



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

CASE NO: 2865/2022

In the matter between:

B[...] M[...] obo

K[...] M[...]

First plaintiff

A[...] M[...]

Second plaintiff

S[...] M[...]

Third plaintiff

and

ESKOM HOLDINGS LIMITED

Defendant

JUDGMENT

RUSI J

[1] Section 25 of the Electricity Regulation Act 4 of 2006 (ERA) provides for the liability of a licensee for damage or injury caused by induction or electrolysis or in any other manner by means of electricity generated,

transmitted, or distributed by a licensee. In this regard, the section provides that such damage or injury is deemed to have been caused by the negligence of the licensee, unless there is credible evidence to the contrary.

[2] On 27 July 2019 in the morning, Ms B[...] M[...]’s children, [KM] who was then 11 months old, the second and third plaintiffs sustained burn wounds allegedly caused by electric shock. The incident took place at their home in Bucula locality, Ngqeleni, Eastern Cape. When the electrocution occurred, the second and third plaintiffs were preparing to shave their heads using electric hair clippers. At the time, the first plaintiff, [KM] had been holding onto the third plaintiff’s knees. Resulting from the incident, [KM], the second and third plaintiffs were admitted at St Barnabas and iSilimela Hospitals for medical treatment.

[3] It became common cause between the parties that the defendant is the licensee that section 25 of ERA envisages and that it supplied Bucula locality with electricity as from June 2019.

[4] Subsequent to the incident, Ms M[...] in personal and representative capacity instituted an action against the defendant for the injury sustained by [KM], the second and third plaintiffs. She holds the defendant liable for damages under several heads in the sum of R14 670 000.00 (fourteen million six hundred and seventy thousand rand), of which the amount of R750 000.00 is her personal claim for general damages.

The pleadings

[5] For reasons that will become clearer during the course of this judgment, it is necessary to reproduce the relevant portion of the plaintiff’s amended particulars of claim dated 03 June 2022. Apart from pleading the provisions of section 25 which I have quoted above as the basis of their claim, the plaintiffs further pleaded, in part, as follows:

‘1. . .

9. In this case there is no credible evidence that the damage or injury to the plaintiffs has not been caused by the defendant’s negligence.

9.1 On the 26th July 2019, after seeing the fallen poles, the community members gathered including the plaintiff, the Chief and ward councillor and the members of the defendant were telephonically called and advised about the fallen poles.

9.2 The members of the Defendant were further advised by the community members to ensure that the electricity line must not be energized until they come and fix the fallen lines.

9.3 The members of the defendant failed to come and attend to the electricity line, as a result of its failure, on the 27th July 2019 the plaintiffs were electrocuted by energized electricity lines.

[6] The plaintiffs rely on several grounds of the alleged negligence of the defendant, including that the defendant:

- (a) failed to ensure that its electricity wires did not pose a danger to the members of the public;
- (b) failed to protect homestead owners such as the plaintiffs and K[...] in this incident;
- (c) failed to provide precautionary measures to avoid injuries to members of the public, including plaintiffs and K[...];
- (d) failed to act with care and remove the source of danger to members of the public;
- (e) failed to avoid high voltage electricity from coming into contact with the second plaintiff, third plaintiff and K[...] when by exercising reasonable care it could have and should have done so; and
- (f) failed to warn or alert the members of the public about the danger posed by the electricity pole and uninsulated electricity wires.

[7] In its amended plea dated 31 July 2023, the defendant denied liability for the claim. Principally, it denied prior knowledge of the fallen poles and asserted that the said poles were the result of an act of vandalism. The material facts that the defendant pleaded are as follows:

- (a) The defendant can only remove a cause of danger when it has gained knowledge of its existence, during reports received from members of the public who report any identified damage seen on the defendant's infrastructure or during the performance of routine inspections on its infrastructure when such routine inspections are due;
- (b) At the time of the incidents that occurred on 26 and 27 July 2019, the defendant had not obtained such knowledge in that no report was made to it by members of the public from Bucula or anywhere; and the defendant's infrastructure installed at Bucula Location was not subject to inspection as no inspection was due on that infrastructure at the time.
- (c) The defendant does not plan for sabotage and relies solely on the members of the community affected by such activities to report them to the defendant to enable the defendant to set in motion its response to such activities in accordance with the prescribed timelines.
- (d) Sabotage is a criminal offence, and defendant has no duty to prevent and/or investigate sabotage activities as such duties fall within the mandate of the South African Police Service in terms of the Constitution Act 108 of 1996.
- (e) The defendant had no legal duty to prevent sabotage. The injuries suffered by the plaintiffs was caused by the sabotage activities committed by saboteurs against the defendant's infrastructure on 26 July 2019, which caused the transformer pole to collapse and the MV line to touch the LV line transmitting electricity to the plaintiffs' homestead on 27 July 2019, and not as a result of the defendant's action or omission as alleged by the plaintiffs.
- (f) When the electrocution incident was reported to the defendant on 27 July 2019, the defendant responded within the prescribed response timelines.

[8] It must be stated at this earliest stage that the plaintiff's amended particulars of claim are not a model of the eloquence and precision that Uniform Rule 18(4) requires by providing that: 'Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his or her claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.' This Rule requires

that a concise statement of the material facts (*facta probanda*) upon which the plaintiff relies for his/her claim must be pleaded. Facts relevant to prove the material facts (*facta probantia*) accordingly have no place in the pleadings. No objection was, however, raised by the defendant in terms of the relevant Rules of Court.

[9] The caution against laxity in the observance of the Rules can never be overstated. Be that as it may, despite the inelegant manner in which the plaintiffs' case has been pleaded, I am satisfied that the hearing of the matter proceeded on the issues as framed and based on the material facts pleaded by the parties. Therefore, no prejudice was occasioned to the defendant.

The trial

[10] At the hearing of the matter an application was made for the separation of the merits of the claim from quantum as envisaged in Uniform Rule 33(4). That application was accordingly granted.

The issues

[11] As regards the merits of the claim, the parties formulated the issues for this Court's determination as follows:

- (i) Whether the defendant is liable for the plaintiff's damages.
- (ii) Whether the member(s) of the community contacted the defendant on 26 July 2019 and reported a fallen electric pole in Bucula locality, Ngqeleni.
- (iii) Whether or not the plaintiff had a duty to inform defendant on 26 and 27 July 2019 about the aforesaid fallen poles.
- (iv) Whether, on 26 and 27 July 2019, as a result of the defendant failing to attend to the aforementioned fallen poles, [KM], the second and third plaintiffs were electrocuted and sustained bodily injuries as well as emotional shock and trauma, following the energization of medium voltage poles/lines by the defendant.

- (v) Whether there was negligence on the part of the defendant in failing to ensure that the fallen electricity pole/line was not energized so that any hazard to the plaintiffs or the public at large may be prevented.
- (vi) Whether the alleged negligence on the part of the defendant caused the bodily injury, emotional shock and trauma sustained by the plaintiffs, which, by the exercise of reasonable professional care and skill the defendant could and should have prevented.

[12] Notwithstanding the above formulation of the issues, during the hearing, the parties still ventilated the separate ground of negligence in the form of failure to warn the community of Bucula locality regarding the dangers of electricity by conducting safety education.

[13] For ease of comprehension, it bears mentioning that at the trial of this matter, the parties made common cause of the fact that the electric poles referred to in the pleadings fell not on 26 July 2019 but on 27 July 2019. On 26 July 2019, they had slanted. Hence, the poles shall henceforth be referred to as the 'slanted poles', 'poles' or 'transmission poles' as the context may require.

The incidence of the onus

[14] Once the plaintiffs prove the electricity related harm, the defendant's negligence is presumed in terms of section 25 of ERA. The corollary is that the defendant must present credible evidence establishing that the harm suffered by the plaintiffs was not caused by its negligence. Since the plaintiffs raise the separate factual issue that the slanted poles were reported to the defendant on 26 July 2019, as the parties alleging this fact, they bear the burden of proving on a balance of probabilities that the report was made.

[15] The plaintiffs were the first to adduce evidence. They called three lay witnesses, namely, Mr Siphiwe Siyalo, a member of the community of Bucula locality, Ms M[...] in her personal capacity and as the mother of the first plaintiff, and the third plaintiff, Mr S[...] M[...].

[16] The defendant adduced the evidence of seven witnesses, namely, Mr Alvir April; Ms Olga Saptoe, Mr Vuyani Mafani, Mr Mlandeli George, Ms Lauren Dean, Mr Simthembile Gqadushe and Mr Sibusiso Santy. These are all defendant's employees who, as their evidence will evince, undertook different roles in connection with this matter. In the interest of brevity, all the witnesses shall individually be referred to by their titles and last names.

[17] Other evidentiary matter relied upon during trial included documents discovered inter partes. Those documents, which were predominantly referred to during the trial of the matter, are the defendant's customer call logs, the reports in relation to the preliminary and final investigations that the defendant's employees undertook after the electrocution incident. The documents were admitted into evidence on the customary basis that there are what they purport to be without the admission of their correctness. A summary of the evidence all the witnesses called during the trial proceedings is adumbrated below.

The plaintiff's evidence

(a) Mr Siyalo

[18] Mr Siyalo's testimony may conveniently be summarized as follows: he is a member of the community of Bucula locality and is self-employed. During the hearing of this matter, it emerged that he is a builder. On 25 July 2019 his locality experienced power outage. In the morning of 26 July 2019, it came to his attention that there were two slanted poles not far from the home of the plaintiffs. This information came from a local scholar transporter. At the advent of this report the community, including Ms M[...], gathered near the scene of the slanted poles. On arrival, they saw the condition of the poles and understood that they presented a life hazard. The poles were close to falling to the ground.

[19] At the time this occurred, the community of Bucula locality had only had electricity for a month. The community members that had gathered at the scene of the slanted poles nominated him to make a telephone call to the defendant to report the fault. Although he was to use his mobile device to make the call, he was offered by one of the community members a Telkom SIM card which was recommended as being the most cost effective in voice call charges. He accordingly removed his own SIM card and inserted the Telkom one in his mobile phone, whereupon he made the phone call to the defendant.

