THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 785/2020

In the matter between:

ARTHUR RYAN LUCAS	**FIRST APPELLANT**
ZELNA LUCAS	**SECOND APPELANT**

and

UMHLATHUZE MUNICIPALITY	**FIRST RESPONDENT**
OCEAN REST 3 BODY CORPORATE	**SECOND RESPONDENT**

Neutral citation: *Lucas & Another v Umhlathuze Municipality and Another* (Case no. 785/2020) [2021] ZASCA 181 (17 December 2021)

Coram: VAN DER MERWE, MOLEMELA, MAKGOKA and SCHIPPERS JJA and MOLEFE AJA

Heard: 12 November 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 12h00 on 17 December 2021.

Summary: Delict – negligence – foreseeability of harm – child fatally electrocuted when touching metal cage encasing electricity distribution kiosk – kiosk on private property administered by body corporate – lock affixed to cage by municipality – whether municipality liable – body corporate responsible for maintenance of common property – s 25 of the Electricity Regulation Act 4 of 2006 – incident not caused by negligence of municipality – appeal dismissed.

ORDER

On appeal from: Kwazulu-Natal Division of the High Court, Durban (Moodley J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Molefe AJA (Van der Merwe, Molemela, Makgoka and Schippers JJA concurring):

[1] This is an appeal against the judgment and order of the Kwazulu-Natal Division of the High Court, Durban (the high court), dismissing the appellants' delictual claim against the first respondent, Umhlathuze Municipality (the municipality). The appeal is with the leave of the high court.

[2] The facts which gave rise to the claim are these. On 29 June 2013, the appellants' six-year-old daughter was fatally electrocuted when she climbed onto a metal cage encasing an electrical distribution kiosk on the premises of a sectional title scheme (the scheme), which was under the management of the second respondent, the Oceans Rest 3 Body Corporate (the body corporate). As a result of the death of their daughter, the appellants claimed damages for emotional shock from the municipality and the body corporate, jointly and severally. They alleged that the municipality and the body corporate had negligently failed to ensure that the metal cage was properly maintained, and was not a danger to the residents, thus failing in their 'duty of care' to the public. Before the trial commenced, the appellants and the body corporate concluded a confidential

settlement agreement. As a result, the trial proceeded only against the municipality, and only in respect of the issue of liability.[1]

[3] It was common cause between the parties that the distribution kiosk was installed by the body corporate, and belonged to it. At the instance of the body corporate, the developer of the scheme had installed five electricity distribution kiosks on the common property, each of which serviced four sections within the scheme. Electrical wiring leading to and from the kiosk was laid underground at a depth of between 350mm and 500mm. The municipality installed prepaid meters in the kiosks which regulate payment but not the supply of electricity. The municipality supplies electricity to the body corporate from its mini substation located across the road from the scheme, and provides subterranean infrastructure to the boundary of the scheme, from which point the body corporate is responsible for reticulation of electricity to various sections within the scheme.

[4] Prior to 2008 and at the instance of the body corporate, metal cages were placed over the kiosks. These cages were constructed with metal legs approximately 30cm in length, which were designed to penetrate the ground and give the cage some stability. Neither the cage nor its legs were secured to the ground with any form of concrete. At some stage after the body corporate had installed the cages, employees of the municipality installed locks onto the cages to safeguard the infrastructure against vandalism and to prevent interference with the prepaid meters within the kiosks. Following the fatal electrocution, the municipality, through its employees, identified the cause of the incident as the electrification of the metal cage. The electrification occurred when one of legs of the cage made contact with the copper coil of an underground cable connected to the distribution kiosk. This took place when weight or pressure was placed on the cage, which had not been earthed.

[5] It was submitted on behalf of the appellants that by placing a lock on the cage and retaining its key, the municipality assumed a legal duty to ensure that the cage was safe.

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[1] Issues of liability and quantum were separated in terms of Rule 33(4) of the Uniform Rules of Court.

The high court rejected this contention, and concluded that the affixing of the locks and retention of the keys by the municipality could not be considered wrongful or contrary to the legal convictions of the community, and that no negligence could be ascribed to the municipality. The high court accordingly dismissed the appellants' claim.

