

REPORTABLE

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 09/24486

DATE: 29 /11/2010

In the matter between:

HENDRIK JOHANNES PITZER

Plaintiff

and

ESKOM

Defendant

J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] The plaintiff has instituted action against the defendant for damages arising from injuries he sustained during an electrical shock at the defendant's 88kW substation located in the high voltage yard, Arcelor Mittal Steel Complex, Vanderbijlpark, on 14/7/2006.

SEPARATION OF ISSUES

[2] At the outset of the trial, and by agreement between the parties, and in terms of Rule 33(4) of the Uniform Rules of Court, I ruled that the merits of the plaintiff's claim be first adjudicated upon and that the question of the quantum of the claim be dealt with later, if necessary.

THE CASE ON THE PLEADINGS

[3] The pertinent allegations on which the plaintiff relies are contained in paras 3 to 7 of the particulars of claim as follows:

- “3. *On or about 14 July 2006 and at the Defendant's Van Der Bijl 88Kw Substation in Van Der Bijl Park in Gauteng, Plaintiff was electrocuted by high voltage electricity current emanating from the plant of machinery of Defendant in a high voltage live chamber (“the live chamber”) as described in Defendant's Operating Regulations for High Voltage Systems (“ORHVS”).*
4. *Defendant is an undertaker for the purposes of Section 1 and Section 26 of the Electricity Act, Act No 41 of 1987.*
5. *Plaintiff's electrocution was caused by induction or electrolysis and/or by means of electricity generated or transmitted by the plant or machinery of the Defendant as a result of which Plaintiff was injured and suffered damages.*
6. *The electrocution of Plaintiff occurred as a result of the sole negligence of the Defendant who was negligent in one or more of the following respects:*
 - 6.1 *Defendant failed to take adequate or any precautions to prevent persons who were not in possession of an Eskom Work Permit for supervision of work in a live chamber from gaining unsupervised access to the live chamber in its substation.*
 - 6.2 *Defendant's Responsible Person who was issued with an Eskom Work Permit for supervision of live chamber work failed to lock or otherwise secure the live chamber*

access points before leaving the live chamber unattended.

6.3 Defendant failed to control access to the live chamber adequately or at all.

6.4 Defendant failed to comply with the requirements of the Occupational Health and Safety Act, Act No 84 of 1993 ("the OHS Act"), with regard to safety procedures relating to access to live chambers, and in particular, paragraph 2 of Regulation 3 of the General Machinery Regulations promulgated in terms of the OHS Act by:

6.4.1 failing to enclose the premises where Defendant's electrical machinery constituted a danger adequately or at all; and

6.4.1 failing to keep the designated entrances to the premises where Defendant's electrical machinery constituted a danger closed and locked whilst unattended.

6.5 Defendant failed to comply with its own Operating Regulations for High Voltage Systems ("ORHVS") by:

6.5.1 failing to ensure that the entrances to the live chamber were closed and locked whilst the chamber was unattended;

6.5.2 failing to ensure that no dangerous situation arose whilst work was performed in the vicinity of the live chamber;

6.5.3 failing to control access to the live chamber adequately or at all.

6.6 Defendant failed to prevent the electrocution of Plaintiff when by the exercise of reasonable care it should and could have done so.

7. Defendant owed all persons who were not in possession of an Eskom Work Permit for supervision of work in a live chamber, including Plaintiff, a legal duty to act without negligence, to prevent unsupervised access to its high voltage live chambers and to prevent with live apparatus by such persons."

[4] On the other hand, the defendant has pleaded in paras 3 to 7, incorporating the defendant's amended plea, as follows:

“3. Ad paragraph 3

3.1 *The defendant admits that on or about 14 July 2006 and at the defendant's Van der Bijl 88KW Substation in Van der Bijl Park in Gauteng, plaintiff was electrocuted.*

3.2 *The remaining allegations in this paragraph are denied.*

4. Ad paragraph 4

4.1 *The allegations in this paragraph are admitted in so far as they correctly record and paraphrase the terms and conditions of the Electricity Regulation Act 4 of 2006 which has replaced the Electricity Act No. 41 of 1987 with the exception of Section 5B.*

5. Ad paragraph 5

The allegations in this paragraph are denied.

6. Ad paragraph 6

6.1 *Each allegation in this paragraph is denied.*

6.2 *The Defendant pleads that when the Plaintiff entered the high voltage yard, and again when Plaintiff entered the live chamber, and when he made contact with the Defendant's equipment at the Vanderbijl 88KW Substation he was aware that such entry and contact would expose him to the risks, dangers and perils attendant upon entering live, high-voltage environments including the risk of being injured in by way of an electric shock.*

6.3 *Despite such knowledge, and whilst appreciating the risks, dangers and perils, the Plaintiff nonetheless entered into the high voltage yard and the live chamber and made contact with equipment within the live chamber.*

6.4 *In the circumstances the Plaintiff consented to being subject to the risks, dangers and perils attendant upon such entry, including the risk of being injured by way of*

electric shock, and the Defendant is accordingly not liable for any loss or damages suffered by the Plaintiff.

6.5 *Alternatively, and in the event of it being found that the Defendant is not absolved from liability by virtue of the principle of volenti non fit iniuria as detailed in paragraph 6.2 to 6.4 above, then, in such event, the Defendant pleads that the cause of the electrical shock sustained by the Plaintiff was the result of the sole negligence of the Plaintiff who was negligent in one or more or all of the following respects:*

6.6.1 *the Plaintiff failed to have due regard to training provided by Defendant;*

6.6.2 *the Plaintiff failed to exercise due care in the circumstances;*

6.6.3 *the Plaintiff failed to avoid electrical shock when by the exercise of reasonable care and skill he could and should have done so;*

6.5 *Alternatively, and in the event of it being held that the Defendant acted negligently as alleged or at all, then the Defendant pleads that such negligence was neither the sole nor a contributory cause of the electric shocks sustained by the Plaintiff.*

6.6 *Alternatively, and in the event of it being found that:*

6.6.1 *the Defendant is not absolved from liability by virtue of the principle of volenti non fit iniuria as detailed in paragraph 6.2 to 6.4 above;*

6.6.2 *the Defendant owed the legal duty alleged in paragraph 7 of the Particulars of Claim (which is denied);*

6.6.3 *the Defendant was negligent as alleged or at all (which is denied); and*

6.6.4 *the Defendant's negligence caused the electric shock*

then, in such event, the Defendant pleads that the electrical shock sustained by the Plaintiff was caused as a result of the joint negligence of the Defendant and the Plaintiff, the Plaintiff having been negligent in one or more or all of the respects as set out in paragraph 6.3 above."

The significance of the amended plea is that it introduced a plea of *volenti non fit iniuria*.