[20] The person who answered the call at the defendant's offices requested him to provide the transformer number from the poles. He was also requested to provide the pole number in order for the defendant's officials to identify the precise locality of the fault. This came to pass and the defendant's official indicated that it would take less than a day to attend to the problem. He requested the defendant's employee to block the energy supply to the locality while the transmission poles were in the slanted position. He understood the undertaking to attend to the problem in no later than a day to mean that the defendant's officials would promptly arrive at Bucula to attend to the fault. He conveyed the report to the rest of the community members gathered at the scene, after which they all dispersed.

[21] By the end of the day on 26 July 2019, the defendant's officials had not arrived. On 27 July 2019 while he was going about his work in the locality, he heard that an accident had occurred at Ms M[...]’s home where young children were electrocuted. He left work and proceeded to Ms M[...]’s home where he remained until dusk. When he left Ms M[...]’s home, the defendant's employees had not arrived.

[22] Asked if the local chief and ward councillor were among the members of the community that had gathered at the scene of the slanted poles on 26 July

2019, Mr Siyalo testified that they were not. He denied the defendant's version that it is the local chief and ward councillor who were designated to report the slanted poles and not him. Mr Siyalo went further and testified that the defendant called a meeting with the community on 20 August 2019 and in that meeting, it rendered safety education concerning the use of electricity. An attendance register was compiled on which each community member present at the meeting provided their contact details. He provided his personal mobile phone number 0[...].

[23] Mr Siyalo testified during his cross-examination by Mr *Petersen*, counsel for the defendant, that when the community gathered at the scene of the slanted poles on 26 July 2019, he made observations that the poles appeared as though they had been damaged by someone. It was suggested to him by Mr *Petersen* that the poles were vandalized by unidentified community members.

[24] A considerable amount of time was spent by Mr *Petersen* in cross-examining Mr Siyalo regarding what he perceived as external and internal contradictions in his testimony. Those related to Mr Siyalo's testimony regarding the absence of the local chief and ward councillor at the scene of the slanted poles and the identity of the person who was assigned to phone the defendant, on the one hand; and on the other, the version to which the plaintiff committed in its pleadings and witness summaries of evidence contained in the parties' joint practice notes. In this regard, Mr *Petersen* confronted Mr Siyalo with the statement of his own summary of evidence, that of Ms M[...], and what the pleadings entail on those aspects.

[25] In the relevant portion of the parties' joint practice note outlining the summary of evidence of the plaintiffs' witnesses the drafter provided the following summary of Mr Siyalo's evidence:

‘This witness will testify to the effect that on 26 July 2019 at Bucula location, the community gathered to discuss the issue of electricity outage and electricity pole that had fallen at Bucula. He will testify that during the gathering, he personally made a phone call to the members of the defendant to come and inspect the pole that had fallen. He also requested members of the defendant to ensure that the electricity must not be restored until the members of the defendant had come to inspect the pole. . .’

[26] Ms M[...]’s summary of evidence regarding the gathering of the community members and the reporting of the slanted poles is encapsulated as follows:

‘. . . She will testify that the local community members decided to go report the issue to the local chief and during this time the members of the defendant were telephonically phoned by Mr Siyalo. Mr Siyalo was acting on the instructions of the community members.’

[27] Reference was made to another statement of Mr Siyalo’s summary of evidence which the plaintiffs’ legal representatives filed of record in which the following is recorded:

‘. . . On 26 July 2019 at Bucula location, some community members gathered after there was an information that an electricity in the area was not working due to an electricity pole that had fallen down. In this gathering where B[...] M[...] and our ward councillor Mr Sifici were among the people who attended, it was agreed that people from Eskom and the local Chief had to be phoned and advised of the situation. On the same day, 26 July 2019, during the gathering, I phoned people from Eskom, and I advised them that an electricity pole in Bucula has fallen down and the electricity is not working. . . We then went to report the incident to the local Chief as the person who rules over our community. . .’

[28] It was further suggested to Mr Siyalo that it was a fabrication that a call was made to the defendant on 26 July 2019 reporting the slanted poles. In this regard, it was put to him that the defendant does not have any record of his personal mobile number and the transformer number connected to a call made to it on 26 July 2019; and no call was logged for the fault in question.

[29] The defendant's version as put to Mr Siyalo was further, that, the only report that the defendant received was on the day electrocution incident. Its officials arrived at the plaintiff's homestead on 27 July 2019 and subsequently investigated the scene where the transmission poles had and the transformer broken.

[30] To this version, Mr Siyalo responded that he was unaware that the defendant would generate the record of the call and therefore he had no reason to fabricate his testimony. It was further postulated that since the transmission poles appeared to have been vandalized, and the defendant is not liable for the damages suffered by the plaintiffs arising out of their injury.

(b) Ms B[...] M[...]

[31] Ms M[...] largely confirmed the testimony of Mr Siyalo regarding the power outage that occurred in Bucula on 25 July 2019, and how it came about that, on 26 July 2019, the community gathered at the scene of the slanted poles.

[32] According to Ms M[...], when Mr Siyalo made the phone call to the defendant it was at the special request of the congregated community members. He stepped aside in order to make the call. The community members had emphasized during their discussions about the incident that a request should be made to the defendant not to restore the supply of electricity to their locality while the poles were in the slanted position lest that posed a danger to them. Mr Siyalo came back to report to the gathering that he had phoned the defendant, and its employees undertook to attend to the problem. The reason why they resolved to report the fault to the defendant was that they feared that the electricity might pose a danger to them.

[33] Ms M[...] went on to state that the electricity supply was restored around 18h00 on 26 July 2019. In the morning on 27 July 2019, Mr M[...] was preparing to shave his younger brother's head using electric hair clippers. He

had been sitting on a chair holding the hair clippers while his younger brother plugged them in the socket. When this happened, [KM] was holding Mr M[...] on his knees. She suddenly heard a sound and saw a flame coming from the socket. At that same time, [KM] and the second plaintiff had fallen on the floor. Mr M[...] was still seated on the chair still holding the hair clippers. All of them were electrocuted. They were subsequently conveyed to St Barnabas Hospital where they received medical treatment for burn wounds and later transferred to iSilimela Hospital further treatment.

[34] The contents of the defendant's final investigation report were put to Ms M[...] from which it appeared that she confirmed knowledge of the fact that the transmission poles were vandalized. Ms M[...] denied that she told the defendant's investigation committee that transmission poles were vandalized.

[35] Ms M[...] was extensively cross-examined by defendant's counsel on the following aspects: the fact that on her version, when her sons used the hair clippers on 27 July 2019, the community of Bucula, including herself, knew that there was danger entailed in the use of electricity. She explained, in response, that, the plaintiffs would not have known of the circumstances in which the available power supply would be unsafe to use. She further stated that since the defendant is the one who supplied electricity, it was the one with the in-depth knowledge of the technical mechanisms of the electricity. To quote her verbatim: *"one that would be expected to care for the electricity would be the one that knows about the electricity."*

[36] It was further suggested that she and Mr Siyalo colluded in fabricating their versions that the slanted poles were reported to the defendant on 26 July 2019 by Mr Siyalo. Counsel embarked on the same exercise as he did with Mr Siyalo, confronting Ms M[...] with the contents of the afore quoted excerpts of the parties' statements of witness summaries.

[37] Notwithstanding the self-explanatory content of the afore quoted portions of the witnesses' summaries of evidence, counsel postulated a number of hypotheses. Their effect was, in summary that, if Bucula's local leaders were among the community that had gathered at the scene of the slanted poles, they are the ones who would have reported the matter to the defendant. Therefore, so it was suggested, it is improbable that Mr Siyalo was the one who reported the matter to the defendant. This proposition was denied by Ms M[...] who maintained that the report about the slanted poles was made to the defendant on 26 July 2019 by Mr Siyalo.

[38] Other than this, the latter part of Ms M[...] cross-examination by counsel, related to the defendant's fault reporting call logs from the date of 27 July 2019 until July 2023. The proposition put to Ms M[...] in that regard was that these records bolster the contention that it could not have been Mr Siyalo who phoned the defendant but a person that the community designated to make such reports. That person, according to the defendant, appeared to be a certain Mr Lulamile Qaba. Mr *Petersen* acknowledged, however, that the calls identified as having consistently been made by Mr Qaba specifically related to meter box faults. To this, Ms M[...] responded that Mr Qaba was the person who made the very first call to the defendant concerning a fault in her meter box. For reasons unknown to her since then, the defendant registered Mr Qaba's contact numbers against her meter box number.

[39] To Ms M[...] it was further suggested that her young children were electrocuted after the electricity was restored on 26 July 2019 without the involvement of the defendant. Furthermore, that, it was expected of the plaintiffs to know that although the poles were in the slanted position, they still carried electric current and, therefore, it was unsafe to use the restored electric supply in those circumstances.

[40] Counsel later put to Ms M[...] that according to the defendant, a report that was made on 24 July 2019 at 11h20 relating to a jumper fault ‘in the same area’ (it was later indicated that the fault concerned was in the Masameni area) but unrelated to the slanted poles at the centre of these proceedings. Further, that, according to the defendant, the said Masameni fault was corrected by its employees on 26 July 2019, and the electricity supply in the Masameni area was restored around 18h25 on that same day.

[41] Mr *Petersen* had great difficulty indicating with certainty whether or not the Masameni fault was on the same line as the slanted poles. In his cross-examination of Ms M[...] on this aspect, he oscillated between the fact that the Masameni fault ‘was unrelated to the slanted poles’, on the one hand; and, on the other hand, the fact that ‘the Masameni fault and slanted poles were in the same line belonging to the defendant’. In the end, he generally put to the witness that ‘the Masameni fault which was reported to the defendant was in relation to a jumper in the same area’.

(c) Mr M[...]

[42] It was Mr M[...]’s evidence that there had been power outage in the Bucula locality on 25 July 2019. It was brought to his mother’s attention that two transmission poles located some distance from his home had fallen down. He did not directly see the fallen poles. The electricity supply was restored later on 26 July 2019. Mr M[...] who was 18 years at the time of the electrocution incident narrated that the incident took place when his younger brother who is the second plaintiff went to plug their hair clippers in the adaptor. He was holding the hair clippers. As his brother plugged the clippers in the adaptor, there was a loud bang and he, his younger brother and [KM] who had been holding his knees at the time fell on the floor. He lost consciousness and regained it in hospital. He sustained burn wounds on several areas of his body including his left hand from which his thumb was amputated.

