

SOUTH AFRICA / JUDGMENT

E.M and Another v Eskom Holdings Limited (39072/2020) [2025]

ZAGPPHC 285 (17 March 2025)

[2025] ZAGPPHC 285

COURT

North Gauteng High Court, Pretoria

BEFORE

GN Moshwana

CASE / FILE NUMBER

39072/2020

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Policy

FLYNOTES:

PERSONAL

INJURY – Electrical cables – Exposed

by vandalism –

Child

fatally electrocuted – Liability – Unsafe condition

not due to Eskom's installation or maintenance

–

Damage caused by third-party vandalism – Statutory liability

does not extend to damage caused by third-party

vandalism –

No evidence that Eskom knew or should have known about dangerous

condition before incident – Failed

to establish negligence

or breach of duty of care – Claim dismissed –

Electricity Regulation Act 4 of 2006, s

25.

REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA
Case Number: 39072/2020
(1)
REPORTABLE: NO
(2)
OF INTEREST TO OTHER JUDGES: NO
(3)
REVISED: YES
DATE: 17/3/25
SIGNATURE

In the matter between:

E[...]
M[...]
First
Plaintiff
M[...]
M[...]
N[...]
Second Plaintiff
and
ESKOM
HOLDINGS
LIMITED
Defendant

Delivered:

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date and for hand-down is deemed to be 17March 2025.
Summary: An action for damages arising from the fatal electrocution of a doli incapax minor child. The minor child was electrocuted by a vandalised and live wire exposed power lines. The plaintiffs relied on section 25 of the Electricity Regulation Act to establish wrongfulness on the part of the defendant. In the alternative, the plaintiffs alleged, but failed to prove, a breach of a duty of care owed. Section 25 finds no application where the damage was caused by vandalised installation. Resultantly, credible evidence was presented to disprove deemed negligence. Having failed to establish foreseeability and causal connection, the plaintiffs failed to discharge the onus of proof resting on them. Held: (1) The action is dismissed with costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This action was to proceed on both merits and quantum. Midstride, this Court ruled, in terms of rule 33(4) of the Uniform Rules of Court, that the issues be separated and the matter to proceed on the issue of merits only. This ruling was occasioned by the fact that no rule 38(2) affidavits were available for the purpose of experts testimony. Such simply implied that the quantum leg of this action was not ripe for determination. This action involved two legal questions, namely; (a) does section 25 of the Electricity

Regulation Act finds application, and if so, was credible evidence presented to disprove the deemed negligence; (b) did the defendant

breach its duty of care owed or not.

[2] In seeking to address the above mentioned legal questions, this Court received evidence from a total of four witnesses. Each party presented two witnesses in support of their case. With regard to section 25 applicability, the defendant bore the onus to prove that it was not negligent. With regard to the alleged breach of the owed duty of care, the plaintiffs bore the onus to prove that

(a) the damage was reasonably foreseeable; the defendant proceeded to act despite the foreseeable damage; and (c) failed to prevent the damage foreseen.

Pertinent background facts and evidence adduced

[3] On or about 25 August 2018, at the corner of Ngubane and Dladla Streets, D[...], N[...], a 7 year old, R[...] E[...] J[...] N[...] (the deceased) suffered a fatal electrical shock when he came into contact with exposed live electrical power line. The biological father of the deceased, Mr E[...] M[...] (Mr M[...]) and the biological mother of the deceased, Ms M[...] M[...] N[...] (Ms N[...]), instituted the present action, seeking damages for the emotional shock occasioned by the loss of the deceased. At the trial of this action, the plaintiff tendered the testimony of Mr Thabo Kodisa and Mr M[...]. The defendant, Eskom Holdings Limited (Eskom),

tendered the evidence of Mrs Refiloe Moira Gumede (Mrs Gumede) and Ms Mapula Mashapo (Ms Mashapo).

Mr Thabo Kodisa

[4] At the time of the incident, he was 17 years of age. On the day in question, he was informed by a neighbour that the deceased was electrocuted. The deceased left the home situated at 1[...] D[...] Street, D[...], N[...] unaccompanied going to buy sweets. He lived in the same house with the deceased. After being so informed by the neighbour, he rushed to the scene. There

he encountered a number of community members and the deceased was lying on the ground. He was still breathing with difficulties. An ambulance was summoned but delayed to arrive at the scene. He then opted to drive the deceased to the nearest hospital.

