

SOUTH AFRICA / JUDGMENT

Pitzer v Eskom (336/11) [2012] ZASCA 44 (29 March 2012)

[2012] ZASCA 44**COURT**

Supreme Court of Appeal

BEFORE

Nugent, Cachalia, Bosielo, Petse, Boruchowitz

CASE / FILE NUMBER

336/11

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**JUDGMENT**

Case No: 336/11

Not Reportable

In the matter between:

HENDRIK JOHANNES PITZERAppellant

and

ESKOM

.....Respondent

Neutral citation: Hendrik Johannes Pitzer v Eskom (336/11) [2012] ZASCA 44 (29/03/ 2012).

Coram: NUGENT, CACHALIA and BOSIELO JJA and PETSE and BORUCHOWITZ AJJA

Heard: 28 February 2012

Delivered: 29 March 2012

Summary: Negligence – failure to take reasonable precautions against foreseeable risk – action for damages against undertaker, as defined in Electricity Act 41 of 1987 – qualified electrician injured in a live chamber of an electrical substation – undertaker failing to rebut presumption of negligence.

ORDER

On appeal from: South Gauteng High Court, Johannesburg, (Moshidi J) sitting as court of first instance):

The following order is accordingly made:

1. The appeal succeeds with costs.
2. The order of the court a quo is set aside and the following order substituted:

‘It is declared that the defendant is liable for fifty per cent of the plaintiff’s proven or agreed damages.’

BORUCHOWITZ AJA (NUGENT, CACHALIA and BOSIELO JJA and PETSE AJA concurring):

- [1] On 14 July 2006 the appellant was injured by an electric shock sustained inside a live chamber of an electrical substation operated by the respondent (Eskom) at a complex in Vanderbijlpark. Arising from this incident he sued Eskom for damages in the South Gauteng High Court, Johannesburg, alleging that it had been negligent in various respects. Eskom denied liability. The trial proceeded on the issue of liability only. At its conclusion, Moshidi J, dismissed the claim, holding that the appellant’s injury was caused solely by his own negligence and that there had been a voluntary assumption of risk. With the leave of the court a quo the appellant appeals against this judgment.
- [2] A live chamber is an enclosed room or area in which a high voltage electrical apparatus is housed. The live chamber in which the appellant was electrocuted is located inside a high voltage yard. In terms of regulations issued by Eskom access to such a yard is strictly controlled, and the door to every live chamber is required to be closed at all times and the key thereto kept under the control of a designated official. The appellant, who is a qualified electrician, was aware of these requirements as he had completed a course presented by Eskom relating to the regulations.
- [3] During the week ending 14 July 2006, the appellant was employed by a private electrical contracting company to carry out electrical work in a control room which is located outside the high voltage yard. He was being assisted by Mr Msibi. At that time certain structures were being painted within the yard under the auspices of an independent contractor. The painting contractor was given access to the high voltage yard through a gate closest to the control room, and was permitted to use a private lock in order to open and close this gate.
- [4] At the time the high voltage yard was under the control and supervision of Mr Fourie, a principal technical official employed by Eskom. His duty was to ensure that the requirements of the regulations were complied with and that the electrical substation was properly secured at all times.

- [5] The appellant testified that at about 11h00 on 14 July 2006 he was approached by Mr Fourie who informed him that he was going fishing. Fourie then left the substation in his Eskom vehicle. When the appellant later emerged from the control room he noticed that the main gate to the high voltage yard was open. The appellant knew, by virtue of his training, that the gate should have been closed and locked, unless work was being performed under supervision inside. He therefore decided to close the gate, but before doing so he wanted to satisfy himself that all the painters had vacated the yard.
- [6] Upon entering the yard the appellant observed that the door to the live chamber on the first floor of the southern blockhouse was open. In order to satisfy himself that no one was in the blockhouse, he went up the stairs and approached the live chamber. He then entered the live chamber where he noticed certain electrical equipment lying on the floor in a partially dismantled state. It was at that stage that the appellant sustained an electric shock and was rendered unconscious. He was taken to the hospital by his assistant, Mr Msibi.
- [7] The appellant explained that he entered the live chamber because he believed that it was either dead or decommissioned. His belief was reinforced by the following factors: the door to the live chamber was open when it should have been closed, the bottom doors to the blockhouse were open and painters were seen using the cubicles, one of the rooms in the southern blockhouse was burned down and equipment used to generate electricity lay in a dismantled state on the floor of the live chamber.
- [8] Mr Fourie conceded that he left the premises at about 11h00, but there is a conflict in the evidence as to the means by which he did so. He said that he left the yard through the gate being used by the painters, who were at that time preparing to leave, and that he assumed that they would lock the gate. At the time he left, so he said, the other gates to the yard were locked. Fourie's evidence in this regard is neither credible nor probable. Pitzer's testimony that he entered the high voltage yard is corroborated by Mr Msibi. Their versions were also not challenged in cross-examination and nor, as one would have expected, was it put to them that Mr Fourie had left the high voltage yard through the gate that was used by the painting contractor.
- [9] Mr Barry Leslie, a protection specialist employed by Eskom, gave expert evidence. He examined the live chamber immediately after the incident and identified flash marks on a meter panel approximately three meters from the door. He also found burnt paint and the residue of clothing on a horizontal bar. He concluded from this that the appellant would have been some three meters into the live chamber and in close proximity to the live equipment when he was electrocuted.
- [10] The foregoing is, in broad terms, a summary of the relevant evidence. The appellant's version was corroborated in material respects by the testimony of his assistant, Mr Msibi. No countervailing evidence was adduced by Eskom as to the circumstances giving rise to the appellant's injury.

