

SOUTH AFRICA / JUDGMENT

T.S obo H.S v Lekwa Local Municipality (1900/17) [2019] ZAMPMHC 9 (23 October 2019) [2019] ZAMPMHC 9

COURT

Middelburg High Court, Mpumalanga

BEFORE

M.T Mankge

CASE / FILE NUMBER

1900/17

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IN

THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION

(MIDDLEBURG LOCAL SEAT)

CASE

NUMBER: 1900 /17

In

the matter between:

T

S (OBO H

S) PLAINTIFF

And

LEKWA

LOCAL

MUNICIPALITY DEFENDANT

JUDGMENT

MANKGE, AJ

INTRODUCTION:

[1] The plaintiff in her representative capacity as a natural mother and legal guardian of a minor child H S (“The minor child”)

instituted action for damages against the defendant in the sum of R 6 000 000. The plaintiff alleges that on 5th August 2016, the minor child was electrocuted after being exposed to live electrical cables from a distribution transformer box belonging to the defendant that was left open, they allege this happened when the minor child was attempting to retrieve his soccer ball inside this distribution transformer box .

[2] The parties informed the court that they agreed that the merits will be separated from quantum. This judgment concerns only the merits.

[3] The plaintiff alleged that the defendant was negligent on the following basis:

- a) It failed to fix the door to the distribution transformer box which in turn, exposed dangerous live electrical wires;
- b) It failed to ensure that the door to the distribution transformer box remained closed and under a lock to prevent danger of live electrical wires from being exposed;
- c) It left the door to the distribution transformer box open, unlocked and unfixed for many years thereby continuing to expose dangerous live electrical wires.

[4] The plaintiff contends that as a result of the electrocution, the minor child suffered serious bodily injuries, and hence the claim for R6000 000-00.

[5] The defendant denied most of the allegations in its plea, and in particular pleaded that:

- (a) All distribution and reticulation structures installed within the municipal area of the defendant comply with the required statutory and regulatory standards applicable;
- (b) All electrical installation (and ancillary components), including but not limited to transformers, powerlines and cables are regularly maintained and serviced in accordance with such aforesaid statutory and regulatory standards;
- (c) All such electrical installation are duly safeguarded and protected to prevent damage thereto and/or to ensure that such installation are safely installed and maintained in accordance with such aforesaid statutory and regulatory standards.

- [6] The use of following words: distribution transformer box, transformer box, and sub-station, in this judgment will be referring to one thing “the distribution transformer box” in question, as these words were used interchangeable throughout the trial and pleadings.

SUBMISSIONS

MADE ON BEHALF OF THE PARTIES:

- [7] Both parties were given opportunity to make submissions to the court by way of written heads of argument. The court considered all submissions and authorities referred to in the arguments. In paraphrasing all of the submissions.
- [8] Adv Motshwane for the plaintiff contended that the defendant failed to repair/secure the door to the mini-substation which amounts to liability on the part of the defendant, the plaintiff is basing this argument on the provisions of Section 25 of Electricity Regulations Act 4 of 2006.
- [9] The plaintiff contended also that there is no credible evidence adduced by the defendant which suggest that the defendant is not liable for its failure to secure/repair the door of the mini-substation where the plaintiff was electrocuted. The plaintiff

contended further that the defendant failed to promote safe and healthy environment in its municipality, and that it also failed to be responsive to the needs of its local community when it was called to repair the door of the mini-substation.

- [10] The defendant on the other hand contended that there is no evidence that there were live exposed electrical wires inside the box as alleged by the plaintiff, and that if there were no exposed live wires it is then not possible for a person to be electrocuted in the manner alleged by the plaintiff.
- [11] Advocate Napo for the defendant argued further that the plaintiff did not prove on the balance of probabilities that the defendant was negligent, and she also contended that the plaintiff failed to prove that the defendant did not take reasonable precautions to prevent harm to the public.
- [12] The counsel for the defendant also argued that the defendant’s evidence proved that the defendant inspected and maintained the sub-station periodically based on a planned schedule and response to complaints reported by the community generally.
- [13] The defendant also contended that the plaintiff failed to show how the electrocution took place, and argue that there was no incident of electrocution that was reported to the defendant for that particular day.

