

ERASMUS DUBE

Versus

**ZIMBABWE ELECTRICITY TRANSMISSION
DISTRIBUTION COMPANY**

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 8 & 9 FEBRUARY & 26 APRIL 2018

Civil trial

L. Mudisi for the plaintiff
Advocate L. Nkomo, for the defendant

MAKONESE J: Where a defect or dangerous condition in the conductor or any appliance of a power company, causing injury to a person or persons, negligence does not *per se* give rise to liability as against the power company. Liability on the part of the power company turns on whether it knew, or by the exercise of reasonable diligence, should have known of the defect, in time to have avoided injury.

The standard test for determining negligence in regard to liability for delictual damages is whether *a diligent paterfamilias* in the position of the defendant would have foreseen the reasonable possibility of his conduct injuring another person or property and causing the patrimonial loss. Negligence arises where the reasonable person would have taken reasonable test to guard against the occurrence of injury, but fails to take such steps to prevent harm from occurring.

On the night of the 13th December 2015 there was a heavy storm in the Hozheri village of Gweru. During the overnight storm a bolt of lightning struck a wooden electricity pole carrying three electricity conductors, destroying the insulator pin and insulation porcelain on the cross-arm, causing one of the three conductors to dislodge from its position on the cross-arm, leaving it hanging two metres above the ground. The following morning, there was a slight drizzle, the plaintiff, who was 19 years old at the time was herding cattle. He was wearing a rain coat. The

plaintiff came into contact with a 100 volt electric conductor thereby “precipitating a short-circuit fault to earth” and was electrocuted. He suffered extensive burns as the electric current surged through his body, discharging into the ground. The plaintiff was taken to Mpilo Central Hospital in Bulawayo where he was hospitalized for three months. His left hand was amputated.

The plaintiff issued summons against the defendant, a power distribution company, claiming damages for the injuries sustained as a result of the electrocution. The amount claimed is broken down as follows:

- (a) \$60 000 for pain and suffering
- (b) \$160 000 for permanent disfigurement and loss of amenities
- (c) \$30 000 for future medical expenses. This third claim was however abandoned before the commencement of the trial.

The plaintiff based his claim on three particulars of negligence as set out in paragraph 5 of his declaration namely that:

- (a) defendant failed to take reasonable steps to fix a fault which had occurred knowing fully the danger associated with such fault, in that the live low lying cable was low lying for over a month before the electrocution.
- (b) defendant failed to take reasonable measures to disconnect electricity transmission after the fault had occurred so that the low lying cable would not carry electric current which ended up injuring the plaintiff.
- (c) defendant failed to take the necessary action in time and only took action after the plaintiff was injured, such delay was the cause of the plaintiff’s injuries.

The defendant entered appearance to defend the plaintiff’s claims and in its plea denied liability for the injuries suffered by the plaintiff as a result of the electrocution. The defendant averred that the electrocution was solely caused by the plaintiff who deliberately handled the live electricity conductor which was hanging two metres above the ground, a distance about the plaintiff’s height. The defendant further averred that the cause of the conductor hanging two

metres above the ground was a natural event, a lightning bolt, for which defendant was not responsible.

The issues for trial were set out in a joint pre-trial memorandum and agreed as follows:-

1. whether or not the plaintiff was injured due to the negligence or wrongfulness on the part of the defendant.
2. whether or not the plaintiff is entitled to the damages claimed against the defendant. If so whether plaintiff is entitled to the quantum claimed in the declaration or any lesser amount.
3. whether or not there was contributory negligence on the part of the plaintiff and if so the effect on the quantum of damages, if any.

