

SOUTH AFRICA / JUDGMENT

Molapo v Emalahleni Local Municipality (4146/2021) [2024]

ZAMPMHC 32 (30 May 2024)

[2024] ZAMPMHC 32

COURT

Middelburg High Court, Mpumalanga

BEFORE

MBG Langa

CASE / FILE NUMBER

4146/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION (MIDDELBURG LOCAL SEAT)

CASE

NO: 4146/2021

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED

DATE:

30/05/2024

SIGNATURE

In

the matter between:

THABISO

JOCKONIAS MOLAPO

PLAINTIFF

AND

EMALAHLENI

LOCAL MUNICIPALITY

DEFENDANT

JUDGMENT

LANGA J:

Introduction and factual background

- [1] This action for damages relates to an electrocution incident which took place on 20 September 2021 in Emalahleni near Bonginsimbi High School. The Plaintiff sustained electrical shock caused at a substation belonging to the Defendant, the Emalahleni Local Municipality. On 26 May 2023 an order was granted separating liability and quantum. The trial is consequently proceeding on the issue of liability.
- [2] While it is common cause that the Plaintiff was electrocuted and injured at the substation belonging to the Defendant, there is however a dispute between the parties regarding how the electrocution took place. The Plaintiff alleges he was electrocuted after he was requested by the Defendant's employee, Ms. Mavis Phogole, to assist her to fasten a cable at the mini substation. Ms. Phogole, however, denied the allegation and stated in her evidence that she was busy at her vehicle fetching tools when she heard an explosion and realized that the Plaintiff had been electrocuted.
- [3] It is, however, common cause that the electrocution happened when the Plaintiff come into physical contact with apparently live cables in mini substation located in an enclosed and fenced yard with a lockable gate. It is further common cause that on the day of the incident the employees of the Defendant, Ms Phogole and Mr Maseko, in response to a power outage complaint, went to the mini station and opened the gate in order to investigate and repair the cause of power

outages to several houses around Bonginsimbi School.

- [4] It is further not disputed that the Plaintiff at some point while the electricians were at the substation, entered the fenced off area where the mini-substation belonging to the Defendant is located without invitation from the Defendant's employees. He was also aware that the mini substation was an electrical installation. He informed the Defendant's employees that his house which is close to the substation was also affected by the power outage. According to the Defendant's employees the Plaintiff showed them where his house was connected in the mini substation. It is further common cause that as the Defendant is a licensee in terms of the Electricity Regulation Act 4 of 2006, (the Act), it accordingly bears the onus to prove that its conduct was not negligent.
- [5] While it is not disputed that the Plaintiff visited the electricity substation while the defendant's employees were there, it is nonetheless denied by the Defendant that Ms Mavis Phogole requested the Plaintiff to assist her to repair and install a cable at the substation as alleged by the Plaintiff. The Defendant denied that there was a breach of the statutory legal duty imposed on it by the Electricity Regulation Act 4 of 2006. The issues for determination are therefore whether the Defendant breached the statutory legal duty by asking the Plaintiff

to operate the electrical substation.

Evidence

Thabiso Jacksonias Molapo

[6] The Plaintiff's evidence is essentially that on 20 September 2021 he went to the substation after seeing the Defendant's employees arrive. He stated that while there Mr

Maseko left Ms. Mavis Phogole behind and the latter later requested him to assist her to repair an electrical cable. As he was doing that he was electrocuted and sustained serious burn wounds.

[7] The Plaintiff further alleged that Ms. Phogole first went to her vehicle and asked him to assist her to take off a cable from a bundle of cables which he then carried to the mini-substation. Ms. Phogole followed him with her toolbox and asked him to get her a knife to cut the insulation around the cable. He went to his house where his grandmother gave him a side cutter pliers which he gave to Ms. Phogole who proceeded to attend to the connection of the cable to existing cable. She tightened the cable Ms. Phogole asked for a 15 / 16" spanner which the plaintiff also collected from his house. Ms. Phogole started to fasten the connection but gave the spanners to the plaintiff to complete the job. She then collected gloves from her vehicle, gave it to the plaintiff who put it on. He carried on tightening the connection while Ms. Phogole once more went to the vehicle. It was then that he was shocked.

[8] Under cross examination he was confronted with his statement under oath dated 21 September 2021 which he confirmed as correct. Certain contradictions between his statement and his viva voce evidence were pointed out to him. For instance, he was informed that there is amongst other things no mention in his statement that he pointed out the cables to his house to the defendant's employees. Further it was put to him that although he testified that Mavis asked for a knife, in his statement he refers to pliers.