- [5] At the hospital, the deceased, who was still alive at the time, was attended to by the nurses. After a while, he was informed by the nurses that the deceased could not make it and had passed on. When led by counsel of the plaintiffs, he was shown a photograph appearing at page 36 of bundle B. In relation thereto, he testified that the photograph depicted the state of the power lines as at the date of the incident. Page 36 depicted exposed burned power lines. He testified that the power line was in that state for the past 5-6 years prior to the fatal incident.
- [6] On his return to the scene, he encountered Eskom technicians, who were busy attending to the power line in question. He was also shown a photograph appearing on page 45 of bundle B. The photograph depicted the same power line and the wires were neatly aligned in a Polyvinyl chloride (PVC) pipe. The power line remained like that ever since and no other incidents happened thereafter. Prior to the incident, he used to see Eskom technicians working on the power line in question. He however could not see what kind of work is being performed by the technicians. Everytime the technicians worked on the power line in question, the colours of the wires would change.
- [7] During cross-examination, he was directed to his sworn statement, where he stated that there were no visible burn marks on the deceased. He testified that he did not see any burn marks on the hands of the deceased. When confronted about the names of the people who reported the fault on the power line in question, he mentioned about three names. He also testified that, at a particular stage, he was still young to have known the names of members of the community who allegedly reported the fault. He could not deliver any comment, when it was put to him that Eskom went through their records and could not find any fault reporting for the power line in question.
- [8] He testified that he does not know who the photographer was of the photographs depicted on pages 3336 of bundle B. However, he testified that the pictures were taken before the incident in 2018. In 2015, he was still young to take things seriously. He used to hear from people that during rainy days, they will observe sparks from the power line in question. As members of the community they would go around in order to avoid passing around the power line. He was directed to page 42 of bundle B, and a version was put to him that the photograph depicts the power line in question, with an indication that the wires were skinned for illegal connection purposes. He, in retort, testified that he knows nothing about illegal connections. He could not deliver any comment, when it was put to him that page 42 of bundle B depicted the scene on the day of the fatal incident. When the Court sought clarity about the sparks he testified about, he stated that the sparks were like a lightning. He confirmed that the photographs were taken after 2018.

Mr E[...] M[...]

- [9] He is the first plaintiff in the action. On the day in question, he received a call from the second plaintiff, Ms N[...], informing him of the passing of the deceased. From Rustenburg, he drove to Duduza. He, on arrival proceeded to the scene. It was approximately 15h00 when he proceeded to the scene. He is an engineer by profession. He inspected the scene and observed exposed cables and wires. He was directed to the photographs. He was the photographer, but he disowned the photograph appearing on page 36 of bundle B. He never encountered the Eskom technicians when he visited the scene. On one of the pictures, he identified a pole and testified that it is the pole in question.
- [10] He testified that he took the photographs on the 27th August 2018 and some were taken in the late evening. He could not comment to the version that on 27 August 2018, the power line was fixed and a PVC was installed as depicted on page 45 of bundle B. He confirmed that the photograph on page 33 is different from that on page 42. He agreed with the version that page 42 depicts how the scene looked after the fatal incident. He testified in re-examination that he took page 42 on 25 August 2018 and page 33 was taken on 27 August 2018. He also testified that he heard that Eskom technicians came and fixed the power line in question.

