

REPORTABLE

**IN THE CAPE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOODHOPE PROVINCIAL DIVISION)**

Case No: A 31/08

In the matter between

KATRIENA SPAMMER

Appellant

And

THE STATE

Respondent

Advocates for Appellant : Adv F van Zyl SC with Adv P A Botha
Instructed by : Spamer Triebel Incorporated
P O Box 5149
TYGER VALLEY 7536
Tel: (021) 913-7392

Advocate Respondent : Mr ADR Stephen
Instructed by : The Director of Public Prosecution
Tel: (021) 487-7000

Dates of hearing : 5 September 2008
Date of judgment : 12 September 2008

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JUDGEMENT: 12 SEPTEMBER 2008

NDITA, J

INTRODUCTION

[1] The appellant was charged in the Magistrate's court, Montagu with two offences. The first offence was that she had with contravened Section 38 (1) (b) of the Occupational Health and Safety Act 85 of 1983 but she was discharged in terms of Section 174 of the Criminal Procedure Act 51 of 1977. The second charge against the appellant was that she had contravened Regulation 11(6) (a) of the Electrical Machinery Regulations in that she had caused to be installed in her premises an electric fence in a manner that persons could inadvertently come into contact with it. She was convicted and sentenced to thirty days

imprisonment which was wholly suspended on certain conditions. She now appeals against both conviction and sentence.

[2] The applicable Regulation reads as follows:

“1 Electric Fence....

(6) When an electric fence is installed along a public road or in an urban area the user shall-

(a) as far as practicable mount the electrified wires or articles in such positions that persons cannot inadvertently come into contact therewith...”

The charge reads as follows:

“Dat die beskuldigde is aan die misdryf van [sic – ‘die oortreding van die Bepalings Van Regulasie 11(6) (a)] van die elektriese masjinerieregulasie deurdat sy gedurende 2005 toegelaat het dat ‘n elektriese heining op haar perseel opgerig is wat die moontlik gemaak het dat persone abuis daarmee in aanraking kom.”

[3] The first ground of appeal is that the charge does not contain essential averments in particular with regard to the mens rea and as such does not disclose an offence. Secondly, even if it did, on the evidence presented, no offence has been proved. Before considering each of these submissions, it is necessary to set out the factual background.

[4] As earlier stated, the appellant was charged with erecting an electric fence in her premises during 2005. At the commencement of the trial, Mr. Spammer

who represented the appellant indicated that he wanted to address the court on the charge which, in his opinion, was unclear. It does not appear that he fully addressed the court on this issue but he did place on record the fact that the charges were not clear. The magistrate ruled that sufficient information had been provided in the charge sheet.

[5] The evidence tendered in support of the allegation was that before the appellant installed the electric fence, she approached Mr. Vorster in order to establish the requirements, should she install it. Mr. Vorster's response to the query was that although he did not have any experience in matters of this nature, he did not believe that she would encounter any problems but she should ensure that installation complied with the South African Bureau of Standards ("SABS"). After the appellant had consulted him, certain complaints regarding the fence were lodged whereupon he decided to visit the premises. On his arrival he found a certain Mr. Elstadt who was busy erecting the fence. Although Mr. Vorster did not have any experience in such matters, he took the measurements and found some of the places whereon the fence was installed to be a little above one meter. In his opinion, because of this reason the fence was not safe. However, Mr. Elstadt informed him that the fence was being erected in accordance with SABS standards. Further complaints were received and that culminated in the visit by Mr. Boegervennig and Mr. Cupido who issued notice in terms of section 30(1) (b) of the Act directing the appellant not activate or energise the portion that was less than 1, 8 meters. It is common cause that it was only the portion of

the fence that was in the region of 1.1 metres that was the basis of the charge. Furthermore, it appears from the photographs that the property lay on a slope and a vibacrete wall had been raised up. In addition, the electric fence followed the decreasing gradient. None of the witnesses testified in relation to the terrain on the lower parts of the electric fence. However, the photographs depict that there are plants, shrubs and trees on the lower area.