[9] Further, it was pointed out to him that although his viva voce testimony is that he went to the bakkie to fetch the cable with Mavis, but in the statement, he stated that that Mavis went alone. In addition, it was pointed out to him that in the statement he did not state that Mavis handed him or passed him any tools and further that he did not mention that she, Mavis, went to get him gloves. It was also, most importantly, pointed out to him that in the statement he indicated that he voluntarily emulated what he saw Mavis doing without her asking him to do so whereas in his evidence he stated that she asked him to tighten the cable. The Plaintiff's explanation of the differences and contradictions was that these are attributable to the drugs given to him at the hospital. He claimed to have been under the influence of medication when he made the statement hence the contradictions. Mr Molapo's evidence was the only adduced by the Plaintiff whose case was thereafter closed.

Mavis Phogole

[10] Ms. Phogole's evidence in a nutshell is that in response to a report about a power outage, she went to the substation where the incident took place where she was joined by her supervisor Mr Maseko who came in a separate vehicle. She testified that while she was busy in the station investigating the cause, she saw the Plaintiff in the yard of the substation. She said the Plaintiff approached them and professed to know where some cables were located or connected and pointed out these to them. Mr Maseko then questioned him how he knew of the cables and then told him to leave the place as he was not allowed to be there. She said the Plaintiff then left the building and they continued with their investigation. When they went to the mini sub-station outside the building, but on the premises, they found the plaintiff still standing outside the building but

still on the premises. Mr Maseko once again ordered the Plaintiff to leave the yard but he told Mr Maseko he wants to show them where his house cables were connected. Mr Maseko however did not want to entertain him and ordered him to leave and he eventually exited through the gate.

[11] She said that she thereafter prepared her tools and carried them to the mini-substation. She returned to her vehicle again and it was while she was there when she heard an explosion. When she checked what was happening, she saw the Plaintiff as well as the grass around him on fire. She confirmed that she took the Plaintiff to hospital.

Abednigo Maseko

[12] Mr Maseko essentially confirmed that he attended to the substation in question together with Ms. Phogole in response to a power outage report. He confirmed that when the Plaintiff was electrocuted, he was not at the station as he had gone to attend a nearby station where it was reported there were also problems. His evidence could not shed any further light on how the Plaintiff was electrocuted as it happened while he was away. He however confirmed that while he was still at the station before he left, he chased the Plaintiff out of the yard as he had no authority to be there. He confirmed that the Plaintiff entered the place without invitation or approval and started advising them about the location of the circuit breakers and his house cables. He then ordered the Plaintiff to leave the building which he did. Later when they went outside the building to inspect the mini substation outside the building but still inside the yard, they saw the Plaintiff still inside the yard. Again, he chased the man out of the yard and he left. He stated that when he left the scene the man was no longer on the premises.

The issues for determination

[13] In essence the issues for determination revolve around how the Plaintiff was electrocuted. According to the Plaintiff he got injured when he was requested and allowed to work on an electricity installation in question by the Defendant's worker Ms Phogole. Ms Phogole on the other hand denied that she asked the Plaintiff to assist her in her work at the substation as alleged by the Plaintiff. the court has to determine whether the Defendant was negligent as envisaged in the Act which the Plaintiff relies on.

Discussion and analysis

[14] It is trite that a defendant does not bear the onus to prove that he was not negligent. As stated in *Ntsala and Others v Mutual & Federal Insurance Co. Ltd* 1996 (2) SA 184 (T) the onus rests on the Plaintiff to prove negligence. In order to succeed with the claim, a Plaintiff therefore had to show that the Defendant's workers were guilty of conduct which was negligent, wrongful and was the cause of the electrocution and damages suffered by the Plaintiff. In *Telematrix (Pty) Ltd v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) para [12], the Supreme Court of Appeal stated the following basic rule. 'The first principle of the law of delict, which is so easily forgotten and hardly appears in any local text on the subject is, as the Dutch author Asser points out, that everyone has to bear the loss he or she suffers. The Afrikaans aphorism is that "skade rus waar dit val". Aquilian liability provides for an exception to the rule and, in order to be liable for the loss of someone else, the act or omission of the defendant must have been wrongful and negligent and have caused the loss. But the fact that an act is negligent does not make it wrongful ...'

[15] The test for negligence is to be found in *Kruger v Coetzee* 1966

(2) SA 428 (A) at 430E-G. '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.

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

Electricity Regulation Act 4 of 2006

[16] It is however common cause in this case that the Section 26 of the Act reverses the onus in respect of damage or injury caused by induction or electrolysis or in any other manner by means of electricity generated as envisaged in the Act.

Liability of licensee for damage or injury 26. 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.

