

**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable/Not reportable

Case number: 3967/2020

In the matter between:

T. S. M[...] obo S. B. M[...]

PLAINTIFF

And

ESKOM HOLDINGS LIMITED SOC

DEFENDANT

And

**LETSEMENG LOCAL MUNICIPALITY
PARTY**

THIRD

Coram: Loubser J

Heard: 22, 23, 25 August 2023 and 4 & 7 June 2024

Delivered: 5 September 2024

Summary: Action instituted on behalf of minor child electrocuted by powerline lying on the ground – whether defendant liable on the evidence and in terms of the provisions of section 25 of the Electricity Regulation Act 4 of 2006 as a licensee.

ORDER

1. Absolution from the instance is granted to the defendant with costs, including the fees of counsel on scale B.
2. Plaintiff to pay the costs of the third party, including the fees of counsel on

scale B.

JUDGMENT

LOUBSER J

[1] In this action the plaintiff is acting in her representative capacity as natural mother and guardian of her minor son. She is claiming damages from the defendant arising from injuries he sustained when he came into contact with an electrical powerline, which contact caused him to suffer electrical burns on his feet, arm and hand. The minor was nine years old at the time of the incident.

[2] The parties agreed to a separation of the merits and the quantum of the claim, and subsequently the trial proceeded in respect of the merits only. In the process the plaintiff presented the evidence of five witnesses, whereafter the plaintiff closed her case. An application for an order of absolution from the instance was then launched on behalf of the defendant, which application was eventually dismissed by the court. When the matter then came before the court again for further hearing, both the defendant and the third party merely closed their cases.

[3] Before I refer to the evidence that was presented by the plaintiff, it is apposite to deal first with the pleadings filed by the respective parties. In her particulars of claim, the plaintiff alleged that the incident occurred on 9 February 2020 at or near the vicinity of Rorichshoop Farm, Koffiefontein. Responding to a request by the defendant for further particulars for trial, the plaintiff stated that the Oppermansgronde Communal Property Association was the landowner of Rorichshoop Farm at the time of the incident. It was further stated in this response that the minor had stepped “on the electrical powerline” with both feet.

[4] In its plea the defendant denied that it operated or utilized the powerlines running across the farm, or that it were in charge of or responsible for the powerlines concerned. It specifically pleaded that the Letsemeng Local Municipality was the owner of the farm in question, and that the powerlines on the farm were therefore the sole responsibility of that municipality. Subsequently, the defendant served a third party notice on the municipality, stating that, should it be found that the defendant is not liable towards the

plaintiff (not being the owner or being in control of the powerlines on the farm), the defendant will seek no relief against the third party. However, should it be found that the defendant is liable towards the plaintiff, the defendant will claim relief from the third party on the basis that the third party was the registered owner of the farm and/or the powerlines and owed a duty of care to the minor. The relief claimed would then be a contribution based on the degree of negligence found on the part of the third party.

[5] In its plea filed in response to the third party notice, the municipality denied that it is the owner of the farm Rorichshoop and that it is the owner of or in control of the powerlines which run across the premises.

[6] Having regard to the allegations made by the parties in their respective pleadings, it is clear to this court that the ownership of the land where the incident occurred and the ownership of the powerlines on the land and the control thereof, had become a vital point of contention between the parties even before the trial proceedings had begun before this court.

[7] Significantly, in the pre-trial minute in terms of rule 37A, the parties have recorded in paragraph 8 thereof that there is no dispute regarding the duty to begin or the onus of proof. "In this regard, the parties record that the plaintiff bears the onus of proof and will start unless the defendant or third party has lodged a special plea or wishes to raise a point in *limine*", it is expressly stated in the minute. It speaks for itself that plaintiff's onus of proof included the onus to prove the defendant's ownership of the land and the powerlines concerned, or at least its control thereof.