Plaintiff's case

The plaintiff testified that on the 14th of December 2015, while he was herding cattle in the Hozheri Village the raincoat he was wearing got into contact with a live conductor that was lying about 50cm from the ground, resulting in a bolt of fire. When plaintiff saw the fire he was startled and panicked resulting in him getting into contact with the live electric conductor. The plaintiff was electrocuted and became unconscious, and when he woke up he was in a hospital bed at Mpilo Central Hospital. The plaintiff stated that there was no way he could have avoided getting into contact with the conductor since everything happened quickly and in a flash. The plaintiff sustained burns on his back, on the right leg and on the head, and behind the right ear. Plaintiff's left hand was amputated and he spent three months in hospital receiving treatment. In his evidence the plaintiff contended that the injuries arose as a result of the defendant's negligence in that it failed to take reasonable measures to fix an electrical fault which had occurred in its distribution system, knowing fully well the dangers associated with such a fault. The plaintiff contended that the defendant as the sole distributor of electricity in the national grid it should have exercised a high degree of maintenance and care of its assets. The plaintiff stated that he was claiming the sum of US\$60 000 for pain and suffering because he endured a lot of pain when his hand was being amputated and also for the wounds on his back, leg, head and right

ear. The plaintiff stated that he suffered a great deal of pain as the electric current surged through his body. The plaintiff further claimed the sum of \$160 000 for permanent disfigurement because the electrocution changed his whole life. He stated that his ambition was to become a soldier or policeman but his dream was shattered by the injuries he sustained. The plaintiff indicated that he was now limited in the things he could do as a result of the amputation of his left hand. The plaintiff claimed a further sum of US\$30 000 in respect of future medical expenses. The plaintiff did indicate the burn wounds he sustained to the court, and the court observed that indeed his left arm had been amputated from shoulder level.

It is noted that the plaintiff in giving oral evidence in court never adverted to or substantiated the particulars of negligence alleged against the defendant as pleaded in paragraph 5 of his declaration. No explanation was proffered for the departure from the pleaded particulars of negligence. Under cross-examination by defendant's counsel, the plaintiff alleged two particulars of negligence which were never pleaded, namely:-

- (1) Defendant was required to clear the grass and trees on the way – leave along the electricity line where plaintiff was electrocuted.
- (2) Defendant was supposed to note that there was a low-lying cable on its electricity network and fix the hazard that had been created.

Under cross examination by the defendant's counsel, the plaintiff was confronted with the defendant's version of the cause of electrocution and the plaintiff persistently denied that the electricity conductor which electrocuted him was hanging two metres above the ground and that he deliberately handled the live conductor thereby precipitating a short-circuit, fault to earth, hence the electrocution. The plaintiff persisted with his denial of the defendant's version even when confronted with photographs depicting the position of the conductor which electrocuted him and the condition of the ground on the way-leave along the electricity line. The plaintiff persisted with his version that the conductor which electrocuted him was only 50cm above the ground and was covered in grass. It was put to him that it was not possible for the electric conductor to have been covered by grass because this would have caused the circuit to trigger

automatically, in which event the conductor would not have been live at the time of electrocution. The plaintiff closed his case without calling any further witness. The plaintiff struck as a witness who was evasive and who could not accept basic factual scenarios presented by the evidence. An example of this is that the photographs where the electrocution occurred, which position was incidentally, pointed out to the defendant by the villagers, showed that the conductor was two metres above the ground. There was no grass or shrubs covering the conductor as shown by the photographs.

Defendant's case

The defendant called its first witness **Mitchel Chiungwe**. This witness testified that he was the lead artisan responsible for maintenance, control and operation of the defendant's electricity networks, which covers Senale sub-station, which feeds the Hozheri village area where the plaintiff was electrocuted. Mr Chiungwe's evidence was that on the afternoon of the 14th of December 2015 he received a telephone call from a late Member of Parliament Mr Chivamba who informed him that there had been an accident involving the electrocution of the plaintiff. Mr Chiungwe abandoned the repair work he was engaged in and drove to the sub-station which fed the Hozheri line. Upon arrival at the substation he observed that the Auto-Recloser Circuit Breaker had not tripped, meaning that the particular line was live. He manually tripped the circuit breaker to ensure that the point at which the accident was safe. He then drove to the scene of the electrocution and the exact spot was identified to him by villagers. The plaintiff had already been taken to hospital. At the scene of the accident, Mr Chiungwe made the following observations:-

1. There was an electric conductor that was hanging roughly two metres above ground.
2. He observed an insulator and insulator pin which were supposed to be sitting on the cross-arm of the electricity pole which had been damaged, causing the conductor to fall off the cross arm, leaving it hanging two metres from the ground.
3. The ground at the scene of the accident was wet and the villagers indicated that there had been a heavy storm the previous night.