COMMON CAUSE ISSUES

[5] The following facts are either common cause or not seriously disputed:

- 5.1 That the plaintiff was shocked by high voltage electric current in the live chamber of the defendant on 14 July 2006 and sustained injuries, as he alleges in paras 3 to 5 of the particulars of claim;
- 5.2 That the high voltage yard and chamber where the incident occurred was under the control of the defendant, in particular under the control and supervision of Mr J J Fourie ("*Fourie*"), the defendant's principal technical official;
- 5.3 That on the date of the incident, the plaintiff and a co-worker, Mr M N Msibi ("*Msibi*"), were performing certain duties in the control room outside the high voltage yard. They were employed by an independent contractor, i.e. Phakema Electrical and Communications Services CC. That the plaintiff and Msibi were performing such duties in the control room from Monday 10 July 2006, until the day of the incident, Friday 14 July 2006;

5.4 That the defendant is an undertaker as envisaged in section 26 of the Electricity Act, No 41 of 1987 (*“the Electricity Act”*).

[6] The Electricity Act came into operation on 1/11/1987. Section 26 thereof provides:

“26. Liability of undertaker for damage or injury.— 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.”

It is plain from this provision that the *onus* rests on the defendant to prove on a balance of probabilities that it was not negligent, or if it was, that there was no causal connection between such negligence and the injuries sustained by the plaintiff. Further, in the context of the present matter, that the plaintiff was the author of his own misfortune.

LOCATION OF INCIDENT

[7] It is necessary to set out more fully the exact location where the incident occurred prior to dealing with the evidence. The layout, as depicted on the photographs taken by both parties after the incident and shortly before the trial respectively, is not in dispute.

7.1 Arcelor Mittal manufactures still from raw material. The substation in question is one of six substations and situated inside the works between plants. In order to gain access to the substation in question, prior arrangement with Arcelor Mittal was required, accompanied by a training programme at security checkpoints, including the initial stage of watching a video on safety. Thereafter an access card was issued. The infrastructure on the premises includes medical facilities with a full ambulance service and a fire department. These medical facilities are a short distance away from the block house and were operational on the day of the incident.

7.2 The high voltage yard as depicted on the photographs, is enclosed by light blue fencing. The fencing encloses the entire substation right round the substation with the same height and the same barbed wire fence on top. There were a total of three gates in place leading to the substation. To the right of the last gate on the right, is situated the control room in which the plaintiff and his subordinate colleague, Msibi, performed their duties in the week leading to the incident. The control room is a face-brick construction which is essentially outside the fenced area on the photographs. There is no access from the control room into the high voltage yard on the corrugated iron fencing. Around the high voltage yard is a five-in-one label warning sign. The warning sign consists of five labels printed on one sheet

routinely used on substation doors and gates. The heading of the warning sign, which also includes the isiZulu language, is “*SUBSTATION*”. It includes the following: “*Unauthorised Entrance Prohibited*”. “*Warning, all unauthorised persons are prohibited from handling or interfering with electrical Apparatus*”. There is a heading which reads: “*Electrical Shock, Treatment, Immediate Action Is Essential*”. It is not in dispute that all these warning signs were in place at the time of the incident under discussion. Exhibit “D4” shows the closest gate to the control room referred to earlier. Exhibit “D4” depicts the closest gates to the control room. The two other gates are to the left from the center, both fitted with similar warning labels. Besides the three gates, there is another gate at the back of the brick substation, and the fifth gate round the corner, all of the same size leading to the high voltage yard. Exhibit “D8” shows not only the corrugated fencing around the substation but also the two front doors of the south block house live chamber. Exhibit “D23” depicts the block house and the two blue doors on the first floor, as well as about seven doors on the ground floor, facing into the high voltage yard. A clearer view of the high voltage yard is on Exhibit “D31”, which shows the south block house in which the live chamber is situated on the first floor. It has a ground level floor as well. The live chamber is in the south block house. To the right of the south block house is a north block house. The latter was decommissioned prior to the incident under

discussion. The incident occurred in the south block house. The two doors on the first floor of the south block house housing the live chamber, displaying warning signs which were in place on the day of the incident. Inside the live chamber has one passage with a mirror image of the same passage on the opposite side. Access to the mirror image passage, and the inside of the south block house from the opposite side is impossible from the outside. In photograph "D68" is shown what was found after the incident. That is that the buzz bar floor was partly dismantled and the white base dropper from the buzz bar down was removed. In addition, some of the buzz bars on top were removed with some flash marks on the earth structure. Exhibit "D68" also shows two horizontal strips of wood which served as barrier boards that restrict the approach or accidental approach to the live high voltage equipment.

- 7.3 The photographs show that the south block house on the upper level in which the live chamber is housed, and where the incident in question occurred, has two doors on the front side, as depicted on Exhibit "D33". There are about four doors on the ground level to the east of the block house. These doors are normally kept locked, as was the case on the day of the incident. The two blue doors on the upper level of the south block house leading into the live chamber, are locked only from the inside using a bolted type of sliding lock. These doors do not have

locks on the outside but the sliding bolted lock, just like a bar which is pushed physically from the inside into the lock. Indeed, photograph "D54" properly describes the hole through which the bolt can be moved to ensure that the door is properly locked. Photograph "C22" better shows the bolt on the door which can be slipped into the hole. This bolt mechanism applies equally to each door of the doors on the south block house in which the live chamber is located. The two doors on the opposite side of the south block house, namely the northern side, as shown on photograph "D44", are locked differently with a coded lock from the inside.

- 7.4 The south block house was still live at the time of the incident as it was on standby in case something happened that could be a switch back onto the buzz bar. In fact, both levels of the floors on the south block house were live. On the other hand, the north block house was completely decommissioned with earths on the buzz bar. The defendant's Protection Specialist, Mr Barry Lesley ("*Les/ey*") testified that in spite of the photographs showing two doors on the first level of the south block house, there is in fact only one door, namely no. 1 buzz bar. There are two buzz bars. The one on the left-hand side is buzz bar no. 2 which is in operation whilst the buzz bar no. 1, where the photographs were taken, is where the plaintiff was injured. This is where the flash occurred.

7.5 Prior to the incident, the defendant took a decision to decommission the substation. The process began in 2004. The project involved replacing transformers which supplied the block houses with new ones. The new transformers supplied power through the ground floor of the block house, and not to the upper level floor of the block house anymore. The supply of power became through the one cubicle on the ground floor. The rest of the cubicles became redundant. The upper level of the block house became unoperational. The whole project had to be completed in 2008. The south block house, where the plaintiff was injured, was also later, about three months after the incident, decommissioned. The north block house at the time of the incident had about eight cubicles on the ground level, of which only two were in use. The doors on the north block house were locked after the decommission because of the copper that was inside. The south block house has the same number of blue doors and cubicles as the north block house. One of the cubicles on the south block house had a fire and burnt out prior to the incident. However, the door to that cubicle was closed, but if the tunnel was earthed, it stood open. Under normal circumstances, the door would be locked because of the copper stored inside.

