IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED
DATE: 7th February 2022
SIGNATURE: [redacted]

Case No. 48584/2017

In the matter between:

DEMPSEY, SAMANTHA	**PLAINTIFF**
And	
NCUBE, VELAPHI MAZILAKANTLA	**1ST DEFENDANT**
DEMBO, MARK	**2ND DEFENDANT**
THE BODY CORPORATE OF THE SECTIONAL TITLE SCHEME KNOWN AS STONEBROOK	**3RD DEFENDANT**
CARR, DAVID ALLAN	**THIRD PARTY**

Coram: Millar J

Heard on: 26 to 28 January 2022.

Delivered: 7 February 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *Caselines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 7 February 2022.

Summary: Law of delict – liability for electrocution of minor child – *nova causa interveniens* breaking chain of causation between negligent first defendant and electrocution - second defendant's agent / employee informed of danger but failing to convey knowledge to him or take any steps to mitigate harm – third party's employees switching electricity back on despite knowing of danger – agent/employee's knowledge of danger imputed to second defendant – liability established and declaratory order granted against the third party.

ORDER

It is ordered:

1. The issues of liability and the quantum of damages are separated in terms of Rule 33(4) of the Uniform Rules of Court;

2. The claims against the first and third defendants are dismissed;

3. The second defendant is liable for such damages as the plaintiff may prove arising out of the electrocution of her minor child on 10 September 2015;

4. The third party is declared to be liable to indemnify the second defendant for 50% of such amount, in respect of both capital and costs, as he is liable to pay to the plaintiff and for the second defendants' costs of suit.

5. The second defendant is ordered to pay the plaintiff's costs of suit to date which costs are to include the costs consequent upon the employment of two counsel and the costs of the expert Mr Arend van der Walt.

6. The determination of the quantum of damages is postponed sine die.

JUDGMENT

MILLAR J

1. The Plaintiff, the mother and guardian of a minor child sued the Defendants for damages suffered in consequence of an incident which occurred on 10 September 2015 at the residential sectional title complex where they lived. It was agreed between the parties that the trial proceed for the determination of liability only. An order separating the issues of liability and the quantum of damages was made in terms of Rule 33(4) of the Uniform Rules of Court.

2. On the day in question and at about 15h00, the minor child, an 11-year-old boy, had offered to wash his mother's car. He went to fill a bucket with water from the communal tap outside a unit opposite the one in which he and the Plaintiff lived. When he touched the tap to open it, there was live electric current flowing through it. His hand became stuck to the tap and this persisted with him being

electrocuted for between 1 to 2 minutes until the electricity supply of the unit behind the tap was switched off.

3. When he first started being electrocuted, the minor child screamed and the Plaintiff heard him and ran towards him. The occupant of the unit, Ms Ramlakan, who had just arrived home early from work, witnessed the electrocution of the minor and it was she who had gone into her unit and switched off the electricity supply.

4. The electrocution of the minor and the circumstances which had led to as set out above it were not in dispute between the parties.

5. On consideration of the evidence as a whole, it was established that Ms Ramlakan, the tenant of unit 29, and who had occupied the premises for some time, had been unhappy with the state of the kitchen in that unit. She had approached Mr Mynhardt, the representative of the Second Defendant, Mr Dembo, with a request that improvements be effected and he had conveyed this to Mr Dembo who had agreed.

6. A contractor - Mr Carr (who traded as Mr Cupboard), the Third Party, was appointed to attend to the refurbishing of the kitchen cupboards. He had sent 2 workers to commence with the improvements on 9 September 2015. During the course of the day and while the improvements were being effected, the workers had drilled into a wall and damaged the electrical installation of Unit 29. In order to effect a repair of the damage that was done, the First Defendant, Mr Ncube, was contracted by Mr Carr (or his workers) to repair the damage and he attended at the premises and effected certain work.

7. When Ms Ramlakan had returned home from work on the 9th, she had gone to switch on a tap in the kitchen and had received an electric shock. She tried other taps in the house and in particular in the bathroom and had found that she had received a shock when touching that tap and also when touching the water that she had run into the bath. Since she had 2 small children of her own she was extremely concerned and so she had telephoned Mr Mynhardt and informed him of the fact that the electrical installation had been damaged and that she had been shocked and that it was not safe. She had requested that Mr Mynhardt make arrangements for repairs to be effected.

