THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 599/2015

In the matter between:

ESKOM HOLDINGS LIMITED **APPELLANT**

and

DEREK ANTHONY HALSTEAD-CLEAK **RESPONDENT**

Neutral citation: *Eskom Holdings Limited v Halstead-Cleak* ZASCA 150 (30 September 2016)

Coram: Lewis and Willis JJA and Schoeman, Fourie and Makgoka AJJA

Heard: 13 September 2016

Delivered: 30 September 2016

Summary: Section 61 of the Consumer Protection Act 68 of 2008 does not create strict liability on the part of a supplier of electricity if the plaintiff is not a consumer vis-à-vis it.

ORDER

On appeal from: Gauteng Division of the High Court of South Africa (Pretoria) (Baqwa J sitting as court of first instance): judgment reported *sub nom Halstead-Cleak v Eskom Holdings Ltd* 2016 (2) SA 141 (GP)

1 The appeal is upheld with costs.

2 The order of the court below is replaced with the following:

'1 (a) The defendant is not liable to the plaintiff in terms of the provisions of s 61 of the Consumer Protection Act 68 of 2008.

(b) The plaintiff's claim, based on those provisions, is dismissed, with costs, those costs to include the costs of the pre-trial conference of 19 February 2015 and the costs of the trial that commenced on 23 February 2015.

(c) The plaintiff's action is remitted to the trial court for the determination of the remaining issues in the action.'

JUDGMENT

Schoeman AJA (Lewis and Willis JJA and Fourie and Makgoka AJJA concurring)

[1] The central question in this appeal is whether the appellant, Eskom Holdings Ltd (Eskom), can be held strictly liable in terms of s 61 of the Consumer Protection Act 68 of 2008 (the Act) for harm caused to the respondent, Mr Derek Anthony Halstead-Cleak, by a low hanging power line which was not supplying or required to supply electricity to anyone.

The background

[2] On 11 August 2013 the respondent, one of a group of four cyclists, came into contact with a low hanging live power line spanning a footpath they were cycling on. He sustained severe electrical burns and issued a summons against Eskom for the damages he had suffered.

[3] The respondent's claim is based on (a) Eskom's role as the sole supplier or producer of electricity on the national grid and its control of all power lines not falling under the control of any local authority or municipality; (b) the strict liability of Eskom as the producer or supplier of electricity provided for in terms of s 61 of the Act; and in the alternative (c) delict, in that Eskom negligently and wrongfully caused the respondent's damages.

[4] The parties agreed that the limited issue pertaining to whether Eskom was liable in terms of s 61 of the Act would be separately adjudicated with the remaining issues to stand over for later determination, if necessary. It was so ordered in terms of Uniform rule 33(4).

[5] The Gauteng Division of the High Court of South Africa (Pretoria) (to which I shall refer for the sake of convenience as the high court) found that Eskom was 100 per cent liable for the respondent's injuries in terms of the provisions of s 61 of the Act. The appeal is with the leave of the high court.

The pleadings

[6] The claim, based on s 61 of the Act, avers that Eskom was a producer or supplier of electricity or a 'service' in terms of the Act while

the production or generation of electricity constituted ‘supply’ and ‘market’ as defined in the Act. The respondent was a person mentioned in s 61(5) of the Act, that is a natural person who had been injured, or a ‘consumer’, and had suffered injuries which constituted harm as envisaged in ss 61(1) and 61(5) of the Act due to the alleged supply of unsafe goods and/or defective goods, or a hazard in the goods resulting in the injuries sustained. The goods were the electricity generated, supplied and permitted to be present in the lines spanning the footpath.

[7] Eskom’s plea was broadly that it was a licensee in terms of the provisions of the Electricity Regulation Act 4 of 2006 and responsible for the relevant power line through which it conducted electricity. Eskom was made aware that the respondent had come into contact with the power line on 11 August 2013 whilst riding a bicycle. Subsequently the employees of Eskom inspected the power lines and discovered that all three conductors of the power line had been vandalised by the theft of stay rods, which resulted in the power lines hanging in a low position. Eskom denied that, in the context of this particular accident, it was a producer or supplier as defined in the Act or that the respondent was a consumer as defined. Eskom denied that the incident arose as a result of the supply of unsafe goods or a product failure, defect or hazard in any goods or inadequate instruction or warnings. Furthermore, Eskom could not have been expected to discover the state of the power line.