7.6 It is not in dispute that the physical contact which the plaintiff had on the day of the incident in the live chamber on the south block house was live copper. It is live copper with respect to earth or live with respect to another phase. In this regard, Lesley testified that it was contact with 11 KV measured between red, white and blue but between phases and the ground. It is also about 7 KV, which is 7 000 Volts. The distance from the control room where the plaintiff and Msibi worked is about 5 meters. The south block house on the upper level is about 30/40 meters from the control room. The south block house is about 8 meters in length and about 4 meters wide plus the passage inside the live chamber is about 1½ meters wide and the inside of the cubicle is 600 mm in depth.

THE EVIDENCE

[8] I deal with the evidence. Msibi, the co-worker of the plaintiff, testified. He qualified as an electrician in 1999, and started working with the plaintiff at Phakema Electrical and Communications Services CC in 2005. It is common cause that Msibi worked on a daily basis with the plaintiff from the Monday, leading to the Friday of the incident. The plaintiff was his senior. They worked in the control room on the defendant's premises. Msibi was the only person present in the vicinity where the plaintiff sustained the injuries under discussion. The control room was outside the high voltage yard with gates-controlled access. The yard housed various structures of the defendant

referred to by Msibi as CT's structures. From 10 July 2006, leading to the incident, Msibi observed that Fourie was in control, unlocking the gates to the yard, and locking the gates after work. Msibi also observed other workers painting structures in the yard. The painters used one of the rooms in the yard for their lunch as a cloakroom.

[9] Msibi testified that on the day of the incident, i.e. Friday 14 July 2006, he and the plaintiff were working in the control room, as usual installing RTU panels. It was about midday. They were wrapping up the day's work. Fourie had left at about 11h00. The painters in the yard had also left. The plaintiff left the control room in order to place some equipment in the employer's bakkie, parked outside in the yard. When the plaintiff did not return after about 5 minutes, Msibi also left the control room to investigate. The gate of the yard was open. Msibi found the plaintiff lying on the ground next to the steel stairs leading from the ground floor where the control room was situated, to the first floor, where the live chamber was, as depicted on photograph C12. The plaintiff's bundle of photographs of the substation consists of some 28 photographs, Exhibit "C", taken shortly after the incident. The plaintiff was injured. He had singes and burnt marks on his knee and arm. Msibi helped the plaintiff to drive the bakkie from the premises up to between Meyerton and Everite. From this point, the plaintiff was taken by his employer, Tom Venter, to the Alberton Hospital.

[10] In cross-examination, Msibi confirmed the following: On their first assignment to the particular control room, on the Monday morning and subsequent dates, they went through two security check points; at the first

security they were shown a video on the layout of the place, including the control room; the video also dealt with safety issues; at the second security check point their bakkie was merely inspected; they also had a map of the defendant's premises, provided by the employer; on each day, Fourie opened the door to the control room; on each day, prior to commencing work in the control room, the plaintiff, as senior, explained to Msibi about the risk assignment and possible dangers which could occur in the high voltage yard; the explanation covered issues such as the closing of tranches after use; not to touch any switches in the panels; and that their assignment on the premises was confined to working in the control room only, and nowhere else; and to ensure that cables to be cut were dead. The safety explanations given by the plaintiff were based on the defendant's document entitled: "*Eskom's Workmen's Register Risk Assessment Form*", Exhibit "A154". The form was then completed by the plaintiff and signed by Msibi and the plaintiff on each morning and after working. On each day, that is the Monday 10 July 2006, to the Thursday, 13 July 2006, the plaintiff locked the control room after work. Msibi conceded that the control room in which he and the plaintiff worked was in fact outside of the high voltage yard, and that their specific assignment excluded working inside the high voltage yard.

[11] Msibi also confirmed in cross-examination that the same safety explanations were given by the plaintiff on their arrival at the control room on the day of the incident. This was about 09h32. The risk assignment form was

similarly completed and signed. The plaintiff unlocked the control room. The gate nearest to the control room was already open. Msibi saw Fourie enter the control room at about 11h00 and spoke about fishing before finally leaving. When he left the control room to look for the plaintiff, Msibi found the plaintiff lying to the left of the wall as depicted on photographs D29 and D30, that is on the ground level with several steel structures or pylons. It is below the first floor of the south block house in which the live chamber was situated. It appears that the plaintiff was found lying on the ground next to the pylon nearest to the south block house. Once Msibi had located the plaintiff, he refreshed him with water. Msibi locked the control room or closed it. He could not remember whether he locked the gate. They drove out of the premises, through the security check points. Msibi said he never thought of reporting the incident to the security personnel or any other person on the massive Arcelor Mittal premises. There was also no conversation about the incident with the plaintiff.

[12] It is appropriate to refer to the contents of “*Eskom Workers’ Register/Risk Assessment Form*” which Msibi confirmed or signed by him and the plaintiff on each day prior to commencing work in the control room. These are Exhibits “A154” to “A161”, covering the period 10 July 2006 to 14 July 2006. The inscriptions made by the plaintiff are almost identical for each of the five days. The form consists of three printed questions on the left column, against which the plaintiff had to complete the relevant answers. The first question is, “*What is the scope of the work?*” The answer written by the plaintiff was, “*Replace RTU and Page Frame.*” The second question reads:

“What risk can be identified?” The plaintiff wrote: *“Work in live control room.”* The third question reads: *“What steps are to be taken to minimise identified risks?”* The plaintiff wrote: *“Don’t touch or operate panels. Make double sure cables to be cut are dead.”* The final question reads: *“State the Names of the workers with whom the above task and risk have been discussed?”* The answer provided the names of the plaintiff and Msibi, their ID Nos and signatures. The form ends with a declaration at the bottom, in which the plaintiff declared: *“... that the above stated risk had been discussed with all personnel involved in the scope of the work and that the steps to be taken to minimise the risk are understood by all, also that the nature and the location of this work/activity as well as all the precautions, special conditions and dangers involved including the right to refuse, have been explained”*. When he testified, the plaintiff confirmed that he completed the form daily.

[13] When put to him in cross-examination, that Fourie locked the gate alleged to have been open, when Fourie left on Friday 14 July 2006 at about 11h00, Msibi’s response was unclear. Msibi also did not know or challenge the version that the painting contractors had a gate opened for them since they had their own lock for that other gate. Msibi could also not remember or deny the version that at the time of the incident, the fences to the high voltage yard on the outside displayed various warning signs as depicted on photograph D11. The close-up photographs of photographs D1, D2 and D3, displayed *inter alia*, the following: *“Substation”*. *“Unauthorised Entrance Prohibited”*, *“Warning – All unauthorised persons are prohibited handling or interfering with electrical apparatus”*. The warnings were also in Afrikaans

and isiZulu. One warning sign discernible, contains the heading: “*Electrical Shock Treatment Immediate Action is Essential*”. When confronted with the contents of his statement, Exhibit “A148”, made after the incident, Msibi could not account for certain discrepancies between his evidence and the statement. It is indeed clear from his evidence that Msibi did not witness how the plaintiff was injured.