8. She waited for some time for someone to be sent to repair the electrical installation. The 2 workers of Mr Carr who now knew that the Mr Ncube's work had not been properly done, waited with her. Their presence in the complex past working hours had elicited enquiries from the complex security officers who were on patrol as to why they were still there and Ms Ramlakan had informed them of the reason. When the workers could not wait any longer, they left and Ms Ramlakan recognizing the danger posed by the damaged installation, had switched off the electricity supply in the unit. No-one came to either inspect the installation or to effect any repairs on the evening of the 9th.

9. The next day, when Ms Ramlakan went to work, the electricity supply was still off. She had returned from work earlier than usual because she was concerned about the repair of the damage and was arriving home when she witnessed the electrocution of the Plaintiff's minor child. The electricity supply to Unit 29 had, as a matter of probability, been switched back on by the 2 workers who had returned to continue with the improvements to the kitchen, notwithstanding they knew that there was a problem with the safety of the installation.

10. Mr Mynhardt's evidence was that Ms Ramlakan had indeed telephoned him and informed him of the problem with the electrical installation. He testified that he had telephoned Mr Dembo that evening and informed him of this.

11. Mr Dembo for his part, testified that Mr Mynhardt had not informed him of the problem with the electrical installation and that if he had, he would immediately have made arrangements for a properly qualified person to go and effect repairs.

12. He further testified that the first time he had become aware of the fact that there was any problem with the electrical installation in unit 29 was when Mr Grant Ravno (the Chairman of the Third Defendant) had called to inform him on the 10th. By that stage, the Third Defendant had been notified of the electrocution of the minor and had immediately arranged for a properly qualified electrician to come out, identify the cause, and to then effect repairs and render the installation safe.

13. Prior to this incident neither Mr Dembo nor Mr Ravno had ever been made aware of any issues with the safety of the electrical installation of either Unit 29 or any of the other units in the complex.

14. It was found that in order to repair the damage to wiring inside the wall that was caused by Mr Carr's workers, Mr Ncube had disconnected the plugs in the kitchen from the earth leakage and in so doing "*by disconnecting the earths the geyser and all taps had no earthing/bonding and became a live conductor.*" It was common cause that the work done by Mr Ncube was not properly done and had caused the dangerous situation that prevailed on the 9th.

15. Mr Mynhardt was cross-examined at some length on whether or not he had in fact informed Mr Dembo of the problem with the electrical installation at unit 29. His evidence in this regard was prefaced by *"I would have"* on a number of occasions and he conceded that he could not remember the time of the call, whether there was more than one or what was conveyed. He sought to distance himself from his role as Mr Dembo's representative in respect of the improvements to the unit and suggested that Mr Dembo himself had been the one who had contracted Mr Carr and who had managed the project. He subsequently conceded that it had been he who had engaged Mr Carr to do the work on Mr Dembo's instruction.

16. An email exchange on 11 August 2015 established that Mr Dembo was dissatisfied with Mr Mynhardt's performance as his representative in a number of respects but particularly:

"The service I receive from you at no.29 is not acceptable to me or to the tenant.

- *You never answer the phone when I call.*
- *You seldom reply to my SMS messages*
- *Requests for quotations/work at the unit takes too long to get to me*
- *Work requested is not attended to in good time"*

17. The reply to the email of 11 August 2015 contained an apology and undertaking to improve. The remaining emails tendered into evidence which covered the period – authored by both Mr Mynhardt and Mr Dembo had as their subject matter the improvements to Unit 29 and who was going to reimburse Mr Carr for Mr Ncube's

costs. There was no mention whatsoever of the call Mr Mynhardt alleged he made to Mr Dembo or for that matter what had happened to the Plaintiff's child.

18. While the evidence of all the other witnesses who testified at the trial can be accepted without reservation, the same cannot be said for that of Mr Mynhardt. However, I am unable to find that all his evidence should be rejected. Save for whether or not he had called Mr Dembo on the evening of the 9th to tell him about the problem with the electrical installation at Unit 29, the other evidence given by him was corroborative of that of all the other persons who testified.

19. The evidence of Mr Dembo considered together with the emails exchanged between himself and Mr Mynhardt prior to and after the incident establish that Mr Mynhardt had failed to communicate adequately with Mr Dembo prior to the incident, so much so that the termination of the working relationship was considered. Furthermore, the absence of any mention in the emails exchanged in the days after the incident to any telephone call by Mr Mynhardt to Mr Dembo on the evening of the 9th is consonant with and establishes to my mind as a probability that no such telephone call took place. On this aspect, the evidence of Mr Dembo is accepted and that of Mr Mynhardt is rejected[1].