[43] Mr *Petersen* pointed to the contradiction in the Mr M[...]’s evidence regarding the time at which he observed that the electricity supply had been restored. When cross-examined further regarding the time of restoration of the electricity supply, Mr M[...] testified that he only noticed the restoration on 27 July 2019 in the morning. If it was restored the night before, he did not see it as his room has no light bulb. This concluded the case for the plaintiffs. At the close of the plaintiff’s case the defendant adduced evidence of the above named seven witnesses. Below is the summary of their evidence.

The case for the defendant

(a) Ms Saptoe

[44] Ms Saptoe testified as the defendant’s East London call centre manager who has been in the defendant’s employ for 30 years. Her evidence pertained to the search process that she undertook at the request of the defendant’s legal representatives in tracing the alleged report of the slanted poles by Mr Siyalo on 26 July 2019. According to Ms Saptoe when a customer phones the call centre, apart from his/her names, he/she would be requested to provide the transformer or meter number, his/her contact numbers among other identifiers for the defendant’s record purposes. Once the customer’s details have been registered, he/she would be issued with a reference number for the phone call. After the customer provides the details of the fault, a call would be logged, and the complaint escalated to the technical department so that technicians may be despatched to the location of the fault. The defendant regards a faulty pole as one of the emergencies.

[45] It was Ms Saptoe’s evidence further that she used a multi-faceted system search to trace the disputed phone call of 26 July 2019. In the first facet, she used Ms Siyalo’s name and surname, without any other identifiers. There were no results for the call of 26 July 2019. On a different screen she used his

personal mobile number 0[...] without his names. The search in which Mr Siyalo's mobile number was used is not depicted on the documents before court. Ms Saptoe explained that failure to document this latter search was an oversight on her part. On another pane she used the case identification or reference number as provided to her by the defendant's legal representatives. That reference number relates to the undisputed call of 27 July 2019 which was made by Mr Qaba after the electrocution incident. This search too yielded no results for the phone call of 26 July 2019.

[46] Ms Saptoe went on to state that if Mr Siyalo made the phone call and provided the transformer number, a work order request would have been logged against the transformer number, and he would have received a reference number for the call. As the defendant's employees they would have been able to search the system against a cell phone number, his name and transformer number.

[47] I put questions to Ms Saptoe to elucidate certain aspects of her search, in particular, whether she used the transformer number to conduct the search. She testified that she did not since the defendant's legal representatives did not furnish her with the transformer number.

(b) Mr April

[48] Mr April testified as the defendant's middle manager in its East London offices. His oversight duties extend to Mthatha Zone which includes Bucula and Masameni localities. He holds a Bachelor's Degree in Engineering from the University of Stellenbosch and a Certificate of Competence from the Department of Labour. He was certified a competent person in terms of the General Machinery Regulations of the Occupational Health and Safety Act.¹ His duties include the corrective and protective maintenance of the defendant's infrastructure, such as correcting and preventing electric faults. Electric faults

¹ Act 85 of 1993.

include broken electric poles, jumpers and conductors which have made contact with the ground. These are treated as emergencies.

[49] Mr April diligently gave extensive technical evidence pertaining to the architecture of the electric infrastructure by means of which the defendant supplies electricity in the Mthatha zone, in particular, in Bucula and Masameni. He furthermore testified regarding the investigation meeting that was held with the community of Bucula on 07 August 2019 subsequent to the electrocution incident. The person interviewed in that meeting was Ms M[...] who was in the company of Mr Siyalo. Other members of the investigation committee present and interviewing Ms M[...] included Mr Santy. Mr Gqadushe was one of the defendant's witnesses. The interview took place in English. Since Ms M[...] is isiXhosa speaking, interpretation was provided to her by one of the committee members although he could not specify who that was.

[50] The aspects of Mr April's testimony which are material for the purposes of the present case may conveniently be summarized as follows: the defendant's electricity lines often traverse hundreds of kilometres. Several areas draw electricity supply from the same line. Bucula and Masameni localities are among the villages which are supplied by the same line. At the take-off of the electric supply, Masameni and Bucula share a single circuit breaker. The circuit breaker (breaker) in simple terms is a form of defence or protection which, when an electric fault occurs, operates as a buffer by tripping and switching the electric supply off for the affected line.

[51] When a jumper or conductor breaks and makes contact with the ground, the first line of defence or protection is the fuse which blows and cuts the electricity supply. If the particular line does not have a fuse, the breaker will constitute the only available protection. The breaker also serves as a modem which communicates data to the defendant's East London office regarding the

power failure. The receipt of such data would impel the immediate despatch of technicians to attend to the fault.

[52] When the fault takes the form of a broken electric pole without conductors making contact with the ground, the defendant depends on the consumers reporting it as there would be no other way of detecting the fault. It is expected of customers to report such faults.

[53] On 24 July 2019 a report was received by the defendant of a broken jumper in Masameni. When that jumper made contact with the ground, the breaker tripped. This resulted in the power outage in the affected villages including Bucula. Although the Masameni fault was reported on 24 July 2019, it was only corrected on 26 July 2019. It was Mr April's surmise in this regard, without presenting any work ticket records and call logs, that the expectation would have been that the technical personnel were despatched to first identify the nature and extent of the fault and thereafter make arrangements for its correction. The defendant's members attended to the fault and corrected it on 26 July 2019.

[54] According to Mr April, the electricity supply was restored to the affected villages including Bucula on 26 July 2019 at approximately 18h25. The defendant was never made aware of broken transmission poles in Bucula. Had that report been made, technicians would have been despatched to attend to the fault as a matter of urgency.

[55] Mr April's analysis of the cause of the electrocution was that at the same time that Ms M[...]s children plugged the hair clippers in the socket, the vandalized poles fell and the medium voltage jumper broke away from the transformer and made contact with the low voltage bundle conductor. This resulted in a surge of volts being transmitted to the Ms M[...]s homestead. When the contact between the said conductors occurred, the fuse took effect as

the line of defence. Had the fuse not operated as designed, the child who was holding the hair clippers might have died. The electrocution incident was ‘one in a million’ and unforeseeable in the circumstances.

[56] When a fault is telephonically reported, the reporter (customer) is issued with a reference number and there would be a record of the call. Since in the present case no reference number was issued, it is unlikely that the phone call was made to the defendant. Apart from this, Mr April testified that acts of vandalism against the defendant’s infrastructure were not uncommon in certain areas of the Mthatha zone. They are impelled by the community rivalry which is actuated by disgruntlement with the provision of electricity for certain villages and not others.

[57] Mr April went on to state that Mr Gqadushe is the one who visited the scene after the electrocution incident and whose observations formed part of the defendant’s preliminary investigation report. In the defendant’s final investigation report, it is recorded that Ms M[...] confirmed to the investigating committee that the broken poles in Bucula had been vandalized by unidentified community members and that the matter was subsequently investigated by the local chief and the South African Police Service (SAPS). The report goes on to suggest that Ms M[...] informed the committee that the chief and ward councillor were among the persons who had gathered at the scene of the slanted poles and whom the community members assigned to phone the defendant to report the fault.

[58] The outcomes of the final investigation are recorded in the report as follows: the transformer post was vandalized by members of the public. The medium voltage jumper made contact with the low voltage bundle conductor. Ms M[...]’s children were electrocuted. The white phase fuse was blown at the take-off and the whole village was without electricity supply.

[59] Mr April's evidence pertaining to the investigation report was challenged in cross-examination by Mr *Rili*, counsel for the plaintiff. Counsel suggested to Mr April that there was no evidence of appropriate interpretation of their interaction during the investigation for Ms M[...]’s benefit. In response, Mr April explained that the interpretation of the interaction was adequate and it appropriately encapsulated what was conveyed to them by Ms M[...] and *vice versa*. He could not recall who among the committee members performed the interpretation task.

[60] Asked whether there were any safety education meetings held with the Bucula community about dangers of electricity before their locality was energized, Mr April merely made a general statement that it is highly unlikely that the defendant would not provide such education. He had difficulty pointing to official records of such educational meetings. It became common cause that the defendant held a safety education meeting with the Bucula community after the electrocution incident. This was on 20 August 2019. In this regards, Mr April stated that this was pursuant to a routine recommendation that the investigation committee would make in such circumstances.

[61] Upon questions from the court, Mr April elucidated that the reason for the power outage in Bucula until 18h00 on 26 July 2019 was the Masameni jumper fault which occurred on 24 July 2019. When the defendant restored the electricity supply in Masameni, it was automatically restored in Bucula. There was no indication from the defendant's records that the Masameni jumper had been vandalized.

(c) *Mr George*

[62] Mr George is a supervisor at the defendant's call centre in East London. Ms Saptoe is his line manager. His duties entail the supervision of the call

centre agents. He utilises a performance tracking tool called ‘Total view’. The tool allows him access to the call centre agents’ daily performance record. Through the tool, he is in a position to view the daily attendance of call centre agents and perform an appraisal of their performance. The essence of Mr George’s testimony was regarding the system that the defendant uses to record and communicate data received from its customers relating to faults, as well as the search he performed for the disputed report of Mr Siyalo.

[63] Mr George explained that the defendant uses the ‘Kana’ and ‘Maximo’ systems. He distinguished between the defendant’s registered, unidentified and non-customers. In this regard it was his evidence that the two data systems make provision for the recording and generation of information received from each of these types of customers. The information required from an unidentified customer entails their personal details and phone numbers. He explained the entries that appeared on the record of the call centre search for the period spanning 01 July 2019 to 31 August 2019. The search was conducted as being that of an unidentified customer. It was performed using the personal mobile number he was provided with. He had no details of the owner of the mobile number. It is common cause that that personal mobile number belongs to Mr Siyalo. There were no results found for the phone call that was made on 26 July 2019 using that mobile number.

