

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No: 867/2011

**Heard on: 24/06/2014-26/06/2014;
22/02/2016-25/02/2016; 29/02/2016-
01/03/2016; 14/06/2016-15/06/2016
Delivered on: 09/09/2016**

In the matter between:

NICOLAAS JACOBUS VAN DEN HEEVER

PLAINTIFF

And

JOHN MARCHANT BRAY.

1ST DEFENDANT

BRAY'S FOODMARKET (PTY) LTD

2ND DEFENDANT

JUDGMENT

MAMOSEBO J

THE PLEADINGS

- [1] The plaintiff, Nicolaas van der Heever, instituted action against the first defendant, John Merchant Bray, and the second defendant, Bray's Foodmarket (Pty) Ltd, also known as Bray's Spar, the lessee, for delictual damages in the amount of R6 252 506.19 which he claims to have suffered as a result of a fall from a stepladder on the business premises.

He received an electrical shock while changing an electrical light fitting in the bakery area of the supermarket. The question of liability was separated from the quantum in terms of Rule 33(4) of the Uniform Rules. This judgment only relates to the merits.

- [2] In his Particulars of Claim, the plaintiff pleads that the electrical shock which caused him to fall from the ladder was due to the wrongful conduct of Mr Bray, who owns the business and/or the company and/or their employees who were acting in the course and within the scope of their employment with the defendants. They are accused of having been negligent in one or more of the following respects:

2.1 The electrical installation in the supermarket was not safe and/or properly maintained;

2.2 The electrical installation was not correctly installed in accordance with the requirements of the Electrical Installation Regulations promulgated under the Occupational Health and Safety Act 85 of 1993 (the Act), thereby exposing him to an electrical shock;

2.3 The electrical installation in the bakery, in particular the electrical wiring which ran along a steel roof beam in the bakery, was not properly insulated thereby exposing him to an electrical shock;

2.4 The first and/or second defendants failed to take any or adequate steps to prevent him from receiving the electric shock when they could and should have done so;

2.5 The first and /or second defendants required him to perform electrical work on the electrical installation which had been connected to the electricity supply in circumstances where defendants did not have a valid certificate of compliance (COC) for that installation contrary to the provisions of Regulations 7 and 8 of the

Electrical Installation Regulations promulgated under the Act and, in the circumstances, they knew or ought to have known that it was unsafe to require him to carry out the task;

2.6.1 The first and/or second defendants required him to perform electrical work on the electrical installation at a time when the supermarket was open to members of the public and when the electrical supply, including lights of the supermarket, had to remain on;

2.6.2 Accordingly, first and/or second defendants knew or ought to have known that the plaintiff could not switch the electrical supply off at the switchboard and that he was required to perform electrical work under dangerous circumstances;

2.6.3 In the circumstances, first and/or second defendants owed a duty of care to him not to require and/or allow him to perform electrical work at a time when he could not switch off the electricity at the switchboard in order to perform his work safely;

3. **Alternatively to para 2** (above): The plaintiff claims that his fall from the ladder was due to the wrongful conduct of the first and/or the second defendants and their employees who were acting in the course and within the scope of their employment with the defendants and who were negligent in one or more of the following respects:

3.1 First and/or second defendant permitted him to work in an elevated position on the electrical installation when they knew or ought to have known that such work could not be performed safely from a ladder unless he had adequate fall protection equipment in the form of a safety harness and/or fall arrest lanyard as provided for in Regulations 8 of the Construction Regulations promulgated in terms of the Act, read with Regulations 4, 5 and 7 thereof and Regulations 6 of the General Safety Regulations promulgated in terms of the Act.

3.2 The first and second defendants:

3.2.1 failed to prepare health and safety specifications for the work to be performed by him or to require him to prepare a health and safety plan for the work as required by Regulations 4 and 5 of the Construction Regulations promulgated under the Act;

3.2.2 failed to discuss and negotiate with him the contents of the health and safety plan contemplated in Regulations 5(1) of the Act and thereafter to finally approve the health and safety plan for implementation as required by Regulation 4(2) of the Construction Regulations;

3.2.3 failed to take reasonable steps to ensure that he had presented a suitable health and safety plan as determined in Regulation 5(1) of the Construction Regulations and that such plan was implemented as required by Regulation 4(d) of the Construction Regulations before the work commenced;

3.2.4 failed to stop him from executing the work when they knew or ought to have known that the work was not being carried out in accordance with a suitable health and safety plan and the failure to do so posed a threat to the health and safety of the plaintiff as they were required to do in terms of Regulation 4(e) read with Regulations 5(1) of the Construction Regulations.

3.3 The first and/or second defendants breached the provisions of s 9 of the Act by failing to ensure that he was not exposed to hazards when they knew or ought to have known that it was dangerous to allow him to perform the work on an electrical installation which did not have a valid certificate of compliance and/or in an elevated position without the use of fall arrest equipment to prevent him from falling;

3.4 The first and/or second defendants failed to take any or adequate steps to prevent him from falling from the ladder when they could and should have done so.

- [4] The defence pleaded was a bare denial or lack of knowledge of the electrical shock and put the plaintiff to prove thereof. They also denied any negligent conduct on their part or by any of their employees. But should it be found that they were liable they claimed contributory negligence on the part of the plaintiff. The defendants denied that the installation was unsafe or that the provisions of the Occupational Health and Safety Act, 85 of 1993, as well as the Regulations promulgated thereunder were applicable to this case or that they owed any legal duty to the plaintiff.