4. The wooden pole which was carrying the conductors and the cross-arm was damaged from the top and there was no doubt that the damage had been caused by a lightning strike.
5. There was a dark patch on the conductor being the point of contact between the plaintiff and the conductor, and the ground beneath the point of contact had burnt grass indicating the point where the electricity was discharged into the ground during the electrocution.

The witness explained that the electricity network protection system had three components namely, the Auto Recloser Circuit Breaker, the current transformers, and the Relay. The system is designed to protect against fault current, current overload and phase faults. The Auto Recloser Breaker operates by tripping when conditions for a trip are achieved and recloses. The tripping and opening operation is so fast that it takes 0.2 to 0.5 seconds. If the conditions for a trip persist beyond the closing and opening operation, the circuit breaker trips permanently, to stop the current from flowing through that particular conductor. Mr Chiungwe further explained that the plaintiff created the conditions for a trip of the circuit breaker when he had direct contact with the conductor and his body created a direct contact between the conductor and the earth. The Auto-Recloser Circuit breaker protection system is designed in such a way that if the contact is temporary or intermittent, it trips and recloses on its own, hence the plaintiff was released and managed to get off the conductor when the circuit breaker opened in the course of that fast operation. The circuit breaker was closed after the plaintiff was released and fell to the ground, hence the conductor was live even after plaintiff's electrocution. Mr Chiungwe disputed the plaintiff's version of how he got electrocuted by pointing out the following factors;

- (1) A live conductor cannot be covered by grass and shrubs as such objects create the conditions for a trip and the line would have tripped upon the conductor getting in contact with the grass and shrubs.
- (2) The conductor which electrocuted the plaintiff is high voltage conductor carrying 11 000 volts. A raincoat coming into contact with such a conductor would have burnt on the plaintiff as the raincoat material is highly conductive.

- (3) The way-leave along the electricity line was cleared of grass and shrubs a few months prior to the electrocution and the photographs of the scene of the accident show that the conductor was hanging two metres above the ground and there were no shrubs or bushes covering the conductor.

Mr Chiungwe testified that the lightning strike which caused the conductor to fall off the cross-arm did not trigger a trip of the circuit breaker because lightning adds more voltage to the current carried in the conductor and the protection system is designed to absorb such over-voltages without causing a trip. According to the finding made by this witness the factual cause of the electrocution was the plaintiff's conduct in deliberately handling the conductor which was hanging two metres above the ground after the lightning had struck the wooden pole on which the conductor was sitting. This witness gave his evidence in a comfortable, consistent and logical manner. He was not shaken under cross-examination. His factual findings were not discredited or disproved at all under cross-examination.

The second witness for the defendant was **Engineer Martin Kanyepe**, who is the senior engineer responsible for the area where the incident occurred. He testified that his role was to carry out an investigation into the circumstances leading to the electrocution. He travelled to Hozheri village on 15th December 2015 to make observations at the scene and to interview witnesses. He was shown the scene of the incident by villagers and he took some photographs. He also visited the plaintiff at Mpilo Hospital and asked him what had happened. The plaintiff told Engineer Kanyepe that he had handled an electrical conductor and sustained burns on his hands, armpits and part of his buttocks. The witness corroborated Mitchel Chiungwe on how the network protection system operates. From his investigations Engineer Kanyepe concluded that there was a deliberate handling of the electrical conductor which resulted in the plaintiff being electrocuted. The witness gave his evidence well and was not contradicted in any material respects under-cross examination.

The applicable law

The test for negligence

The plaintiff maintained throughout the trial that the defendant was negligent in that it failed to take notice of the fact that a fault had occurred in its system. The plaintiff averred that the defendant was exclusively responsible for electricity transmission and distribution and as such where a fault occurred causing injury they should be held liable.