[14] The plaintiff, aged 32, testified about the various courses and training he received from the defendant prior to the incident in question. These include First Aid, Basic Fire Fighting and more relevant, training in modules 1 to 10 of the defendant’s Operating Regulations for High Voltage Systems. The latter regulations, attached to Exhibit “A49” to “A111” consist of some 62 pages, and deal with various aspects of electricity. The plaintiff confirmed, in particular, that he received training in a document entitled “*Summary of Eskom’s Modules 1 to 10*”, as set out in Exhibit “A41-48”. He referred to Regulation 3.0.11 on Exhibit “A42”, which reads:

“Under no circumstances may you leave a live chamber/prohibited/restricted area unlocked when it is unattended, by looking a little further, you may lock the door/gate while you are working or operating inside the area ... However, you must guard against unauthorised persons entering the area at will, while the door/gate is unlocked.”

Having completed Modules 1 to 10, the plaintiff regarded himself as “*an authorised person*”. In this regard Regulation 5(2) of the Modules 1 to 10 provides as follows:

“No person other than a person authorised thereto by the user shall enter, or be required or permitted by the user to enter, premises housing suites gear or transformers unless all conductors are insulated against inadvertent contact or are screened off: Provided that the person so authorised may be accompanied by any other person acting under his control.”

As a result, the plaintiff contended that he was entitled to perform operations at the substation in emergency situations.

[15] The plaintiff confirmed several of the non-contentious aspects on which Msibi testified. These include that they started work at that particular substation of the defendant at the Arcelor Mittal Vanderbijlpark, premises on the Monday 10 July 2006 to the Friday 14 July 2006. Further that their duties consisted of replacing ratchets (ratels), and IDF cables and replacing RTU's, and replacing old panels. The work had to be performed in the control room designated. Access to the control room and the high voltage yard was under the control of Fourie. There were three gates to the yard. There were other contractors on the premises in that particular week.

[16] The plaintiff testified that he was aware of the contents of the block house depicted on photographs C12 to C14. The ground floor, according to him, contained circuit breakers (brekers) which led to metering points on the first floor of the block house. The circuit breakers are used to switch electricity on and off. The plaintiff testified that he was under the impression that the block house was in disuse as the right-hand side door of the first floor stood open. In addition, the doors on the ground floor of the block house

were open and some of the rooms looked burnt out. The painters in the yard used the rooms as change rooms and during lunch time.

[17] Photograph C12 shows the steel stairs leading to the first floor. The first floor, in turn, shows two blue doors with warning signs. One door is on the left, whilst the other is on the right-hand side of the south block house. The two doors lead into the live chamber. On the opposite side of the chamber is an entrance according to Fourie, which was kept locked. The doors to the chamber were locked from inside. It is indeed through the right-hand side of the first floor that the plaintiff proceeded into the chamber and got injured. This is a door which the plaintiff alleged stood open and prompted his visit there on the fateful date.

[18] The plaintiff said he arrived at the control room, situated outside the yard, on 14 July 2006. As usual, he completed the Risk Assessment with Msibi. Fourie came to him in the control room at about 11h00 and said that he was going fishing. Fourie left and never returned. Between 12h00 and 13h00, the work for the day was completed. The plaintiff completed the Risk Assessment Form with Msibi. The plaintiff left the control room to fetch a label from his company's bakkie parked outside. On his way, the plaintiff observed that the main gate near the control room was open. He decided to walk into the yard of the substation. This, he said, was to ensure that all persons had vacated, that it was safe, and in order to lock the gate. The decision was based on his knowledge of the regulations that the high voltage yard must not be unattended. As he entered the yard he observed, as stated above, that the

right-hand side door to the live chamber of the south block on the first floor, stood open. He saw no other persons. He went to the steel stairs to open the door. At all times he believed that the block house was not in use. He entered the live chamber. He observed parts of the equipment on the floor. He also thought that the block house was in the process of being decommissioned.

[19] The plaintiff identified the location in photograph C1A as the place where he sustained the injuries. Where the metal panel appeared stripped apart, and the buzz bars conveying electricity current, whilst photograph C1B showed flash marks. The bottom part of the metal panel is on photograph C3A, whilst C3B depicted the loose portions lying on the floor. The metal rods on the same photograph were copper buzz bars of some 4/5 meters long. He identified photograph C1B as the place where his clothes came into contact with earthing. He assumed that since the equipment appeared to have been stripped apart, it was dead. Significantly, the plaintiff testified that he did not know exactly what had happened next after he made the above observations and assumptions. He said he must have touched something in the live chamber. In this regard, his evidence-in-chief is: *“Nee, ek weet nie definitief wat gebeur het nie. Ek het na die ondersoek wat ek gesien het, kan ek aflei soos wat die dokters ook aan my genoem het met my beserings dat dit het ge-flash na my knieë toe en dit is waar die current ingevloei het. So dit het na my toe gespring nog voor ek ‘n rede kon hê om eers aan iets te vat.”* He lost consciousness, and when he came to, Msibi was busy with him on the ground floor as testified by Msibi. It is not in dispute that the plaintiff and Msibi drove off the premises as described by Msibi.

[20] In cross-examination, the plaintiff confirmed his *curriculum vitae* and qualifications as reflected in Exhibit “A21”, and that he understood English and Afrikaans well. He commenced employment with Phakama Electrical and Communications Services CC in February 2004. He was supervised by the Project Manager, Mr Basil Basson. Before that, he was however, working at Phakama for no salary during which period he was initiated into the electricity industry. He worked under Basson until he obtained his ORHVS (Operating Regulations for High Voltage Systems) qualification. During his training, he was taught about the defendant’s substations, the high voltage yard, live chamber and block houses etc. In September 2005, he obtained a Course Certificate from the defendant showing that he had successfully completed ORHVS for Authorised Persons, covering 10 modules. The plaintiff also received further training from the defendant, which covered aspects such as Distribution Risk Management Induction; Job Safety Analysis; Hazardous Task Identification; Supervision, Warning Notices and Prohibiting Signs; Handling of Equipment etc. He confirmed that he was well acquainted with the defendant’s Operating Regulations for High Voltage Systems, and the dangers of electricity in general.