[8] In terms of the common law a manufacturer could not be held strictly liable in delict for any harm caused. In *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd*[1] it was found that if the common law is

[1] *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* 2003 (4) SA 285 (SCA) para 38.

to be extended to make provision for strict liability, it is the Legislature's duty to do so. That came to fruition with the promulgation of the Act.

The interpretation of the Act and s 61 in particular

The applicable definitions and tools of interpretation

[9] In interpreting the Act it is instructive to refer to the principles enunciated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[2] and *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd*[3] that the interpetative process involves ascertaing the intention of the legislature but considers the words used in the light of all relevant and admissible context, including the circumstances in which the legislation came into being. Furthemore, as was said in *Endumeni* '. . a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results. . .'

[10] The long title of the Act provides that it is to promote a '. . . fair, accessible and sustainable marketplace for consumer products and services and for that purpose to establish national norms and standards relating to consumer protection, to provide for improved standards of consumer information, to prohibit certain unfair marketing and business practices, to promote responsible consumer behaviour, to promote a consistent legislative and enforcement framework relating to consumer transactions and agreements. . .'

[11] The Green Paper discussion of the Act makes it clear that a broad spectrum of consumers needed protection:

'Perhaps one of the greatest pitfalls in most consumer protection laws in South Africa, is the absence of a uniform definition of "a consumer". This has

[2] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.
[3] *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* [2015] ZASCA 111; 2016 (1) 518 para 27.

resulted in a difficulty for enforcers to accurately identify individuals that the State seeks to protect. Consumers must be defined broadly as individuals who purchase goods and services, and must include third parties who act on behalf of the consumer. . . .'[4]

[12] In terms of the provisions of s 2(1), the Act must be interpreted in a manner that gives effect to the purpose of the Act as set out in s 3. That purpose is to promote and advance the social and economic welfare of consumers, in particular vulnerable consumers, in South Africa.[5] If there is an inconsistency between the Act and any other legislation both Acts apply concurrently, to the extent that it is possible. If it is not possible, the provisions that extend the greater protection to a consumer prevail over the alternative provision.

[13] Section 5 concerns the application of the Act. The relevant provisions apply to every transaction occurring within South Africa for the supply of goods or services or the promotion of goods or services. Section 5(5) provides that if any goods are supplied within the Republic to any person in terms of an exempt transaction, those goods and the producer are nevertheless subject to s 61.

[14] A 'transaction' is defined in s 1 as an agreement between two or more persons for the supply of goods or services for consideration in the ordinary course of business. The instances where consideration is not a requirement for a transaction and deemed to be transactions are set out in s 5(6) and include the supply of goods or services in the ordinary course

[4] Draft Green Paper on the Consumer Policy Framework, GN 1957, *GG* 26774 of 9 September 2004.
[5] The same purpose has been set out in the Preamble of the Act.

of business to members of a club, trade union, association, society or a voluntary association of people for a common purpose.

[15] The definition of ‘consumer’ in s 1 is a person to whom goods or services are marketed in the ordinary course of a supplier's business, or who has entered into a transaction with a supplier in the ordinary course of a supplier’s business. The definition includes a person who is a user of the goods or a recipient or beneficiary of the particular service irrespective of whether that person was a party to a transaction concerning the supply of the goods or services. This has the effect that the recipient of a gift from a consumer would also be considered a consumer in terms of the Act. The important features to note are that there must be a transaction to which a consumer is party, or the goods are used by another person consequent on that transaction.

[16] From the definitions, the Preamble and purpose of the Act, it is clear that the whole tenor of the Act is to protect consumers. A consumer is a person who buys goods and services, as well as persons who act on their behalf or use products that have been bought by consumers. There are categories of persons who fall outside this definition, but they are deemed to be consumers in terms of the provisions of s 5(6) as set out above. These purchases are made by way of transactions. The Act must therefore be interpreted keeping in mind that its focus is the protection of consumers.

