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**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MTHATHA**

Case no: 4368/2022

In the matter between:

S[...] T[...]

o.b.o. A[...] M[...] T[...]

Plaintiff

and

KING SABATA DALINDYEBO LOCAL MUNICIPALITY

Defendant

JUDGMENT

APPELS AJ:

Introduction

[1] The Plaintiff has instituted a delictual claim for damages on behalf of her minor child, a two-year female. The minor child sustained injuries after having been allegedly electrocuted on 6 June 2022 by electricity transmitted by a transformer owned and operated by the Defendant (“the transformer”).

[2] It was the Plaintiff’s case that the Defendant is a licensee as defined in the Electricity Regulation Act 4 of 2006 (“ERA”) and that the Defendant was deemed negligent by virtue of the provisions of Section 25 of ERA.

[3] The parties reached an agreement on the separation of issues of liability and quantum. Accordingly, it was ordered, in terms of rule 33(4) of the Rules of this Court, that the matter proceed on the issue of liability only and that the issue of quantum be determined at a later stage, if necessary.

[4] Therefore, this judgment deals with the issue of liability only.

The facts

[5] On 6 June 2022, the minor child and other children of the neighbourhood were playing in Thole Street, Ngangelizwe, Mthatha, near the transformer. Moments later, the minor child was found lying underneath the transformer, unresponsive, with burn wounds on both her forearms and hands. She was thereafter admitted to hospital where she received medical treatment for burn wounds, including a skin graft operation.

[6] The transformer was a step-down transformer, utilised by the Defendant to convert high voltage electricity of 11 000 volts to 400 volts for consumption by domestic consumers. It was common cause that transformers of this nature are usually pole-mounted overhead high above the ground to ensure that the electricity transmitted by the transformer does not pose a danger to members of the public who may come into contact with it.

[7] It was also common cause that the particular transformer in question was not pole-mounted high above the ground. Instead, it was installed close to the ground in

Thole Street, approximately 20 meters from where the Plaintiff and her minor child lived.

[8] It is the Plaintiff's case that prior to the incident the Defendant was warned by a local community member that the transformer posed a danger to the members of the public, but to no avail. In particular, it was alleged (*inter alia*) that the Defendant left the transformer opened and uncovered and as a result, the transformer posed a danger to members of the public and children nearby not accustomed to the dangers of electricity.

The pleadings

[9] It is alleged that the electrocution resulted from the wrongful and negligent conduct of the Defendant and/or its officials and employees acting within the course and scope of their employment with the Defendant, in that (*inter alia*), they:

- (a) Left the transformer which caused the electrocution unattended for extended periods;
- (b) Failed to warn members of the public about the danger of the transformer "*when open for access by children*" and/or members of the public not accustomed to the dangers of electricity;
- (c) Failed to conduct regular inspection of the transformer to satisfy itself that the transformer guaranteed a level of safety to members of the public;
- (d) Were aware that the transformer was open and that this posed a danger to members of the public and children playing nearby;
- (e) Ought to have foreseen that an open transformer was likely to cause injuries and loss to third parties; and
- (f) Failed to prevent the injuries and or electrocution of the minor child by exercising reasonable care and skill.

[10] The Plaintiff alleges that in terms of Section 26(1) of ERA in any civil proceedings against a licensee arising out of damage or injury caused by induction

or electrolysis or any other manner by means of electricity generated, transmitted to be distributed by a licensee, such damage or injury is deemed to have been caused by the negligence of the licensee, unless there is credible evidence to the contrary.

[11] The reference to Section 26 above is a patent error in the Plaintiff's particulars of claim, because Section 26 of ERA refers to expropriation. Reference should have been made to Section 25 of ERA which stipulates as follows:

"In any civil proceedings against a licensee arising out of damage or injury caused by induction or electrolysis or in any other manner by means of electricity generated, transmitted or distributed by a licensee, such damage or injury is deemed to have been caused by the negligence of the licensee, unless there is credible evidence to the contrary."

[12] The incorrect reference to the particular provision of ERA is of no consequence. The deeming provision applies by operation of law once it has been proven that the Defendant is a licensee and that the Plaintiff's minor child suffered damage or injury as a result of electricity generated, transmitted or distributed by the Defendant.

[13] The Defendant effected an amendment to its plea after the hearing of all the evidence but before the parties made submissions. Originally, in the plea filed prior to the amendment, the Defendant denied that it was a licensee as contemplated in ERA, and it pleaded no knowledge of the allegations relating to the electrocution of the minor child and no knowledge about whether it was the owner and operator of the transformer.

[14] The Defendant also denied that it was negligent and pleaded that (in the event that the court finds that the minor child sustained injuries as a result of the electricity transmitted by the transformer), the sole cause of injuries sustained by her was the negligence of the Plaintiff who allegedly failed to adequately supervise the minor child.

[15] Alternatively, it was pleaded that the Plaintiff was contributorily negligent and any claim which the Plaintiff has against the Defendant should be reduced in accordance with the Apportionment of Damages Act 24 of 1956.

[16] In essence, almost all the issues on liability were placed in dispute by the Defendant until the amendment of the plea.