[21] The plaintiff was cross-examined closely on Exhibit “A30”, entitled, “*Eskom’s High Voltage Authorisation for Distribution*” issued to him on 1 February 2006. In order to appreciate properly the evidence in cross-

examination, the relevant portions of the documents are reproduced as follows:

“1.60 Responsible person restricted to: (eg line work only, cable work only etc.) SUBSTATION construction work UP TO AND INCLUDING 132 KV EXCLUDING BLOCK HOUSE SUBSTATION’S 3.0.1.2 ACCESS to Restricted-prohibited area (if restricted state which areas/chamber), prohibited area under work permit up to and including 132KV Excluding Block Houses, 3.0.3 Supervised persons in Prohibited/Restricted Areas (if restricted state which areas and/or nature of work): Prohibited area and level Only if above ground level Barricaded area Only UP to and including 132 KV Excluding Block House Substations.”

The plaintiff confirmed that he was aware of the contents and restrictions imposed by the authorisation. He further confirmed that he was injured at a block house where he was not authorised to work. The plaintiff also confirmed that, through his employer, Phekama Electrical and Communications Services CC, he was issued with a certificate styled *“Health and Safety Representative”*, on 1/12/2005. In terms of this designation, his duties included, *“receiving the effectiveness of the health and safety measures”* assessing the potential hazards to the health and safety of employees. Similarly, on 1 December 2005, the plaintiff was appointed as Construction Supervisor for various of the defendant’s sites. The certificate reads:

“In terms of this appointment you are required to ensure that all construction work performed under your supervision is carried out as follows:

‘By persons suitably trained and competent to do such work; that all persons are aware and understood the hazards attached to the work being carried out; that the required risk assessments are carried out,’

etc.”

The plaintiff completed the Risk Assessment Form with Msibi from Monday 10 July 2006 to Friday 14 July 2006 as testified by Msibi.

[22] In regard to the Friday of the incident, the plaintiff testified in cross-examination that on arrival at the substation, he parked the company bakkie at the open gate nearest to the control room. He denied that the voltage yard had three gates. Like Msibi, he was adamant that while they were working in the control room, Fourie visited them at about 11h00. On his version, Fourie said he was going fishing. It is unnecessary to repeat all the evidence in cross-examination leading to the actual incident. In short, the plaintiff conceded that he knew that he was not supposed to enter the high voltage yard. Before knocking off, he left Msibi in the control room. He observed that the one gate was open. The painting contractors had left. He decided to enter the high voltage chamber in order to ensure that no other workers were on the premises since it was the start of the weekend. He did not think of inviting Msibi to accompany him. He entered the high voltage yard through the gate on the right-hand side and walked round the wall as depicted on photograph D20. The brick wall is better depicted in photograph D30. He turned right after the wall towards the south block house. He observed that the right-hand side door on the first floor of the south block house was open, about two-thirds open. This door is best visible on photograph D32. The plaintiff proceeded up to the steel stairs towards the open door leading into the live chamber. He conceded that at the time he knew full well that he was prohibited from entering the block house and live chamber. He did not see or scream for anybody possibly in the vicinity. The live chamber was in

darkness. He observed certain copper equipment and metering panels lying on the floor as he testified in evidence-in-chief. However, the equipment was not in his path since he did not proceed any further. He conceded that some of the copper equipment therein had some value. He then turned back to exit the live chamber. However, he did not remember whether he turned to the left or not. It was at this stage, he thought he felt a flash to his knees. However, he was unsure as to what exactly happened. He clearly was shocked by live electricity. He said he regained consciousness on the ground floor where Msibi was busy pouring water over him in the yard. He was aware of the warning signs on the doors of the live chamber. He decided to drive to hospital in Alberton from the scene. He did not know of the medical facilities available on the premises of Arcelor Mittal. He also did not think of informing the security personnel of the incident at the check points as he drove away. On arrival at the hospital, he was taken to the trauma unit where he was prepared for theatre. He was immediately operated upon. It is not in dispute that as a result of the electric shock in the live chamber, the plaintiff sustained serious bodily injuries, including burns to his right hand and arm, as well as his left knee and right upper leg.

[23] The plaintiff was confronted with the contents of his hospital record, Exhibit "A165", dated 14 July 2006. Next to the, "*Description of Accident*" column, there is a notation, "*He was busy with pulling in cables and was electrocuted*". He could not explain, but averred that he was "*installing RTU cables in the control room*". The plaintiff was also confronted with the contents of the Preliminary Incident Report by his employer, Exhibit "A1",

under the heading, “*Description of loss or near miss*”, the following was noted: “*Mr H J Pitzer sustained Electrical shock and burns in the H.V. Yard, at Vanderbijlpark 88Kv Substation, located in the Mittal Steel Complex at Vanderbijlpark*”. In the same report, the following is noted: “*As there were no eyewitnesses, and Mr H J Pitzer cannot remember what happened, it is unclear how the incident occurred. The workmen were installing D20 supervisory equipment in the control room of the substation. Under the scope of work they did not have any work to do in the H.V. Yard and thus it was not required to go into the yard where the incident occurred.*” The report is dated 17 July 2006. The plaintiff could not remember the latter date. He could not remember how he was shocked. The plaintiff also could not remember a statement he made subsequently to a Mr Basson (the Incident Investigation/Safety Officer) of his employer, on 14 July 2006. The statement is contained in Exhibit “A149”. However, after the trial was adjourned for the weekend, the plaintiff confirmed that he had since studied the statement. The cross-examination on the contents of the statement revealed certain discrepancies between his evidence and the statement which the plaintiff attempted to explain unsuccessfully. When he observed the open door to the live chamber, and based on his experience and training, he thought the chamber was dead. The main reason why he entered the chamber was to ensure that no one was left inside. When confronted with the contents of the statement saying, “*I went inside to determine what was going on*”, the plaintiff replied that he did not word the statement, but was relating the incident to his employer even though the statement contains his name at the bottom. The statement went on to state that, “*I noticed that a part of another metering*

panel buzz bar volts were already removed", the equipment was lying on the floor. The plaintiff was confronted further with the following contents of the statement, *"The mistake I made was to feel if it was loose and that is when the incident occurred"*. When asked if this is what in fact happened, the plaintiff responded as follows: *"Nee, ek het gesê hierdie verklaring wanneer dit afgeneem was, het ek aangeneem ek moes in kontak gekom het met seer gekry het en ondersoek later en waar ek beserings het, wys dit dat dit na my knieë toe moes flash voordat ek aan iets kon vat."* Further cross-examination on this crucial aspect did not elicit any comprehensive response when put to the plaintiff that he in fact made a mistake by deliberately touching the equipment to see if it was loose, his response was: *"Dit is al wat ek kan dink vir watter rede ek aan dit gevat het as ek aan dit gevat het."* He did not think that the equipment would contain residual electric current. He had previously entered a similar live chamber accompanied by somebody. The plaintiff could not remember how he landed on the ground floor of the high voltage yard after he was shocked on the first floor of the south block house. The last two paragraphs of the statement are reproduced later in this judgment. When asked if on regaining consciousness on the way out of the premises whether he thought that it appeared suspicious that somebody was busy stripping where the incident occurred, the plaintiff said it was possible. He denied that he rushed to the Alberton Hospital since he was afraid to report the incident to the security personnel or anybody else on the scene. He conceded readily that he was not permitted to be in the live chamber on the first floor of the south block where the incident occurred.

