The City argued that its Housing Policy which was enacted after the decision in the *Grootboom* case only catered for emergency housing for people who are in crisis or for other reasons beyond their control.<sup>197</sup> The City further stated that it is not primarily responsible for realising this right and that it depends on national and provincial government as they are confined to acting within the parameters set by national and provincial laws and policies.<sup>198</sup> Subsequent to stating that the obligation falls on all the spheres of government, the Court further held that local government should self-fund

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<sup>191</sup> Wrongful and intentional and/or negligent conduct which causes harm by a municipality when executing these functions may lead to delictual claims by communities against such municipalities. See *Harding v Nelson Mandela Bay Metropolitan Municipality*; *SMS v City of Johannesburg Metropolitan Municipality*; *Skenjana v Buffalo City Metropolitan Municipality*; *Van Zyl v Siyancuma Municipality*; *Boshoff v City of Cape Town*; *DB v The City of Cape Town*; *Amoah v KSD Municipality*; *Cronje v Nelson Mandela Bay Metropolitan Municipality Uitenhage*; *Judd v Nelson Mandela Bay Municipality*.

<sup>192</sup> See Freedman 2014 *PER* 569; Christmas and De Visser 2009 *CJLG* 111; *City of Cape Town v Robertson* para 60; Fuo 2022 *Stell LR* 489.

<sup>193</sup> See ss 156(1) and (2) of the *Constitution*. See Van der Waldt "Municipal Management: An Orientation" 7.

<sup>194</sup> Based on joint reading of ss 156(3) and 149 of the *Constitution*.

<sup>195</sup> *Blue Moonlight Properties* case paras 21-97; *Le Sueur v Ethekwini Municipality* paras 19-29.

<sup>196</sup> *Blue Moonlight Properties* case paras 47-57; Fuo "The Courts and Local Governments in South Africa" 108.

<sup>197</sup> *Blue Moonlight Properties* case paras 27,28,47.

<sup>198</sup> *Blue Moonlight Properties* case para 50.

emergency housing even without the assistance from national or provincial government.<sup>199</sup> This is because local government is "best situated to react to, engage with and prospectively plan around the needs of local communities", especially in emergency situations.<sup>200</sup> The reasoning of the Court confirmed that the powers and functions of municipalities are not limited to those expressly listed in Schedules 4B and 5B and it was followed by HC in several cases.<sup>201</sup>

Furthermore, the national or provincial government may assign the administration of any matters listed in Schedules 4A and 5A of the *Constitution* to local government subject to the conditions listed in section 156(4) of the *Constitution*. In respect of this, the matter assigned should be capable of being effectively administered locally and within the bounds of the administrative capacity of the relevant municipalities.<sup>202</sup> The assignment can take place as an individual assignment to a specific municipality or a general assignment to local government.<sup>203</sup> In making the assignments compulsory under those conditions, the principle of subsidiarity is established.<sup>204</sup>

In addition to its legislative and executive powers, local government also has a certain degree of financial independence.<sup>205</sup> In this regard, the *Constitution* guarantees municipalities the power to impose rates on property<sup>206</sup> and surcharges on fees for services rendered.<sup>207</sup> Additionally, "if authorised by national legislation, municipalities may impose other taxes, levies or duties appropriate to local government, but no municipality may impose income tax, value-added tax, general

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<sup>199</sup> *Blue Moonlight Properties* case para 42; Fuo "The Courts and Local Governments in South Africa" 108; Brickhill and Ferreira "Socio-Economic Rights" 585; Steytler and De Visser "Local Government" 22-72,73.

<sup>200</sup> *Blue Moonlight Properties* case para 57. See Fuo 2022 *Stell LR* 494.

<sup>201</sup> Fuo "The Courts and Local Governments in South Africa" 109; see *Le Sueur v Ethekwini Municipality*; *Nel v Hessequa Local Municipality*.

<sup>202</sup> Section 156(4)(a) and (b) of the *Constitution*.

<sup>203</sup> Steytler and De Visser *Local Government Law of South Africa* 5-6.

<sup>204</sup> Steytler and De Visser *Local Government Law of South Africa* 5-6.

<sup>205</sup> Section 229 of the *Constitution*. See Steytler and De Visser *Local Government Law of South Africa* 1-27 and 5-6.

<sup>206</sup> Section 229(1)(a) of the *Constitution*.

<sup>207</sup> Section 229(1)(a) of the *Constitution*. See Steytler and De Visser *Local Government Law of South Africa* 5-6; Van der Waldt "Municipal Management: An Orientation" 7; *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) at paras 61, 64 and 73; *Rates Action Group v City of Cape Town* 2006 (1) SA 496 (SCA) at paras 1-20, 76.

sales tax or customs duty".<sup>208</sup> The fiscal powers of municipalities cannot be used in a manner that prejudices national economic policies, economic activities over municipal boundaries or the national movement of goods, services, capital or labour materially and unreasonably.<sup>209</sup> Section 230A of the *Constitution* further gives municipalities the power to raise loans for current or capital expenditures subject to certain requirements. The constitutional fiscal powers of municipalities are also original powers and cannot be revoked without the amendment of the *Constitution*.<sup>210</sup>

The above-mentioned powers are of paramount importance as they enable local government to execute its developmental duties as they generate capacity. Despite their fiscal powers, the majority of municipalities cannot raise the money required to fully execute their mandate.<sup>211</sup> This remains so even with the national equitable share grant provided by national government.<sup>212</sup> The money raised through their fiscal powers and from the grant, is the same money that municipalities have to pay as compensation if they incur delictual liability. Therefore, it stands to reason that if municipalities continuously incur delictual liability and must pay compensation to members of the community that they ought to serve, they further constrain their ability to provide adequate services because their budgets will also be negatively impacted.

To further strengthen the general powers of local government, the *Constitution* accords municipalities "incidental powers" in section 156(5). According to this provision, a municipality has a "right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions".<sup>213</sup> Therefore, a power or function may be exercised by municipalities

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<sup>208</sup> Section 229(1)(b) of the *Constitution*. See *Certification of the Constitution of the RSA* 1996 (4) SA 744 (CC) para 305.

<sup>209</sup> Section 229(2)(a) of the *Constitution*.

<sup>210</sup> *Executive Council of KZN v President of the RSA* 2000 (1) SA 661 (CC) para 26.

<sup>211</sup> Glasser and Wright 2020 *Law, Democracy & Development* 413-414.

<sup>212</sup> See s 227 of the *Constitution*.

<sup>213</sup> Section 156(5) of the *Constitution*. See Steytler and De Visser *Local Government Law of South Africa* 5-7; Rautenbach and Venter *Constitutional Law* 244.

even though it is not expressly provided for in the *Constitution* or legislation,<sup>214</sup> as long as it will enable them to effectively perform their functions. As noted by Steytler and De Visser,<sup>215</sup> the objective is not to increase the functional areas the local government can exercise these powers on, but to ensure the successful administration of that matter that results in effective performance. Circumstances surrounding the matter are important and the provision should always be invoked for its intended purpose. The provision is of importance especially for developmental local government as municipalities can exercise powers on particular needs of individual communities given their dynamics.

Additionally, the fulfilment of the developmental duties should not only fall on local government, but national and provincial spheres must also contribute to a developmental state.<sup>216</sup> These intergovernmental relations and co-operative governance are established in Chapter 3 of the *Constitution*. Alongside the national and provincial spheres of government, local government is termed as distinctive, interdependent, and interrelated.<sup>217</sup> All the spheres must observe and adhere to the principles in Chapter 3 of the *Constitution* and must conduct their activities within the provided parameters of the chapter.<sup>218</sup> The *Constitution* requires the other spheres of government to support, strengthen and monitor the work and capacity of local government.<sup>219</sup>

In preserving the autonomy of local government, section 139 of the *Constitution* lays down the circumstances in which the provincial government can intervene in local government matters. These provincial interventions are invoked when local government cannot or does not execute its executive obligations as legally prescribed.<sup>220</sup> A provincial executive can intervene by taking any necessary and

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<sup>214</sup> *City of Cape Town v Robertson* para 60.

<sup>215</sup> Steytler and De Visser *Local Government Law of South Africa* 5-7.

<sup>216</sup> President Ramaphosa 2024 *Address on the Presidency Budget Vote 2024* <https://tinyurl.com/4evd5sza>; Bekink *Restructuring (Systemization) of Local Government* 108.

<sup>217</sup> Section 40(1) of the *Constitution*. See Rautenbach and Venter *Constitutional Law* 234; Van der Waldt "Municipal Management: An Orientation" 15; Schwella *et al South African Governance* 165.

<sup>218</sup> Section 40(2) of the *Constitution*.

<sup>219</sup> Section 154(1) of the *Constitution*.

<sup>220</sup> Section 139(1) of the *Constitution*. See Rautenbach and Venter *Constitutional Law* 239.

applicable steps to ensure the execution of that obligation.<sup>221</sup> This suggests that where local government cannot or does not execute its executive obligations in relation to its developmental duties, provincial government may intervene by discharging the duties.<sup>222</sup>

When the failure of local government to execute these developmental duties constitutes a delict,<sup>223</sup> this may induce delictual liability. Following the latest redefinition of municipal boundaries, South Africa now has 257 municipalities.<sup>224</sup> Each of these municipalities has a separate legal personality as per the *Systems Act*, and consequently also separate legal liability.<sup>225</sup> This indicates that municipalities are regarded as legal subjects with the legal capacity to institute legal proceedings or have legal proceedings instituted against them.<sup>226</sup> The implication hereof is that municipalities, as entities with legal personality, can be held delictually liable for their conduct.

## **2.5 Internal and external mechanisms in executing developmental duties**

Local government needs tools or instruments to execute their developmental duties. With the powers conferred upon them, municipalities perform their functions through such tools to deliver services, and thereby fulfil their developmental duties. In exercising their powers, municipalities may develop and adopt policies, and strategies, and set targets to deliver services and monitor their impact or

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<sup>221</sup> Section 139(1) of the *Constitution*. See Rautenbach and Venter *Constitutional Law* 239.

<sup>222</sup> See Mathenjwa 2014 *Law, Democracy & Development* 178-201; see *Premier of the North West Province v Kagisano Molopo Local Municipality*.

<sup>223</sup> See chap 3 below.

<sup>224</sup> In terms of s 2 of the *Systems Act*, a municipality is defined as: "an organ of state within the local sphere of government exercising legislative and executive authority within an area determined in terms of the *Local Government: Municipal Demarcation Act, 1998*". It "consists of the political structures and administration of the municipality; and the community of the municipality; functions in its area in accordance with the political, statutory, and other relationships between its political structures, political office bearers and administration and its community; and has a separate legal personality which excludes liability on the part of its community for the actions of the municipality".

<sup>225</sup> See s 2(d) of the *Systems Act*.

<sup>226</sup> Note however that this separate legal liability "excludes liability on the part of its community for the actions of the municipality" - see s 2(d) of the *Systems Act*.

effectiveness, as well as prepare, approve and implement their budgets.<sup>227</sup> Relevant to this study, the instruments include by-laws,<sup>228</sup> the Integrated Development Plan (IDP),<sup>229</sup> and community participation,<sup>230</sup> to mention a few. This part of the chapter only focuses on the internal and external mechanisms that a municipality can use to deliver on its mandate because it may have implications concerning claims based on delictual liability.

Services can be delivered through internal or external mechanisms.<sup>231</sup> An internal mechanism refers to a municipal department, a municipal business unit, as well as any other component of its administration.<sup>232</sup> This means that a municipality provides a service on its own without outsourcing or hiring another entity. An external mechanism refers to the appointment of a service provider to provide municipal services to local communities on behalf of a municipality.<sup>233</sup> The fact that such a service is outsourced does not diminish its status as a "municipal service".<sup>234</sup> The service providers that provide outsourced services can be a municipal entity, another municipality, another organ of state, a Community-Based Organisation (CBO), a Non-Governmental Organisation (NGO), or any other institution or entity.<sup>235</sup>

A municipality needs to follow the procedure set out in section 78 of the *Systems Act* in choosing whether to use an internal or external mechanism to provide a particular service. This entails that a municipality must, amongst other things, consider costs (direct or indirect); benefits or effects associated with the project; capacity (human resource and financial); impact on development, the creation of jobs and employment patterns in the municipality as well as the sustainability of provision of services.<sup>236</sup>

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<sup>227</sup> Sections 11(3)(a), (h), (j) of the *Systems Act*.

<sup>228</sup> Section 156(2) of the *Constitution*.

<sup>229</sup> Section B of the *WPLG*.

<sup>230</sup> Steytler and De Visser *Local Government Law of South Africa* 6-3; Rautenbach and Venter *Constitutional Law* 233.

<sup>231</sup> Sections 11(3)(f) and 76(a)-(b) of the *Systems Act*.

<sup>232</sup> Section 76(a)(i)-(iii) of the *Systems Act*.

<sup>233</sup> Section 11(3)(g) of the *Systems Act*.

<sup>234</sup> Steytler and De Visser *Local Government Law of South Africa* 9-15.

<sup>235</sup> Sections 76(b)(i)-(v) of the *Systems Act*.

<sup>236</sup> Sections 78(1) and (3) of the *Systems Act*.

When utilising service providers, municipalities are still executing their developmental duties. In a case where the harm that attracts delictual liability occurs, both the conduct of the municipality and service provider is evaluated as seen in the case of *Lucas v Umhlathuze Municipality*.<sup>237</sup> Their conduct is evaluated according to their responsibilities that arise from the relevant legislative standards and regulations.<sup>238</sup> The relevant legislative standards and regulations depend on the service at issue, and they vary from case to case. However, a municipality would not be expected to adhere to a higher standard of conduct than that of a service provider. This is because service providers are expected to be experts in the execution of that relevant duty.

## **2.6 The status quo in South African cities**

As briefly stated, the failures of municipalities to fulfil their mandate continue to pose significant threats to the life and health of members of local communities.<sup>239</sup> This includes the cholera outbreak that claimed 47 lives while leaving hundreds of people affected.<sup>240</sup> Also, the Department of Water and Sanitation recently released the full No Drop Report which focused on water losses and non-revenue water in all the municipalities.<sup>241</sup> It was found that, out of the 958 Water Supply Systems (WSS), 277 of them (about 29%) were in a critical state of performance resulting in bad microbiological water quality performance.<sup>242</sup> Consequently, the drinking water quality poses health risks to consumers, who are the local communities.<sup>243</sup> It was then suggested that municipalities needed to improve and maintain infrastructure, repair leaks as well as engage in community education.<sup>244</sup>

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<sup>237</sup> *Lucas v Umhlathuze Municipality* (785/2020) [2021] ZASCA 181 (17 December 2021) paras 7-10, 14-18. See a more detailed discussion in chap 4 below.

<sup>238</sup> *Lucas v Umhlathuze Municipality* paras 7-10, 14-18.

<sup>239</sup> Auditor-General South Africa *Consolidated General Report on Local Government* 74,82-85.

<sup>240</sup> See para 1.1 above.

<sup>241</sup> Department of Water and Sanitation 2023 <https://tinyurl.com/42khcaej>.

<sup>242</sup> Department of Water and Sanitation 2023 <https://tinyurl.com/42khcaej>.

<sup>243</sup> Department of Water and Sanitation 2023 <https://tinyurl.com/42khcaej>.

<sup>244</sup> Department of Water and Sanitation 2023 <https://tinyurl.com/42khcaej>.

The state of municipalities can also be seen in fires igniting from dilapidated buildings,<sup>245</sup> street explosions,<sup>246</sup> a building collapsing mid-construction,<sup>247</sup> and poor reaction to disasters (a lack of disaster readiness).<sup>248</sup> These are functional areas of municipalities from which legal duties stem. The effects of the non-execution of these duties could result in local members being harmed. The state of a municipality always affects the local community it serves.

The state of our municipalities regarding the provision of services was also noted in the case of *Kgetlengrivier Concerned Residents v Kgetlengrivier Local Municipality*, where Petersen stated:

A sad reflection on our nascent democracy is the reality faced by the people of our Country brought about by the chronic absence of service delivery. The narrative which is replete in our media on a daily basis implicates service delivery at its core or basic level. The coalface of the absence of service delivery is more often than not at Municipal level, where Municipalities are failing our people. This appeal speaks to that sad reality and the endeavors of residents of a community to force their Municipality and its Municipal Manager into action to avert a human catastrophe which threatens the said community on a daily basis.<sup>249</sup>

In this case, the local community called for action on the part of the municipality after continuously contravening its obligations to prevent the contamination of the environment by allowing raw sewage to spill.<sup>250</sup> The municipality was contravening their constitutional obligations to provide potable water sustainably.<sup>251</sup> The local members' rights to potable water supply, a healthy environment and proper basic sanitation services were at issue. This shows that the public outcry due to the lack of basic amenities continues, but now before the courts.<sup>252</sup>

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<sup>245</sup> Mabasa 2024 <https://tinyurl.com/4tcsv8ry>.

<sup>246</sup> Patrick 2023 <https://tinyurl.com/4su33c6p>.

<sup>247</sup> Seleka 2024 <https://tinyurl.com/2mu8pjniw>.

<sup>248</sup> Auditor-General South Africa *First Special Report on Flood Relief Funds* 10-11.

<sup>249</sup> *Kgetlengrivier Concerned Residents v Kgetlengrivier Local Municipality* para 1.

<sup>250</sup> *Kgetlengrivier Concerned Residents v Kgetlengrivier Local Municipality* paras 8 and 36.

<sup>251</sup> See Schedule 4B of the *Constitution*. See *Kgetlengrivier Concerned Residents v Kgetlengrivier Local Municipality* paras 8, 36.

<sup>252</sup> See *Harding v Nelson Mandela Bay Metropolitan Municipality*; *SMS v City of Johannesburg Metropolitan Municipality*; *Skenjana v Buffalo City Metropolitan Municipality*; *Van Zyl v Siyancuma Municipality*; *Boshoff v City of Cape Town*; *DB v The City of Cape Town*; *Amoah v KSD Municipality*; *Maimela v Makhado Municipality* 2011 (6) SA 533 (SCA); *Cronje v Nelson Mandela Bay Metropolitan Municipality Uitenhage*; *Judd v Nelson Mandela Bay Municipality*.

A community member in the City of Ekurhuleni Municipality also had to seek an order from the court to compel the Municipality to repair streetlights that did not function on specific streets.<sup>253</sup> The community member expressed that the non-maintenance of these services could potentially lead to dangerous situations, such as members of communities being robbed or traffic accidents occurring.<sup>254</sup> The Court had to assert that the Municipality has a legal duty to maintain streetlamps and ordered the Municipality to repair the streetlights.<sup>255</sup>

Moreover, the South African Human Rights Commission (SAHRC), after receiving numerous complaints relating to insufficient access to water in parts of Limpopo decided to investigate and compiled a report that was released at the end of 2023.<sup>256</sup> It found that Water Services Authorities are continuously failing to provide the minimum standard for basic water supplies and are contravening the provisions of the *Water Services Act* 108 of 1997 (hereafter *WSA*) and the *Regulations relating to Compulsory National Standards and Measures to Conserve Water*.<sup>257</sup> It was reported that almost a third of Limpopo residents, amounting to 1.4 million people have no access to piped water,<sup>258</sup> with people drinking and cooking with water found in rivers and streams.<sup>259</sup> It further reported that 7 out of 10 municipalities are not complying with the *WSA* and all 6 of the local and 4 district municipalities in Limpopo responsible for treating and supplying water are failing to do so.<sup>260</sup> The report indicated that at the end of every financial year, funds that were allocated for water infrastructure are returned to the National Treasury after failing to use them.<sup>261</sup> Municipalities are required to achieve their constitutional objects within their administrative and financial capacity. From the above, it can be observed that municipalities have failed to provide the basic service of access to water despite

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<sup>253</sup> *Messina v City of Ekurhuleni Metropolitan Municipality* (21/27399) [2022] ZAGPJHC 976 (4 November 2022) para 1.

<sup>254</sup> *Messina v City of Ekurhuleni Metropolitan Municipality* para 38.

<sup>255</sup> *Messina v City of Ekurhuleni Metropolitan Municipality* para 48.

<sup>256</sup> SAHRC *Inquiry into Access to Water and the Efficacy of Water Services Authorities* 11.

<sup>257</sup> GNR 509 of 8 June 2001. See SAHRC *Inquiry into Access to Water and the Efficacy of Water Services Authorities* 55-61.

<sup>258</sup> SAHRC *Inquiry into Access to Water and the Efficacy of Water Services Authorities* 30-31.

<sup>259</sup> SAHRC *Inquiry into Access to Water and the Efficacy of Water Services Authorities* 17-20.

<sup>260</sup> SAHRC *Inquiry into Access to Water and the Efficacy of Water Services Authorities* 54-61.

<sup>261</sup> SAHRC *Inquiry into Access to Water and the Efficacy of Water Services Authorities* 39,52.

having the financial capacity to do so.<sup>262</sup> The failure was attributed to the challenging administrative capacity that resulted in underspending of funds and, therefore, funds were returned to the National Treasury.<sup>263</sup> In remedying the challenges of administrative capacity, the Department of Water and Sanitation (DWS) provided training and capacity to the municipalities on how to apply for grants but they are still failing to apply and the underspending continues.<sup>264</sup> The municipalities do not apply for the grants, or the applications submitted fail to meet minimum requirements and at times, the grants are not used for their intended purposes.<sup>265</sup> Not only is there an infringement on people's right to access at least a minimum level of services, but the question of whether people's basic needs are prioritised seems to arise.

It was also found that a shortage of access to clean drinking water impacts the children's cognitive development in poor areas.<sup>266</sup> The shortage of access to water mostly affects vulnerable groups whose economic rights would be impacted since they make up the majority of informal traders.<sup>267</sup> The shortage puts the communities under threat because they share the major source of their drinking water with animals which can easily lead to contamination when unaddressed, placing their health and well-being under risk.<sup>268</sup> The shortage of water was linked to the unmaintained and ageing water infrastructure.<sup>269</sup>

Unmaintained infrastructure continues to have adverse impacts on members of the communities as they are affected the most. For instance, a man once fell into an uncovered drain inspection hatch and suffered a terrible ankle injury which led to fractures to ribs as well.<sup>270</sup> As a result, he was hospitalised for one month and could

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<sup>262</sup> SAHRC *Inquiry into Access to Water and the Efficacy of Water Services Authorities* 39.

<sup>263</sup> SAHRC *Inquiry into Access to Water and the Efficacy of Water Services Authorities* 39.

<sup>264</sup> SAHRC *Inquiry into Access to Water and the Efficacy of Water Services Authorities* 39.

<sup>265</sup> SAHRC *Inquiry into Access to Water and the Efficacy of Water Services Authorities* 52.

<sup>266</sup> SAHRC *Inquiry into Access to Water and the Efficacy of Water Services Authorities* 52.

<sup>267</sup> SAHRC *Inquiry into Access to Water and the Efficacy of Water Services Authorities* 52.

<sup>268</sup> SAHRC *Inquiry into Access to Water and the Efficacy of Water Services Authorities* 53.

<sup>269</sup> SAHRC *Inquiry into Access to Water and the Efficacy of Water Services Authorities* 53-54, 57-61.

<sup>270</sup> *DB v The City of Cape Town* paras 1,3.

not work for four months.<sup>271</sup> He could no longer walk long distances, was unable to run and he limped when he walked.<sup>272</sup> He depended on pain killers to ease the pain, especially in winter when the pain increased.<sup>273</sup> He went from working seven days per week to five days per week.<sup>274</sup> He was self-employed as a shoe shiner and his work relied on him squatting in front of the customers to shine their shoes.<sup>275</sup> This is one of the many cases where the conduct of a municipality (either an action or inaction) caused harm to a member of the community.<sup>276</sup> As a result, there is a deprivation of amenities of life and their lives are altered temporarily or even permanently. The alteration impacts their ability to make a livelihood which then affects their socio-economic conditions. In cases where the victim has dependents, they also suffer as a result.

## 2.7 Concluding remarks

The chapter discussed the mandate, powers and functions of local government as well as the tools or instruments to carry out its duties. With regard to the powers, functions and tools or instruments, it also evaluated the status quo of municipalities in executing the duties of the mandate. It demonstrated that local government is no longer an administrative arm of the provincial government which was unrecognised and unprotected.<sup>277</sup> Its fragmented, dysfunctional and unequal systems that led to unequal access to municipal services, poor standards of living and the disrupted spatial, social and economic environments were transformed. Local government was restructured from a racially discriminative system to a uniform and democratic system that serves all people.<sup>278</sup> It is currently a self-governing institution that is constitutionally protected.<sup>279</sup> Not only is it recognised as

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<sup>271</sup> *DB v The City of Cape Town* para 3.

<sup>272</sup> *DB v The City of Cape Town* para 3.

<sup>273</sup> *DB v The City of Cape Town* para 3.

<sup>274</sup> *DB v The City of Cape Town* para 3.

<sup>275</sup> *DB v The City of Cape Town* para 3.

<sup>276</sup> *Harding v Nelson Mandela Bay Metropolitan Municipality; SMS v City of Johannesburg Metropolitan Municipality; Skenjana v Buffalo City Metropolitan Municipality; Van Zyl v Siyancuma Municipality; Boshoff v City of Cape Town.*

<sup>277</sup> See para 2.2 above.

<sup>278</sup> See para 2.2 above.

<sup>279</sup> See para 2.2 above.

a distinct sphere of government, but also as one with a developmental mandate.<sup>280</sup> The mandate is evident from several constitutional provisions and has been given further effect through legislation and policies.<sup>281</sup> This developmental mandate is provided in sections 152 and 153 of the *Constitution*. In brief, local government must go above and beyond providing services. It must "structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community".<sup>282</sup> It must also promote the social and economic development of the community. In addition to these duties, it must also fulfil the human rights duties detailed in the Bill of Rights.<sup>283</sup> However, service delivery remains a cardinal function of municipalities in which they can execute their developmental mandate.<sup>284</sup>

As a result, they have the right to govern, on their own initiatives, the local government affairs of their communities without any restriction.<sup>285</sup> Municipalities are assigned powers, functions and competences to execute the duties resulting from the mandate.<sup>286</sup> They exercise legislative and executive powers to govern local government affairs through Municipal Councils.<sup>287</sup> Local government has executive authority in respect of and the right to administer local government matters listed in Schedules 4B and 5B of the *Constitution*. However, the courts have confirmed that even though environmental rights and housing rights fall outside the Schedules, municipalities are still responsible for realising them.<sup>288</sup>

When executing these duties, municipalities need tools or instruments. They may make use of internal or external mechanisms to execute their developmental duties. An internal mechanism refers to a municipal department, or a municipal business

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<sup>280</sup> See para 2.3 above.

<sup>281</sup> See para 2.3 above.

<sup>282</sup> See para 2.3.2 above.

<sup>283</sup> See para 2.3.3 above.

<sup>284</sup> See para 2.3.5 above.

<sup>285</sup> See para 2.4 above.

<sup>286</sup> See para 2.4 above.

<sup>287</sup> See para 2.4 above.

<sup>288</sup> See para 2.4 above.

unit, and an external mechanism refers to the appointment of a service provider to provide municipal services on behalf of a municipality.

With regard to their mandate, powers and functions as well as their instruments to carry out the duties of the mandate, municipalities are not living up to the expectations of their mandate.<sup>289</sup> This was seen from their non-provision of services, non-maintenance of infrastructure and their lack of proactiveness.<sup>290</sup> As a result, local members lose their lives, get injured, and their lives are altered either temporarily or permanently.<sup>291</sup> Their health and well-being are at risk as they continue living in dangerous conditions.<sup>292</sup> As a result, municipalities must be held liable for such. As established, harm from these failures can be attributed to various factors. However, this study focuses on the failures that are attributed to a municipality's wrongful and culpable conduct which causes damage. The harm must qualify as a delict in order to attract the delictual liability of a municipality.<sup>293</sup> Chapter 3 lays out what a delict is as well as the elements that must be present to successfully institute a delictual claim. These principles are considered with regard to municipalities.

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<sup>289</sup> See para 2.6 above.

<sup>290</sup> See para 2.6 above.

<sup>291</sup> See para 2.6 above.

<sup>292</sup> See para 2.6 above.

<sup>293</sup> See para 3.2 below.

## CHAPTER 3 THE LEGAL FRAMEWORK FOR DELICTUAL LIABILITY IN SOUTH AFRICA

### 3.1 Introduction

Private law, including the law of delict, intends to regulate how members of a community relate to each other.<sup>294</sup> In their relations, the members' individual interests are "continually in a state of real or threatened conflict".<sup>295</sup> Therefore, it is private law's purpose to recognise those individual interests, determine their limits in relation to each other and balance the conflicting ones.<sup>296</sup> The law of delict specifically determines legally recognised interests, the circumstances under which they are protected against infringements, and how to restore the balance of interests after infringement.<sup>297</sup> It is also through private law that members of a community who suffered harm can potentially hold municipalities liable for such harm, but only if it can be proven that a particular municipality committed a delict. Therefore, it is imperative to examine and analyse the requirements of delictual liability to be able to determine when municipalities may or could be held delictually liable.

