IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) 13/2009

In the matter between:

LESOTHO ELECTRICITY CORPORATION APPELLANT

AND

THABO RAMOKHOSI RESPONDENT

CORAM: GROSSKOPF, JA
SMALBERGER, JA
GAUNTLETT, JA

HEARD: 15 OCTOBER 2009
DELIVERED: 23 OCTOBER 2009

SUMMARY

Negligence - failure of electricity provider to take reasonable steps to prevent harm - schoolchild electrocuted by fallen power cable - provider liable in delict for child's injuries.

JUDGMENT

GAUNTLETT, JA:

[1] The appellant is, in terms of the Electricity Act, 7 of 1969, Lesotho's statutory provider of electricity. The respondent sustained disabling injuries when, twelve years ago as a 15-year old schoolboy, he was electrocuted by a cable installed by the appellant. In an action instituted in the High Court on 10 August 2004 but only heard on 23 February 2008 the respondent claimed damages arising from the severe injuries he sustained. The respondent adduced his own evidence and that of three witnesses, one of whom was an expert. After an unsuccessful application for absolution from the instance, the appellant closed its case without leading evidence. In his judgment delivered a year later, Mofolo AJ upheld the respondent's claim. The appellant appeals against the trial court's finding of liability, but not its determination of the quantum of loss. This was in respect of future medical costs and general damages. Nothing was claimed in respect of loss of earning capacity, despite the disabling nature of the injuries sustained.

[2] The appellant's central contention in its argument on appeal is that the trial court found against it "on the basis of causes of action not specifically pleaded by the respondent". These other "causes of action", it says, were "not appreciated by the appellant or fully canvassed at the trial", because they "never formed part of the pleadings".

[3] To assess the validity of this attack it is necessary to relate it in turn to the notice of appeal, the pleadings, the ambit of the evidence addressed, and the judgment.

[4] A litigant intent on holding its adversary to procedural precision at first instance may be expected to be consistent in its own compliance on appeal with the standard it seeks to enforce. The notice of appeal in this matter, although detailed, makes no reference at all in its 12 grounds to what has been advanced as the appellant's central contention summarized in paragraph [2] above. To the contrary, several grounds suggest the obverse: that the case

entailed a single cause of action; that this relates to whether the appellant had been negligent "in any manner"; that this in turn involves a broad inquiry as to whether the appellant "had failed to take the necessary precautions to avoid harm to the respondent" by "putting the necessary safety measures in place to avoid harm to the respondent". In short, according to the notice of appeal, the trial court erred in holding it negligent on the evidence. The case now sought to be advanced in argument is materially different, and is in my view not one sufficiently indicated by the notice of appeal. It is however not necessary to determine the matter on this basis alone, given the further considerations which arise, and to which I now turn.

[5] The first of these is that the pleadings properly viewed, are not as confining as the appellant would have it. The Declaration reads in its relevant parts as follows:

> 5. "On or about the 1st September 1997, the Plaintiff was attending school at

Mazenod Vocational School. He was electrocuted by a fallen electric cable.

6. Despite notification by the public the Defendant … failed to disconnect the electric cable which was loose and hanging and which cable electrocuted the Plaintiff.

7. Defendant … has therefore unlawfully and negligently failed to disconnect the said electric cable. As a result the Plaintiff suffered severe bodily injury; he lost an arm, a toe and sustained severe burns".

[6] To this the appellant requested further particulars, which were provided. It was quite clear from the answer that the respondent's case was not, in fact, restricted to an alleged failure to act after notification. In its plea, the appellant pleaded no knowledge (and a consequential general denial) of the facts advanced in paragraph 5 of the Declaration. It denied paragraph 6, adding that:

"it was unaware of any loose cables in the area in question, and that it was only notified of such cables after the alleged incident".

In relation to paragraph 7, the appellant denied "that it had unlawfully and negligently failed to disconnect the electric cable", with a general denial of the residual allegations.