[64] Among the search results is the undisputed report that was made on 27 July 2019 in relation to the electrocution incident. The information given to the call centre agent on 27 July 2019 was pole number ‘KPSF026/4’, the metre number and cell phone number. The description of the incident encapsulates what is now common cause regarding the fallen poles after the electrocution incident.

(d) Mr Mafani

[65] Mr Mafani testified as the defendant's customer relations area manager. His evidence concerned the safety education that the defendant undertakes whenever it installs infrastructure in a given area. That education relates to the dangers of coming into contact with electric poles and low hanging and overhead electric cables, use of broken cables and appliances. Regarding the present case, Mr Mafani adduced evidence of the safety education meeting that was held at Bucula locality on 20 August 2019 after the electrocution incident. He conceded that he did not have in his possession evidence of any safety education which may have been held in Bucula before the electrocution incident.

(e) *Ms Dean*

[66] Ms Dean testified that she is the defendant's data officer. She is conversant with the Maximo system which is the defendant's asset management tool. She deals with all data received from the defendant's call centre. Ms Dean adduced evidence of the record of the data transmitted to her section by the call center for the purposes of dispatching technicians. She does not verify the correctness of the information received.

[67] In connection with the present case, the data received from the call centre related to the call log pertaining to pole number 'KPS026/4' for the period spanning 01 July 2019 to October 2020. She performed an extensive search using a coding tool referred to as 'Customer Structured Query Language.' In this regard, she extracted the information from the ticket table received from the customer call center. The ticket table commences on 15 July 2019.

[68] Ms Dean went on to explain that using 'KPSF026' as a filter, she prompted the Maximo system to perform a search for the period "greater than or equal to 01 to 07 July 2019". She obtained results for the period of 01 July 2019 to 08 July 2023. She further filtered the search across various fields using the

same KPSF026 number. Those fields were *'the standard label,' 'pole number,' 'work description,' 'transformer name' and 'fault.'* The number used as the filter did not have to be precise. When she searched in relation to *'fault,'* the number 'KPSF206' emerged.

[69] For the period of July 2019 to July 2020, she drew the first 3 work orders which were chronologically arranged in accordance to the date the on which the work order was made. In a separate column the date on which the customer phoned the defendant is recorded. The first work order was made on 15 July 2019, the second on 27 July 2019 and the third on 9 January 2020. She found two reports for pole number KPSF026, the one dated 15 July 2019 and the other dated 27 July 2019. These would be the dates on which the customer made the phone call to the defendant. Ms Dean further explained that she did not include other columns in the spreadsheet presented to court. There is no idea, then, of what those columns entailed. Ms Dean's evidence regarding the work order of 27 July 2019 mirrors the common cause evidence of the preceding witnesses of the defendant.

[70] The results of Ms Deans search appropriately summarized from the documents she referred this Court to are as follows:

- (a) On 15 July 2019, a report was made by an individual identified as 'Celiwe' with contact numbers 078 [. . .] 455. The 'raw description of her location' is KPSF026. The meter number concerned is 372 [. . .] 916.
- (b) On 27 July 2019, an electrocution incident was reported. The 'raw description of the location' of the reporter of incident is KPSF025. Two persons are recorded as having reported the incident, namely, Mr Maqubela and Mr Qaba. Mr Qaba's contact number is recorded as 073 [. . .] 3106. The meter number used is that of Ms M[...], namely, 372 [. . .]

322. Once again ‘KPSF026’ is recorded as the locator of the direction of the fault.

- (c) On 09 January 2020, a report was made by a person named ‘Zodidi’, with contact number 060 [. . .] 2510. The work ticket is for 10 January 2020. The complaint was about a faulty meter whose number 372 [. . .] 890. In this instance KPSF028 is used as the location finder. The ‘raw location description’ of the caller is KPSF026-128. For that particular call, the standard label is recorded as KPSF026. No standard label is provided for the first two searches.

[71] No explanation was proffered why ‘KPSF028’ would appear in the same search for ‘KPSF026’ within the period forming the subject of Ms Dean’s search whereas Ms Dean had given ‘KPSF026’ as the search prompt. Moreover, although Ms Dean also searched the field “*transformer*” among others, none of the search results include transformer details. There was no explanation for this in the light of the fact that when Ms Dean testified, the evidence before court, albeit disputed, was that when Mr Siyalo made the call on 26 July 2019 he provided the call centre agent with the transformer number.

[72] Ms Dean did not, like Mr George, indicate whether or not the customers listed in the data she received from the call centre are the defendant’s registered or unidentified customers. She did not explain how Mr George’s distinction would have impacted her search which covered a wide range of search fields.

(f) *Mr Gqadushe*

[73] Mr Gqadushe testified that he is the defendant’s senior controller. In 2019 he was the defendant’s principal technical officer whose functions entailed attending to complaints and electric faults. While on standby duty on 27 July 2019, he was alerted to an incident of a transmission pole that had fallen down in Bucula and that children had been electrocuted. The alert came from the

defendant's despatching unit. He proceeded to the scene, and his first stop was at the take-off of the line which supplies Bucula with electricity where he performed a preliminary inspection. He observed a blown fuse. At the time of this observation, there were members of the community nearby. He enquired from them about the location of the incident and the fallen poles. They directed him to Bucula locality and informed him that the poles in question had been cut by protesting community members. These community members refused to divulge the identity of the person or persons who vandalized the poles.

[74] On arrival at the scene of the fallen poles, he observed that one of the poles was cut at approximately half a meter above the ground. The low voltage jumper broke and made contact with the medium voltage conductor. This resulted in the pole falling, hence the transformer broke. Using his mobile phone he took photographs of the fallen poles depicting the cut which he said appeared to be by means of a hack saw or chain saw. From there he proceeded to Ms M[...]’s home where he found members of the public gathered. Ms M[...] was not present, she only arrived a short while later. He took photographs of the room where the electrocution occurred. Nothing turns on this latter photograph as it common cause that the incident occurred in that room.

[75] Upon meeting Ms M[...], he informed her that her children were electrocuted because someone vandalized the transformer pole. Mr Gqadushe confirmed that the information he gathered when he responded to the electrocution report was subsequently recorded in the defendant's preliminary investigation report. The date of the investigation is 30 July 2019. The report was reviewed on 20 March 2020. It records that the incident occurred due to vandalism. The vandalized infrastructure is described as ‘transformer pole number KPSF026-48.’

[76] At the subsequent investigation meeting held on 07 August 2019 where Mr Santy, Mr April, and Mr Makhondza, the defendant's crime investigator,

were present, he is the one who gave testimony regarding the vandalization of the Bucula transmission poles. Mr Gqadushe took this Court through photographs of the Bucula poles and transformer in its broken state subsequent to the electrocution incident. Notably, the photograph of the pole in its broken state does not depict where the pole would have been cut. Mr Gqadushe confirmed this fact. Asked in cross-examination about the photographs of the fallen poles depicting the cut, Mr Gqadushe said he no longer has those photographs as he lost his mobile phone in which they were stored.

[77] Further according to Mr Gqadushe, Mr Makhondza, was part of a subsequent meeting held on 13 August 2019 with the police. He is the one who dealt with the matter concerning the vandalization of the Bucula transmission poles. Mr Makhondza was not called to testify on behalf of the defendant.

(g) Mr Santy

[78] Mr Santy's evidence may conveniently be summarized as follows: in 2019 he was the defendant's senior supervisor in charge of the defendant's technicians. His functions entailed overseeing the technicians' performance and compliance with the defendant's rules. Although he visited the scene of the incident, he has no recollection of when that was. He was present at the investigation meeting of 07 August 2019 which culminated in the defendant's final investigation report. At that meeting, Ms M[...] was asked questions regarding the events of 26 and 27 July 2019. The report correctly reflects her responses and explanations. One of the reasons why they conduct these investigations is to ensure that they, as the defendant's employees, may learn from the investigations. Therefore, there would be no reason for them to record false information in their investigation reports.

[79] At the meeting of 07 August 2019, one of them as the defendant's officials interpreted what was said and written in English to isiXhosa for the

benefit of Ms M[...]. She confirmed the contents of what was read and translated to her. Similar to Mr April, Mr Santy could not recall who among them interpreted the interaction with Ms M[...] from English to isiXhosa and vice versa.

[80] According to Mr Santy, although information emerged from the investigation that the fallen poles in Bucula were vandalized, the defendant's employees did not report the alleged act of vandalism to the SAPS. Rather worryingly, Mr Santy testified that since the members of the Bucula locality had indicated that they were still to conduct further investigation and involve the SAPS, as the defendant's officials they did not consider it necessary to follow through with instituting a criminal investigation into the alleged vandalism. He conceded that that ought to have been done.

[81] Asked whether the defendant conducted any safety education in Bucula before that locality was energized in June 2019, Mr Santy explained that although he could not produce proof of that safety education, he was certain that it would have been conducted.

The parties' submissions

[82] On behalf of the plaintiff, Mr *Rili* submitted that two aspects, namely, the defendant's contention regarding sabotage; and whether the defendant had prior knowledge of the slanted poles were central to the determination that this Court should make against the probabilities.

[83] On the score of the alleged vandalism, counsel underscored the fact that none of those members of the public were called to testify regarding Mr Gqadushe's allegations of vandalism. According to counsel, this is compounded by the fact that none of the photographs which depict the fallen poles after the electrocution indubitably evince where the poles were cut. Further, that, Mr

Makhondza was not called to testify regarding a report as he may have compiled, pertaining to the defendant's own investigation of the vandalism.

[84] Mr *Rili* took the view that the defendant's failure to adduce direct evidence of the vandalism and to call Mr Makhondza as a witness, militate against the credibility of its version in support of its defence of vandalism.

[85] Dealing with the issue of the defendant's prior knowledge of the slanted poles, counsel submitted that the defendant's version collapses on its witnesses' testimony regarding the search they conducted for Mr Siyalo's phone call of 26 July 2019. In this regard, he placed emphasis on the fact that Ms Saptoe, Mr George and Ms Dean failed to conduct the search against the transformer number despite Ms Saptoes' evidence that Mr Siyalo's request would have been logged against the transformer. The defendant's employees' search, so the submission went, was ineffective in establishing whether or not Mr Siyalo called Eskom on the 26th of July 2019.