- [14] The defendant argued that they established that the box contained three insulated electrical cables, and that an insulated electrical cable should not electrocute a person. That if there was electrocution it did not happen in the manner that is alleged by the plaintiff, because the box in which the plaintiff is alleged to have been electrocuted had 11 000 volts, and that there would have been serious injuries and/or fatality if one was electrocuted by a 11 000 volt phase to ground fault.
- [15] The defendant's further contention is that it was a phase to phase fault since white and blue fuses blew. And that a phase to phase fault is worse than phase to ground fault, and that a phase to phase fault would have resulted in the minor child's fatality.

THE DISCUSSION AND THE LAW

- [16] In civil proceedings, a party that carries the onus of proof does so on a balance of probabilities, *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A), 157D-E. This standard of proof was explained in the following terms in the matter of *Denissova v Heyns Helicopter* 2003 (4) All SA 74 (C) "in civil matters the onus is discharged upon a balance of probabilities but, no doubt, this simplistic statement must be used with caution since, even if the onus-bearing party puts into his "pan of the scale of probability" slender evidence, as against no counter-balance on the part of the opponent, and although the scale should therefore automatically go down on the side of the onus-bearing party, the court may still hold that the evidence tendered is not sufficiently cogent and convincing(See: *Ramakulukusha v Commander, Venda National Force* 1989 (2)SA 813 (V) at 838H-I and other authorities cited therein)"
- [17] Section 25 of Electricity Regulations Act 4 of 2006 provides that "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".
- [18] The above provision is similar in nature as that one in Section 26 of the Electricity Act 41 of 1987 which 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.'

- [19] Throughout the trial the defendant did not deny that it is a "licensee" and an "undertaker" as described by both enactments mentioned above.
- [20] The crux of the plaintiff's case have its basis on the following allegations in its particulars of claim, that is the defendant was negligent in that:

20.1 it failed to fix the door of the distribution transformer box which in turn, exposed dangerous live electricity wires;

20.2 it failed to ensure that the door to the distribution transformer box remained closed and under a lock to prevent danger of live electrical wires from being exposed;

20.3 it left the door to the distribution transformer box open, unlocked and unfixed for many years thereby continuing to expose dangerous live electrical wires.

[21] To support the above the plaintiff led evidence of the victim “The minor child”, that one of S S (13 years of age), the evidence of Ms T S (the minor child’s mother), as well as that one of Ms Nomusa Buthelezi.

[22] The minor child testified that he went to the box to fetch the soccer ball, after it fell inside the box as they were playing, he testified that when his hands was inside the transformer box in the process of retrieving his soccer ball he touched the electric wires.

[23] All the four witnesses testified the same on the issue of the door of the distribution transformer box being opened and unfixed on the day of incident, in fact their testimony was that this door had been broken for a number of years before the day of incident. Their testimony was also to the effect that this door was like that for a long time.

[23] The evidence of Ms S and that one of Ms Buthelezi, was in the main to confirm that this particular door was falling on its own when it is windy, this fact was also confirmed by S, who when asked during cross-examination whether he had seen it falling, his response was Yes when I was passing going to the shop, S also responded on this issue during cross-examination by stating that “because the hinges of the door were damaged, and when there is wind it falls on its own” I am persuaded by this evidence, especially if I consider this evidence together with the defendant’s photos that are attached in Amended index bundle “D”, I will deal with the issue of these photos more fully later in this judgment.

[24] All the plaintiff’s witnesses gave a clear and straightforward evidence to support the claim in the particulars of claim, these witnesses did not contradict themselves during cross-examination, on issues which I find material, I am satisfied as to their credibility.

[26] The defendant called three witnesses, Mr Pretorius (the electrical engineer), Ms Phungwayo (Supervisor in metering section), Mr Tshepo Tsotetsi (the electrician), out of these witnesses the defendant’s evidence established that Ms Phungwayo is the only one who visited the scene of incident albeit day after.