[8] This brings me to the evidence that was presented by the plaintiff. The first witness called was Christelle Johnson. She testified that she was sent by a firm of attorneys where she was employed in Koffiefontein to take photographs of the place where the minor child was injured by the power cable. She was taken to the scene by a male person she met at the child's residence. It was on a Friday, the date of which she cannot recall. She took photographs, and handed in an album thereof as exhibit A. The photographs show powerline structures that appear to be dilapidated, with low hanging powerlines. The witness testified that she also saw a silver cable that was on the ground, but she did not photograph that cable. She made a note of the numbers appearing on the structures, but it was put to her in cross-examination that those numbers did not belong to the defendant.

[9] The next witness was T[...] M[...], the plaintiff. She confirmed that she is the

mother of the injured child, who was staying with her mother at Koffiefontein. She never went to the specific spot where her son got electrocuted, but she knows the area in general. Her mother lived in a location called Donkerhoek, and the farmland where the incident happened is on the other side of the tarred road.

[10] The plaintiff then called the minor child to the witness stand. He testified that on the day of the incident, he and his friends went to look for his sister in an area of the farmland that is about two kilometers from his home. There was a low hanging power cable, and when he ducked to pass underneath, he stepped on a cable that was on the ground and which he did not notice. He sustained burns on his feet and his arm. Soon thereafter an ambulance took him to Pelonomi Hospital.

[11] The child identified the area depicted in exhibit A as the place where the incident occurred. A part of a washing machine is visible on the photographs, and he told the court that he and his friends were playing with that part before he stepped on the cable. When he was in the hospital, people from Eskom came and told his grandmother that they should not take Eskom to court, but that they need to get a lawyer. The witness further testified that he does not know who the owner of the property is where he stepped on the cable, but the name of the farm is Rorichshoop. In cross-examination he confirmed that the photographs in exhibit A do not show any cable that is flat on the ground. His uncle also took photographs of the spot where he got electrocuted, he testified. However, his uncle lost the phone which he used to photograph the spot.

[12] The next witness was the grandmother of the child with whom he stayed at Donkerhoek, namely A[...] M[...]. She told the court that she frequently visited the area where the accident happened because she used to go there to collect wood. She saw low hanging powerlines and a cable on the ground over a period of more than twelve months. For this reason, she avoided that spot and rather took a different route. After the incident, a man and a woman from Eskom visited her at her house and told her not to take Eskom to court, but to find herself a lawyer. After the visit two men of Eskom came to see her and the child at the hospital. They told her the same thing, namely, not to take Eskom to court but to go and see a lawyer. She further testified that when she went to the area some time later, the poles of the powerlines and the powerlines itself were no longer there. She confirmed that the area is on the other side of the tar road from Donkerhoek.

[13] The last witness called by the plaintiff was Daniel Nhlapo. He is an uncle of the

child in question. He also testified that there were low hanging powerlines and one lying on the ground at a place on the farmland across the road. The farm is called Rorichshoop. He always only saw one cable lying on the ground in the area. It is him who took the first witness to the place to take photographs. It was during the same weekend that the child got injured. The photographs shown to him do not show any powerlines on the ground. He told the court that the photographs in exhibit A are not the same photographs taken by the first witness when he accompanied her. He also denied that there was a cable on the ground when he visited the scene together with the first witness. He himself also took photographs of the scene, but he does not have those photographs anymore. He does not know to whom that property belongs, he testified.

[14] With this, the case of the plaintiff was closed. The defendant then moved an application for an order of absolution from the instance. As mentioned earlier, this application was dismissed with costs. In dismissing the application, the court on the one hand acknowledged that there was no evidence suggesting that the electrical infrastructure at that place belonged to the defendant, or that the defendant carried the responsibility for the powerlines on the farmland. On the other hand, the court referred to the provisions of section 25 of the Electricity Regulation Act¹, which provides that in any civil proceedings against a licensee arising out of damage or injury caused by induction or electrolysis or in any manner by means of electricity generated, transmitted or distributed by a licensee, such damage or injury is deemed to have been caused by the negligence of the licensee, unless there is credible evidence to the contrary. In the present case, it was common cause that the defendant was a licensee in terms of the said Act.

[15] The court also took the view that in a situation where the defendant and the third party pointed to one another as being the party responsible for the plaintiff's damages, absolution should not be granted at the close of the plaintiff's case, because they could perhaps supplement the abovementioned shortcomings in the plaintiff's case when they state their cases. As we have seen, this came to nothing since both the defendant and the third party have closed their cases without further ado. The court is therefore only left with the evidence presented by the plaintiff, and nothing more.