[17] In terms of the Act a "licensee" means the holder of a licence granted or deemed to have been granted by the Regulator under this Act. A "distributor" is defined as a person who distributes electricity. It is common cause that the Defendant in this matter is a licensee or

distributor as envisaged by the Act and therefore falls within the purview of the Act and in particular Section 26 above. In *Eskom Holdings Ltd v Hendricks* 2005 (5) SA 503 (SCA) the court confirmed that the effect of this section is that the licensee, in this case the Defendant, bore the onus of proving on a balance of probabilities that it was not negligent, or if it was, that there was no causal link between that negligence and

the injuries sustained by the plaintiff. Once the licensee's conduct is found to have been negligent, then its conduct would have been wrongful.

[18] In line with this decision a court must accordingly make a determination whether a reasonable person would have taken steps to guard against the danger and, if so, whether the steps taken by the defendant were reasonable in the circumstances. The court in *Eskom*, supra, further stated that what is reasonable must depend on the circumstances of each case and that in making this determination the court would consider inter alia but not limited to the following:

[18.1] The degree or extent of the risk created by the actor's conduct;

[18.2] The gravity of the possible consequences if the risk of harm materializes;

[18.3] The utility of the actor's conduct, and the burden of eliminating the risk.

[19] It is evident that Section 26 contains a deeming provision or creates a rebuttable presumption of negligence against the licensee. In the absence of credible evidence to the contrary the claimant's injuries are deemed to have been caused by the negligence of the licensee.

[20] In this case it is common cause that the Plaintiff suffered injuries caused by induction or electrolysis or electricity generated, transmitted or distributed by the Defendant. Section 26 of the Act is accordingly applicable in this matter. The Defendant is therefore deemed to have negligently caused the injuries sustained by the Plaintiff. What remains to be determined is whether the Defendant has presented credible evidence to prove that it did not negligently cause the injuries.

[21] Considering the evidence, the crisp issue to be determined in this case is whether the Plaintiff was injured while he was assisting an employee of the Defendant to repair a mini substation with their knowledge and permission as he contended. Alternatively, the court must determine whether the Plaintiff was injured, while of his own volition and contrary to the orders of the Defendant's employees, he fiddled with the electrical installation of mini substation. The court must further determine whether having regard to the common cause facts, the Plaintiff injuries were foreseeable and, if so, whether the Defendant could have taken any reasonable steps to prevent such injuries.

[22] The evidence by the witnesses is obviously very pivotal in the determination of these issues, particularly whether the Plaintiff decided to fiddle with the electrical installation despite the order by Mr Maseko for him to leave the premises. It is evident that in this respect, the

parties have presented mutually destructive versions as was correctly pointed out by Mr Kruger SC for the Plaintiff. As the versions by the parties are irreconcilable and thus mutually destructive the court must accordingly determine which of the two irreconcilable versions is most probable. The court must properly consider the probabilities.

- [23] It is trite that where there are two mutually destructive versions before court, the court must be satisfied that the version of the litigant who carries the onus is true and the other false. In *City of Johannesburg Metropolitan Council v Ngobeni* [2012] ZASCA 55, the SCA in dealing with the correct approach to be adopted when dealing with the question of onus and the probabilities referred to *National Employers' General v Jagers National Employers' General Insurance v Jagers* 1984 (4) SA 437 (E) at 440D, in which the following were stated by Eksteen JP: 'It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfied the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If, however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.' See also *Stellenbosch Farmers' Winery Group Ltd v Martell et cie* 2003 (1) SA 1 (SCA) para 5 and *Dreyer v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA) at 558E-G.
- [24] In is evident from the evidence that the Plaintiff's evidence is not free of discrepancies. For instances in his statement made to the police he made a number of averments which he later denied under cross examination. For instance, although he stated in the statement that he went to the bakkie with Mavis to fetch the cables this is not contained in his statement. Likewise, the he did not mention in his statement that Mavis went to fetch gloves and gave him the gloves to wear. Furthermore, in his statement he said Mavis asked him to borrow her pliers to cut the cable but, in his evidence, he said it was a knife. Further, although he confirmed that he pointed out to Mavis and Maseko the cables leading to his house, this is not mentioned in the statement.
- [25] However, the most significant contradiction is the one relating to whether he was asked by Mavis to work on the cables or whether he did so of his own volition. This issue is right at the core of the dispute. In his viva voce evidence, he stated that after Mavis asked for a spanner which he also fetched from his house. Mavis after fastening the cable half-way then gave

him the spanners to fasten the cable further. It was while he was fastening the cables that he was electrocuted. However, in his statement made shortly after the accident, he stated that Mavis tightened the cable and then went to the bakkie leaving him alone in the substation. While she was away 'I then took the tool and tight (sic) the cable myself as I saw what she was doing'.