[27] I found Ms Phungwayo’s evidence on the issue of the opened door to be consistent with the evidence of the plaintiff, in the following manner: she stated that on her arrival in the mini-substation the door on the front high voltage was not closed, it was on the ground leaning towards the mini sub-station.

[28] The evidence of the Mr Pretorius was very general and academic in nature in that it sought to educate about electricity and how the defendant's substations works, in my view his testimony did not take the defendant's case any further.

[29] The evidence of Mr Tsotetsi sought to prove that the defendant maintained its sub-stations in the main, his testimony, sought to mitigate the alleged negligence on the part of the defendant, but still ,it does not rebut the plaintiff's claim in as far as the issue of an open door, and also like that one of Mr Pretorius it did not take the evidence of the defendant any further I say so because of the following:

29.1 Mr Tsotetsi, in his own words testified that the last maintenance was done in July 2016;

29.2 He did not attend the scene of incident on the day or closer to the day of incident, except when he went for inspection which resulted in his report on page 155 (in July 2016);

29.3 Though he contended that this particular door according him, it was fixed and was working properly as it was fixed during Sasol Project but only July 2016 therefore it is a given fact that he cannot contend something that happened in August 2016, if he did not visit the sub-station after July 2016 until the day of incident;

29.4 I find also that Mr Tsotetsi also contradicted himself on the issue of this door being fixed during the Sasol project, as he testified that he is the one compiled the list/ report at page 155, and that list was for all the stations that was to be fixed with the Sasol Project, he however stated that this particular substation was not listed because there was no problem with it, from this it is easy to conclude that particular station did not form part of Sasol Project;

29.5 Mr Tsotetsi could not tell whether the door was opened or not on the day after the electrocution incident.

[30] The evidence of the defendant established that the last inspection of that transformer sub-station was July 2016, though it was not clear which date in July. I have found above that this evidence had some contradictions in so far as the door being fixed during the Sasol project. My view is that on this issue the duty was on the defendant (being the party who bore the onus of disproving negligence), to submit clear evidence which relates to the doors that were fixed during this project and those that were not fixed during this project on the grounds that they were in good order, I am in the consequence not persuaded that this report/list at Page 155 is helpful to the defendant.

[31] In light of the fact that Mr Tsotetsi report or list is not helpful as it has contradictions and is not properly dated to give clear guidance as highlighted above, I conclude that the probabilities are that the sub-station was left opened for an unknown period.

On unlocked door

[32] My view is that the defendant's consideration of the defendant's negligence begins here: Mr Tsotetsi when he was asked by his counsel whether when they went to this sub-station in July 2016 was the door closed his response was "it was closed but the padlock was damaged

so it was not locked” the question that arise from this is that if the defendant in July 2016 already was aware even of this fact (that the door was not locked), what steps did the defendant take to make sure that the door of the sub-station that contains something as dangerous as electricity in a residential area is not only closed but it is also locked? I must say nothing in the defendant’s entire evidence contained an answer to this

question.