In this chapter, the researcher aims to set out the legal framework for the law of delict in South Africa, taking into consideration the requirements for potential legal liability of municipalities. For this purpose, the researcher explains what a "delict" is and discusses the elements that constitute a delict, while at the same time contextualising each element in relation to municipalities. Lastly, the researcher explores the three pillars of delictual liability to illustrate the actions through which

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<sup>294</sup> By contrast, public law's task is to regulate relations between the state and individual as well as the organs of the state. Nevertheless, private law also plays a role concerning delictual liability of the state. In a delictual liability matter, a municipality is regarded as "being on an equal footing with any other private individual involved in that matter". See Peté *et al Civil Procedure: A Practical Guide* 38; Neethling and Potgieter *Law of Delict* 3; Loubser and Midgley (eds) *Law of Delict* 32.

<sup>295</sup> Neethling and Potgieter *Law of Delict* 3; Loubser and Midgley (eds) *Law of Delict* 32.

<sup>296</sup> Neethling and Potgieter *Law of Delict* 3; Loubser and Midgley (eds) *Law of Delict* 30.

<sup>297</sup> Neethling and Potgieter *Law of Delict* 3; Loubser and Midgley (eds) *Law of Delict* 28.

municipalities may be held legally liable for causing harm to members of their communities.

### 3.2 A delict and its elements

A delict is a person's wrongful and culpable conduct which causes harm to another.<sup>298</sup> In other words, a delict occurs when a person causes harm to another which can be categorised under certain actions for which the wrongdoer may be held accountable.<sup>299</sup> The wrongdoer is held accountable in accordance with the private law, the law of delict. To classify conduct as a "delict" the following elements must all be present: conduct, wrongfulness, fault, causation as well as damage.<sup>300</sup> The elements are discussed below in more detail.

#### 3.2.1 Conduct

Conduct is defined as a "voluntary human act or omission".<sup>301</sup> It is one of the elements that needs to be present and it is a general prerequisite as it constitutes the "damage-causing event".<sup>302</sup> It is present where there is an act or omission of a human being which occurred voluntarily.<sup>303</sup> It comes in two forms, a commission (positive conduct) or an omission (negative conduct).<sup>304</sup> Commission is the causing of harm through a positive act while omission is the failure to prevent harm from occurring while a legal duty to positively act exists.<sup>305</sup>

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<sup>298</sup> See *Draghoender v Lukhanji Municipality* (972/2016) [2018] ZAECGHC 105 (2 October 2018) para 2; see also Neethling and Potgieter *Law of Delict* 4.

<sup>299</sup> See para 3.5 below for the actions.

<sup>300</sup> Neethling and Potgieter *Law of Delict* 4; *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) para 9; *Black v Joffe* 2007 (3) SA 171 (CC) para 32; *MTO Forestry (Pty) Ltd v Swart NO* 2017 (5) SA 76 (SCA) para 15; *Draghoender v Lukhanji Municipality* para 2.

<sup>301</sup> Snyman *Criminal Law* 51; Ahmed 2019 *PER/PELJ* 5; Neethling and Potgieter *Law of Delict* 27.

<sup>302</sup> It must be proved amongst other elements; see Neethling and Potgieter *Law of Delict* 27; Ahmed 2019 *PER/PELJ* 8. (Proved vs present = liability perspective vs definitional perspective).

<sup>303</sup> Conduct by municipalities is regarded as human being conduct. It has already been established in chap 2 above that municipalities are regarded as persons with separate legal personalities. See s 2(d) of the *Systems Act*; see also Neethling and Potgieter *Law of Delict* 27; Snyman *Criminal Law* 53.

<sup>304</sup> Neethling and Potgieter *Law of Delict* 32; Snyman *Criminal Law* 51.

<sup>305</sup> *Home Talk Developments (Pty) Ltd v Ekurhuleni Metropolitan Municipality* 2018 (1) SA 391 (SCA) para 19; Neethling and Potgieter *Law of Delict* 32.

It should be noted that omission has restricted liability because the courts are hesitant to hold someone liable for failing to act positively to prevent harm to another person.<sup>306</sup> Omission is viewed "benevolently" compared to commission because the duty to prevent harm is less strict than the duty to not cause harm.<sup>307</sup> This is because imposing these general duties to prevent harm would burden the members of the communities,<sup>308</sup> and essentially lead to undue societal pressure. An inference can be drawn from above that in a delictual action, the courts are not quick to establish liability based on omission as a conduct, where someone failed to act positively to prevent harm.

In the case of a juristic person, such as a company or statutory body like a municipality, the juristic person performs through its organs (humans) and may as such also be held delictually liable for such conduct.<sup>309</sup> This is because conduct carried out as an order or with permission by an employee of a juristic person when executing their duties or functions to advance or attempt to advance the interests of the relevant juristic person is deemed to have been performed by that juristic person.<sup>310</sup>

After establishing whether certain conduct constitutes a human act or omission, it must be established whether it was voluntary. Voluntariness refers to the person's ability to control their will regarding the conduct at that relevant time.<sup>311</sup> The person must have possessed adequate mental ability or capacity to control their bodily or muscular movements at the relevant time.<sup>312</sup> This is not to suggest that the person's conduct was their desire or will but to signify the control over their movements as well as the capacity to have made and executed decisions concerning their

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<sup>306</sup> Neethling and Potgieter *Law of Delict* 32.

<sup>307</sup> *Home Talk Developments v Ekurhuleni Metropolitan Municipality* para 19; see also Neethling and Potgieter *Law of Delict* 32.

<sup>308</sup> Neethling and Potgieter *Law of Delict* 61.

<sup>309</sup> Neethling and Potgieter *Law of Delict* 27.

<sup>310</sup> Neethling and Potgieter *Law of Delict* 28.

<sup>311</sup> Snyman *Criminal Law* 54. Involuntary conduct does not give rise to delictual liability, and the onus is on the wrongdoer to prove involuntariness. See *Molefe v Mahaeng* 1999 (1) SA 562 (SCA) para 13.

<sup>312</sup> See Snyman *Criminal Law* 54; Neethling and Potgieter *Law of Delict* 28.

conduct.<sup>313</sup> The qualification of voluntariness does not necessarily require the conduct to be well-thought, rational or explicable.<sup>314</sup>

For the purposes of this study, it is important to determine the relevant conduct to be considered in delictual claims against municipalities. As already mentioned in paragraph 2.5 above, municipalities execute their duties through internal and external mechanisms. The internal mechanism refers to the municipality itself, through its employees and the external mechanism refers to the execution of duties through service providers.<sup>315</sup> The conduct of the municipality's employees is regarded as the municipality's own conduct following the theory of vicarious liability,<sup>316</sup> and therefore, that relevant conduct is considered as such.<sup>317</sup> As indicated in Chapter 4 of this study, where municipalities work with service providers to provide a service, a municipality's conduct is considered according to the surrounding circumstances to determine whether liability should be incurred.<sup>318</sup> A municipality's conduct is considered following the responsibilities arising from the relevant legislative standards and regulations governing the execution of that duty.<sup>319</sup> This suggests that, where a municipality utilises a service provider to provide a service, liability is not automatically incurred by a municipality. The conduct of both the service provider and municipality are separately considered.

In instances where vicarious liability or external service provision is not expressly applicable, a municipality may be implicated purely because of the duties it owes to a local community and the conduct is also considered as the municipality's. It is important to note that in all these instances, the legal proceedings instituted against a municipality are instituted in its own capacity and liability is incurred by the

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<sup>313</sup> See Snyman *Criminal Law* 54; Neethling and Potgieter *Law of Delict* 28.

<sup>314</sup> In the case of mentally incapacitated people or infants, their conduct is also voluntary, but they will not be delictually liable on the basis that they lack accountability and consequently fault is absent, see para 3.2.2 below. See also Neethling and Potgieter *Law of Delict* 28.

<sup>315</sup> Sections 11(3)(g) and 76(a)(i)-(iii) of the *Systems Act*.

<sup>316</sup> As established in para 3.4 below.

<sup>317</sup> See also *LRM v Mnquma Local Municipality* (453/2020) [2022] ZAECMKHC 64 (20 September 2022) para 19.

<sup>318</sup> See also *Lucas v Umhlathuze Municipality* paras 13-19. See a detailed discussion in para 4.2.2 below.

<sup>319</sup> See *Lucas v Umhlathuze Municipality* paras 13-19.

municipality in its own capacity.<sup>320</sup> This is because a municipality is regarded as a person with a separate legal personality and its conduct is regarded as human being conduct.<sup>321</sup> The separate legal personality enables a municipality in its own capacity to acquire rights as well as incur obligations distinct from its employees.<sup>322</sup> This indicates that a municipality can institute legal proceedings against others and have legal proceedings instituted against it, to sue and be sued.

### 3.2.2 Wrongfulness

A delict does not occur by way of conduct that causes harm only, it is essential for the conduct to also be wrongful.<sup>323</sup> Wrongfulness entails the infringement of interests that are worthy of protection (legally protected interests) in a legally reprehensible manner.<sup>324</sup> In other words, if a person violates another person's interests which are protected by the law in a way that contravenes the law, that conduct is wrongful. Wrongfulness entails a dual investigation, firstly, whether a legally protected interest has been infringed upon, and secondly, whether according to legal norms, the infringement occurred in a legally unacceptable manner.<sup>325</sup>

The test of *boni mores* or legal convictions of the community is applied to determine whether an interest is worthy of protection and determine its unlawful infringement.<sup>326</sup> This is an objective test that is based on the reasonableness criterion.<sup>327</sup> It is a judicial yardstick that expresses the community's prevailing

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<sup>320</sup> See these cases involving the execution of duties using internal and external mechanisms: *Harding v Nelson Mandela Bay Metropolitan Municipality*; *Lucas v Umhlathuze Municipality*; *LRM v Mquma Local Municipality*.

<sup>321</sup> See s 2(d) of the *Systems Act*.

<sup>322</sup> See s 2(d) of the *Systems Act*; Heaton *South African Law of Persons* 2; Malatji *The Future of the Common-Law Doctrine of Vicarious Liability* 73.

<sup>323</sup> See *Stedall v Aspeling* 2018 (2) SA 75 (SCA) para 11; *AK v Minister of Safety and Security* 2019 (1) SACR 529 (ECP) para 190; Neethling and Potgieter *Law of Delict* 35.

<sup>324</sup> Neethling and Potgieter *Law of Delict* 35; *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* 2003 (6) SA 13 (SCA) paras 31-32.

<sup>325</sup> Neethling and Potgieter *Law of Delict* 36.

<sup>326</sup> *Loureiro v Invula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) para 34; *Paixão v Road Accident Fund* 2012 (6) SA 377 (SCA) para 13; Neethling and Potgieter *Law of Delict* 36.

<sup>327</sup> This is where the morals and the law part ways. Not every moral obligation has a legal counterpart. *Boni mores* do not purely entail "good morals", they entail the community's legal convictions serving as a standard to determine the delictual wrongfulness of a certain conduct. See *Van Eeden v Minister of Safety and Security* para 10; Neethling and Potgieter *Law of Delict* 40; *Telematrix (Pty) Ltd v Advertising Standards Authority SA* para 13.

convictions in regard to right and wrong and it is "the community's general sense of justice".<sup>328</sup> Since these are prevailing convictions, the yardstick enables the courts to adapt the law to keep up with the community's values and needs.<sup>329</sup> What is asked regarding the test is whether or not the wrongdoer infringed the prejudiced party's interests unreasonably, according to the legal convictions of the community and in light of the circumstances surrounding the case.<sup>330</sup>

To determine whether the infringement is unreasonable or not, the courts must balance the wrongdoer's interests that were promoted by the conduct and the prejudiced party's interests that were infringed.<sup>331</sup> In weighing up these conflicting interests, the courts must consider the social consequences of imposing liability under those circumstances in light of all pertinent factors.<sup>332</sup> These factors include, among others, the subjective reasonable foreseeability of the harm,<sup>333</sup> the nature and extent of the harm, the costs and efforts in regard to the preventability of the harm, the success rate of the preventative measures, the proportionality of the preventability of the harm and the harm suffered, fear of limitless liability, and considerations of public interest or policy including the values and norms underpinning the *Constitution* and the Bill of Rights.<sup>334</sup>

Moreover, when applying the criterion of *boni mores* in the law of delict, what the community regards as morally, ethically, socially or religiously right or wrong is

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<sup>328</sup> *DE v RH* para 51; *Telematrix (Pty) Ltd v Advertising Standards Authority SA* para 13; Neethling and Potgieter *Law of Delict* 44.

<sup>329</sup> *Premier, Western Cape v Faircape Property Developers* para 32; Neethling and Potgieter *Law of Delict* 44.

<sup>330</sup> *Van Eeden v Minister of Safety and Security* para 9; Neethling and Potgieter *Law of Delict* 40.

<sup>331</sup> Neethling and Potgieter *Law of Delict* 41; *Le Roux v Dey* 2011 (3) SA 274 (CC) para 53.

<sup>332</sup> *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) para 11; *Country Cloud Trading CC v MEC, Department of Infrastructure and Development, Gauteng* 2015 (1) SA 1 (CC) para 20; Neethling and Potgieter *Law of Delict* 41.

<sup>333</sup> *Telematrix (Pty) Ltd v Advertising Standards Authority SA* para 12; *Minister of Justice and Constitutional Development v X* 2015 (1) SA 25 (SCA) para 34; *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* para 42.

<sup>334</sup> See more factors on Neethling and Potgieter *Law of Delict* 41-42; *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* para 32; *Paixão v Road Accident Fund* 2012 (6) SA 377 (SCA) para 13; *Loureiro v Invula Quality Protection (Pty) Ltd* para 34; The influence of the *Constitution* and the Bill of Rights on the *boni mores* criterion requires the legal convictions of the community to incorporate and give effect to the values and norms found in them. The legal convictions are part of the common law and must be developed in accordance with ss 39(2) and 8(3)(a) of the *Constitution*; see also *Van Eeden v Minister of Safety and Security* para 12.

immaterial.<sup>335</sup> It is only concerned with the conduct which the community regards as delictually wrongful.<sup>336</sup> However, over the years, more precise methods have been developed to determine the legal convictions of the community as the general *boni mores* criterion is seldom applied.<sup>337</sup> These methods have given a practical application of the *boni mores* yardstick and have now been accepted as the basic tests for wrongfulness.<sup>338</sup> These basic tests are, wrongfulness lies in the "infringement of a subjective right or the non-compliance with a legal duty to act".<sup>339</sup> They are juridical methods or procedures to determine whether the infringement of an interest is in conflict with the legal convictions of the community and, in turn, wrongful.<sup>340</sup> Put differently, conduct is contrary to the *boni mores* (wrongful) if it infringes on a subjective right or if it is in violation of a legal duty.<sup>341</sup>

### 3.2.2.1 Wrongfulness as an infringement of a subjective right

All people are legal subjects in possession of subjective rights.<sup>342</sup> Subjective rights are defined in reference to the nature of the legal object they relate to.<sup>343</sup> A legal object is any object with "economic value", not purely monetary market value, but "anything that is scarce and useful".<sup>344</sup> The subjective rights in relation to legal objects are real rights, personal rights, personality rights, personal immaterial property rights and immaterial property rights.<sup>345</sup>

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<sup>335</sup> Therefore, the courts (adjudicators) are tasked to, without promoting their personal perspective, apply and interpret the legal convictions by considering legal rules and policies, previous lessons of the court as well the circumstances surrounding the relevant case. See *Van Eeden v Minister of Safety and Security* para 10; Neethling and Potgieter *Law of Delict* 45,47.

<sup>336</sup> See *Van Eeden v Minister of Safety and Security* para 10; Neethling and Potgieter *Law of Delict* 45,47.

<sup>337</sup> Neethling and Potgieter *Law of Delict* 51.

<sup>338</sup> Neethling and Potgieter *Law of Delict* 51.

<sup>339</sup> Neethling and Potgieter *Law of Delict* 51.

<sup>340</sup> Neethling and Potgieter *Law of Delict* 52.

<sup>341</sup> Neethling and Potgieter *Law of Delict* 52.

<sup>342</sup> See para 3.5.1 below for a definition of a legal subject.

<sup>343</sup> Heaton *South African Law of Persons* 2; Neethling and Potgieter *Law of Delict* 56.

<sup>344</sup> Heaton *South African Law of Persons* 2.

<sup>345</sup> Relevant for this study: real rights (tangible and valuable items to humans susceptible to their control such as property) and personality rights (human personality aspects such as reputation and physical integrity; for more details on the rights see Neethling and Potgieter *Law of Delict* 55-56; Heaton *South African Law of Persons* 2-3.

Legal subjects (people) possess rights, duties and capacities to "use, enjoy and alienate" their legal objects.<sup>346</sup> However, this freedom is still subject to legal constraints in the sense that in doing so, people may not infringe on the rights of other legal subjects.<sup>347</sup> Therefore, this freedom imposes a correlative duty.<sup>348</sup> For instance, an owner of a car with a real right cannot use and enjoy his/her car by damaging another person's car. The crash would prohibit another person to use and enjoy his/her car, thereby infringing on his/her real right in relation to the car. If the disturbance in the relationship between the person and their legal object (the car) occurred in a manner that is contrary to the *boni mores*, then the subjective right (real right) has been infringed.<sup>349</sup>

In the context of this study, when municipalities execute their duties in a manner that disturbs the relationship between local members (legal subjects) and their legal objects, the subjective rights of local members may be infringed. To determine whether an infringement occurred or not, a municipality's disturbance must occur in a manner that is contrary to the *boni mores*. For instance, a municipality may, in a manner that is contrary to *boni mores*, publish a defaming statement of a local member resulting in the loss of their income, thereby infringing on the member's personality right manifesting as defamation.<sup>350</sup> A municipality may also, contrary to the *boni mores*, diminish a local member's property, thereby infringing on the member's real right towards their property manifesting as physical damage to property.<sup>351</sup>

### 3.2.2.2 Wrongfulness as violation of a legal duty

Another method of determining wrongfulness is by inquiring whether a legal duty was breached.<sup>352</sup> This method is generally applied in liability cases concerning

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<sup>346</sup> Heaton *South African Law of Persons 2*; see Neethling and Potgieter *Law of Delict* 55-56.

<sup>347</sup> Neethling and Potgieter *Law of Delict* 56.

<sup>348</sup> Neethling and Potgieter *Law of Delict* 56.

<sup>349</sup> Neethling and Potgieter *Law of Delict* 58-59.

<sup>350</sup> See the case of *Schoeman v Rustenburg Local Municipality* (1404/2005) [2011] ZANWHC 97 (13 October 2011).

<sup>351</sup> See *Amoah v King Sabata Dalindyebo Municipality*.

<sup>352</sup> Circumstances surrounding a case will determine the appropriate juridical method to be used to determine wrongfulness. See Neethling and Potgieter *Law of Delict* 60.

omission or pure economic loss.<sup>353</sup> It is determined by asking whether, in accordance with the criterion of *boni mores*, the wrongdoer had a legal duty to prevent harm.<sup>354</sup> Put differently, it is asked whether it is reasonable to have expected the wrongdoer to act positively in preventing the harm, in accordance with the *boni mores*.<sup>355</sup>

The instances under which an omission will be wrongful is when a wrongdoer is under a legal duty to positively act in preventing harm suffered by the prejudiced party.<sup>356</sup> However, the reasonableness test still applies, which means that it needs to be reasonable to expect the wrongdoer to take positive measures to prevent such harm from occurring.<sup>357</sup>

The violation of a legal duty qualification is required in omissions because the infringement of a legal object is "*prima facie* lawful", not wrongful.<sup>358</sup> This means that, when someone fails to take preventative steps to prevent harm to another person, the failure is not automatically presumed as wrongful.<sup>359</sup> For it to be regarded as wrongful, it must first be established whether the person who refrained from preventing the harm was legally obliged to act positively. According to the legal convictions of the community, the reason for this is that there is normally no duty to prevent harm or damage to others by positive conduct (commission).<sup>360</sup> Imposing a general duty to prevent harm would burden members of communities and this requirement prevents that.<sup>361</sup> As already mentioned in paragraph 3.2.1

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<sup>353</sup> For the purposes of this study, only omissions are discussed in detail. See Neethling and Potgieter *Law of Delict* 60.

<sup>354</sup> Neethling and Potgieter *Law of Delict* 60.

<sup>355</sup> Neethling and Potgieter *Law of Delict* 60.

<sup>356</sup> *Van Eeden v Minister of Safety and Security* para 9.

<sup>357</sup> See *Municipality of Cape Town v Bakkerud* [2000] 3 All SA 171 (A) para 9; *Van Eeden v Minister of Safety and Security* para 9; *Stedall v Aspeling* para 13.

<sup>358</sup> *Minister of Justice and Constitutional Development v X* para 13; Neethling and Potgieter *Law of Delict* 61; see *Hawekwa Youth Camp v Byrne* 2010 (6) SA 83 (SCA) para 22; *Van Vuuren v eThekweni Municipality* 2018 (1) SA 189 (SCA) para 16.

<sup>359</sup> Neethling and Potgieter *Law of Delict* 64-65.

<sup>360</sup> See *Minister of Police v Ewels* [1975] ZAENGTR 2 (23 May 1975) 596-597; Neethling and Potgieter *Law of Delict* 61.

<sup>361</sup> See *Municipality of Cape Town v Bakkerud* paras 8,10; Neethling and Potgieter *Law of Delict* 61.

above, this is why the law is hesitant to establish omission as a type of conduct in liability cases.

For the purposes of this study, it also means that the courts may be hesitant to accept a municipality's omission in delictual liability.<sup>362</sup> This is to prevent burdening municipalities with general legal duties and the opening of floodgates of claims against municipalities.<sup>363</sup> Therefore, relevant legal duties will only be imposed on municipalities if warranted.<sup>364</sup> As a result, for a municipality's omission to be rendered wrongful, there has to be a legal duty on a municipality to act positively to prevent the harm.<sup>365</sup>

If a legal duty exists and there is no ground of justification, then the breach of that duty by omission is unreasonable, contrary to *boni mores* and, therefore, wrongful.<sup>366</sup> Grounds of justification are those special circumstances in which a conduct that appears to be wrongful because of violated interests is rendered lawful because a norm is not violated.<sup>367</sup> The violation of the interest is not unreasonable, it is not contrary to the *boni mores*.<sup>368</sup> Therefore, grounds of justification exclude wrongfulness by negating the wrongfulness of the wrongdoer's conduct.<sup>369</sup>

Furthermore, the legal convictions of the community or the *boni mores* determine whether or not a legal duty was breached.<sup>370</sup> Nevertheless, there are cases of omissions which are *prima facie* wrongful, but those are exceptions.<sup>371</sup> This is when the legal convictions of the community in that relevant case require that a legal duty

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<sup>362</sup> *Municipality of Cape Town v Bakkerud* paras 8-9.

<sup>363</sup> See *Municipality of Cape Town v Bakkerud* paras 30,31.

<sup>364</sup> See *Municipality of Cape Town v Bakkerud* paras 30-31.

<sup>365</sup> See *Draghoender v Lukhanji Municipality* para 13; *Sinukela v King Sabata Dalindyebo Municipality* (3123/17) [2019] ZAECMHC 27 (4 June 2019) para 8; *Moqhaka Municipality v Mariti* (A227/2007) [2009] ZAFSHC (2 February 2009) paras 17-20.

<sup>366</sup> See Neethling and Potgieter *Law of Delict* 62.

<sup>367</sup> They are not discussed in detail in this study as they do not form a substantial part of this study. They will only be briefly discussed as and when relevant. See more details on Neethling and Potgieter *Law of Delict* 62, 106-147; *Cobra Towing CC v Mangaung Metropolitan Municipality* (5264/2021) [2024] ZAFSHC 277 (5 December 2024) para 57.

<sup>368</sup> Neethling and Potgieter *Law of Delict* 106.

<sup>369</sup> Neethling and Potgieter *Law of Delict* 106.

<sup>370</sup> *Minister of Justice and Constitutional Development v X* para 13; *Van Eeden v Minister of Safety and Security* para 9; Neethling and Potgieter *Law of Delict* 62.

<sup>371</sup> Neethling and Potgieter *Law of Delict* 61.

to positively act to prevent harm from occurring should have existed.<sup>372</sup> In such instances, an inquiry into whether a legal duty existed is not necessary because, in view of the circumstances surrounding the case, a pre-existing duty would have already been present. The pre-existing duties are established by the legal convictions of the community and legal policies regarding the relevant area of law concerning the case.<sup>373</sup>

Whether or not there was a duty to act positively in accordance with the legal convictions of the community, is an objective test, and all the relevant factors as well as the surrounding circumstances of the case must be considered.<sup>374</sup> The factors to determine whether a legal duty exists are numerous and have been developing over the years.<sup>375</sup> The factors relevant to this study are prior conduct, control of a dangerous object, knowledge and foresight of possible harm, rule of law, special relationship between parties and danger of limitless liability.<sup>376</sup> These are briefly discussed below.

#### 3.2.2.2.1 Prior conduct

The prior conduct factor comes into play when a person causes harm to another by creating a new source of danger through positive conduct (commission), but failing to eliminate the danger afterwards (omission).<sup>377</sup> The person's commission that causes the danger confers a legal duty upon him/herself to prevent the occurrence of the harm.<sup>378</sup> Prior conduct indicates that a positive duty to act exists.<sup>379</sup> However,

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<sup>372</sup> *Van Eeden v Minister of Safety and Security* para 9; Neethling and Potgieter *Law of Delict* 64-65.

<sup>373</sup> Neethling and Potgieter *Law of Delict* 65.

<sup>374</sup> Neethling and Potgieter *Law of Delict* 65.

<sup>375</sup> See *Municipality of Cape Town v Bakkerud* para 11; The application of the factors to the case must be in accordance with s 39(2) of the *Constitution*. See also Neethling and Potgieter *Law of Delict* 66.

<sup>376</sup> The other factors are a particular office, contractual undertaking for the safety of a third party, creation of the impression that the interests of a third party will be protected, vulnerability to risk of damage and interplay of factors. See Neethling and Potgieter *Law of Delict* 67-89 for more details on the factors.

<sup>377</sup> *Municipality of Cape Town v Bakkerud* para 11; Scott 2008 *Obiter* 275; Neethling and Potgieter *Law of Delict* 67.

<sup>378</sup> Neethling and Potgieter *Law of Delict* 67.

<sup>379</sup> See *Municipality of Cape Town v Bakkerud* para 11.

other factors may also prove the existence and as such it is not an indispensable requirement.<sup>380</sup>

In the context of this study, a legal duty also arises when a municipality through positive conduct, creates a new source of danger with risk of harm to members of the community and then omits to take reasonable steps to prevent the harm.<sup>381</sup> However, the imposition of this duty must not burden the municipalities, financially or otherwise, and limitless liability must be guarded against.<sup>382</sup> For instance, a new source of danger may be created when a municipality sets up a recreational space with a slide and a pool for children.<sup>383</sup> The municipality then has a legal duty to act positively by supervising and controlling access to the slide so that children do not push each other, which would result in harm.<sup>384</sup> However, before the legal duty can be held to exist, it has to be determined whether its imposition would not financially burden the municipalities or lead to limitless liability.<sup>385</sup>

#### 3.2.2.2.2 Control of a dangerous or potentially dangerous object or situation

The second factor is the control of a dangerous or potentially dangerous object or situation which determines when a legal duty to prevent harm rests on the person who is in control.<sup>386</sup> Examples of such would be a fire, a broken stairway, a hole in the ground or even a dangerous road that is hazardous.<sup>387</sup>

With regard to this factor, two inquiries are important – firstly, whether there was actual control, and secondly, whether the wrongdoer had a legal duty to prevent

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<sup>380</sup> See *Minister of Police v Ewels* 597-598; *Municipality of Cape Town v Bakkerud* para 11: to be discussed in chap 4 below. See also Neethling and Potgieter *Law of Delict* 67.

<sup>381</sup> *Van Vuuren v eThekweni Municipality* para 20; *Mtyido v City of Cape Town* (5044/2015) [2020] ZAWCHC 196 (24 June 2020) paras 51-52; *Moghaka Municipality v Mariti* para 20.

<sup>382</sup> See *Van Vuuren v eThekweni Municipality* (7099/2012) [2016] ZAKZDHC 8 (19 February 2016) paras 29-31; *Van Vuuren v eThekweni Municipality* paras 24-26.

<sup>383</sup> See *Van Vuuren v eThekweni Municipality*, see a detailed discussion in chap 4 below.

<sup>384</sup> See *Van Vuuren v eThekweni Municipality*.

<sup>385</sup> See *Van Vuuren v eThekweni Municipality*.

<sup>386</sup> See *Rust v Coetzee* (18694/14) [2022] ZAWCHC 88 (24 May 2022) para 24.4; *Municipality of Cape Town v Bakkerud* para 11; Neethling and Potgieter *Law of Delict* 69.