- [26] This aspect of the evidence is not only important in the assessment of the credibility of the Plaintiff but it is equally critical in dealing with the probabilities. Based on his version in the statement, the Plaintiff tightened the cable without anyone asking him to do so. In justifying his almost fatal naughtiness, the Plaintiff stated in the statement that he was not aware that the electricity was on at the station. Despite this, it is important to note that he also positively stated in his evidence in chief that nobody switched off the power supply while they were there. This constitutes a glaring contradiction of his averment that he was not aware that the power was on. In addition to this clear contradiction, if indeed Mavis also worked on the same cable as insinuated by the Plaintiff, Mavis should have been electrocuted as well. It was only when he was confronted with these contradictions that the Plaintiff stated that he made the statement was still under the influence of medication. This explanation is, however, not consistent with his evidence under cross examination where before the contradictions were pointed out, he confirmed the correctness of the statement. This explanation stands to be rejected outright.
- [27] The Plaintiff's version must be contrasted with that of Mavis and Mr Maseko. These two witnesses corroborated each other on what happened before the Plaintiff was electrocuted. Both stated that the Plaintiff claimed to be conversant with the functioning of that particular substation to the extent that he even wanted to show them the location of the cables to his house. However most importantly these witnesses both testified that on at least two occasions Mr. Maseko ordered the Plaintiff to leave the premises as he was not allowed to be there. Both confirmed that it was only on the second occasion that the Plaintiff left the yard. In my view neither Maseko nor Mavis created the risk for the Plaintiff. they were clearly aware of the gravity of the possible consequences if the risk of harm materializes and tried to eliminate that risk by chasing the Plaintiff away from the premises.
- [28] In response to this evidence all the Plaintiff could say was a bare denial. It is however important to note that although the Plaintiff alleged that he was not prevented from entering the premises, he stated on his own that the gate was unlocked but he stood 2-3 away from the substation. He further stated that when the workers asked him where his houses cables were connected, he showed them while standing 4 meters away.
- [29] It is further strange that the although he testified that he had a witness who saw the incident who was available to testify, the Plaintiff decided not to call or subpoena the said witness. A failure by party to call a witness under these circumstances should attract a negative inference. If the witness had a favourable account of the incident one would have expected the Plaintiff to call him. The failure to call this witness suggests that his account is not favourable to the Plaintiff. This failure can only mean that there is no such witness or that

the Plaintiff feared that the witness might expose facts which are unfavourable to his case.

[30] Nevertheless, in my view the evidence of Maseko and Mavis cannot be faulted. Contrary to that of the Plaintiff, the evidence of Mavis and Maseko was not contradictory or hyperbolic. They did not deny that the Plaintiff entered the station. In fact, their evidence is consistent with his regarding his apparent knowledge of the working of the station which a civilian is not expected to know. He confirmed that he told them where cables were located in the power station. In the light of the discrepancies in the evidence of the Plaintiff, it is in my view highly improbable that the Plaintiff would have been allowed or requested by Mavis to assist with the repair work on a live electrical line which Mavis was well aware is live. Mavis herself was not allowed to do any repair work until her supervisor came back and the live feed was switched off. The probabilities show

that after having been chased away the Plaintiff somehow managed to sneak into the premises while Mavis was at the bakkie.

[31] The Defendant's two witnesses were in my judgment credible and consistent. Their testimonies corroborated each other in all material respects and should be accepted. They were also consistent with the Defendant's pleaded facts. I therefore accept that the Plaintiff was chased out of the premises by Maseko as stated by both witnesses. I further conclude based on the above facts that the Plaintiff out of his own as stated in his statement, fiddled with the cables while Mavis was at the bakkie. I am therefore satisfied that the Plaintiff was solely responsible for putting in motion the chain of events which led to the injuries he sustained.

[32] I am of the view that on a balance of probabilities, the Plaintiff has failed to demonstrate that his injuries were foreseeable and the Defendant should have taken steps to prevent it and failed to do so. I am accordingly satisfied that the Defendant has rebutted the presumption created by Section 26 that it was the cause of the Plaintiff's injury. In the result the Plaintiff's claim stands to be dismissed with costs.

Order

[33] In the result I make the following order:

The Plaintiff's claim is dismissed with costs.

MBG LANGA

JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff: Advocate TP Kruger SC For the Defendant: Advocate L Matsiela Date of hearing: 14 February 2024 Date of judgment: 30 May 2024

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 30 May 2024 at 14h00

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