[24] In re-examination, the plaintiff essentially advanced two contentions. First, that he had no intention at all of removing from the live chamber the property of the defendant. Secondly, that based on his status as an authorised person, he was entitled to be at the live chamber, and that his concern about the open door leading into the chamber was justified.

[25] Fourie, the principal technical official of the defendant at the time, testified. He worked at the defendant's substation in question on the premises of Arcelor Mittal since December 1999. Fourie was in charge of the substation in question on 14 July 2006.

[26] At the time of the incident, Fourie possessed a substation master key which could open any type of lock in the substation and high voltage yard. The gate closest to the control room, as depicted on Exhibit "D4" was locked with a private lock which belonged to the painting contractors.

[27] Fourie testified that on the day of the incident he was on duty at the substation in the high voltage yard from about 08h15. He was due to proceed on leave on that day for about a week. On his arrival at work, the contractor called Oom Chris and his crew of between 10/12 persons was already on site. This team was repainting the steel works inside the high voltage yard as well as the fencing around. Oom Chris and his team entered the high voltage yard through Gate No. 3, i.e. the gate furthest from the control room (the plaintiff and Misib worked in the control room). Oom Chris and his team had a work

permit that allowed them to perform duties on the ground level only of the block house.

[28] Fourie testified that at about 11h00 that morning and after Oom Chris had paid his workers, he left the high voltage yard through Gate No. 3, the gate closest to the control room was closed. He did not see or speak to the plaintiff or Msibi as alleged by the plaintiff. The south block house was still alive as it was on standby in case something happened that could be a switch back onto its buzz bar. Both levels of the floors of the south block house were alive. On the other hand, the north block house was completely decommissioned, with earths on the buzz bar. This was the reason why Oom Chris and his team were allowed to use the rooms on the ground level as change rooms.

[29] Fourie conceded that a permit system was in place for each piece of job to be done in the high voltage yard or block houses. After the incident he was still on leave. However, before, during and after the incident, Fourie was in charge of the substation as principal technical official. Fourie disagreed that if a door is not closed and locked at the substation, any person can assume that the area was not live. In his view, if somebody found a door open, he should follow proper channels and let Eskom know, and Eskom must send somebody to investigate. There is a telephone inside the control room for this purpose. The plaintiff, although an authorised person, in terms of Eskom's Regulations, was not allowed to enter, open gates or doors unless he had a key or permit to perform some function. The plaintiff could rather secure open

places from the outside but not to enter at all. Fourie, however, later conceded that as an authorised person, the plaintiff could secure open places when they should be locked.

[30] Fourie could however, not recall if the door on the first level of the south block house stood open on the day of the incident, as alleged by the plaintiff. All the rooms on the bottom floor of the south block house were alive, as far as Fourie could remember. The whole block house was in the process of being decommissioned. There were two buzz bars in the south block house. One of the buzz bars is on the one side of the passage, as reflected in photograph “D52”, and the other buzz bar, on the opposite side. This is the area where the plaintiff was injured. The equipment was physically dismantled during the decommission.

[31] Although he could not remember the exact date, according to Fourie, the decommissioning of the south block house, which lasted one day, involved the buzz bars, the equipment on the first floor, cables, breakers, meters, and transformers.

[32] For some strange reason, Fourie testified in cross-examination that he could not remember meeting the plaintiff and Msibi in the control room during the week of 10 July 2006, leading up to the incident on 14 July 2006. However, he conceded that if they were working there in the control room, he had to see them. Fourie denied that the reason why he could not remember the presence of the plaintiff and Msibi, especially on 14 July 2006, is that he

entered the gate closest to the control room, forgot to close it, and that the plaintiff later entered the high voltage yard through the same gate which led to the plaintiff's injuries.

[33] Fourie was cross-examined closely on the position of the gates to the high voltage yard in general, and in particular on the day of the incident. His answers came to this. That in terms of the applicable regulations, whenever there was an operation, the gates may be left unlocked. When there is no work underway, the gates should be closed and also locked. When he left the yard on the day of the incident at about 11h00, he left behind the painting contractors under Oom Chris. The latter was the last person responsible who had authority over the one gate for which his own lock was provided. The question of the circumstances under which Fourie and Eskom issued a key to Oom Chris truly does not assist in resolving the disputes in this matter.

[34] In regard to the sliding bolt lock used to lock the front door (the right-hand side door) of the south block house referred to earlier, Fourie explained that it was a thick bolt. The bolt fits in the hole as depicted on photograph "D54". The hole was drilled through the angle iron into the brick wall. If the bolt is pushed, and the door is closed properly, the door becomes strongly secured. The bolt cannot be opened from the inside. It was therefore improbable, according to Fourie, that the door could have been blown open by a strong rainstorm. Fourie testified that on investigation, and approximately two weeks before the incident, there was an attempt to steal the buzz bars still in use in the south block house. Fourie agreed that it was possible that on the

day of the incident, the plaintiff observed the top right-hand side door of the south block house was open, and went there. He said it was also possible that on arrival at the open door, the plaintiff observed some buzz bars and equipment lying on the floor. Fourie was however, emphatic that it was not possible that the door in question was not properly locked prior to the incident. The reason for this is that ordinarily during operations, two persons were required. One person would remain outside the door to ensure the safety of the person entering the block house doing the work. It was therefore unlikely that two persons would forget to lock the door. However, all of these answers given by Fourie were based on speculative questions. Fourie said that after he left the premises at about 11h00 on the day of the incident, Oom Chris and his contractors had to lock up the gate to the high voltage yard. Fourie did not unlock the control room on the morning of the incident. Fourie testified in re-examination that he had no responsibility towards any person or persons working in the control room.

[35] Lesley also testified for the defendant. He came to hear of the incident under discussion on 17 July 2006, and commenced his investigation. The investigation was preceded by a flash report. Lesley and his colleague went to the substation where the plaintiff was injured. No flash over or flash marks, open marks could be found. This was on 1 August 2006. The right-hand side door on the top level of the south block house (the door used by the plaintiff) was seen open, about 400/500 open. On closer investigation, Lesley and his colleague, Hennie Jordaan, found that the buzz bars were stripped. Copper

buzz bars were lying on the floor. There were flash marks on the second tunnel from the door. Lesley compiled a report, Exhibit "B14".

