

SOUTH AFRICA / JUDGMENT

Kruger v Carlton Paper of South Africa (Pty) Ltd (304/2000) [2001] ZASCA 97; [2002] 2 All SA 351 (A); 2002 (2) SA 335 (SCA) (30 November 2001) [2001] ZASCA 97

COURT

Supreme Court of Appeal

BEFORE

Marais, Scott, Cameron, Mthiyane, Brand

CASE / FILE NUMBER

304/2000

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IN

THE SUPREME COURT

OF APPEAL OF SOUTH AFRICA

REPORTABLE

CASE NO: 304/2000

In the matter between:

M
M J KRUGER
APPELLANT
and
CARLTON
PAPER OF SOUTH AFRICA (PTY)
LTD
RESPONDENT
CORAM:MARAIS, SCOTT,
CAMERON, MTHIYANE JJA and BRAND AJA
DATE
OF HEARING: 13
NOVEMBER 2001
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DATE:

30 NOVEMBER 2001
Summary: Negligence -
test for culpa - whether injury to a qualified and trained
electrician reasonably foreseeable where electrically live terminal
left uninsulated
in enclosure accessible only to electricians.

JUDGMENT

... MTHIYANE JA

MTHIYANE JA:

- [1] The appellant ('the plaintiff'), a maintenance electrician, sued his employer, the respondent ('the defendant'), a paper manufacturing company, in the Transvaal Provincial Division for damages arising from the injuries he sustained when he came into contact with a live terminal connected to a type of transformer known as a Neutral Earth Compensator ('NEC'), carrying 6.600 volts.
- [2] The NEC was enclosed in a metal casing approximately 1.4m high and 50cm wide. The electric terminal with which the plaintiff came into contact was a finger-shaped metal object approximately 7cm by 3cm and was the only uninsulated live part of the NEC. The NEC was placed in an enclosure of approximately 2.5m by 3m, more or less in the middle but closer to the rear wall. Three of the walls of the enclosure were made of brick and the front of the enclosure was barricaded by a gate made of steel and wire mesh. The enclosure had no roof. Affixed to the gate was a large sign bearing the following warning in English, Zulu and Afrikaans. It read:

'UNAUTHORISED ENTRANCE PROHIBITED', 'All unauthorised persons are warned against touching or handling machinery or electric apparatus'.

The large sign also had a triangular drawing bearing the usual symbol indicating a live electric current. Facing the NEC with one's back to the gate, the open terminal was on the left side of it with a gap of about 70cm between the wall on the left and the terminal. A 22cm wide and 15 cm deep furrow ran between the wall and the NEC, thus reducing the available space between them at ground level to a mere 48cm (70cm - 22cm). In addition, any attempt to pass through that gap was made more difficult by the presence of electric cables of a large diameter which were affixed vertically to the adjoining wall, extended to the floor, and then formed a U-shaped loop in order to connect with the terminal. The effect was to create a substantial impediment to anyone who attempted to move through the gap. On the right hand side of the NEC between the casing and the wall the available space was approximately 1 metre in width.

- [3] The gate of the enclosure was locked at all times. Only qualified and trained electricians and an assistant, Mr Willem Phasake, were allowed access to the enclosure and had keys to it. At the time of the incident there were four electricians in the employ of the defendant: the plaintiff, Messrs Christiaan Coertze (Chris Coertze), Wickus Maartens and Arend Reynecke. On occasions certain oil company staff entered the NEC enclosure to check the level of oil in the tank or to fill it up.

- [4] There was a special 'lockout' (shut-down) procedure to be complied with before the electricians were allowed to wash the enclosure. This required an electrician to proceed to the control panels which were situated elsewhere and, in the presence of a supervisor, to cut out the electricity and lock the switch. The electrician would then himself retain possession of the key. The NEC would be shut down only on limited occasions. The reason was that the shut-down would affect a large section of the mill and cause a loss of production
- [5] Litter which found its way into the NEC enclosure was removed from time to time. This was done whenever needed during the week by the electrician who was on duty that week or by the supervisor or the charge hand when going about his normal duties or at the monthly shut down. In addition, all qualified electricians whether or not they were on duty there, were expected to pick up litter in the enclosure. Only qualified electricians were allowed to enter the enclosure to do this.
- [6] With this background I turn to the incident. Shortly after midday on 3 February 1994 and after the plaintiff had completed his work for the day, he set off to assist a colleague, Chris Coertze, who had been appointed to clean certain transformers and the area around them that day. Coertze was cleaning the area with a water hose. The plaintiff joined Coertze to help do the work and after he had finished he told Coertze that he was going to switch off the tap.

