

JUDGMENT

(13 JUNE 2019)

GYANDA J In this matter the plaintiff sues the defendant for damages arising out of injuries he sustained as a result of coming into contact with an overhead electric cable whilst he was driving a tractor during the course  
5 and scope of his employment on a road in the Braemer area.

At the commencement of the proceedings before me and by agreement between the parties and in terms of the provisions of Rule 33(4) the issues of liability and quantum were separated and the trial before me proceeded only on the issue of liability, the issue of quantum to stand over  
10 for decision at a later stage.

Various bundles of documents were handed in, more especially in the form of photographs, being Bundles A, B, C, D and a single photograph, Exhibit E.

The plaintiff led the evidence of two witnesses, Lindokuhle Eugene  
15 Msomi (the plaintiff himself) and a witness, Senzeni Nkonyeni, who was his superior at the Department of Agriculture where he was employed. The defendant led the evidence of two witnesses, Sipiwe Cyprian Ngcobo and Devon Naradmuni.

At the conclusion of all the evidence before me the issue that had  
20 to be determined is firstly, bearing in mind the provisions of the Electricity Regulation Act 4 of 2006, more especially Section 25 thereof, which reads –

In any civil proceedings against a licensee arising out of  
damage or injury caused by induction or electrolysis or  
25 in any other manner by means of electricity generated,

transmitted or distributed by a licensee, such damage or injury is deemed to have been caused by the negligence of the licensee, unless there is credible evidence to the contrary.”

5           Based on the provisions of Section 25 upon which the plaintiff based its claim on one of its legs, the other being on the basis of damages arising out of delict for the failure on the part of the defendant to take proper steps to remove the cause of danger that caused the plaintiff’s injury.

          From the tenor of the cross-examination by counsel for the plaintiff and  
10   the defendant it appears to me that at the conclusion of the evidence it is not disputed that the incident in fact occurred as testified to by the plaintiff on 25 January 2016, that he was driving his tractor in the course and scope of his employment upon this road in the Braemer area when he came into contact with a low hanging electric cable.

15           The first issue to be determined is whether or not this cable was a cable that was constructed or provided by the defendant in the course of its provision of electricity in the area. This I say on the basis of the manner in which the plaintiff pleaded its claim, more especially in paragraph 5.4 of its pleadings, where it pleaded –

20           “5.4. The electrical wiring was at the time of the incident  
          the property of the defendant.

          5.5. The electrical wires hung loosely over the road  
          allowing members of the public and the plaintiff to  
          easily come into contact therewith.

25           5.6. Access to the wires was unrestricted and safety

measures protecting the public and in particular the plaintiff, were not implemented.”

Mr Naidoo, for the plaintiff, argued that inasmuch as on a reading of Section 25 the *onus* is on the defendant and there is a presumption of negligence on the part of the defendant which the defendant may rebut by the production of credible evidence to the contrary, that in these circumstances it did not matter whether the cable in question was one which was erected or supplied by the defendant. He argued, however, that from the evidence before me, more especially in light of the evidence that the electrical pole depicted in Exhibit E, which bears a tag on it, was identified by the plaintiff and his witness as being an Eskom pole bearing an Eskom tag the Court should find that it was indeed an Eskom pole and that it was therefore provided by Eskom. There is, however, the gainsaying evidence of the defendant's witness, Mr Sipiwe Cyprian Ngcobo, to the effect that all three of those poles that are depicted in Exhibit E were not supplied or installed by the defendant as part of its electrification programme and were in fact poles used for the purposes of illegally taking electricity from the legal source that the defendant had supplied across to those persons who were living on what has been termed as the right side of the road which had not been electrified by the defendant.

Mr Ngcobo in fact testified that the first of the three poles visible on Exhibit E was in fact not even a treated pole but rather an ordinary gum tree or some other tree pole that had been erected. He disputed that the pole, that had been identified by the plaintiff's witnesses as being an

Eskom pole was in fact installed there by Eskom.

He testified that if regard be had to the manner in which the cables were connected to that pole it was not in the fashion that the cables are connected by the employees and the contractors employed by Eskom whose method was to use what was called a pigtail and that the apparatus  
5 used on the pole at present, although it was a type of pigtail, was not of the type that was used by Eskom and the manner in which the cable was tied to that pigtail was not the manner in which Eskom, its employees or subcontractors tied off the electricity cable.

10 In dealing with the calibre of the witnesses that testified Mr Ngcobo gave his evidence, in my view, in a forthright manner and had very little or no criticism that could be levelled against him in the quality of the evidence he gave before me. The plaintiff, on the other hand, appeared for some unfortunate reason to try and give his evidence in a fashion that would  
15 indicate that the defendant's witness in the form of Mr Ngcobo was trying to manipulate the evidence in the manner in which photographs were taken and in refusing to give him certain copies. These photographs are available before the Court.