Mrs Gumede

- [11] From 1 August 2018, she assumed a supervisory position at Dunnottar CNC. On the day in question, she received a call from a technician informing her about the incident. She could not wait for the relevant stakeholders and she proceeded to the scene. On arrival, she encountered two technicians, who were attempting to fix but she stopped them so that an investigation be conducted before. She received reports from members of the public as to what transpired. She also visited the home of the deceased on the advice of the community members. She is unaware as to who reported the incident to Eskom.
- [12] The photograph at page 42 was taken by one Yetang, a Health and Safety officer at Eskom. She confirmed that the photograph depicts how the power line looked when she first encountered it on the day in question. She observed that the power line was vandalised and the wires were exposed. To her knowledge vandalising is occasioned by two instances; either copper theft attempt or illegal connections. She confirmed that page 45 depicts the power line after being fixed and the photograph was taken on 27 August 2018. Prior thereto, the power line was temporarily fixed and was tied with cable ties. She did not partake in the compilation of the investigation report. The report contained some incorrect information, as she did not provide additional information as recorded in the report. She had never seen the power line in question prior to the fatal incident. She confirmed that page 42 depicts aluminium and not copper cables. She also testified that when community members gained knowledge that Eskom officials are around, they remove the illegal connections. She testified at length about how fault reporting happens and the process thereafter. She never became aware of any fault reporting with regard to the power line in question. She, with reference to documents appearing on pages 92-98

of bundle B, testified about the inspections that take place on a three-year cycle.

[13] She was cross-examined at length. The cross-examination was not on point. With reference to page 42, she testified that she does not see a joint but only exposed wires. She testified that members of the public are educated by Eskom with regard to the dangers of electricity and the importance of fault reporting. She was referred to documents which confirms the public awareness programmes by Eskom. She testified that illegal connection is terribly rife and it is difficult to control or police. She confirmed that what appears on page 42 is a sign of vandalising and it is unfortunately committed by community members. She surmised that given the state of the power line as depicted on page 42, there could have been an illegal connection.

Ms Mapula Mashapo

[14] She is a Senior Technician Officer (STO). Her duties relate to operating, maintenance and inspections. She confirmed that page 45 of bundle B represent the power line in question after it was fixed. She together with a team of approximately 15 Eskom officials conducted what is known as Configuration Management Lead (CML) inspection during February 2017. At that time she saw the power line in question and it had at the time, a steel casing around the pole. At that time, the power line was safe and not posing any danger.

[15] If, in 2017, the power line appeared as depicted on page 42, the team would not have left it unattended. On the day of the fatal incident, she was informed by a colleague about the incident but was not summoned to the scene. In relation to page 42, she testified that regard being had to the ferrules, it appeared that something was connected to the power line. Based on her 15 years experience, what is depicted on page 42 was caused by an illegal connection. She was directed to the investigation report. She testified that she did not review the report. Some of the contents of the report are not correct in relation to her. She, with reference to the uncontested documents in bundle B, testified about the inspection procedures and how schedule work orders are dealt with. During 2017, she went to maternity leave and some of the reporting forms were changed during that time. She only observed that change on her return when a colleague completed one such form.

[16] Page 42 indicates that various units may have been illegally connected since a white flex cable would melt. When Eskom teams perform inspections, community members lock them out and at times attack them. When she has regard to page 42, the power line posed a danger. The state in which the power line was, could not have been anything effected by Eskom employees. She believes that there could have been an illegal connection on the power line. She was directed to page 35 of bundle B, to which she testified that ferrules

were not exposed.

Argument

[17] This Court afforded the counsel for the parties an opportunity to submit written submissions. Indeed, helpful written

submissions

were submitted by both counsel. This Court expresses sincere gratitude for such helpful written submissions. Briefly, Mr Bowles, counsel for the plaintiffs, argued that the provisions of section 25 of the ERA found application. In his submission section 25

finds application even in an illegal connection situation. On the other hand, Ms Slabbert, counsel for Eskom argued, with reliance to case law authorities, that section 25 finds no application in instances of illegal connection. She further submitted that the

plaintiffs remain with the onus to prove a breach of the alleged duty, in an instance where section 25 finds no application. She

further submitted that the plaintiffs failed to discharge that onus. On the inspection aspect, she submitted that even if this Court finds that negligence was proven, there is no causal link between the damages suffered and the negligence. She further submitted that on application of the foreseeability test, Eskom could not have foreseen that the vandalism, which was only discovered by it after the fatal incident, would lead to the electrocution of the deceased. Particularly because the state of vandalism was not reported to Eskom. Ultimately, she submitted that, since Eskom is not liable, the action must be dismissed with costs. On the issue of costs, Mr Bowles submitted that this is a case where costs must not follow the results

Evaluation

[18] This matter turns, to a greater degree, sharply on the proper interpretation of section 25 of the Electricity Regulation Act (ERA)[1]. The pleaded case of the plaintiffs suggests a two-pronged claim. On the one hand, the plaintiffs rely on the provisions of section 25 of the ERA. On the other hand, they rely on a breach of duty of care. They alleged that the defendant Eskom owed them a duty of care and such duty of care was breached.