[16] The position therefore remains unaltered that there is no evidence suggesting that the defendant owned the electrical infrastructure or carried the responsibility for the powerlines at the place where the accident occurred. As for the abovementioned section

¹ Act 4 of 2006

25, it must be accepted that Eskom is not the only licensee in the country in terms of the Act.² It therefore speaks for itself that more is required than a mere allegation that an entity is a licensee for Section 25 to find application. Certainly, it must also be proven that a licensee was the owner or provider of electricity at the place where the accident occurred, and that he had constructed the cable concerned or at least had carried the responsibility for the safety and the maintenance of the electrical infrastructure at that place.³ In the present matter, the plaintiff is not assisted by section 25 where any such evidence is lacking.

[17] It was contended on behalf of the plaintiff that there is circumstantial evidence that call for an answer from the defendant. The circumstantial evidence consists in the fact that Eskom had inspected the incident and had advised the plaintiff not to take them to court, but rather to consult a lawyer. This is indicative of the fact that Eskom had realized its liability in the incident but chose to remain silent to their own prejudice, it was submitted. I cannot agree. In my view, it is equally or more probable that Eskom had found that it is not liable at all by reason of the fact that the infrastructure did not belong to them and that they were not responsible for the safekeeping or maintenance of that infrastructure. On a balance of probabilities, that could have prompted Eskom to advise against taking them to court and rather to consult an attorney.

[18] As far as the exact spot of the incident is concerned, it is true that there is a measure of confusion in the evidence presented. What is equally true, however, is that there is sufficient evidence showing that the incident occurred on the farmland known as Rorichshoop farm more or less opposite the location of Donkerhoek in the municipal area of Koffiefontein. At the same time, there is no direct and convincing evidence that the electrical infrastructure in the area belonged to the defendant and that it carried the sole responsibility to maintain and safeguard that infrastructure in the course of the provision of electricity to that area.

[19] It follows that the claim of the plaintiff against the defendant cannot succeed. The final question is then whether the court should simply dismiss the plaintiff's claim with costs. I think not, for the following reasons:

[20] Firstly, the claim was instituted on behalf of a minor child who was only nine years old when the incident happened, and a court should always be mindful of the best interests of all children. If the claim is dismissed, the child would not have any further

² Lucas and Another v Umhlathuze Municipality 2021 JDR 3366 (SCA)

³ See in this respect L.E. Msomi v Eskom Holdings SOC Limited [2019] ZAKZPHC 82

remedy against the defendant generally, save to appeal against the dismissal. Secondly, the present claim cannot succeed because neither the plaintiff nor the defendant have put forward sufficient evidence to secure judgement in their favour. In such circumstances, absolution from the instance would be an appropriate order, for it would enable the plaintiff to re-instate action should additional evidence become available.

[21] As for costs, I am of the view that the defendant is entitled to an order of costs in its favour. As far as the costs of the third party is concerned, I am mindful of the fact that, having regard to the pleadings filed, it was never the case for the plaintiff that the farmland known as Rorichshoop was the property of the defendant. The Oppermansgronde Communal Property Association was the owner, the plaintiff alleged. However, in its plea, the defendant alleged that the third party was in fact the owner of the farm in question, and that the powerlines on the farm were therefore the sole responsibility of the third party. I am of the view that, as a consequence, it was not unreasonable for the defendant to have joined the Municipality as a third party. Therefore, the plaintiff should also be ordered to pay the costs of the third party.

[22] The following order is made:

1. Absolution from the instance is granted to the defendant with costs, including the fees of counsel on scale B.
2. Plaintiff to pay the costs of the third party, including the fees of counsel on scale B.

P.J. LOUBSER, J

For the plaintiff: Adv. H. E. De la Rey
Instructed by: Honey Attorneys, Bloemfontein

For the defendant: Adv. C. Snyman
Instructed by: Phatshoane Henney Attorneys, Bloemfontein

For the third party:

Adv. M. C. Louw

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