There is a dispute in the evidence between Mr Msomi and  
20 Mr Ngcobo as to whether, on the date of the inspection by Mr Ngcobo and Mr Msomi, an offending pole and part of the cable lay at the side of the road or not. Mr Ngcobo in fact produced the photograph, Exhibit C1, which indicates the cable running across the road at a fairly substantial height as being the offending cable which Mr Msomi pointed out to him at the  
25 inspection and which he photographed. Mr Msomi denies that he pointed

out this cable.

There is also a dispute as to whether the inspection in question occurred on 26 January as testified to by Mr Msomi and his witness, Senzeni Nkonyeni or whether it was on the 29<sup>th</sup> as testified to by Mr Ngcobo. Mr Ngcobo testified that it was on the 29<sup>th</sup>. Although his camera did not have the facility to record the date when the photographs were taken he had emailed the photographs to his superiors and the dates when he had done those emails substantiated his view that it was in fact the 29<sup>th</sup>. What is more, he used a vehicle that belonged to Eskom and the use of that vehicle, especially the mileage thereof, is logged on a regular basis. From the log sheets which were provided in evidence to the plaintiff it was apparent that on 26 January 2016 he was not in the area but was in an area called Marina Beach. This was independent evidence supporting his version that he was not present on the 26<sup>th</sup> of January as alleged by the plaintiff and his witness.

As against this evidence we have the evidence of Senzeni Nkonyeni. She testified to seeing an Eskom vehicle leaving the scene on the 26<sup>th</sup>, as she was arriving there and she confirmed the evidence of Mr Msomi that the pole and the cable lay at the side of the road on the verge. She, like Mr Msomi, testified to the fact that she had grave difficulty in trying to obtain copies of the photographs from Mr Ngcobo. If she attempted to get copies of the photographs on the 26<sup>th</sup> as she appeared to be testifying this was not possible because on Mr Ngcobo's evidence he had not been at the scene and had not taken any photographs. In any event, Mr Ngcobo testified that Ms Senzeni Nkonyeni had never been in

contact with him and had never requested any photographs and that when he had printed the photographs he gave a complete set of the photographs that he had printed to the plaintiff himself.

The plaintiff, again in my view, dishonestly said that he was  
5 demanding a copy of the photographs because he wanted to give them to his attorney at the time. Bearing in mind that he only obtained the services of an attorney after the meeting with the defendant's representatives on 8 February he could not have wanted the photographs for his attorney. Whilst he was testifying he realised that he had erred on his evidence and  
10 he amended his evidence by saying that he wanted to show his family as to how the accident had occurred. He was, in my view, being dishonest.

Senzeni Nkonyeni, because of her camaraderie or relationship with Mr Msomi was, in my view, merely trying to support his version. There was no need for Mr Ngcobo to lie about the photographs or refuse to give the  
15 photographs to anybody who requested them on behalf of Mr Msomi.

On 8 February it is common cause that the parties had a meeting at the offices of the Department of Agriculture. Minutes of that meeting are recorded and contained in Exhibit C19, which minutes have been acknowledged as correct by Mr Msomi when he testified. Mr Msomi gave  
20 the impression that at that meeting these representatives of the defendant had agreed to compensate him and it was only the issue of the amount that had to be determined. This is gainsaid by the contents of those minutes, once again casting a poor reflection on the credibility of Mr Msomi.

25 What is clear is that Mr Ngcobo and the representatives of the

defendants correctly advised the plaintiff that he was entitled to seek the assistance of an attorney for the purposes of instituting a claim for damages which are recorded in the minutes.

Turning now to whether the defendant can be said to be negligent  
5 based on the provisions of Section 25 or whether the defendant has succeeded by the evidence placed before me of establishing that there is credible evidence to the contrary. The evidence before me is, although it has not been categorically accepted by the plaintiff, it cannot be disputed by the plaintiff that the offending electric cable, if I may refer to it as such,  
10 was not a cable that belonged to the defendant and it was in fact a cable that was used to access electricity illegally by some third party.

I am in full agreement with the submissions by Mr Aboobaker that Section 25 cannot be interpreted to be applicable to situations other than the legal supply of electricity. It cannot apply to a situation that represents  
15 an illegal connection of electricity by a third party unrelated to the defendant.

