IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No 25785/09

In the matter between:

VINCENT HUMPHREY PEACOCKE	Plaintiff
and	
NEIL MULLER CONSTRUCTION (PTY) LIMITED	First Defendant
ELECTRICAL RETICULATION COMPANY (PTY) LIMITED	Second Defendant
OLD MUTUAL LIFE ASSURANCE COMPANY (SA) LIMITED	Third Defendant
and	
ELECTRICAL RETICULATION COMPANY (PTY) LIMITED	First Third Party
TENTRON ENGINEERING MANAGE-MENT SERVICES CC	Second Third Party
NEIL MULLER CONSTRUCTION (PTY) LIMITED	Third Third Party

Court:	GRIESEL J
Heard:	4, 5, 6, 10 June & 25 July 2013
Delivered:	7 August 2013

JUDGMENT

GRIESEL J:

Introduction

[1] This is an action for damages for personal injuries sustained by the plaintiff in an incident that occurred on Sunday, 11 February 2007 on a building site at Cavendish Connect which forms part of the Cavendish Square shopping centre in Claremont, Western Cape.

[2] In his particulars of claim, the plaintiff pleaded that on the day in question and whilst engaged in construction work at the above-mentioned site he 'was electrocuted by electrical cables whilst guiding a steel beam into position on the first floor as a result of which he lost his balance and fell from the first floor to the ground floor of the premises'. He sustained fairly serious bodily injuries as a result of the fall and has cited three defendants in the alternative, claiming that one or more or all of them are liable for the damages sustained by him.

[3] The third defendant, Old Mutual Life Assurance Company (SA) Limited ('Old Mutual'), is the owner of the shopping centre in question. During 2006 it was planning certain alterations and renovations to its Cavendish Connect shopping centre and to this end it concluded a contract with the first defendant, Neil Muller Construction (Pty) Limited ('NMC'), to act as principal contractor for the project. Subsequently, Old Mutual instructed NMC to appoint the second defendant, Electrical Reticulation Company (Pty) Limited ('ERC'), as the selected sub-contractor responsible for the electrical services on the project. During January 2007, NMC concluded a written sub-contract with Tentron Management Services CC ('Tentron') for the supply and fixing of metalwork to the project. The plaintiff was employed by Tentron at the time of the

incident. Tentron has in the meantime been liquidated and its liquidator abides the decision of this court.

[4] All three defendants deny liability for the plaintiff's damages. They pleaded *inter alia* that the plaintiff's injuries were caused by his own negligence. In the alternative, they pointed fingers at one another. Thus, NMC has issued third party notices against ERC (as first third party) and against Tentron (as second third party), claiming that it be indemnified against the plaintiff's claim in terms of the sub-contracts concluded between them only in the event of a finding of liability against NMC. Old Mutual, in turn, has issued a third party notice against NMC (as third third party), claiming from NMC an indemnity in terms of the principal building contract in the event of a finding of liability against Old Mutual.

[5] By agreement between the parties the question of liability, if any, for the plaintiff's damages is the issue calling for resolution at this stage, with the quantum of the claim standing over for later determination (if necessary).

Factual causation

[6] Before the respective degrees of negligence (if any) on the part of the defendants can be considered, it is necessary to try and establish the exact cause of the plaintiff's injuries. The plaintiff himself could offer only limited assistance in this regard. In support of the allegations as pleaded, the plaintiff testified that because the project was behind schedule, it had been arranged that Tentron would work on the Sunday in question, installing steel I-beams so that concrete could be poured during

the following week. Before he and his crew could commence work, they had to wait for ERC to move certain electrical cables out of the way. This was eventually completed between 13h00 and 14h00, after which he was assured by Mr Sylvester on behalf of ERC that the site was safe for them to commence their work. The plaintiff himself did not carry out any physical work. Instead, he was supervising the installation of a steel I-beam from the first floor, approximately 4 - 4.5m above the area where three co-workers were working. He was sitting on the edge of the concrete slab, holding onto one of the steel stanchions of the safety rail, with his legs hanging over the edge of the slab. His upper body was behind the safety rail and he did not feel that there was a risk of falling, hence he did not utilise a safety harness. The I-beam in question was hanging onto three chain blocks that were hoisting it into position. He testified:

'As it was going into position, I reached out and touched one of the chains that were holding the beam. I received a shock. After that time I do not remember anything.'