- [33] I ask whether after seeing that the door of the box that contains something as dangerous as electricity, was there no legal duty, on the defendant from that moment of making sure that the transformer box, (which by the way is not surrounded by any sort of security or fence) is securely locked at least to avoid harm to humans?, I find from this alone that a reasonable undertaker faced with the similar circumstances would have acted differently in those circumstance, and would have minimise the risk of danger by making sure that the door is locked, especially if it not secured by any fence or gate, but the defendant failed to appreciate the harm.
- [34] I am of the firm view that the defendant might have foreseen or at least ought reasonably to have foreseen, especially with the rust that has built around the door of the transformer box that, if the door is left locked that the transformer box might pose as a danger to the humans especially children who uses that street.
- [35] I also find that a reasonable undertaker, and a licensee in the position of the defendant would have foreseen that there is a reasonable possibility of its conduct, (of leaving the door unlocked) injuring humans and causing them loss, also a reasonable undertaker would have taken steps to avoid the danger or injury to humans who uses the street in question, and in particular the children and would have taken reasonable steps to guard against such occurrence, but the defendant failed to take such steps.
- [36] I also find that this failure on the part of the defendant to make sure that this door is locked was also failure on the part of the defendant to take reasonable steps to guard against harm occurring, which was reasonably foreseeable at that time already, I also find that the defendant failed to have a reasonably adequate precaution against electrocution of humans who uses the particular street, where harm was foreseeable, based on these findings, I conclude this failure on the part of the defendant to be wrongful.
- [37] The last enquiry is if the door was locked and closed was the minor child going to have contact with the electric wires in the transformer box, (i.e. would have harm occurred) the answer is: he would not have been touched the electric wires, and would not have been electrocuted as the door would have been as closed as depicted in Page 71.
- [38] In the consequent I find that, harm would not have occurred if the defendant had taken a reasonable action of locking the door, to avoid this harm.

On other issues relating to the door, and electric wires

- [40] The photo which depicts the inside of the particular transformer box in question was also used a lot by the defendant during trial, and the photo that is on Page 62 of Amended Index Bundle “D”, low hanging wires are visible, when Mr Pretorius was explaining on how he would retrieve something with the low hanging wires as in Page 62 his answer was interestingly the following “even if cables are insulated and safe if I drop something in there, I will call an electrician to switch off electricity and to earth the cable and if it is safe, I will go down bend into the door go a little bit down into the door as it is deep, and when you do that you have to be careful as the door sometimes closes on its own” (Emphasis underlined).
- [41] The other question I ask is the following: If it was not safe for electrical engineer, who is also a trained electrician to retrieve something in there without having to switch of the electricity, how much more for a 7 year old who in terms of the law is presumed to lack capacity to appreciate wrongfulness and fault, until contrary is proved.
- [42] I find also that this answer by Mr Pretorius is a clear indication that, even if we accept that the wires that the minor child came into contact with on the day in question were insulated, it means they were still dangerous, that is why even the electrical engineer of 28 years of experience would not find it safe to touch them without switching off the electricity and earthing the cable, I find that harm would have occurred any way, even with the insulated wires.
- [44] Also the defendant in their plea denied the negligence on their part, but for the reasons unknown to this court they did not defend the issue of the open door, the defendant in replying to paragraph 4 of the plaintiff’s particulars of claim, (which remained unamended even with so many amendments that were done by the plaintiff) the defendant responded as follows:

‘4’

“the defendant has no knowledge of the allegations contained in this paragraph, does not admit same and puts the plaintiff to the proof thereof, without derogation from the above and in amplification the defendant further pleads that:

4.1 all distribution and reticulation structures installed within the municipal area of the defendant comply with the required statutory and regulatory standards applicable thereto;

4.2 all electrical installations (and ancillary components), including but not limited to transformers, powerlines and cables are regularly maintained and serviced in accordance with such aforesaid statutory and regulatory standards and;

4.3 all such electrical installations are duly safeguarded and protected to prevent damage thereto and/to ensure that such installations are safely installed and maintained in accordance with such aforesaid statutory and regulatory standards.

The plaintiff is accordingly put to the proof of the allegations contained in the paragraph.