[6] The key question in this appeal is whether the municipality, by virtue of the fact that it placed its lock on the metal cage encasing the electricity distribution kiosk belonging to the body corporate, assumed the duty to ensure the safety of the kiosk and metal cage. And if so, whether the municipality was negligent for failing to ensure the safety thereof.

[7] The appellants relied on s 25 of the Electricity Regulation Act 4 of 2006 (the Electricity Act), which provides:

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

[8] The municipality is a licensee as envisaged in the Electricity Act and it distributed electricity to the scheme. It accepted that s 25 placed an onus on it to show that the incident had not been caused by its negligence. In the result the separated issue for determination by the high court was whether there was credible evidence produced by the municipality to show that the injury was not caused by its negligence.

[9] I turn now to consider the appellants' contention that the municipality was negligent. 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 municipality would have acted differently. A

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

[10] The test for negligence remains as set out in *Kruger v Coetzee.*[2] Applying that test to the present case, the questions are whether (i) employees of the municipality should have foreseen the reasonable possibility of the metal cage causing injury or harm; (ii) persons in the position of those employees would have taken reasonable steps to guard against that harm; and (iii) those employees failed to take those steps. In the light of recent authorities, Midgley and Van der Walt made the following observation:

'When assessing negligence, the focus appears to have shifted from the foreseeability and preventability formulation of the test to the actual standard; conduct associated with a reasonable person. The *Kruger v Coetzee* test, or any modification thereof, has been relegated to a formula or guide that does not require strict adherence. It is merely a method for determining the reasonable person standard, which is why courts are free to assume foreseeability and focus on whether the defendant took the appropriate steps that were expected of him or her.'[3]

[11] The appellants submitted that a reasonable person in the position of the municipality, once it knew of the existence of the metal cage and acquired control of it by affixing a lock thereto, would have ensured that the cage, installed in close proximity to electrical cables and enclosing an electrical installation, was safe and remained so whilst it was under lock and key. Furthermore, the municipality should have foreseen that the cage was of an unsafe design, could therefore become electrified and could cause harm to any person who touched it. It was also submitted that the municipality was negligent because it failed to mitigate any risk of the cage becoming electrified by ensuring that it was earthed.

[12] The appellants did not plead that the municipality acquired control over the cage installed by the body corporate because it had affixed a lock to the cage. This Court in *Minister of Safety and Security v Slabbert* held as follows:

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[2] *Kruger v Coetzee*[2] 1966 (2) SA 428 (A) at 430E-F.
[3] J R Midgley and J C Van der Walt in 15 *Lawsa* 3 ed para 155.

'A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.'[4]

This is subject to the following caveat. This Court has inherent jurisdiction to decide a matter even where it has not been pleaded, provided that such matter was ventilated before it. In *Van Mentz v Provident Assurance Corporation of Africa Ltd*, this Court said that '. . . where it is clear that the appellate tribunal has all the materials before it on which to form an opinion upon the real issue emerging during the course of the trial it will be proper to treat the issues as enlarged, where this can be done without prejudice to the party against whom the enlargement is to be used'.[5]

[13] There was no prejudice to the municipality because the question of whether the municipality was negligent by placing a lock on the cage was extensively explored by its counsel with Mr Gregersen, an electrical engineer called as a witness by the appellants. Further, Mr Deetlefs, a senior electrician in the employ of the municipality, had testified that the lock on the kiosk could have been broken as happened in many other cases. The question thus remains whether a reasonable person in the position of the municipality would have foreseen the possibility of the metal cage being electrified. As stated, this was the cause of the fatal accident – one of the legs of the cage had made contact with the copper coil of an underground cable connected to the distribution kiosk, because the cage was not earthed. It must be borne in mind that the cage was not installed by the municipality, nor did it approve its design or installation. As already mentioned, it was designed and installed by the developer of the scheme, at the body corporate's instance. All the municipality did was to take steps to safeguard its infrastructure within the kiosk (the prepaid meters) against vandalism and prevent interference with meters it had installed in the kiosk.

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[4] *Minister of Safety and Security v Slabbert* [2009] ZASCA 163; [2010] 2 All SA 474 (SCA) para 11.
[5] *Van Mentz v Provident Assurance Corporation of Africa Ltd* 1961 SA 115 (A) at 122; See also *Shill v Milner* 1937 AD 101 at 105. See also *Colleen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 433 and *Robinson v Randfontein Estates, G.M. Co Ltd*. 1925 A.D. 173 at 198.