<sup>387</sup> For more dangerous situations see these cases: *Van Zyl v Siyancuma Municipality* para 1; *SMS v City of Johannesburg Metropolitan Municipality* paras 1-3; *Skenjana v Buffalo City Metropolitan Municipality* para 1; see also Neethling and Potgieter *Law of Delict* 69.

the harm that occurred as a result of his/her failure to properly exercise control.<sup>388</sup> Actual control by itself is not indicative of a legal duty, although it might serve as a factor to determine such duty.<sup>389</sup>

For liability to be incurred in this way, the omission must be wrongful with no ground of justification, and it must be clear that the wrongdoer failed to take precautionary measures to prevent harm.<sup>390</sup> At times it might be difficult to establish the presence of control of a dangerous or potentially dangerous object and prior conduct.<sup>391</sup> However, the distinction is not vital because either way, delictual liability is inferred.<sup>392</sup> Incurring delictual liability depends on the factor that was proven to the satisfaction of the court.

In the context of this study, where municipalities are in control of dangerous or potentially dangerous objects or situations, with prior knowledge of such, they have a legal duty to prevent the occurrence of the harm.<sup>393</sup> Actual control alone does give rise to this legal duty; the municipality must have prior knowledge of the object or situation.<sup>394</sup>

#### 3.2.2.2.3 Knowledge and foresight of possible harm

Another factor is the "knowledge and foresight of possible harm", where possessing the knowledge and foreseeing that the omission might result in harm shows that the conduct was unreasonable and wrongful.<sup>395</sup> Being aware of a dangerous

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<sup>388</sup> Neethling and Potgieter *Law of Delict* 69.

<sup>389</sup> Surrounding circumstances will decide whether the "wrongdoer should have exercised control". See *City of Cape Town v Mtyido* (1272/2022) [2023] ZASCA 163 (1 December 2023) para 36; Neethling and Potgieter *Law of Delict* 71.

<sup>390</sup> In the latter instance, the reasonable preventability leg of the negligence test must not have been met to establish negligence. See Neethling and Potgieter *Law of Delict* 73.

<sup>391</sup> Neethling and Potgieter *Law of Delict* 73.

<sup>392</sup> Neethling and Potgieter *Law of Delict* 73.

<sup>393</sup> See *City of Cape Town v Mtyido* para 36.

<sup>394</sup> See *City of Cape Town v Mtyido* para 36.

<sup>395</sup> However, the foreseeability of harm is another leg in the test for negligence and, therefore, should not find a place in the inquiry of wrongfulness, see the case of *Country Cloud Trading CC v MEC, Department of Infrastructure Development* para 27; *MTO Forestry (Pty) Ltd v Swart NO* para 18; *Stedall v Aspeling* para 14; Neethling and Potgieter *Law of Delict* 73.

situation may be a factor in determining whether a person has to exercise control over the situation and whether a legal duty to prevent harm exists.<sup>396</sup>

In the context of this study, a legal duty may arise when a municipality has prior knowledge of a potentially dangerous situation which may cause harm.<sup>397</sup> In cases where members of the communities report dangerous or potentially dangerous situations like open manholes, uneven pavement or broken stairs to municipalities, this may indicate the knowledge of the situation or object.<sup>398</sup> When such a case is brought, the courts determine whether the municipality had prior knowledge of the dangerous situation, whether that knowledge gave rise to a duty of care and whether the breach of that duty was negligent.<sup>399</sup> Each case will depend on its own facts and surrounding circumstances, especially regarding the acquisition of knowledge by municipalities.

#### 3.2.2.2.4 Rule of law

Another factor is the rule of law. This is when an obligation is placed on a person to perform a specific act emanating from a statute or common law.<sup>400</sup> Circumstances under which a statute exists as well as its provisions and the harm it intends to prevent must be taken into consideration in this factor.<sup>401</sup>

In a delictual claim, it must be questioned whether it is equitable and reasonable to award damages to the prejudiced party in light of the non-compliance.<sup>402</sup> Therefore, the wrongfulness of the conduct will not be due to the fact that a statutory duty was not complied with, but because it is reasonable to compensate the prejudiced party under the circumstances.<sup>403</sup> When it comes to governmental bodies and state

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<sup>396</sup> Neethling and Potgieter *Law of Delict* 73.

<sup>397</sup> *City of Cape Town v Mtyido* para 36.

<sup>398</sup> See *City of Cape Town v Mtyido* paras 35-38.

<sup>399</sup> *City of Cape Town v Mtyido* para 35.

<sup>400</sup> *Municipality of Cape Town v Bakkerud* para 11; Neethling and Potgieter *Law of Delict* 74. For the purposes of this study, the obligations imposed upon municipalities by legislation are discussed in chap 2 above.

<sup>401</sup> See *Olitzki Property Holdings v State Tender Board* (698/98) [2001] ZASCA 51 (28 March 2001) para 12; *Premier of the Province of Western Cape v Fair Cape Property Developers (Pty) Ltd* para 33; Neethling and Potgieter *Law of Delict* 75.

<sup>402</sup> Neethling and Potgieter *Law of Delict* 75.

<sup>403</sup> Reasonableness is determined by the *boni mores*, see Neethling and Potgieter *Law of Delict* 75.

institutions, statutory provisions will be taken into consideration to determine whether legal duties to prevent harm exist.<sup>404</sup> However, the statutory provisions will be considered amongst other factors because they do not give rise to legal duties on their own.<sup>405</sup> This is because not every statutory duty is a private law duty and the breach of that duty does not automatically give rise to a delictual claim.<sup>406</sup> Also, delictual liability is not inferred in breach of duties unless policy considerations suggest otherwise.<sup>407</sup> The courts will consider the provisions in the respective statutes and constitutional provisions to determine delictual wrongfulness.<sup>408</sup>

The provisions that oblige municipalities and, therefore, are relevant for this study emanate from the *Constitution* and framework of local government legislation which include the *Systems Act* and the *Local Government: Municipal Structures Act* 117 of 1998 (hereafter *MSA*). There is also sector-specific legislation including the: *Water Services Act* 108 of 1997 (hereafter *WSA*), *National Environmental: Waste Act* 59 of 2008 (hereafter *Waste Act*); *National Environmental Management Act* 107 of 1998 (hereafter *NEMA*), *National Environmental: Air Quality Act* 39 of 2004 (hereafter *Air Quality Act*), *Disaster Management Act* 57 of 2008 (hereafter *DMA*), *Local Government: Municipal Finance Management Act* 56 of 2003 (hereafter *MFMA*), *Municipal Property Rates Act* 6 of 2004 (hereafter *MPRA*), *Local Government: Municipal Demarcation Act* 27 of 1998 (hereafter *MDA*), and the *Spatial Planning and Land Use Management Act* 16 of 2013 (hereafter *SPLUMA*). In determining how a breach of duty emanating from either of the provisions amounts to a wrongful omission, the provision is used as a factor and not as a basis of the whole claim.<sup>409</sup> This suggests that the rule of law factor is considered amongst other factors because

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<sup>404</sup> See *City of Cape Town v Mtyido* para 33; *Mashongwa v PRASA* 2016 (3) SA 528 (CC) paras 20,24; Neethling and Potgieter *Law of Delict* 75.

<sup>405</sup> *Home Talk Developments (Pty) Ltd v Ekurhuleni Metropolitan Municipality* 2018 (1) SA 391 (SCA) para 19; *Mashongwa v PRASA* 2016 (3) SA 528 (CC) paras 20-29; *Municipality of Cape Town v Bakkerud* [2000] 3 All SA 171 (A) para 11; see Neethling and Potgieter *Law of Delict* 75.

<sup>406</sup> *Home Talk Developments (Pty) Ltd v Ekurhuleni Metropolitan Municipality* para 19; see *Mashongwa v PRASA* para 25.

<sup>407</sup> *Home Talk Developments (Pty) Ltd v Ekurhuleni Metropolitan Municipality* para 19.

<sup>408</sup> See *Mashongwa v PRASA* para 24; Neethling and Potgieter *Law of Delict* 76-78.

<sup>409</sup> *Sinukela v King Sabata Dalindyebo Municipality* para 8. See chap 4 below for a detailed discussion.

provisions in statutes alone are not private law duties. Therefore, they would not give rise to delictual claims on their own.

#### 3.2.2.2.5 Special relationship between the parties

Another factor to be considered is the special relationship between parties which could indicate that a legal duty to prevent harm existed.<sup>410</sup> Although a special relationship is not essentially required to indicate the existence of a legal duty, the relevant surrounding circumstances are also considered.<sup>411</sup> Each and every case is subjected to the *boni mores* criterion in light of the relevant circumstances including the special relationship to determine whether a legal duty to prevent harm exists.<sup>412</sup>

In this context, the relationship would be between a municipality and a member of the public, and it is a factor that determines the existence of a legal duty.<sup>413</sup> All the cases discussed or to be discussed which involve municipalities and members of the community are a result of this relationship. Members of the community institute delictual claims against municipalities for damages as a result of an opened street water drainage tank,<sup>414</sup> an open manhole,<sup>415</sup> a municipal water slide to a pool,<sup>416</sup> or an uneven pavement.<sup>417</sup> This is because, as already established, municipalities must execute certain duties towards members of the community.<sup>418</sup> It is for this reason that members of the community may institute delictual claims against the relevant municipality and this relationship is a factor in establishing a legal duty.

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<sup>410</sup> *Municipality of Cape Town v Bakkerud* para 11; see *Mashongwa v PRASA* para 20; Neethling and Potgieter *Law of Delict* 79.

<sup>411</sup> Neethling and Potgieter *Law of Delict* 80; see *Mashongwa v PRASA* para 20.

<sup>412</sup> Neethling and Potgieter *Law of Delict* 80.

<sup>413</sup> See these few cases where delictual actions ensued between members of the public and their municipalities: see *SMS v City of Johannesburg Metropolitan Municipality*, *Skenjana v Buffalo City Metropolitan Municipality*, *Van Zyl v Siyancuma Municipality*, *Boshoff v City of Cape Town*; *DB v The City of Cape Town*; *Amoah v KSD Municipality*, *Maimela v Makhado Municipality*.

<sup>414</sup> See the case of *Sinukela v King Sabata Dalindyebo Municipality* paras 1, 5.

<sup>415</sup> See *Mtyido v City of Cape Town* para 1.

<sup>416</sup> See *Van Vuuren v eThekweni Municipality* para 1.

<sup>417</sup> See *Skenjana v Buffalo City Metropolitan Municipality* para 1.

<sup>418</sup> See chap 2 above.

### 3.2.2.2.6 Danger of limitless liability

This factor provides that, delictual liability is imposed more readily for a single loss of a single identified prejudiced party occurring but once and if multiple actions would not be brought as a result.<sup>419</sup> It is concerned about an indeterminate liability that would result from the imposition of liability under such a situation.<sup>420</sup> Therefore, the factor can influence whether or not an omission in certain instances is wrongful.<sup>421</sup>

In the context of this study, liability for omission is imposed on municipalities if the imposition would not lead to the opening of floodgates to claims, limitless liability.<sup>422</sup> If the imposition of liability would result in limitless liability, this would place an intolerable burden on municipalities.<sup>423</sup> However, municipalities must prove an intolerable burden where limitless liability as a factor to influence wrongfulness is pleaded.<sup>424</sup>

The above discussion examined how wrongfulness is determined and, therefore, it is also important to consider when it can be determined. To determine if conduct is wrongful, an objective *ex post facto* consideration of all the relevant facts, circumstances and the ensued consequences has to be made.<sup>425</sup> This means that wrongfulness can only be determined after the fact. This is because conduct is wrongful if it can be referenced to its consequence.<sup>426</sup> Conduct and its consequences are always separated by time and space.<sup>427</sup> Therefore, it is not always the case that

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<sup>419</sup> *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) para 24; Neethling and Potgieter *Law of Delict* 84.

<sup>420</sup> *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* paras 24-25; Neethling and Potgieter *Law of Delict* 84.

<sup>421</sup> *South African Hang and Paragliding Association v Bewick* 2015 (3) SA 449 (SCA) para 32; *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* para 24; Neethling and Potgieter *Law of Delict* 84.

<sup>422</sup> See *Municipality of Cape Town v Bakkerud* para 31; *SMS v City of Johannesburg Metropolitan Municipality* paras 11, 13.

<sup>423</sup> See *Witzenberg Municipality v Bridgman* (685/2018) [2019] ZASCA 186 (3 December 2019) para 27; *Van Vuuren v eThekweni Municipality* para 31.

<sup>424</sup> See *Witzenberg Municipality v Bridgman* para 27; *Van Vuuren v eThekweni Municipality* 2018 para 25.

<sup>425</sup> Neethling and Potgieter *Law of Delict* 35.

<sup>426</sup> Neethling and Potgieter *Law of Delict* 37.

<sup>427</sup> Neethling and Potgieter *Law of Delict* 37.

consequences immediately follow conduct since the harmful consequences may arise later. The conduct will not be wrongful until such consequences arise.<sup>428</sup> It will have to be determined whether the prejudiced party's physical-mental integrity was infringed, their reputation has been impaired, or their property was damaged.<sup>429</sup> These are the consequences of different conduct.

### 3.2.3 Fault

Fault is a subjective element referring to "the legal blameworthiness or the reprehensible state of mind or conduct" of someone whose conduct was wrongful.<sup>430</sup> It is a subjective element because it has to do with the attitude or disposition of a person.<sup>431</sup>

There are two forms of fault: intent (*dolus*) and negligence (*culpa*).<sup>432</sup> To prove the fault element, a person's legal blameworthiness for the wrongful conduct must be as a result of their intent or negligence. However, before an inquiry into whether intent or negligence is at issue, it must first be determined whether the wrongdoer has the capacity to be held legally accountable: accountability.<sup>433</sup>

A person is deemed to be accountable when he/she "has the mental ability to distinguish between right and wrong and if he/she can also act in accordance with such appreciation".<sup>434</sup> The mental ability that is relevant is of the time the conduct at issue was carried out.<sup>435</sup> In the absence of accountability, there is no fault.<sup>436</sup> In

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<sup>428</sup> Neethling and Potgieter *Law of Delict* 37.

<sup>429</sup> Neethling and Potgieter *Law of Delict* 37.

<sup>430</sup> Although "fault" is generally a subjective element, the test of its form (negligence) is objective in nature. See Neethling and Potgieter *Law of Delict* 155.

<sup>431</sup> Neethling and Potgieter *Law of Delict* 155.

<sup>432</sup> *Black v Joffe* 2007 (3) SA 171 (CC) para 39; Neethling and Potgieter *Law of Delict* 155.

<sup>433</sup> See Ahmed 2021 *PER/PELJ* 10; Neethling and Potgieter *Law of Delict* 157.

<sup>434</sup> See Ahmed 2021 *PER/PELJ* 10-11; Neethling and Potgieter *Law of Delict* 157.

<sup>435</sup> The factors that affect accountability are youth, mental illness or disease, intoxication or provocation. See more details in Neethling and Potgieter *Law of Delict* 157-159. For purposes of this study, municipalities are often deemed accountable unless expressly regarded otherwise or unless the claims concern vicarious liability or service providers. Where a certain conduct can be attributed to a specific known person, the factors above may apply.

<sup>436</sup> Neethling and Potgieter *Law of Delict* 157.

the presence of accountability, an inquiry of whether intent or negligence is at issue may ensue.<sup>437</sup> These two forms are discussed in more detail below.

### 3.2.3.1 Intent

A person acts intentionally when he/she directs his/her will at a certain result, which he/she causes while being conscious of the fact that the conduct is wrongful.<sup>438</sup> Two elements are important to intent, the direction of will and consciousness or knowledge of wrongfulness.<sup>439</sup> The direction of will refers to when the wrongdoer directs their will to a result which was either their principal object or one which was foreseen to likely follow from the conduct.<sup>440</sup> The direction of will only is insufficient, therefore, the wrongdoer must further know or at least foresee the possibility that their conduct is wrongful.<sup>441</sup> Both elements must be present for intent to be present.

In municipal cases where intent is at issue, the relevant wrongful conduct is subjected to both elements to establish intent and it depends on the infringed legally protected interest.<sup>442</sup> The legally protected interests where intent is required and is often at issue are personality interests such as reputation or privacy as established in 3.5.3 below.

### 3.2.3.2 Negligence

Negligence is the other form of fault.<sup>443</sup> The test for negligence was laid down in the case of *Kruger v Coetzee* by Holmes AJ as follows:<sup>444</sup>

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<sup>437</sup> Neethling and Potgieter *Law of Delict* 157.

<sup>438</sup> Neethling and Potgieter *Law of Delict* 159.

<sup>439</sup> Neethling and Potgieter *Law of Delict* 160.

<sup>440</sup> There are three forms of intent: direct intent, indirect intent and *dolus eventualis*. See more on them on Neethling and Potgieter *Law of Delict* 160-162; see also *Black v Joffe* para 39.

<sup>441</sup> Neethling and Potgieter *Law of Delict* 162.

<sup>442</sup> See *Schoeman v Rustenburg Local Municipality* paras 1,2, 33-39, 59-61. It was a defamation case where intent as a fault element was at issue. The municipality was held liable for the intentional wrongful conduct of its employees.

<sup>443</sup> Neethling and Potgieter *Law of Delict* 164.

<sup>444</sup> 1966 2 SA 428 (A) 430E-G. *Minister of Justice and Constitutional Development v X* para 20; *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* para 53; *AK v Minister of Safety and Security* para 59.

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 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 means that negligence is established if a person anticipated the reasonable possibility of their conduct causing harm and it was reasonable to expect them to prevent the harm and they failed to. The conduct of the person is compared to that of a reasonable person in the same position under similar circumstances.

The criteria used to determine negligence is an objective standard of a "reasonable person".<sup>445</sup> A reasonable person is a "fictitious person" created to embody a concept of a person whose qualities are between exceptional, careful or developed and underdeveloped, reckless or imprudent.<sup>446</sup> It is a legal personification of the qualities found between those two extremes, serving as a "workable objective norm" for the conduct required by society in their daily contact with each other.<sup>447</sup> A reasonable person is not static and adapts when circumstances change depending on the area it is applied.<sup>448</sup> In brief, negligence arises when a reasonable person in the position of the wrongdoer would reasonably prevent harm that was reasonably foreseeable and preventable from occurring and the wrongdoer failed to.

The two legs of negligence are important: reasonable foreseeability and reasonable preventability of damage.<sup>449</sup> In regard to reasonable foreseeability, conduct may only be deemed negligent if it can be referenced to a specific consequence which was reasonably foreseeable.<sup>450</sup> The foreseeability of that harm depends on the "degree of probability of the manifestation of the harm", which is the greater

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<sup>445</sup> Neethling and Potgieter *Law of Delict* 164.

<sup>446</sup> See Ahmed 2021 *PER/PELJ* 14; Neethling and Potgieter *Law of Delict* 169.

<sup>447</sup> See Ahmed 2021 *PER/PELJ* 14; Neethling and Potgieter *Law of Delict* 169.

<sup>448</sup> See Ahmed 2021 *PER/PELJ* 14; Neethling and Potgieter *Law of Delict* 170.

<sup>449</sup> *N v Member of the Executive Council for Education Gauteng Province* (42538/2012) [2016] ZAGPJHC 170 (17 June 2016) para 15; Neethling and Potgieter *Law of Delict* 176.

<sup>450</sup> *N v Member of the Executive Council for Education Gauteng Province* (42538/2012) [2016] ZAGPJHC 170 (17 June 2016) para 15; Neethling and Potgieter *Law of Delict* 177.

possibility or chance of it occurring.<sup>451</sup> The second leg is reasonable preventability of the harm where it is inquired whether a reasonable person in the position of the wrongdoer would have taken reasonable precautionary steps to prevent the occurrence of the harm.<sup>452</sup> The inquiry in this case would be whether the wrongdoer took reasonable adequate steps to guard against the harm from occurring.<sup>453</sup> There are four factors that the courts take into consideration regarding this leg such as "i) the degree or extent of the risk created by the actor's conduct, ii) the gravity of the possible consequences if the risk of harm materialises, iii) the utility of the actor's conduct, and iv) the burden of eliminating the risk of harm."<sup>454</sup> These factors determine whether it was reasonable to take steps, and where they were taken, if whether they were reasonably adequate.

Concerning negligence, it could therefore be said that a person is legally blamed for his/her "attitude or conduct of carelessness, thoughtlessness or imprudence".<sup>455</sup> This is because the wrongdoer does not pay sufficient attention to his or her conduct, thereby failing to adhere to the standard of care the law requires.<sup>456</sup>

In light of the above, a municipality's relevant conduct would be deemed negligent if it failed to adhere to the standard the law requires, considering the service it had to provide as well as the provisions regulating such service's execution.<sup>457</sup> In this context, the standard would be what a reasonable municipality under those similar circumstances would have done to prevent the occurrence of the harm if that harm was reasonably foreseen and reasonably preventable. If harm occurs in the execution, and it was reasonably foreseen and preventable, negligence may be

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<sup>451</sup> Neethling and Potgieter *Law of Delict* 179.

<sup>452</sup> See *Cape Town Metropolitan Council v Graham* 2001 (1) SA 1197 para 7; *Judd v Nelson Mandela Bay Municipality* para 5; Neethling and Potgieter *Law of Delict* 180.

<sup>453</sup> See *Cape Town Metropolitan Council v Graham* para 7; *Judd v Nelson Mandela Bay Municipality* para 5; Neethling and Potgieter *Law of Delict* 180.

<sup>454</sup> See *Boshoff v City of Cape Town* para 31; *Cape Town Metropolitan Council v Graham* para 7; *Judd v Nelson Mandela Bay Municipality* para 5; Neethling and Potgieter *Law of Delict* 180.

<sup>455</sup> See *Lucas v Umhlathuze Municipality* para 9; Neethling and Potgieter *Law of Delict* 164.

<sup>456</sup> See *LRM v Mquma Local Municipality* para 33; *Lucas v Umhlathuze Municipality* para 9; Neethling and Potgieter *Law of Delict* 164.

<sup>457</sup> See *LRM v Mquma Local Municipality* para 32; *Harding v Nelson Mandela Bay Metropolitan Municipality* paras 27-28; *Lucas v Umhlathuze Municipality* para 9.

established.<sup>458</sup> The four factors regarding the reasonable preventability of the harm are also considered in municipal cases.<sup>459</sup>

### 3.2.3.3 Contributory fault

On the one hand, the above discussion of fault in general concerns the conduct of the wrongdoer, where he/she is entirely at fault. On the other hand, contributory fault concerns the conduct of the prejudiced party, where both the prejudiced party and the wrongdoer are partly at fault for contributing to the harm.<sup>460</sup> Contributory fault is regulated by the *Apportionment of Damages Act* 34 of 1956.<sup>461</sup> The Act states that the damages to be claimed as a result of the harm will be reduced equitably regarding the degree to which the claimant (prejudiced party) was at fault in reference to the harm.<sup>462</sup> Since fault is in two forms, negligence and intent, a distinction of when contributory fault applies is of importance. The defence of contributory fault is usually invoked when the wrongdoer and prejudiced party were partly negligent in causing the harm.<sup>463</sup> Where the wrongdoer acted with intent to cause harm, a defence of contributory negligence on the part of the prejudiced party cannot apply.<sup>464</sup> Where the prejudiced party intentionally contributed to their own harm and the wrongdoer was merely negligent, the prejudiced party's intent forfeits the claim.<sup>465</sup> However, the defence of contributory intent could be applicable where both the prejudiced party and the wrongdoer intentionally contributed to the

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<sup>458</sup> See *Lucas v Umhlathuze Municipality* para 9; *LRM v Mnquma Local Municipality* para 32; *Harding v Nelson Mandela Bay Metropolitan Municipality* paras 27-28.

<sup>459</sup> *Harding v Nelson Mandela Bay Metropolitan Municipality* para 29.

<sup>460</sup> Section 1 (1)(a) of the *Apportionment of Damages Act* 34 of 1956. It does not apply in the cases of strict liability, where liability is entirely the defendant's fault. See Ahmed 2014 *PER/PELJ* 1517.

<sup>461</sup> Neethling and Potgieter *Law of Delict* 198; Ahmed 2014 *PER/PELJ* 1517; *Cobra Towing CC v Mangaung Metropolitan Municipality* para 44.

<sup>462</sup> Section 1 (1)(a) of the *Apportionment of Damages Act* 34 of 1956. See Ahmed 2014 *PER/PELJ* 1517; see *Cobra Towing CC v Mangaung Metropolitan Municipality* para 44.

<sup>463</sup> Neethling and Potgieter *Law of Delict* 199; see *Botes v Ekurhuleni Metropolitan Municipality* para 6.

<sup>464</sup> Neethling and Potgieter *Law of Delict* 200.

<sup>465</sup> Neethling and Potgieter *Law of Delict* 200.

prejudiced party's harm.<sup>466</sup> In all of these cases, damages are not divided, they are just reduced in reference to the prejudiced party's fault.<sup>467</sup>

Regarding the reduction or rather the apportionment of damages, the courts use the criterion of a reasonable person test in negligence.<sup>468</sup> When it comes to determining who bears what portion, the respective degrees of the parties' negligence are compared.<sup>469</sup> The approaches applied in the apportionment of damages based on the test for negligence were illustrated in two cases: *South British Insurance Co Ltd v Smit*<sup>470</sup> (the *Smit* case) and *Jones v Santam Bpk* (the *Jones* case).<sup>471</sup> In the *Smit* case, the approach formulated was that, determining the prejudiced party's degree of negligence, automatically determines the wrongdoer's.<sup>472</sup> This means that, if the prejudiced party's conduct has deviated from the standard of a reasonable person by 30%, that means the wrongdoer automatically deviated by 70%. In the *Jones* case, the deviations were determined in isolation, the degree of deviation of the wrongdoer was not automatically implied.<sup>473</sup> The degrees of both the prejudiced party and wrongdoer were separately determined in isolation against the standard of a reasonable person.<sup>474</sup> This would mean that it is possible for the prejudiced party to deviate by 40% and the wrongdoer to deviate by 80% in a case.<sup>475</sup> The courts are still yet to confirm one approach and reject another.<sup>476</sup>

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<sup>466</sup> It is suggested that because "fault" includes both intention and negligence, the defence can be raised. This may be achieved because s 4(2)(b)(iii) of the *Apportionment of Loss Bill* 2003 uses the term "fault" to include both intention and negligence. The Bill will replace the current Act, but it has not yet been promulgated. See also Ahmed 2014 *PER/PELJ* 1518.

<sup>467</sup> Neethling and Potgieter *Law of Delict* 201.

<sup>468</sup> Neethling and Potgieter *Law of Delict* 201.

<sup>469</sup> Neethling and Potgieter *Law of Delict* 202.

<sup>470</sup> 1962 (3) SA 826 (A).

<sup>471</sup> 1965 (2) SA 542 (A); see Neethling and Potgieter *Law of Delict* 201.

<sup>472</sup> *Smit* case 835.

<sup>473</sup> Neethling and Potgieter *Law of Delict* 202.

<sup>474</sup> Neethling and Potgieter *Law of Delict* 202.

<sup>475</sup> Ratios are used to determine the degrees of the parties in reference to the damages, see more details on Neethling and Potgieter *Law of Delict* 202.

<sup>476</sup> Neethling and Potgieter *Law of Delict* 203.

For the purposes of this study, it would mean that the defence of contributory negligence may be raised by municipalities.<sup>477</sup> Where contributory negligence is established on the part of the prejudiced party, the amount of damages to be awarded to the prejudiced party will be proportionally reduced in accordance with the *Apportionment of Damages Act* 34 of 1956.<sup>478</sup> Courts usually apply the approach followed in the *Smit* case in contributory negligence where determining the prejudiced party's degree of negligence automatically determines the municipality's.<sup>479</sup> So far, there have not been municipal cases where contributory intent as a defence was raised.

#### 3.2.3.4 Onus of proof

After the above discussion of fault in general and contributory fault, it is important to determine who bears the onus of proof in either. Regarding fault in general, the onus is on the prejudiced party (claimant) to prove on a preponderance (balance) of probabilities the negligence of the wrongdoer.<sup>480</sup> However, in a case where there is presumed negligence in a statute, the onus is on the wrongdoer to rebut the presumption of negligence to not incur liability.<sup>481</sup> In contributory fault (negligence), the wrongdoer must prove contributory negligence on a preponderance of probabilities if the defence is raised.<sup>482</sup> Although, where contributory negligence as a defence is not raised, it may still be taken into account by the courts if it applies.<sup>483</sup>

In the case of municipalities, the onus is on the prejudiced party to prove the municipality's fault in general on a balance of probabilities.<sup>484</sup> Where the defence of

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<sup>477</sup> See *Botes v Ekurhuleni Metropolitan Municipality* para 6; *Kutu v City of Johannesburg Metropolitan Municipality* (06828/2015) [2023] ZAGPJHC 1266 (6 November 2023) paras 2,7.

<sup>478</sup> Act 34 of 1956; see *Kutu v City of Johannesburg Metropolitan Municipality* paras 2,7.

<sup>479</sup> *Botes v Ekurhuleni Metropolitan Municipality* paras 31, 48; see *Kutu v City of Johannesburg Metropolitan Municipality* paras 25-26. The prejudiced party's degree of negligence was 40% and the municipality was ordered to pay 60% of the damages. See also *Bedrock Mining Support Pty (Ltd) v Greater Tzaneen Local Municipality* (66861/2014) [2017] ZAGPPHC 15 (25 January 2017) para 88.