Because of his amnesia the plaintiff has no recollection of what happened thereafter. The plaintiff had left Coertze scrubbing the floor. When Coertze next looked in the direction of the enclosure in question he noticed that the gate was open and he saw flames. He saw that the plaintiff was hard up against the NEC. He described the scene that confronted him as follows:

'Kyk hy het met sy rug teen die terminaal vasgesit sy skouer en sy kop was teen die olietenk se kant ... '

'... ek het hom geskop aan die linkerkant so sy linkerkant het uitgesteek langs die transformator. So hy het aan die ding geraak' [Emphasis added]

'... sy gesig was na die muur toe.'

He went on to say that the plaintiff was facing the left wall of the enclosure and the right side of his head was bent over up against the oil tank, which was just above the terminal. Coertze was unable to say how the plaintiff could have come into contact with the terminal. No such accident had ever happened since the NEC was installed in 1975. The plaintiff had been in the employ of the defendant since 1988 and had done an apprenticeship for two years prior to the incident in

1994. He had since then routinely entered the enclosure to pick up litter without incident. It was well known that the chief engineer at the time, Mr Bulleurs, was strict about the neatness of the enclosure and expected his electricians to pick up litter as and when they saw any in the enclosure. Bulleurs did not testify because at the time of trial he had retired but his successor, Jerry Coertze, testified that it was never expected of the electricians to risk their lives merely in order to pick up litter. It was not expected or required of them to go close to

the terminal for that purpose. If litter was too close to the terminal to make it safe to pick it up they could use either a broom or something similar to draw it closer or simply leave it if an attempt to pick it up would be dangerous.

- [7] The questions in issue at the trial were primarily whether the defendant had been negligent in not ensuring that the NEC terminal was insulated, and if so, whether there had been contributory negligence on plaintiffs part. A separation of the issues of negligence and quantum was ordered by the trial judge in terms of Rule 33(4) and the trial proceeded on the question of negligence only. Because the plaintiff suffered from amnesia and because of the absence of witnesses as to how the plaintiff came into contact with the terminal, no evidence on that score was forthcoming. The case had to be decided on the probabilities and inferences to be drawn from the proven facts. At the conclusion of the trial Van der Walt J found that the defendant had been 65%, and the defendant 35%, to blame and refused leave to appeal and cross appeal. On petition to this Court leave was granted to the parties to appeal and cross appeal respectively to the Full Court against the learned judge's finding. On appeal to the Full Court, and by a majority, the defendant's appeal was allowed with costs but the plaintiff's cross appeal was dismissed with costs. With the special leave of this Court the plaintiff now appeals against the whole of the judgment and order of the Full Court. The Full Court found that the defendant had not been negligent. Writing for the majority, Le Roux J said:

'Na my mening het eiser nie daarin geslaag om te bewys dat verweerder hierdie sort "fratsongeluk" (soos hy dit selfnoem) redelikewys moes voorsien het nie en verdere voorsorgmaatreels daarteen moes getrefhet as wat hy reeds gedoen het nie.'

- [8] It is common cause that the NEC terminal with which the plaintiff came into contact was not insulated and that it had been exposed since its installation in the enclosure in
1975. The evidence was that the NEC was received from the manufacturer in that state and that transformers of that type come with terminals exposed. They function in that state. Expert evidence presented at the trial was to the effect that transformers of that type are commonplace in the industry, and that there is nothing unusual about technically competent persons working at or near electrically live machinery.
- [9] During argument before us it became clear that the question for decision had narrowed to whether the defendant ought reasonably to have foreseen the possibility of the plaintiff, a qualified and trained electrician of experience, who was well aware of the dangers of electricity, coming into contact with the NEC terminal in the enclosure and injuring himself, and whether the defendant ought reasonably to have taken steps to insulate the terminal.
- [10] The classic test for determining negligence which has been applied in numerous decisions of this Comi was enunciated by Holmes JA in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430-F. It reads:

'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.'
- [11] There can be no doubt that as a general possibility contact with the open terminal was foreseeable and the defendant did indeed take steps to avoid such contact.