20. Neither Mr Ncube nor Mr Carr were represented at the trial. The plaintiff seeks judgment by default against Mr Ncube and the represented defendants seek a declaratory order against Mr Carr in the event of a finding against one or both of them.

[1] National Employers general Insurance C0. Ltd v Jagers 1984 (4) SA 437 (E)

21. The failure of Mr Ncube to effect the repairs to the installation properly was established as being a direct cause of the incident. That this is so factually is not in issue. However, can it be said that the switching off of the electrical installation on the 9th and switching on again on the 10th by the workers of Mr Carr, who knew of the dangerous state of affairs, would amount to a new intervening cause[2] which severed the chain of liability between Mr Ncube and the incident the following day?

22. It was held in OK Bazaars (1929) Ltd v Standard Bank of South Africa Ltd[3]-

"When directed specifically to whether a new intervening cause should be regarded as having interrupted the chain of causation (at least as a matter of law if not as a matter of fact) the foreseeability of the new act occurring will clearly play a prominent role ....If the new intervening cause is neither unusual nor unexpected, and it was reasonably foreseeable that it might occur, the original actor can have no reason to complain if it does not relieve him of liability"

23. In the present case, the switching off of the electricity ended, at least temporarily the dangerous situation created by Mr Ncube. After leaving the premises on the 9th he never returned and played no further role in the matter. While the subsequent switching on of the electricity is on its own neither "unusual" nor "unexpected", the fact that it was switched on again by persons who knew that to do so would create a dangerous situation anew is to my mind "unusual", "unexpected" and not "reasonably foreseeable". It is for this reason that the action against Mr Ncube must fail.

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[2] Dendy 1998 SALJ 583 594 quotes the well-known description of a *novus actus interveniens* by Lord Wright in *The Oropesa* [1943] 1 All ER 215: "To break the chain of causation it must be shown that there is something which I will call ultraneous, something unwarrantable, a new cause which disturbs the sequence of events, something which can be described as either unreasonable or extraneous or extrinsic."

[3] 2002 3 SA 688 (SCA) as quoted in Neethling-Potgieter-Visser Law of Delict, 7th edition, Neethling & Potgieter, Lexis Nexis, 2015 at footnote 245.

24. In respect of the 3rd defendant, the evidence establishes that the electrocution of the plaintiff's child was unforeseeable as far as it was concerned. It had no duty to do anything while it was unaware of the danger posed[4]. There had never been any problem with the electrical installation and it follows that what occurred was not reasonably foreseeable to it. Immediately the dangerous situation was brought to its attention it acted immediately. For this reason the action against the 3rd defendant must also fail.

25. This is however not the end of the enquiry – both Mr Mynhardt, and Mr Carr's workers knew of the dangerous situation. Both had an ongoing obligation to their respective principal and employer and to persons who may be injured as a result, to take steps to mitigate the risk of harm eventuating from it.

26. Had Mr Mynhardt informed Mr Dembo or for that matter Mr Carr of the dangerous situation brought to his attention by Ms Ramlakan, or even taken any steps himself to have it rectified on the 9th, the electrocution of the plaintiff's child would not have occurred. The same can be said of the workers of Mr Carr who switched the electricity back on while they continued their work on the day of the incident.

27. What then is the relationship between Mr Dembo and Mr Mynhardt and Mr Carr respectively? It is upon the determination of this question that the liability of Mr Dembo and whether the declaratory order sought against Mr Carr, in the event of liability, must be considered.

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[4] Kruger v Coetzee 1966 2 SA 428 (A)

28. It was argued that Mr Dembo could not be held liable as Mr Mynhardt acted as his "agent". This term was used by most of the witnesses in its ordinary sense[5]. None used it in a legal sense for to do so would have implied specific legal consequences.

29. In regard to agency, Kerr[6] describes the position as follows:

"The aim of the appointment of an agent is the performance of a service for the principal: what the principal finds it impracticable, inconvenient, or difficult to do for himself he proposes to do through another. However, many besides agents perform services for another so one needs to consider other characteristics when one identifies the nature of agency. In legal contexts the word "agent" is most commonly used of a person whose activities are concerned with the formation, variation, or termination of contractual obligations, and "agency" has a corresponding meaning."

30. The evidence established that Mr Mynhardt did not act as the "agent" of Mr Dembo in the legal sense. He introduced Ms Ramlakan to Mr Dembo who then contracted with her directly. The evidence was that thereafter Mr Mynhardt attended to maintenance and other ad hoc matters such as making the arrangements for the improvements to the kitchen on an ongoing basis.