- [45] The plaintiff's allegation of the opened door, is an allegation of fact, and in terms of Rule 22(3) of the Uniform Rules of Court, "Every allegation of fact in the combined summons or declaration which is not stated in the in the plea to be denied or to be admitted, shall be deemed to be admitted. If any explanation or qualification for a denial is necessary, it shall be stated in the plea.
- [46] It is clear that the defendant decided to concentrate only in the electrical installation in their plea, however they also touched on the ancillary components, which it is not clear whether this included the door of the transformer box or only the casing, cabling and electronic circuitry, but what is clear from the plea is that the defendant is not specifically denying the issue of an open door, and is also not providing an explanation or qualification on this allegation.
- [47] I am of the view that the defendant's avoided the issue of an open door completely in their plea, they clearly avoided an allegation of fact, Van Loggerenberg Superior Court Practice: Volume 2, D1-263 states that "A denial cannot be made to do the work of a pleas in confession and avoidance. The function of a denial is to contradict, not to excuse or justify. . . As a general rule, the onus is on the plaintiff to prove those facts which have been denied, but on the defendant to prove facts which he has alleged by way of confession and avoidance
- [48] It becomes clear from Rule 22(3) that the onus of disproving the issue of the open door was on the defendant, and from my finding is that, the defendant's evidence this was not proved, in the contrary the defendant confirmed that on the day following the day of incident the door was open and lying on the floor (through the evidence of Ms Phungwayo).
- [49] It is my considered view that the defendant's evidence on this issue supported the contention of the plaintiff, in any event in terms of the above-mentioned sub-rule 22 it should be deemed as admitted.
- [50] I proceed to consider whether with this door of a transformer box opened was the defendant negligent, and if after this consideration

I find the defendant to be so negligent, I will then proceed to consider whether this negligence was the cause of the minor child's electrocution.

- [51] The question I ask based on the plaintiff's allegation of negligence in the particulars of claim is the following:

51.1 If the distribution transformer box's was door closed on the day of incident would the minor child have touched the wires and result in him being electrocuted?

- [52] The answer is my view should be approached by first doing the following enquiry: what was the minor child's purpose of going to the distribution transformer box on that day?, the undisputed evidence is that, the minor child was playing soccer with other children on that day, and the soccer ball went inside the distribution transformer box, so the answer to this enquiry is simple that the minor child went into the transformer box to fetch this soccer ball.
- [53] I also proceed to consider the photo of this particular distribution transformer box, it was common cause throughout the trial that the box in question is the one which is depicted in picture that appears on Page 71 of Amended Index Bundle "D" and the particular door in question is the one which is shown on the left hand side of the box, even though in the picture the door is closed, the defendant confirmed that this is the particular door in question.
- [54] The closed door in the picture appears to have no opened space for anything to enter through, it would seem looking at the picture that even something as small as a playing marble cannot enter through, if this door is closed, like it is in the photo, I have no doubt looking at the closed door in the picture that the soccer ball no matter how small it was, it was obviously not going to enter through this closed door.
- [55] The SCA in matter of Eskom Holdings LTD v Jacob Johannes Hendricks obo Jacques Justin Hendricks, in a reportable case number 262/2004, over-emphasize the effect of Section 26 Electricity Act 41 of 1987, that its effect is that the undertaker bore the onus of proving on the balance of probabilities that it was not negligent, or if its, that there is no causal link between that negligence and the injuries sustained by the victim.
- [56] In terms of Section 26 of the Electricity Act 41 of 1987, the defendant is an 'undertaker' in terms of the provision of this section also such damage or injury shall be presumed to have been caused by the negligence of the undertaker, unless the contrary is proved, also in terms of Section 25 of Electricity Regulations Act 4 of 2006, the defendant is a 'licensee' and the section provides that injury is deemed to have been caused by the negligence of the licensee, unless there is credible evidence to the contrary".
- [57] It is clear from section 25 that the defendant in casu as an undertaker needed to prove the contrary, if the defendant failed to prove the contrary then the defendant is negligent.
- [58] Section 25 of Electricity Regulations Act 4 of 2006 and Section 26 of Electricity Act 41 of 1987 was pleaded by the plaintiff in its amended particulars of claim, and the fact that the defendant did not deny them, I take it as admitted, I therefore find that the defendant is a "licensee' and an "undertaker" as described in both these statutes.