[11] There is a presumption of negligence that operates in favour of the appellant. Section 26 of the Electricity Act 41 of 1987 (the Act) provides:

‘In any civil proceedings against an undertaker arising out of damage or injury caused by induction or electrolysis or in any other manner by means of electricity generated or transmitted by or leaking from the plant or machinery of any undertaker, such damage or injury shall be presumed to have been caused by the negligence of the undertaker, unless the contrary is proved.’

[12] Eskom is an ‘undertaker’ as defined in section 1 of the Act. It is common cause that the appellant’s injuries were caused by electricity transmitted by Eskom’s apparatus in the live chamber. The effect of the section is to cast upon Eskom 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 injury sustained by the appellant. (See *Eskom Holdings Ltd v Hendricks* 2005 (5) SA 503 (SCA) para 8).

[13] Counsel for Eskom, rightly, conceded that the trial court’s finding that there had been a voluntary assumption of risk by the appellant was unsustainable. It was submitted, however, that Eskom had discharged the evidential onus of establishing an absence of negligence on its part.

[14] Two general propositions were advanced on Eskom’s behalf. Firstly, that a diligens paterfamilias in the same position would not have foreseen the possibility that a trained electrician, such as the appellant, would enter a live chamber and injure himself by coming into contact with live equipment. Secondly, on the assumption that such harm was reasonably foreseeable, that Eskom had taken all reasonable steps to guard against such occurrence. In this regard, Eskom had ensured that the live chamber was specifically housed in a separate blockhouse structure located on the first floor away from other activities at ground level, the keys thereto were subject to strict control and access to the chamber was only permitted if authorised by a permit.

[15] It was also argued that the appellant’s injury was caused entirely by his own negligence. He was only required to perform work in the control room outside the high voltage yard and had no instruction or authority to enter the yard. He knew the dangers of electricity and particularly the dangers associated with live chambers, but despite such knowledge entered the live chamber and touched or placed himself in close proximity to the high voltage equipment. It was submitted that a reasonable person in the position of the appellant would not have entered the live chamber before first ascertaining whether it was in fact decommissioned. Moreover, the appellant’s stated reason for entering the yard and the live chamber was contradictory, illogical and suspicious. If he really believed that the chamber was not active there would have been no reason for him to conclude that he had a duty to enter the yard and close or lock the door of the live chamber. He also had no key with which to lock the chamber.

- [16] Finally, it was submitted that even if the gate to the high voltage yard and the exit door to the live chamber were open, this was not the cause of the appellant's injury. The direct cause was his own negligence in entering the live chamber.
- [17] Of the three requirements that are necessary for liability under the Aquilian action, only fault (culpa) and causation are in issue. Wrongfulness is not in contention. The parties accept that as the operator of a high voltage system, Eskom was under a legal duty to take reasonable measures to prevent injury to persons entering the high voltage yard and that a failure to do so would be actionable.¹
- [18] The test for determining negligence is that formulated by Holmes JA in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F:
- ‘For the purposes of liability culpa arises if–
- (a) a diligens paterfamilias in the position of the defendant–
- 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
- the defendant failed to take such steps.’
- [19] I think there can be no question that Mr Fourie must have foreseen, or at least ought reasonably to have foreseen, that some person, albeit that he or she may have been a trespasser, might enter the yard and be exposed to the danger of electrocution if the gate to the yard was left open while it was not under supervision. The very purpose for which there was a gate, and for which Mr Fourie's instructions were to keep it locked, was to prevent that from occurring. It was submitted on behalf of Eskom, however, that even if it was foreseeable that some person might be exposed to the risk of electrocution, it was not foreseeable that harm might come to a person in the position of Mr Pitzer, a trained electrician.
- [20] Whether foreseeability of harm to someone suffices for negligence, or whether it requires foreseeability of harm to a person in the position of the appellant, is a matter that has evoked considerable debate over the years. It is not necessary to enter that debate in this case. I will assume that the reasonable foreseeability of harm to a person in the position of the appellant namely, a person qualified and experienced in the risks associated with electricity, is required for Mr Fourie (and hence Eskom) to be held liable.
- [21] In my view, Mr Fourie should reasonably have foreseen that even a qualified electrician might come to harm if the entrances to the premises were left open. Indeed, I think that one might expect that such a person particularly will appreciate the risks of leaving the premises open and will take steps to prevent that happening, if necessary by entering the premises to close and secure open doors. Nor do I think that his or her qualification, in itself, is any guarantee that he or she will not come to harm. He or she will not necessarily have intimate