Amendment to pleadings effected on 20 August 2024

[17] On 20 August 2024, three days prior to the date on which the parties submitted oral argument, the Defendant effected an amendment to its plea. In terms of the amended plea, where the Defendant previously denied being a licensee in terms of ERA, this has now been admitted. It was also admitted that the Defendant is responsible for the electricity transformer situated in Thole Street.

[18] Where the Defendant previously pleaded no knowledge of the alleged electrocution and put the Plaintiff to the proof thereof, it has now, in terms of the amended plea, denied the allegation relating to the electrocution. No material facts have been pleaded in the amended plea in support of such denial.

Issues in dispute

[19] The following issues were in dispute on the pleadings as amended:

- (a) Whether the minor child was electrocuted on 6 June 2022 as a result of contact with the transformer.
- (b) Whether the minor child suffered injuries to both her arms as a result of the electrocution and was hospitalised at Nelson Mandela Academic Hospital for a period of three months from the date of the incident.
- (c) Whether the electrocution of the minor resulted from the wrongful and negligent conduct of the Defendant and its employees acting within the course and scope of their employment.
- (d) Whether the sole cause of the minor child's injuries was the Plaintiff's negligence; alternatively whether the Plaintiff was contributorily negligent and whether her claim ought to be reduced in accordance with the Apportionment of Damages Act.

The evidence

[20] Three witnesses gave evidence on behalf of the Plaintiff and two witnesses were called on behalf of the Defendant.

[21] The Plaintiff, S[...] T[...], an adult female, gave evidence that she lives with her minor child at their home in Thole Street, Ngangelizwe, Mthatha. On 6 June 2022 at approximately between 12h00 and 14h00, the minor child left their home with another child to play outside in Thole Street with the neighbourhood children.

[22] When the children went to play, she also left her home to go to Gomomo Street, Ngangelizwe. When she was still at Gomomo Street, a woman by the name of Ntombefuthi arrived and informed her that her minor child had been “*burned*”. She hurried back to her house in Thole Street and on her arrival, she found the minor child being carried in the arms of her neighbour. She noticed that both forearms and hands of the minor child were “*burned*”. She testified that the minor child appeared to be unconscious because she was not crying and was “just looking at” her.

[23] At first, she took the minor child to Ngangelizwe Clinic where bandages were applied to her wounds, and she was referred to Nelson Mandela Academic Hospital for further medical treatment. The Plaintiff was allowed to stay with her minor child in hospital for approximately one month and one week. She testified that she was told that the minor child would not heal quickly, that the burn wounds were deep and that she was required to sign consent documents for a skin graft to be conducted on the minor child.

[24] She testified that it was explained to her that a patch of skin would be removed from the minor child’s thigh and transplanted to enable her to heal quicker. She thereafter agreed and signed the consent papers to give permission for the skin graft. In total, the minor child stayed in hospital for one month and two weeks.

[25] She testified that she had lived in Thole Street for 25 years and that when she was growing up, the transformer in Thole Street, which was approximately 20 metres from her house, was “*closed up*”. However, at some stage on an unknown date, a new transformer was installed which was not “*closed up*”.

[26] During the Plaintiff's evidence-in-chief, the following photographs were handed into evidence:

- (a) A photograph depicting the transformer in Thole Street, marked Exhibit "A";
- (b) Two photographs depicting the burn wounds on the forearms and hands of the minor child, marked Exhibits "B" and "C".

[27] She testified that Exhibit "A" was taken on 6 June 2022 after the incident occurred and that she was present when the photograph was taken. She confirmed that Exhibit "A" was a photograph of the transformer in Thole Street.

[28] The Plaintiff testified that she took the photographs handed in as Exhibits "B" and "C" at the hospital on 6 June 2022 and she confirmed that the photographs depict the burn wounds on her minor child's hands.

[29] Under cross-examination, she denied that the transformer was ever enclosed by a fence and that such fence was stolen or vandalised. When it was put to her that once the Defendant was made aware of the incident (the alleged electrocution), its officials conducted a site inspection and caused the fence to be replaced, she confirmed that she had been made aware that the Defendant had erected a fence around the transformer.

[30] The Plaintiff's next witness was an adult woman named Ntombifuthi Siphamla. She testified that she lives in Thole Street, Ngangelizwe, Mthatha and that on 6 June 2022, she was seated next to her house and saw the minor child playing amongst other children in Thole Street near the transformer.

[31] Later she heard a loud sound, which she described as sounding like thunder, and noticed that the minor child was no longer playing amongst the other children. She then saw the minor child lying down on the ground under the transformer. She pulled the minor child from underneath the transformer towards the tarred road. The minor child had sustained burn wounds on her forearms and hands. She screamed and called out to the neighbour for help. She said the minor child was silent and not crying at all. When the neighbour arrived, she went to call the Plaintiff where she

was at Gomomo Street. When she and the Plaintiff arrived at the Plaintiff's house, the neighbour was carrying the minor child in her arms.

[32] Under cross-examination she said that when she was sitting outside her house in Thole Street, the minor child was amongst four children who were playing near the transformer. She was sitting approximately 15 paces away from where the children were playing. The loud sound, which came from the direction of the transformer, made her notice that the minor child was no longer playing among the others. .

[33] She testified that she saw the head and shoulders of the minor child sticking out from under the transformer and the remainder of the minor child was underneath it. She dragged the minor child out from underneath the transformer by her shoulders by holding onto to the minor child's clothes. The minor child was facing upwards.