THE EVENTS LEADING TO THIS CLAIM

- [5] The plaintiff is a qualified installation electrician operating under the name Tierberg Elektries in Keimoes near Upington. On 12 May 2009 he was asked by the defendants to replace light fittings in the butchery and bakery areas of the supermarket. He arrived at the supermarket around 16:30 accompanied by his two assistants. He used an extended aluminium ladder to reach the light fittings. He replaced four light fittings in the butchery and completed the installation. He then moved to the bakery area where he had to replace 3 light fittings. He managed to replace two of the three light fittings without any mishap.
- [6] We had the benefit of watching, in court, the video footage of the CCTV camera that captured what transpired during the installation of the third

light fitting in the bakery area, which was positioned higher than the other two and attached to a steel beam running diagonally across the supermarket. It also formed part of the roof structure. The plaintiff had to extend the ladder in order to reach this third light fitting. The bottom part of the aluminium ladder was earthed whereas the top part was supported against the steel beam. Measuring the distance of the plaintiff proportionally from the ground: His feet were 2.4 meters high and his head was 4.1 meters from the ground. The light fitting was just above his head, more to his right side. According to him, there was electrical wiring attached to the top of the steel beam which was secured with cable ties. Once he reached the light fitting he removed the tubes and handed them down to his assistant who was standing next to the ladder. He thereafter removed the cover of the light fitting to access and disconnect the wiring. Only then did he request one of his assistants to switch off the electricity at the light switch (ligskakelaar) outside the bakery area as it was safe for the assistant to switch off there instead of at the distribution board where the entire supermarket would have been plunged into darkness during this busy time of the day for business. The lights were switched off at 16:55:43 as depicted on the video footage.

- [7] The affected light having been so switched off, the plaintiff disconnected the wiring inside the light fitting by loosening the screws in the block with a screwdriver. An assistant handed him a pair of insulated pliers which he held in his right hand and used it to loosen the nuts holding the light fitting. He had to use the pair of pliers to remove the nuts and bolts which were tightened to the steel beam. He was in the process of removing the light fitting from the steel beam when this happened: *“En die oomblik toe ek met my linkerhand aan die balk vat, staalbalk, om*

myself te balanseer om stewig te werk, toe word ek geskok in my linkerhand. Dit het 'n brandmerk in my linkerhand onder my pinkie veroorsaak. En toe val ek van die leer af."

In response to the question what caused him to be shocked he explained that *"dit moet 'n oop geleier bo-op die staalbalk of 'n geleier wat meganies beskadig was wat bo-op die staalbalk geloop het."* At the time of the shock the insulated pliers were still held in his right hand.

- [8] The electrocution rendered the plaintiff unconscious. He regained consciousness at a hospital in Cape Town. He sustained serious injuries in the fall which rendered him a paraplegic and was treated and detained in hospital for five months.

- [9] As already pleaded, the plaintiff testified that none of the defendants advised him or even insisted that he should gear up with adequate fall protection equipment, either a safety harness or a fall-arrest lanyard. There was no "Health and Safety Plan" in place which ought to have been compiled by the defendants and discussed with him. The defendants did not ask him to compile a health and safety plan either. Plaintiff maintained that had the defendants obtained a certificate of compliance (COC) the damaged wire on top of the steel beam would in all probability have been detected and repaired. The electricity current emanated from an uninsulated or damaged electrical wire on top of the steel beam, he says. He asserted that he never touched any of the loose electrical wires he earlier disconnected in the light fitting. Although the defendants had earlier requested him to assist with the issuing of a certificate of compliance, they were aware that he had a busy schedule and should have approached other electricians within the vicinity for the COC. It

ultimately took the defendants six years after the accident to receive the required COC.

[10] Plaintiff maintained that the light fitting was wired as depicted on photograph 21 of Exh “B” with the light switch between the distribution board and the light fitting. He asserted that but for the hidden uninsulated cable, it was safe for him to work on the light fitting by switching it off at the light switch. Although Mr Hendrik Hendricks, the defendant’s expert witness, had confirmed this assertion in a telephone conversation with Ms Cornelia van Heerden, the plaintiff’s attorney, on 13 January 2011, he reneged on this statement the following day. According to the plaintiff had the third light fitting been wired as testified to by Mr Hendricks, and depicted on photograph 22 Exh “B” he would not have worked on it before turning it off at the distribution board.

[11] The plaintiff called an expert, Mr Mark Palmer, to testify. He is the National Operations Manager of the Electrical Approved Inspection Authority of Southern Africa, an institution accredited by the Department of Labour. He served in that organisation for the past 16 years. Before then he worked as an electrical contractor for about 8 years. Cumulatively, his experience in the electrical field is about 25 years. He was part of the work group in the Department of Labour that formulated the current Electrical Installation Regulations where certificates of compliance were also dealt with. He is currently a working group member of the South African National Standard (SANS1014251). They have been involved in resolving complaints and investigating incidents involving electrical installations since November 2015. Many of the

complaints they receive involve certificates of compliance. They also conduct investigations where there have been fatalities or injuries and provide technical reports to the Department of Labour. Mr Palmer's credentials are not in dispute.

[12] Mr Palmer filed two expert reports. He confirmed his written opinions in evidence. He had sight of the expert summaries filed by the defendants' expert, Mr Hendricks, and also referred to the transcript of the plaintiff's evidence as well as photographs from the CCTV footage and the photograph depicting the roof of the supermarket. He referred to Regulations 2(1), 7(1) and sub (3) of the Electrical Installation Regulations 2009 on the aspect upon which the plaintiff was cross-examined, that a certificate of compliance is no guarantee that after the issue thereof, the electrical installation would be safe.

[13] Regulation 2(1), 7(1) and sub (3) stipulates:

13.1 *"2(1) Subject to sub regulation (3), the user or lessor of an electrical installation, as the case may be, shall be responsible for the safety, safe use and maintenance of the electrical installation he or she uses or leases."*

13.2 *"7(1) Subject to the provisions of sub regulation (3), every user or lessor of an electrical installation, as the case may be, shall have a valid certificate of compliance for that installation in the form of Annexure 1, which shall be accompanied by a test report in the format approved by the chief inspector, in respect of every such electrical installation."*

13.3 *"(3) Sub regulation (1) shall not apply to an electrical installation that existed prior to 23 October 1992, and where there was no change of ownership after 01 March 1994: Provided that, if any addition or*

alteration is effected to such an electrical installation, the user or lessor of the electrical installation, as the case may be, shall obtain a certificate of compliance for the whole electrical installation, whereafter the provisions of sub regulation (1) shall be applicable to such electrical installation.”