knowledge of the apparatus on the premises; he or she will not be aware of dangers that might have been left in existence by incomplete work; he or she will not necessarily be aware of the layout of the apparatus and where the danger points are. The fact alone that the appellant found himself being electrocuted seems to me to demonstrate amply that even qualified electricians are subject to risk.

[22] We were referred by counsel for Eskom to the decision of this court in *Kruger v Carlton Paper of South Africa (Pty) Ltd* 2002 (2) SA 335 (SCA). In that case a maintenance electrician came into contact with a live terminal connected to a transformer. The court identified the issue before it as follows:

‘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.’²

[23] It went on to make the following findings:

‘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 the 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 to 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.’³

And it concluded as follows:

‘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.’⁴

- [24] What is or is not reasonably foreseeable in any particular case is a fact bound enquiry. I think it is clear from the abovementioned excerpts alone that it was by no means only because the plaintiff in that case was an electrician that the court concluded that harm to a person in his position was not foreseeable. The facts that founded that decision were more complex than that. Where questions that fall to be answered are fact bound there is seldom any assistance to be had from other cases that do not share all the same facts. That seems particularly apposite in this case, in which the facts are materially distinguishable.
- [25] In my view, it was indeed reasonably foreseeable to Mr Fourie that if the premises were left open the appellant might enter and accidentally be electrocuted. It needs to be borne in mind that the precise or exact manner in which the harm occurs need not be foreseeable: only the general manner of its occurrence. (*Sea Harvest Corporation (Pty) Ltd & another v Duncan Dock Cold Storage (Pty) Ltd & another* 2000 (1) SA 827 (SCA) para 22). That being so, he was obliged to take reasonable steps to avoid it occurring. What was called for in that regard was no more than to lock the gate as his duties required. His failure to do so was in my view negligent.
- [26] Turning to the question of causation, the test is ‘whether but for the negligent act or omission of the defendant the event giving rise to the harm in question would have occurred’ (*Minister of Police v Skosana* 1977 (1) SA 31 (A) at 35C-D. See too *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A) at 915B-H; *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700F-H).
- [27] That the gate to the high voltage yard and the exit door to the live chamber were open at the relevant time can admit no doubt regarding causation. Logic dictates that had they been closed the appellant would not have had access to the substation and the incident would not have occurred. It is indeed so that the appellant’s explanation for entering the live chamber is suspicious, but nothing material turns on that aspect. It was Eskom’s duty to ensure that only authorised persons had access to the yard and that the substation was properly secured as required under the regulations. Eskom’s designated official, Mr Fourie, was required to see to it that all doors and gates to the substation and, especially to the live chamber were closed and locked. Clearly, he did not comply with his obligations. The reason as to why the door to the live chamber was left open remains unexplained. There was thus a causal link between Eskom’s conduct in failing to properly secure the yard and the live chamber and the appellant’s injury. But whether Eskom’s conduct was the sole cause of the appellant’s injury is another matter.
- [28] What remains is whether the appellant was contributorily negligent. Objectively viewed the appellant would have had no valid reason to assume that it was safe to enter the live chamber. The factors upon which the appellant relied were at best superficial. The appellant never knew for a fact whether the blockhouse and live chamber had been decommissioned. A reasonable person in the position of the appellant ought to have made such enquiries before entering the live chamber. He was undoubtedly negligent in either touching or standing in close proximity to the high voltage equipment which injured him.

[29] On an overview of the proven facts, I find that both parties were equally at fault in relation to the damage caused and that the appellant's damages should be reduced by fifty per cent.

[30] The following order is accordingly made:

2. The order of the court a quo is set aside and substituted with the following:

P BORUCHOWITZ

ACTING JUDGE OF APPEAL

Appearances:

Appellants: J J WESSELS SC

Instructed by Malcolm Lyons & Brivik,

Cape Town

Matsepes Inc, Bloemfontein

Respondent: M DU P VAN DER NEST SC

Instructed by Webber Wentzel,

Johannesburg

McIntyre & Van Der Post, Bloemfontein

1See, for example, Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd 2006 (3) SA 138 (SCA) paras 11-13 and cases cited.

2Kruger v Carlton Paper of South Africa (Pty) Ltd para 9.

3Kruger v Carlton Paper of South Africa (Pty) Ltd para 13.

4Kruger v Carlton Paper of South Africa (Pty) Ltd para 19.

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