[7] When asked how the incident occurred, he testified: 'The steel beam had touched one of the cables and had become alive.' He conceded, though, that he did not see the beam touch any wire. He surmised that the beam must have hit one of the cables and gone through the insulation, thereby causing the cable to become 'live'. Although the plaintiff does not recall falling, it is common cause that he did in fact fall and ended up on the ground floor. Thereafter he was unconscious with 'momentary awareness' from time to time. He was hospitalised and regained consciousness the next day, but he was still 'pretty dazed', with

little or no personal recollection of events when he spoke to Mr Michael Clarke of Tentron later that day.

[8] He sustained various orthopaedic injuries as a result of the fall, but suffered no burns or burn related injuries. The nature of the injuries was in consequence of the height and the fact that he fell without a safety harness.

[9] Other than his own evidence, the plaintiff did not present any other *viva voce* evidence to prove how he sustained his injuries.[1]

Hearsay

[10] In order to fill in the gaps in the narrative, the plaintiff relied heavily on a report of his erstwhile supervisor, Mr Clarke, who passed away in the meantime. It is dated 19 February 2007 and is addressed to the 'senior site manager', Mr Dale Gay of NMC. It forms part of Exh A that was placed before the court, in respect of which it was agreed at a pre-trial conference that the documents 'are what they purport to be and copies thereof may serve as evidence without further proof, subject to any party's right to challenge the correctness of the contents, and provided that a document would not serve as evidence unless referred to during the course of evidence'. In view of the importance attached to this report and the extent of debate that it gave rise to, it is necessary to quote it in full:

[1] The expert evidence of Mr Eppenberger about the relevant safety regulations was provisionally allowed, but it does not throw any further light on this question and does not require further consideration.

‘On Sunday afternoon of 11/2/07, I was contacted at approximately 16h30 by Fils, Vincent’s [i.e. the plaintiff’s] charge hand, with the unhappy news that Vincent had fallen from the floor just above where they were installing steel, (First Floor Escalator Infill Slab Grid 8-9 / A-C).

When I arrived there, approximately 10 minutes after I was called, Vincent was being attended to by two Paramedics, at this stage Vincent was extremely confused and could not talk; he did not even know that he had fallen.

I then questioned Fils, and the other two men, Dody Kamanda and Manuel, on what had transpired. I was told that other than Fils, both men received a terrific shock, fortunately neither were injured.

Dody and Manuel were operating from just below where Vincent fell; all noticed a shower of sparks coming from the bunch of cables below the beam.

It would appear that Vincent was electrocuted and rendered unconscious, which caused him to fall from he’s [sic] sitting position on the floor just above where the beam was to be fitted, from what we have been told, Vincent was holding on to the safety railing which happened to have the Chain block lifting chain touching the railing.

I made an inspection of the site where the beam was to be installed and noticed that there was a mass of cables of all descriptions hanging loosely from the soffit over which the beam was being lifted for final positioning.

I checked the beam end in contact with the cables and did not notice any trapped or strained cables at that time.

I have been told that cables were taped and made safe within the bundle of electric cables before we were allowed to proceed on Monday morning.

I questioned Vincent's men as to why were they working over all those loose electric cables, they assured me that they considered them safe, as Vincent had spoken with the electrician, asking him to isolate and turn the power of while he placed the beam into position, he was assured that the power had been turned off.

When we continued the installation on Monday morning after the accident, we noticed that one of the chain block chains had fused against the beam, indicating a serious short circuit had occurred.

Vincent has a broken arm, has had to have a prosthesis placed in his elbow, severely fractured pelvis, head and face lacerations, he will be immobile for approximately 10 weeks.

In view of how the Chain block chain had welded itself against the steel beam, we would recommend the earth leakage be checked for future safety purposes, earth leakage should have tripped the breaker before rendering a person unconscious.

My report is based on statements obtained from the crew on site at the time of the accident.'

[11] Relying on the provisions of s 3(1)(c) of the Law of Evidence Amendment Act, 45 of 1988, I was urged on behalf of the plaintiff to allow the hearsay report as being 'the most reliable evidence of the circumstances in which the incident took place and the events immediately thereafter'. Before this can happen, however, I must be satisfied that such evidence should be admitted 'in the interests of justice', having regard to the various factors enumerated to in para (c), namely -

'(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account.'