The standard test for determining negligence to ground liability for damages in delict was formulated by HOLMES JA in *Kruger v Coetzee* 1996 (2) SA 428 (A) at page 430E-F 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.”*

The test has often stated as the question; “Whether but for the negligent act or omission of the defendant the event giving rise to the harm in question would have occurred.”

See *Minister of Police v Skosana* 1997 (1) SA 31 (A).

In *Border Timbers v Zimbabwe Revenue Authority* 2009 (1) ZLR 131 (H) at 132C, MAKARAU (JP) (as she then was) held as follows:

“while the culpable conduct causing harm is not actionable unless it also causes wrongful, conduct that is not negligently or intentionally caused but that results in harm is equally not actionable unless there was a duty to prevent the occurrence of harm to the plaintiff.”

What is the approach to mutually destructive and irreconcilable versions?

There can be little doubt that the versions led by both parties are mutually destructive and cannot be reconciled. The version of how the electrocution occurred as narrated by the plaintiff cannot be reconciled with the defendant's version. The approach to be taken in such circumstances was discussed in *Stellenbosch Farmers' Winery Group Ltd & Anor v Martel et cie and Ors* 2003 (1) SA 11 (SCA), the court held that:-

“The technique generally employed by the courts in resolving factual disputes of this nature may conveniently be summarised as follows: To come to a conclusion on the disputed issues a court must make findings on:

- (a) the credibility of the various factual witnesses;*
- (b) their reliability; and*
- (c) the probabilities”*

As to (a) the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a verality of subsidiary factors, not necessarily in order of importance such as (i) the witness's candour and demeanour in the witness box, (ii) his bias, latent and blatant; (iii) internal contradictions in the evidence; (iv) external contradictions with was pleaded or put on his behalf, or with established fact or with his own extra-curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the caliber and cogency of his performance compared to that of other witnesses testifying about the same incident or events.

“As to (b) a witness's reliability will depend, apart from the factors mentioned under (a) (ii), (iii), (iv) and (v) above, on the opportunities e had to experience or observe the event in question and (ii) the quality integrity and independence of his recall thereof.

As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it.”

It is my view that the plaintiff's version of how the electrocution occurred is inherently implausible and not consistent with all the established facts. The defendant led evidence from qualified persons who indicated that where a live electricity conductor falls off from the cross-arm on the pole and hangs at 50cm above the ground where it is covered by grass and trees this will trigger a trip of the circuit breaker as they become the direct link between the live conductor and earth, causing short-circuit to earth. The plaintiff's account of how he got into contact with the live conductor is clearly not sustainable on the facts. In *Matambo v Mutsago* 1996 (1) ZLR 101 (S) at p 103E, the Supreme Court stated the approach in evaluating the evidence where a witness makes an assertion that is mechanically impossible McNALLY JA, had this to say:

“However charmingly, smoothly or impressively Mr Mutsago made these statements, the fact is that they are mechanically impossible. If a witness says he saw water flowing uphill unaided by a pump, you do not judge his veracity by reference to his demeanor. You apply the law of physics.”

The plaintiff in this matter did not adhere to the pleaded cause of action and departed from his declaration in material respects. No explanation was given why the oral evidence given under oath was substantially different to the cause of the electrocution stated in the declaration. The plaintiff failed to discharge the onus on him to prove his pleaded cause of action. The purpose of pleadings is to set out the basis of the claim. The particulars of negligence as pleaded in the declaration were responded to by the defendant in his plea. The issues for trial were set out on the basis of the pleaded cause of action. The matter then proceeded to trial. A party who makes a claim based on a particular cause of action may not abandon the pleaded cause of action during the course of the trial without seeking, and being granted a formal amendment.

Applying the law to the facts

The plaintiff essentially relied on the case of 1959 *Andrew v Appalachian Flier Power Company*, 192 VA 150 635.E.ZD 750 where the court held that:

“Under the res ipsa loquitur, proof that injury has resulted from contact with highly charged wire which is under exclusive operation and control of the defendant and is out of its proper place, raises prima facie presumption that defendant was negligent. Electric companies are held to high degree of care in construction and maintenance of dangerous appliances employed by them. Such high degree of care by those using public streets for transmission of electric power includes duty of making reasonable and proper inspection of their wires and appliances.”