It has to be accepted that the electricity in question is generated in the sense of being supplied by Eskom. It is the only authority that supplies electricity so to that extent Section 25 would be applicable. But, the  
20 offending cable was part of cables used to illicitly access electricity by those who were not entitled to electricity.

Mr Ngcobo gave evidence that at the time there were only two paying customers of Eskom that were registered and he named them for the record. Other than those two customers who had sought and obtained  
25 electricity supplied by Eskom directly to them the other users in the area

were illegally accessing electricity.

It has been contended on behalf of the plaintiff that inasmuch as it was apparent to the defendant's representatives that there was a large scale theft of electricity and illegal access to electricity by means of these  
5 illegal cables the defendant ought to have taken more adequate steps to have prevented the occurrence occurring that caused the plaintiff's injury and damages.

Both the defendant's representatives testified that they were obliged in terms of the law to carry out an annual inspection and that that annual  
10 inspection was in terms of the international standards. Mr Naidoo argued that bearing in mind that the defendant was aware of this rampant violation where electricity was being stolen and that there was an opportunity for persons getting injured by the theft of electricity as electricity, it is well known, can cause injury and damage to persons the defendant ought to have taken more decisive  
15 steps by having more inspections than the single annual inspection and they should have taken steps to have removed the illegal electrical connections by, for example, shutting off completely the power to the area.

The defendant's witnesses testified in detail about their attempts to try and remove the illegal connections, about how their employees have been  
20 attacked and chased, threatened and even shot at by residents in that area. Communication with the councillors and the elders in the area have not proved fruitful in any way in attempting to solve the problem to the extent that when their employees notice illegal connections which in their view appear to be safe they do not take steps to immediately disconnect it but report the offending  
25 connection and it is logged on their list of offending connections to be dealt with



in due course.

Mr Naradmuni, who testified for the defendant, also testified about the challenges that faced the employees of Eskom in the form of threats of assaults and attacks upon the employees, threats by the community to burn the facilities and infrastructure belonging to Eskom when services are terminated. And, that in spite of meetings with councillors and agreements being concluded, when they went to go and act in terms of the agreement the councillors themselves adopted the position that “you disconnect at your own risk, I cannot guarantee your safety in leaving here if you do so”. To that end Mr Naradmuni has indicated that there is only one solution and that is to connect everybody to electricity free of charge but that is the problem of the Department of Energy which provides the funding. The funding required by Eskom to be able to have full-time armed escorts available for their employees, even when they are conducting normal routine maintenance, has become astronomical in the light of the budget restraints and Eskom’s reduced funding. All of that he placed before the Court and much of it is in the public domain in any event.

In the light of this background, to ask that the employees of Eskom do more than one annual inspection and take more decisive steps to prevent an occurrence of injury or damage in my view is asking too much because the area concerned is not the only area in the country or in that particular municipal area that has been experiencing the same problems. Mr Naradmuni also testified to similar problems being experienced in all of the informal settlements surrounding Umzinto which forms part of that service area. One would expect then that these employees on almost a daily basis present themselves in these

areas to conduct inspections and disconnect illegal connections in the light of the fact that they know that they would be facing retaliation, violence, assaults and even killings by those inhabitants if they attempted to disconnect the electricity. And, if they shut off the power to the area they cannot even go  
5 anywhere near the area without being attacked. Repercussions for that sort of behaviour have also been in the public domain. Protests are then brought onto the roads and into the cities. It is never-ending and it appears from the evidence of Mr Naradmuni that the only solution is to electrify everybody.

Turning to the particular incident in question, Mr Naidoo argued that  
10 the defendant ought to have foreseen the possibility that illegal connections would result in injury to the residents of the area and people who are travelling in the area and therefore owed a duty of care to those people to ensure that illegal connections did not cause them injury or harm. He referred the Court to the decision of HOLMES JA in *Kruger v Coetzee* 1966 (2) SA (A), especially at  
15 page 430 where that court stated that –

“For the purposes of liability *culpa* arises if-

(a) a *diligens paterfamilias* in the position of the  
defendant –

(i) would foresee the reasonable possibility of  
20 his conduct injuring another in his person or property and causing him patrimonial loss;  
and

(ii) would take reasonable steps to guard  
against such occurrence; and

25 (b) the defendant failed to take such steps.”

In this particular instance one should examine the evidence of the plaintiff himself. The plaintiff testified that he went along this route a number of times. He noticed the cable. The cable was never a source of danger. On the day in question he did not see the cable and it contacted  
5 with him and the tractor that he was driving. He could not explain how that on that particular day the cable was now lower than it was on previous occasions. He surmised and speculated that it might have come lower as a result of somebody knocking the pole or some such accident which caused the cable to be lowered. But, the cable was lower on that day  
10 when he contacted it and met this unfortunate accident.