<sup>480</sup> Neethling and Potgieter *Law of Delict* 190.

<sup>481</sup> Neethling and Potgieter *Law of Delict* 190; see *Thabisang v Polokwane Municipality* (4739/2021) [2024] ZALMPPHC 27 (13 March 2024) para 9; *Lucas v Umhlathuze Municipality* paras 7-8.

<sup>482</sup> Neethling and Potgieter *Law of Delict* 204.

<sup>483</sup> Neethling and Potgieter *Law of Delict* 204.

<sup>484</sup> *Kutu v City of Johannesburg Metropolitan Municipality* para 7.

contributory negligence is raised by a municipality, the onus is on that municipality to prove that the prejudiced party was contributory negligent.<sup>485</sup> From the above legal framework, it would also mean that where the municipality does not raise a defence of contributory negligence, it may still be taken into account if warranted. Furthermore, where there is a presumption of negligence in a statute concerning municipalities, the onus will be on that relevant municipality to rebut it.<sup>486</sup>

### 3.2.4 Causation

Causation is another delictual element that needs to be present to establish delictual liability. It refers to a "causal nexus" between conduct and harm (damage).<sup>487</sup> The wrongdoer must have caused the harm for which damages are sought.<sup>488</sup> The question of whether causation exists is of facts and must be answered in light of the available evidence and relevant probabilities.<sup>489</sup> Causation is determined through factual and legal causation.

#### 3.2.4.1 Factual causation

Factual causation is used by the courts to identify a cause in light of available facts and relevant probabilities.<sup>490</sup> A method that is applied is expressed as *conditio sine qua non* known as the "but for" test.<sup>491</sup> According to the theory, a certain conduct is the cause of a result if the conduct cannot be thought away without the simultaneous disappearance of the result.<sup>492</sup> This would mean that if the harm is still there after taking away the relevant conduct, then the conduct did not cause the

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<sup>485</sup> See *Harding v Nelson Mandela Bay Metropolitan Municipality* para 42; see also *Kutu v City of Johannesburg Metropolitan Municipality* para 7; *Van Vuuren v eThekweni Municipality* para 32.

<sup>486</sup> See *Thabisang v Polokwane Municipality* para 9; *Lucas v Umhlathuze Municipality* paras 7-8.

<sup>487</sup> *Minister of Justice and Constitutional Development v X* para 22; *Black v Joffe* para 37; Neethling and Potgieter *Law of Delict* 215.

<sup>488</sup> See *AK v Minister of Safety and Security* para 202; *Thabisang v Polokwane Municipality* para 11; Neethling and Potgieter *Law of Delict* 215.

<sup>489</sup> *AK v Minister of Safety and Security* para 202; Neethling and Potgieter *Law of Delict* 215.

<sup>490</sup> Neethling and Potgieter *Law of Delict* 217.

<sup>491</sup> *AK v Minister of Safety and Security* para 205; *Minister of Justice and Constitutional Development v X* para 22; *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC) para 40; *Black v Joffe* para 37; *International Shipping Company (Pty) Ltd v Bentley* [1990] 1 SA 498 (A) paras 64-65; Neethling and Potgieter *Law of Delict* 218.

<sup>492</sup> *Lee v Minister of Correctional Services* para 40; *International Shipping Company (Pty) Ltd v Bentley* para 65.

harm as there is no connection between the conduct and the harm. It comes in two forms; through positive conduct and negative conduct.<sup>493</sup>

In determining causation by positive conduct, the theory states that you need to hypothetically remove the conduct to determine if the relevant consequence would have resulted.<sup>494</sup> With negative conduct, a hypothetical positive act is inserted into the facts and the wrongdoer's omission is mentally removed to determine if the consequence would still result.<sup>495</sup> Issues arose regarding the theory where the courts held that the theory is not flexible as it results in injustices when it comes to certain cases.<sup>496</sup> In the *Gore* case, it was expressed that the flexible approach theory should be based on the practical ways of ordinary people, on how their minds work in their daily life experiences and not on philosophy, mathematics or pure science.<sup>497</sup> A common-sense approach was promoted, which is based on practical ways in which an ordinary person's mind works against daily life experiences as the background.<sup>498</sup>

Therefore, factual causation is a connection between at least two facts or a certain set of facts, where one fact arises out of another.<sup>499</sup> This is when harm can be linked to a certain conduct,<sup>500</sup> meaning that the conduct is the cause of harm. With experience, knowledge as well as the available reliable evidence, a causal link can be established.<sup>501</sup> It either exists or does not, it is purely a question of fact.<sup>502</sup> Even if the facts illustrate that the wrongdoer's conduct was not the only cause or main cause and that it only contributed, that mere contribution is sufficient for factual

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<sup>493</sup> *Lee v Minister of Correctional Services* para 41; Neethling and Potgieter *Law of Delict* 218.

<sup>494</sup> *Lee v Minister of Correctional Services* para 41; Neethling and Potgieter *Law of Delict* 219.

<sup>495</sup> The hypothetical conduct is of a reasonable person in the position of the wrongdoer considering the wrongdoer's relevant circumstances. *Lee v Minister of Correctional Services* para 41; *AK v Minister of Safety and Security* para 208; Neethling and Potgieter *Law of Delict* 224.

<sup>496</sup> See *Lee v Minister of Correctional Services* para 41; *Minister of Finance v Gore* 2007 (1) SA 111 (SCA) (the *Gore* case) paras 32-33; *AK v Minister of Safety and Security* para 208; Neethling and Potgieter *Law of Delict* 226.

<sup>497</sup> *Gore* case para 33; see also *AK v Minister of Safety and Security* para 206.

<sup>498</sup> *Gore* case para 33; see also *AK v Minister of Safety and Security* para 206.

<sup>499</sup> *Lee v Minister of Correctional Services* para 40.

<sup>500</sup> Neethling and Potgieter *Law of Delict* 228.

<sup>501</sup> See *Carmichele v Minister of Security* 2001 (4) SA 938 (CC) paras 76-77; Neethling and Potgieter *Law of Delict* 228.

<sup>502</sup> See *Carmichele v Minister of Security* paras 76-77; *Lee v Minister of Correctional Services* para 41; *AK v Minister of Safety and Security* para 204; Neethling and Potgieter *Law of Delict* 228.

causation.<sup>503</sup> If factual causation is not established, then delictual liability cannot be inferred.<sup>504</sup> However, establishing factual causation does not necessarily result in delictual liability, a second inquiry of legal causation arises.<sup>505</sup>

#### 3.2.4.2 Legal causation

The second enquiry of legal causation arises to limit a wrongdoer's liability.<sup>506</sup> It determines what the wrongdoer should be liable for in instances where there are endless harmful consequences caused culpably by the wrongdoer's wrongful conduct.<sup>507</sup> The wrongdoer can only be held accountable for harm that falls within his/her limits of liability and will not be accountable for harm that is "too remote".<sup>508</sup> Generally, it becomes apparent that the harm falls within the wrongdoer's limits of liability when elements such as wrongfulness and fault are established and an inquiry of legal causation would be unnecessary.<sup>509</sup> It becomes relevant where there is an endless chain of remote harmful consequences and where it is alleged that the wrongdoer should not be held legally liable for all of them.<sup>510</sup>

To determine legal causation, there are different theories: flexible approach, based on policy considerations, theory of adequate causation, direct consequences, theory of fault, reasonable foreseeability criterion, reasonableness, fairness and justice.<sup>511</sup> For the purposes of this study, only the flexible approach is briefly discussed as it reflects the current preferred theory to determine legal causation.

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<sup>503</sup> Neethling and Potgieter *Law of Delict* 228.

<sup>504</sup> *Lee v Minister of Correctional Services* para 38.

<sup>505</sup> *Lee v Minister of Correctional Services* para 38.

<sup>506</sup> It is not the only method that limits liability, the other delictual elements also limit liability, e.g. in the absence of one, delictual liability cannot succeed. See Neethling and Potgieter *Law of Delict* 230, 232; *Lee v Minister of Correctional Services* para 39.

<sup>507</sup> *International Shipping Company (Pty) Ltd v Bentley* paras 66-67; Neethling and Potgieter *Law of Delict* 230.

<sup>508</sup> *Minister of Justice and Constitutional Development v X* para 23; *Lee v Minister of Correctional Services* para 38; *International Shipping Company (Pty) Ltd v Bentley* para 66; see Neethling and Potgieter *Law of Delict* 231; Mukheibir 2015 *SALJ* 28.

<sup>509</sup> Its inexpression in most cases does not invalidate it. Neethling and Potgieter *Law of Delict* 231.

<sup>510</sup> *International Shipping Company (Pty) Ltd v Bentley* paras 66-67; Neethling and Potgieter *Law of Delict* 231-232.

<sup>511</sup> See more in Neethling and Potgieter *Law of Delict* 233.

Legal causation was set out in the case of *S v Mokgethi*<sup>512</sup> and was subsequently confirmed in private law cases.<sup>513</sup> It was held that legal causation cannot be determined by a single and general criterion which can be applied in all instances.<sup>514</sup> There needs to be a close relationship between the wrongdoer's conduct and the harmful consequences to impute the consequences to the wrongdoer in light of policy considerations based on reasonableness, fairness and justice.<sup>515</sup> Through the development of the approach, it was suggested that the rest of the theories should serve subsidiary roles as pointers or factors to determine the imputability of the harm.<sup>516</sup> However, in the case of *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd*,<sup>517</sup> this development was denied with the flexible approach's dominance being undermined, and the other theories were denied of their subsidiary roles. However, in the case of *Cape Empowerment Trust Limited v Fisher Hoffman Sithole*,<sup>518</sup> the flexible approach was recognised and confirmed as the independent and decisive test for legal causation.

In the case of municipalities, the enquiry of causation still entails these two distinct enquiries, factual and legal causation. The factual causation inquiry involves the "but for" test where it asked whether the municipality's culpable wrongful conduct was the cause of the prejudiced party's damage.<sup>519</sup> If factual causation is established, then the inquiry into legal causation arises. It is then asked whether that relevant culpable and wrongful conduct can be linked sufficiently closely to the damage for liability to ensue or whether the damage is too remote.<sup>520</sup> If it can be linked closely to the damage, then liability can ensue. If the damage is too remote,

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<sup>512</sup> [1990] 1 All SA 320 (A) para 40.

<sup>513</sup> See *Barnard v Santam Ltd* 1999 (1) SA 202 (SCA) para 25.

<sup>514</sup> *S v Mokgethi* paras 24,44; see also *Smit v Abrahams* [1994] 4 All SA 679 para 44.

<sup>515</sup> *S v Mokgethi* paras 22,24,40-41.

<sup>516</sup> *S v Mokgethi* paras 40-45; *Smit v Abrahams* paras 30-48.

<sup>517</sup> 2009 (2) SA 150 (SCA) paras 33-35.

<sup>518</sup> 2013 (5) SA 183 (SCA) paras 37-39.

<sup>519</sup> See *Skenjana v Buffalo City Metropolitan Municipality* para 23; *Home Talk Developments (Pty) Ltd v Ekurhuleni Metropolitan Municipality* para 45; *Moqhaka Municipality v Mariti* para 30.

<sup>520</sup> See *Skenjana v Buffalo City Metropolitan Municipality* para 23; *Home Talk Developments (Pty) Ltd v Ekurhuleni Metropolitan Municipality* para 45; *Moqhaka Municipality v Mariti* paras 33-34.

then liability will not ensue.<sup>521</sup> The flexible approach in legal causation is also supported in municipality cases.<sup>522</sup>

### 3.2.5 Damage

The law of delict's function is to compensate for the harmful consequences caused culpably by wrongful conduct.<sup>523</sup> The damage element is fundamental to a delictual claim.<sup>524</sup> It is defined as the "detrimental impact upon any patrimonial or personality interest deemed worthy of protection by the law".<sup>525</sup> There are two types of harm. Harm that is money equivalent as it can be directly translated into money (patrimonial loss), and harm that is not money equivalent (non-patrimonial loss or injury to personality).<sup>526</sup> In patrimonial loss, the prejudiced party is compensated for the direct exact loss (compensation) while in non-patrimonial loss the prejudiced party is paid a satisfactory sum of money in proportion to the wrong inflicted (satisfaction).<sup>527</sup> The onus of proof rests on the prejudiced party to prove on a balance of probability that he/she suffered damage and the extent of such damage through sufficient evidence.<sup>528</sup>

#### 3.2.5.1 Patrimonial loss

In patrimonial loss, a patrimonial interest (a subjective right with a monetary value) is detrimentally impacted.<sup>529</sup> It is the reduction utility of an element of a person's patrimony.<sup>530</sup> The damage occurs when the patrimonial element is lost or reduced

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<sup>521</sup> See *Skenjana v Buffalo City Metropolitan* para 23; *Home Talk Developments (Pty) Ltd v Ekurhuleni Metropolitan Municipality* para 45.

<sup>522</sup> *Moqhaka Municipality v Mariti* para 34.

<sup>523</sup> Compensation takes two forms: compensation for damage (monetary equivalent damage) and satisfaction (damage that is not monetary equivalent). See Neethling and Potgieter *Law of Delict* 255-256.

<sup>524</sup> *Home Talk Developments (Pty) Ltd v Ekurhuleni Metropolitan Municipality* para 93.

<sup>525</sup> Neethling and Potgieter *Law of Delict* 256.

<sup>526</sup> *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC) para 39; Neethling and Potgieter *Law of Delict* 255-256.

<sup>527</sup> *Van der Merwe v Road Accident Fund* para 39; Neethling and Potgieter *Law of Delict* 255-256.

<sup>528</sup> *Home Talk Developments (Pty) Ltd v Ekurhuleni Metropolitan Municipality* para 93; Neethling and Potgieter *Law of Delict* 280.

<sup>529</sup> See more on subjective rights in para 3.3.2 above. See also Neethling and Potgieter *Law of Delict* 263.

<sup>530</sup> Neethling and Potgieter *Law of Delict* 264.

in value.<sup>531</sup> Forms of patrimonial losses that are recognised are loss of profit and the loss of patrimonial expectancy,<sup>532</sup> damage to property and pure economic loss; direct and consequential loss; general (intrinsic) and special (extrinsic) damage.<sup>533</sup> A prejudiced party may institute a delictual claim against a municipality depending on the form of patrimonial loss above.

### 3.2.5.2 Non-patrimonial loss

Non-patrimonial damage (injury to personality) can be defined as the detrimental impact that could manifest as a change or factual disturbance of personality interests that are deemed worthy of protection by the law.<sup>534</sup> Personality interests can be defined in reference to personality rights which are dignity, privacy, reputation and physical-mental integrity.<sup>535</sup> The loss occurs when these interests are impaired or disturbed, causing a reduction in their utility or quality.<sup>536</sup> Furthermore, non-patrimonial loss has an objective element which occurs when the manifestation of the impairment is recognised generally or externally and the subjective element which occurs in a person's mind or consciousness as a result of their reaction to their personality interests being objectively impaired.<sup>537</sup> A prejudiced person may institute a delictual claim against a municipality for non-patrimonial loss depending on the personality right which was detrimentally impacted.

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<sup>531</sup> Neethling and Potgieter *Law of Delict* 264-265.

<sup>532</sup> See more on this on Neethling and Potgieter *Law of Delict* 268-270.

<sup>533</sup> They are not explained in detail as they do not form a substantial part of this study. They are briefly explained as and when it is relevant, see more on them in Neethling and Potgieter *Law of Delict* 265-266.

<sup>534</sup> *Van der Merwe v Road Accident Fund* para 39; Neethling and Potgieter *Law of Delict* 288.

<sup>535</sup> *Van der Merwe v Road Accident Fund* para 40; Forms of injury to personality in regard to physical-mental integrity recognised in practice are pain and suffering, shock, disfigurement, loss of amenities of life, shortened life expectancy, see more details on Neethling and Potgieter *Law of Delict* 291-292.

<sup>536</sup> *Van der Merwe v Road Accident Fund* para 40; Neethling and Potgieter *Law of Delict* 288.

<sup>537</sup> An example of an objective element is when a person is defamed, their reputation is lowered. The subjective element is the reaction of physical and affective nature such as pain (physical feeling of unhappiness) and sentimental loss after having suffered an injustice. See Neethling and Potgieter *Law of Delict* 288-289.

### 3.2.5.3 Assessment methods for damage

To determine the damages to be awarded, there is a need for an assessment of the damage. Below are the assessment methods used to determine the existence and extent of the damage or loss.<sup>538</sup> The methods presented below are those that are relevant and applicable to municipality cases only.

#### 3.2.5.3.1 Comparative method

This sum-formula method involves a negative difference between two patrimonial positions of a person, the hypothetical position the person would be in had the event not occurred and the current position after the event occurred.<sup>539</sup> However, sometimes it is not always accepted like that, it is referred to as the difference between the patrimonial position before the wrongful conduct and after the event.<sup>540</sup> The hypothetical patrimonial position is not mentioned and this is an approach agreed to by Van der Walt,<sup>541</sup> and this study agrees with it. A hypothetical position would be an assumed position that is most often inaccurate, the prior position should be what actually was instead.

#### 3.2.5.3.2 "Once and for all" rule

To claim for compensation and satisfaction arising from a delict, the claimant (prejudiced party) must claim damages for the damage that is already sustained or the damage that is expected in future as long as it is based on a single cause of action.<sup>542</sup> Prior to the application of the rule, there must be a valid cause of action, and the prescription rules outlined below apply to the rule. When the prejudiced party has instituted legal proceedings successfully or unsuccessfully, the prejudiced party may not institute proceedings for another part if all these claims are based on

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<sup>538</sup> The assessment of the quantum of damages does not form part of this study. Quantification of damages refers to "the process whereby damage which the law has found to exist and for which compensation may be awarded is expressed in monetary terms in order to reach a specific amount of damages". See Neethling and Potgieter *Law of Delict* 266, 289, 282.

<sup>539</sup> *Prinsloo v Road Accident Fund* 2009 (5) SA 406 (SE) paras 4-5.

<sup>540</sup> *Kantey and Templer (Pty) Ltd v Van Zyl* 2007 (1) SA 610 (C) para 51.

<sup>541</sup> Potgieter, Steynberg and Floyd *Law of Damages* 78–79.

<sup>542</sup> See para below on para 3.3 for what a "cause of action" is. See also Neethling and Potgieter *Law of Delict* 270.

a single cause of action.<sup>543</sup> This means that a claim by the prejudiced party arising from similar facts or circumstances that were previously adjudicated upon is not allowed. Since this would be a matter that would have been adjudicated upon already between the parties, the wrongdoer, in this case, a municipality, may raise a special plea of *res judicata* to destroy the prejudiced party's cause of action.<sup>544</sup> A matter is "*res judicata*" if a competent court had previously reached a final judgement in a matter that is based on the same cause of action that involves the same parties.<sup>545</sup>

### **3.3 Institution of legal proceedings against the state (municipality)**

Prior to instituting any legal proceedings against the state, the *Institution of Legal Proceedings against Certain of State Act* 40 of 2002 must be observed. The Act regulates how legal proceedings are instituted against organs of state; such as municipalities in this context. Amongst other requirements, it provides that a written notice has to be given to the relevant organ of state about the intention to institute legal proceedings.<sup>546</sup> The legal proceedings must be instituted in accordance with the provisions in sections 3, 4 and 5 of the Act.

However, before legal proceedings can be instituted, there must be a valid cause of action to determine whether or not the matter will proceed.<sup>547</sup> A cause of action is the cause of the prejudiced party's complaint, referring to all the elements that must be proved for the claimant to be entitled to the relief sought.<sup>548</sup> In the context of this study, a cause of action is all delictual elements that need to be proved in order for the prejudiced party to claim damages. However, the law of delict's compensatory function implies that there must be some damage or loss for which compensation may be made.<sup>549</sup> This suggests that damage or loss upon which the delictual action is based must be present. There can be no delictual action in the

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<sup>543</sup> Neethling and Potgieter *Law of Delict* 270.

<sup>544</sup> Peté *et al Civil Procedure: A Practical Guide* 245.

<sup>545</sup> Peté *et al Civil Procedure: A Practical Guide* 245.

<sup>546</sup> Section 3(1) of the *Institution of Legal Proceedings against Certain of State Act* 40 of 2002.

<sup>547</sup> Peté *et al Civil Procedure: A Practical Guide* 62.

<sup>548</sup> Peté *et al Civil Procedure: A Practical Guide* 62.

<sup>549</sup> Neethling and Potgieter *Law of Delict* 255.

absence of damage of some sort. However, the other elements must be present at face value and their presence will be ascertained by the court in that action including the damage element.

The earliest date when the damage occurs with the other elements being present at face value, is the date of the commission of the delict.<sup>550</sup> Where there is a series of harmful consequences resulting from a delict, the date on which the first damage manifested is used.<sup>551</sup> The date of the manifestation of the first damage is the date on which the delictual debt is due.<sup>552</sup> The period of prescription is three years, and after three years the delictual action is extinguished.<sup>553</sup>

Prescription begins to run as soon the debt is due and when the creditor (prejudiced party) knows or reasonably ought to know the wrongdoer, the relevant municipality.<sup>554</sup> Therefore, the prejudiced party would have 3 years from the date of the manifestation of the damage to institute a claim against the wrongdoer.<sup>555</sup> If the prejudiced party institutes the proceedings after the claim has prescribed, the wrongdoer may raise a special plea of extinctive prescription.<sup>556</sup> Therefore, the wrongdoer (municipality) will not be held liable even if the prejudiced party had a valid cause of action upon which damages were going to be awarded had the claim not prescribed.<sup>557</sup>

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<sup>550</sup> Neethling and Potgieter *Law of Delict* 267.

<sup>551</sup> Neethling and Potgieter *Law of Delict* 267.

<sup>552</sup> See s 11(d) of the *Prescription Act* 68 of 1969. See also Peté *et al Civil Procedure: A Practical Guide* 243.

<sup>553</sup> See s 11(d) of the *Prescription Act* 68 of 1969. See also Peté *et al Civil Procedure: A Practical Guide* 243.

<sup>554</sup> See s 12(1) and (3) of the *Prescription Act* 68 of 1969. Although, the completion of a prescription may be delayed, by suspension and interruption, see s 13-15 of the *Institution of Legal Proceedings Against Certain Organs of State Act* 40 of 2002.

<sup>555</sup> See s 11(d) of the *Prescription Act* 68 of 1969. The legal proceedings must be instituted in accordance with the provisions in s 3,4 and 5 of the *Institution of Legal Proceedings Against Certain Organs of State Act* 40 of 2002. See also *Sinukela v King Sabata Dalindyebo Municipality* para 3; *Amoah v King Sabata Dalindyebo Municipality* para 5.

<sup>556</sup> Peté *et al Civil Procedure: A Practical Guide* 242. This is a special plea in abatement, procedural in character and it destroys the prejudiced party's cause of action, the whole claim.

<sup>557</sup> Peté *et al Civil Procedure: A Practical Guide* 242.

### 3.4 Vicarious liability

As already stated, municipalities utilise both internal and external mechanisms to carry out their duties.<sup>558</sup> Internal mechanisms include the employees of a municipality carrying out their duties of the relevant municipality as their employer.<sup>559</sup> The conduct of that employee performed at the order of or with permission of the municipality to advance or attempt to advance the interests of that municipality is deemed to have been performed by that municipality.<sup>560</sup> In this context, the imposition of liability on a municipality as a result of the conduct of the municipality's employee is referred to as "vicarious liability".<sup>561</sup>

Vicarious liability can be defined as the strict liability of one person for the delict of another person, where the former is "indirectly or vicariously liable for the damage caused by the latter".<sup>562</sup> There needs to be a particular relationship that exists between two persons and for purposes of this study, the relationship between an employer and employee is of importance.<sup>563</sup> With this relationship, an employer (master) is fully liable for damage resulting from a delict committed by their employee (servant) while acting within the scope of employment.<sup>564</sup> This is a form of strict liability the employer is held liable in the absence of fault on their part.<sup>565</sup> The employer is held liable on the "grounds of fairness and justice" because of the inherent risks or dangers associated with the work entrusted to the employee.<sup>566</sup> This imposition of liability is based on a risk or danger theory.<sup>567</sup>

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<sup>558</sup> See para 2.5 above.

<sup>559</sup> See para 2.5 above.

<sup>560</sup> See para 3.2.1 above.

<sup>561</sup> Neethling and Potgieter *Law of Delict* 444; see also Botha and Millard 2012 *De Jure* 227.

<sup>562</sup> Neethling and Potgieter *Law of Delict* 444; see also Botha and Millard 2012 *De Jure* 227; Malatji *The Future of the Common-Law Doctrine of Vicarious Liability* 19.

<sup>563</sup> Other relationships are between a principal and agent, motor-car owner and motor-car driver, and state and public school. See more details on Neethling and Potgieter *Law of Delict* 444-454.

<sup>564</sup> Botha and Millard 2012 *De Jure* 225; Neethling and Potgieter *Law of Delict* 445.

<sup>565</sup> Neethling and Potgieter *Law of Delict* 444-445; Malatji *The Future of the Common-Law Doctrine of Vicarious Liability* 19.

<sup>566</sup> *Minister of Police v Rabie* [1986] 1 All SA 361 (A) paras 9-10; see Malatji *The Future of the Common-Law Doctrine of Vicarious Liability* 87.

<sup>567</sup> Neethling and Potgieter *Law of Delict* 434.

For vicarious liability to be incurred by an employer for the delict committed by an employee, three requirements need to be proved. Firstly, at the relevant time the delict was committed, there must have been an employer-employee relationship.<sup>568</sup> A contract of service (*locatio conductio operarum*) must exist to show that an employee agreed to avail his/her working capacity or energy to the employer for remuneration while the employer exercises authority over the employee.<sup>569</sup> The state (municipality) occupies the same position as other employers and to escape liability, the state must show that it did not have the authority to control such an employee at that relevant time.<sup>570</sup> Secondly, it is required that the employee must commit a delict, and any available defence to the employee may be raised by the employer.<sup>571</sup> They will be regarded as joint wrongdoers against the prejudiced party but a right of recourse is made available to the employer only.<sup>572</sup> Thirdly, at the relevant time when the delict was committed, the employee must have been acting within the course and scope of employment.<sup>573</sup> The employer may escape liability in instances where an employee has not only entirely advanced his/her own interests, but has also disengaged completely from the duties arising out of his/her contract of employment.<sup>574</sup>

In the context of this study, a municipality is held vicariously liable for the delict committed by its employee while acting within the course and scope of employment.<sup>575</sup> For a municipality to be held vicariously liable for its employee's delict, the above three requirements must also be proven.<sup>576</sup>

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<sup>568</sup> Neethling and Potgieter *Law of Delict* 445.

<sup>569</sup> Wagener 2014 *SALJ* 178; Neethling and Potgieter *Law of Delict* 445.

<sup>570</sup> Neethling and Potgieter *Law of Delict* 447.

<sup>571</sup> Botha and Millard 2012 *De Jure* 226.

<sup>572</sup> Neethling and Potgieter *Law of Delict* 447; see also Malatji *The Future of the Common-Law Doctrine of Vicarious Liability* 87-88.

<sup>573</sup> See *LRM v Mnquma Local Municipality* paras 18-19; Neethling and Potgieter *Law of Delict* 447.

<sup>574</sup> *Kasper v Andre Kemp Boerdery* (10879/2006) [2011] ZAWCHC 556 (22 November 2011) para 30.

<sup>575</sup> See *LRM v Mnquma Local Municipality* para 19.

<sup>576</sup> *LRM v Mnquma Local Municipality* paras 18-19.

## 3.5 Delictual liability and the three pillars of the law of delict

### 3.5.1 Introduction

The basic assertion of the law of delict is that damage (harm) rests where it falls, that is, everyone must bear the damage they suffer.<sup>577</sup> For instance, if a person suffers damage as a result of their own conduct, or as a result of an entity which is not a legal subject and thus possesses no *locus standi*, they must bear the damage.<sup>578</sup> Nevertheless, "damage does not always rest where it falls".<sup>579</sup> It could occur that the damage can be attributed to another person and they would instead bear the damage and compensate the prejudiced party for it.<sup>580</sup> In the law of delict, damage that results in delictual liability obliges the wrongdoer to compensate the prejudiced party.<sup>581</sup> The wrongdoer is obliged to compensate for the damage and the prejudiced party has the right to claim the compensation.<sup>582</sup>

In order to establish delictual liability and claim compensation, all the elements (requirements) of a delict must be met.<sup>583</sup> The absence of any one of the elements voids delictual action and consequently voids delictual liability.<sup>584</sup> As a result,

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<sup>577</sup> *Telematrix (Pty) Ltd v Advertising Standards Authority SA* para 12. Reiterated in *Home Talk Development (Pty) Ltd v Ekurhuleni Metropolitan Municipality* para 1; *Edward Nathan Sonnenberg Inc v Judith Mary Hawarden* 2024 (5) SA 9 (SCA) (10 June 2024) para 17.

<sup>578</sup> Entities or factors like fire or lightning are not legal subjects. A legal subject is "any entity that can have rights, duties and capacities". When the law assigns the capacity to have rights, duties and capacities to an entity, the entity is said to possess legal personality. See Heaton *South African Law of Persons* 2. A person is said to possess *locus standi* when they have the "right to sue or be sued in a particular matter", see also Peté *et al Civil Procedure: A Practical Guide* 72.

