Editorial note: Certain information has been redacted from this judgment in compliance with the law.

**IN THE HIGH COURT OF SOUTH AFRICA**

**(EASTERN CAPE DIVISION, MAKHANDA)**

**NOT REPORTABLE**

**Case no. 1568/2018**

In the matter between:

**NONKOSI XABENDLINI on behalf of**

**Y X** **Plaintiff**

and

**ESKOM HOLDINGS LIMITED** **First defendant**

**KSD LOCAL MUNICIPALITY** **Second defendant**

---

**JUDGMENT**

---

**LAING J**

[1] This is a claim for damages brought on behalf of a minor, who sustained injuries after having been electrocuted by a live electrical powerline. The matter was presented for adjudication as a stated case, brought in terms of rule 33 of the Uniform Rules of Court.

[2] A brief outline of the parties' pleadings follows.

**Plaintiff's claim**

[3] The plaintiff alleges that her son, Y, had been playing in a tree when he touched a loose powerline that employees of either the first or second defendant had left dangling in the foliage. The incident occurred on 19 January 2017, at Ncambedlana, in the Mthatha district. Y had been seven years old at the time. Both the plaintiff and other members of the local community had previously alerted the employees to the danger posed by the powerline, but to no avail.

[4] It was the plaintiff’s case that section 25 of the Electricity Regulation Act 4 of 2006 (‘ERA’) imputed negligence to the first defendant. The plaintiff pleaded, too, that the second defendant had a duty to prevent injury to the child and the public in general. She listed several grounds upon which to assert that the defendants had been negligent, averring that they had, *inter alia*, failed to lead the powerline at a safe height above the ground and failed to display sufficient warning signs. Their negligence had resulted in injuries to Y, who had suffered burns to various parts of his body.

[5] The plaintiff claimed the sum of R 5,000,000 for estimated future medical expenses and general damages.

**First defendant’s defence**

[6] The first defendant pleaded that it was not the owner or supplier of the electrical infrastructure and equipment situated at Ncambedlana, where the incident happened. It was, consequently, not liable for the damages incurred.

[7] For the remainder of its plea, the first defendant admitted the provisions of section 25 of the ERA and the duty to lead its powerlines at a safe height above the ground but denied that its employees had been negligent. It put the plaintiff to the proof of her allegations.

**Second defendant’s defence**

[8] The second defendant pleaded that, on 19 February 2016, at Mthatha, it entered into a service level agreement (‘SLA’) with a service provider described as Deep Blue Sea Investments. It was the responsibility of the service provider to refurbish the

electrical infrastructure for certain areas within the district of Mthatha, including Ncambedlana.

[9] At the time of the incident, the infrastructure was under the control and supervision of the service provider. The second defendant pleaded that it was not liable for the damages incurred.

## Issues to be decided

[10] The question of liability was separated from that of quantum and an order to that effect was made at the commencement of trial. The parties, furthermore, agreed upon a written statement of facts, which was presented to the court as a special case for adjudication in terms of rule 33.

[11] The court, in terms of the statement of facts, is called upon to decide: (a) whether the first defendant is liable for the injuries caused to Y because of the negligent exposure of the powerline; and (b) whether the second defendant is so liable. The parties did not annex any documents to the statement.

[12] Before the court can decide the issues described above, it will be necessary to consider more closely the provisions of rule 33. It will also be necessary to determine whether the statement is adequate for the purposes contemplated by the parties.

## Rule 33

[13] The relevant provisions of rule 33 state that:

> ‘(1) The parties to any dispute may, after institution of proceedings, agree upon a written statement of facts in the form of a special case for the adjudication of the court.
>
> (2) (a) Such statement shall set forth the facts agreed upon, the questions of law in dispute between the parties and their contentions thereon. Such statement shall be divided into consecutively numbered paragraphs and there shall be annexed thereto copies of documents necessary to enable the court to decide upon such questions. It shall be signed by an advocate and an attorney on behalf of each party or, where a party sues or defends personally, by such party.
>
> (b) Such special case shall be set down for hearing in the manner provided for trials or opposed applications, whichever may be more convenient.
>
> (c) …
>
> (3) At the hearing thereof the court and the parties may refer to the whole of the contents of such documents and the court may draw any inference of fact or of law from the facts and documents as if proved at a trial.
>
> (4) …
>
> (5) When giving its decision upon any question in terms of this rule the court may give such judgment as may upon such decision be appropriate and may give any direction with regard to the hearing of any other issues in the proceeding which may be necessary for the final disposal thereof.
>
> (6) If the question in dispute is one of law and the parties are agreed upon the facts, the facts may be admitted and recorded at the trial and the court may give judgment without hearing any evidence.’