[86] Mr *Rili* submitted that the effectiveness of the search for Mr Siyalo's phone call of 26 July 2019 depended on two factors, namely, whether the Kana system did in fact log all the calls received on the 26th of July 2019; and whether the call centre did in fact transmit all such information to the Maximo system. Ms Deans evidence, said counsel, is wanting in regard to these factors. Counsel submitted that absent proof of these factors the search conducted by Ms Dean was similarly ineffective in disproving the version of Mr Siyalo. The consistent failure to search the Kana system using the transformer number by two separate witnesses, said Mr *Rili*, tilts the scale of probabilities in favour of the version of Mr Siyalo.

[87] On these bases, Mr *Rili* submitted that the defendant, being the onus bearing party, failed to adduce credible evidence to rebut its deemed negligence, as envisaged in section 25 of ERA.

[88] As regards the defendant's alleged failure to conduct safety education in Bucula, counsel submitted that the fact that no proof was presented of such education is dispositive of the defendant's negligence based on this ground. Hence, a finding ought to be made that the defendant reasonably foresaw that the members of the community who were uneducated in the use of electricity might suffer electricity related harm without safety education. A reasonable licensee in the position of the defendant would have taken steps to guard against the occurrence of 27th July 2019 by educating members of the community about the dangers of electricity before energising the area and the defendant failed to take such steps.

[89] Mr *Petersen* made the following principal submissions on behalf of the defendant: the plaintiffs were required to present credible and reliable evidence to show that Mr Siyalo did call the defendant on 26 July 2019. Further, that, notwithstanding this prior report to the defendant, the defendant failed to attend to the fault on the same day and/or any time before the poles fell on 27 July 2019. Counsel invited this Court to have regard to Mr April's evidence that when the medium voltage jumper came into contact with the low voltage line, the protection provided by the defendant's system took immediate effect within milliseconds of the contact. From these facts, a finding must be made that the incident that occurred at the plaintiffs' house on 27 July 2019 was not reasonably foreseeable.

[90] On the probabilities as they relate to whether the slanted poles were reported to the defendant on 26 July 2019, counsel submitted that the plaintiffs' version was not a consistent, credible and reliable one and that of the defendant was. He submitted that the plaintiff's version must therefore be rejected as improbable and therefore false.

[91] Mr *Petersen* criticised the plaintiff's version on the ground that it was contradictory both as set out in their amended particulars of claim, the parties'

witness summaries in the joint practice note and the witnesses' respective oral testimony. In this regard, he pointed out that in the particulars of claim, the plaintiffs alleged that the community members who gathered at the scene of the slanted poles included Ms M[...], the local chief and ward councillor, and the members of defendant were telephonically contacted and advised of the fallen poles. Whereas in court, both Mr Siyalo and Ms M[...] denied that the local chief and ward councillor were present on 26 July 2019 when the community gathered.

[92] Another contradiction, so counsel argued, was regarding whether Mr Siyalo was given the defendant's contact numbers and the Telkom SIM card as opposed to him having been handed a cell phone from which to glean the defendant's number. He took issue with the fact that Ms M[...] made no mention of the Telkom SIM card, and since she was also present at the scene of the slanted poles, she would have witnessed Mr Siyalo being handed a Telkom SIM card.

[93] Counsel further placed emphasis on the fact that during the investigation meeting of 07 August 2019, neither Ms M[...] nor Mr Siyalo specifically mentioned to the investigating team that the defendant was phoned regarding the slanted poles. Instead, as the report suggests, they mentioned that the chief and the ward councillor were nominated to phone the defendant and report the slanted poles.

[94] According to counsel, these contradictions are material and tend to undermine the credibility of the plaintiff's version. By contrast, said Mr *Petersen*, the defendant's witnesses gave credible and reliable evidence regarding these aspects, supported by the defendant's final investigation report. In particular, the integrity and reliability of Ms Dean's search on the Maximo system remains unassailable. On these grounds, counsel submitted that the probabilities favour an inference that Mr Siyalo did not call the defendant and

was not assigned by the community to make the call, but the local chief and councillor were assigned to but failed to do so.

[95] Regarding Mr Siyalo's failure to provide the name of the community member that gave him the Telkom SIM card, counsel submitted that this was indicative of a witness who tailored his evidence. In counsel's view, from Ms Saptoe's evidence it appeared that most of the phone calls made from Bucula, and other areas, evidenced that a '073' mobile number was used. For this reason, a finding must be made that the assertion that a Telkom SIM card was used to make the call to the defendant was a fabrication.

[96] As regards the contention that the defendant failed to educate the Bucula community about the dangers of using electricity, counsel submitted that although no evidence was adduced that prior to the electrocution incident of 27 July 2019, such education was conducted, on Mr Siyalo and Ms M[...]’s own showing, they knew that the slanted poles posed danger to them. Hence, as the community that had gathered at the scene of the slanted poles, they resolved to keep a distance from the poles and to report the fault to the defendant. This is the same aspect of safety education that Mr Santy said the defendant ordinarily conducts. Thus, the defendant's failure to educate on that aspect and on use of electricity inside the house is not the cause of the plaintiff's injury.

The legal principles

[97] The defendant's presumed negligence and its onus to produce credible evidence to establish that the harm that plaintiffs suffered was not caused by its negligence, is grounded upon proof by the plaintiffs that they did suffer the electricity related harm.

[98] As held in *Eskom Holdings Ltd v Hendricks*,² the effect of section 25 of ERA is that defendant bore the onus of proving on a balance of probabilities that

² *Eskom Holdings Ltd v Hendricks* 2005 (5) SA 503 (SCA), para 8.

it was not negligent or, if it was, that there was no causal link between the negligence and the injuries sustained by the plaintiff. This, however, does not entail the insulation of the plaintiff's evidence from the ordinary standards of assessment of evidence in civil proceedings.

[99] The hallmark of credible evidence is the convergence of plausibility, reliability, and coherence. In the context of civil proceedings, in order to be sufficient to support the factual findings to be made in a given case, evidence must be plausible, reliable, and coherent when measured against the preponderance of probabilities.³ The interplay between credibility and the probabilities, was articulated in *Snyman Bpk v Biddulph*,⁴ as follows:

‘[I]t is equally true that findings of credibility cannot be judged in isolation but require to be considered in the light of the proven facts and the probabilities of the matter under consideration. . . The proper test is not whether a witness is truthful or indeed reliable in all that he says, but whether on a balance of probabilities the essential features of the story which he tells are true.’

[100] Where, such as in the present case, there are two mutually destructive versions of the dispute, the approach to be followed in resolving the conflicting versions was articulated in *National Employers General Insurance Co Ltd v Jagers*⁵, as follows:

‘In a civil case the *onus* is obviously not as heavy as it is in a criminal case, but nevertheless where the *onus* rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's

³ *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie SA and Others* 2003 (1) SA 11 SCA at 14i-15d.

⁴ *Snyman Bpk v Biddulph* 2004 (5) SA 586 (SCA) at 589G and 592B.

⁵ 1984 (4) SA 437 (ECD), at 440 D-G; see also *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie SA and Others* 2003 (1) SA 11 SCA at 14i-15d.

allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If, however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

[101] The test for negligence as laid down in *Kruger v Coetzee*⁶ is 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.'

[102] Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, will always depend upon the particular circumstances of each case.⁷ In *Lucas and another v Umhlathuze Municipality and Another*,⁸ the Supreme Court of Appeal articulated the standard of negligence as follows:

'In terms of the law of delict, 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

⁶ *Kruger v Coetzee* 1966 (2) SA 428 (A) 430E-G.

⁷ *Kruger v Coetzee*, supra.

⁸ *Lucas & Another v Umhlathuze Municipality and Another* (785/2020) [2021] ZASCA 181 (17 December 2021) para 9;

municipality would have acted differently. A reasonable person would have acted differently if the cause of damage was reasonably foreseeable and preventable.’⁹

[103] In the discussion that follows, I deal with the issues that the parties called me upon to determine.

Discussion

[104] From the evidence led by both parties, the fact that the plaintiffs suffered electricity related harm is beyond dispute. The present enquiry turns on these narrow issues:

- (a) whether Mr Siyalo was assigned by the community on 26 July 2019 to report the slanted poles to the defendant, and indeed did so;
- (b) whether the defendant committed an omission by failing to attend to the fault, or as additionally alleged by the plaintiffs, by failing to educate the Bucula community of the dangers of using electricity; and
- (c) whether as the defendant contends, the plaintiff’s injury resulted from the vandalization of the poles which event would break the chain of causation.

[105] As the court observed in *E.M and Another v Eskom*,¹⁰ ‘[e]lectricity in itself is, although a useful commodity, dangerous. When it is installed, a peculiar duty to take precaution is imposed on the installers. . .’ The licensees are expected to maintain proper and stringent supervisory control and data acquisition mechanisms pertaining to the provision and inspection of their infrastructure. This entails a credible system of record keeping regarding the maintenance of their infrastructure, its engineering intricacy and the tracking of

⁹ Ibid, para 9; see also, *Eskom Holdings Ltd v Hendricks* (262/2004) [2005] ZASCA 46; [2005] 3 All SA 415 (SCA); 2005 (5) SA 503 (SCA) (27 May 2005), para 10.

¹⁰ *E.M and Another v Eskom Holdings Limited* (39072/2020) [2025] ZAGPPHC 285 (17 March 2025) (unreported), para 23.

faults, inter alia. Regard must be had to the fact that the consumers of electricity are ordinarily unable to access the technical evidence required to prove negligence in cases of electricity-related harm.

[106] It is for these reasons that where harm arises from the use of electricity, the licensee's negligence is, in terms of section 25 of ERA, presumed. Section 25 of ERA shifts the burden to the licensee (the defendant in this case,) to adduce credible evidence that the electricity-related harm was not caused by its negligence. This is to ensure that the plaintiffs are not defeated by the technical complexity entailed in the provision and distribution of electricity.

[107] Conversely, the vandalization of the defendant's infrastructure by third parties would break the chain of causation if it were established that it was not foreseeable; it was the sole cause of the plaintiffs' harm, it was not preventable and the defendant responded to it reasonably.