[19] For the purposes of this judgment, the proper place to start is section 25 of the ERA. The section provides as follows: -

“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 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.”

[20] Regard been had to the above statutory provisions, the key question that arises in this case, is whether, Eskom is liable to be held negligent for a power line that has been vandalised to a point of it posing danger to the public. Differently put, Eskom generates a power line in the safest manner, but the safety gets compromised by vandals to a point that the installed power line becomes unsafe and pose a danger. In my view, where vandalism enters the fray, section 25 finds no application. Such is the case when the

words, generated, transmitted or distributed by a licensee are given textual; contextual; and purposive meaning. In my view anything that is generated, transmitted or distributed by somebody else other than a licensee cannot be attributed to a licensee.

[21] Once the power line is vandalised, by for instance theft of copper cables or in order to enable an illegal connection, it assumes a different power line from the one as installed by the licensee. The mischief that section 25 seeks to prevent, arises in a situation where a person installs electricity structure, knowing fully well that electricity, although useful, is dangerous, but does not install it in a manner that prevents the inherent dangers of electricity. It is apparent to this Court that the deeming negligence provisions must have been influenced by what the House of Lords said in *Donoghue v Stevenson* (*Donoghue*)[2]. Lord Buckmaster had the following to say: -

“The general principle of these cases is stated by Lord Sumner in the case of Blacker v Lake & Elliot, Ltd. (1), in these terms: “The breach of the defendant’s contract with A to use care and skill in and about the manufacture or repair of an article does not of itself give any cause of action to B when he is injured by reason of the article proving to be defective.”

From this general rule there are two well-known exceptions: (1) In the case of an article dangerous in itself; and (2) where the article not in itself dangerous is in fact dangerous by reason of some defect or for any other reason and this is known to the manufacturer. Until the case of *George v Skivington* (2) I know of no further modification of the general rule. As to (1), in the case of things dangerous in themselves, there is, in the words of Lord Dunedin, “a peculiar duty to take precaution imposed upon those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity” : *Dominion Natural Gas Co., Ltd v Collins & Perkins* (3). And as to (2), this depends on the fact that the knowledge of the danger creates an obligation to warn, and its concealment is in the nature of fraud. In this case no one can suggest that ginger-beer was an article dangerous in itself, and the words of Lord Dunedin show that the duty attaches only to such articles, for I read the words “a peculiar duty” as meaning a duty peculiar to the special class of subject mentioned.

[22] In my considered view, the decision of *Dominion Natural Gas Co. Ltd v Collins & Perkins* (*Dominion*)[3], perspicuously makes the point of strict liability, as contemplated in section 25 of the ERA. Briefly, the facts in *Dominion* were as follows. In order to obtain a way-leave for their main, the railway company engaged the natural gas company to install a gas apparatus to provide natural gas on the premises of a railway company. The gas company installed a regulator to control pressure

and their employees negligently made an escape-valve discharge into the building instead of into the open air. As a result the building exploded and fatally injured one of the employees of the railway company. Lord Dunedin had the following to say, which aptly, in my view, sets the tone of section 25 of the ERA:

*“There may be, however, in the case of any one performing an operation, or setting up and installing a machine, a relationship of duty. What that duty is will vary according to the subject-matter of the things involved. It has, however, again and again been held that in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things ejusdem generis, there is a peculiar duty to take precaution imposed upon those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity. The duty being to take precaution, it is no excuse to say that the accident would not have happened unless some other agency than that of the Defendant had intermeddled with the matter. A loaded gun will not go off unless someone pulls the trigger, a poison is innocuous unless someone takes it, gas will not explode unless it is mixed with air and then light is set to it. Yet the cases of *Dixon v Bell*, 5 M. & S., 198, *Thomas v Winchester*, 6 N.Y., 397, and *Parry v Smith*, 4 C.P.D., 325 are all illustrations of liability enforced. On the other hand, if the proximate cause of the accident is not the negligence of the Defendant, but the conscious act of another*

violation, then he will not be liable. For against such conscious act of violation no precaution can really avail.