<sup>579</sup> See *Telematrix (Pty) Ltd v Advertising Standards Authority SA* para 12.

<sup>580</sup> Neethling and Potgieter *Law of Delict* 3; *Telematrix (Pty) Ltd v Advertising Standards Authority SA* para 12.

<sup>581</sup> Neethling and Potgieter *Law of Delict* 3.

<sup>582</sup> Neethling and Potgieter *Law of Delict* 3.

<sup>583</sup> See *Skenjana v Buffalo City Metropolitan Municipality* para 26; *Black v Joffe* para 32; Neethling and Potgieter *Law of Delict* 4.

<sup>584</sup> See *MTO Forestry (Pty) Ltd v Swart NO* para 15; see also *AFA v Blue Crane Route Municipality* (4784/2015) [2017] ZAECHC 86 (11 July 2017) paras 50-57: causation was not established and, therefore, delictual liability was not incurred.

delictual liability is said to be governed by a generalising approach as it is regulated by these general requirements or principles.<sup>585</sup>

Moreover, delictual liability arises from three actions which are considered to be the pillars of the law of the delict: *actio legis Aquiliae*, *actio iniuriarum* and the action for pain and suffering.<sup>586</sup> These actions differ depending on the infringed legally protected interest and they cover the field of delictual liability as a whole as shown below.

### 3.5.2 *Actio legis Aquiliae (aquilian action)*

In this action, damages are claimed as a result of wrongful and culpable (intentional or negligent) damage to property (patrimonial damage).<sup>587</sup> This action is for any claim for compensation as a result of damaged property. The damage to property may be a result of the wrongdoer's wrongful conduct, either intentionally or negligently.<sup>588</sup>

### 3.5.3 *Actio iniuriarum*

This is an action resulting from a wrongful act against a person which resulted in the infringement of his dignity, his person and his reputation.<sup>589</sup> The act must be wrongful, intentional and infringing on a person's personality interests: dignity, privacy or reputation.<sup>590</sup> This action is for compensation in the form of satisfaction for the wrongful and intentional injury to personality.<sup>591</sup> This means that in this action, an intentional, wrongful positive act is required in order to claim damages.

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<sup>585</sup> The general principles apply regardless of the individual interests at issue and how it was infringed. Individual interests such as inventors (governed by the *Patents Act* 57 of 1978) or authors (governed by *Copyright Act* 98 of 1978) are the exceptions in regard to the general principles. See Neethling and Potgieter *Law of Delict* 4.

<sup>586</sup> Neethling and Potgieter *Law of Delict* 5.

<sup>587</sup> Neethling and Potgieter *Law of Delict* 5. See the forms of patrimonial loss in para 3.2.5.1 above.

<sup>588</sup> See para 3.3.3 for fault in the form of intent or negligence.

<sup>589</sup> Negligence is insufficient for liability, see *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (AD) paras 66-67; *NM v Smith* 2007 (5) SA 250 (CC) para 55; see also Neethling and Potgieter *Law of Delict* 15-16.

<sup>590</sup> Neethling and Potgieter *Law of Delict* 15-16.

<sup>591</sup> Neethling and Potgieter *Law of Delict* 5; Visser 2021 *Stell LR* 280.

### 3.5.4 Action for pain and suffering

With regard to this action, compensation is claimed for injury of personality as a result of wrongful and negligent or intentional impairment of physical-mental or bodily integrity.<sup>592</sup> Compensation is claimed for loss or shortened life expectancy, amenities of life and health, emotional shock, psychological or mental injury, pain, suffering and disfigurement that resulted from the wrongdoer's wrongful and negligent or wrongful act.<sup>593</sup>

In the context of this study, these above-mentioned actions can only be instituted if a delict has occurred whereby the wrongdoer, a municipality is obliged to compensate the prejudiced party, a local member. The prejudiced party will have to institute any one of these three actions that may be appropriate if he or she suffers harm because of the wrongful culpable conduct of a municipality. It would depend on whether the municipality's delict led to the prejudiced party's patrimonial loss<sup>594</sup> or injury to personality concerning their reputation<sup>595</sup> or their physical-mental or bodily integrity.<sup>596</sup> It can be said that the actions determine the assessment method to be used in identifying the nature and extent of the damage which can be quantified into the actual amount that will then be awarded to the prejudiced party, provided their claim was successful.

## 3.6 Concluding remarks

The objective of this chapter was to set out the legal framework for the law of delict in South Africa. This was done while considering the potential requirements for the delictual liability of municipalities. The concept of delict was discussed as well as the elements that must be present in order to institute a delictual liability claim. This chapter further explored the three pillars of delictual liability which covers the whole area of the law of the delict. These are three different actions which can be instituted

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<sup>592</sup> Neethling and Potgieter *Law of Delict* 5-6.

<sup>593</sup> Neethling and Potgieter *Law of Delict* 17.

<sup>594</sup> See the case of *Cobra Towing CC v Mangaung Metropolitan Municipality*. See a detailed discussion in chap 4 below.

<sup>595</sup> *Schoeman v Rustenburg Local Municipality*. See more details in chap 4 below.

<sup>596</sup> See the case of *DB v City of Cape Town*.

by the prejudiced party for damages suffered for a delict committed by the wrongdoer. This is because the law of delict determines people's interests that are legally protected, the instances in which they are protected against infringement as well as how the balance can be restored after infringement.<sup>597</sup>

With regard to municipalities, any conduct that cannot be attributed to a specific employee based on vicarious liability or a specific service provider is still considered the conduct of that relevant municipality if it falls within a municipality's powers, functions and competences.<sup>598</sup> Where a delict occurs as a result, legal proceedings are instituted against the relevant municipality in its own capacity and liability is incurred by that municipality in its own capacity.<sup>599</sup>

In determining whether that conduct is wrongful, it must be determined whether the prejudiced party's interests were infringed in a legally reprehensible manner, a manner that is contrary to the *boni mores*.<sup>600</sup> Since a lot of municipality cases consist of an omission as a type of conduct at issue, it is important to determine the instances in which an omission is wrongful.<sup>601</sup> A municipality's omission is wrongful when there is a legal duty on the municipality to positively act in preventing the harm.<sup>602</sup> There are instances where the courts are hesitant to accept omission as a type of conduct, to prevent burdening the municipalities as well as the opening of floodgates of claims.<sup>603</sup> There are instances where omission as a type of conduct is *prima facie* presumed wrongful.<sup>604</sup> This is where a pre-existing duty is already present and these are prior conduct, control of a dangerous object, knowledge and foresight of possible harm, rule of law, special relationship between parties and the danger of limitless liability.<sup>605</sup> However, before these duties are imposed on municipalities, it must be clear that they will not burden municipalities financially or

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<sup>597</sup> Neethling and Potgieter *Law of Delict* 3.

<sup>598</sup> See para 3.2.1 above.

<sup>599</sup> See para 3.2.1 above.

<sup>600</sup> See para 3.2.2 above.

<sup>601</sup> See the cases in chap 4 below.

<sup>602</sup> See para 3.2.2.2 above.

<sup>603</sup> See para 3.2.2.2 above.

<sup>604</sup> See para 3.2.2.2 above.

<sup>605</sup> These are only relevant to municipalities.

otherwise and that the imposition would not open floodgates of claims against municipalities.<sup>606</sup> This notion is in alignment with section 152(2) of the *Constitution* by taking into consideration the financial and administrative capacity of municipalities before the imposition of any duties. Furthermore, where a duty comes from a certain statute, it must be taken into account that the duties from that statute are not always private law duties calling for delictual claims.<sup>607</sup> It must first be determined if it qualifies as a private law duty, and this is why one of the other factors must at least be present as they can easily establish private law duties.<sup>608</sup> The provisions of other statutes only serve as supporting duties after the establishment of a private law duty.

After it has been established that the conduct is wrongful, the municipality's blameworthiness has to be established; the municipality's intent or negligence.<sup>609</sup> Where intent is at issue, it must be proven that the municipality directed their will towards that certain result while being conscious of the wrongfulness of its conduct.<sup>610</sup> To establish the municipality's negligence, it must be clear that its conduct failed to adhere to the standard required by the law when executing its duties.<sup>611</sup> Therefore, the standard would be what a reasonable municipality under those similar circumstances would have done to prevent the occurrence of the harm if that harm was reasonably foreseen and reasonably preventable. Also, there is contributory fault where a municipality and prejudiced party are partly at fault.<sup>612</sup> With regard to the two approaches followed when reducing the damages, municipalities usually apply the approach followed in the *Smit* case.<sup>613</sup> The approach briefly establishes that determining the deviation of the prejudiced party, automatically determines the deviation of a municipality.<sup>614</sup> Only contributory

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<sup>606</sup> See para 3.2.2 above.

<sup>607</sup> See para 3.2.2.2.4 above.

<sup>608</sup> See para 3.2.2.2.4 above.

<sup>609</sup> See para 3.2.3 above.

<sup>610</sup> See para 3.2.3.1 above.

<sup>611</sup> See para 3.2.3.2 above.

<sup>612</sup> See para 3.3.3.3 above.

<sup>613</sup> See para 3.3.3.3 above.

<sup>614</sup> See para 3.3.3.3 above.

negligence has been raised as a defence by municipalities. However, contributory intent as a defence has not been raised in municipal delictual liability cases.<sup>615</sup>

After the legal blameworthiness has been established, the wrongful conduct must be linked to the damage before liability can be incurred. Causation can be established through factual and legal causation.<sup>616</sup> Factual causation is purely a question of fact whether or not that damage was caused by that wrongful culpable conduct.<sup>617</sup> The second enquiry is legal causation, where liability can only be incurred if the damage falls within the limits of the municipality's liability, the damage must not be too remote.<sup>618</sup>

After causation, damage must be established to determine the interests that were detrimentally impacted so that the prejudiced party can be compensated.<sup>619</sup> Whether patrimonial loss or non-patrimonial loss occurred determines the method to assess the damages.<sup>620</sup> The infringed legally protected interest also determines the type of action to be instituted.<sup>621</sup> This chapter laid the legal framework of the law of delict while taking into consideration municipalities. Chapter 4 below analyses how the courts applied the law in municipal cases by evaluating and reviewing selected cases.

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<sup>615</sup> See para 3.3.3.3 above.

<sup>616</sup> See para 3.2.4 above.

<sup>617</sup> See para 3.2.4.1 above.

<sup>618</sup> See para 3.2.4.2 above.

<sup>619</sup> See para 3.2.5 above.

<sup>620</sup> See para 3.2.5 above.

<sup>621</sup> See para 3.5 above.

## **CHAPTER 4 REVIEW AND EVALUATION OF SELECTED CASE LAW REGARDING DELICTUAL LIABILITY OF SOUTH AFRICAN MUNICIPALITIES**

### **4.1 Introduction**

As stated in the previous chapter, private law regulates relations between individuals in a community.<sup>622</sup> If people lived in complete harmony, a legal order would not be necessary.<sup>623</sup> However, the interests of individuals are "continually in a state of real or threatened conflict".<sup>624</sup> The function of private law is to recognise those interests, delimit them in their relations to each other and harmonise conflicting ones.<sup>625</sup> It is the law of delict that determines the interests protected by the law, the circumstances under which they are protected against infringement, and how to restore a disturbed harmonious balance of those interests.<sup>626</sup> Chapter 3 of this dissertation laid down the theoretical framework for the law of delict. It explained the evolution of the law of delict in South Africa and the general principles that have been applied by the courts. Against that backdrop, this chapter analyses how the courts apply those general principles in municipal delictual liability claims.

As indicated in 1.4, even though the HC and the SCA have specifically entertained delictual claims against municipalities, none of the cases have reached the Constitutional Court. For this reason, the researcher analyses the jurisprudence of these superior courts (SCA and HC). The cases are selected based on their relevance and usefulness to this study in illustrating how the courts apply the law of delict in delictual claims against municipalities. Lessons that emerge from this exercise should be able to guide municipalities and potential litigants. The lessons that could be drawn from these cases should assist in establishing the standard that municipalities must adhere to when executing their developmental duties towards

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<sup>622</sup> See para 3.1 above.

<sup>623</sup> Neethling and Potgieter *Law of Delict* 3.

<sup>624</sup> See para 3.1 above.

<sup>625</sup> See para 3.1 above.

<sup>626</sup> See para 3.1 above.

local communities. The cases are also used to demonstrate what potential litigants need to prove in delictual claims against municipalities. For this purpose, the review of each case begins with a brief narration of the facts and issues in dispute, followed by a summary of the judgment and reasoning of the court. The review of each case ends with an analysis of the identified lessons.

## 4.2 SCA cases

### 4.2.1 *Municipality of Cape Town v Bakkerud*<sup>627</sup>

#### 4.2.1.1 Facts and legal issues

In this matter, an elderly lady stepped into a hole while walking along a street pavement and sustained injuries as she stumbled and fell.<sup>628</sup> There were two holes in the tarred pavement for six months.<sup>629</sup> Although she was aware of the holes, she was preoccupied with other thoughts when stepping into one and falling.<sup>630</sup> A few days after the incident, the municipality repaired the holes in the pavement. This was before the case went to court.<sup>631</sup> It is important to note that the relevant applicable legislation at the time only empowered but did not oblige municipalities to construct, maintain and repair streets as well as pavements within their jurisdictions.<sup>632</sup> As a result, municipalities enjoyed immunity against actions resulting from streets that were not properly constructed.<sup>633</sup>

The matter started in the MC, where the elderly lady claimed damages to which the Municipality raised a defence of contributory negligence on her part.<sup>634</sup> The lady's claim for damages was upheld by the Court but the Court did not make any finding on the possible contributory negligence.<sup>635</sup>

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<sup>627</sup> *Municipality of Cape Town v Bakkerud* [2000] 3 All SA 171 (A) (hereafter *Bakkerud* case).

<sup>628</sup> *Bakkerud* case para 2.

<sup>629</sup> *Bakkerud* case para 2.

<sup>630</sup> *Bakkerud* case para 2.

<sup>631</sup> *Bakkerud* case para 2.

<sup>632</sup> See s 24(1) of *Ordinance 2 (Private)* of 1906; *Bakkerud* case para 2.

<sup>633</sup> See s 24(1) of *Ordinance 2 (Private)* of 1906. See also *Johannesburg Municipality v Halliwell* [1912] ZATPD 83 (4 July 1912) 593.

<sup>634</sup> *Bakkerud* case para 3.

<sup>635</sup> *Bakkerud* case para 3.

As a result, the Municipality then appealed to the Cape Provincial Division of the HC. The Court reviewed relevant applicable legislation and earlier case law which afforded municipalities immunity because they were not obliged to build and maintain streets and pavements but only empowered them to do so.<sup>636</sup> The Court held that those cases were no longer authoritative in light of subsequent decisions made by the Court from 1957 to 1996 concerning omissions.<sup>637</sup> The Court held that the earlier municipal cases were inconsistent with the legal convictions of the time when the old lady got injured.<sup>638</sup> The legal convictions required municipalities to keep streets and pavements safe.<sup>639</sup> Therefore, failure to do so was wrongful.<sup>640</sup>

The Court concluded that fault accompanied the failure in this matter.<sup>641</sup> It also indicated that, when considering whether or not fault could be attributed to a municipality, it has to be reasonable to do so, and all factors must be considered, including financial constraints or otherwise.<sup>642</sup> The Court concluded that since the Municipality was able to fix the holes a few days after the incident, there were no such constraints.<sup>643</sup> The Court held that since no explanation was provided as to why the repairs were not effected earlier, it could not go against the MC's finding that the Municipality was negligent.<sup>644</sup> The Court upheld the Municipality's defence of contributory negligence and found that the lady was also negligent.<sup>645</sup> The Court reduced the damages awarded from R1500 to R750.<sup>646</sup>

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<sup>636</sup> *Bakkerud* case para 3. The cases were: "*Haliwell v Johannesburg Municipal Council* 1912 AD 659; *Municipality of Bulawayo v Stewart* 1916 AD 357; *Cape Town Municipality v Clohessy* 1921 AD 4; *De Villiers v Johannesburg Municipality* 1926 AD 401; *Moulang v Port Elizabeth Municipality* 1958 (2) SA 518 (A)".

<sup>637</sup> The subsequent decisions were: "*Silva's Fishing Corporation (Pty) Ltd v Maweza* 1957 (2) SA 256 (A); *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A); *Minister of Forestry v Quathlamba (Pty) Ltd* 1973 (3) SA 69 (A); *Minister van Polisie v Ewels* 1975 (3) SA 590 (A); *Van der Merwe Burger v Munisipaliteit van Warrenton* 1987 (1) SA 899 (NC); *Rabie v Kimberley Munisipaliteit en 'n Ander* 1991 (4) SA 243 (NC); *Butters v Cape Town Municipality* 1996 (1) SA 473 (C)".

<sup>638</sup> *Bakkerud* case paras 3-4.

<sup>639</sup> *Bakkerud* case para 4.

<sup>640</sup> *Bakkerud* case para 4.

<sup>641</sup> *Bakkerud* case para 4.

<sup>642</sup> *Bakkerud* case para 4.

<sup>643</sup> *Bakkerud* case para 5.

<sup>644</sup> *Bakkerud* case para 5.

<sup>645</sup> *Bakkerud* case para 6.

<sup>646</sup> *Bakkerud* case para 6.

Unhappy with the outcome, the Municipality appealed to the SCA with leave of the HC.<sup>647</sup> Leave to appeal was granted because of the importance of the legal principle concerning the imposition of a legal duty on the Municipality to repair pavements and streets.<sup>648</sup> The main issue in the SCA was whether the Municipality should be held liable for its omission to repair and maintain pavements and roads even though the legislation at that time did not establish such a duty.<sup>649</sup> In doing so, the Court considered the idea of municipal immunity and had to review it.<sup>650</sup>

#### 4.2.1.2 Decision and reasoning of the judgment

The Court established that a legal duty existed and the failure to execute it was blameworthy.<sup>651</sup> In reaching the judgment, the Court considered liability for omissions where it expressed that society is hesitant to impose liability for "minding one's own business".<sup>652</sup> It is hesitant because of its apprehension regarding the consequences that would result from the conversion of moral or ethical obligations into legal duties.<sup>653</sup> Society does not want to live in a potentially demanding and burdensome legal regime concerning delictual omissions.<sup>654</sup> This is why the courts developed techniques to determine when legal duties should exist.<sup>655</sup> When it comes to moral and ethical obligations, the Court expressed that they will metamorphose into legal duties when legal convictions of the relevant community demand the omission to be regarded as unlawful.<sup>656</sup>

The Court evaluated previous municipal cases that involved incidents that resulted from unrepaired roads and pavements and stated that they addressed some issues

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<sup>647</sup> *Bakkerud* case para 6.

<sup>648</sup> *Bakkerud* case para 6.

<sup>649</sup> *Bakkerud* case para 32.

<sup>650</sup> *Bakkerud* case paras 7-31. See also *Boshoff v City of Cape Town* para 32.

<sup>651</sup> *Bakkerud* case paras 32-33. See Scott 2008 *Obiter* 275.

<sup>652</sup> *Bakkerud* case para 8.

<sup>653</sup> *Bakkerud* case para 10.

<sup>654</sup> *Bakkerud* case para 10.

<sup>655</sup> See the factors in para 3.2.2.2 above.

<sup>656</sup> It must be taken into account that the legal convictions of the community are constantly changing to keep up with the changing community values and needs. See *Bakkerud* case para 14; *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* para 32; Scott 2008 *Obiter* 276.

but left out some.<sup>657</sup> This was because they proceeded from the premise that liability for omissions in negligence was only recognised exceptionally, particularly when there was a previous commission on the wrongdoer's part.<sup>658</sup> In doing so, they hindered the courts from enquiring whether the legal convictions of the community demand a legal duty to repair or warn in the absence of a legislative imposed duty or prior commission.<sup>659</sup> The Court expressed that where a test of legal convictions of the community is applied to reach a conclusion, those will not be principles of law that will be applied generally, it would be value judgments made *ad hoc*.<sup>660</sup> As a result, the Court held that the HC was wrong in substituting a blanket imposition on municipalities generally of a legal duty to repair roads and pavements.<sup>661</sup>

The Court held that there cannot be a principle of law in which municipalities have legal duties all the time to repair or warn the public of potholes in pavements or streets within their jurisdiction.<sup>662</sup> In a case where a municipality is small and underfunded, with less used streets of visible small potholes which can be avoided by reasonably looking out, there might not be a legal duty to repair them or even warn the public of their presence.<sup>663</sup> In cases where a municipality is large and well-funded, with much-used streets of substantial potholes in size and depth, there might be a legal duty to repair or barricade or at least warn the public of them.<sup>664</sup> This is because man-made streets as well as pavements will not always be in the best condition as they were when first constructed and it would be highly impossible even for the largest and well-funded municipalities to always keep them in that

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<sup>657</sup> *Bakkerud* case paras 20-26.

<sup>658</sup> *Bakkerud* case para 25. See *Moulang v Port Elizabeth Municipality* 1958 (2) SA 518 (A) 522 H.

<sup>659</sup> *Bakkerud* case para 25. See more on prior conduct in para 3.2.2.2.1 above.

<sup>660</sup> *Bakkerud* case para 27. See also *Skenjana v Buffalo City Metropolitan Municipality* para 22; *SMS v City of Johannesburg Metropolitan Municipality* para 13; *Du Plessis v Nelson Mandela Metropolitan Municipality* para 18.

<sup>661</sup> *Bakkerud* case para 27.

<sup>662</sup> *Bakkerud* case para 28. See also *City of Cape Town v Mtyido* para 33; Scott 2008 *Obiter* 279.

<sup>663</sup> *Bakkerud* case para 28. See also Scott 2008 *Obiter* 279.

<sup>664</sup> *Bakkerud* case paras 28,30. See also Scott 2008 *Obiter* 279.

condition.<sup>665</sup> The members of the public were informed to realise this so that they care for their own safety when they use roads and pavements.<sup>666</sup>

In determining when a legal duty may be imposed on a municipality, the Court expressed that the prejudiced party must place before a court sufficient and reliable evidence for it to conclude that a legal duty to repair or warn should be held to have existed.<sup>667</sup> Secondly, the prejudiced party must also prove that the failure to fulfil that duty is attributable to culpa, blameworthiness.<sup>668</sup> Placing the onus on the prejudiced party would prevent the opening of the floodgates of claims which is feared by municipalities.<sup>669</sup>

Taking into consideration the facts of this case, the Court established that the place where the elderly woman sustained injuries is a densely populated suburb, which could also mean that the pavement was constantly used.<sup>670</sup> The Court also established that the two holes were substantial in depth, close to each other and had been there for six months.<sup>671</sup> The Court further held that, unless the municipal immunity was reaffirmed, the Municipality had accepted that it would be liable.<sup>672</sup> The Municipality's appeal was dismissed.<sup>673</sup>

#### 4.2.1.3 Lessons from the *Bakkerud* case

Firstly, the judgment from the case indicates that the courts have moved away from the prior position where municipalities enjoyed a general immunity from delictual liability from harm resulting from poor roads or pavements.<sup>674</sup> In this case, an

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<sup>665</sup> *Bakkerud* case para 29. See also *City of Cape Town v Mtyido* para 33; Scott 2008 *Obiter* 279-280.

<sup>666</sup> *Bakkerud* case para 29. See also *City of Cape Town v Mtyido* para 33; *Messina v City of Ekurhuleni Metropolitan Municipality* para 19.

<sup>667</sup> *Bakkerud* case para 31; see also *SMS v City of Johannesburg Metropolitan Municipality* para 11; Scott 2008 *Obiter* 280.

<sup>668</sup> *Bakkerud* case para 31. See also *SMS v City of Johannesburg Metropolitan Municipality* para 11; Scott 2008 *Obiter* 280.

<sup>669</sup> *Bakkerud* case para 31; *SMS v City of Johannesburg Metropolitan Municipality* para 11; Scott 2008 *Obiter* 280.

<sup>670</sup> *Bakkerud* case para 32.

<sup>671</sup> *Bakkerud* case para 32.

<sup>672</sup> *Bakkerud* case para 32.

<sup>673</sup> *Bakkerud* case paras 32-33. See Scott 2008 *Obiter* 275.

<sup>674</sup> See also *Skerjana v Buffalo City Metropolitan Municipality* para 20.

omission as a type of conduct was at issue.<sup>675</sup> For an omission to be wrongful, legal convictions of the community must demand for it to be regarded as such. However, it had to be decided in this case whether there is a blanket imposition on municipalities generally of a legal duty to repair roads and pavements at all times even though the legislation did not oblige them. As can be learned from the case, legal convictions would determine whether a municipality was expected to repair that road or pavement in the absence of such obligation. The legal convictions may include whether a municipality is small and underfunded or large and well-funded. A municipality that generates sufficient revenue that is mismanaged may not dispel the legal conviction of its residents that it ought to have maintained roads. The legal convictions may also be informed by whether the potholes are small or shallow or they are substantial in size and depth. However, these principles of law are not generally applicable, they are relevant and applicable to the matter before a court. They will also continuously adapt to new circumstances as legal convictions of the community adapt as well.<sup>676</sup> As a result, no immunity would be afforded to municipalities anymore, the legal convictions of the communities they serve would now determine whether they are delictually liable or not.

Additionally, the judgment set a precedent for delictual claims against municipalities for harm sustained as a result of poor roads and pavements and it is still applicable.<sup>677</sup> There are two enquiries that a potential litigant would have to adduce sufficient evidence to prove to claim damages. Firstly, he/she must provide sufficient evidence before the court for it to conclude that a legal duty to repair or warn should have existed in accordance with the current legal convictions of the community. Secondly, he/she must prove that a municipality's failure to repair or warn the public is blameworthy and attributable to culpa under those circumstances. Also, it is important to note that the first enquiry relates to wrongfulness, when there is an

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<sup>675</sup> See more on "omissions" in para 3.2.1 above.

<sup>676</sup> See "legal convictions of the community" in para 3.2.2.

<sup>677</sup> See *Botes v Ekurhuleni Metropolitan Municipality* paras 26,28. In para 24, it was further held that the admission of a legal duty by a municipality does not automatically render the municipality liable for failing to fulfil that duty. Few cases that cited the *Bakkerud* case: *Skenjana v Buffalo City Metropolitan Municipality* paras 19-20; *SMS v City of Johannesburg Metropolitan Municipality* paras 11,13; *Boshoff v City of Cape Town* paras 32-34.

unreasonable failure to act positively to prevent harm while there is a legal duty, that omission is wrongful.<sup>678</sup> The second enquiry relates to fault, it must be proved that the wrongful omission is blameworthy.<sup>679</sup> It becomes easier to prove causation when some elements are already present or proven. It must only be proved that if it was not for the wrongful omission, the harm could not have ensued and that the conduct is sufficiently closely linked to the harm.<sup>680</sup> The harm would be the main reason the matter is before the court and for which damages are sought.<sup>681</sup>

In placing the onus on potential litigants to establish the two enquiries, the courts are attempting to prevent limitless liability against municipalities as well as to avoid burdening municipalities, financially or otherwise. However, these are important factors that would influence whether the claim is successful or not as they directly relate to the two delictual elements of wrongfulness and fault. This shows that a municipality is only required to act reasonably considering its capacity, financially or otherwise.

Moreover, the previous legislation, *Ordinance 2 (Private)* of 1906 only empowered but did not impose legal duties on municipalities to construct, maintain and repair streets and pavements. However, the situation is currently slightly different as municipalities are obliged by provisions from the *Constitution* and *Systems Act* to provide a safe and healthy environment for local communities. This includes the construction and maintenance of roads and pavements. In instances where harm occurs, these duties will be considered under the factor of rule of law in the element of wrongfulness to determine whether a legal duty to prevent harm existed. As stated already and as seen in the case of *Sinukela v King Sabata Dalindyebo Municipality*,<sup>682</sup> statutory provisions are considered amongst other factors because they do not give rise to legal duties on their own.<sup>683</sup> Not every statutory duty is a

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<sup>678</sup> See "wrongfulness" in para 3.2.2 above.

<sup>679</sup> See "fault" in para 3.2.3 above.

<sup>680</sup> See "causation" in para 3.2.4 above.

<sup>681</sup> See "damage" in para 3.2.5 above.

<sup>682</sup> (3123/17) [2019] ZAECMHC 27 (4 June 2019). See more details in para 4.4 below. See also the "rule of law" in para 3.2.2.2.4 above.