[14] A special case is a procedural mechanism that is designed to facilitate the expeditious disposal of litigation.[1] AC Cilliers (*et al*) comments as follows:

[1] DE van Loggerenberg, *Erasmus: Superior Court Practice* (Jutatstat e-publications, RS 7, 2018), at D1-434.

> 'When no questions of fact and only questions of law are in dispute between litigants, they may utilise the provisions of rule 33(1)-(3) by agreeing upon a written statement of facts in the form of a special case. No further pleadings are required.'[2]

[15] The learned writer goes on to remark that litigants are entitled to invoke the procedure as of right, provided that the entire dispute is adjudicated upon by the court hearing the special case.[3]

[16] The Constitutional Court dealt with the subject in *Mtokonya v Minister of Police*.[4] It is helpful to quote the relevant text in full:

> '…From rule 33(1) and (2)(a) it is clear that what is contemplated in a special case is that there must be a question of law that the parties require the court to decide on the agreed facts and in the light of their contentions which must be set forth in the agreed statement. Rule 33(2)(a) provides that the parties may annex to the statement "copies of documents necessary to enable the court to decide upon such questions." The reference to "such questions" in rule 33(2)(a) is a reference to "the questions of law in dispute between the parties" which one finds early in the provision. That, in turn, is a reference to the question or questions of law identified by the parties as the questions that they are asking the court to decide.
>
> …Rule 33(5) proceeds from this understanding when it says:
>
> > "When giving its decision upon any question in terms of this rule the court may give such judgment as may upon such decision be appropriate…"
>
> From rule 33(5) it is clear that the decision of the court is required to be "upon any question in terms of this rule". As I have said, the reference to the "question in terms of this rule" in rule 33(5)

[2] AC Cilliers (et al), *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (Juta, 5ed, 2009), at 1412.
[3] Op cit, at 1413.
[4] 2018 (5) SA 22 (CC).

> is a reference to the question or questions of law that the parties have submitted to the court for a decision. A court that is called upon to decide a special case under rule 33 is required to decide the question of law presented to it and has no right to travel outside the four corners of the agreed statement and decide a different question that it wishes the parties had submitted to it to decide, but did not, or that it may wish the parties had included as one of the questions of law they had submitted to it to decide, but did not.
>
> …There is a good reason for this. In terms of rule 33 parties to pending proceedings agree upon a certain set of facts in the light of what the question is that the court is called upon to decide and in the light of the particular contentions that both parties will pursue. So, if a court were to change the question to be decided from the one that the parties had agreed upon, there would be prejudice to one or both of the parties because, for the different questions, one or both may have wished to add certain facts to the case or withdraw their agreement to certain facts. It would, therefore, be fundamentally unfair to at least one of the parties, but, possibly, to both, if, in a special case, the court were to change the question to be decided. It would be both a serious misdirection and a gross irregularity for a court to do so. It is, therefore, important that the court should study the agreed statement carefully to identify the question of law that the parties are asking it to decide, so that it should not decide a different question from the question the parties asked it to decide.'[5]

[17] It is clear, from the above, that there are three requirements before a court can decide a stated case under rule 33: (a) the parties must have agreed upon a set of facts; (b) they must have agreed upon a set of questions of law to be decided; and (c) each must have advanced a set of arguments regarding such facts and questions of law. In the absence of any one of the requirements, the stated case is deficient and does not lend itself to expeditious disposal. The parties will be unable to rely upon the procedural mechanism provided.

**The special case presented**

[5] At paragraphs [14]- [16]. Emphasis has been omitted.

[18] Upon closer examination, the statement does not appear to assist to the degree originally intended. The relevant contents are set out below.

‘**AGREED FACTS**

1. On or about 19 January 2017, at or near Ncambedlana, Brown’s Farm, Mthatha, the plaintiff’s minor child was electrocuted by a live wire.