- [14] Mr Palmer explained that *“had the required inspections and tests been performed as prescribed by the regulations and a certificate of compliance been issued, any deterioration or damage to the electrical wiring, in particular, the wiring on the steel beam which the plaintiff had contact with would have been detected and repaired prior to the incident occurring.”* The inspection would also have detected if the wiring complied with general safety principles and were installed appropriately in accordance with SANS10142 and SANS1507. Mr Palmer maintained that without the certificate of compliance the defendants could not assume that the installation was compliant or was safe to use.
- [15] Mr Palmer characterised it as improbable the theoretical proposition (the hypothesis) put forward by Mr Hendricks in his expert summary that the cables could have been damaged by deterioration, human interference, rodents or mice gnawing through them, or struck by lightning bolts. The damaged electrical cable was strapped to a steel beam and was exposed. The likelihood of being gnawed by rodents etc was therefore unlikely, compared to when the cable was located in a nesting or breeding area. Had it been human interference like employees causing the damage, the defendants would have been responsible in terms of s 37 of the Occupational Health and Safety Act 85 of 1993. He maintained that the damage could have occurred during the installation process. It is

improbable that it would have occurred due to human interference or a bolt of lightning because the damage would have affected the entire electrical installation and more inspections and tests would have been required. He maintained that “*electrical wiring which is approved for installation and which has been installed and maintained according to the requirements of prescribed regulations has a life expectancy of many decades.*” Of significance is that Mr Hendricks did not testify on these aspects and his counsel did not cross-examine Mr Palmer on them either.

In ***President of the Republic of South Africa and Others v South African Rugby Football Union and Others*** 2000 (1) SA 1 (CC) at 36J - 37B (para 61) the Court pronounced:

“The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in Browne v Dunn [(1893) 6 R 67 (HL)] and has been adopted and consistently followed by our courts.”

- [16] The second summary by Mr Palmer in essence dealt with Mr Hendricks' first summary. About 15 to 16 prescribed visual inspections of the cables should normally be followed by 15 or 16 tests, including the insulation resistance test, which must also be conducted at an electrical

installation. According to Mr Palmer the insulation resistance test must be conducted before a COC can be issued. The insulation resistance test would determine whether an electrical installation was safe to energise and would have confirmed the presence of a damaged cable on the steel beam. The electrician would have had to repair that cable before issuing a COC.

THE OPINION OF THE EXPERTS

- [17] The assumption by Mr Hendricks was that the main switch of the distribution board in the bakery had a three-phase earth leakage circuit breaker of 30mA (milliAmps). He says the plaintiff would not have been shocked by a live conductor. However, according to Mr Palmer his instruction by the plaintiff is that the bakery main switch was not equipped with an earth leakage device with a tripping current of 30mA nor was any installed in the bakery sub-distribution board. Mr Palmer says it was highly unlikely that a commercial operation like a supermarket would have an earth leakage installed as a main switch as any fault which occurred in the area would cause all power to be interrupted in the entire area. The mandatory requirements would not extend to items like stoves and geysers normally referred to as resistive loads which can cause a tripping nuisance. The earth leakage device would not be installed as a main switch where there are ovens and cooking appliances like in the bakery. Mr Palmer added that even if it can be assumed that there was an earth leakage device it would still be necessary to investigate and determine whether it was operational. He emphasized that only a registered person who had inspected and tested

the installation could attest to the safety of that installation. It is only then that the user or owner could accept that the installation was safe.

- [18] Mr Palmer differed with Mr Hendricks on the aspect of the injuries that a person can sustain when exposed to an electrical current. According to Mr Hendricks less than 200mA current will not cause electrical burns. The limitation to 200mA by Mr Hendricks causes a problem and has no technical merit, added Mr Palmer. According to him, the limit of 'let go' is generally between 75mA and 100mA. He confirmed that the plaintiff came into contact with a low voltage burn because he was dealing with a low voltage installation of about 400 volts. The plaintiff's burn was on the contact side with the live conductor, his left palm. His evidence on the plaintiff's burn marks was not put in issue.
- [19] Mr Palmer testified that the defendants have breached Regulations 2(1) read with Regulation 7. The employer had an obligation to ensure that there was a health and safety plan in place before any construction works could be performed and at the appropriate time obtain a valid COC. He emphasised that should any issue or incident occur at the site, as it has, the employer will be held liable in accordance with the construction regulations.
- [20] Mr Palmer stated that the construction regulations promulgated in terms of the Occupational Health and Safety Act, 85 of 1993 were applicable in respect of the electrical installations. Adv Van Niekerk SC, for the defendants, conceded, correctly in my view, with this assertion.

THE EVIDENCE OF ATTORNEY VAN HEERDEN

- [21] The plaintiff's instructing attorney, Ms Cornelia Susanna Van Heerden of the firm Heyns Incorporated, was admitted to practice as an attorney since 1989. Her evidence related mainly to the contemporaneous notes she took down while in telephonic conversation with the defendant's expert, Mr Hendricks, on 13 January 2011. Her testimony encompassed the transcripts that were typed by her secretary from her dictaphone which Ms Van Heerden resorted to at the time of the telephone conversation. Ms Van Heerden had three consultations with Mr Hendricks: telephonically on 13 January 2011, in person on 14 January 2011 and again on 10 October 2011.
- [22] Mr Van Niekerk had taken an objection to the admissibility of the dictaphone recording which was countered by Mr McClarty. I ruled in favour of the plaintiff having found that Ms Van Heerden was in custody of the document and had instructed her secretary to transcribe the recorded conversation with Mr Hendricks after it ended, there was no reason to doubt the veracity of the transcript which, in any event, essentially tallies with Ms Van Heerden's handwritten notes. See **Howard & Decker Witkoppen Agencies and Fourways Estates (Pty) Ltd v De Sousa** 1971 (3) SA 937 (T) at 490E- G and s 4 of the Regulation of Interception of Communications and Provision of Communication-Related Information Act, 70 of 2002 (RICA).
- [23] According to Ms Van Heerden in the course of her preparation for the plaintiff's case, she was given the name of Mr Fanus Hendricks who subsequently provided the name of "Mr Hennie Hendricks" to her. She

called Mr Hendrick Hendicks immediately thereafter on 13 January 2011 after learning from Mr Fanie Hendricks that he was the person involved in the matter. She explained who she was to him and provided some background to the call. She made contemporaneous notes as they spoke, particularly due to the technical nature of the subject matter. She decided to record the conversation on the dictaphone and put the phone on speaker. At the end of the telephone conversation she requested her secretary to transcribe the recording from the dictaphone. She urgently needed the transcription for the following day when she was to consult in person with Mr Hendricks.