<sup>683</sup> See the "rule of law" in para 3.2.2.2.4 above.

private law duty, and the breach of that duty does not automatically give rise to a delictual claim.<sup>684</sup> They are considered against the legal convictions of the community and a potential litigant may use them to support the existence of a legal duty in the first enquiry. They are also considered against the fear of limitless liability and the capacity of the relevant municipality, financial or otherwise.<sup>685</sup>

#### 4.2.2 *Lucas v Umhlathuze Municipality*<sup>686</sup>

##### 4.2.2.1 Facts and legal issues

In this matter, a child died as a result of a fatal electrocution after she climbed onto a metal cage enclosing an electrical distribution kiosk.<sup>687</sup> The distribution kiosk, which reticulated electricity, was installed by the body corporate and, therefore, belonged to it.<sup>688</sup> The Umhlathuze Municipality installed prepaid meters in the kiosks to regulate payment.<sup>689</sup> The Municipality supplied electricity to the body corporate that was responsible for reticulating the electricity to various sections.<sup>690</sup> Thereafter, the body corporate installed metal cages over the kiosks and the cages had legs that penetrated the ground to give the cage some stability, but they were not secured to the ground with any concrete.<sup>691</sup> To safeguard the infrastructure against vandalism as well as to prevent interference with the prepaid meters that were within the kiosk, the Municipality installed locks on the cages.<sup>692</sup> In this incident, one of the cage legs made contact with the copper coil of an underground cable which was connected to the distribution kiosk, but the cage was not earthed, and that is how the cage leg was electrified.<sup>693</sup> It is important to note that the body corporate was the developer and manager of the scheme and it reticulated electricity to

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<sup>684</sup> See the "rule of law" in para 3.2.2.2.4 above.

<sup>685</sup> See more on "limitless liability" in para 3.2.2.2.6 above.

<sup>686</sup> *Lucas v Umhlathuze Municipality* (785/2020) [2021] ZASCA 181 (17 December 2021) (hereafter *Lucas case*).

<sup>687</sup> *Lucas case* para 2.

<sup>688</sup> *Lucas case* para 3.

<sup>689</sup> *Lucas case* para 3.

<sup>690</sup> *Lucas case* para 3.

<sup>691</sup> *Lucas case* para 4.

<sup>692</sup> *Lucas case* para 4.

<sup>693</sup> *Lucas case* para 4.

various sections within the scheme, so it was merely serving its residents.<sup>694</sup> The Municipality supplied electricity to the body corporate, of which the body corporate reticulated the electricity to the residents.<sup>695</sup>

The appellants initially claimed damages for emotional shock from both the municipality and the body corporate, jointly and severally.<sup>696</sup> It was alleged that they both failed to ensure proper maintenance of the metal cage as well as making sure that it did not pose a danger to the public and that they failed to fulfil their "duty of care".<sup>697</sup> Before the case could go on trial, the body corporate and appellants concluded a settlement agreement between them but the appellants nevertheless proceeded with their claim against the Municipality.<sup>698</sup> The matter began in the HC, where the issue was whether the Municipality, in placing a lock on the cage assumed a legal duty to ensure the safety of the cage.<sup>699</sup> The claim against the Municipality was dismissed.<sup>700</sup> The HC held that affixing locks was not considered wrongful and the Municipality was not negligent.<sup>701</sup> The parents, who are the appellants in this Court then launched an appeal against the HC judgment at the SCA.<sup>702</sup> Before the SCA, the issue was whether, in placing locks on the metal cages, a duty to ensure the safety of the cage and kiosk was assumed by the Municipality and whether the failure to execute the duty was negligent.<sup>703</sup>

#### 4.2.2.2 Decision and reasoning of the judgment

The appellants relied on section 25 of the *Electricity Regulation Act 4* of 2006 and argued that it provided for presumed negligence on the part of the Municipality and

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<sup>694</sup> *Lucas* case paras 2-3.

<sup>695</sup> *Lucas* case para 3.

<sup>696</sup> *Lucas* case para 2.

<sup>697</sup> *Lucas* case para 2.

<sup>698</sup> *Lucas* case para 2.

<sup>699</sup> *Lucas* case para 5.

<sup>700</sup> *Lucas* case paras 1, 5.

<sup>701</sup> *Lucas* case para 5.

<sup>702</sup> *Lucas* case para 1.

<sup>703</sup> *Lucas* case para 6.

that the onus was on the municipality to discharge it.<sup>704</sup> The Municipality is a licensee in terms of the Act and it had distributed electricity to the scheme.<sup>705</sup> The Court had to consider the Municipality's presumed negligence and evaluate the conduct using the test for negligence as set out in the case of *Kruger v Coetzee*.<sup>706</sup> In applying the test to the case, the Court asked whether the Municipality should have foreseen the reasonable possibility of the metal cage causing harm, whether a reasonable person in their position would have taken adequate reasonable steps to guard against the harm, and whether they failed to take the steps.<sup>707</sup> The Court held that negligence could not be ascribed to the Municipality because it could not have reasonably foreseen the possibility of the cage causing harm and dismissed the appeal.<sup>708</sup>

The Court expressed that the Municipality did not install the cage and did not approve the design or the installation of the cage, it was designed and installed at the body corporate's instance.<sup>709</sup> What the Municipality did was to only safeguard its infrastructure, the meters it installed in the kiosk against vandalism.<sup>710</sup> The Court further evaluated the responsibilities of both the body corporate and the Municipality as well as their conduct when carrying out those responsibilities.<sup>711</sup> It expressed that section 3(1) of the *Sectional Titles Schemes Management Act* 8 of 2011 (hereafter the *Sectional Titles Act*) imposed specific and extensive duties on the body corporate to maintain common property.<sup>712</sup> Those specific and extensive duties did not extend to the local municipality.<sup>713</sup>

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<sup>704</sup> The section provides: "Liability of licensee for damage or injury – In any civil proceedings against a licensee arising out of damage or injury caused by induction or electrolysis or in any other manner by means of electricity generated, transmitted or distributed by a licensee, such damage or injury is deemed to have been caused by the negligence of the licensee, unless there is credible evidence to the contrary". See more on "statutory presumption of negligence" in para 3.3.3.4 above.

<sup>705</sup> *Lucas* case para 8.

<sup>706</sup> *Kruger v Coetzee* 1966 2 SA 428 (A) 430E-G. See more on the "test of negligence" in para 3.2.3.2 above. *Lucas* case paras 9-10.

<sup>707</sup> *Lucas* case para 10.

<sup>708</sup> *Lucas* case paras 18-20.

<sup>709</sup> *Lucas* case para 13.

<sup>710</sup> *Lucas* case para 13.

<sup>711</sup> *Lucas* case paras 3-5, 9-18.

<sup>712</sup> *Lucas* case paras 14-15.

<sup>713</sup> *Lucas* case para 15.

The Court further referenced the city's by-laws where section 39 of their *Electricity Supply By-laws* provided that the erection and maintenance of the electrical installation is the body corporate's duty.<sup>714</sup> The fact that after the incident, the body corporate instructed its electrician to earth the cage as well as the kiosk was an acknowledgement of that duty and that was consistent with the By-law.<sup>715</sup> It expressed that the Municipality's role was to distribute electricity to the body corporate's premises and it had to safeguard its infrastructure to enable it to carry out its function.<sup>716</sup> Ensuring safe installation and the safety of the kiosk as well as the metal cage laid with the body corporate in terms of the *Sectional Titles Act* and the By-laws.<sup>717</sup>

As a result, negligence could not be ascribed to the municipality because it could not have reasonably foreseen the possibility of the cage causing harm as it could not be detected by merely looking at the cage, and it did not design, construct or was in any way responsible for the maintenance of the kiosk.<sup>718</sup> The ground around the cage had to be excavated to find out if the metal cage came in contact with the power cable that electrified the cage.<sup>719</sup> It would be assumed that anyone with knowledge of electricity would earth the metal cage when putting it around an electrical cubicle as this is also a statutory requirement.<sup>720</sup> Therefore, this was the body corporate's responsibility and not the Municipality's.

#### 4.2.2.3 Lessons from the *Lucas* case

As seen in 2.5 above, a municipality can use an external mechanism to provide services. Where a municipality is working with an external service provider to execute its duties, and where harm occurs as a result, liability will not automatically be incurred by a municipality. As seen in the case, there are instances where municipalities work with other service providers to execute their duties towards the

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<sup>714</sup> *Lucas* case para 15.

<sup>715</sup> *Lucas* case para 15.

<sup>716</sup> *Lucas* case para 16.

<sup>717</sup> *Lucas* case para 16.

<sup>718</sup> *Lucas* case paras 18-19.

<sup>719</sup> *Lucas* case para 18.

<sup>720</sup> *Lucas* case para 18.

public. It might be unclear who can be held delictually liable, especially when the service appears to fall directly within the powers, functions and competences of municipalities. However, when determining the inference of liability, both the conduct and subsequent responsibilities of a municipality and the service provider are considered. Their conduct is considered according to their responsibilities arising from the relevant legislative (or contractual) standards in reference to the occurred damage. The relevant legislative standards depend on the service at issue, and these can vary from case to case. A municipality would only be liable to the extent that it was directly involved and responsible for the execution of the duty. The courts evaluate whether a municipality executed its duties in a way that is objectively reasonably required according to the relevant legislative or contractual standards governing the provision of that service.

#### 4.2.3 *Bergrivier Municipality v Van Ryn Beck*<sup>721</sup>

##### 4.2.3.1 Facts and legal issues

In this case, the prejudiced party's house flooded three times in successive two-year intervals, in 2007, 2009 and 2011.<sup>722</sup> The Bergrivier Municipality's storm-water drainage system was ineffective and inadequate to deal with the volume of water and damaged the respondent's property.<sup>723</sup> The prejudiced party sought compensation for damages that were caused by the 2011 flooding.<sup>724</sup> The Municipality only effected substantial changes to the drainage system after the 2011 flooding.<sup>725</sup>

The case began in the MC, where the Municipality was absolved from liability because the prejudiced party had failed to discharge the onus of establishing the existence of a legal duty and the Municipality's negligent breach of that duty.<sup>726</sup> The

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<sup>721</sup> *Bergrivier Municipality v Van Ryn Beck* 2019 (4) SA 127 (SCA) (hereafter *Bergrivier Municipality case*).

<sup>722</sup> *Bergrivier Municipality case* paras 1,8.

<sup>723</sup> *Bergrivier Municipality case* paras 1,18.

<sup>724</sup> *Bergrivier Municipality case* paras 1, 42.

<sup>725</sup> *Bergrivier Municipality case* paras 19,32.

<sup>726</sup> *Bergrivier Municipality case* para 3.

Court held that the prejudiced party failed to provide sufficient evidence, with measurements and informed estimations, that the measures suggested were going to prevent the damage to the property or at least lessen it.<sup>727</sup> It was held that the prejudiced party failed to establish that the Municipality could have effectively averted the harm by relatively cheap means.<sup>728</sup>

The prejudiced party appealed to the Western Cape Division of the HC which overturned the MC's order and held the Municipality liable.<sup>729</sup> The Court held that the first two floods were enough for the Municipality to prevent the 2011 flooding as they indicated that the drainage system was inadequate.<sup>730</sup> It held that the evidence adduced by the prejudiced party was enough to establish a legal duty and that the failure to prevent the damage was negligent.<sup>731</sup> It further expressed that the measures taken after the 2011 flooding should have been taken after the 2009 flooding.<sup>732</sup> The Municipality then appealed to the SCA to overturn the judgment. The SCA had to decide whether the Municipality should be held delictually liable for damages sustained by the prejudiced party as a result of the 2011 flooding of his property.<sup>733</sup>

#### 4.2.3.2 Decision and reasoning of the judgment

The Court upheld the appeal and set aside the order of the HC.<sup>734</sup> With regard to the issue of negligence, the Court analysed the reasonable foreseeability and reasonable preventability of the harm.<sup>735</sup> The SCA held that because there was no reliable data relating to the nature and intensity of the 2011 storm, there was no way to know the type or extent of the storm-water drainage system required to avert the effects of the floods in question.<sup>736</sup> Statistical and other evidence was

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<sup>727</sup> *Bergrivier Municipality* case para 4.

<sup>728</sup> *Bergrivier Municipality* case para 4.

<sup>729</sup> *Bergrivier Municipality* case para 5.

<sup>730</sup> *Bergrivier Municipality* case para 37.

<sup>731</sup> *Bergrivier Municipality* case para 40.

<sup>732</sup> *Bergrivier Municipality* case para 40.

<sup>733</sup> *Bergrivier Municipality* case para 2.

<sup>734</sup> *Bergrivier Municipality* case para 55.

<sup>735</sup> *Bergrivier Municipality* case paras 48-49.

<sup>736</sup> *Bergrivier Municipality* case paras 46, 47 and 49.

limited and could not indicate whether the improvements made after the 2011 flood could have averted the damage of the floods on any of those three occasions.<sup>737</sup> In consideration of these unknown circumstances, the Court held that the prejudiced party failed to address what could have been reasonably foreseen and what reasonable steps could have been taken to guard against the flooding.<sup>738</sup> It held that the prejudiced party did not address these questions and, therefore, negligence could not be established.<sup>739</sup>

The SCA affirmed that when it comes to the issue of wrongfulness, omission is regarded as wrongful conduct when the legal convictions of the community demand that the omission should be regarded as wrongful in light of the circumstances of the case.<sup>740</sup> The Court inquired whether the legal convictions of the community would compel the inference of liability on the municipality considering that it is restricted by budgetary and sociological concerns.<sup>741</sup> The Court considered the limited budget of the municipality as well as its greater need to deal with the predicament of informal settlement communities which were more susceptible to the effects of the floods.<sup>742</sup> The Court reasoned that such concerns cannot be dismissed.<sup>743</sup> It also stated that this should not be perceived as though municipalities are given a licence to ignore the fulfilment of their obligations and justify that by asserting budgetary constraints.<sup>744</sup> The Court then held that legal convictions of the society cannot compel the conclusion of holding the Municipality liable.<sup>745</sup>

For causation, the Court held that the prejudiced party had failed to show that the municipality could have improved the storm-water drainage system in a way that would have averted the flood by relatively cheap means.<sup>746</sup> The Court expressed that

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<sup>737</sup> *Bergrivier Municipality* case para 47.

<sup>738</sup> *Bergrivier Municipality* case para 49.

<sup>739</sup> *Bergrivier Municipality* case para 49.

<sup>740</sup> *Bergrivier Municipality* case para 50. See *Loureiro v Imvula Quality Protection (Pty) Ltd* para 34; *Paixão v Road Accident Fund* para 13; *DE v RH* para 51; *Telematrix (Pty) Ltd v Advertising Standards Authority SA* para 13; see also para 3.2.2 above.

<sup>741</sup> *Bergrivier Municipality* case para 51.

<sup>742</sup> *Bergrivier Municipality* case para 51.

<sup>743</sup> *Bergrivier Municipality* case para 51.

<sup>744</sup> *Bergrivier Municipality* case para 51.

<sup>745</sup> *Bergrivier Municipality* case para 51.

<sup>746</sup> *Bergrivier Municipality* case paras 53-55.

in establishing whether a wrongful conduct was probably a cause of a loss, certainty was not required, only a common-sense approach.<sup>747</sup> The Court held that given the failure to establish the above elements, causation cannot be established.<sup>748</sup>

#### 4.2.3.3 Lessons from the *Bergrivier Municipality* case

The first lesson learnt in the case is that the capacity of a municipality, financial or otherwise, determines the existence of a legal duty to act positively to prevent harm and consequently liability. Since the Municipality was restricted by budgetary concerns, it was not reasonable to have expected the Municipality to act positively to prevent the harm. This is because, the legal convictions of the community are based on an objective test of reasonableness, and if the concerns affect the reasonableness criterion, they influence the legal convictions. If the legal convictions do not compel the existence of a legal duty to prevent the harm, then wrongfulness is absent and consequently, liability cannot be established.

Secondly, the courts also take into consideration the prioritised basic needs of the relevant community. Municipalities are obliged to give priority to the basic needs of the community as provided by legislation. So, the fact that the Municipality was small with a small rates base and that it prioritised informal housing settlements which were more susceptible to the flood effects was taken into consideration by the Court. These sociological concerns could not compel the conclusion that the Municipality was liable. They were considered when the Court was applying the test of legal convictions of the community and in turn, influenced whether the Municipality should be held liable.

Thirdly, the reasonable preventability of the harm is affected by whether the harm was reasonably foreseeable. The reasonable preventability of the harm is affected by the capacity of a municipality, financial or otherwise, which directly relates to the factor of the burden of eliminating the risk of the harm.<sup>749</sup> In this case, there was no data to determine the nature and intensity of the storm which caused the floods.

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<sup>747</sup> *Bergrivier Municipality* case para 53. See the "common-sense approach" in para 3.2.4.1 above.

<sup>748</sup> *Bergrivier Municipality* case para 53.

<sup>749</sup> See more "negligence" and factors of "reasonable preventability" in para 3.2.3.2 above.

As a result, the loss could not be reasonably foreseen but most importantly, the Municipality could not have reasonably prepared to prevent an unknown event. Considering the budgetary and sociological concerns of the Municipality, reasonable preventability would have further been hindered by its financial capacity, even if the harm was reasonably foreseeable.

#### 4.2.4 *Van Vuuren v eThekweni Municipality*<sup>750</sup>

##### 4.2.4.1 Facts and legal issues

In this matter, a child sustained serious injuries while using the eThekweni Municipality's water slide and pool facilities.<sup>751</sup> Another child pushed him and he lost his balance.<sup>752</sup> He fractured his jaw and lost teeth which required surgical intervention and future operations.<sup>753</sup> The Municipality did not employ any staff to supervise or control the usage of the water slide and pool facilities.<sup>754</sup> However, it was common cause that the slide could only be used by children who were under 12 years of age and that it was safely constructed and designed to be used by children.<sup>755</sup>

The matter started at the HC where the issue that had to be determined was whether a parent exercising parental control over a child can legally expect a local authority, a municipality, to share that duty or usurp that duty and responsibility.<sup>756</sup> The Court held that it cannot impose a duty on municipalities to act in instances where the parent is not expected to act.<sup>757</sup> Not only would it be an intolerable burden, but it would also result in limitless liability.<sup>758</sup> The HC dismissed the claim

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<sup>750</sup> *Van Vuuren v eThekweni Municipality* 2018 (1) SA 189 (SCA) (hereafter *Van Vuuren* case).

<sup>751</sup> *Van Vuuren* case para 1.

<sup>752</sup> *Van Vuuren* case para 2.

<sup>753</sup> *Van Vuuren* case para 3.

<sup>754</sup> *Van Vuuren* case para 2.

<sup>755</sup> *Van Vuuren* case paras 8,9,12. See clause 9 of the City of Durban Pools Bylaws (1989) (PN 85 in PG 4683 of 16 March 1989).

<sup>756</sup> *Van Vuuren* case para 5. For details of the HC judgment, see *Van Vuuren v eThekweni Municipality* (7099/2012) [2016] ZAKZDHC 8 (19 February 2016) para 1.

<sup>757</sup> *Van Vuuren v eThekweni Municipality* (7099/2012) [2016] ZAKZDHC 8 (19 February 2016) para 29.

<sup>758</sup> *Van Vuuren v eThekweni Municipality* (7099/2012) [2016] ZAKZDHC 8 (19 February 2016) paras 29,31.

and did not find the Municipality liable.<sup>759</sup> The child's parent then appealed to SCA, where the primary issue to be decided was whether there was a legal duty on the Municipality's part to supervise as well as to control access to the slide.<sup>760</sup>

#### 4.2.4.2 Decision and reasoning of the judgment

The Court held that the Municipality owed a legal duty to prevent the negligent causing of harm to people as it created a potential risk of harm.<sup>761</sup> The first inquiry was into wrongfulness where the Court had to determine whether a legal duty to supervise and control access to the slide existed.<sup>762</sup> In determining whether a legal duty ought to be imposed on the Municipality, the Court analysed certain factors that had to be considered. The fact that only children under the age of 12 years were allowed to enter, be on or use the slide as provided in the By-laws of the Municipality, that regulated this aspect.<sup>763</sup> According to the Court, this suggested that the children who used those facilities would be immature and ill-disciplined.<sup>764</sup> Another factor considered by the Court was the constitutional provision that "a child's best interests are of paramount importance in every matter concerning the child".<sup>765</sup> The factor of prior conduct was analysed, and it was highlighted that in providing the water slide and pool facility to be used by children, the Municipality created a potential risk of harm.<sup>766</sup> The Court noted that in such circumstances, it is obvious that uncontrolled access to the slide would result in children piling against each other.<sup>767</sup> Also, parental control and supervision were not made a requirement for attendance.<sup>768</sup> It held that the Municipality was required by public policy and the community's sense of justice, to prevent the chaos that threatened the children's safety.<sup>769</sup> To prevent the chaos, the Court expressed that the Municipality would only

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<sup>759</sup> *Van Vuuren v Ethekwini Municipality* (7099/2012) [2016] ZAKZDHC 8 (19 February 2016) paras 34-36; *Van Vuuren* case para 7.

<sup>760</sup> *Van Vuuren* case para 15.

<sup>761</sup> *Van Vuuren* case para 29.

<sup>762</sup> *Van Vuuren* case para 19.

<sup>763</sup> *Van Vuuren* case para 22. See clause 9 of the City of Durban Pools Bylaws (1989).

<sup>764</sup> *Van Vuuren* case para 22.

<sup>765</sup> *Van Vuuren* case para 22. See s 28(2) of the *Constitution*.

<sup>766</sup> *Van Vuuren* case para 29. See more on "prior conduct" in para 3.2.2.2. above.

<sup>767</sup> *Van Vuuren* case para 23.

<sup>768</sup> *Van Vuuren* case para 24.

<sup>769</sup> *Van Vuuren* case para 23.

need to place an official at the top of the stairhead of the facilities.<sup>770</sup> It also held that this would not be an intolerable financial burden on the Municipality.<sup>771</sup> As a result, the criteria of reasonableness as well as constitutional norms and public policy compel the conclusion that the Municipality had a legal duty to avoid the negligent causing of harm.<sup>772</sup>

Additionally, the Court had to determine whether there was a negligent breach of that legal duty. It is important to note that, with regard to the factor of prior conduct, the Municipality pleaded the defence of *volenti non fit injuria* or voluntary assumption of risk.<sup>773</sup> The Municipality argued that the parent consented to the risk of injury as she was aware that the facilities would be dangerous and may result in injuries.<sup>774</sup> However, the Court dealt with prior conduct in the enquiry of wrongfulness and dealt with the Municipality's defence in the enquiry of negligence. Firstly, the Court evaluated whether a reasonable person in the position of the Municipality would foresee the reasonable possibility that the operation of the facility without access control would harm the children in the position of the child.<sup>775</sup> It reasoned that it was obvious that unattended access, which resulted in the children bunching up and pushing one another with the harm occurring, was a reasonable possibility.<sup>776</sup> Therefore, the Court held that the Municipality failed to take adequate and reasonable steps to prevent the harm.<sup>777</sup> As a result, it was held that the defence of voluntary assumption of risk must fail for this reason because the parent could hardly consent to her minor's risk of injury.<sup>778</sup>

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<sup>770</sup> *Van Vuuren* case para 25.

<sup>771</sup> *Van Vuuren* case para 25.

<sup>772</sup> *Van Vuuren* case para 29.

<sup>773</sup> *Van Vuuren* case para 4. *Volenti non fit injuria* is a ground of justification which entails that the wrongdoer is not liable where the prejudiced party consented to injury or the risk thereof. This ground of justification negates the wrongfulness of the wrongdoer's conduct. Voluntary assumption of risk in contributory fault cancels fault and occurs when the prejudiced party is aware of the danger but wilfully exposes him/herself to it, thereby acting intentionally with respect to the prejudice suffered. See Neethling and Potgieter *Law of Delict* 128,208,209.

<sup>774</sup> *Van Vuuren* case para 21.

<sup>775</sup> *Van Vuuren* case para 31. See the "test for negligence" in para 3.2.3.2 above.

<sup>776</sup> *Van Vuuren* case para 31.

<sup>777</sup> *Van Vuuren* case para 31.

<sup>778</sup> *Van Vuuren* case para 32.

As for the defence of contributory negligence raised by the Municipality, the Court held that it cannot apply in respect of the claims brought by the child's parent in her representative capacity.<sup>779</sup> The Court referred to the principle which states that a debtor (municipality) liable to a minor child, when sued by the child's parent may not set off against its liability to the child any amount owed by the parent.<sup>780</sup> The appeal was then upheld, and liability was incurred by the Municipality for damages proven.<sup>781</sup>

#### 4.2.4.3 Lessons from the *Van Vuuren* case

Firstly, municipalities must execute their legal duties as objectively reasonably required, especially when children are involved. In doing so, this does not mean that legal guardians should abdicate their responsibilities towards their children, objectively reasonable conduct is also required on their part. However, municipalities must adhere to a higher standard of care especially when the children's use of a service is not dependent on parental control and supervision.

Secondly, a higher standard of care is also required in instances where the municipality creates a new source of danger, such as in this case, the building of a water pool and slide for children. It is even more compelling in such instances that a municipality should take adequate reasonable measures to ensure that harm does not occur. This is because, with regard to the factor of prior conduct, creating a new source of danger through commission confers a legal duty upon the creator to positively act to eliminate the danger.

Thirdly, in all of these instances, children's best interests are of paramount importance, and they must inform the conduct of a municipality and that of a legal guardian. This statutory provision is one of the factors that is considered by the courts when determining whether a legal duty to positively act in preventing harm exists. This provision is considered in cases concerning children.

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<sup>779</sup> *Van Vuuren* case para 34.

<sup>780</sup> *Van Vuuren* case para 34. See *Road Accident Fund v Myhill* 2013 (5) SA 426 (SCA) para 28.

<sup>781</sup> *Van Vuuren* case paras 35-36.

Furthermore, the conduct at issue in the case was an omission that manifested in the Municipality's failure to act positively in preventing the child's injuries.<sup>782</sup> For that omission to be wrongful, there had to be a legal duty on the municipality to prevent the harm.<sup>783</sup> The factors of prior conduct and the rule of law as mentioned above establish wrongfulness as a violation of a legal duty.<sup>784</sup> It is also important to note that this was a municipal beach and amusement facility administered and controlled by the Municipality. In consideration of all these factors, it was reasonable to expect the municipality to have acted positively in preventing the harm.<sup>785</sup>

#### 4.2.5 *Witzenberg Municipality v Bridgman*<sup>786</sup>

##### 4.2.5.1 Facts and legal issues

This matter involved an adopted young girl who was disabled and suffered from chronic illnesses.<sup>787</sup> She had slow cognitive and neurological developments.<sup>788</sup> There was a point where they did not expect her to live but her adoptive parents stepped in and helped her.<sup>789</sup> They made arrangements for her to see various professionals for different therapy sessions according to her developmental needs.<sup>790</sup> She was able to slowly develop and it was professionally advised that her independence needed to be promoted.<sup>791</sup>

When she was 18 years old, she was sexually assaulted and raped in a resort owned by Witzenberg Municipality.<sup>792</sup> She was a residential guest at the resort alongside her adoptive parents when they visited South Africa.<sup>793</sup> She had asked her parents

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<sup>782</sup> See more on "omission" in para 3.2.1 above.

<sup>783</sup> See more on "wrongfulness" in para 3.2.2 above.

<sup>784</sup> See more on "wrongfulness as a violation of a legal duty" in para 3.2.2.2 above. See more on "rule of law" in para 3.2.2.2.4 above.

<sup>785</sup> See more on the "reasonableness criterion" in para 3.2.2.2 above.

<sup>786</sup> *Witzenberg Municipality v Bridgman* (685/2018) [2019] ZASCA 186 (3 December 2019) (hereafter *Witzenberg Municipality case*).

<sup>787</sup> *Witzenberg Municipality case* para 2.

<sup>788</sup> *Witzenberg Municipality case* para 2.

<sup>789</sup> *Witzenberg Municipality case* para 2.

<sup>790</sup> *Witzenberg Municipality case* paras 3-4.

<sup>791</sup> *Witzenberg Municipality case* para 4.

<sup>792</sup> *Bridgman v Witzenberg Municipality* 2017 (3) SA 435 para 4; *Witzenberg Municipality case* paras 5-6.

<sup>793</sup> *Witzenberg Municipality case* para 5.

to go play on her own in a playground close to their unit.<sup>794</sup> Three minors who gained access to the resort physically and forcefully led her away to the floor of a squash court where she was assaulted and raped.<sup>795</sup> When the incident occurred, she had the reading and numeracy skills at grade one level with the cognitive level of a seven to eight-year-old child.<sup>796</sup> The incident traumatised her for years.<sup>797</sup> She suffered from intrusive nightmares and Post-Traumatic Stress Disorder (PTSD).<sup>798</sup> She socially withdrew and found it difficult to concentrate.<sup>799</sup> As a result, she was set back by a year in terms of her emotional and cognitive development.<sup>800</sup> Two of the boys actively raped her and the other one kept a lookout during the incident.<sup>801</sup> They were convicted and sentenced accordingly.<sup>802</sup>

The matter began in the HC where the Court had to decide whether the rape was caused by a lack of ordinary care and diligence on the Municipality's part through its employees.<sup>803</sup> The Court held the Municipality liable and was ordered to pay damages.<sup>804</sup> Not satisfied with the judgment, the Municipality applied for an appeal to this Court concerning the merits and quantum of damages.<sup>805</sup> The Court denied the Municipality's application for leave to appeal against the merits and granted the leave concerning the amount of awarded damages.<sup>806</sup> The Municipality applied for leave to appeal the decision on merits to the SCA and it was refused.<sup>807</sup> The Municipality applied for a reconsideration of that decision and was referred to

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<sup>794</sup> *Witzenberg Municipality* case para 6.