31. It is clear that Mr Mynhardt at no stage, although acting in the furtherance of the interests of Mr Dembo, ever acted on his own initiative. He acted on the specific instructions of Mr Dembo[7] – demonstrated clearly by the emails exchanged in regard to the arrangements for, implementation of and payment for the kitchen improvements. For doing so, Mr Mynhardt was paid a monthly fee, contingent upon the ongoing rendering of services to Mr Dembo. That this was the true nature of the

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[5] "A person who or thing which produces an effect" -The Shorter Oxford English Dictionary,5th Ed. Vol 1 at p 41
[6] The Law of Agency, 4th Ed, AJ Kerr, Lexis Nexis Butterworths, 2006 at page 3
[7] Boucher v Du Toit 1978 (3) SA 965 (O)

relationship is established by the evidence of Ms Ramlakan that Mr Mynhardt was the one she should contact in regard to anything arising at the property.

32. Additionally, the evidence of Mr Mynhardt himself that his first port of call upon being notified of problems with the electrical installation, was to contact Mr Dembo. (Although in this specific instance I find that recognising that he had the obligation to do so, his evidence that he did in fact telephone Mr Dembo is not accepted).

33. Whether the relationship between Mr Dembo and Mr Mynhardt is characterised as one of principal and agent or employer and employee[8], is of no moment in the present case. However, the relationship is characterised, Mr Mynhardt had a duty to communicate that there was a dangerous situation with the electrical installation to Mr Dembo. While I have found that he did not communicate this knowledge, the question arises whether the knowledge is to be imputed to Mr Dembo – either as principal or as employer.

34. While it is trite that an employer is vicariously liable for the negligent acts of his employee[9], in regard to an agent, it was held in Town Council of Barberton v Ocean Accident and Guarantee Corporation Ltd [10] that :

"*There are two essential requirements for the application of the doctrine that knowledge acquired by an agent and not communicated to his principal is imputed to the principal merely by reason of the fact that the agent has acquired such knowledge. In the first place, the knowledge must have been acquired in the course of the agent's employment and, secondly, there must be a duty upon the agent to*

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[8] See footnote 11
[9] See Minister of Safety and Security v F 2011 (3) SA 487 (SCA) at paragraphs [15] – [17] and the footnotes thereto.
[10] 1945 TPD 306; Wilkens NO v Voges 1994 (3) SA 130 (AD)

communicate the information obtained. Whether it will be the duty of the agent to communicate will depend upon the scope of his authority and the importance or materiality of such knowledge to the principal. The test of materiality is whether the knowledge of the agent is such that in the ordinary course of business a reasonable man would be expected to impart such knowledge to the person who has delegated to him the conduct and control of his affairs. This rule is equally applicable to cases in contract as it is to cases in tort."

35. It was Mr Dembo who chose Mr Mynhardt as his representative and who continued to keep him as his representative notwithstanding the misgivings expressed a month before the incident. It is not in issue in the present matter that Ms Ramlakan knew to communicate with Mr Mynhardt or that he in turn knew it was his obligation to inform Mr Dembo of a situation which he testified would have received his immediate attention. Accordingly, the risk attendant upon the failure of Mr Mynhardt to inform Mr Dembo of the dangerous situation lies with him and the knowledge of Mr Mynhardt of the dangerous situation must be imputed to him. This principle, must clearly also apply equally to an employer / employee relationship.

36. Insofar as Mr Carr is concerned, the Supreme Court of Appeal[11] has held that:-

"An independent contractor undertakes the performance of certain specified work or the production of a certain specified result. An employee at common law, on the other hand, undertakes to render personal services to an employer. In the former case it is the product or the result of the labour which is the object of the contract and in the latter case the labour as such is the object."

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[11] Niselow v Liberty Life Association of Africa Ltd 1998 (4) SA 163 (SCA) at 165 E-G

37. In the circumstances of the present case Mr Carr clearly falls into the category of an independent contractor. It was held in Chartaprops 16 Pty Ltd and Another v Silberman[12] that a principal is not automatically liable for the negligent act of an independent contractor or its employees. In this regard, it was held:

"[38] It must be accepted that the content of the ordinary common-law duty is to exercise reasonable care (and skill) or to take reasonable steps to avoid risk of harm to a person to whom the duty is owed. The degree or standard of care required varies with the risk involved. It follows that those who engage in inherently dangerous operations must take precautions not required of persons engaged in routine activities. This involves no departure from the standard reasonable care for it predicates that the reasonable person will take more stringent precautions to avoid the risk of injury arising from dangerous operations. The concept of personal duty departs from the basic principles of liability in negligence by substituting for the duty to take reasonable care a more stringent duty – a duty to ensure that reasonable care is taken.