[24] There were a few “transcription roll-ups” which were picked up where the transcriber had not identified who the speaker was. However, the reader can clearly discern what was a question by the one voice and the answer by a different voice. The dictation was then, unfortunately, deleted after it was transcribed because the tape was re-used. Ms Van Heerden testified that Mr Hendricks pertinently told her that he saw the wires hanging from the light fitting of which one was live. He tested the wires and went to the light switch in the room next door where he switched the current off.

[25] Ms Van Heerden testified further that she regarded the evidence of Mr Hendricks as essential for the plaintiff’s case. The following was the conversation between Ms Van Heerden and Mr Hendricks:

“Ms Van Heerden: Okay en toe die draad wat bo-op die balk lê is lewendig en hy was nie geïsoleerd nie?

Mr Hendricks: Hy was lewendig en hy, ja hy was nie geïsoleerd met isoleermaterial soos ‘n draad geïsoleer moet word nie met ander woorde

jou kaal draad het daar gesit, jy kan aan hom vat en as jy aan hom vat sal hy jou ruk.

Ms Van Heerden: *Sal hy jou skok?*

Mr Hendricks: *Yes”*

- [26] What irked Ms Van Heerden was the about turn that Mr Hendricks made on 14 January 2011 when she had the follow-up consultation with him. There were material differences between the consultations of the 13 and the 14 January 2011. Whereas on the 13th Mr Hendricks had confirmed that it was safe to work on the lights by switching them off at the light switch, the version changed on the 14th when he stated that it was not safe to turn the lights off at the light switch. He also for the very first time mentioned the necessity of turning the lights off at the distribution board by switching off the circuit breaker. Interestingly, the word “light switch” appears both on her hand written notes and on the transcribed notes of the conversation. In both her contemporaneous notes and the typed transcript it is recorded that the light switch is in another room. Ms Van Heerden testified that Mr Hendricks never mentioned it to her that he climbed up the ladder and checked the wiring on the steel beam and found that it was safe and properly insulated. *“In fact, he confirmed the plaintiff’s version of how he got burned and shocked, that there was an “oop geleier” on top of the steel beam, he confirmed it to me.”* ‘Geleier’ is an open current conductor.

- [27] Ms Van Heerden testified that during their third consultation with Mr Hendricks on 10 October 2011 there was a sense that Mr Hendricks was dictated to in light of his adapted stance. It was at that stage that plaintiff’s counsel asked him whether he had consulted with the

defendant's legal representatives and his response was in the affirmative. The consultation terminated at that juncture. The rule 36(9)(a) Notice was signed and served on the plaintiff's correspondent attorney on the same date at 04:15 in the afternoon.

- [28] In her testimony Ms Van Heerden denied the version by Mr Hendricks that the words “*verdeelbord*” (distribution board) or “*DB*” was ever used. She reiterated that the words “*skakelaar*” (switch) and “*ligskakelaar*” (light switch) were used and appears on both her contemporaneous notes and the typed transcript by her secretary. Nowhere in the notes were the words “*stroombreker*” (contact-breaker) and “*verdeelbord*” (distribution board) used or found.

This completed the plaintiff's case.

MR HENDRICKS' EVIDENCE

- [29] The defendants chose not to testify but called their expert, Mr Hendrik Hendricks, as a witness. He owns a business operating under the name and style of Noordkaap Verkoeling CC. He filed three expert summaries in terms of Rule 36(9)(b). The first summary was dated 18 October 2012 and the second and the third 24 August 2015. Mr Hendricks confirmed that he remained in the courtroom when the plaintiff gave his testimony, which is not unusual for an expert. He is a qualified installation electrician since 1981 on electrical installations theory and practice. The defendants are his clients. He installed air-conditioning, a freezing room as well as refrigeration rooms (cold storage) for them.

- [30] It is Mr Hendricks' evidence that he worked regularly at Bray Spar and had rendered services at the business that same month in May 2009. He confirmed that he was familiar with the electrical installations in that supermarket prior to 12 May 2009. The supermarket is an old building which was renovated from time to time. He is aware that by 12 May 2009 there had been COC issued. He commented that "*'n installasie, elektriese installasie wat korrek uitgevoer is, is veilig al het dit nie 'n nakomingssertifikaat wat dit bekragtig. Maar dit beteken ook nie dat dit 100 persent veilig is nie.*" He maintained that issuance of a COC means that the person who conducted the tests declares that the installation is safe, but not necessarily 100% safe. He does that by conducting certain tests and inspections. He confirmed that he holds a view different to Mr Palmer's in relation to the "reasonably safe" test propounded by Mr Palmer regarding installation requirements. According to Mr Hendricks an insulation test can pick up a conductor that is exposed.
- [31] Mr Hendricks has watched the video footage and confirmed that the plaintiff did not have in his possession any testing apparatus, a multimeter. It is not in dispute that the plaintiff received the electrical shock before he fell to the ground. He explained that even though the light was switched off at the light switch in the other room there was still current in the light fitting. He had visited the scene immediately after the plaintiff's accident upon Mr Bray's invitation. He immediately tested the wires that were hanging from that light fitting to determine if they were live or dead. He only found one live wire. As a result thereof he mounted his A-frame ladder to reach the level above the installation without touching the wires. He discovered that the one live wire came directly from the switchboard (skakelbord) in a PVC pipe towards the

light fitting. He then identified the relevant circuit-breaker (stroombreker) and disconnected it. It is only then that he switched the rest of the lights in the supermarket back on.