- [59] Now that we have ascertain that these sections leave the burden of proof on the defendant. What I found odd is that the defendant chose to give a plea of a bare denial on the issue of an open door even with the knowledge of the fact that it bore an onus of proving that it was not negligent, even during the evidence in court the defendant chose to give evidence of a general and academic nature when it comes to this allegation.
- [60] The defendant through the evidence of Mr Pretorius stated that “if a person touches anyone of these wires they are insulated theoretically nothing will happen” Mr Pretorius went further to state that “Generally there will be no live wires exposed as they are insulated we use high voltage tape or patty, theoretically you are not supposed to touch anything live in those wires. When told by his counsel that the particulars of claim alleges that there were live wires, his response was “yes” there is live wires, but it is not exposed, it is insulated.
- [61] Interestingly also when told by his counsel that the minor child said his ball fell in, his response was “to get the ball you will have to push these cables” in this regard Mr Pretorius was referring to the wires in as depicted in Page 62 of the amended index bundle “D” (to which it was common cause that it was the inside of the transformer box in question) (Emphasis is underlined).
- [62] Accordingly, we know through the evidence of the defendant alone that for the minor child to retrieve his ball on the day in question he would have come into contact with the wires, which is also consistent with the evidence of a minor child. When looking this together with Ms Phungwayo’s answer under cross-examination when asked whether on high voltage (which is the section where the minor child was electrocuted) if one go inside can he get burnt, her response was “these are insulated cables there but “yes” you can be burnt provided the insulation has torn, and if it is torn one can get burnt (Emphasis underlined).
- [63] When Ms Phungwayo was asked further on this point as to whether she knows whether on 5 August 2016 there was a tear on the insulation, her response was to the negative and upon being further asked whether from 5 August 2016 backwards she knows whether there was tear on the insulation her response was “from the 5th backwards I would not know”.
- [65] Mr Tsotetsi did however mentioned in his evidence that he is the one who recorded the notes in page 155 of bundle “C”, and that in the notes/list the particular sub-station in not in this list as it was in good order.
- [66] From this part of the evidence one might easily be persuaded to accept that, the municipality did what a reasonable municipality could have done to keep this door in good order.

- [67] The challenge that I also find with the evidence of the defendant, is that the defendant on their own decided to discover and use the photo's in proving their defence, even though there was no single witness of the defendant who confirmed to the court as to when these photos were taken, in fact Mr Pretorius suggested that they were taken after the incident while Mr Tsotetsi did not even know when they were taken, Ms Phungwayo was never asked when these photos were taken.
- [68] What stands out in the photos (in particular the photos at page's 67, 72, 73, and 74 of bundle "C"), I must however state that I am not making any finding on these photos since I was never guided as to when they were taken in relation to the date of incident, the photos shows that the old hinges of these doors were broken and have been replaced with new hinges, (which issue in any event was confirmed by the evidence of the defendant) what is also clear from the photos is that around the old broken hinges there is an erosion or rust. When one also looks at photo on page 65, one can see that there is an erosion which has created an opening in this transformer box.
- [69] If the defendant discovered these photos to prove that they were not negligent in that they had replaced the hinges, my view is that this is not assisting the defendant, if their own witnesses cannot tell when were these photos taken, my view is also that had the defendant committed to the date of when the photos were taken, this would have assisted the defendant in disproving the negligence on the issue of the open door, but with the erosion and/or rust around most of the old hinges I don't see how they sought to achieve that, but I will not take this issue further as I have already indicated that, I will not make any findings on the photos.
- [70] In the consequent, I find that the defendant was negligent in not fixing the door of this particular transformer box, especially the transformer box that is situated in the middle of the residential area, where the probabilities are high that there will be children, I also find that if this door was closed the minor child would not have touched the electric wires.

Was the defendant's negligence the cause of the minor child's electrocution.

- [71] The approach to this issue as set out in *International Shipping Co (Pty) Ltd v Bentley (A)* 1990 (1) SA 680, at 700F-H. See too *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) paras 24-25.

"The enquiry as to factual causation is generally conducted by applying the so-called "but-for" test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question. In order to apply this test, one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such a hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; if it would not so have ensued. If the wrongful act is shown in this way not to be a causa sine qua non of the loss suffered, then no legal liability can arise."