<sup>795</sup> *Witzenberg Municipality* case para 6.

<sup>796</sup> *Witzenberg Municipality* case para 4.

<sup>797</sup> *Witzenberg Municipality* case para 19.

<sup>798</sup> *Witzenberg Municipality* case para 19.

<sup>799</sup> *Witzenberg Municipality* case paras 15-19.

<sup>800</sup> *Witzenberg Municipality* case para 18.

<sup>801</sup> *Witzenberg Municipality* case para 6.

<sup>802</sup> *Witzenberg Municipality* case para 6.

<sup>803</sup> *Bridgman v Witzenberg Municipality* 2017 (3) SA 435 WCC para 5.

<sup>804</sup> *Bridgman v Witzenberg Municipality* 2017 (3) SA 435 WCC paras 166, 226; *Witzenberg Municipality* case para 21.

<sup>805</sup> *Witzenberg Municipality* case para 21.

<sup>806</sup> *Witzenberg Municipality* case para 21.

<sup>807</sup> *Witzenberg Municipality* case para 21.

the SCA.<sup>808</sup> The matter was before the SCA as a result of the referral as well as the appeal against the quantum of damages awarded.<sup>809</sup>

#### 4.2.5.2 Decision and reasoning of the judgment

Since the appeal was a reconsideration of the decision of the HC, the SCA gave its reasoning and judgment based on it. The Court considered the reasoning and judgment of the HC to see if there were any reasonable prospects that another court would reach a different conclusion. In the reasoning, the HC evaluated the state's duty to address the enabling and perpetuating conditions underlying gender-based violence.<sup>810</sup> It referred to the rights to dignity and equality as guaranteed in the *Constitution*. Since the Municipality is part of the state, it is bound to promote and respect the girl's constitutional rights. In consideration of that, the Court analysed the Municipality's conduct in relation to wrongfulness. The Court held that, considering its constitutional duties and that it owned and controlled the resort, the Municipality's failure in preventing the rape was unlawful.<sup>811</sup> The Municipality's contention that this would lead to limitless liability resulting in an intolerable burden was held to be without substance considering the circumstances and constitutional norms.<sup>812</sup>

In considering whether the Municipality owed the girl a legal duty to take steps to prevent the incident and whether the failure was negligent, the Court analysed the test for negligence.<sup>813</sup> It highlighted the fact that on the day of the incident, there were only two guards instead of four as per the Municipality's technical requirements with an additional two patrolling the grounds.<sup>814</sup> Given the resort's previous criminal conduct experiences, the Court expressed the view that the harm

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<sup>808</sup> *Witzenberg Municipality* case para 21.

<sup>809</sup> *Witzenberg Municipality* case para 1.

<sup>810</sup> *Bridgman v Witzenberg Municipality* 2017 (3) SA 435 paras 1-3.

<sup>811</sup> *Bridgman v Witzenberg Municipality* 2017 (3) SA 435 para 4.

<sup>812</sup> *Witzenberg Municipality* case para 27.

<sup>813</sup> See also para 3.2.3.2 above for the "test of negligence"; see *Kruger v Coetzee* 1966 2 SA 428 (A) 430E-G. *Bridgman v Witzenberg Municipality* 2017 (3) SA 435 para 153.

<sup>814</sup> *Bridgman v Witzenberg Municipality* 2017 (3) SA 435 paras 74, 75, 87; *Witzenberg Municipality* case paras 12,24.

was reasonably foreseeable and reasonable measures could have been taken.<sup>815</sup> It held that the Municipality's submission that harm in the form of rape could not have been foreseen was misconceived.<sup>816</sup> The Court further reasoned that the precise nature of harm did not need to be foreseen, what ought to have been foreseen was the "general nature of serious criminal conduct with attendant consequences".<sup>817</sup> The Court found the Municipality negligent and liable for the damages.<sup>818</sup>

The SCA further reasoned that even if the incident occurred at a private resort in similar circumstances, the owner would also be negligent, and the same results would have ensued.<sup>819</sup> It was even more compelling to reach this conclusion considering that the municipality is part of the state.<sup>820</sup> As an organ state, it is obliged to "take reasonable measures to advance the realisation of the rights in the Bill of Rights", subject to the availability of resources.<sup>821</sup> The resources determine the reasonableness of their conduct and the Municipality led no evidence to show their budgetary concerns.<sup>822</sup> The SCA dismissed the Municipality's argument that, in finding it negligent, the HC relied heavily on the fact that it was part of the state.<sup>823</sup>

Concerning the claim by the Municipality that the adoptive parents contributed to the incident, the Court opined that no fault could be attributed to them.<sup>824</sup> The Court held that allowing her to play on her own promoted her right to freedom of movement and dignity as it asserted her independence.<sup>825</sup> The Municipality had a duty to take appropriate steps to safeguard the safety of its residents and visitors and it failed to do so.<sup>826</sup>

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<sup>815</sup> *Witzenberg Municipality* case para 24.

<sup>816</sup> *Witzenberg Municipality* case para 25.

<sup>817</sup> *Witzenberg Municipality* case para 25.

<sup>818</sup> *Witzenberg Municipality* case para 24.

<sup>819</sup> *Witzenberg Municipality* case para 26.

<sup>820</sup> *Witzenberg Municipality* case para 26.

<sup>821</sup> See chap 2 of the *Constitution*, the Bill of Rights.

<sup>822</sup> *Witzenberg Municipality* case para 26.

<sup>823</sup> *Witzenberg Municipality* case para 26.

<sup>824</sup> *Bridgman v Witzenberg Municipality* 2017 (3) SA 435 paras 12,19; *Witzenberg Municipality* case para 28.

<sup>825</sup> See s 10 and 12 of the *Constitution*. *Bridgman v Witzenberg Municipality* 2017 (3) SA 435 paras 12,19.

<sup>826</sup> *Witzenberg Municipality* case para 28.

In light of the above findings, the Court held that the application for reconsideration must fail as there were no reasonable prospects that another court would come to a different conclusion.<sup>827</sup>

#### 4.2.5.3 Lessons from the *Witzenberg Municipality* case

What can be learnt from the case is that, firstly, municipalities are held to a higher standard compared to private individuals since they, like all the other spheres of government, have a constitutional duty to realise all the rights in the Bill of Rights.<sup>828</sup> The rights may include the right of everyone to an environment that is not harmful to their health or wellbeing,<sup>829</sup> to dignity,<sup>830</sup> to freedom of movement,<sup>831</sup> and to freedom and security of the person.<sup>832</sup> Also, this responsibility would suggest that they are required to adhere to a higher standard in those instances where their legal duties have to be evaluated in the context of delictual liability.

Secondly, the duties of municipalities may arise from different legal provisions. Therefore, their breaches would have to qualify as private law duty breaches before they could give rise to delictual liability. This is a factor called rule of law and as seen in the case of *Sinukela v KSD Municipality*,<sup>833</sup> statutory provisions are considered amongst other factors as they do not give rise to legal duties on their own. Hence why the Court, in establishing a private law duty, had to analyse the Municipality's conduct in relation to wrongfulness. The rule of law as a factor in determining the existence of a duty in omission was applicable due to the constitutional provisions. The Court then had to also consider the rule of law as well as the special relationship between a municipality and a member of the public. A

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<sup>827</sup> *Witzenberg Municipality* case para 29. The court assessed the quantum of damages, and this is not discussed in detail as it does not form part of this study.

<sup>828</sup> See s 7(2) of the *Constitution*. See Brickhill and Ferreira "Socio-Economic Rights" 563-565, 573-584; Currie and De Waal "Structure of Bill of Rights Litigation" 23; Steytler and De Visser "Local Government" 22-66, 67.

<sup>829</sup> Section 24 of the *Constitution*. See Kidd "Environment" 516, 518-524; see also para 2.3.3 above.

<sup>830</sup> Section 10 of the *Constitution*. See Currie and De Waal "Human Dignity" 250-256.

<sup>831</sup> Section 21 of the *Constitution*. See Currie and De Waal "Freedom of Movement and Residence" 451-453.

<sup>832</sup> Section 12 of the *Constitution*. See Currie and De Waal "Freedom and Security of the Person" 270-271, 281, 286-288.

<sup>833</sup> See more details in para 4.4 below.

municipality is part of the state; therefore, it has to execute the constitutional duties imposed as a result of the relationship it has with the public. More specifically, the Municipality had to execute the duties that come with owning, managing and controlling the resort.

Thirdly, as affirmed in the *Bergrivier Municipality* case, harm may be reasonably preventable if it was reasonably foreseeable in relation to the test of negligence. However, the reasonable preventability of the harm is affected by the capacity of a municipality, financial or otherwise which directly relates to the factor of the burden of eliminating the risk of the harm. In this case, the criminal conduct that the resort previously experienced was an indication that any type of harm was reasonably foreseeable. Preventing the occurrence of the harm was not going to pose an intolerable burden on the Municipality as the resort only had to be guarded by four guards like it normally was. So, there was nothing more required of the Municipality than controlling and managing the resort as per its own stated technical requirements. Also, the Municipality did not show the unreasonableness of this as they did not show financial incapacity. In consideration of all of this, the Municipality failed to take reasonable steps to prevent the harm that occurred.

### 4.3 HC cases

#### 4.3.1 *Amoah v King Sabata Dalindyebo Municipality*<sup>834</sup>

##### 4.3.1.1 Facts and legal issues

The plaintiffs sought damages alleging that the King Sabata Dalindyebo Municipality intentionally and/or negligently and unlawfully damaged their business container, which was a hair salon.<sup>835</sup> The Municipality removed the plaintiffs' container alleging that it was placed in a restricted or prohibited area and this was in contravention of the Municipal By-law.<sup>836</sup> The claim was based on vicarious liability in that the

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<sup>834</sup> *Amoah v King Sabata Dalindyebo Municipality* (348/2019) [2023] ZAECMHC 41 (15 August 2023) (hereafter *Amoah* case).

<sup>835</sup> *Amoah* case para 1.

<sup>836</sup> *Amoah* case para 6. See s 4(1)(a) of the King Sabata Dalindyebo Municipality's *By-laws related to Street Trading* (2010) (GN 137 in GG 2489 of 24 December 2010).

Municipality's employees committed the acts and omissions within the course and scope of their employment.<sup>837</sup> The relevant issues in dispute were whether the container of the plaintiffs was built in an area that was restricted or prohibited; and whether relevant provisions of the Municipal By-law were adhered to in the removal of the container.<sup>838</sup> The broader issue was whether the Municipality's employees acted intentionally, alternatively negligently as well as unlawfully when the plaintiffs' container was damaged.<sup>839</sup>

#### 4.3.1.2 Decision and reasoning of judgment

The Court held the Municipality vicariously liable in that the Municipality's employees, wrongfully and negligently caused harm to the plaintiffs' property and patrimonial loss.<sup>840</sup> In reaching this judgment, the Court evaluated the evidence before it, the circumstances surrounding this case, and the Municipal By-law. The Municipal By-law entails that an authorised official may remove a street trader's property found at a place where street trading is restricted or prohibited as that constitutes an infringement.<sup>841</sup> It provided that the Municipality cannot be held liable for the damage of such property unless the damage resulted from the Municipality's negligence.<sup>842</sup> Also, if the official reasonably believes that the by-laws are being contravened, a compliance notice may be served to the offender or the occupier of the premises.<sup>843</sup> In the event where property is removed, an authorised official must take all reasonable steps to ensure that the property is not damaged.<sup>844</sup> Where the property to be removed is attached to an immovable structure and the owner is present, an official may order the owner to remove the property where failure to comply is an offence.<sup>845</sup>

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<sup>837</sup> *Amoah* case para 2.

<sup>838</sup> *Amoah* case of 15 August 2023 paras 26, 29. See s 9 of the *By-laws related to Street Trading* (2010).

<sup>839</sup> *Amoah* case para 27.

<sup>840</sup> *Amoah* case paras 54-55.

<sup>841</sup> See s 9(1)(b) of the *By-laws related to Street Trading* (2010). *Amoah* case para 35.

<sup>842</sup> See s 9(8) of the *By-laws related to Street Trading* (2010). *Amoah* case para 35.

<sup>843</sup> See s 12(1) of the *By-laws related to Street Trading* (2010). *Amoah* case para 36.

<sup>844</sup> See s 9(7) of the *By-laws related to Street Trading* (2010).

<sup>845</sup> See s 9(4) of the *By-laws related to Street Trading* (2010). *Amoah* case para 52.2.

Considering the facts and the provisions of the By-law, the Court held that the question of negligence is at the heart of this claim and it applied the test of negligence as outlined in *Kruger v Coetzee*.<sup>846</sup> The Court established that the Municipality contravened its own By-law by serving the plaintiffs with a notice in a verbal communication which was in breach of section 12(1) of the By-law.<sup>847</sup> The Court held that if the plaintiffs were in contravention of the Municipal By-law, they should have been personally served with a notice.<sup>848</sup> Especially because the plaintiffs were able to prove that they informally traded according to the regulated prescripts applicable and were never notified of any contravention.<sup>849</sup> Also, the plaintiffs' container was partially mobile, and one plaintiff was present during the removal and was supposed to be ordered to remove the property.<sup>850</sup> Instead, when one plaintiff pleaded with the official that day to at least be allowed to remove the goods, he was ordered to leave.<sup>851</sup> The Court held that it would have been a reasonable precaution to prevent damage to the property but such reasonable steps were not taken.<sup>852</sup> In applying the principle of reasonableness, the Court held that the Municipality could have followed the legal procedures and taken steps to guard against the occurrence of the harm.<sup>853</sup> The Court held that the incident was foreseeable as proper procedures were not followed by the municipality prior to the removal.<sup>854</sup> As a result, the Municipality failed to take reasonable steps to guard against the occurrence of harm to the plaintiffs' property as well as their patrimonial loss.<sup>855</sup>

Moreover, the Court affirmed the municipality's role in informal trading.<sup>856</sup> It indicated that a Municipality must create a favourable and enabling regulatory policy

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<sup>846</sup> 1966 2 SA 428 (A) 430E-G; *Amoah* case para 33. See also para 3.2.3.2 above for the "test of negligence".

<sup>847</sup> *Amoah* case para 52.1.

<sup>848</sup> *Amoah* case para 50.

<sup>849</sup> *Amoah* case para 51.

<sup>850</sup> *Amoah* case para 53.

<sup>851</sup> *Amoah* case paras 15, 53.

<sup>852</sup> See s 9 of the *By-laws related to Street Trading* (2010). *Amoah* case para 53.

<sup>853</sup> *Amoah* case para 54.

<sup>854</sup> *Amoah* case para 52.

<sup>855</sup> *Amoah* case para 54.

<sup>856</sup> *Amoah* case para 49.

environment for informal trade and that this is a critical role.<sup>857</sup> The *Constitution* obliges the local sphere of government to facilitate economic development at the municipal level.<sup>858</sup> Local government has the authority to regulate informal trade without abusing the authority and, therefore, any action taken by municipal officials must be reasonable and lawful.<sup>859</sup> Any actions taken must be logically or rationally linked to the purpose intended to be achieved.<sup>860</sup> Before a municipality considers whether to restrict or prohibit trading in a certain area, it must investigate how that will affect informal traders.<sup>861</sup> Prior to adopting that motion, a municipality must consider the effect it will have on the large number of informal traders and how it will drive a substantive number of them out of business.<sup>862</sup>

#### 4.3.1.3 Lessons from the *Amoah* case

Firstly, municipalities need to follow the proper procedures and steps when implementing and enforcing their by-laws as specified in those by-laws. Non-compliance which results in a community member's loss may lead to delictual liability for which a municipality must compensate the prejudiced member. The compliance of a municipality would encourage compliance of the local communities. This would also greatly contribute to the relationship between a municipality and the local community it serves. As already stated, this relationship is important when municipalities execute their developmental mandate. It is through these relationships that municipalities would enact by-laws that seek to address the dynamic needs of their local communities. As expressed by the Court in this case, local communities need to be considered in all the actions of the municipalities. This would also prevent incidents such as these where local members suffer harm for which a municipality may compensate. However, this relates to when compliance with a by-law is at issue. Where an issue at dispute is the contents of the by-law itself, it must be made clear by a prejudiced party in the pleadings that the contents

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<sup>857</sup> *Amoah* case para 49.

<sup>858</sup> See ss 152(1)(c) and 153 of the *Constitution*.

<sup>859</sup> *Amoah* case para 49.

<sup>860</sup> *Amoah* case para 49.

<sup>861</sup> *Amoah* case para 49.

<sup>862</sup> *Amoah* case para 49.

are a case that a municipality must meet from which a court may draw legal conclusions. As seen in the *Cobra Towing* case, a prejudiced party may plead the illegality or the unconstitutionality of the relevant by-law.<sup>863</sup>

Secondly, the wrongfulness of a commission is determined by the unreasonable infringement of a prejudiced party's subjective right.<sup>864</sup> The commission is wrongful if it cannot be justified when it is evaluated in reference to the prejudiced party's loss. In this case, commission as a type of conduct was present as the employees' removal and dismantling of the container.<sup>865</sup> The commission was wrongful as it infringed on the plaintiffs' subjective rights, their real rights to their property.<sup>866</sup> As a result of the commission, the plaintiffs could not operate their business and work to earn a living. Therefore, the plaintiffs could not use, enjoy and alienate their property. In determining whether the infringement occurred in a manner that is contrary to the *boni mores* or unreasonably, a reasonableness criterion had to be applied.<sup>867</sup> During the commission, the employees did not follow their own legislated procedures and systems and were not enforced properly as they failed to take steps to avoid the plaintiffs' loss. They contravened their own Municipal By-law which then resulted in the loss suffered.

Thirdly, the Court reiterated that fault is a subjective element concerning the legal blameworthy state of mind or conduct of a person whose conduct was wrongful.<sup>868</sup> It has a lot to do with the attitude or disposition of that person.<sup>869</sup> The plaintiffs alleged that the municipality's employees intentionally and/or negligently and unlawfully damaged their property, and the Court had to decide the form of fault at issue. A person acts intentionally by directing his/her will towards a certain result while being conscious of the fact the conduct is wrongful.<sup>870</sup> Negligence is established when a person foresees the reasonable possibility of their conduct

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<sup>863</sup> See more details in para 4.3.2 below.

<sup>864</sup> See more on "wrongfulness as an infringement of a subjective right" in para 3.2.2.1 above.

<sup>865</sup> See more on "commission" in para 3.2.1 above.

<sup>866</sup> See more on "subjective rights" in para 3.2.2.1 above.

<sup>867</sup> See more on the "reasonableness criterion" in para 3.2.1 above.

<sup>868</sup> See more on "fault" in para 3.3.3 above.

<sup>869</sup> See more on "fault" in para 3.3.3 above.

<sup>870</sup> See more on "intent" in para 3.2.3.1 above.

causing harm which was reasonably preventable and he/she failed to take steps to prevent the harm.<sup>871</sup> In this case, the employees were of the perception that their commission was lawful as they were ordered by the Municipality to remove the containers as promoted by the Municipal By-law. Intent is absent because although they directed their will in removing the container as per the By-law, the manner in which they carried out the removal was negligent. That is why the Court reasoned that negligence was a form of fault that was at issue. The employees' conduct or attitude was careless and thoughtless as they failed to adhere to the standard of care required by the law by failing to pay sufficient attention to their wrongful commission. They failed to properly implement and enforce their systems and procedures provided in the Municipal By-law and did not take reasonable steps to prevent loss suffered by the plaintiffs. It was reasonably foreseeable that the failure to properly follow proper procedures would lead to such an incident. Also, they failed to take reasonable steps to ensure that the property was not damaged such as ordering the plaintiffs to remove it as provided in their procedures.

Moreover, the Court expressly affirmed the principle of vicarious liability by holding the Municipality vicariously liable for the delict committed by its employees while acting within the scope and course of employment. However, to find the Municipality vicariously liable, three requirements should be met.<sup>872</sup> It must be proved that a delict was committed by the employees while acting within the course and scope of employment and that an employer-employee relationship existed.<sup>873</sup> From the above judgment, a delict was committed by the Municipality's employees. The employees were municipal officials in possession of municipal vehicles and resources which were utilised to give effect and enforce the municipal by-laws. Lastly, the employees were acting within the course and scope of employment as they committed the delict while enforcing the Municipal By-law.

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<sup>871</sup> See more on "negligence" in para 3.2.3.2 above.

<sup>872</sup> See more on "vicarious liability" in para 3.4 above.

<sup>873</sup> See more on "vicarious liability" in para 3.4 above.

### 4.3.2 *Cobra Towing CC v Mangaung Metropolitan Municipality* <sup>874</sup>

#### 4.3.2.1 Facts and legal issues

The delictual claim was against Mangaung Metro, its municipal manager and its Chief Fire Officer for damages resulting from a fire that ignited at the plaintiff's premises resulting in the loss of vehicles and spare parts.<sup>875</sup> An employee of the plaintiff was grinding on one of the vehicle wrecks and he had taken precautionary measures as was required.<sup>876</sup> During the grinding, a fire ignited and he used a fire extinguisher he had near him as part of the measures to put the fire out.<sup>877</sup> The fire could not be stopped, there was no water in the area, so the fire spread and even community members came to help with extinguishers.<sup>878</sup> They could not put it out without water and even their portable firefighting equipment was not operational as there was no water.<sup>879</sup> When the called firefighter truck arrived, it also had no water.<sup>880</sup> After some time, a fire brigade arrived with water and they connected it to the truck to put out the fire.<sup>881</sup> The water emptied out so the truck left to refill and the fire re-ignited while it was away, and by the time it was back the fire had already spread.<sup>882</sup>

The issues in dispute were several but the main relevant issue was whether the loss was caused by the wrongful and negligent conduct of the Municipality and its employees by failing to provide water.<sup>883</sup> Also, whether there was contributory negligence on the part of the plaintiff.<sup>884</sup> The plaintiff prayed for judgment against

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<sup>874</sup> *Cobra Towing CC v Mangaung Metropolitan Municipality* (5264/2021) [2024] ZAFSHC 277 (5 September 2024) (hereafter *Cobra Towing* case).

<sup>875</sup> *Cobra Towing* case para 1.

<sup>876</sup> *Cobra Towing* case paras 13,16.

<sup>877</sup> *Cobra Towing* case para 16.

<sup>878</sup> *Cobra Towing* case para 20.

<sup>879</sup> *Cobra Towing* case paras 4, 22.

<sup>880</sup> *Cobra Towing* case para 23.

<sup>881</sup> *Cobra Towing* case para 24.

<sup>882</sup> *Cobra Towing* case paras 25-26.

<sup>883</sup> *Cobra Towing* case para 3.

<sup>884</sup> *Cobra Towing* case paras 46-47.

the Municipality and its manager, jointly and severally where payment from one absolved the other.<sup>885</sup>

#### 4.3.2.2 Decision and reasoning of the judgment

The Court dealt with the issue of contributory negligence first and held that there was no contributory negligence on the part of the plaintiff.<sup>886</sup> This was based on several issues, including the employee taking precautionary measures when grinding, and the plaintiff's employees taking adequate steps in putting out the fire.<sup>887</sup> The Court established that the absence of water led to the spread of the fire.<sup>888</sup>

In the other disputed issues, the Court held that the Municipality caused the plaintiff's damages by its wrongful and negligent omission to provide access to water.<sup>889</sup> In establishing wrongfulness, the Court asserted that liability would follow if an omission was wrongful, which is when a legal duty rested on the wrongdoer to act positively to prevent the occurrence of the harm.<sup>890</sup> On the concession by the Municipality that it had a legal duty to provide access to water within its available means, the Court held that the omission to provide water was *prima facie* wrongful.<sup>891</sup> The Court indicated that for a wrongful omission to be rendered lawful, there must be a ground of justification that excludes the wrongfulness of the omission.<sup>892</sup> However, the defendants relied on their By-laws which included that they may interrupt water supply to any premises without any prior notice in cases of emergency.<sup>893</sup> The Court reasoned that a ground of justification that could have been pleaded was statutory authority.<sup>894</sup> Statutory authority entails that a person's

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<sup>885</sup> *Cobra Towing* case para 3.

<sup>886</sup> *Cobra Towing* case para 50.

<sup>887</sup> *Cobra Towing* case paras 35, 36-41.

<sup>888</sup> *Cobra Towing* case para 37.

<sup>889</sup> *Cobra Towing* case paras 65, 73.

<sup>890</sup> See more on "omission" in para 3.2.2.2 above; *Cobra Towing* case para 51.

<sup>891</sup> *Cobra Towing* case paras 3, 61. See more on "prima facie wrongful omissions" in para 3.2.2.2 above.

<sup>892</sup> See para 3.2.2.2 above and para 4.3.2.3 below.

<sup>893</sup> Reg 33 of the Mangaung Metropolitan Municipality's *By-laws relating to Water Services* (2013) (PG 60 of 25 October 2013); *Cobra Towing* case para 63.

<sup>894</sup> *Cobra Towing* case para 59.

conduct is not wrongful if it was carried out while exercising a statutory authority within the limits of the authorisation and the wrongdoer's conduct must have been reasonable.<sup>895</sup> The onus will be on the prejudiced party to show that alternative measures or methods existed and that the conduct was unreasonable.<sup>896</sup> The Court held that if the defendants wanted to rely on a ground of justification, they should have pleaded that it was not within the Municipality's means and available resources to supply water at that stage and that it was their statutory authority not to.<sup>897</sup> It was then going to be the plaintiff's burden to prove the unreasonableness of the conduct by showing alternative measures.<sup>898</sup> The Court held that the defendants cannot rely on the By-laws while they did not plead the same as justification, and that one can only plead the facts but not the law.<sup>899</sup> This is because pleadings should define the issues for the other parties and inform them of the case that must be met.<sup>900</sup> A pleading must contain a concise and clear statement of material facts upon which the pleader relies for the claim or defence to sufficiently enable the opposite party to reply.<sup>901</sup> Therefore, pleadings are about facts upon which legal conclusions may be drawn and they are not about the law.<sup>902</sup> The Court held that they should have pleaded statutory authority in terms of the By-laws, and not the By-laws themselves.<sup>903</sup> The Court found the Municipality's conduct wrongful for failing to comply with its statutory duty.<sup>904</sup>

For negligence, the Court held that a reasonable person in the position of the Municipality would have foreseen the reasonable possibility that the extended interruption in the supply of water could injure another person's property and cause patrimonial loss.<sup>905</sup> A reasonable person would take reasonable adequate steps to

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<sup>895</sup> *Cobra Towing* case para 59.

<sup>896</sup> *Cobra Towing* case para 59.

<sup>897</sup> *Cobra Towing* case para 62.

<sup>898</sup> *Cobra Towing* case para 59.

<sup>899</sup> *Cobra Towing* case para 64.

<sup>900</sup> *Cobra Towing* case para 60.

<sup>901</sup> *Cobra Towing* case para 60.

<sup>902</sup> *Cobra Towing* case para 60.

<sup>903</sup> *Cobra Towing* case para 64.

<sup>904</sup> *Cobra Towing* case para 65.

<sup>905</sup> *Cobra Towing* case para 66. See the "test for negligence" in para 3.2.3.2 above.

prevent the occurrence of the loss.<sup>906</sup> The Municipality could have informed the residents and businesses prior, depending on the circumstances as so to eliminate risks.<sup>907</sup> The element of negligence was thus established.

For causation, the Court considered the above findings and held that the Municipality's wrongful and negligent omission caused the plaintiff's damages and therefore, it was responsible.<sup>908</sup>

The plaintiff sought patrimonial loss concerning general damages of the value of the loss of those vehicles and spare parts as well as consequential damages in the form of income loss.<sup>909</sup> The Court only awarded general damages because the plaintiff failed to present proper and reliable evidence of the basis upon which consequential damages can be awarded.<sup>910</sup> The amount that was claimed on pleadings was less than the amount that was proved in Court and the Court indicated that damages are to be proven and not guessed.<sup>911</sup>

#### 4.3.2.3 Lessons from the *Cobra Towing* case

Firstly, what can be learned from this case is that municipalities cannot invoke statutory provisions, such as a by-law, to dismiss a prejudiced party's valid cause of action.<sup>912</sup> In brief, the Court reiterated the legal principle that one does not plead the law, but facts.<sup>913</sup> The conduct at issue in the case was an omission which manifested as the municipality's failure to provide access to water, which resulted in the plaintiff's patrimonial loss.<sup>914</sup> Therefore, wrongfulness was established by enquiring whether a legal duty had been violated.<sup>915</sup> The Municipality had to show that the breach of the provisions from the *Constitution* and the *Systems Act* was reasonable. However, the Municipality relied on their By-law to show that their

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<sup>906</sup> *Cobra Towing* case para 66.

<sup>907</sup> *Cobra Towing* case para 676.

<sup>908</sup> *Cobra Towing* case para 73.

<sup>909</sup> *Cobra Towing* case para 1.

<sup>910</sup> *Cobra Towing* case para 72.

<sup>911</sup> *Cobra Towing* case para 72.

<sup>912</sup> See more "cause of action" in para 3.3 above.

<sup>913</sup> See Peté *et al Civil Procedure: A Practical Guide* 213, 221.