[7] A unconstructive pre-trial conference took place, and a formal minute compiled. But evidently the respondent furnished the appellant with three detailed statements: by the respondent himself, by a witness to the lightning strike, Motebang Lekaka, and by an expert, Motlalentoa Khobatha (in the form of an expert summary in terms of Rule 35 (11) (b)). The latter two are relevant for present purposes, because they precognised the appellant of the intended ambit of the respondent's evidence. Thus Mr. Lekaka described how, at Thota-Moli, Mazenod at about 4.00pm on Friday 29 August 1997, in the midst of a heavy storm he heard a clap of thunder close by and saw smoke at the electricity pole on the premises of the school about 100 metres away. When he inspected the pole, it was black with soot and "had tipped over", with its power cable hanging about half a metre above the ground. The

cable "remained loosely suspended for the whole weekend. LEC people never came in response to the incident". Mr. Lekaka also stated that lightning striking poles was not unusual in the area, and concluded:

> "I must also point out that it would seem to be the practice of the Lesotho Electricity Corporation to take some time before completing all safety measures on pole installations. For instance houses in my area were first electrified in November 2007; it was only in February, 2008 that the pole next to my home was earthed. I however cannot say whether the particular pole was earthed or not, but I know that it was struck by lightning".

(Mr. Lekaka, it may be noted, was inexplicably not asked by the respondent's counsel at the trial to confirm his statement. Neither counsel referred to it. Not all its contents were confirmed in his viva voce evidence. But the point to be made here is that the statement, read with the relevant paragraphs of the Declaration quoted above, forewarned the appellant that the intended ambit of the respondent's case was one of negligence entailing a failure to take reasonable steps to prevent the harm arising for the respondent).

[8] The expert summary made this yet clearer. It suffices for the present question to note that Mr. Khobatha's summary refers to various safety devices which (he suggested) if properly installed and functioning should have had the effect of automatically terminating the electricity supply at the point of the lightning strike, so that - he specifically notes - "[t]here would have been no need for villagers to report to [the appellant] that a line has fallen" (that which the appellant now argues was the sole and exclusive cause of action advanced by the respondent on the pleadings).

[9] Then there is the evidence itself. From beginning to end it bears out the fact that the width of the respondent's case went considerably beyond the failure of the appellant to disconnect the hanging cable, despite notification by the public (see paragraph 6 of the Declaration, quoted above). Without objection from the appellant, the witnesses testified in terms which related to a more general failure by the appellant to take reasonable steps to avert the

harm inflicted on the respondent. Indeed, in cross-examination the appellant's counsel himself entered upon this terrain, well beyond what is now contended to have been the permissible ambit marked out by the Declaration.

[10] Particularly illuminating of the broad way in which the trial was conducted by the parties is how the cross-examination of the respondent's expert witness commenced. His attention was first drawn to the issue of the earthing of the pole in question. In his summary, Mr. Khobatha had pertinently stated that "if the poles were earthed … the lightning would be brought down to the ground by earth wire and not cause any danger. The earth device would break [the] circuit and cut [the flow] of electricity". Besides confirming his summary at the commencement of his evidence, Mr. Khobatha in his evidence-in-chief reiterated as follows:

"Every electrical pole is supposed to be earthed, on the transmission line, so that the purpose of earthing the electrical pole is to conduct the lightning to the ground, so if the earth is not

effective, then the pole will [be] damaged by the … lightning. But if the earth is effective, the lightning will go down to earth immediately, before destroying the pole".

[11] As already noted, no objection to the width of the evidence was made by the appellant's counsel during this and similar evidence-in-chief. And his cross-examination expressly reverted to it - not to protest, however belatedly, that this was not an issue in the case, but merely to suggest that there was at that stage no evidence to indicate whether the pole had been fitted with an earth wire. (To that the expert readily assented). The cross-examiner then proceeded to deal with yet further alleged culpable failures by the appellant, to which I shall revert. Just as with the question of deficient earthing, these had not been specifically pleaded, but they had been covered by the expert summary and (again without protest) dealt with in the evidence-in-chief.

[12] It is in these cumulative circumstances that the deficiencies of the notice of appeal aside, the question arises

whether the trial court was precluded (as the appellant would have it) from determining the matter on any basis other than an alleged culpable failure by the appellant to disconnect the power flow following an alleged notification of the danger prior to the respondent being injured.

[13] The departure point remains this classic formulation by Innes CJ in **Robinson v Randfontein Estates GM Co Ltd** 1925 AD 173 at 198:

> "The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for pleadings. And where a party has had every facility to place all the facts before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been".

(See also **Shill v Milner** 1937 AD 101 at 105; **Stead v Conradie** 1995 (2) SA 111 (A) at 122-3).