[12] These factors should not be considered in isolation: they are inter-related and they overlap.[2] Moreover, they do not constitute a closed list, because of the wide and generalised nature of para (c)(vii).

[13] Applying these principles to the case at hand, the nature of the present proceedings [*para (c)(i)*] is that of a civil trial, where parties are ordinarily required to adduce their evidence *viva voce* and under oath, which evidence can be tested by opposing parties by means of cross-examination. Allowing the introduction of hearsay evidence inevitably deprives opposing parties of this important benefit. The more crucial the evidence, the greater the potential prejudice. In my view, the defendants will clearly be prejudiced by their inability to test the reliability and accuracy of the evidence contained in the report in question [*para (c)(vi)*].

[14] The nature of the evidence sought to be adduced [*para (c)(ii)*] relates to the content of statements made by eye-witnesses of an event to a third party (Clarke), who was not present and who is now deceased. As

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[2] *Makhatini v RAF* 2002 (1) SA 511 (SCA) para 28. See also *Hewan v Kourie NO* 1993 (3) SA 233 (T) at 239C-240A.

such, it constitutes double hearsay and in one respect third-hand hearsay, to the extent that the workers appear to have stated to Mr Clarke that the plaintiff had told them that he had been assured by 'the electrician' that the power had been turned off. While there is no absolute bar against allowing double hearsay, it must be borne in mind that 'the more hearsay is piled upon hearsay the more unreliable it becomes'.[3]

[15] The purpose for which the evidence is tendered [*para (c)(iii)*] is to prove the truth of the contents thereof and goes to the root of the dispute between the parties, namely the manner in which the plaintiff sustained his injuries. In *Hewan v Kourie NO, supra*, a Full Bench of the erstwhile TPD held: 'The fact that the evidence is untested and goes to prove the central issue militates against its admission.'[4] As pointed out by the court in that case, however, it may be that this factor is out-weighed in a particular case by other considerations.

[16] With regard to the probative value of the hearsay evidence sought to be admitted [*para (c)(iv)*], I have referred to the fact that it contains second-hand (and in some respects third-hand) hearsay, which in itself tends to undermine its reliability. In addition, there are further factors that adversely affect the probative value of the hearsay evidence: Mr Clarke (according to his report) interviewed the three co-workers on the site shortly after the incident in question. Two of them hail from the DRC and one from Zimbabwe. It can safely be assumed that Mr Clarke interviewed them in English which, in all probability, is not their mother tongue. The danger of misunderstanding due to miscommunication

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[3] *Makhatini, supra*, para 25.
[4] 1993 (3) SA 233 (T) at 241D.

therefore looms large. That this is more than mere speculation appears from the fact that two earlier reports by Mr Clarke paint a different picture of events: on 12 February 2007, i.e. a day after the incident, he submitted reports to Workmen's Compensation and to the relevant insurance company respectively, in each of which he stated, *inter alia*, that the plaintiff 'was working on a scaffold installing a beam; the beam touched some wiring which was live; the shock resulted in [the plaintiff] falling from scaffold'. In a third report, dated 14 February 2007, Mr Clarke stated that the plaintiff 'was sitting on the first floor when he received an electric shock from the hand-railing, causing him to fall from the [first?] floor onto the ground floor'. These discrepancies will forever remain unexplained. This raises the question why the fourth report should be the one on which the court should rely in preference to the earlier ones.

[17] The probative value of the report is further undermined by direct evidence adduced on behalf of the first and second defendants which tends to contradict Mr Clarke's observations on the site immediately after the incident, such as the state of the cables and the question whether the chain block had welded itself against the steel beam, as alleged in the report.

[18] A final factor affecting the probative value of the evidence is the fact that Mr Clarke was not a disinterested neutral observer; he was one of two members of Tentron, which stood in a contractual relationship not only with the plaintiff, but also with NMC. As such, he had a direct financial interest in the matter inasmuch as Tentron was potentially liable to one or both these parties arising from the incident. He accord-

ingly had a potential motive to try and shift as much of the blame as possible to ERC and/or NMC. This requires the court to exercise caution in evaluating the probative value of his report.