[14] In terms of section 3(1) of the Sectional Titles Schemes Management Act 8 of 2011 (the Sectional Titles Act), the function of the body corporate is:

'*(l)* to maintain all the common property and to keep it in a state of good and serviceable repair;

. . .

(p) to ensure compliance with any law relating to the common property or to any improvement of land comprised in the common property;

(q) to maintain any plant, machinery, fixtures and fittings used in connection with the common property and sections and to keep them in a state of good and serviceable repair;

(r) subject to the rights of the local municipality concerned, to maintain and repair including renewal where reasonably necessary, pipes, wires, cables and ducts existing on the land and capable of being used in connection with the enjoyment of more than one section or of the common property or in favour of one section over the common property; [and]

. . . .

(t) in general, to control, manage and administer the common property for the benefit of all owners.'

[15] The Sectional Titles Act accordingly imposes specific and extensive duties on a body corporate in respect of the maintenance of the common property. These duties under the Act do not extend to a local municipality. Furthermore, in terms of s 39 of the Electricity Supply By-laws of the City of Umhlathuze (the By-laws), it is the duty of the body corporate to maintain the installation at its expenses.[6] The body corporate's conduct in instructing its appointed electrician Mr Joseph Davis after the incident, to earth the cage and the kiosk, is an acknowledgement of that responsibility, and is consistent with s 39 of the By-laws.

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[6] Section 39 reads as follows:

'**39. Customer to erect and maintain electrical installation**.

Any electrical installation connected or to be connected to the supply mains, and any additions or alterations thereto which may be made from time to time, shall at all times be provided, erected, maintained and kept in good order by the customer at his own expense and in accordance with this bylaw and the Regulations.'

[16] The role of the municipality was to distribute electricity to the premises of the body corporate. Consequently, it was important for it to safeguard its infrastructure so as to enable it to carry out its function. The duty to ensure the safe installation and ultimately, the safety of the kiosk and metal cage lay with the body corporate in terms of the By-laws and the relevant provisions of the Sectional Titles Act.

[17] On the facts of this case, a person in the position of the municipality would not have reasonably foreseen the possibility of the cage becoming electrified and causing harm. The uncontested evidence is that the municipality only became aware of the unearthed structure after the fatal incident. On 28 June 2013, a day before the incident, a report was made to the body corporate of an incident involving a mild shock to a child caused by the same metal cage. Mr Davis, an electrician engaged by the body corporate, had tested the cage for voltage during the morning of 29 June 2013 and found that it was not electrified. Mr Davis conceded that a similar inspection by the employees of the municipality would not have raised any concern to them. He did not access the locked cage but requested the body corporate to instruct him should it require him to procure the key for the lock from the Municipality, which was readily obtainable.

[18] Moreover, a reasonable person in the position of the municipality would not have foreseen that a leg of the metal cage would penetrate the underground cable, nor that the cage was unsafe because it was not earthed. Mr Gregersen's evidence was that the metal leg which had made contact with the power cable that electrified the cage, 'is not obvious if the ground is closed and sealed, you don't know there are legs on the kiosk'. This was only detected when the ground around the cage had been excavated. It is thus not surprising that when testing the metal cage on the day of the incident, Mr Davis found that it was not electrified. The position would have been no different had that test been carried out by an electrician employed by the municipality. In addition, Mr Gregersen testified that one could not determine integrity of the cage or how it was installed by merely looking at it, and one would assume that anybody with knowledge of electricity, who put a metal cage around an electrical cubicle, would have earthed the cage since this was a statutory requirement. Mr Gregersen also stated that a cause of the incident was that the

cage was not secure: it could be rocked backwards and forwards. He said: '[i]deally the security cages should be bolted to a concrete base common to that of the distribution kiosk, without any legs which are pressed into the earth'. This was not the responsibility of the municipality, but the body corporate.

[19] The high court was thus correct in finding that there was credible evidence that negligence could not be ascribed to the municipality.

[20] In the result, the appeal is dismissed with costs.

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D S MOLEFE

ACTING JUDGE OF APPEAL

APPEARANCES

For appellants:	R Pillemer
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