[34] It was put to her that Mr Gwexe, an employee of the municipality, would testify that he visited the scene a few days after the incident allegedly occurred and would say that it would be impossible for a two year old child to fit underneath the transformer because the gap between the ground and the transformer was only 15cm in size. She once again confirmed that she saw the minor child underneath the transformer.

[35] It was also put to her that if she had indeed pulled the minor child from under the transformer in the way she had explained, she herself would have been electrocuted. She did not have any comment to this proposition, but steadfastly confirmed that she indeed pulled the minor child from under the transformer.

[36] When it was put to her that if there was a loud sound, the transformer would have failed and there would have been an interruption of electricity supply in the area, she immediately confirmed that there was indeed an interruption in the electricity supply.

[37] The nature of the propositions put to the witness suggested that the Defendant intends to introduce opinion evidence. Accordingly, the court required the Defendant's counsel to clarify whether the Defendant intends to present evidence on

the propositions put to the witness. When the Defendant's counsel confirmed that evidence in this regard will be presented, the Plaintiff's counsel interjected and noted that, based on the nature of the propositions, the Defendant is required to lead expert evidence.

[38] The Plaintiff's counsel also noted that there had not been compliance with Rule 36(9) and accordingly that the Defendant would not be entitled to call an expert witness. The admissibility of expert evidence in the absence of compliance with Rule 36(9) is discussed in more detail under the heading "***analysis of the evidence***" below.

[39] The Plaintiff's third witness was Siyabulela Fodo, an adult male and a resident of Thole Street who is a member of the "Street Committee". He has lived in Thole Street for five years. He explained that the function of the "Street Committee" is to resolve and communicate problems and concerns of the community to the Municipality through its councillors.

[40] He testified that the previous transformer which used to be in Thole Street (prior to its replacement by the current transformer depicted on Exhibit A) was completely "*closed up*" and fitted inside a panel. None of the previous transformer's parts were exposed as depicted on Exhibit "A". He also stated that these types of transformers are normally installed overhead, and pole mounted high above the ground.

[41] He testified that the community members of Thole Street raised their concerns regarding the open transformer to the Street Committee. In turn, he raised the community's concerns in two meetings attended by the ward councillor, which he named as Ms Mathubathuba, and with other representatives of the Defendant. He stated that it was made clear at the meetings that the community requires the transformer to be closed or covered.

[42] Under cross-examination he stated that he was not sure of the exact date on which the current transformer was installed and said that it was during or about November 2021. He stated that the first meeting with the ward councillor during which concerns regarding the transformer were raised, took place in February 2022 and the second meeting took place in May 2022.

[43] Under cross-examination he denied that a fence was erected around the transformer when the transformer was installed. He also denied that the alleged fence was stolen or vandalised. He stated that it was only after the incident on 6 June 2022 that the Defendant erected a barbed wire fence around the transformer.

[44] The first witness, called by the Defendant was Mr Luvuyo Gwexe ("Mr Gwexe") who is employed by the Defendant as a supervisor of electricians within its electrical services division. He testified that he has been employed by the Defendant since 2005 and that he holds a Diploma in Electrical Engineering which he obtained in 2019.

[45] According to Mr Gwexe, he conducted a site inspection of the transformer in Thole Street sometime in June 2022 after he was requested to do so by his manager, Mr Bantuboxolo Gwadiso ("Mr Gwadiso"). He testified that Mr Gwadiso informed him that a member of the mayoral committee ("an MMC") told him that a child was electrocuted at Thole Street. He could not recall the exact date on which he received the instruction nor the date on which he carried out the site inspection of the transformer sometime in June 2022.

[46] He could also not recall the exact date on which the current transformer as depicted on Exhibit A was erected, i.e. when it replaced the previous transformer, but said that it could have been "*before COVID*".

[47] He further testified that the transformer is a stepdown transformer, with the function of reducing high voltage electricity (11KV) to lower voltage electricity (400 volts) in order for it to be distributed to and used by domestic consumers such as the residents of Thole Street.

[48] When he arrived at the scene in Thole Street sometime in June 2022, he observed that there was no fence around the transformer even though a fence was put around it "*that time of COVID*". Other than the fact that the transformer was not enclosed, he did not find anything else amiss. He noted that he could not see any carbonised dark marks on the transformer and that its "*mva insulators*" which he referred to as the "*blue parts*", were still intact. He reported his observations to his manager and instructed his team to enclose the transformer by erecting a fence around it.

[49] Under cross-examination he conceded that it is necessary for the transformer to be enclosed because it is of the type which is ordinarily pole-mounted high up from the ground. He also conceded that if these transformers are not pole mounted, it was necessary for the Defendant to enclose them with a fence to ensure that they do not pose a danger or cause injuries to persons who might come into contact with it.

[50] When he was asked whether he disputed that the minor child was electrocuted he said that he cannot dispute it.

[51] The next witness called by the Defendant, Mr Gwadiso, is employed by the Defendant as a General Manager: Electrical Services. He testified that he holds a B.Sc degree with a major in physics and applied mathematics and a B.Sc in Electrical Engineering. He has been employed by the Defendant since 2014. He is responsible for the overall management of the electricity division of the municipality.