[108] To rebut the presumption in section 25 of ERA, the defendant must produce technically credible, logically coherent, and contemporaneously recorded and verifiable evidence showing that the harm was not caused by its negligence. Generalised assertions of compliance fall short of this threshold.

[109] In the discussion that follows, I deal first with the defendant's alleged liability as envisaged in section 25 of ERA. In so doing, first consider the vandalism contention.

The vandalism contention

[110] The plaintiffs distanced themselves from the allegations of vandalism. The defendant's evidence in this regard took the form of its investigation reports

which were admitted in evidence on the customary basis that they are what they purport to be. Thus, notwithstanding the parties' agreement that the investigation reports should form part of the evidence adduced before me, that agreement cannot be taken as an automatic certification of their reliability items of evidence.

[111] I did not understand the evidence adduced by the defendant's witness regarding the technical cause of the electrocution and the condition of the infrastructure to be expert opinions and no expert notices were filed as the Rules envisage. Their evidence will therefore be treated as factual testimony based on their personal observation and operational experience, and not as independent expert opinion. The importance of this observation relates to the weight that will ultimately be accorded to the said witnesses' conclusions.

[112] Mr Gqadushe is indeed the initial source of the vandalism allegation in as far as the defendant's preliminary investigation report indicates. The central point of contention between the parties in this regard became Ms M[...]’s denial of the fact that she also informed the defendant's investigation committee that the poles were vandalised. That being the case, in the context of its presumed negligence, in order to rebut the statutory presumption, the defendant is required to adduce credible evidence of vandalism as the only cause of the harm.

[113] In dealing with the contents of the defendant's investigation reports, the following factors are significant: Mr Gqadushe did not state when the poles were allegedly vandalized. The preliminary investigation report dated was based on the hearsay statements that according to Mr Gqadushe were made to him by unidentified community members that certain unidentified persons vandalized the poles. Although in cross-examination Mr Siyalo stated that when the community gathered at the scene of the slanted poles that the poles appeared to

have been damaged by someone, he was not asked about the specific features he observed from the poles on which he based his conclusion.

[114] It ought to be borne in mind that the defendant's final investigation was not an independent fact-finding exercise. The report was compiled on 07 August 2019, sometime after the electrocution incident, by the defendant's own witnesses in the present trial following their interview of Ms M[...]. It is not a contemporaneous report, and there is no independent verification of its contents.

[115] This is apart from the fact that Mr April and Mr Santy who were both present as the investigation committee members made a bald assertion that the interaction between them and the two interviewees, Ms M[...] and Mr Siyalo was adequately interpreted to their spoken language (isiXhosa). However, somewhat disturbingly, neither Mr April nor Mr Santy were able to state who among them undertook that interpretative exercise. In any event, Ms M[...] and Mr Siyalo denied that they told the investigation committee members that the poles were vandalized.

[116] Even though the final investigation report, together with Mr Gqadushe's evidence suggests that the defendant's crime investigating officer, Mr Makhondza was the one charged with the investigation of the alleged vandalism incident, and that he met the police on 13 August 2019, Mr Makhondza was not called as a witness to present the evidence of such investigation. Moreover, it was not explained how the vandalization was connected to the breaking of the jumper from the transformer to make contact with the low voltage conductor at the time it did. Mr Santy's evidence suggests that the defendant outsourced the investigation of the vandalism to the community of Bucula merely because they indicated during the investigation that they were still to hold further investigative meetings concerning the vandalism matter.

[117] Furthermore, although Mr Gqadushe was able to produce photographs of Ms M[...]’s house where the electrocution occurred, and the photograph of the fallen transformer after the electrocution, he was unable to produce evidence of photographs that depict the cut or cuts on the poles. His explanation that he lost his mobile phone in which he stored the photographs is confusing – the already mentioned photographs were taken by him on the same day of his visit to the scene after the electrocution incident.

[118] The preliminary and final investigation reports are lacking regarding the timing of the alleged vandalization in relation to the electrocution incident. Since they were admitted only as what they purport to be, and not for the correctness of their contents, their probative value depended on internal coherence and corroboration. The absence of photographs, contemporaneous notes, or testimony of Mr Makhondza as the investigator responsible for the vandalism assessment materially weakens the reliability of the reports. They do not constitute credible evidence capable of rebutting the statutory presumption under section 25.

[119] In the present case, the trial turned on the factual dispute regarding whether the slanted poles were reported to the defendant on 26 July 2019 and the defendant failed to attend to the report. In this regard, the plaintiffs are required to produce credible evidence that would establish that it is probable that the slanted poles were reported to the defendant on 26 July 2019. The defendant, on the other hand, must produce credible evidence to displace the plaintiff’s version on this aspect. It is to this issue that I now turn.

The disputed prior knowledge of the fault

[120] The defendant’s own evidence reveals that the practice of assigning intermediaries to report electric faults is commonplace. There does not appear to

be any controversy regarding the fact that there was a gathering of the members of the community at the scene of the slanted poles.

[121] What is disputed by the defendant is the fact that the local chief and ward councillor were not part of the gathering as the plaintiffs' witnesses have suggested. The defendant further contends that these are the persons which the community assigned to report the slanted poles. It bases this assertion on what appears from its final investigation report as information that was conveyed to its employees by Ms M[...] and Mr Siyalo. Hence, it refutes Mr Siyalo's version as a fabrication. I deal first with the contradictions that Mr *Petersen* pointed out from the version of the plaintiffs.

[122] The contradictions that defendant's counsel delineated must be considered in accordance with their nature, their extent and bearing on other parts of the witnesses' evidence. Contradictions *per se* do not lead to the rejection of a witness' evidence.¹¹ Musi J had this to say in his dissenting judgment in *Meiring v S*,¹² regarding contradictions:

‘[I]n considering the nature, number and impact of contradictions it must always be remembered that witnesses do not always make a blow-by-blow mental recording of an incident. In many instances witnesses do not even realise that they would be called upon to testify and be subjected to cross-examination about an incident. It is important when assessing the impact of a contradiction to weigh it up against the other evidence tendered in the particular case. Contradictions should not be evaluated without placing them in their proper context.

An all or nothing approach, i.e. two or more state or defence witnesses contradicted each other therefore the state's case or the defence's case should be rejected, or they corroborate each other therefore their evidence must be accepted, should not be adopted. One witness should not be crucified for the sins of another. It goes without saying that two witnesses may

¹¹ *S v Mkhohle* 1990 (1) SACR 95 (A) at 98f – g. Although the principle was laid down in a criminal matter, it applies in civil proceedings with equal force.

¹² *Meiring v S* (A29/2009) [2011] ZAFSHC 184 (10 November 2011), para 5-6.

see the same incident differently for different reasons, for example, their power of observation, retention concentration and narration.

When two or more witnesses contradict each other, it might be that the one witness did not pay proper attention to the incident or because he/she cannot remember exactly what happened whereas the other witness observed and recalls everything. Proper attention must be given to the reasons or probable reasons for the contradictions. An all or nothing approach like a compartmentalized approach is flawed, unhelpful and inimical to the holistic approach that ought to be followed.’

[123] I respectfully align myself with approach adopted by the learned judge. It was suggested that Mr Siyalo and Ms M[...]’ s viva voce evidence is diametrically at odds with the version they committed to in the pleadings and the parties’ summary of witness evidence outlined in the afore quoted excerpts. This relates to the presence of the local chief and the ward councillor at the scene of the slanted poles.

[124] Subject to what I say hereafter on this aspect, it bears emphasis that a joint practice note serves a specific purpose in the context of judicial case management. It serves to aid the expeditious disposal of litigation in the sense that the parties delineate in it the issues for the court’s determination, inter alia. Through the summaries of the evidence of witnesses, the judicial case management judge is able to gauge the duration of the trial and the issues raised by the parties’ pleadings. The parties, on the other hand, are better placed to identify and collect the necessary and relevant evidence for trial purposes.

[125] It is in the pleadings that the parties’ respective cases are made, and issues identified. Those pleadings pave the way for evidence to be adduced at trial. Although a joint practice note constitutes agreements reached by the parties in the pre-trial process, it cannot, as a primary function be taken as a means to later measure the consistency and credibility of a party’s version. This is not to say a party would be barred from challenging the witnesses’ evidence on the ground

of inconsistency where the deviation is material as there would then be external contradictions in the witness's testimony.

[126] Suffice it to state that in the present case, both from the summaries of evidence of Mr Siyalo and Ms M[...]; and the plaintiffs' amended particulars of claim, it is readily discernible that the local chief and the ward councillor were not among the persons that were gathered at the scene of the slanted poles, so is the fact that it is Mr Siyalo who made the call to the defendant.

[127] Against this background, it is difficult to comprehend what the defendant's counsel aimed to achieve by making reference to the joint practice note and the summaries of the evidence of Mr Siyalo and Ms M[...] as the plaintiffs' witnesses.

[128] It is so, however, as Mr *Petersen* pointed out, that from the defendant's investigation report, it appears that Mr Siyalo and Ms M[...] informed the investigation committee members that the local chief and ward councillor were assigned by the congregated community members to phone the defendant.

[129] I have already made a finding regarding the weakened probative value of the investigation report. On the score of who made the report to the defendant on 26 July 2019 regarding the slanted poles, regard must be had to the fact, as correctly pointed out by Mr *Petersen*, that, in the defendant's final investigation report, neither Ms M[...] nor Mr Siyalo stated whether or not the report was ultimately made to the defendant.

[130] Significantly, it does not appear, from that same report that the two interviewees were asked by the defendant's investigation committee members to confirm whether they had knowledge of the fact that the local chief or ward councillor ultimately reported the slanted poles to the defendant on 26 July 2019. If anything, this is a material lacuna in the investigation report, as

opposed to a contradiction, and it is inextricably linked to the identity of the person who ultimately made the court.

[131] Be that as it may, the material fact as pleaded by the plaintiffs on this aspect is that Mr Siyalo made the report to the defendant on 26 July 2019. To this the defendant pleaded the denial of prior knowledge of the fault. In his evidence, Mr Siyalo repeated this fact and stated, additionally, that when he called the defendant's 'offices' the call centre agent requested him to provide the transformer number of the faulty infrastructure.