... For the safety-valve by its very existence was meant to work from time to time; and the frequency of its working would seem to depend on causes which might be quite independent of negligence, e.g., sudden pressure of gas, and also accumulation of dirt which would prevent the portcullis closing tight. When the valve did work, gas was necessarily emitted, and it would seem both an easy and a reasonable precaution that that emission should be led to the open air, where it would be harmless, rather than put into the closed chamber where it might become a source of danger. That being so, have the Defendants been able to show affirmatively that the true cause of the accident was the conscious act of another violation, i.e. the tampering with the machines by the Railway Company's workmen.

... Accordingly their Lordships hold that the Defendants, the Gas Company, have failed to show that the proximate cause of the accident was the act of a subsequent conscious violation, and that, there being initial negligence found against them, the Plaintiffs are entitled to recover.”

[23] This Court takes a view that electricity in itself is, although a useful commodity, dangerous. When it is installed, a peculiar duty to take precaution is imposed on the installers. A peculiar duty to take precaution simply implies that negligence would automatically arise if the installation happened without taking precaution. In *George v Skivington* (2) (*Skivington*) [4] a sale of a noxious hairwash was involved, and a claim made by a person who had not bought it but who had suffered from its use, based on its having been negligently compounded was allowed. Smith L.J. in *Heaven v Pender* (2) (*Pender*) [5], stated the following, which, in my view, buttresses the point made in this judgment. He said: -

“A duty to take care did arise when the person or property of another that, if due care was not taken, damage might be done to the other.”

[24] In this Court's view, in order for the provisions of section 25 to arise, the electricity must have been compounded negligently at the time of installation. In *Amos v New Brunswick Electric Power Commission (Amos)*[6], the Supreme Court of Canada laid down the principle that those who transmit dangerous element such as electricity are bound to exercise the greatest possible care and to use every public precaution for the protection of the public. The view propagated in this judgment was affirmed by the Supreme Court of Appeals in *Lucas & Another v Umhlathuze Municipality and Another (Lucas)*[7], when her Ladyship Madam Justice Molefe AJA, as she then was, writing for the majority, said: -

"[13] ...The question thus remains whether a reasonable person in the position of the municipality would have foreseen the possibility of the metal cage being electrified. As stated, this was the cause of the fatal accident – one of the legs of the cage had made contact with the copper coil of an underground cable connected to the distribution kiosk, because the cage was not earthed. It must be borne in mind that the cage was not installed by the municipality, nor did it approve its design and installation. As already mentioned, it was designed and installed by the developer of the scheme, at the body corporate's instance. All the municipality did was to take steps to safeguard its infrastructure within the kiosk (the prepaid meters) against vandalism and prevent interference with its meters it had installed in the kiosk."

[16] The role of the municipality was to distribute electricity to the premises of the body corporate. Consequently, it was important for it to safeguard its infrastructure so as to enable it to carry out its function. The duty to ensure the safe installation and ultimately the safety of the kiosk and metal cage lay with the body corporate in terms of the By-laws and the relevant provisions of the Sectional Titles Act.

[17] On the facts of this case, a person in the position of the municipality would not have reasonably foreseen the possibility of the cage becoming electrified and causing harm. The uncontested evidence is that the municipality only became aware of the unearthed structure after the fatal incident."

[25] In the present matter, the non-vandalised power line did not pose any danger. That being the case, section 25 would only apply if the non-vandalised power line, due to it having been negligently compounded by Eskom, had caused the damage. It became common cause that what caused the fatal incident was the vandalised power line as depicted in a photograph appearing in page 42 of bundle B. The vandalism was clearly not caused by Eskom but by the unknown members of the community, either attempting to steal copper wires or making an illegal connection.

[26] The conclusion this Court reaches is that the deemed negligence contemplated in section 25 does not arise, since the fatal incident

or damage was not caused by a negligent installation of electricity by Eskom. Logic dictates that had the power line not been vandalised,

the fatal incident would not have happened. The fatal incident happened because the power line was vandalised by community members.