[52] Mr Gwadiso said that “*approximately within five days*” after the incident occurred, he received a telephone call from a member of the mayoral committee (“MMC”) informing him that a child was electrocuted by what he referred to as “*one of our installations*”. He was unable to tell the court the exact date on which he received the report that the minor child was electrocuted. Upon receiving the report from the MMC he stated that he contacted Mr Gwexe and requested him to do a site inspection.

[53] He further testified that after conducting the site inspection, Mr Gwexe reported to him that the fence which was erected around the transformer was removed by an unknown person and that no visible signs could be detected that anybody touched the transformer.

[54] When he received the abovementioned report from Mr Gwexe he decided that there was no need to investigate further because there was no obvious signs that the transformer had been touched, everything was normal and the customers had electricity.

[55] He thereafter instructed Mr Gwexe to ensure that a fence was erected around the transformer. He stated that this was the end of the interaction between himself and Mr Gwexe about the incident.

[56] In August 2022, Mr Gwadiso was contacted by the Defendant's "Asset Division" and he was informed that there was a claim in relation to the alleged electrocution. He was asked by the Asset Division for information regarding the incident.

[57] He decided to check the records of the 24-hour call centre where most electricity-related complaints are reported. He evidently formed the opinion that if there was an incident on 6 June 2022 emanating from the transformer, there would have been an interruption of power. He stated that he could find no record of any customer who complained that there was an interruption in the electricity service. He stated that this is how he responded to the Asset Division Unit and that he regarded the matter as finalised.

Analysis of the evidence

[58] The Plaintiff's evidence that on 6 June 2022 the minor child was uninjured when she went to play with the neighbourhood children and her evidence that the minor child later returned, carried in her neighbour's arms with burn wounds to her forearms and hands, are unchallenged and undisputed. It is also undisputed that the minor child was treated in hospital for burn wounds, including a skin graft operation. There is no reason why I cannot accept her evidence in this regard.

[59] Similarly, no evidence was led by the Defendant to refute the evidence of Ntombefuthi regarding the place where the minor child was found on 6 June 2022 and that she pulled the minor child from underneath the transformer. There was also no evidence to dispute that the minor child had burn wounds on her forearms and hands when she was so found under the transformer.

[60] The evidence of the Defendant's witnesses consisted mainly of observations made by Mr Gwexe during a site inspection of the transformer on an unknown date in June 2022 and of the conclusions drawn by Mr Gwadiso based on the information he received from Mr Gwexe following the site inspection.

[61] These observations and conclusions contained nothing of probative value to assist the court in making any inferences regarding whether or not the minor child was electrocuted on 6 June 2022.

[62] Mr Gwexe testified that he did not find any carbonised dark marks on the transformer, but he never excluded the possibility that the minor child came into contact with electricity transmitted by the transformer. In fact, he conceded that he could not dispute that the minor child was electrocuted on 6 June 2022.

[63] It was evident from Mr Gwadiso's evidence that he came to a conclusion (although not very clearly expressed in his evidence) that the minor child was not electrocuted. It appears that he held an opinion that if someone touched the transformer and was electrocuted or burned by it, there would still be visible signs of such electrocution a few days after the incident. He also appeared to have concluded that if there was no record of a complaint of a power disruption emanating from the transformer on 6 June 2022, there could not have been an electrocution. Such was his trust in the accuracy of the call centre records that he considered the matter closed and did not require or make any further investigation into the incident.

[64] The evidence of Mr. Gwadiso was purely in the nature of an opinion. There was an attempt to qualify Mr. Gwadiso as an expert at the start of his evidence. In this regard, he was led extensively on his qualifications, training and experience in the field of electricity. However, any opinions expressed by Mr Gwadiso are inadmissible opinion evidence for the reasons stated below.

[65] An opinion, whether expressed by a lay person or an expert, on an issue which the court can decide without receiving such opinion, is in principle inadmissible because it is irrelevant.¹ In this matter, Mr Gwadiso expressed an opinion on a matter which the court is able to determine based on the factual evidence and the probabilities.

[66] His opinion is of no probative value and of no assistance to the court in deciding the issues. Mr Gwadiso did not do a site inspection of the transformer.

¹ **Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others** [2014] ZACC 32 at para [30]. See also the explanation in footnote 30.

Instead, he relied on observations relayed to him by Mr Gwexe and on inadmissible hearsay evidence regarding call centre records of which he had no personal knowledge. In this regard it should be noted Mr Gwadiso does not work in the call centre, is not the person to whom a report would have been made and is also not the person who records the calls that are made to the call centre. He therefore does not possess personal knowledge of whether there was a report of a power failure at the call centre. The employees of the Defendant who work in the call centre were not called to give evidence nor did the Defendant adduce documentary evidence of the records of the call centre.

[67] Furthermore, the Defendant did not comply with Rule 36(9) and did not give notice that it intended to call Mr Gwadiso as an expert witness or provide any summary of Mr Gwadiso's conclusions regarding the events on 6 June 2022. The Defendant also did not seek the court's leave to call an expert witness.