[6] In the light of the above, the crisp question is whether the trial court misdirected itself in finding that the appellant was negligent in installing an electric fence without ensuring 'as far as was practicable' that no persons could inadvertently come into contact with live wires.

[7] In considering the above, it seems prudent to first consider the prior question: whether the court a quo erred in coming to the conclusion that the charge sheet disclosed an offence.

[8] The essential elements of the crime created by Regulation 11(6) (a) are the following:

1. The installation of an electric fence next to a public road or in an urban area;
2. An omission to monitor the electric wires as far as is practicable to ensure that persons will not inadvertently come into contact with it.

It is clear from the above that guilt is in the form of culpa.

[9] The purpose of a charge sheet is to inform an accused person of the charges he or she is facing and should clearly set out all the elements of that particular offence to enable an accused person to conduct a proper defence. This is a fundamental principle of the right to a fair trial. In the present matter the charge sheet only shows that the offence against the appellant is that she allowed that an electric fence be erected in her premises during 2005 that made it possible that persons can come in contact by mistake. It is always possible that wherever any electric fence is installed people will come in contact with it by mistake. What creates an offence is the failure, as far practicable to ensure that persons do not inadvertently come into contact with live electric fence. In the present matter, the charge sheet clearly does not include the words the failure to ensure 'as far as practicable' that people do not inadvertently come into contact with it. In my view, the charge sheet is deficient to the extent that it does not disclose what forms the basis of the appellant's culpability. The deficiency in the charge sheet operated to the prejudice of the appellant who sought to understand the basis for liability.

[10] The charge as it stands does not even allege a recognizable offence. (See **S v Dhudhla** 1968 (1) SA 459 at 462). Furthermore, this defect cannot be salvaged by the provisions Section 88 of the Criminal Procedure Act 51 of 1977 which provides that, where a charge is defective for the want of an averment which is an essential ingredient of the relevant offence, the defect shall, unless brought to the notice of the court before judgment, be cured by evidence at the

trial proving the offence. It is clear from the record that the appellant's legal representative in the court a quo at least attempted to bring to the attention of the magistrate that the charge sheet lacked an essential ingredient. The magistrate ignored the objection and merely retorted that the charge sheet contained sufficient information to enable the appellant to plead. This is a misdirection. Malherbe AJ in **S v Gaba** 1981(3) SA 746 at 746 H reaffirmed the principle that:

“Where the existence of a legal duty is not averred in a charge sheet, and the charge sheet is not amended, notwithstanding the fact that the defect was brought to the attention court at the commencement of the trial and such legal duty is “an essential ingredient of the relevant offence”, such defect cannot be cured by evidence, in terms s 88 of the Criminal Procedure Act 51 of 1977, at the trial proving the matter which should have been averred”.

On this ground alone, in my view, the appeal should succeed.

[11] For the sake of completeness, I turn to consider whether the evidence falls significantly short of the measure required to sustain a conviction. On Mr Vorster's version, the appellant made enquiries regarding problems she was likely to encounter if she erected an electric fence. He told her that if she complied with SABS standards she should not encounter any problems. Mr Vorster was present when Mr Elstadt erected the fence. It is further common cause that the officials had adopted the SABS code of practice as guideline but these have no foundation in law. Various Safety Standards were incorporated into the Machinery and Occupational Safety Act in terms of GN R1594 dated 5 August 2008. However, no safety standards were incorporated with regard to

Regulation 11 under which the appellant has been charged. No inspection in loco was conducted in the course of the trial and for that reason it becomes difficult to understand on what basis the magistrate came to the conclusion that the appellant failed to mount the electrified wires in such positions that persons could inadvertently come into contact therewith. on the one side, direct access to the electrified wires was blocked by a wall, on the other side by extensive foliage. In my view, on the evidence presented the trial court misdirected itself by returning a verdict of guilt against the appellant and for that reason the appeal should be upheld.

[12] In the circumstances, the appeal succeeds and the order of the court a quo is set aside and replaced as follows: The accused is acquitted.

NDITA, J

I agree.

DAVIS, J