Like in Lucas, the liability rested on the shoulders of the community members, as it did rest on the body corporate. It cannot be said that the structure as depicted on page 42 of bundle B is the structure installed by Eskom. The safe structure that was installed by Eskom was disfigured to a point of leaving it in an unsafe state. On the basis of the above stated, there is credible evidence that Eskom was not negligent. It did not breach its peculiar duty when it installed the power line. This Court is in full agreement with the Court in *Msomi v Eskom Holdings SOC. Limited (Msomi)* [8], when it stated the following:

“I am in full agreement with the submission by Mr Aboobaker that Section 25 cannot be interpreted to be applicable to situations other than the legal supply of electricity. It cannot apply to a situation that represents an illegal connection of electricity by a third party unrelated to the defendant. It has to be accepted that the electricity in question is generated in the sense of being supplied by Eskom. It is the only authority that supplies electricity so to that extent Section 25 would be applicable. But, the offending cable was part of cables used to

illicit access to electricity by those who were not entitled to electricity

- [27] As a parting shot, in *Eskom Holdings Ltd v Hendricks (Hendricks)*[9], it was conceded that Eskom had failed to install the pylon in accordance with the prescribed method, as such section 25 was applicable. Such a concession rendered it unnecessary for the SCA to inquire into the foreseeability leg. Having not installed the pylon in accordance with the prescripts, it was foreseeable that such negligence would cause damage. In the present matter, it was not conceded that when Eskom installed the power line, it did that contrary to the prescribed or legislated method. Accordingly, Hendricks is distinguishable from the present matter.
- [28] I now turn to the next leg of the plaintiffs’ case. This is the case where the plaintiffs allege that Eskom owed them a duty of care. In my view, this is a case not necessarily covered by section 25 of the ERA. In a typical section 25 situation, since negligence is deemed, there is no onus on the part of the plaintiff to establish negligence, which as defined in Lucas, it means conduct that is embraced by carelessness, thoughtlessness or impudence, because of giving insufficient attention to such conduct. The onus lies fully on the shoulders of the licensee to demonstrate that it did not conduct itself carelessly, thoughtlessly or imprudently.
- [29] However, where the situation contemplated in section 25 does not arise, like in the present instance, and a party alleges some other duty of care outside the situation contemplated in section 25, as discussed in this judgment, the onus remains with the plaintiff. The old adage of s/he who alleges must prove finds application. In this matter, it is common cause that the fatality arose as a result of the vandalised power line. When regard is had to the pleaded case, the plaintiffs alleged negligence on the part of Eskom, in that it failed in its duty to ensure that (a) all live electrical power lines and or cabling or electrical wires or uncovered

electrical wires are; (i) not left unattended; (ii) are not left uncovered; (iii) are properly maintained and or inspected; (iv)

are not left at any place or area where it is within reach of members of the public more particularly minor children; (v) are disconnected

from the electrical power supply; (vi) are not raised or covered sufficiently to ensure that it is not within reach of the public, and more particularly minor children; (vii) are properly secured; and (viii) are not in an area where members of the public more

particularly minor children have access to or are able to gain access. It was not placed in dispute that all the above are duties of care to be exercised by Eskom.

[30] However, Eskom disputed that it breached any of the alleged duties nor acted inconsistent with its owed duties. As correctly held in *Dabula v Nelson Mandela Bay Municipality* (Dabula)[10], the normal situation calls for the plaintiff to allege and prove negligence[11]. As already held, section 25 situation is not applicable to the present situation, the plaintiffs bore the onus to allege and prove the breach of the duty of care. This Court is quick to remark that the witnesses of the plaintiffs were very poor and failed to acquit themselves with any measure of distinction in proving on the balance of probabilities the alleged breach. On the uncontested evidence, the state of the power line was only encountered by Eskom after the fatality. The power line was indisputably vandalised and gravitated from a safe power line, observed in 2017 to an unsafe power line. All of these outside the knowledge of Eskom.

[31] The immediate question that must arise is whether Eskom owed the community members a duty to prevent vandalism of its infrastructure.

Having failed in its duties, vandalism happened, which culminated in the fatal injury. In order to address this pertinent question a return to *Kruger v Coetzee* (Kruger)[12] becomes inevitable.