[36] Lesley testified further that when he climbed the steel stairs from the ground level into the south block chamber, he assumed that everything was alive. He took photographs of the live chamber. There were two or three flash marks. There was one on the angle iron running across, showing particles of clothing on the angle iron. On the top, on the actual riser coming to the buzz bar, was another flash mark. The two horizontal wooden slats called barrier boards. They were painted in red because it is a dangerous area. Lesley was of the view that there was definitely contact with live apparatus where the flash marks appear. In simple terms, it was a test making contact between a live apparatus and ground. On the angle bar, the contact still showed residue of clothing. The investigation established, without any doubt, that there was physical contact between a person and the copper bar. There was no substantial fault or protraction operation as the person who made contact would have been thrown away from the apparatus, and the fault would have cleared. There was also no trip. If this occurred, signals would have gone through the control room at the time of the incident.

[37] In cross-examination, Lesley conceded that his report could be incorrect where it refers to two doors being open. He recalled that on his inspection, it was "*a very windy blustering day, and I distinctly remembered the right-hand door being open and that is why we went up there and that is why I took photographs*". Lesley testified further that at buzz bar No. 1, where

the plaintiff sustained injuries, the buzz bars were being stripped, no current could flow through the buzz bars. The only current that would have flown was from the actual link that came from the bottom to ground. The buzz bars are the copper conductors at the top. They were not in service. The current came from the link, to the circuit breakers, and then to the customer. A flash mark could be anything that is burnt with carbon or with metal splatter, and be contracted in the 88KV yard. No flash marks or burnt marks were found in the 88KV yard.

THE LEGAL PRINCIPLES

[38] I consider some legal principles applicable to the issue of negligence based on the above evidence. The classical test for negligence is found in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430 where the Court held that the liability in delict based on negligence will be established against a defendant if a *diligens paterfamilias* in the position of the defendant:

- (a) would foresee the reasonable possibility of his conduct injuring another in his personal property and causing him patrimonial loss;
- (b) would take reasonable steps to guard against such occurrence, and
- (c) that the defendant failed to take such steps.

In dealing with liability based on a negligent omission, as opposed to negligence *per se*, Nugent JA in *Minister of Safety and Security v Van Duivenboden* [2002] 3 All SA 741 (SCA), at para [12] said:

“Where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability – it will attract liability only if the omission was also culpable as determined by the application of the separate test that has consistently been applied by this court in Kruger v Coetzee, namely, whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it.”

More pertinent to the present matter, and from which I intend to quote liberally, arose in *Kruger v Carlton Paper of South Africa (Pty) Ltd* 2002 (2) SA 335 (SCA). The appellant was an experienced and qualified maintenance electrician who sustained injuries when he came into contact with a live terminal in an enclosed transformer owned by the respondent. The crisp issue before the Court was should the respondent have foreseen the possibility of harm to the appellant, and if so, did the respondent take reasonable steps to avoid such harm. In the particular circumstances of that case, the narrowed issue was whether or not reasonable steps would include insulating the terminal so as to avoid such harm. In para [9] of the judgment the issue was defined ultimately 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.”

Having satisfied itself as to the nature of the enquiry, the Court, at para [11], turned to what steps were taken to avoid the harm, as follows:

“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 assistant were allowed into the enclosure.*
- (d) A large sign was placed at the gate, warning of the dangers 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 ...”*

[39] I revert to the evidence in this matter, bearing in mind the legal principles set out above. I must hasten to state that Msibi impressed as a simple and honest witness. However, he did not witness how the plaintiff sustained his injuries. This is common cause.

[40] The gravamen of the plaintiff's particulars of claim is that the defendant failed to prevent the plaintiff from not gaining access to the live chamber. However, his version is not without problems. He is a properly qualified electrician, accompanied by extensive training which he received, not only from his employer, but also from the defendant, as the evidence shows. In short, he left the control room on the fateful day, and went to his company vehicle parked outside. He saw that no. 1 gate leading to the high voltage yard was open. He decided to lock the gate. He saw nobody in the yard. He wanted to make sure that nobody else was locked inside the yard since it was the beginning of the weekend. In the process, the plaintiff observed that the right-hand side blue door of the south block house on the upper level, was open. He decided to climb the steel stairs all the way to the upper level and to see if there was possibly anyone inside the building. He entered the live chamber because he thought that the whole building was "*dead*". He saw some buzz bar material on the floor. That is the last he can remember anything. He told the Court that he cannot remember what he touched. I pause here to question why the plaintiff, when he observed the open door, did not rather phone the defendant's offices or staff on the premises, or the security personnel at the entrances. He did not shout or scream or ask Msibi to accompany him. This brings into question the plaintiff's motives by approaching and entering the live chamber stealthily. In this regard, it was argued on behalf of the defendant that on the probabilities the plaintiff's motives and/or intention in the live chamber was not to "*do good*" for the defendant. This, clearly in reference to the valuable copper stored in the

building. I am, however, unpersuaded that the evidence in this regard is conclusive.

[41] The above is however not the end of the problems in the plaintiff's version. As the evidence shows, the plaintiff's original version mirrored in the particulars of claim, and the plaintiff's statement at p 149 of Exhibit "A", was that the plaintiff entered the live chamber in the belief that the chamber in the south block house was live. The contents of the statement, with the portion that reads, "*The mistake I made was to feel if it was loose and that is when the incident occurred,*" was quoted earlier in this judgment. The plaintiff's attempt to disassociate himself from the version contained in the statement during cross-examination did not advance his case in any meaningful manner, and was possibly disingenuous. As stated earlier, the version at trial is that the plaintiff believed that the live chamber was entirely "*dead*". As a consequence, the defendant argued that the latter version is a recent fabrication in order to escape the defence of *volenti non fit injuria*, and to avoid the inference that the plaintiff's motives for being in the live chamber was *mala fide*. What is of critical importance to the Court based on the evidence, including the admission by the plaintiff, and possibly decisive of the case, is that the plaintiff was not authorised, and was in fact prohibited from entering the live chamber. This included to access the chamber through the open gate and the door. The plaintiff was not employed by the defendant. His concerns about the open gate and the open chamber door in the knowledge that the high voltage yard is not to be left open, and that he felt it was his duty based on his training to lock the door, are not satisfactorily explained. In fact,

he had no obligation in this regard. The plaintiff did not act as a reasonable qualified electrician with all his training and experience in the circumstances of the case. His training and qualification are borne out by the documentation in Exhibit “A”, including his *curriculum vitae*, his course certificates relating to O.R.H.V.S. (Operating Regulations for High Voltage Systems) for Authorised Persons, as well as a description of the plaintiff at p 4 of Exhibit “A”. The plaintiff admitted this description.

[42] The plaintiff was trained as a responsible person. He was aware of the dangers involved in High Voltage Yards and the live chambers. These were clearly signposted with prohibitory signs as shown in the various photographs depicting the scene and the block house. The plaintiff was indeed aware of the restrictions of access applicable to him. On his version, and that of Msibi, his duties were confined to the control room, outside the yard and the chamber.