The steps taken were the following:

- (a) The NEC was housed in an enclosure;
- (b) It was kept under lock and key and the keys were issued only to electricians and an assistant, Phasake, who was allowed into the enclosure only under supervision.
- (c) Only qualified electricians and the assistant were allowed into the enclosure.
- (d) A large sign was placed at the gate, warning of the danger of electrocution.
- (e) Certain 'lockout' (shut-down) procedures were put in place and implemented.
- (f) Safety talks were held regularly to keep the workforce aware of the dangers inherent in an electrically live environment.
- (g) Documentation was produced at the trial as proof of the high premium placed by the company on safety. The defendant's commitment to safety is reflected in its Health and Safety Policy document. I refer only to the first paragraph which reads:

'THE COMPANY'S SAFETY OBJECTIVE IS TO PREVENT ALL ACCIDENTS THROUGH:

1. The encouragement and training of employees to make conditions on this site safe and healthy at all times, and to prevent all unsafe acts and conditions.'

[12] For the appellant it was argued that notwithstanding all the above measures the defendant was under a legal duty to take yet further precautionary measures, such as insulating or encasing the terminal to prevent electricians, such as the plaintiff, who were required to enter the enclosure in the course of their duties, from coming into contact with the live terminal. Had this been done, so the argument went, the plaintiff would not have been injured. This stance is similar to that adopted by the trial court as well as that adopted by De Klerk J in the minority judgment in the court a quo. When confronted with a case where there is absolutely no explanation of how the plaintiff came into contact with the terminal, and his right to relief depends upon proof of whether the risk of his doing so was reasonably foreseeable, there can be no justification for assuming that it was foreseeable simply because the event occurred. The temptation to do so should be resisted. 'It is easy to be wise after the event, and nothing is so perfect that it cannot be improved' (Heuston and Buckley -

Salmond and Heuston on the Law of Torts

(1987) 9 ed 264). That is the situation in casu. It would be easy to say, because the terminal was exposed and the defendant could have covered it, therefore liability should follow. In *S v Bochriss Investments (Pty) Ltd and Another* 1988(1) SA 861 (A) at 866J-867B

Nicholas AJA said the following:

'In considering this question [what was reasonably foreseeable], one must guard against what Williamson JA called "the insidious subconscious influence of ex post facto knowledge" (in *S v Mini* 1963(3) SA 188 (A) at 196E-F). Negligence is not established by showing merely that the occurrence happened (unless the case is one where *res ipsa loquitur*), or by showing after it happened how it could have been prevented. The *diligens paterfamilias* does not have "prophetic foresight." (*S v Burger* (supra at 879D).) In *Overseas Tankship (UK) Ltd v Marts Dock & Engineering Co Ltd* (The Wagon Mound) [1961] UKPC 1; [1961] AC 388 (PC) ([1961] All ER404) Viscount Simonds said at 424 (AC) and at 414G-H (in All ER):

"After the event, even a fool is wise. But it is not the hindsight of a fool; it is the foresight of the reasonable man which alone can determine responsibility." '

(See also *Sea Harvest Corporation v Duncan Dock Cold Storage* 2000

(1) 827 (SCA) at 842 F-H.)

[13] The salient facts which were available to the defendant as a reasonable person at the relevant time to enable it to decide whether there was any real danger of the plaintiff coming into contact with terminal, were the following:

- (a) The plaintiff was a qualified and trained electrician.
- (b) He was aware of the danger of coming into contact with the live terminal and how he had to conduct himself in the enclosure. He knew that it was dangerous to get close the terminal and that it was not required of him to get close to it.
- (c) At the commencement of his employment with the defendant in 1988 he had been inducted while working under the supervision of a senior electrician and would have been told of the dangers inherent in working in proximity to an electrically live apparatus, in this case, the NEC.
- (d) From 1988 to 1994 when the accident occurred, he had worked without incident and had not complained that working in the NEC enclosure constituted any danger to himself.

[14] Mr Jerry Coertze, the senior engineer who testified for the defendant, said that he had no idea how the plaintiff could have come into contact with the terminal. It is to this day not known how this came about. When Coertze heard at the trial that on occasions his electricians took a chance by squeezing through the narrow space between the terminal and the wall on the left, he was horrified. He denied any knowledge of the manoeuvre and described it as reckless or grossly negligent. Although the trial judge had doubts about

Coertze's ignorance of the manoeuvre, there was no evidence to gainsay his testimony that such conduct was fraught with risk and it is obvious that the latter observation is correct. The plaintiff and other witnesses he called admitted that on occasion they had done the same thing but sought to place the manoeuvre in a better light by saying that they had only squeezed through with their backs to the wall and while facing the terminal.