Section 61 of the Act

[17] Section 61 falls within Chapter 2 of the Act that deals with ‘Fundamental Consumer Rights’ and specifically Part H thereof, which concerns the ‘Right to fair value, good quality and safety’. Section 61(4)

deals with defences to a claim brought against a producer, or importer, distributor or retailer in terms of s 61, but it is common cause that the defences do not apply in this case. The salient provisions of s 61 are:

'Liability for damage caused by goods

(1) Except to the extent contemplated in subsection (4), the producer or importer, distributor or retailer of any goods is liable for any harm, as described in subsection (5), caused wholly or partly as a consequence of –

(a) supplying any unsafe goods;

(b) a product failure, defect or hazard in any goods; or

(c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods,

irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be.

(2) A supplier of services who, in conjunction with the performance of those services, applies, supplies, installs or provides access to any goods, must be regarded as a supplier of those goods to the consumer, for the purposes of this section.

(3) If, in a particular case, more than one person is liable in terms of this section, their liability is joint and several.

(4) . . .

(5) Harm for which a person may be held liable in terms of this section includes –

(a) the death of, or injury to, any natural person;

. . . and

(d) any economic loss that results from harm contemplated in paragraph *(a)*, *(b)* or *(c)*.

(6) Nothing in this section limits the authority of a court to –

(a) assess whether any harm has been proven and adequately mitigated;

(b) determine the extent and monetary value of any damages, including economic loss; or

(c) apportion liability among persons who are found to be jointly and severally liable.'

[18] The words creating liability used in s 61(1) are defined in s 53(1):

'(1) In this Part, when used with respect to any goods, component of goods, or services –

(a) ‘defect’ means –

‘(i) any material imperfection in the manufacture of the goods or components, . . . that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or

(ii) any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances;

(b) ‘failure’ means the inability of the goods to perform in the intended manner or to the intended effect;

(c) ‘hazard’ means a characteristic that –

(i) has been identified as, or declared to be, a hazard in terms of any other law; or

(ii) presents a significant risk of personal injury to any person, or damage to property, when the goods are utilised; and

(d) ‘unsafe’ means that, due to a characteristic, failure, defect or hazard, particular goods present an extreme risk of personal injury or property damage to the consumer or to other persons’

[19] Electricity is ‘goods’ as defined in s 1 of the Act. Further definitions that are relevant are:

(a) ‘Supply’ when used as a verb in relation to goods, includes sell, rent, exchange and hire in the ordinary course of business for consideration.

(b) A ‘producer’ with regard to particular goods is defined as a person who generates or otherwise produces the goods within South Africa with the intention of making them available for supply in the ordinary course of business.

(c) ‘Market’ when used as a verb means to promote or supply any goods or services.

[20] ‘Ordinary course of business’ is not defined in the Act but it has been the subject of interpretation in respect of, inter alia, insolvency

matters. In *Van Zyl & others NNO v Turner & another NNO*[6] Brand J, when discussing whether a disposition was made in the 'ordinary course of business', found that the test is an objective one and that regard must be had to all the circumstances, including the actions of both parties to the transaction.

[21] Taking into account all the definitions and the wording of s 61, the respondent had to establish that, first, in respect of that incident, the respondent came to harm and secondly that Eskom was a producer of electricity. Furthermore, that the harm was caused wholly or partly as a consequence of Eskom selling unsafe electricity in the ordinary course of business, for consideration, or there was a product failure, defect or hazard in the electricity. Taking into consideration that s 61 is a section in Chapter 2 of the Act dealing with 'Fundamental Consumer Rights' it is clear that the harm envisaged in s 61 must be caused to a natural person mentioned in s 61(5)(*a*), in his or her capacity as a consumer. This is the only businesslike interpretation possible. The reason why reference is made to a 'natural person' is clearly to distinguish it from 'person' which may include a 'juristic person' or 'consumer' which may also include a 'juristic person'.