[32] The questions to be asked and answered must be formulated as follows: (i) Should Eskom or its employees have foreseen the reasonable possibility of the vandalised power line causing fatal harm to the deceased; (ii) would a reasonable person in the position of Eskom and its employees have taken reasonable steps to guard against that fatal harm; and (iii) did Eskom and its employees fail to take reasonable steps.

[33] The first leg, popularly known as a foreseeability test, on the facts of this case cannot arise. On the evidence presented, Eskom and its employees only became aware of the unsafe power line as vandalised after the fatal injury. The plaintiffs led inadmissible evidence that the vandalised power line was reported to Eskom long before the fatality. The witness who testified about the alleged reporting did not himself report but he only heard that there was reporting. This Court finds it hard to believe that the power

line stood in the vandalised state for a solid period of 6 years. Six years is a long time. It is equally hard to believe that for six years, members of the community were saved from any fatality, clearly posed by the vandalised power line, and only on the seventh year did the fatality occur. The coincidence is too good to be true.

[34] There is indisputable evidence from Eskom's witnesses that in 2017, an inspection was conducted and the power line looked safe. The policy of Eskom is to inspect its installed power lines on a three year cycle. Also, there was indisputable testimony that Eskom educates members of the community about the dangers of electricity and also encouraged them to report any incident that poses danger emanating from the installed electricity.

[35] Vandalism of Eskom's infrastructures, either for copper wires theft or the illegal connections, is rife. It is at alarming proportions, given the rate of unemployment and the unaffordability of electricity as an indispensable commodity. In almost all the townships and squatter camps in South Africa, there is a scourge of illegal connections. The illegal connections are difficult to be policed or controlled by Eskom and its officials. When Eskom officials seek to correct the situation of illegal connections, they are threatened. With regard to constant inspections, it is difficult to observe how constant inspections would have led to Eskom and its employees foreseeing any vandalism. Often times, the illegal connections or any form of vandalisms are done nicodemously. Access to places where illegal connections have been made is denied to Eskom officials by members of the community.

[36] Lord Atkin in Donoghue stated that "you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour." Sherstobitoff J.A, writing for the majority, in *City of Saskatoon v Smith and others (Smith)* [13] dealing with the aspect of warning and notification to customers, admirably stated the following: -

"[14] The first question is whether such a notification or warning to its customers was necessary given the ordinary common sense would tell all reasonable persons who have problems with their electricity supply that they should notify the supplier, just as any person who purchases a defective product or service knows to contact the supplier to remedy the defect or to direct the complaint to the appropriate person to provide a remedy..."

[37] It is not the case of the plaintiffs that they were not made aware that they must report any fault. On the contrary, their case is that they heard from some named persons who, for reasons unknown to this Court, failed to testify, that the vandalised power line, which ultimately caused the fatal damage, was reported to Eskom. Obviously, this critically invaluable evidence of reporting is inadmissible. Clearly, if the vandalism was for illegal connection purposes, members of the community would not report such to Eskom. Eskom testified, and its evidence was not controverted in any manner or shape, that, faults, when reported, are recorded and attended to. There were no records unearthed by Eskom evidencing any reporting made before the fatal incident. Neither did the plaintiffs provide any collateral evidence of reporting to Eskom the vandalised power line. On the

preponderance of probabilities, the vandalised power line was not reported to Eskom. The inadmissible evidence of reporting is rejected by this Court. Equally, this Court rejects, as false, the testimony that the vandalised power line was like that for the past six years. It is simply improbable that Eskom officials would not have observed such blatant and unsafe vandalised power line during the uncontested 2017 inspection.