<sup>914</sup> See more on "omission" as a type of conduct in para 3.2.1 above.

<sup>915</sup> See more on "wrongfulness as violation of a legal duty" in para 3.2.2.2 above.

omission to provide water which then led to the patrimonial loss of the plaintiffs was lawful. The Court reasoned that, if the Municipality sought to negate the wrongfulness of this omission, they should have relied on a ground of justification instead.<sup>916</sup> In this case, an applicable ground of justification was statutory authority as explained by the Court. As the Court asserted, the Municipality cannot rely on a by-law without pleading a ground of justification for the principles mentioned.

Secondly, this case shows that grounds of justification are not just legal excuses that municipalities may evoke in order to escape delictual liability. They speak to wrongfulness as a delictual element, and the grounds have principles that enable both parties to fairly meet their cases. Statutory authority, amongst other requirements, requires that the conduct of a municipality must not exceed the bounds of authorisation. The onus would be on a municipality to prove that it was not possible to exercise its powers without infringing on the prejudiced party's interests. As a result, it will be the prejudiced party's onus to prove the unreasonableness of that conduct by showing that some other reasonably feasible measures or methods existed, which would have made it possible to prevent or limit the damage. In this case, the onus would have been on the Municipality to prove that it was not possible to not interrupt the supply of water per the By-law for the reason the interruption was for. Then it would have been the plaintiff's onus to prove that some other reasonably feasible measures or methods would have been possible to prevent or limit the damage such as warning or notifying residents as the plaintiff expressed. However, there was still no explanation as to why the Municipality interrupted the supply of water in that area that day. The Municipality did give examples of when an interruption of water supply cannot be wrongful and/or negligent, but it never actually stated if any of those examples were the case here.<sup>917</sup> The Court held that pleading the statutory authority in terms of the By-law would also have allowed the plaintiff to replicate by pleading the illegality or rather the unconstitutionality of the By-laws.<sup>918</sup>

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<sup>916</sup> See para 3.2.2.2 above.

<sup>917</sup> *Cobra Towing* case para 55.

<sup>918</sup> *Cobra Towing* case para 64.

Thirdly, a prejudiced party can only be awarded the damages that they were able to prove before a court. It is the prejudiced party's onus to prove on a preponderance of probabilities the damages suffered.<sup>919</sup> In this case, the plaintiff claimed damages for patrimonial loss concerning general damages and consequential damages, but the Court only awarded general damages. The Court did not award the plaintiff consequential damages because the plaintiff failed to present proper and reliable evidence to prove the damages. The plaintiff could not be awarded what was not proven.

#### **4.4 Summarised table of cases from SCA and HC**

Besides the cases discussed above, there are other delictual cases involving municipalities that were decided by the SCA and the HC. However, these cases merely restate existing positions in our jurisprudence on the law of delict vis-à-vis municipalities and people within their jurisdiction. The table below provides a summary of the few selected cases. They were selected on the basis that they contain brief pronouncements of courts on various delictual elements in cases involving municipalities.

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<sup>919</sup> See "damage" in para 3.2.5 above.

**Table 4-1: Summary of SCA case**

Name of the cases	Facts of the case	Legal issues/ issues in dispute	Reasoning and judgment	Lessons
<p><i>City of Cape Town v Mtyido</i> (1272/2022) [2023] ZASCA 163 (1 December 2023)</p>	<p>The respondent fell into an open manhole where she sustained injuries to her right ankle. The trial court in the HC found the municipality liable for wrongfully and negligently failing to prevent the respondent from sustaining injuries due to the open manhole. This appeal was against the HC judgment which dismissed the appeal.</p>	<p>The legal issue was whether a legal duty of care arose when the municipality had knowledge of the existence of the open manhole. Also, whether the breach of that duty was wrongful and negligent.</p>	<p>The SCA held that the legal convictions of the community dictate whether or not the Municipality should be held liable for a breach of a duty of care. It held that the Municipality's conduct was wrongful and negligent in that it objectively reasonably failed to prevent the occurrence of the harm. Even after knowing about the dangerous situation posed by the existence of the open manhole.</p>	<p>A legal duty may arise when a municipality has prior knowledge of a potentially dangerous situation which may cause harm. The courts determine whether: a municipality had prior knowledge of the dangerous situation; whether that knowledge gave rise to a legal duty of care; and whether the breach was negligent.</p>

**Table 4-2: Summary of HC cases**

Name of the cases	Facts of the case	Legal issues/ issues in dispute	Reasoning and judgment	Lessons
<p><i>Harding v Nelson Mandela Bay Metropolitan Municipality</i> (2446/2022) [2023] ZAECQHC 65 (5 December 2023)</p>	<p>Damages were sought after the plaintiff fell into an uncovered stormwater drain.</p>	<p>The issues determined were whether the plaintiff fell into the drain due to the Municipality's wrongful and negligent conduct and whether the plaintiff was contributory negligent. The Municipality appreciated that it bore a duty of care and that it did not breach it as it took reasonable steps to prevent the harm.</p>	<p>The court held that the Municipality acted negligently by failing to prevent the harm as objectively reasonably required. The steps taken by the municipality to prevent the harm were not reasonably adequate. Contributory negligence was not established.</p>	<p>With regard to the test of negligence, the occurrence of foreseeable harm does not indicate that the steps taken were unreasonable. However, in instances where reasonably preventable harm ensued anyway, taking steps is insufficient, the steps must be reasonably adequate.</p>
<p><i>SMS v City of Johannesburg Metropolitan Municipality</i> (9165/2017) [2022] ZAGPHC 55 (11 February 2022)</p>	<p>Damages were sought on behalf of the child who stumbled and fell into an uncovered manhole on a pavement while running after a ball to save it from going in. The manhole had a concrete barrier around and the child knew of the manhole.</p>	<p>The issue was whether the defendant was negligent and whether the negligence caused the child's injuries or loss.</p>	<p>The Municipality's negligence or breach of a legal duty was not proven. Causation or the causal link between the conduct and the harm was also not proven. The harm would nevertheless have ensued despite the omission.</p>	<p>Wrongful and negligent conduct is insufficient to find delictual liability, it must also be proved that the conduct caused the loss in question (causation).</p>
<p><i>Sinukela v King Sabata Dalindyebo Municipality</i></p>	<p>The plaintiff fell into a street water drainage tank which,</p>	<p>Whether the Municipality's employees wrongfully and</p>	<p>The Municipality was found liable for the plaintiff's</p>	<p>Statutory provisions will be considered amongst other</p>

<p>(3123/17) [2019] ZAECMHC 27 (4 June 2019)</p>	<p>allegedly, the Municipality's employees failed to properly close the lid after working on it.</p>	<p>negligently omitted to prevent the plaintiff's injuries.</p>	<p>damages. A reasonable person in the Municipality's position ought to have foreseen the possibility of the plaintiff's harm and would have reasonably prevented it by placing the lid or warning the public of the danger. The duty in section 152 of the <i>Constitution</i> was also considered as a factor to determine the existence of a legal duty.</p>	<p>factors because they do not give rise to legal duties on their own. This is because, not every statutory duty is a private law duty, and the breach of that duty does not automatically give rise to a delictual claim. It was not the breach of section 152 that gave rise to the claim, it was the wrongful and negligent breach that gave rise to the delictual claim.</p>
<p><i>Schoeman v Rustenburg Local Municipality</i> (1404/2005) [2011] ZANWHC 97 (13 October 2011)</p>	<p>The plaintiff was well-established in the finance industry and the municipality published a newsletter that suggested that he "allegedly maladministered" a provident fund.</p>	<p>The issue in dispute was whether that statement was defamatory.</p>	<p>The Court found that the words "alleged maladministration" in their ordinary sense are defamatory as they affect the plaintiff's moral character by suggesting dishonesty which reflects on his profession. The statement was capable of conveying a defamatory meaning to a reasonable reader. It was further presumed that the publication was wrongful and that the</p>	<p>In a defamation case, what is questioned is the meaning that a reasonable person would give to the publication and whether it has a defamatory meaning. It is also up to the wrongdoer to prove the absence of the intent to defame or a ground of justification in order to escape liability.</p>

			Municipality acted <i>animus iniuriandi</i> based on the Municipality's failure to provide a ground of justification or the absence of <i>animus iniurandi</i> .	
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## 4.5 Concluding remarks

This dissertation explored lessons that emerged from case law concerning the delictual liability of South African municipalities. This chapter analysed how the courts apply the law in municipal delictual liability claims to distil potentially useful lessons to guide municipalities and potential litigants. The chapter reviewed five SCA and two HC cases in detail and summarised in Tables 4-1 and 4-2 five cases from both courts. The review of the cases in this chapter holds valuable lessons for municipalities and potential litigants insofar as delictual liability is concerned. The emerging lessons include:

Firstly, the courts have moved away from the prior position where municipalities enjoyed a general immunity from delictual liability from harm resulting from poor roads or pavements.<sup>920</sup> Currently, there are two enquiries that a potential litigant would have to adduce sufficient evidence to prove to claim damages for harm that resulted from poor roads and pavements. A potential litigant must provide sufficient evidence before the court for it to conclude that a legal duty to repair or warn should have existed and that the municipality's failure to repair or warn the public is blameworthy, attributable to culpa under those circumstances.

Secondly, where a municipality has worked with another service provider to execute its duties in which harm occurs as a result, liability does not automatically fall on a municipality.<sup>921</sup> The conduct and subsequent responsibilities of a municipality and the service provider are considered to determine a party that is delictually liable. A municipality would only be responsible to the extent that it was directly involved and responsible in the execution of the duty.

Thirdly, in determining the delictual liability of a municipality, there are prevailing factors that courts take into consideration. These are the capacity of a municipality, financial or otherwise, limitless liability and the prioritised needs of a community.<sup>922</sup>

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<sup>920</sup> See para 4.2.1 above.

<sup>921</sup> See para 4.2.2 above.

<sup>922</sup> See paras 4.2.1, 4.2.3, 4.2.4, 4.2.5 above.

As seen from the above cases, all of these factors directly relate to the delictual elements that must be proved for a potential litigant to succeed in a claim.

Fourthly, a higher standard of care is required in instances where the municipality creates a new source of danger, especially where children are concerned.<sup>923</sup> It is even more compelling in such instances that a municipality should take adequate reasonable measures to ensure that harm does not occur. Children's best interests are of paramount importance and therefore, municipalities must execute their legal duties towards children as reasonably objectively required.

Fifthly, when compared to private individuals, municipalities are held to a higher standard because of their constitutional duties and because they are part of the state.<sup>924</sup> In the context of this study, this would suggest that they are held to a higher standard in those instances where their legal duties have to be evaluated in the context of delictual liability. This is when constitutional duties have to be qualified to be private law duties in the context of delictual liability. This is because, not every constitutional duty is a private law duty, and the breach of that duty does not automatically give rise to a delictual claim. This applies to all the statutory provisions from other legislation which concerns municipalities.

The case law also shows that, where municipalities enact by-laws to regulate certain services concerning local communities, they need to comply with them.<sup>925</sup> Non-compliance which results in a community member's loss may lead to delictual liability for which a municipality must compensate the prejudiced local member. However, where the contents of the by-law itself are regarded as problematic by local communities, the legality or the constitutionality of those by-laws may be challenged.

Like all wrongdoers, municipalities may seek to justify their wrongful conduct which resulted in a prejudiced party's harm, and they may do so by pleading grounds of

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<sup>923</sup> See para 4.2.4 above.

<sup>924</sup> See para 4.2.5 above.

<sup>925</sup> See para 4.3.1 above.

justification.<sup>926</sup> However, grounds of justification are not just legal excuses that municipalities may evoke to escape delictual liability. Grounds of justification speak to wrongfulness as a delictual element, and they are governed by principles that enable both parties to fairly meet their cases. The existence of a by-law as such, does not constitute a ground of justification, but the content and authority from such a by-law might if it substantiates a ground of justification. This ensures that both the municipality and the prejudiced party have a fair trial.

In addition, even if a prejudiced party's delictual claim is successful, he\she will only be awarded damages they were able to prove before a court.<sup>927</sup> It is the prejudiced party's onus to prove the damages suffered on a preponderance of probabilities. The prejudiced party must present proper and reliable evidence before a court to award the damages.

Additionally, where a municipality has prior knowledge of a potentially dangerous situation that may cause harm, a legal duty to positively act to prevent the harm may arise.<sup>928</sup> In such instances, a court considers whether a municipality had prior knowledge of the dangerous situation, whether that knowledge gave rise to a legal duty of care; and whether there was a negligent breach of that duty.

In defamation cases involving municipalities, what is questioned is the meaning that a reasonable person would give to the publication and whether the publication has a defamatory meaning.<sup>929</sup> It is also up to a municipality to prove the absence of the intent to defame or a ground of justification to escape liability.

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<sup>926</sup> See para 4.3.2 above.

<sup>927</sup> See para 4.3.2 above.

<sup>928</sup> See para 4.4 above.

<sup>929</sup> See para 4.4 above.

## CHAPTER 5 CONCLUSION

### 5.1 Background and context of the study

Municipalities' failures to fulfil their duties towards local communities are not a new phenomenon. Research has been done on what could be the causes and they ranged from lack of adequate funding, poor revenue collection, bad financial management, and lack of skills.<sup>930</sup> However, there is no extensive research on the wrongful and negligent and/or intentional conduct of municipalities being the cause of such failures. The paucity of research on this cause motivated this study. This study finds relevance in those cases where failures result in harm to community members which gives rise to delictual actions. It is one issue for a municipality to be restricted by other factors and it is also another issue when a municipality solely does not carry out its duties as objectively reasonably required. This is what the law of delict determines, it takes into consideration all of the restricting factors to establish if there was any alternative way a wrongdoer could have averted the harm that occurred.<sup>931</sup> If an alternative way existed, then a prejudiced party's legally protected interest would have been unreasonably infringed.<sup>932</sup> The law of delict's compensatory function, therefore, seeks to harmonise the conflicted interests by attempting to put the prejudiced party in the original position it was in before the occurrence of the delict.<sup>933</sup> The primary objective of this study was to explore lessons that have emerged from case law that dealt with the delictual liability of South African cities in the execution of their developmental mandate to guide municipalities and potential litigants.

Chapter two outlined key historical features of local government in South Africa and the developmental duties that arise from its legal mandate. The objective of this chapter was to evaluate the developmental duties of municipalities and how their execution impacts local communities.<sup>934</sup> It discussed the status of local government

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<sup>930</sup> See para 1.1 above.

<sup>931</sup> See para 3.2 above.

<sup>932</sup> See para 3.2.2 above.

<sup>933</sup> See para 3.2.5 above.

<sup>934</sup> See chap 2 above.

and evaluated its powers and functions in relation to the developmental duties. The governance mechanisms that local government utilise to carry out its developmental duties were also highlighted. Lastly, it examined the status quo of local government concerning its developmental mandate and the resulting impact on communities.

Chapter three set out the legal framework for the South African law of delict. It laid down what a delict is and the elements that must be present to successfully institute a delictual claim.<sup>935</sup> These principles were contextualised with regard to municipalities. The objective was to examine how municipalities may be held delictually liable for the harm of local members from the execution of their duties.

Chapter four analysed how the courts applied those general principles in municipal delictual liability claims. It reviewed and evaluated the HC and SCA cases which dealt with delictual claims against municipalities.<sup>936</sup> None of these cases reached the CC, and the MC did not have jurisdiction due to the value of the claims and where MC did have jurisdiction, it did not lay binding judgments as the cases were appealed. The objective of this study was to draw lessons from those cases which could assist both municipalities and potential litigants concerning municipal delictual liability. The lessons that were drawn from these cases should assist in establishing the standard that municipalities must adhere to when executing their developmental duties towards local communities. They could also be used to demonstrate what potential litigants need to prove in delictual claims against municipalities.

## **5.2 Main findings of the study**

Although the findings from the cases reviewed and analysed are laid out in 4.5 above, it is necessary to reiterate the main findings of this study below:

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<sup>935</sup> See chap 3 above.

<sup>936</sup> See chap 4 above.

### *5.2.1 Municipalities no longer enjoy general immunity from delictual actions arising from poor roads or pavements*

As it was established, municipalities previously enjoyed legislative general immunity for actions resulting from poor streets and pavements.<sup>937</sup> Legislation only empowered but did not oblige municipalities to maintain and repair streets and pavements within their jurisdiction.<sup>938</sup> However, the situation is different now because legal convictions of a community require a municipality to keep roads and pavements safe. However, whether a municipality was required to have repaired or maintained or warned the public of the poor roads or pavements would depend on the circumstances. Where a municipality is small and underfunded and the potholes are shallow and not substantial in size and depth, there might not be a legal duty on a municipality to repair or warn the public of them.<sup>939</sup> Where a municipality is large and well-funded and the potholes are substantial in depth and size, a legal duty to repair, maintain or warn the public might arise.<sup>940</sup> Local members must also care for their own safety when they use roads and pavements.<sup>941</sup> However, in instances where local members reasonably cared for their own safety but harm occurred anyway, they bear the onus to present before a court sufficient evidence to hold a municipality delictually liable. A prejudiced party must provide sufficient evidence before a court to enable it to conclude that a legal duty to repair, maintain or warn should have existed.<sup>942</sup> Secondly, the prejudiced party must prove that the municipality's failure to repair, maintain or warn the public is blameworthy and attributable to culpa.<sup>943</sup>

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<sup>937</sup> See para 4.2.1 above.

<sup>938</sup> See para 4.2.1 above.

<sup>939</sup> See para 4.2.1 above.

<sup>940</sup> See para 4.2.1 above.

<sup>941</sup> See para 4.2.1 above.

<sup>942</sup> See para 4.2.1 above.

<sup>943</sup> See para 4.2.1 above.

### *5.2.2 The breach of statutory duties does not automatically call for delictual liability*

Chapter two of this study laid out the developmental mandate of municipalities and the duties that arise out of it. The failure to execute such duties often results in harm to local members or their juristic persons. However, as already established, it is not the breach of a duty that leads to the delictual liability of a municipality.<sup>944</sup> It is the wrongful and negligent and/or intentional breach of a duty which caused harm to the prejudiced party's legally protected interests that leads to the established delictual liability.<sup>945</sup> Statutory duties have to qualify as private law duties before their breach could give rise to a delictual claim.<sup>946</sup> This means that the breach of that statutory duty has to qualify as a delict before a delictual claim may arise. To qualify as a delict, all the delictual elements must be present/proven.<sup>947</sup> This is also because the statutory duties speak to the element of wrongfulness, hence why the qualification. So, they are taken into consideration to determine whether a legal duty to prevent the harm exists. However, the wrongfulness of that conduct will not be due to the fact that there was non-compliance with a statutory duty, it will be because it is reasonable, under the circumstances, to compensate the prejudiced party.<sup>948</sup>

### *5.2.3 Municipalities are required to execute their duties reasonably, considering their administrative and financial capacity*

For conduct to be wrongful for the purposes of delict, there must be an unreasonable infringement of the prejudiced party's legally protected interests.<sup>949</sup> In establishing whether the infringement is unreasonable or not, the courts weigh up the interests of a wrongdoer promoted by the conduct and the prejudiced party's infringed interests.<sup>950</sup> In doing so, the courts, amongst other factors, consider the

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<sup>944</sup> See paras 3.2.2.2.4, 4.2.1.3, 4.2.4.3, 4.2.5.3, 4.4 above.

<sup>945</sup> See paras 4.2.1.3, 4.2.4.3, 4.2.5.3, 4.4 above.

<sup>946</sup> See paras 3.2.2.2.4, 4.2.1.3, 4.2.4.3, 4.2.5.3, 4.4 above.

<sup>947</sup> See para 3.2 above.

<sup>948</sup> See para 3.2.2.2.4 above.

<sup>949</sup> See para 3.2.2 above.

<sup>950</sup> See para 3.2.2 above.

costs and effort concerning the preventability of the harm.<sup>951</sup> As established, the financial capacity of a municipality is considered to determine whether there is an unreasonable infringement.<sup>952</sup> A municipality is required to execute its duties reasonably considering its financial capacity because it can only be expected to prevent harm where it is reasonable to do so.<sup>953</sup> Legal convictions of a community are also influenced by the administrative and financial capacity of a municipality. They would compel the conclusion that a municipality should be held liable where there were no constraints, financially or otherwise, but harm occurred anyway,<sup>954</sup> provided that all delictual elements are proven and there are no other factors that compel a different conclusion. Also, this is in alignment with section 152(2) of the *Constitution* where a municipality must strive to execute their duties within its financial and administrative capacity.<sup>955</sup>

#### *5.2.4 Municipal by-laws do not negate wrongfulness*

As mentioned, by-laws are tools or instruments that are used by municipalities to execute their developmental duties.<sup>956</sup> However, municipalities cannot use certain by-laws to nullify the wrongfulness of an otherwise wrongful conduct.<sup>957</sup> As already established, wrongfulness is an unreasonable infringement of a legally protected interest.<sup>958</sup> If one wants to negate the wrongfulness, one must show that the infringement of the legally protected interest was reasonable.<sup>959</sup> One can only do so through a ground of justification, which makes the infringement reasonable as there is no violation of a norm.<sup>960</sup> Like all the wrongdoers, municipalities may seek to justify their conduct that resulted in a prejudiced party's harm, especially when they have reasonable legal justifications. They may invoke grounds of justification as a result. However, grounds of justification are not just legal excuses that

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<sup>951</sup> See para 3.2.2 above.

<sup>952</sup> See paras 4.2.1.3, 4.2.3.3, 4.2.5.3 above.

<sup>953</sup> See paras 2.3.2, 4.2.1.3, 4.2.3.3, 4.2.5.3 above.

<sup>954</sup> See para 4.2.3 above.

<sup>955</sup> See para 1.1, 2.3.2 above.

<sup>956</sup> See para 2.5 above.

<sup>957</sup> See paras 4.3.2.2, 4.3.2.3 above.

<sup>958</sup> See para 3.2.2 above.

<sup>959</sup> See para 3.2.2 above.

<sup>960</sup> See para 3.2.2 above.

municipalities may evoke to negate wrongfulness and in turn escape liability.<sup>961</sup> Grounds of justification often allow a prejudiced party to challenge the reasonability of the infringement.<sup>962</sup> They are governed by principles that enable both a wrongdoer and a prejudiced party to fairly meet their cases. In cases where a by-law exists to indicate the reasonableness of a municipality's conduct, the by-law can only be utilised to substantiate a pleaded ground of justification.<sup>963</sup> A by-law on its own cannot be used to negate wrongfulness and consequently, delictual liability of a municipality.

#### *5.2.5 Municipalities are required to adhere to a higher standard of care*

Municipalities have a broader developmental mandate from which developmental duties arise.<sup>964</sup> These duties have to be fulfilled within their available resources and financial and administrative capacity towards local communities.<sup>965</sup> For the purposes of the law of delict, it could be suggested that the duties determine the standard of care required from municipalities which must be adhered to. As a result, municipalities being part of the state and also due to the constitutional duties they owe to local members, are required to adhere to a higher standard of care. Negligence relates to the adherence to the standard of care required by the law.<sup>966</sup> Therefore, in instances where a municipality negligently and wrongfully omits to adhere to the prevailing standard of care that results in the commission of a delict to a local member, a municipality may be held delictually liable.<sup>967</sup> In establishing whether a municipality is negligent, the fact that it is part of the state compels the conclusion that it may well be, provided that the other delictual elements are present.

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<sup>961</sup> See paras 4.3.2.2, 4.3.2.3 above.

<sup>962</sup> See paras 4.3.2.2, 4.3.2.3 above.

<sup>963</sup> See paras 4.3.2.2, 4.3.2.3 above.

<sup>964</sup> See para 2.3 above.

<sup>965</sup> See paras 1.1, 2.3.2 above.

<sup>966</sup> See para 3.2.3.2 above.

<sup>967</sup> See paras 4.2.1.2, 4.2.4.2, 4.2.5.2, 4.3.1.2, 4.3.2.2 above.

### *5.2.6 Public participation is an important instrument in developmental local government*

Local government is obliged to "structure and manage its administration and budgeting and planning processes to give priority to the basic needs of a community".<sup>968</sup> This means that even by-laws or programmes that are adopted by a municipality should be development-focused to ensure that the basic needs of a local community are prioritised.<sup>969</sup> As established, this relationship is important to both local members and a municipality in the execution of developmental duties. A municipality that disregards this relationship might adopt by-laws that do not address the dynamic needs of that community, which then might become problematic.<sup>970</sup> The prioritised basic needs of a community are taken into consideration when the courts are establishing delictual liability because they inform the legal convictions of that community.<sup>971</sup> Legal convictions of a community would compel the conclusion that a municipality should be held liable for failing to prioritise the basic needs of a community where it had the capacity to. The legal convictions would influence the inference of delictual liability provided that the other delictual elements are met and no other factors compel a different conclusion.

### *5.2.7 Municipalities will not always be held delictually liable for harm that arose while working with another service provider*

Municipalities use internal or external mechanisms to execute their developmental duties such as delivering services.<sup>972</sup> There are instances where a municipality has to work with another service provider to deliver a certain service.<sup>973</sup> A municipality can contract the provision of a service to a service provider which will then deliver the service to local members. A service being delivered by a service provider to a local community is still a municipal service, its status is not diminished.<sup>974</sup> However,

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<sup>968</sup> See paras 1.1, 2.3.2 above.

<sup>969</sup> See paras 4.2.3, 4.3.2.

<sup>970</sup> See para 4.3.1 above.

<sup>971</sup> See para 4.2.3 above.

<sup>972</sup> See para 2.5 above.

<sup>973</sup> See para 4.2.2 above.

<sup>974</sup> See para 2.5 above.

where a municipality has worked with another external service provider to execute its duties in which harm occurs as a result, liability does not automatically fall on a municipality.<sup>975</sup> The conduct and subsequent responsibilities of a municipality and the service provider will be considered to determine a delictually liable party. A municipality would only be responsible to the extent that it was directly involved and responsible in the execution of the duty. The courts evaluate whether a municipality executed its duties in a way that is objectively reasonably required according to the relevant legislative or contractual standards governing the provision of that service.

#### *5.2.8 Prejudiced parties can only be awarded the damages proven*

Delictual damages attempt to put back a prejudiced party in a position they were originally in before the delict occurred. However, it is the onus of the prejudiced party to prove the damages that he/she suffered.<sup>976</sup> Delictual liability could be established, but the courts only award damages that a prejudiced party proved to have suffered.<sup>977</sup>

### **5.3 Recommendations**

The study has two sets of recommendations, the first set of recommendations is directed to municipalities and the second set is directed to potential litigants. Looking at the findings of this study, especially the lessons from Chapter 4, the following recommendations are made:

#### *5.3.1 Recommendations for municipalities*

- Municipalities should prioritise public participation as an instrument in the execution of their developmental duties. Public involvement informs municipalities of the prioritised basic needs of a community which would inform the legal convictions of that community. Such legal convictions would

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<sup>975</sup> See para 4.2.2 above.

<sup>976</sup> See para 3.2.5 above.

<sup>977</sup> See paras 4.3.2.2, 4.3.2.3 above.

serve as a yardstick that influences whether a municipality should be held delictually liable in a delictual action.

- When municipalities adopt by-laws, they have to consider the dynamic needs of their local communities. The by-laws should adequately consider the relevant dynamic values and needs of the local community at that time. The dynamic values and needs inform the legal convictions of that community.
- Municipalities should execute their developmental duties as objectively reasonably required. They should adhere to the standard of care established by their developmental mandate. Where capacity is an issue, financially or otherwise, a municipality should strive to adhere to the highest standard of care within its capacity.
- In instances where a municipality is working with another service provider, a municipality must adhere to its legislative responsibilities that govern the execution of that relevant service. A higher standard of care is still required from a municipality to the extent that it is directly involved and responsible even though there is another service provider.

### *5.3.2 Recommendations for potential litigants*

- Potential litigants must consider the administrative and financial capacity of a municipality, in forming their expectations. Municipalities can only strive to reasonably execute their duties towards local communities within their financial or administrative capacity. Usually, in a delictual action, potential litigants must prove that a municipality could have reasonably averted the occurrence of the harm. A potential litigant must prove that a municipality, within its capacity, could have positively acted to prevent the harm where negligence is at issue. Where intent is at issue, a potential litigant must prove that within its capacity, a municipality could have acted in an entirely different manner to reasonably guard against the occurrence of the harm or to at least minimise the harm.
- Potential litigants should have sufficient and reliable evidence to prove the damages claimed. As claimants, they have the onus to prove their suffered damages and will only be awarded the damages they were able to prove.

#### **5.4 Areas for future research**

This study was limited to specific delictual action principles that relate to the relevant municipal delictual liability cases that were evaluated and reviewed. During this research, it was found that a certain area would benefit from further research as it would establish lessons that would further inform municipalities and potential litigants in municipal delictual liability. The remaining future research question is:

- What role can the law of delict play as a tool to compel municipalities to comply with their developmental mandate? This could entail looking at the frequency that such claims are instituted, the high cost at which the claims are defended and the awarded damages that attempt to put back the prejudiced parties in their original positions rather than using such financial resources to provide services instead.

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