The facts

[22] The high court determined that '. . . the wording of Section 61(5) makes it clear that liability arises not only in respect of "consumers" as defined in the CPA [the Act] or consumers in the general sense, but to "any natural person" . . . . The plaintiff need not, therefore be a "consumer" in the contractual sense as defined in order for the Defendant to be liable to him.' However, this loses sight of the fact that there should

[6] *Van Zyl & others NNO v Turner & another NNO* 1998 (2) SA 236 (C) para 34.

be a supplier and consumer relationship for Eskom to be strictly liable for harm, as the Act's purpose is to protect consumers. In this instance the respondent is not a consumer vis-à-vis Eskom as: (a) the respondent did not enter into any transaction with Eskom as a supplier or producer of electricity in the ordinary course of Eskom's business; and (b) the respondent was not utilising the electricity, nor was he a recipient or beneficiary thereof.[7]

[23] The supply of unsafe electricity also presupposes that Eskom sold the electricity in the ordinary course of business for consideration. Similarly, where s 61(1)(*c*) provides that inadequate instructions pertaining to any hazard attracts liability, it is restricted to inadequate instructions to a consumer who has entered into a transaction with Eskom. The respondent and Eskom were not in a consumer, producer or supplier relationship in respect of the electricity that caused the harm to the respondent.

[24] Section 61(1)(*b*) makes provision for liability due to a product failure, defect or hazard in any goods. As stated, it is clear in the context of the Act that it is restricted to a supplier and consumer relationship. In any event it cannot be found that the harm the respondent suffered was as a result of the electricity itself failing, or that the electricity had a defect. Failing in this context would be if the electricity were unable to perform in the intended manner. This was not the case. The electricity, in the context of the case did not suffer from a material imperfection in the manufacture of the goods. Likewise, the electricity did not have a characteristic that rendered it less useful or safe than a person would generally expect in the circumstances. The same applies to the electricity

[7] The *Concise Oxford Dictionary* 12 ed (2011) defines 'utilise' as 'make practical and effective use of'.

not possessing a characteristic that presented a significant risk of injury to any person when the goods are utilised. It is clear that the respondent was not utilising the electricity when he was harmed.

[25] Accordingly the respondent was not a consumer that was entitled to the protection of Part H of Chapter 2 of the Act. Furthermore, the circumstances of this case clearly fall outside the ambit of a consumer – supplier relationship to which the Act applies. Therefore, the appeal should succeed.

The separation of issues

[26] There is another matter that needs to be addressed. An order was made by agreement that there be a separation of issues and the applicability of s 61 of the Act be dealt with separately. The procedure in rule 33(4) is aimed at curtailing litigation if a question of fact or law may be conveniently decided separately. In *Denel (Edms) Bpk v Vorster*[8] Nugent JA said:

'Rule 33(4) of the Uniform Rules – which entitles a Court to try issues separately in appropriate circumstances – is aimed at facilitating the convenient and expeditious disposal of litigation. It should not be assumed that that result is always achieved by separating the issues. In many cases, once properly considered, the issues will be found to be inextricably linked, even though, at first sight, they might appear to be discrete. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a whole that

[8] *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) para 3.

it will be possible properly to determine whether it is convenient to try an issue separately.'

[27] Even though the parties to the litigation may agree to a separation of issues, before a court orders separation in terms of rule 33(4), it must be satisfied that it is convenient and proper to adjudicate that issue separately. In this matter, the obvious issue for determination was whether there was liability in delict. Once the trial had commenced, and evidence was presented, the court should, in the ordinary course, have determined all the bases of liability, especially the claim in delict. Determination of one issue only – on the unlikely interpretation of a statute – can only serve to prejudice the parties.

[28] In the result the following order is made.

1 The appeal is upheld with costs.

2 The order of the court below is replaced with the following:

'1 (a) The defendant is not liable to the plaintiff in terms of the provisions of s 61 of the Consumer Protection Act 68 of 2008.

(b) The plaintiff's claim, based on those provisions, is dismissed, with costs, those costs to include the costs of the pre-trial conference of 19 February 2015 and the costs of the trial that commenced on 23 February 2015.

(c) The plaintiff's action is remitted to the trial court for the determination of the remaining issues in the action.'

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I Schoeman

Acting Judge of Appeal

APPEARANCES

For Appellants:	J F Mullins SC (and L East) Instructed by: Mothle Jooma Sabdia Inc., Pretoria Matsepes Inc., Bloemfontein
For Respondent:	W P de Waal SC Instructed by: Joseph's Inc., Pretoria McIntyre & Van der Post, Bloemfontein