[32] Mr Hendricks maintained that the light wiring was found as depicted on photo 22. He read from the contemporaneous notes of Ms Van Heerden and maintained that for the notes to be correct the words “*ligskakelaar*” should be replaced with “*hoof skakelbord*” and “*skakelaar*” be replaced with “*verdeelbord*”. He says the reason why the plaintiff was shocked was because he had worked on the first two lights in the bakery and assumed that there will not be any current flowing in the third light because the lights were off, whereas the light fitting of the third light was wired differently from the switch board.

[33] During cross-examination Mr McClarty persuasively demonstrated that Mr Hendricks did not place accurate facts before court but sometimes became speculative. It was shown through the production of an invoice drawn out to Noordkaap Verkoeling that the last time Mr Hendricks worked at Bray Spar was on 08 January 2009, five months before the accident whereas he had created the impression that he frequented the place and was familiar with the electrical installations. The following are further examples:

33.1 “*Mr McClarty: Mnr Hendricks ek het aan jou gestel dat die enigste rede hoekom hierdie derde opsomming ingedien is namens die verweerder was dat jy wou probeer het om die getuienis van die eiser dat hy geskok was deur ‘n beskadigde, ‘n ongeïsoleerde draad of geleier bo die staalbalk u wou dit uitgesluit het en u wou u mening staaf dat hy is*

geskok deur 'n geleier wat uit die ligmontuur gekom het is dit die doel van hierdie finale opsomming van jou?

Mr Hendricks: Dit is korrek u edele.”

33.2 Mr Hendricks was referred to photo 5 of Exhibit “B” (the photo bundle) which depicts the plaintiff standing in front of and holding the step ladder (‘n enkel leer) looking upwards. He was cross-examined on the diagram he made on page 21 of Volume 4:

Mr McClarty: Nou as ons terug gaan na die skets op 21 u sal met my saamstem die leer was nie ‘n A-frame leer soos daar geteken is nie?

Mr Hendricks: Dit is korrek

Mr McClarty: Maar sien wat probeer jy hierso uit te wys op jou skets, jy probeer of jy het ‘n mannetjie daar geteken en die persoon se linker hand hou vas aan wat voorkom asof dit die montuur is, is dit korrek?

Mr Hendricks: Korrek

Mr McClarty: En met sy regterhand, sien jy, is sy regterhand in ‘n posisie waar dit naby is aan die rooi stroomdraad of lewendige draad korrek?

Mr Hendricks: Korrek

Mr McClarty: En wat jy wil hier probeer uitwys is met sy linkerhand want die leer is geïsoleer, ja okay. Hy vat aan die ligmontuur wat geaard is en dan vat hy aan die lewendige draad?

Mr Hendricks: Dit is korrek.

Mr McClarty: En dan word hy geskok?

Mr Hendricks: Dit is korrek.

Mr McClarty: Maar ‘n belangrike punt wat jy hier nie geteken het is dat die leer soos dit was feitlik geposisioneer is die leer teen die staalbalk en dit is jou aard?

Mr Hendricks: Dit is korrek.

Mr McClarty: Hierdie skets is heeltemaal misleidend sal u dit aanvaar?

Mr Hendricks: Korrek edele.”

33.3 Mr McClarty: “U weet ook as deskundige soos ek al net tevore aan jou gestel het moet jy met feite werk is dit korrek?

Mr Hendricks: Korrek

Mr McClarty: En dit is nie vir ‘n deskundige om te spekuleer is dit korrek?

Mr Hendricks: Korrek”

Mr McClarty: referring the witness to para 1 of page 25 of Volume 8 where the witness said the following: “Indien aanvaar word dat ‘n hoofskakelaar op die verdeelbord in die bakkery ‘n drie fase aard lekkasie stroombreker van 30 milli Amp was dan kon die eiser nie geskok gewees het deur ‘n lewendige geleier wat van daardie verdeelbord gekom het nie in die lig van wat hieronder uiteengesit.” The witness was informed that his counsel was not proceeding with this statement (stelling) because Mr Hendricks had subsequently established that there was no main switch on the Distribution Board in the bakery.

Mr McClarty: “Nou hoekom het u in hierdie deskundige opsomming instruksies aan die verweerders se regspan gegee wat gelei het tot hierdie spekulatiewe mening van jou?

Mr Hendricks: Wel omdat daar stellings is waarvan af die oorsprong kan wees wat Mnr van den Heever geskok het. Aan my is gestel dat daar ‘n kabel oor daardie balk geloop het wat van daardie skakelbord af kom. En vir my as ‘n elektrisiën klink dit, is dit glad nie ‘n onwaarskynlikheid dat daar nie so ‘n aardlekassie op ‘n skakelbord is wat drie fase is en waar daar ook enkel fase plugs en drie fase toerusting gebruik is nie.”

Mr Hendricks’ testimony concluded the defence case.

[34] A good starting point would be to deal with the approach to be adopted with the evidence of an expert witness. Mr Van Niekerk conceded, correctly so in my view, that the evidence of the defence expert witness, who happened to be their only witness, was not satisfactory in a number of material respects. Majiedt JA, writing for the unanimous court in ***Jacobs and Another v Transnet (Ltd) t/a metrorail and Another*** 2015 (1) SA 139 (SCA) at 148B – D, pronounced:

“[15] It is well established that an expert is required to assist the court, not the party for whom he or she testifies. Objectivity is the central prerequisite for his or her opinions. In assessing an expert's credibility an appellate court can test his or her underlying reasoning and is in no worse a position than a trial court in that respect. Diemont JA put it thus in Stock v Stock[1981 (3) SA 1280 (A) at 1296F]:

'An expert . . . must be made to understand that he is there to assist the Court. If he is to be helpful he must be neutral. The evidence of such a witness is of little value where he, or she, is partisan and consistently asserts the cause of the party who calls him. I may add that when it comes to assessing the credibility of such a witness, this Court can test his reasoning and is accordingly to that extent in as good a position as the trial court was.'”