- [72] To respond to a “but-for” test I go back to the question when the children were playing was the soccer ball going to enter into the distribution transformer box if it was closed as it is closed in page 71, and the irrefutable answer is that, NO, the soccer ball was not going to enter through looking at the closed door in the picture. The follow-up question was; if the ball did not enter would the minor child have approached the distribution box, the answer was also; No he would not have gone to the transformer box, and if he did not go to the transformer box would he had contact with the electric wires, the answer is also No he would not.
- [73] The evidence of S S on cross-examination was that they often play in that street and he gave an approximation of twice a week, when asked further whether this was the first time the ball fell in the box, his answer was “yes” when the counsel for the defendant put to him that it would not have fell in as the door was closed, S denied that the door was closed. with this, I conclude that if these children were used to playing in that street, but on that day the minor child was electrocuted the probabilities points to the fact that, but-for an open door, or unlocked door, the minor child would not have been electrocuted.
- [74] The defendant also has a duty in terms of Municipal System Act 32 of 2000. In terms of Section 4(2) (i) the defendant has a duty to promote a safe and healthier environment in the municipality.
- [75] The question I ask based on the evidence of Ms Phungwayo alone, can it be said that the defendant complied with this provision, and a clear answer is that the defendant fell short of compliance with this section, if the defendant left the door of a transformer box opened and unlocked in July 2016, I find this conduct on the part of the defendant to be irresponsible and wrongful and the fact that the padlock was damaged I don't find it to be a justifiable excused in the light of the risk of injury if the door containing electricity in the residential area is left unlocked.
- [76] I am also of the firm view that if the defendant had left the door unlocked but the transformer box in question was fenced, it would have been a different story, but from the photos of this particular transumer box, it is clear that it is unfenced and easily accessible to the children of that street.
- [77] My considered view is that the evidence of the plaintiff as to: the opened door, (is supported by the evidence of Mr Tsotetsi that the door was not locked); and also the evidence as to the minor child touching the wires; remained unchallenged, the evidence of the plaintiff on this issue is in actual fact also corroborated by that one of Ms Phungwayo for the defendant.
- [78] I find that but-for the negligent and wrongful conduct of the defendant of leaving the door of the distribution box unlocked and opened:
- 78.1 the minor child's soccer ball would not have entered this transformer box;
- 78.2 the minor child would not have approached this transformer box;

78.3 the minor child would not have come into contact with electric cables, and therefore the minor child would not have been electrocuted.

[79] On the injury caused by this electrocution the minor child pointed a scar on top of his head, (1cm healed scar was observed), a scar on his left arm (30 cm healed scar on the left forearm was observed, a scar on the hand (15 cm healed scar on the left hand was observed), the other scars that the minor child mentioned could not be observed as they were inside the body.

[80] This court find that with the above, the defendant have failed to rebut the presumption created by the above-named sections,

accordingly I conclude based on the provisions of the above-mentioned Enactments that the presumption that the above-mentioned injuries on the minor child were caused by the conduct of the defendant has not been successfully rebutted by the defendant, as highlighted above the defendant from its very own evidence strengthened this presumption, and in the circumstance the presumption of negligence operated in favour of the plaintiff.

[81] I find that the plaintiff discharged the onus on the facts, and the plaintiff's evidence was in any event supported by that one the defendant, on material issues as mentioned above.

[82] In the consequent, I find that the plaintiff has successfully proved its claim as pleaded in its particulars of claim, in fact the plaintiff's duty was made easy by the defendant when the defendant through the evidence of Mr Pretorius, Ms Phungwayo and that one of Mr Tsotetsi sang from the same hymn book with the plaintiff, on the issue of the following issues:

82.1 Open door (Ms Phungwayo and Mr Pretorius);

82.2 electric wires (Ms Phungwayo and Mr Tsotetsi).

ORDER

[83] In the circumstances the court orders that:

83.1 The defendant is liable to compensate the plaintiff for 100% of the damages as agreed to between the parties;

83.2 The defendant is ordered to pay the costs of the action.

M.T Mankge, AJ

Acting Judge of the High Court

DATE OF HEARING: 16 September 2019

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