[68] The requirements of Rule 36(9) are peremptory. A party is not entitled to lead expert evidence without prior compliance with the sub-rule irrespective of whether there was an objection to the non-compliance.²

[69] Not only was no notice given in terms of Rule 36(9) regarding any opinions relating to the electrocution on 6 June 2022, at the time when Mr. Gwadiso was called as a witness, the Defendant did not even plead a denial that an electrocution occurred. Instead on the pleadings as they stood at the time when Mr Gwadiso gave his evidence, the Defendant pleaded no knowledge of the alleged electrocution.

[70] The Defendant has therefore not put up any acceptable version to counter the Plaintiff's evidence of the events that occurred on 6 June 2022.

[71] There is however one important issue in respect of which there is a factual dispute where the parties have two mutually-destructive versions. This issue is whether the Defendant had at one stage prior to 6 June 2022 erected a fence around the current transformer and whether that fence was at a later stage, prior to 6 June 2022, stolen or vandalised.

² **Colt Motors (Edms) Bpk v Kenny** 1987 (4) SA 378 (T) at 387 F.

[72] The conflicting versions must be weighed up against the inherent or general probabilities of the matter and a finding must be made. Both versions cannot be allowed to stand.

[73] In **Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and others** the Supreme Court of Appeal laid out the accepted test applicable to a trial court when faced with a factual dispute, in particular when faced with two irreconcilable versions.³ A trial court has to come to a conclusion on the disputed issues by making findings on (1) the credibility of the various factual witnesses; (2) their reliability; and (3) the probabilities.

[74] The court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. This finding will, in turn, depend on factors, such as the witness's candour and demeanour, his or her bias, internal contradictions in his or her evidence; external contradictions with what was pleaded or put on his or her behalf, and the calibre and cogency of his or her performance compared to that of other witnesses testifying about the same incident or events.⁴

[75] A witness's reliability will depend, apart from some of the factors above, on the opportunities he or she had to experience or observe the event in question; and the quality, integrity and independence of his or her recall thereof.⁵

[76] I found the Plaintiff's witnesses credible and reliable on all the issues. They gave clear and direct answers to the questions put to them and did not try to embellish or exaggerate. It is also found that they provided a consistent and plausible version of events. They made concessions where necessary and did not pretend to know answers to questions which they did not have, nor did they attempt to convince the court that they saw more than what they did.

[77] All three of the witnesses live in Thole Street and were able to confirm that when the previous transformer was replaced with the current transformer, it was not

³ **Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and Others** 2003 (1) SA 11 (SCA) at para [5].

⁴ **Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and Others**, *supra* at para [5]

⁵ **Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and Others**, *supra* at para [5]

enclosed and there was no fence around it. All of them have lived in Thole Street for several years and had many opportunities to observe the transformer and were able to provide the court with accurate information regarding whether the transformer was ever enclosed.

[78] Their evidence also ties in with Mr Fodo's evidence that it was necessary to have engagements with the ward councillor to raise the community's concerns regarding the transformer. His evidence that he raised concerns regarding the open transformer in meetings attended by the ward councillor, which he named as Ms Mathubathuba, and with other representatives of the Defendant on two separate occasions in 2022 before the incident occurred, was unchallenged. Mr Fodo does not have a vested interest in the matter and there is therefore no reason why the court should regard his evidence with caution.

[79] The evidence of the Defendant's witnesses, however, does not stand up to the same scrutiny. Even though both Defendant's witnesses testified that a fence was once erected around the transformer, they were unable to articulate clearly or precisely when the fence was so erected. Mr Gwexe only vaguely stated that it was erected in pre-COVID times. No indication was given as to how he had knowledge of the erection of the fence. He did not state that he personally gave instructions to erect the fence, or that he personally inspected the site and saw that a fence was erected. He could not give any evidence of the most recent date prior to the incident when the site was inspected and the fence found intact.

[80] There was some vague suggestion that the fence was removed due to vandalism or theft without the Defendant's knowledge, but this was not clearly articulated in his evidence, nor was there any approximate date given as to when the fence could have been so removed.

[81] There is no reason why the Defendant's witnesses should have been so vague when giving details about the enclosure of the transformer. Both witnesses work in management and supervisory positions in the Defendant's electrical services division and must have had access to the records and files regarding infrastructure related to the installation of the transformer. Mr Gwadiso could give detailed evidence about the call centre records and there is no reason why he could not also

have consulted the Defendant's records relating to the erection of the fence to provide the court with accurate and clear information regarding the date on which it was erected, the quality of the fence that was erected and whether it was adequate to safeguard against the risk of injury which the transformer posed.

[82] There are more reasons to generally doubt the veracity and reliability of the evidence of the Defendant's witnesses' testimony. These reasons relate to contradictions between what was put on the Defendant's behalf to witnesses, what was pleaded and what was established during their evidence.

[83] Firstly, several propositions were put to Ntombefuthi (which one would assume was in accordance with the Defendant's counsel's instructions) which the Defendant's witnesses never testified about. For instance, Ntombefuthi was told that the Defendant's witnesses will testify that it was impossible for a two-year-old child to fit underneath the transformer because the transformer is fitted only 15 cm from the ground. This was never confirmed in evidence by any of the Defendant's witnesses.