[35] I do not wish to be unkind to Mr Hendricks but his evidence was too tenuous to be given any credence. Firstly, he attempted to manoeuvre his way out of the telephonic conversation he had with Ms Van Heerden and then the one-on-one consultation with her on two subsequent occasions. It is unquestionable that what was contained in Ms Van Heerden's contemporaneous handwritten notes essentially tallied with the transcribed recorded conversation by her secretary, dealt with earlier.

It is therefore improbable that words like “*verdeelbord*” in a voice recording can be mistaken for “*ligskakelaar*” because they do not rhyme. Ms Van Heerden was an impressive and honest witness who was able to find a way around the technical electrical jargon by recording the conversation on her dictaphone. Mr Hendricks on the other hand was not an objective and neutral witness but was partisan and recanted his explanation that he had furnished to Ms Van Heerden. He was therefore inconsistent on a crucial aspect of the case. He has not explained this discrepancy at all. I have illustrated above how he was caught out under cross-examination for having embellished his evidence. No reliance can be placed in his evidence.

- [36] Mr McClarty has persuaded me that a negative inference be drawn against the defendants for their failure to call Mr Bray, the directing mind of the company, the second defendant, in whose bosom is buried all the information. The making of a negative inference from a party’s failure to call a witness or present evidence was considered in ***Titus v Shield Insurance Co Ltd*** 1980 (3) SA 119 (A) at 133E – G where the Court said:

“It is clearly not an invariable rule that an adverse inference be drawn; in the final result the decision must depend in large measure upon 'the particular circumstances of the litigation' in which the question arises. And one of the circumstances that must be taken into account and given due weight, is the strength or weakness of the case which faces the party who refrains from calling the witness. It would ordinarily be unsafe to draw an adverse inference against a defendant when the evidence of the plaintiff, at the close of the latter's case, was so vague and ineffectual that the Court could only by a process of speculation or very dubious

inferential reasoning, attempt to find the facts. (See Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) at 40E, 49F - H.)”

- [37] In **SOS Kinderdorf International v Effie Lentin Architects** 1993 (2) SA 481 (Nm) at 489J Levy J concurred in by Hanna AJ and Muller AJ pronounced:

“Failure to produce a witness who is available and who is clearly capable of giving relevant evidence can lead to an adverse inference.”

In my view, it is safe to infer that the defendants having noticed that their expert was discredited, as their counsel also conceded, decided to throw in the towel and not to call Mr Bray.

THE LEGISLATIVE FRAMEWORK

- [38] Sec 9 of the Occupational Health and Safety Act, 85 of 1993 (OHSA) deals with the General duties of employers and those who are self-employed to persons other than their employees. Sec 9(1) provides:

“(1) Every employer shall conduct his undertaking in such a manner as to ensure, as far as is reasonably practicable, that persons other than those in his employment who may be directly affected by his activities are not thereby exposed to hazards to their health or safety.

- [39] Mr Van Niekerk argued that the fact that s 9 of OHSA requires every employer to conduct his undertaking in a manner that is reasonably practicable does not mean that it applies to the second defendant when conducting his business as a shopkeeper. He maintained that since the term “undertaking” is not defined in the Act it must be ascribed its ordinary grammatical meaning which means “a task, venture, or enterprise.” Counsel also made the same submission in relation to the

term “activities” whose ordinary dictionary meaning is “any specific action, pursuit, etc.” I disagree. In my view the section enjoins an employer to conduct his business, as far as it is reasonably practicable, in such a manner that ensures that even those who are not his employees but who for whatever reason are within the supermarket are not exposed to hazards to their health and safety. I therefore find that this section does extend to the second defendant.

[40] **Sec 24 of OHSA: Report to inspectors regarding certain incidents:**

“(1) Each incident occurring at work or arising out of or in connection with activities of persons at work, or in connection with the use of plant or machinery in which, or in consequence of which –

(a) any person dies, becomes unconscious, suffers the loss of a limb or part of a limb or is otherwise injured or becomes ill to such a degree that he is likely either to die or to suffer a permanent physical defect or likely to be unable for a period of at least 14 days either to work or to continue with the activity for which he was employed or is usually employed; shall within the prescribed period and in the prescribed manner, be reported to an inspector by the employer or the user of the plant or machinery concerned, as the case may be.”

The defendants failed to report the accident as required by s 24 of OHSA. It is even strange that Mr Hendricks, who was called by Mr Bray immediately after the accident, and to whom Mr Bray “reported”, did not advise the defendants to file a report with the inspectors of the Department of Labour.

[41] **Sec 2 of the Occupational Health and Safety Act, 1993 Electrical Regulations provides:**

“(1) Subject to subregulation (3), the user or lessor of an electrical installation, as the case may be, shall be responsible for the safety, safe use and maintenance of the electrical installation he or she uses or leases.”

This section places a duty on the defendants to ensure that the electrical installation in Bray Spar is safe.

[42] Certificate of compliance (COC)

Regulation 7 of the OHSA Electrical Regulations stipulates:

“(1) Subject to the provisions of subregulation (3), every user or lessor of an electrical installation, as the case may be, shall have a valid certificate of compliance for that installation in the form of Annexure 1, which shall be accompanied by a test report in the format approved by the chief inspector, in respect of every such electrical installation.

(3) Subregulation (1) shall not apply to an electrical installation that existed prior to 23 October 1992, and where there was no change of ownership after 01 March 1994: Provided that, if any addition or alteration is effected to such an electrical installation, the user or lessor of the electrical installation, as the case may be, shall obtain a certificate of compliance for the whole electrical installation, whereafter the provisions of subregulation (1) shall be applicable to such electrical installation.”