[19] A further important factor to consider in the present context is the reason why the evidence sought to be introduced is not given by the persons upon whose credibility the probative value of such evidence depends [*para (c)(v)*]. In this instance, it is not because the witnesses are not available, or cannot be traced, or is out of the country, or deceased; it is simply because the plaintiff approached two of them for assistance and, according to him, 'they refused'. He says nothing about the position of the third potential witness, nor does he furnish any reason why they were not subpoenaed. A natural inference to be drawn from this failure is that he expected them to give unfavourable evidence.[5]

[20] On an overall conspectus of the evidence, the plaintiff seeks admission of the report on the basis that Mr Clarke is deceased. However, this fact only gets the plaintiff over the first hurdle, namely of placing the report before the court. With regard to the truth of the contents thereof, the more fundamental question is whether Mr Clarke, had he been available to give *viva voce* evidence, would have been permitted to adduce such hearsay evidence. For the reasons stated above, the answer must clearly be no. It follows, *a fortiori*, that I am not persuaded that the contents of his report should be admitted 'in the interests of justice'.

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[5] *Sampson v Pim* 1918 AD 657 at 662; *Elgin Fireclays Ltd v Webb* 1947(4) SA 744 (A) at 749.

[21] In any event, even if the report were to be admitted as evidence, I bear in mind that the *admissibility* of evidence and its *weight* are separate issues.[6] For the reasons set out above, not much weight can be attached to the hearsay evidence contained in Mr Clarke's report under consideration.

Criticism of the plaintiff's evidence

[22] The plaintiff's evidence was criticised on behalf of the defendants on various grounds. Without going into detail, it is sufficient for present purposes to record that I agree with much of the criticism and accordingly regard the plaintiff's evidence as unreliable insofar as it relates to the events of the day in question. The following examples will suffice in order to illustrate the point:

- First, due to the fact that the plaintiff was unconscious and 'dazed' after the incident, his memory of events is understandably vague and sketchy.

- Secondly, the plaintiff was ambivalent and gave conflicting versions on the question as to whether or not he regarded the electrical cables as live at the relevant time. The evidence adduced on behalf of the defendants, on the other hand, makes it abundantly clear that it was conveyed to all concerned that the building site formed part of a 'fully operational shopping mall' and that all electrical cables had to be regarded as live at all times unless the contrary had been clearly indicated.

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[6] D T Zeffertt & A P Paizes *The South African Law of Evidence* 2 ed p 397.

- Thirdly, insofar as the plaintiff sought to rely on an assurance received from Mr Sylvester of ERC on the day in question that the site was safe for them to do their work, the reliability of such evidence is undermined, not only by the plaintiff's own contradictory evidence in that regard, but also by cogent evidence presented on behalf of the first and second defendants to the effect that neither Mr Sylvester nor anyone else on behalf of ERC was on site on the Sunday in question.

Evaluation

[23] Reverting to the cause of the plaintiff's injuries, it thus appears that the hypothesis advanced by him in his particulars of claim, namely of 'electrocution' resulting in his fall, is not supported by the evidence. Instead, two alternative hypotheses present themselves as probable causes for his fall: first, he may have fallen while working on the scaffold, as stated in Mr Clarke's first two reports. Secondly, even if he was sitting on the first floor, he may have fallen because he leaned across into the void, i.e. over the ledge, either from above or from below the safety rail. On either version, no liability would attach to any of the defendants, as the proximate cause of the plaintiff's injuries would have been his own failure to wear a safety harness, notwithstanding the foreseeable risk of harm and the explicit safety requirements in that regard.

[24] Finally, even if the plaintiff's hypothesis of 'electrocution' were to be accepted, it is clear, in my view, that such electrocution (if it occurred) was caused not by any negligent conduct or omission on the part of any of the defendants, but because the particular manoeuvre of hoisting the I-beam into position was performed in a negligent manner

by the plaintiff and his crew. He conceded during cross-examination that before commencing the work he regarded the cables as safe, in the sense that they did not present an obstruction to the beam. He conceded, further, that if the exercise of hoisting the beam into position had been performed as planned, the issue of whether or not there was electricity in the cables would have been 'entirely irrelevant'. The fact that the beam may have made contact with the cables and may have 'snagged' one of them, as suggested by the plaintiff, was what caused the electrical shock and this cannot be blamed on any of the defendants.

Conclusion

[25] For the reasons set out above, I am driven to the conclusion that the plaintiff has failed to discharge the onus of proving that his injuries were caused by the negligence of any of the defendants. It follows that his claim cannot succeed against any of them.

[26] In the result, the plaintiff's claim is DISMISSED with costs.

B M GRIESEL
Judge of the High Court