[84] Secondly, and most importantly, the Defendant did not plead that the transformer was enclosed by a fence to ensure the safety of members of the public and children playing nearby, nor did it plead that the fence which it erected was stolen or vandalised. Instead, the Defendant pleaded a bare denial to the factual allegation that the transformer was open which rendered it unsafe for members of the public and children playing nearby. The absence of material factual allegations to support the bare denial of negligence in the plea, the introduction of the allegations regarding the fence for the first time at the trial and the vague and unsatisfactory manner in which the evidence relating to the erection of the fence was given during the oral testimony of the Defendant's witnesses must lead to an adverse finding regarding their credibility and reliability.

[85] The Defendant's witnesses are also not unbiased and independent. In fact, the factual allegations in relation to negligence implicate the very same witnesses who gave evidence. Yet, the Defendant did not launch an independent investigation into such a serious allegation, nor was the court provided with any evidence that a proper internal investigation was launched with clear findings contained in a written report.

[86] In the circumstances, I accept the evidence of the Plaintiff's witnesses that on 6 June 2022, the minor child was found under the transformer with burn wounds on her forearms and hands and that she was hospitalised and treated at the Nelson Mandela Academic Hospital for such burn wounds.

[87] For the reasons I explained above, I accept the evidence of the Plaintiff's witnesses that the transformer was not enclosed by a fence prior to 6 June 2022 and that it therefore posed a danger to members of the public and that this danger was reported to the Defendant's representatives prior to June 2022.

The onus

[88] In terms of Section 25 of ERA, there is an onus on a licensee such as the Defendant, in civil proceedings against it, to provide credible evidence that damage or injury caused by means of electricity generated, transmitted or distributed by such licensee was not caused by its negligence.

[89] It is only the element of negligence which the Defendant must disprove. The Plaintiff still carries the burden of proving all the other elements of the delict.

[90] Therefore, based on a plain reading of Section 25 of ERA, and in accordance with the general principle that he who alleges must prove, the Plaintiff must discharge the burden of proving that the minor child was injured as a result of electricity transmitted or distributed by the Defendant. Only once it is found that the Plaintiff has discharged this onus, would such damages be deemed to have been caused by the negligence of the Defendant in the absence of credible evidence to the contrary.

The electrocution

[91] There was no direct eyewitness evidence of the alleged electrocution. In the absence of such direct evidence, a finding that the electrocution happened cannot be made unless the court is able to draw an inference in this regard from the objective facts proven by the evidence.

[92] In **S A Post Office v Delacy and Another**, the Supreme Court of Appeal said the following regarding the process of inferential reasoning:

*“The process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts. The inference that is sought to be drawn must be ‘consistent with all the proved facts. If it is not, then the inference cannot be drawn’ and it must be the ‘more natural or plausible, conclusion from among several conceivable ones’ when measured against the probabilities.”*⁶

[93] It has also been held that “*plausible*” in the aforementioned context means ‘*acceptable, credible, suitable*’.⁷ Where more than one inferences is possible, a court must satisfy itself that the inference sought to be drawn is the most plausible or probable, even if that conclusion may not be the only one.⁸

[94] If there are no positive proven facts from which an inference can be made, what is left is mere speculation or conjecture.

[95] I will now set out what I consider to be the objectively proven facts in this matter from which inferences may be drawn.

[96] It is an objectively proven fact that the Defendant is the distributor of the electricity transmitted by the transformer. The evidence showed that the Defendant operates the transformer for the purpose of distributing electricity to residential areas for household use.

[97] It has also been proven that in its uncovered state, the transformer poses a danger to the safety of members of the public who may come into contact with the electricity transmitted by the transformer. In this regard, the evidence showed that the transformer ought to be either pole-mounted overhead high up from the ground where it does not pose a risk to the safety of members of the public or it ought to be enclosed or covered to protect members of the public from the danger of the electricity transmitted by the transformer.

⁶ **S A Post Office v Delacy and Another 2009 (5) SA 255 (SCA)** at para [35].

⁷ **Ocean Accident and Guarantee Corporation Ltd v Koch** 1963 (4) SA 147 (A) at 159B-D.

⁸ **AA Onderlinge Assuransie-Assosiasie Bpk v De Beer** 1982 (2) SA 603 (A). **Cooper and Another v Merchant Trade Finance Ltd** (474/97) [1999] ZASCA 97 (1 December 1999) para [7]

[98] It is also an objective fact that on 6 June 2022, the transformer was neither pole-mounted overhead nor was it enclosed to ensure that it did not pose a risk of harm to members of the public. Moreover, it was clear from the evidence of both of the Defendant's witnesses that if any person comes into contact with any of the live or electrically-charged parts of the transformer, it could result in injuries.

[99] It has also been proven that on 6 June 2022, the Plaintiff's minor child was initially seen uninjured playing with other children near the transformer, but shortly after a loud sound was heard, she was found lying underneath the transformer, unresponsive, with burn wounds sustained on both her forearms and hands. The minor child was hospitalised for more than a month at Nelson Mandela Academic Hospital where she was treated for burn wounds.

[100] It is from the abovementioned proven objective facts on which I may draw an inference regarding whether the minor child sustained injuries as a result of electricity transmitted or distributed by the transformer.