[132] Even if there are inconsistencies in the version of the plaintiffs, they do not automatically render their evidence unreliable. Regard must still be had to other corroborative evidence, the objective probabilities and the defendant's ability to contradict their version with contemporaneous records.

[133] I readily accept that Mr Siyalo did not provide the Telkom SIM telephone number that he allegedly used in phoning the defendant on 26 July 2019, nor did the plaintiff call the community member who provided him with the SIM card. His explanation was that he had no reason to keep record of the Telkom number, nor did he know that the defendant was recording the calls. That being the case, his evidence regarding the fact that he was assigned by the community members to phone the defendant has been corroborated by Ms M[...]. It does not appear to me that the plaintiffs were expected to do more than they did in the circumstances of the present case, in establishing that on a balance of probabilities, the slanted poles were reported to the defendant.

[134] The defendant, on the other hand, is the party with the exclusive control over call logs and fault reporting records. Hence it should have been able to adduce credible evidence of those records. It is from those records that the report itself, whoever the caller was, will be recorded. Afterall, the defendant's own version is to the effect that any person is entitled to report a fault. Notably,

multiple employees of the defendant searched for the disputed report using various search methods. It was indicated by counsel for the defendant that the search for the disputed phone call was conducted during the hearing of this matter, some three years after the electrocution incident.

[135] The starting point on this score must logically be that considering Mr George's evidence regarding registered and unidentified customers, Mr Siyalo phoned the defendant as an unidentified customer. His evidence was that he provided the call centre agent with the transformer. I hold the view that the transformer number is a precise and unique identifier of the defendant's infrastructure. It must have been against this background that Ms Dean included "*transformer*" among her search fields using 'KPSF026' as the search filter. Furthermore, Ms Saptoe testified that the transformer number is one of the identifiers that the customer would be asked for when she/he reports a fault and it is one of the filters they would use to conduct the search for the call log. I interpose to mention that Ms Saptoe's evidence differs from the evidence of Mr George to the extent that she made no distinction between the various types of the defendant's customers.

[136] I made an observation earlier on that it was not explained, in the context of Ms Dean's evidence, what impact the distinction between a registered and unidentified customer would have had on her search for Ms Siyalo's call. It was not explained how the Kana and Maximo systems handle unidentified or unregistered customers. I may add that although Mr George further testified that he has access to all the call centre agents' daily performance track record using the performance tracking tool called 'Total View', no objective evidence of this fact was adduced, nor was any evidence adduced of the functionality and operational pattern of the call centre system on the date of the disputed call. The court only has the witness's say-so in this regard.

[137] I note that the ‘KPSF026’ number which was used in Ms Dean’s search differs from the ‘transformer pole’ number that is recorded in the defendant’s preliminary investigation report, namely, ‘KPSF026-48’. It bears mentioning that Ms Dean’s results using ‘KPSF026’ are muddled. From her search report, ‘KPSF026’ is described as the location finder. It is unsurprising that this number is linked to the two other unrelated faults, locations, and infrastructure, namely, faulty meters.

[138] There was, furthermore, no explanation why the transformer pole number recorded in the preliminary investigation report as ‘KPSF026-48’ was not used in conducting the search despite the fact that Ms Dean’s search was an extensive one covering a wide range of filters which included ‘*transformer name*’. Apart from this, no explanation was proffered why the infrastructure concerned in these proceedings was recorded in the defendant’s preliminary report as ‘KPSF026-48 and not ‘KPSF026/4’.

[139] Significantly, the Bucula community had recently been energized when the incident occurred. The slanted poles were visibly hazardous. It is inherently probable that community members would attempt to report the hazard. It is, furthermore, probable that a rural community member using a borrowed SIM card might not be captured on the defendant’s system. Hence, it was important the Ms Dean, Ms Saptoe and Mr George elucidate how the Kana and Maximo Systems would handle such a customer. With that said, the clearest from of an identifier, viz, the transformer number recorded in the preliminary investigation report, was not used in conducting the search by any of the defendant’s witnesses.

[140] I must point out that even though Mr Siyalo did not provide that transformer number during trial, this detail of the infrastructure concerned is

known to the defendant. Hence it is recorded in its preliminary investigation report. There is no reason why the transformer pole number thus recorded was not used to conduct the search for the disputed call.

[141] It is rather odd that Ms Saptoe and Mr George used Mr Siyalo's personal mobile number even though it was not the number he used to call the defendant, and despite Ms Saptoe's evidence that it was possible to conduct the search using the transformer number. It certainly must have been clear to the defendant's employees that the search using that cell phone number which, on the evidence of Mr Siyalo is unrelated to the report of 26 July 2019 would produce no results.

[142] It is indeed an ever-present possibility in fact finding proceedings that witnesses would tend to reconstruct the scene after the event. On the facts of the present matter, I am unable to make the finding that this is what the plaintiffs' witnesses did. It is, in any event, inherently improbable that the community would simply ignore the slanted pole despite their acknowledgement of the danger it posed to their lives. In the light of the lacunae in the version of the defendant as to the search of the report by Mr Siyalo, the absence of a logged call cannot be treated as being conclusive in disproving that a call was made.

[143] On the totality of the evidence, I make the finding that the plaintiffs have proven, on a balance of probabilities, that a report was made on 26 July 2019 to the defendant concerning the slanted poles. It ought to follow that the defendant had actual knowledge of the potentially dangerous condition of the slanted poles. This leads me to the element of foreseeability.

Foreseeability

[144] What is or is not reasonably foreseeable in any particular case depends on the facts. Foreseeability is fundamental in electricity distribution. Electricity is

inherently dangerous, and energizing compromised infrastructure creates a foreseeable risk of harm.

[145] The defendant is required to produce credible evidence showing that the harm was not caused by its negligence. In this regard, the defendant was required to adduce evidence that is reliable, technically coherent including contemporaneous records. The explanation given regarding why the fault occurred must be logically consistent with engineering principles and physical evidence.

[146] Rather surprisingly, even though Mr April testified regarding the report dated 24 July 2019 concerning a broken jumper in Masameni, which the defendant's employees corrected on 26 July 2019, none of the records and call logs produced at the trial of this matter make reference to this incident. Yet, the undocumented Masameni fault is not an insignificant aspect in the chronology of the events leading to the electrocution incident.

[147] Mr April's evidence was that the broken jumper in Masameni was the reason why Bucula was out of electricity supply from 25 to 26 July 2019. When the supply of electricity was restored in Masameni around 18h25 on 26 July 2019, it was automatically restored in Bucula as the two villages share the 30km power line. The defendant asserts that the harm that the plaintiffs suffered as a result of electrocution was not reasonably foreseeable. However, the slanted poles constituted a manifest hazard on the newly energized Bucula line. From the evidence of Mr Santy, the defendant's own policies classify compromised poles as emergencies requiring prompt response.

[148] The evidence concerning the Masameni jumper fault is disturbingly equivocal. The shifting positions adopted by defendant's counsel in cross-examining plaintiffs' witnesses regarding this aspect underscore the absence of a coherent factual foundation in the defendant's version. An

irresistible inference is that the defendant's unsupported assertions regarding the undocumented Masameni fault are a ruse calculated to obfuscate the true facts regarding the plaintiffs' report of the Bucula fault on 26 July 2019.

[149] I may add that Mr April had testified that the defendant has become aware of the rise in the incidence of vandalism in some of the Mthatha zone areas. Therefore, the defendant's contention that no inspection was due on the Bucula infrastructure does not assist it. A reasonable licensee must ensure that its inspection intervals are adequate to detect hazards inherent in newly installed infrastructure, particularly in rural areas where environmental and third-party risks are elevated. The defendant produced no evidence of the inspection schedule applicable to Bucula, nor of any risk-based assessment justifying the absence of inspection. In the absence of such evidence, the defendant has not shown that its inspection regime met the standard of reasonable care required to rebut the statutory presumption.

[150] The defendant's employees knew that the Masameni jumper fault caused the power outage in Bucula as the two villages share the power line. As a result, when the supply of electricity was restored in Masameni, the Bucula line was automatically energized on 26 July 2019. The defendant's employees reasonably foresaw that restoring electricity supply to compromised infrastructure creates a risk of harm.

Failure to take reasonable steps

[151] A reasonable licensee would have taken reasonable steps to prevent the plaintiffs' harm. The defendant failed to take such steps. The defendant did not attend to the hazard on 26 or 27 July 2019 before the electrocution occurred despite the undertaking to do so. The failure to de-energize the line or despatch technicians within a reasonable time constitutes a breach of the duty of care.

[152] For all foregoing reasons, I come to the conclusion that the defendant failed to adduce credible evidence to discharge the onus imposed on it by section 25 of ERA of proving, on a balance of probabilities, that the harm suffered by the plaintiffs was not due to its negligence.

[153] There was no agreement between the parties that if the defendant is found to have acted negligently then wrongfulness and causation would not need to be determined. The defendant specifically disputed that the injuries suffered by the plaintiffs were caused by any negligent conduct on its part. It behoves me to deal with these latter two elements of delictual liability.

Wrongfulness

[154] It is trite that negligent conduct in the form of an omission is not regarded as *prima facie* wrongful. Its wrongfulness depends on the existence of a legal duty to act in order prevent the harm. The imposition of this legal duty is a matter for judicial determination involving the criteria of public and legal policy consistent with constitutional norms. A negligent omission causing loss will only be regarded as wrongful, and therefore actionable, if public or legal policy considerations require that such omission, if negligent, should attract legal liability for the resultant damage.¹³

[155] Electricity is an inherently dangerous commodity which is operated by means of a highly technical system. The law places a duty on the licensees that ERA envisages, to ensure proper provision and safe use of electricity. The exclusive control over this risk-creating commodity rests with the licensee. The commodity's technical faults, whether internal or external are intrinsically known to the licensee. Therefore, engineering safety protocols are indispensable. There is invariably an imbalance in so far as the consumer's

¹³ *Hawekwa Youth Camp and Another v Byrne* 2010 (6) SA 83 SCA at para [22], *Roberts and Another v MEC, Department of Police, Roads and Transport, Free State Province* (1447/2017) [2019] ZAFSHC 3 (7 February 2019), paras 39 and 40.

understanding of the technical mechanisms of electricity. The right-thinking members of the community would denounce the defendant's neglect of the safety protocols applicable to the provision and distribution of electricity, and its failure to fulfil its legal duty of care despite its knowledge of the dangers inherent in the use of electricity.