[39] Traditionally, non-delegable duties have been held to apply in instances where, first, the defendant's enterprise carries with it a substantial risk and secondly, the defendant assumed a particular responsibility towards the claimant. Neither of which in my view is present in this case. As already stated, our "ordinary" law of negligence does take proper account of the presence of abnormally high risks and especial vulnerabilities. Thus where those features are found to be present our law expects greater vigilance from a defendant to prevent the risk of harm from materialising, for that according to our law is what a reasonable person in the position of the defendant would do. In the nature of a coherent legal doctrine, the response of our law in those

[12] 2009 (1) SA 265 (SCA)

circumstances should not be to impose strict liability or to resort to a disguised form of vicarious liability but rather to insist on a higher standard of care. It follows that the correct approach to the liability of a principal for the negligence of an independent contractor is to apply the fundamental rule of our law that obliges a person to exercise that degree of care that the circumstances demand."

38. Although Mr Carr did not appear at the trial or lead any evidence, he did file a Plea to the Third Party Notice. The essence of the Plea was that the defendants were aware of the dangerous situation and took no steps to mitigate it and further that the two workers who were attending to improvements in the kitchen, were themselves independent contractors appointed by him. There was no evidence lead at the trial in regard to the relationship between Mr Carr and his workers and it was established that it was they who, knowing of the dangerous situation, had nonetheless switched the electricity back on, on the 10th.

39. Significantly in his Plea, he admitted that the workers had made him aware of the fact that they had damaged the electrical installation and that it was he who had instructed them to obtain the services of a qualified electrician to effect repairs which had lead to the engagement of the first defendant.

40. The uncontroverted evidence of Ms Ramlakan was that the workers had been aware of the fact that Mr Ncube had failed to repair the damage and that the installation was unsafe – until late on the evening in question when they had eventually left. They too like Mr Mynhardt knew of the situation but did nothing. Their conduct went further – it was they who switched the electricity back on.

41. In this regard, the Supreme Court of Appeal held in Rand Bank BPK v Santam Versekeringsmaatskappy BPK[13] that:

"*It is the principal, who selects his agent and represents him as a trustworthy person, and not the other party to a contract who has no say in the selection, who bears the risk……*"

42. For the reasons set out above, I find that both Mr Dembo and Mr Carr are liable for the negligent omissions and/or acts on the part of their agents / employees. I am of the view that the omission on the part of Mr Mynhardt and the actions of Mr Carr's employees jointly contributed to the cause of the electrocution of the minor. Had either acted as they ought to have, the minor would not have been electrocuted. It is for this reason that I intend to make the order that I do.

43. In regard to costs, I am of the view that this matter has been properly brought before this court and that given the nature and importance of the matter, that the engagement by the plaintiff of two counsel was warranted.

44. Accordingly, I make the following order:

44.1 The issues of liability and the quantum of damages are separated in terms of Rule 33(4) of the Uniform Rules of Court;

44.2 The claims against the first and third defendants are dismissed with no order as to costs;

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[13] 1965 (4) SA 363 (A)

44.3 The second defendant is liable for such damages as the plaintiff may prove arising out of the electrocution of her minor child on 10 September 2015;

44.4 The third party is declared to be liable to indemnify the second defendant to the extent 50% of such amount, in respect of both capital and costs, as he is liable to pay to the plaintiff and for the second defendants' costs of suit.

44.5 The second defendant is ordered to pay the plaintiff's costs of suit to date which costs are to include the costs consequent upon the employment of two counsel and the costs of the expert Mr Arend van der Walt.

44.6 The determination of the quantum of damages is postponed sine die.

[redacted]

A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:	26 - 28 JANUARY 2022
JUDGMENT DELIVERED ON:	7 FEBRUARY 2022
COUNSEL FOR THE PLAINTIFF:	ADV JO WILLIAMS SC
	ADV JB MOUTON
INSTRUCTED BY:	MARAIS BASSON
REFERENCE:	MR. BASSON

NO APPEARANCE FOR THE 1ST DEFENDANT

COUNSEL FOR THE 2ND & 3RD	
DEFENDANTS:	ADV W STEYN
INSTRUCTED BY:	MALATJI & CO
REFERENCE:	MR W VAN WYK

NO APPEARANCE FOR THE THIRD PARTY