[43] The Construction Regulations, 2003 under OHSA 1993, Regulation 1 GN 1010 GG 25207 18 July 2003. Construction work is defined in the following terms:

“Construction work means any work in connection with -

- (a) *the erection, maintenance, alteration, renovation, repair, demolition or dismantling of or addition to a building or any similar structure;*
- (b) ***the installation, erection, dismantling or maintenance of a fixed plant where such work includes the risk of a person falling;***
- (c) *the construction, maintenance, demolition or dismantling of any bridge, dam, canal, road, railway, runway, sewer or water reticulation system or any similar civil engineering structure; or*
- (d) *the moving of earth, clearing of land, the making of an excavation, piling or any similar type of work.”*

[44] **Regulation 3 Notification of construction work:**

- “(1) A principal contractor who intends to carry out any construction work shall –
- (a) *before carrying out that work, notify the provincial director in writing of the construction work if it includes-*
 - (i) *the demolition of a structure exceeding a height of 3 metres; or*
 - (ii) *the use of explosives to perform construction work; or*
 - (iii) *the dismantling of a fixed plant at a height greater than 3 metres.*
 - (b) *before carrying out that work, notify the provincial director in writing when the construction work-*
 - (i) *exceeds 30 days or will involve more than 300 person days of construction work; and*
 - (ii) *includes excavation work deeper than 1 metre; or*
 - (iii) ***includes working at a height greater than 3 metres above ground or a landing.***

(2) The notification to the provincial director contemplated in subregulation (1) must be done on the form similar to Annexure A to these Regulations.”

[45] It is common cause that when the plaintiff performed the installation he was 4.1 metres above the ground without fall arrest equipment. This constituted construction work for which a notice had to be issued in compliance with Construction Regulations 3. This therefore means that notification was required.

[46] Regulation 4: Client

“(1) A client shall be responsible for the following in order to ensure compliance with the provisions of the Act:

- (a) to prepare a health and safety specifications for the construction work, and provide any principal contractor who is making a bid or appointed to perform construction work for the client with the same;*
- (d) to take reasonable steps to ensure that each principal contractor’s health and safety plan as determined in regulation 5(1) is implemented and maintained on the construction site: Provided that the steps taken, shall include periodic audits at intervals mutually agreed upon between the client and principal contractor, but at least once every month;*
- (e) to stop any contractor from executing construction work, which is not in accordance with, the principal contractor’s health and safety plan contemplated in regulation 5(1) for the site or which poses a threat to the health and safety of persons.”*

[47] It is common cause further that the defendants, being the clients as contemplated in Regulation 4, should have prepared a Health and safety Plan which they ought to have furnished to the plaintiff before he performed the construction works at Bray Spar and they failed to do so. The defendants should, furthermore, have stopped him from performing any work until a safety plan was produced in terms of Regulations 4(e) read with 5(1) of the Construction Regulations.

[48] Regulation 8 deals with fall protection.

“(1) A contractor shall cause –

(a) The designation of a competent person, responsible for the preparation of a fall protection plan.”

DECIDED CASES AND ANALYSIS

[49] Having traversed the aforementioned legislative framework, the question that falls for determination is whether the aforementioned statutory provisions give rise to a claim in delict or whether they can justify the conclusion that a common law legal duty exists. In ***Olitzki Property Holdings v The State Tender Board and Another*** 2001 (3) SA 1247 (SCA at 1257, an instructive case, Cameron JA pronounced at para 12:

“[12] Where the legal duty the plaintiff invokes derives from the breach of a statutory provision, the jurisprudence of this Court has developed a supple test. The focal question remains one of statutory interpretation, since the statute may on a proper construction by implication itself confer a right of action, or alternatively provide the basis for inferring that a legal duty exists at common law. The process in either case requires a consideration of the statute as a whole, its objects and provisions, the circumstances in which it was enacted, and the kind of mischief it was

designed to prevent. But where a common-law duty is at issue, the answer now depends less on the application of formulaic approaches to statutory construction than on a broad assessment by the court whether it is 'just and reasonable' that a civil claim for damages should be accorded. The conduct is wrongful, not because of the breach of the statutory duty per se, but because it is reasonable in the circumstances to compensate the plaintiff for the infringement of his legal right. The determination of reasonableness here in turn depends on whether affording the plaintiff a remedy is congruent with the court's appreciation of the sense of justice of the community. This appreciation must unavoidably include the application of broad considerations of public policy determined also in the light of the Constitution and the impact upon them that the grant or refusal of the remedy the plaintiff seeks will entail." (Footnotes omitted)

- [50] What is common cause is that the defendants did not have a COC for the electrical installation. They could therefore not accept on face value that the installation was safe. There was no merit in their argument that the mere fact that a COC was issued did not necessarily mean the installation was safe. In ***Minister of Safety and Security v Van Duivenboden*** 2002 (6) SA 431A (SCA) at 441E – 442B (para 12) Nugent JA said the following on the aspect of wrongfulness:

"Negligence as it is understood in our law, is not inherently unlawful- it is unlawful and thus actionable, only if it occurs in circumstances that the law recognises as making it unlawful. Where the negligence manifests itself in a positive act that causes physical harm, it is presumed to be unlawful, but that is not so in the case of a negligent omission. A negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently

causing harm. It is important to keep that concept quite separate from the concept of fault... A legal duty ... will attract liability only if the omission was also culpable as determined by the application of the separate test that has consistently been applied by this Court in Kruger v Coetzee [1966 (2) SA 428 (AD) at 430] namely whether a reasonable person in the position of the defendant would not only have foreseen the harm but would have acted to avert it.”