[101] The Defendant's counsel argued that in order for the court to draw an inference that the minor child was injured as a result of an electrocution or by electricity transmitted by the transformer, it is essential that the court is provided with evidence as to how the electrocution occurred. It was argued that if there is no direct eyewitness who witnessed the electrocution, expert evidence is required to explain exactly how the electrocution occurred. If no such evidence is tendered, it was argued, there will not be sufficient objective facts from which the court may draw an inference that an electrocution occurred.

[102] The absence of evidence of how the electrocution occurred, according to the argument presented by the Defendant's counsel, is a material deficiency in the Plaintiff's case.

[103] In support of this argument I was referred to the cases of **Clan Syndicate v Peattie and Others NNO** and **Briers N.O and Others v Salmon N.O and Others** which were both cases dealing with claims for damages caused by fires.⁹ Neither of

⁹ **Clan Syndicate v Peattie and Others NNO** 1986 (2) 791 and **Briers N.O and Others v Salmon N.O and Others** (A63/2022) [2023] ZAWCHC 26 (14 February 2023).

these cases assists the Defendant's case. I will explain in more detail in the paragraphs below.

[104] The major distinguishing factor between this case and the two fire cases referred to by the Defendant is that, in order to decide the issue of negligence, the courts in the abovementioned cases had to establish the most probable cause of the fires, i.e. how the fires started. In this matter, the Plaintiff has no onus to prove negligence, she only has to prove that an electrocution occurred – not how it occurred.

[105] In any event, the Defendant's witnesses themselves provided the court with a theory of how the electrocution occurred in that it is clear from their own evidence that people who come into contact with the live electrified parts of the transformer may suffer electric shock or burns as a result of the electricity transmitted by the transformer.

[106] I was referred to several other authorities by the Defendant's counsel in relation to the drawing of inferences in cases based on circumstantial evidence. In particular, I was referred to **R v Blom** where it was held that the inference sought to be drawn ought to be the only reasonable inference to be drawn from the proven facts so as to exclude reasonable doubt whether the inference sought to be drawn is correct.¹⁰ Accordingly, counsel argued that if the proven facts do not exclude all other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.

[107] The obvious flaw in this argument is that in criminal proceedings such as in **R v Blom**, the onus is discharged if proof beyond reasonable doubt is adduced, while in civil proceedings, the standard of proof is a balance of probabilities.

[108] In civil proceedings it is not necessary to prove that the inference sought to be drawn must be the only reasonable inference, only that it is the most natural or acceptable inference from amongst several conceivable ones.

[109] In this matter, the Defendant has not provided the court with an alternative probable version of its own. Instead, during the trial, the Defendant's counsel put

¹⁰ **R v Blom** 1939 AD 188 at 202 – 203

certain propositions to the Plaintiff's witnesses during cross examination in an attempt to poke holes in the Plaintiff's version. For instance, it was put to Ntombefuthi that a two-year-old child cannot fit underneath the transformer and that she herself would have been electrocuted had she pulled the injured minor child from underneath the transformer. Many of these propositions were never confirmed by the Defendant's witnesses in their own evidence. In short, the Defendant's defence strategy was to attempt to cast doubt as to whether the electrocution occurred.

[110] In the circumstances, the two probable versions which I am required to consider is either that an electrocution did occur or that it did not occur. Amongst these two alternative probabilities, I have to decide which is the "*the more natural, or plausible conclusion*" based on all the objectively proven facts.

[111] Based on the proven facts, it is highly improbable that the minor child sustained her injuries elsewhere or in any manner other than as a result of contact with the electricity transmitted by the transformer. It is indeed the most natural and acceptable inference from the proven facts. No other inference seems plausible.

[112] In the circumstances, based on all the objectively proven facts, I find that there is a sufficient evidentiary basis for the court to conclude that the minor child was indeed injured on 6 June 2022 as a result of an electrocution caused by electricity transmitted or distributed by the Defendant by means of the transformer.

Negligence

[113] Since I have found that the minor child's injuries were caused by the means of electricity transmitted or distributed by the Defendant and since the Defendant has admitted in its amended plea to being a licensee as contemplated in ERA, the onus shifts to the Defendant to adduce credible evidence that the injury was not caused by its negligence.

[114] The test for negligence was set out in **Kruger v Coetzee** as follows:

"For the purposes of liability culpa arises if:

(a) *A diligens paterfamilias in the position of the defendant-*

- (i) *would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and*
- (ii) *would take reasonable steps to guard against such occurrence; and*
- (b) *the defendant failed to take such steps.*¹¹

[115] It has also been stated in **Lucas & Another v Umhlathuze Municipality and Another** regarding the test for negligence that:

*“...negligence refers to the blameworthy conduct of someone who has acted wrongfully. A person is blamed for conduct of carelessness, thoughtlessness or imprudence, because by giving insufficient attention to his/her actions, he/she failed to adhere to the standard of care legally required of him/her. The standard used is an objective standard of a reasonable person. The question is whether a reasonable person in the position of the municipality would have acted differently.”*¹²

[116] It is clear from the evidence that the Defendant’s officials knew or at least ought to have known that the transformer posed a risk to persons who might come into contact with it.

[117] The Defendant’s officials were also well aware of what the appropriate steps were that could be taken in order to safeguard members of the public from being injured by the transformer. They were aware that the transformer is safest if it is either pole-mounted overhead high above the ground or enclosed or covered so that members of the public will not come into contact with the live energised parts of the transformer.