[156] On the facts of the present case, I have no difficulty finding that the defendant had the legal duty to take reasonable steps to prevent the harm. It breached this legal duty; therefore, its negligent omissions were wrongful.

Causation

[157] The last element to consider is causation. The enquiry into causation is two pronged. In the first prong, the question is whether the negligent act or omission caused the harm giving rise to the claim (factual causation). The plaintiffs must prove that 'but for' the negligence of the defendant, they would not have suffered the harm. The second prong, which follows if the first question is answered in the affirmative, is whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether the harm is too remote (legal causation).¹⁴

[158] Put another way, the plaintiffs must show that the defendant's negligent failure to attend to the slanted poles was a factual and legal cause of the electrocution. The evidence establishes that the poles were slanted on the morning of 26 July 2019. Despite the report by Mr Siyalo, the fault was not

¹⁴ *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC) para 38.

attended to. The shared line was energized around 18h25 on the same day while its Bucula portion was compromised. When the poles fell on 27 July 2019, the medium voltage line and the low voltage lines made contact. The electrocution occurred at that point.

[159] From the explanation posited by Mr Santy, the fuse operated after the electrocution. Furthermore, it operated as protection to the transformer and not protection against electrocution. In these circumstances, the defendant's safety device cannot operate as an intervening act breaking the chain of causation. The defendant's failure to de-energize or attend to the hazard materially contributed to the chain of events leading to the electrocution. Moreover, the harm was a foreseeable consequence of the defendant re-energizing the compromised infrastructure in Bucula locality.

[160] Even if vandalism were established on the evidence, and it has not, the question would remain whether such conduct constitutes a *novus actus interveniens* breaking the chain of legal causation. To constitute a *novus actus*, the secondary act must not be reasonably foreseeable. If it is reasonably foreseeable that it may occur, at the time of the initial wrongful act, the secondary act cannot be considered as a *novus actus*.¹⁵ In the context of electricity distribution, the possibility of third-party interference with infrastructure is a known risk. A reasonable licensee is expected to anticipate and guard against the consequences of compromised equipment. Significantly, the energisation of a line in circumstances where poles were slanted or unstable remains a sufficiently direct and foreseeable cause of the electrocution. The alleged vandalism would therefore not constitute a *novus actus interveniens* even if proven.

Conclusion

¹⁵ *Van der Merwe v Road Accident Fund* (584/2023) [2025] ZASCA 28 (28 March 2025), para 25; *OK Bazaars (1929) Ltd v Standard Bank of South Africa Ltd*, para 33.

[161] I make the finding that the plaintiffs' witnesses to be credible and consistent on the material aspects of their evidence. Their accounts were internally coherent and aligned with the probabilities. By contrast, the defendant's witnesses gave evidence that is inconsistent with lacunae in the documentary evidence relied upon by the defendant. This is quite apart from the absence of Mr Makhondza whose evidence was crucial in relation to the vandalism allegation. All of this undermines the credibility of the defendant's evidence. The plaintiffs' versions ought to prevail where the two versions conflict.

[162] The result is that the defendant has failed to adduce credible evidence to rebut the presumption of its negligence. The defendant must accordingly be found liable of the plaintiffs' claim. I consider is necessary, for the sake of completeness, to deal with the defendant's alleged failure to conduct safety education as the separate ground of negligence relied upon by the plaintiffs.

Failure to conduct safety education

[163] In this regard I was called upon to determine whether the defendant's failure to conduct safety education before the electrocution incident would succeed as an independent ground of negligence.

[164] Central to this enquiry is the test as laid down in *Kruger v Coetzee*:¹⁶ whether the harm was reasonably foreseeable; a reasonable licensee would have taken steps to prevent it; the defendant failed to take those steps; and those steps would have prevented the harm. The plaintiffs bear the onus of proof in this regard in accordance with the ordinary common law principles. Section 25 of ERA finds no application as the statutory presumption does not impose on the licensee the duty to conduct safety education.

¹⁶ Supra, footnote 6.

[165] The plaintiffs pleaded that the defendant was negligent in failing to provide precautionary measures and warnings to the Bucula community, including safety education about the risks associated with electricity infrastructure. In defence, the defendant pleaded that the safety education would not have prevented the harm suffered.

Foreseeability

[166] As mentioned, electricity is inherently dangerous, and the defendant, as licensee, is required to anticipate that newly energized rural communities may lack technical knowledge about the risks posed by compromised infrastructure. The evidence establishes that Bucula locality had received electricity only a month prior to the electrocution incident. This was underscored by Ms M[...]’s assertion that “*one that would be expected to care for the electricity would be the one that knows about the electricity.*”

[167] On the facts, an inference could reasonably be drawn that the defendant foresaw that community members would not appreciate the danger posed by slanted poles or the implications of energizing compromised lines. Although the presumption of negligence in section 25 of ERA does not impose a statutory duty on licensees to conduct safety education, the question is therefore whether a common-law duty arises to do so.

[168] The defendant’s duty as the licensee extends beyond the technical maintenance of its infrastructure. It also includes the taking of reasonable measures to prevent electricity related harm. This is informed by the dangerous nature of electricity; the licensee’s exclusive knowledge of its technical risks; and the vulnerability of consumers lacking such knowledge. On its own showing, the defendant convened a safety-education meeting with the Bucula community on 20 August 2019. This demonstrates that it recognizes the import and necessity of such measures.

Breach of duty

[169] The evidence establishes that no safety education was provided to the Bucula community before the incident. The defendant's own witnesses confirmed that the first safety-education session occurred only after the electrocution. Given the community's lack of experience with electricity, and the defendant's knowledge of the risks posed by compromised infrastructure, a reasonable licensee would have implemented basic safety education measures upon energizing the area. In keeping with Mr Santy's evidence, these include warnings about the dangers of slanted or fallen poles; instructions not to use electricity when infrastructure appears compromised; information on how and when to report faults, inter alia. The defendant's omission constitutes a breach of the duty of care.

Wrongfulness

[170] The plaintiffs' allegation that the defendant was negligent in failing to provide safety education engages the wrongfulness inquiry applicable to omissions. The question is whether public or legal policy imposes a positive duty on the defendant to act. While the defendant exercises control over a dangerous resource, the evidence establishes that the community already appreciated the danger posed by the slanted poles. In these circumstances, the omission to provide additional education was not causally connected to the harm, and imposing a positive duty would not serve the normative purposes of the law of delict. The omission is therefore not wrongful. Therefore, failure to conduct safety education as a separate ground of negligence collapses at this point. The question that remains is that of costs.

Costs

[171] Mr *Rili* submitted that costs of two counsel are warranted in the present case when regard is had to the value of the claim and the length of the trial. Mr *Petersen* opposed this view arguing that the matter is uncomplicated and there was no need for the employment of two counsel. Mr *Petersen* further submitted the present matter warrants costs on scale A.

[172] The award of costs is a matter for the court's discretion which it exercises in accordance with what is fair between the parties. The test regarding costs consequent upon the employment of two counsel is whether the employment of two counsel was a wise and reasonable precaution on the part of the litigant.¹⁷ The factors relevant to that determination include the length of the hearing, the volume of evidence (oral or written) dealt with by counsel, the presence or absence of scientific or technical problems and their difficulty if they were present, the importance and complexity of questions of law and fact involved and the number of authorities quoted.¹⁸

[173] Although the present case does not involve complex issues of law, it engaged complex factual issues of a technical nature falling in the domain of engineering and data analysis. I have considered the value of the plaintiff's claim and the length of the hearing. It cannot be said that the plaintiff's employment of two counsel was extravagant or overcautious. Costs of two counsel are, therefore, warranted.

[174] The default position in terms of Rule 67A which regulates the scale of costs is that, in the absence of a contrary indication, counsel's costs will be recovered on scale A, unless the application of a higher scale is justified by careful reference to clearly identified features of the case that mark it out as unusually complex, important or valuable. Run-of-the-mill cases, which must be

¹⁷ *Burroughs Machines Ltd v Chennile Corporation of SA (Pty) Ltd* 1964 (1) SA 669 (W) 677F – 678A-B; *Broom v The Administrator Natal* 1966 (3) SA 505 (D) 529; Cf *De Klerk v Steven-Lee Properties* (297/12) [2013] ZASCA 54 (04 April 2013), at paragraph 21.

¹⁸ *Motaung v Mukubela and Another*, NNO 1975 (1) SA 618 (O) at 631B-C.

the vast majority of cases in the High Court, do not warrant an order on the B or C scales.¹⁹

[175] Although litigation relating to electricity related harm is commonplace in this Court, the present case, as I have already found, involved complex technical issues and is of a substantial value. That being the case, it does not warrant the highest scale of costs. Costs shall be taxable on scale B.

Order

[176] In the result, I make the following order:

1. The defendant is held 100 percent liable for the plaintiffs' damages resulting from the electrocution incident that occurred on 27 July 2019 at Bucula locality, Ngqeleni, Eastern Cape.
2. The defendant shall pay the plaintiffs' costs of suite. Such costs, which shall include costs of two counsel where so employed, shall be taxable on scale B referred to in Uniform Rule 67A.

L. RUSI

JUDGE OF THE HIGH COURT

Appearances:

For the applicant : *Adv. M Rili*

Adv. A Msindo

Instructed by : N. Mhlauli Attorneys Inc.

¹⁹ *Mashavha v Enaex Africa (Pty) Ltd* 2025 (1) SA 466 (GJ), para 16.

Mthatha

For the respondents : *Adv. F Petersen*

Instructed by : Lulama Prince Inc.
c/o Clayton Mkhululi Manxiwa & Co
Mthatha

Date heard : 28 & 29 February 2024; 22 -26 April 2024
23 September 2024; 26 November 2025

Date delivered : 08 September 2026