[51] I have already referred to Regulations 2(1) and 7(1) at paras 41 and 42 (above). According to these provisions, the defendants were responsible for the safety, safe use and maintenance of the electrical installation in Bray’s Supermarket and to ensure that the installation was safe, a valid COC was required. It does not help the defendants to try and hide behind the fact that they had approached the plaintiff to furnish such a certificate. Seeing that the plaintiff was engaged elsewhere, nothing prevented them from approaching other contractors to ensure that they are in possession of a valid COC as prescribed by the law. It took the defendants about six years after the plaintiff’s fateful accident to obtain a COC. The plaintiff would not have sustained an electrical shock from that damaged wire on the steel beam had the necessary inspections and tests been conducted and a COC been issued. Unquestionably, harm to the plaintiff was clearly foreseeable. The defendants have failed to take reasonable steps to guard against such occurrence.

[52] The Constitutional Court formulated the test for wrongfulness in ***Oppelt v Department of Health, Western Cape***, 2016 (1) SA 325 (CC) at 343G – 344B (para 51) where Molemela AJ remarked:

“[51] The next enquiry is whether the “negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm”. In Loureiro, Van der Westhuizen J explained that the wrongfulness enquiry is based on the duty not to cause harm, and that in the case of negligent omissions; the focus is on the reasonableness of imposing liability. An enquiry into wrongfulness is determined by weighing competing norms and interests. The criterion of wrongfulness ultimately depends on a judicial determination of whether, assuming all the other elements of delictual liability are present, it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct. Whether conduct is wrongful is tested against the legal convictions of the community which are, “by necessity underpinned and informed by the norms and values of our society, embodied in the Constitution”.”

See also ***Loureiro & Others v Invula Quality Protection (Pty) Ltd*** 2014 (3) SA 394 (CC).

- [53] It was argued by Mr McClarty, correctly in my view, that the installation of the electrical wiring on the steel beam which was uninsulated or damaged constituted a positive act which resulted in the plaintiff’s physical harm. The averment by the plaintiff that he received an electric shock from an uninsulated or damaged electric cable on top of a steel beam was corroborated first by Mr Hendricks in the telephone conversation with the plaintiff’s instructing attorney, Ms Van Heerden, and also by what Mr Bray told Hendricks immediately after the incident that *“the plaintiff was shocked by something on top of the steel beam.”*

[54] Mr Van Niekerk sought to persuade me that the only available evidence which could possibly enable me to decide what the origin of the electrical shock was, was that of the plaintiff and Mr Hendricks which, according to counsel are mutually destructive. Based on the aforementioned and relying on the principles enunciated in *National Employers General Insurance Co Ltd v Jagers* 1984 (4) SA 437 ECD at 440 D – E and *National Employers Mutual General Insurance Association v Gany* 1931 AD 187 at 199. I disagree. In *Stellenbosch Farmers' Winery Group Ltd and Another v Martell ET CIE and Others* 2003 (1) SA 11 (SCA) at 14h-15E (para 5) the Supreme Court of Appeal dealt with irreconcilable versions of the parties. In the case before me however, the evidence of Mr Hendricks was discarded as I have already found that he was not objective and neutral but a poor expert witness. It is my finding that the defendants have not told the remainder of the story and stand the risk of a judgment against them. See *Arthur v Bezuidenhout and Mieny* 1962 (2) SA 566 (A) at 574H. They exercised a choice not to call Mr Bray who was available in court and could have presented his side of the story. The evidence of the plaintiff on the other hand was credible and honest. I should add that I did not consider Mr Hendricks' evidence in piecemeal fashion but conjunctively with the rest of the evidence. I found that the case for the plaintiff has been made out.

CONTRIBUTORY NEGLIGENCE

[55] Mr Van Niekerk urged that should I find unlawful conduct on the part of the defendants and in that event I should also take into consideration the fact that it was not just the failure on the part of the plaintiff to wear the fall arrest gear but that the plaintiff's failure to issue a COC when

requested to do so by the defendants has also contributed to the negligence. Had he complied with the request of Mr Bray, argued Mr Van Niekerk, he would have dealt with the uninsulated cable; and that there is a common law duty, not circumscribed in the Act or regulations, on the installation electrician, that when he is approached to issue a COC to do what is necessary without any waste of time or to refer the requestor to another service provider. Counsel submitted that the plaintiff's conduct was not that of a reasonable electrician. In my view, the plaintiff had no legal duty to issue the COC to the defendants. It was correctly stated that they could have approached any other electrician to render the service. There is no justification to lay the blame on the plaintiff's doorstep. Neither the OHSA nor the regulations placed an obligation on the plaintiff to comply when approached to issue a COC.

- [56] Mr McClarty argued convincingly, that should contributory negligence be considered as pleaded by the defendants in the alternative, the only attributable negligence to the plaintiff is that he failed to wear fall arrest gear. Counsel submitted that this failure can be compared to failure to wear a seatbelt. See ***Union National South British Insurance co (Ltd) v Victoria*** 1982 (1) SA 444 (A) at 462. The failure to wear a fall arrest gear was negligible, counsel pointed out. He pointed out that Hendricks himself failed to wear the fall arrest gear when he replaced the light fitting. Counsel further submitted that in the event that I am inclined to grant an order on contributory negligence, the apportionment should be no higher than 10%. Having considered the degrees of negligence I am in agreement with Mr McClarty that Mr Van de Heever's negligence is no more than 10%.

[57] I am persuaded that had it not been for the uninsulated and damaged cable on top of the steel beam, the plaintiff would have successfully replaced the third light fitting without any mishap. The failure by the defendants to have a valid certificate of compliance would have prevented the occurrence. The fact that they even failed to report the accident to the Department of Labour where proper and full investigations could have followed puts them in a bad light. I have no doubt in my mind that the defendants' conduct was unlawful. The plaintiff stands to succeed on merits. I apportion the defendants' blame to 90%.

[58] In the result the following order is made:

- 1. That the defendants are liable jointly and severally to compensate the plaintiff in respect of 90% of his proven damages.**
- 2. That the defendants are to pay the costs of the action in respect of the merits, such costs to include the qualifying expenses of Mr Mark Palmer (including his travel and accommodation expenses).**

MAMOSEBO J

NORTHERN CAPE DIVISION

For the plaintiff:

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