[43] On the evidence, there are, however, two mutually destructive versions in regard to the question of the open gate. The test in this regard was captured succinctly in *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at 662C-F where Jones J said thus:

“The upshot is that I am faced with two conflicting versions, only one of which can be correct. The onus is on each plaintiff to prove on a preponderance of probability that her version is the truth. This onus is discharged if the plaintiff can show by credible evidence that her version is the more probable and acceptable version. The credibility of the witnesses and the probability or improbability of what they say should not be regarded as separate enquiries to be considered piecemeal. They are part of a single investigation into the acceptability

or otherwise of a plaintiff's version, an investigation where questions of demeanour and impression are measured against the content of a witness's evidence, where the importance of any discrepancies or contradictions are assessed and where a particular story is tested against facts which cannot be disputed and against the inherent probabilities, so that at the end of the day one can say with conviction that one version is more probable and should be accepted, and that therefore the other version is false and may be rejected with safety (National Employers' General Insurance Co Ltd v Jagers 1984 (4) SA 437 (E))."

See also *Machewane v Road Accident Fund* 2005 (6) SA 72 at 76.

[44] The defendant's counsel has sharply criticised the evidence of Fourie as a witness. The criticism was based essentially on Fourie's evidence that he did not unlock gate no. 1 on 14 July 2006, but made use of gate no. 3. Further, that Fourie denied that he unlocked the control room on the same day. Fourie was also criticised for not remembering seeing or talking to the plaintiff and Msibi on the day of the incident. For a person in charge of a substation, this evidence of Fourie was some cause for concern. However, it must be recalled that the incident occurred more than four years previously at the time of the trial. The Court certainly did not gain the impression that Fourie was deliberately misleading in this regard. On the contrary, he came across as a long-serving and reliable employee of the defendant.

[45] On the contentious issue of the open gate, it is not in dispute that the plaintiff probably gained access to the live chamber through an open door. On the probabilities, the plaintiff was able to gain access to the High Voltage Yard whether this was by means of the gate closest to the control room where he worked or the gate used by the painting contractors or by some other

means. Even if the plaintiff gained access through the gate allegedly left open by Fourie, this does not advance the plaintiff's case in any material manner. The fact of the matter is that the plaintiff was not authorised and was in fact prohibited from entering the live chamber. The negligence of the plaintiff, having in mind his extensive training and experience and qualifications, was the ultimate cause of his injuries.

[46] In addition, the conduct of the plaintiff immediately after the incident, on his version, as supported by Msibi, is inherently inexplicable. In a seriously injured condition, the plaintiff chose to drive towards the Union Hospital in Alberton some distance away. As stated earlier, he ignored the defendant's security personnel and the readily available medical facilities on site. There was also an ambulance service available on the premises of the defendant. Furthermore, it is not in dispute that there was a telephone available in the control room where the plaintiff and Msibi worked. There is no reasonable explanation given by the plaintiff why he did not make use of this facility either when he observed the open gate to the yard or open door to the live chamber, or after he was injured. There is also no reasonable explanation why the plaintiff did not contact William at the Rigi Depot. In Exhibit "A149", the plaintiff said:

"The thought was in my mind to contact William at Rigi Depot as I only had his number because I found it suspicious that somebody was stripping there. Once I was injured the only thought that went through my mind was to get to a hospital as soon as possible. I had no intentions of harming myself or Eskom's property, I was only doing my job and thought I was doing good."

Indeed, this remains unconvincing. Once more, this brings into question the motives of the plaintiff on the day of the incident. William was employed by Eskom at the Rigi Depot in Vanderbijlpark.

[47] The probabilities show that it was rather the negligence, not of the defendant, but that of the plaintiff which caused him to sustain the electrical shock. On the probabilities, the plaintiff was not injured by merely walking in and out of the live chamber. It is plain that the live chamber links were against the left wall of the live chamber, and were protected by wooden slats which were between 400 mm and 600 mm away from these links. It is also clear from the evidence of Lesley that in order for there to be a flash, plaintiff's knee would have had to have come as close as 5 to 7 cm from those links. This would have entailed plaintiff actually placing his knee to the left of the wooden protective slat. It is not conceivable that plaintiff was searching for a person on the left of the protective slat. It is also clear from Lesley's evidence that contact was at least made with the metal bar. If contact was made only with this metal bar and not with the live links there could be no flash. It was not in dispute that there were in fact three flash marks. I did not understand counsel for the plaintiff to challenge the evidence of Lesley pertinently. Lesley was objective. He could not say how exactly the incident occurred. He made concessions where necessary.

[48] From the perspective of the defendant, it was not foreseeable that a qualified and trained and experienced electrician like the plaintiff, would wander into the live chamber and fiddle with equipment resulting in his

injuries. See *Kruger v Carlton Paper of South Africa (supra)*. In any event, the defendant had taken all reasonable steps to guard against the occurrence in question. This is borne out by the evidence in the form of, *inter alia*, the initial video on safety at the security checkpoint; the warning signs; the training provided to the plaintiff etc. The plaintiff also completed risk assessment forms with Msibi on a daily basis in the week leading to the incident. In this regard, the defendant's submission that the plaintiff was fully aware of the dangers and risks associated with a High Voltage Yard, a block house and a live chamber, has merit. Further, that the uncontroverted evidence show that the plaintiff was expressly aware that he was not, under any circumstances, to enter the live chamber. The plaintiff also conceded the presence of the prohibitory signs on the High Voltage Yard fencing and the live chamber doors. The plaintiff further conceded that he had no business at all in the High Voltage Yard nor that he had any right to be in the live chamber.

CONCLUSION

[49] I conclude that for all the above reasons, in the circumstances of the case, there can hardly be any negligence on the part of the defendant. The defendant has proved, on a balance of probabilities, that the plaintiff knew of the risk, appreciated the ambit of the risk, and in fact consented to the risk. See *Malherbe v Eskom* 2002 (4) SA 497 (O). The exclusive recklessness and/or negligence of the plaintiff was the approximate cause of his injuries. The plaintiff has at no stage relied on any allegation of negligence against the

defendant on the basis that it negligently created the impression that the live chamber was in fact completely dead. In the circumstances, the defendant has discharged the *onus* on it to establish the defence of *volenti non fit injuria*, alternatively, to negative the presumption created by sec 26 of the Electricity Act No. 41 of 1987. See *Rossouw v Viljoen* 1970 (3) SA 413 (C) at 417. The plaintiff's claim falls to be dismissed.

ORDER

[50] The following order is made:

1. The plaintiff's claim is dismissed with costs.

**D S S MOSHIDI
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG**

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DATE OF HEARING

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DATE OF JUDGMENT

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