- [15] It seems to me that squeezing through that narrow gap in the immediate proximity of a live and deadly terminal conveying 6.600 volts, would be an act of gross negligence, if not out and out recklessness: it does not matter whether one does so facing the terminal or with one's back to it.
- [16] Of course the plaintiffs case is not that the accident happened as a consequence of squeezing between the wall and the terminal. Because of his amnesia he is unable to say how he was injured. The suggestion that the plaintiff may have stumbled is the product of counsel's ingenuity during argument based on inferences which he contended should be drawn from the facts and the probabilities in the case. However, of the proper approach to be adopted in finding facts and reasoning by inference in a civil case, Holmes JA had this to say in *Ocean Accident and Guarantee Corporation Ltd v Kock* 1963(4) SA 147 (A) at 159 B - D:

'As to the balancing of probabilities, I agree with the remarks of Selke J, in

Govan v Skidmore 1952(1) SA 732 (N) at 734, namely

"... in finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on Evidence 3rd ed, para 32, by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one."

I need hardly add that "plausible" is not here used in its bad sense of "specious", but in the connotation which is conveyed by words such as acceptable, credible, suitable (Oxford Dictionmy, and Webster's International Dictionary).'

- [17] In my view, the possibility of the plaintiff having stumbled was rightly rejected by the two courts below as improbable. The argument in support of the proposition founders when regard is had to the facts of this case. Had the plaintiff stumbled he would most probably have suffered burns on his hands and arms. If you stumble you instinctively stretch out your hands to try and keep your balance. That is the most natural thing to do. Furthermore, if you stumble, you go down: not up. Had the plaintiff stumbled he would not have ended up with injuries to the upper part of his body, that is the upper part of his right hip and the upper back.
- [18] It seems to me that, regard being had to (1) the site of the plaintiff's injuries, (2) the position in which Chris Coertze found him and (3) the plaintiff's admission that he had in the past squeezed through the gap between the terminal and the wall, the more natural and plausible conclusion to which one is driven is that the plaintiff was injured either while he was trying to squeeze through the gap between the wall and the terminal, with his back to it, or when

he had in some other way come too close to it. The photographs make it plain that he sustained burn wounds in the area of the right hip towards his back, to his back itself (but more to the middle of his upper back) and to the back of his head. According to the photographs the (finger-like) terminal is positioned in such a way that in order to come into contact with it and sustain the injuries which he did, it would be necessary for the plaintiff to place himself in the gap previously described. It is also significant that Chris Coertze says that when he found the plaintiff pinned to the NEC he saw him 'sticking out'. Why would he stick out if he were not in the 'gap'? Having regard to the nature of the terrain, Coertze's description would fit in with him sticking out of the 'gap' between the wall and the terminal. If the plaintiff were found merely on the side of the casing, to say that he was sticking out would not make sense. The argument that it is unlikely that the plaintiff would have entered the gap between the terminal and the wall because he was safety conscious loses much of its force if regard is had to the admission that he did it on occasion, albeit while facing the terminal. Even if the plaintiff may not have attempted to squeeze through the gap he must, on the probabilities, somehow have got too close to the terminal to be shocked by it. He knew that he had to keep a safe distance between himself and the terminal but in utter disregard of the safety procedures and the rules which he had been accustomed to follow and had presumably employed over the past six years from 1988 to 1994, he did the opposite.

[19] Having regard to all the above factors I consider that a reasonable person in the position of the defendant would not have foreseen that the plaintiff would either squeeze between the terminal and the wall or get so close to the terminal as to cause him to come into contact with it. (See *Griffiths v Netherlands Insurance Co of SA Ltd* 1976(4) SA 691 (AD) at 697B.)

[20] Having regard to all the factors in the case I am of the view that it has not been shown that the danger of the plaintiff coming into contact with the terminal was so real as to be foreseeable. In my judgment a reasonable person in the position of the defendant would not have foreseen it and would therefore not have considered it necessary to take steps to insulate the terminal to protect a qualified and trained electrician of the plaintiff's experience. It has therefore not been shown that the defendant was negligent.

[21] The appeal is dismissed with costs, such costs to include the costs of two counsel.

K K MTHIYANE

JUDGE OF APPEAL

MARAIS JA)Concur

SCOTT JA)

CAMERON JA)

BRAND AJA)

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