The critical issue for determination is whether the plaintiff proved on a balance of probabilities, that a particular wrongful and negligent act on the part of the defendant was the factual cause of the electrocution suffered. It is evident that the plaintiff’s case suffers a still birth at the point where the plaintiff fails to adduce evidence to prove the pleaded cause of action. The plaintiff may not place reliance on the doctrine of *res ipsa loquitur* for the simple reason that his version on how the electrocution occurred is not believable and is not consistent with the established facts. The court’s finding is that the plaintiff must have deliberately or carelessly handled the live electrical conductor which was 2 metres above the ground. In that regard therefore, liability on the part of the defendant could not be established. The proper approach in establishing factual causation was set out by CORBETT CJ in *International Shipping Company (Pty) Ltd v Bentley* 1990 (1) SA 680 (A), as follows:-

“The enquiry as to factual causation is generally conducted by applying the so called “but – for” test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probability would have happened but for the wrongful conduct of the defendant.”

On the plaintiff’s version, it is clear that the plaintiff failed to establish any particular wrongful or negligent act on the part of the defendant. What is clear from the totality of the evidence is that the plaintiff must have suffered the electrocution when he deliberately came into contact with a live electrical conductor. In cases of delictual liability, a distinction must be drawn between actual and human phenomena. Responsibility and liability is not attached where natural events or natural disasters cause damage or injury. The lightning bolt that caused the conductor to hang two metres above the ground was an act “of God” for which the defendant cannot be held liable. The evidence from the defendant’s witnesses is that there was no report

made of a conductor hanging two metres above the ground before the accident involving the Plaintiff. The defendant's Auto-Recloser System was found to have been working. There is therefore no conduct attributed to the defendant's fault, which could be said to be the factual cause of the electrocution of the plaintiff.

The plaintiff was 19 years old at the time of the accident. By his own admission he already knew about the dangers of electricity. He voluntarily assumed risk when he handled or came into contact with the live electrical conductor. In the circumstances, it cannot be said that the defendant breached any duty owed to the plaintiff to prevent the plaintiff from deliberately handling a live wire and causing harm to himself.

Conclusion

I make the finding, that on the evidence led and in applying the relevant law to the facts, the plaintiff failed to discharge the onus on him to prove, on a balance of probabilities, the pleaded cause of action. The plaintiff failed to substantiate his claims and the defendant's version of how the electrocution occurred is more plausible than the plaintiff's version. The plaintiff gave an inherently impossible and implausible account of how he got into contact with the live electric conductor. The plaintiff failed to prove any particular of negligence against the defendant. The plaintiff's claims must therefore fail with costs.

In view of the finding that I have made on the liability of the defendant, it is not necessary to make a specific finding on the issue of the quantum of damages sought by the plaintiff in this matter. However, in keeping with the practice of this court, I shall proceed to do so, in the event that this decision is appealed against. It is my finding that the quantum of damages claimed by the plaintiff is way above the range of damages usually awarded by this court in cases of electrocution resulting in amputation. In *Chinembiri & Ors v Ncube* HH-55-2014, a case in which the defendant was being sued for damages, the six plaintiffs in that matter were awarded damages in the following ranges;

- (a) \$4 000 - \$6 000 for pain and suffering

(b) \$2 000 - \$10 000 for permanent disfigurement and loss of amenities

The plaintiff did not adduce any evidence from any expert on future medical expenses. There is no basis on which the court would be able to award such damages in the absence of any credible evidence as to the nature of future treatment envisaged. As a whole the plaintiff's claims were somewhat exaggerated and the figures were certainly plucked from the air.

In the result, I make the following order:-

1. The plaintiff's claims be and are hereby dismissed.
2. The plaintiff shall meet the defendant's costs of suit.

Mutendi, Mudisi & Shumba c/o Dube-Tachiona & Tsvangirai plaintiff's legal practitioners
Danziger & Partners c/o Danziger & Partners – Bulawayo, defendant's legal practitioners