[118] I accordingly conclude that a *diligens paterfamilias* in the position of the Defendant would have foreseen the reasonable possibility of a person being injured as a direct consequence of coming into contact with the electricity transmitted by the transformer and would have taken steps to guard against such occurrence.

¹¹ **Kruger v Coetzee 1966 (2) SA 428** (A) at 430 E-F.

¹² **Lucas & Another v Umhlathuze Municipality and Another** (Case no. 785/2020) [2021] ZASCA 181 (17 December 2021) at para [9].

[119] The next step of the enquiry into negligence is whether in the particular circumstances, the Defendant took appropriate steps to avoid injury persons who may come into contact with the transformer.

[120] The Defendant (as the party bearing the onus of disproving negligence), had to adduce clear evidence to show that it took such steps. For the reasons stated below, I find that the Defendant did not take appropriate steps to guard against the risk posed by the transformer.

[121] As set out above, the evidence of the Plaintiff's witnesses that the transformer depicted on Exhibit A was never enclosed by a fence was accepted and the Defendant's version that a fence was erected was rejected. Even if that finding is wrong, no evidence was adduced that the Defendant conducted regular inspections of the transformer to ensure that the fence (allegedly erected) remained intact and that members of the public remained protected. Having erected the enclosure, it would have been expected of a reasonable person in the position of the Defendant to conduct periodic inspection and maintenance of the fence.

[122] Instead, it appears from the testimony of the Defendant's witnesses that the Defendant relied exclusively on the alleged erection of a fence around the transformer more than three years prior to the incident and that it expected the fence to withstand the elements and vandalism, without any additional safeguards or maintenance in the years after erecting the fence. Even if I accepted the Defendant's evidence in this regard, the Defendant's conduct would still have fallen short of the standard of care which could be expected of a *diligens paterfamilias*.

[123] It is therefore found that no credible evidence was adduced to show that the Defendant took appropriate steps to guard against the foreseeable harm posed by the transformer. The Defendant has therefore not discharged the onus cast on it and is deemed negligent by virtue of Section 25 of ERA.

Contributory negligence of the plaintiff

[124] There is also some blameworthiness on the Plaintiff's part for the injuries sustained by the minor child. A child of only two year's old requires constant supervision. The Plaintiff left her home and allowed the minor child to play with other

children in Thole Street when she knew that there was a transformer situated only 20 metres from her house which was not enclosed by a fence.

[125] Although she is also partly to blame for not supervising her minor child adequately, her lack of supervision in the circumstances of this matter is not the sole cause of the injuries sustained by the minor child. The Defendant cannot therefore escape liability on the basis of the Plaintiff's contributory negligence.

[126] A defendant faced with a delictual claim may in the plea request apportionment of damages in terms of Section 1 of the Apportionment of Damages Act based on the contributory negligence of the Plaintiff. By comparing the respective degrees of negligence of the parties, the court can determine the extent to which each party's negligence caused the injuries in question. In this regard, Section 1(a) of the Act stipulates as follows:

“1. Apportionment of liability in case of contributory negligence.—(1) (a) Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.”

[127] The Plaintiff has not instituted the claim in her personal capacity but in her representative capacity on behalf of the minor. The person whose “own fault” is referred to in Section 1 of the Act is the person who actually suffered the loss – i.e. in this particular case it is the minor child and not the Plaintiff.

[128] Therefore, unless I find negligence on the part of the minor child, I cannot order an apportionment of the minor child's claim in terms of Section 1 of the Act on the basis of the Plaintiff's negligence as pleaded by the Defendant.

[129] In **South British Insurance Co. Ltd. v Smit**, reference was made to the decision in **De Bruyn, N.O. v Minister van Vervoer**, in which it was held that

“a child of under seven years is in law incapable of contributory negligence and that, consequently, for the purposes of apportioning damages, no fault or ‘skuld’ can be attributed to such child”.¹³

[130] The correctness of that decision was later accepted in **Van Oudtshoorn v Northern Assurance Co. Ltd.**¹⁴

[131] Since the minor child was only two years old at the time of the incident, she was *doli et culpa* *incapax* and I cannot hold that she was negligent. Accordingly, there can be no apportionment in terms of Section 1 of the Act.

The Order

[132] In the premises, the Plaintiff succeeds on the merits of her claim against Defendant and the following order is issued:

(a) The Defendant shall pay the Plaintiff’s proven or agreed damages arising from the electrocution of her minor child, A[...] M[...] T[...], on 6 June 2022.

(b) The Defendant shall pay the Plaintiff’s taxed costs of suit in respect of the separated proceedings on liability on a party and party basis on Scale C of the tariff of fees applicable to proceedings in the High Court.

APPELS AJ

ACTING JUDGE OF THE HIGH COURT

Heard: 29 July 2024 – 30 July 2024 and 23 August 2024

Delivered: 8 October 2024

APPEARANCES:

¹³ **South British Insurance Co. Ltd. v. Smit** 1962 (3) SA 826 (AD) *supra* at p. 836; **De Bruyn, N.O. v. Minister van Vervoer**, 1960 (3) S.A. 820 (O).

¹⁴ **Van Oudtshoorn v. Northern Assurance Co. Ltd.**, 1963 (2) S.A. 642 (A.D.) at p. 648H.

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