How would the defendant know of the fact that this cable was hanging low? In the evidence of the defendant's witness, Mr Ngcobo, he testified that because it is an illegal connection the defendant would only become aware of an illegal connection being a source of danger if it was  
15 reported to them or if an incident occurs and then they go and take steps. The defendant would have been blissfully unaware of this illegal cable causing a potential danger to anybody, more especially the plaintiff in this case.

What is more this was an illegal connection. It was not a cable as  
20 contended for by the defendant in its plea that belonged to the plaintiff. In fact, Mr Ngcobo testified that when he photographed the cable and he showed the Court the kink or mark on the cable and he said that he was able to see the wires within which were exposed when the cable snapped and that it was the multi-coloured wires and that this was in fact a Telkom  
25 cable, not even an Eskom cable that was used for the illegal connection.

It is so that the public expect people to be protected against damage and injury caused by the supply of electricity but the public cannot expect Eskom to prevent damage and injury caused to the people by the illegal theft of electricity of which Eskom is unaware, of which they cannot  
5 become aware of until they are informed or until an incident occurs.

In the light of all of the challenges that face the employees of Eskom it is incredible to impose upon them a duty then to go on a more regular basis to terminate or disconnect illegal connections to ensure the safety of the people in the area. They can do no more than they are doing  
10 at present. They have testified in the evidence of Mr Naradmuni and Mr Ngcobo that the police cannot help, they are themselves undermanned and under-resourced and they cannot provide assistance. The cost of having permanent armed guards to escort them every time they conduct normal maintenance is astronomical and, because of the current economic  
15 position of Eskom, unaffordable. It is in those circumstances not possible for Eskom to take steps that Mr Naidoo suggests they should or ought to have taken in the circumstances.

In the light of this particular case it is quite clear that even bearing in mind and accepting the plaintiff's evidence, even the plaintiff himself  
20 was unaware of the danger being caused by this cable until the incident occurred. He was travelling this route on a daily basis and it presented no problem to him before. It would be unreasonable in the circumstances to expect that Eskom would in those circumstances be aware of this cable hanging low and being a source of danger, firstly because nobody reported  
25 it and secondly, because until the incident with the plaintiff there was no

other incident that they were aware of or was reported to them. One must accept the evidence of Mr Ngcobo in that regard.

In the circumstances it cannot be said that the defendant reasonably foresaw that there was this low hanging cable that was illegally  
5 connected that may possibly cause damage or injury to another person or property, that in the circumstances they were obliged to take reasonable steps and that they failed to take reasonable steps because they were simply unaware of the existence of this cable until the incident occurred. That is the evidence before me. It cannot be unreasonable, bearing in  
10 mind the steps that they take to ensure that dangerous connections are not left unattended.

In any event, as Mr Aboobaker properly argued, this was not an act on the part of Eskom that caused the injury to Mr Msomi, it was the act of the person who was illegally stealing the electricity who pulled the cable  
15 across the road from the legal supply that caused the injury to Mr Msomi.

For all of these reasons I am satisfied that the plaintiff has failed to prove its case against the defendant and –

THE PLAINTIFF'S CLAIM IS DISMISSED WITH COSTS.

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## **TRANSCRIBER'S CERTIFICATE**

This is, to the best abilities of the transcriber, a true and correct transcript of the proceedings, **where audible**, recorded by means of a mechanical recorder in the matter:

**LINDOKUHLE EUGENE MSOMI**  
**v**  
**ESKOM HOLDINGS SOC. LIMITED**

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CASE NUMBER : 8650/2016

COURT OF ORIGIN : PIETERMARITZBURG HIGH COURT

TRANSCRIBER : KERRY DICKINSON

DATE COMPLETED : 13 SEPTEMBER 2019

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Tel 033 3425256 • Fax 033 3941190

**IN THE KWAZULU-NATAL HIGH COURT  
PIETERMARITZBURG  
REPUBLIC OF SOUTH AFRICA**

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CASE NUMBER : 8650/2016

DATE : 13 JUNE 2019

**LINDOKUHLE EUGENE MSOMI**

versus

**ESKOM HOLDINGS SOC. LIMITED**

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**BEFORE THE HONOURABLE JUDGE GYANDA**

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ON BEHALF OF APPLICANT : ADVOCATE V M NAIDOO SC

ON BEHALF OF DEFENDANT : ADVOCATE ABOOBAKER SC

INTERPRETER : NOT REQUIRED

**EXTRACT OF JUDGMENT**

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Tel 033 3425256 • Fax 033 3941190