**DISPUTED FACTS**

2. The wire ran through a tree and was left loosely hanging by employees of either first and/or second defendant.

3. The plaintiff, who resides within close proximity of where the tree is situated, and other members of the public, had on numerous occasions complained to the employees of the first and/or second defendant about the danger which the wires running through the tree posed to members of the public, the employees of the first and/or second defendant failed, refused and/or neglected to take any precautionary measures to safeguard the members of the public, more particularly the minor child.

4. The plaintiff holds the first defendant liable in terms of section 25 of the Electricity Regulation Act 4 of 2006.

5. The plaintiff holds the second defendant liable in terms of the duty of care from being injured by electrical wires which are within its control and which are exposed.

6. The wires are under the control of the first and second defendant.

7. *None of the facts are expressly denied or admitted by the defendants.*'[6]

[19] The statement then proceeds, under the heading of 'Stated case', to list the two issues to be decided by the court. It also records the defences, indicating that the first defendant asserts that the electrical infrastructure is not its responsibility, while the second defendant asserts that the infrastructure was not under its control and supervision at the time, but rather under that of the service provider.

[20] The set of facts agreed upon by the parties is very small. Much is still disputed. Whether this is sufficient to decide the questions of law stipulated remains to be seen.

[21] Counsel for the first defendant submitted copies of its discovered documents. Amongst these was a letter from the National Energy Regulator of South Africa ('NERSA'), approving an application made by the second defendant to amend its electricity distribution licence. The application was for the Mandela Park, Joe Slovo, and Chris Hani, settlements. The 38 supply areas falling under the amended licence, as apparent from Schedule 1 to the letter, included Ncambedlana. A diagram accompanying the letter purported to indicate that the first defendant's electricity supply network did not extend as far as the location where the incident took place.

[22] At the time, neither counsel for the plaintiff nor the second respondent raised any objection to the submission of the documents in question. The difficulty facing the court, however, is that none of the facts in relation to the above have expressly been agreed upon. They do not form part of the statement. The first defendant would have been required, in the normal course of trial proceedings, to have led evidence regarding both the letter and the diagram. The court cannot rely on the contents thereof as admissible evidence without clear agreement to that effect having been recorded in the statement

[6] Sic. Emphasis added.

and having been presented as part of the stated case. To illustrate, further, the difficulty facing the court is that the incident took place on 19 January 2017. NERSA's approval was only given on 6 February 2018.[7] It is not apparent whether Ncambedlana fell under the second defendant's electricity distribution licence at the time of the incident or whether it was only added subsequently. Evidence would be necessary to clarify this aspect.

[23] Turning to the second defendant, counsel submitted a copy of the SLA concluded between the municipality and Deep Blue Sea Investments. Similarly, although neither counsel for the plaintiff nor the first defendant objected thereto, there was no express agreement about the nature and extent of the rights and duties that arose under the SLA. Upon closer inspection, the SLA merely records that the second defendant appointed the service provider for the refurbishment of certain electrical infrastructure and goes on to describe the service provider's primary obligation as follows:

> 'The Service Provider will in terms of the Specification on the Bid Document No 55/2015/16 for the refurbishment of Thornhill to Wellington feeder Hillcrest to Northcrest feeders and Spur, Hillcrest to Local and Hillcrest to Tech Feeder, Spurs associated equipment and Street Lights of R 12,560,761.22 including Vat and contingencies.'[8]

[24] The clause in question is so badly drafted as to be almost unintelligible. The specifications for the underlying bid are unknown, the work entailed for refurbishment is unknown, and, critically, whether the powerline that caused the injuries to Y was part of the 'feeder', equipment, or streetlights, as contemplated in terms of the clause in question, is simply unknown. Evidence is needed.

[7] The date appears at the foot of the letter, in manuscript.
[8] Sic.

[25] Counsel for the second respondent relied on the common law principle that a principal is not liable for the wrongs committed by an independent contractor or its employees. This was affirmed in *Chartaprops 16 (Pty) Ltd and another v Silberman*.[9]

[26] It is apparent from the authorities, however, that there are exceptions to this. In *Saayman v Visser*,[10] Navsa JA held that the employer may be held liable where he or she has been negligent in relation to the conduct of the independent contractor which caused the harm to a third party. Such liability was not vicarious; it arises where the employer has breached a duty owed to those injured.[11] The learned judge relied on *Langley Fox Building Partnership (Pty) Ltd v De Valence*,[12] where Goldstone AJA observed that the answer to the question whether a duty arises depends on all the facts.[13] Goldstone AJA went on to hold as follows:

> 'It follows from the aforegoing that the existence of a duty upon an employer of an independent contractor to take steps to prevent harm to members of the public will depend in each case upon the facts. It would be relevant to consider the nature of the danger; the context in which the danger may arise; the degree of expertise available to the employer and the independent contractor respectively; and the means available to the employer to avert the danger. This list is in no way intended to be comprehensive.'[14]

[27] Counsel for the second defendant in the present matter also referred to a full bench decision of this division in *Nelson Mandela Metropolitan Municipality v Gaai*.[15] In that matter, the court dealt with a situation where the respondent's child had drowned in a hole dug by a contractor appointed by the appellant for a construction project. The

[9] 2009 (1) SA 265 (SCA).
[10] 2008 (5) SA 312 (SCA).
[11] At paragraph [18].
[12] 1991 (1) SA 1 (A).
[13] At 9H.
[14] At 13A-C.
[15] [2019] JOL 45411 (ECG).

court held that the issue was whether the appellant was liable for the negligent omission of the contractor in failing to ensure that the excavated hole did not pose a danger. In that regard, the court applied the three step approach adopted in the *Langley Fox* matter to ask: (a) would a reasonable person have foreseen the risk of danger in consequence of the work that he or she employed the contractor to perform; (b) if so, then would a reasonable person have taken steps to guard against the danger; and (c) if so, then were such steps duly taken?[16] The court found that the appellant's appointment of the contractor, as an expert, was sufficient for it to have avoided liability. The respondent had not pleaded that the appellant had breached its duty it owed to the public by failing to carry out inspections of the site, which had not been under its control.[17]

[28] The above decision formed the basis of counsel's argument, in the present matter, that the second respondent's appointment of the service provider to carry out the dangerous work required meant that it could not be held liable for Y's injuries. The plaintiff had not pleaded that the second respondent had had a duty to inspect the electrical infrastructure in question.

[29] As attractive as the argument may be, there is no evidence to support it. The agreed set of facts is too small to permit the court to make such a finding. The stated case presented to the court for adjudication does not indicate that the exposed powerline formed part of the 'feeder', equipment, or streetlights, contemplated under the SLA. There is simply no evidence, in short, to demonstrate that the powerline was the service provider's responsibility.

**Relief and order**

[16] At paragraph [8].
[17] At paragraph [17].

[30] The stated case presented by the parties is, upon examination, inadequate for purposes of deciding the issues placed before the court. In *Minister of Police v Mboweni*,[18] Wallis JA held:

> '…It is clear therefore that a special case must set out agreed facts, not assumptions. The point was re-emphasised in *Bane and others v D'Ambrosi*,[19] where it was said that deciding such a case on assumptions as to the facts defeats the purpose of the rule, which is to enable a case to be determined without the necessity of hearing all, or at least a major part, of the evidence. A judge faced with a request to determine a special case where the facts are inadequately stated should decline the request.'[20]

[31] The set of facts agreed upon by the parties is entirely insufficient for the question of the first and second defendants' negligence to be answered. To attempt to do so would be to stray well beyond the borders of the stated case and to rely on assumptions that appear to have been made by counsel in their respective arguments. This cannot be done. As much as the statement prepared and submitted to the court was a genuine effort to curtail proceedings and to dispose of the matter expeditiously, it is, regrettably, not fit for purpose. The leading of evidence seems to be both necessary and inevitable.

[32] In the circumstances, the following order is made:

(a) subject to such further directions as may be given, the parties are directed to proceed to trial for the determination of liability, the question of quantum being held over for determination in due course; and

(b) there is no order as to costs.

---

[18] 2014 (6) SA 256.
[19] 2010 (2) SA 539 (SCA).
[20] *Mboweni*, at paragraph [8].

______________________________

**JGA LAING**

**JUDGE OF THE HIGH COURT**

APPEARANCE

| | |
|---|---|
| For the Plaintiff: | Adv Pitt |
| Instructed by: | Nolte Smit<br>51A Hill Street<br>Makhanda<br>6139 |
| For the First Defendant: | Adv Maduma |

Instructed by: Netteltons
118A High Street
Makhanda
6139

For the Second Defendant: Adv Conjwa

Instructed by: Yokwana Attorneys
10 New Street
Makhanda
6139

Date of hearing: 29 May 2023

Date of delivery of judgment: 29 August 2023