[38] For all the above reasons, this Court concludes that Eskom would not have reasonably foreseen that members of the community would vandalise the power line, which would eventually fatally injure the deceased. Even if this Court were to accept that failure to perform inspection is a form of negligence on the part of Eskom, the fatal injury was not caused by such negligence. There is no causal connection between the failure to routinely inspect and the fatal injuries which admittedly were caused by the exposed live

wires, exposed as a result of vandalism. Nevertheless, this Court is unable to question the policy decision of Eskom to only inspect after three years. In *Smith*, the following true statement of law was stated: -

“[20] The Supreme Court per Cory J, elaborated upon the distinction between policy and operations as follows, in Brown at para 38:

38 In distinguishing what is policy and what is operations, it may be helpful to review some of the relevant factors that should be considered in making that determination....; and can be summarised as follows:

True policy decisions involve social, political and economic factors. In such decisions, the authority attempts to strike a balance between efficiency and thrift, in the context of planning and predetermining the boundaries of its undertakings and of their actual performance. True policy decisions will usually be dictated by financial, economic, social and political factors or constraints. The operational area is concerned with the practical implementation of the formulated policies, it mainly covers the performance or carrying out of a policy. Operational decisions will usually be made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.”

[23] Again, it was an error of law on the part of the trial judge to find that the failure to notify or warn electricity consumers to report problems constituted a part of the “operational implementation” of the policy. The implicit decision not to so notify was part of the policy itself and thus not a decision capable of rendering the City liable in tort.”

[39] Accordingly, this Court concludes that the policy decision of Eskom not to inspect as regular as it may be expected, but to only conducted such inspections on triennial basis is incapable of rendering Eskom liable. This Court accepts that Eskom is the biggest supplier of electricity in South Africa. Conducting annual inspections in the whole country, for instance, will put a huge financial strain on Eskom. The education programmes, if heeded to, will certainly go along way in reducing or avoiding fatalities. It cannot be gainsaid that illegal connections pose a biggest threat to the safety of the public. A stop on it, will secure

the safety of

the public. Even if it can be said that, given the rife nature of vandalism, Eskom attracts an additional duty of care, it is not

reasonably foreseeable for Eskom that the vandalism would cause a damage to the very members of the public who vandalise Eskom's

infrastructure. Also, it is not foreseeable that members of the public, with the abundance of educational programmes, would irresponsibly ignore to report a palpably dangerous situation posed by the vandalism. In this particular instance, in 2017, the power line was secured by steel pipe, yet same was vandalised. Vandalism must simply come to an end.

[40] Having failed to establish the first leg of foreseeability, it shall only be academic for this Court to consider the other legs. Having become aware of the vandalism, Eskom acted, and the power line has been incidents free since then. It is important to acknowledge that after the incident, Eskom, within a period of less than 72 hours, did the following: (a) temporarily fixed the vandalised power line to avoid overnight recurrence of the fatalities; and (b) secured the power line with a PVC pipe which stood incident free for seven years. The incontestable testimony of Eskom that once a vandalised power line is encountered, an official must wait until the vandalism is fixed and rendered safe, lends credence to the unchallenged testimony that in 2017, the power line was safe.

[41] Having failed to establish wrongfulness, in the form of negligence, the plaintiffs have failed to establish the alleged breach of the duty of care. Accordingly, the plaintiffs' claim must fail, with an appropriate order as to costs.

[42] For all the above reasons, I make the following order:

Order

1. The action is dismissed.
2. The plaintiffs to jointly and severally, the one paying absolving the other, pay the costs of the defendant on a party and party scale to be taxed or settled at scale B.

GN MOSHOANA

JUDGE OF THE HIGH COURT

DIVISION, PRETORIA

APPEARANCES

For the Plaintiffs: Mr R G Bowels Instructed by: Tiaan Smuts Attorneys, Pretoria For Defendant: Ms K Slabbert Instructed by: Malebye Motaung Mtembu Inc, Pretoria Date of hearing: 10-12 March 2025 Date of judgment: 17 March 2025

[1] Act 4 of 2006.

[2]

[1932] AC 562

[3] 1909 A.C 640

[4]

(1886) L.R 5 Ex.1

[5]

(1883) 11 QBD 503.

[6]

[1977] 1 S.C.R 500

[7] (Case no. 785/2020) [2021 ZASCA 181 (17 December 2021)

[8] (8650/2016) handed down on 13 June 2019 (KZNHCP)

[9] 2005

(5) SA 503 (SCA)

[10] (2695)/2017)

[2021] ZAECPEHC 34 (27 May 2021.

[11] Dabula para 27.

[12] 1962

(2) SA 428 (A) at 430E-F

[13] 2008 SKCA 157

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