14. But, argued the appellant's counsel, a party may not be "positively misleading" by "referring explicitly to certain clauses of the contract as identifying the cause of action when another is intended or will at some later stage - in this case at the last possible moment - be relied upon" (quoting **Imprefed (Pty) Ltd v National Transport Commission** 1993 (3) SA 94 (A) at 107 B-108F).

[15] This authority is hardly helpful to the appellant. The present case concerns a claim in delict in which a single loss-making event is in issue. There is no suggestion of any "positively misleading" conduct by the respondent. The ambit of the cause of action has been widely treated by both sides, as I have described. There is no suggestion of a last-minute attempt to widen or divert it from its original course. There is also no indication of material prejudice to the appellant, for two reasons. The first is that it had an opportunity to object, or thereafter to adduce through cross-examination and its own witnesses evidence as regards the wider

basis on which the case was being run by the respondent. The second is that to the extent the appellant did not adduce evidence, this was either because it could not do so, or because it chose not to do so.

[16] The primary contention that the trial court was wrong to approach the matter on any basis wider than that pleaded in paragraph 6 of the Declaration must accordingly fail. The residual inquiry is whether it erred in holding that the appellant negligently failed to take reasonable precautionary steps which, if taken, would in all likelihood have averted the harm suffered by the respondent.

[17] The trial court's judgment was criticised in argument for the appellant in a number of respects. Several in my view are justified: there is every indication that the year taken by the trial judge to deliver judgment (without explanation and on the face of it, inexplicably) was to the detriment of his recollection of the evidence. This Court has repeatedly warned of the harm to

litigants and to the administration of justice of delays in giving judgment (see especially **Otubanjo v Director of Immigration** (2005-6) LAC 336 at 343F-346C).

[18] One ground on which the trial court found for the respondent appears however to be unassailable in the absence of either dispositive cross-examination on the point or any evidence in rebuttal. This is the apparent failure by the appellant either to earth the pole when it was erected, or (through proper maintenance) to ensure that its earthing remained functional.

[19] It is necessary in this regard to return to the evidence. The respondent, it was not in issue, was injured on 1 September 1997 when, on the bell ringing for the commencement of school, he ran to the toilet. Nothing indicated any danger, and no one warned him that it existed. He did not see a broken pole or any hanging electric cable. When he ran, his leg came into contact with what the villager, Mr. Lekaka, and the school principal, Mr.

Lesibana Ramakhula, testified was a hanging cable, just above the ground, in the vicinity of a fallen electricity pole. Mr. Ramakhula testified that, after the respondent was pulled away (by means of a stick) from the live cable which was electrocuting him, he (Mr. Ramakhula) reported the incident to the appellant's offices. The staff was "really surprised to learn that the electricity there was still alive" as they were under the impression that the power supply there "was no longer functioning". (He further testified that the appellant's staff knew from the previous evening that the pole had been struck by lightning).

[20] The evidence did not establish exactly what damage was done to the pole when the lightning struck it. But the villager, Mr. Lekaka, twice stated without challenge that he saw smoke rise from the pole: clearly it was to some degree burnt and damaged when struck, such that it toppled.

[21] The evidence as a whole confirms that which is a matter of common knowledge: the transmission of electricity holds acute dangers for the public. It is for this reason that cables are required by statute to be suspended a stipulated height above ground. Contact between a live cable and the human body is life-threatening. In Lesotho dangers in transmission are exacerbated by the prevalence of lightning strikes, especially in more mountainous areas such as that where the respondent attended school (as Mr. Lekaka confirmed in his evidence).

[22] The leading formulation of the elements of negligence remains this:

> "For the purposes of liability culpa [negligence] arises if -
>
> (a) a diligens paterfamilias [prudent head of a household or reasonable person] 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 appellant failed to take such steps".

(**Kruger v Coetzee** 1966 (2) SA 428 (A) at 430 E-F).

And in assessing whether the appellant took reasonable steps, the court will consider:

"(a) The degree or extent of the risk created by the actor's conduct;

(b) The gravity of the possible consequences if the risk of harm materialises;

(c) The utility of the actor's conduct; and

(d) The burden of eliminating the risk of harm".

(**Ngubane v South African Transport Services** 1991 (1) SA 756 (A) at 776 H-J).

[23] The respondent's evidence established that lightning struck the electricity pole at the Mazenod Vocational School; that it caught fire; and that it at least partially toppled over, so that the electric cable sagged to a distance just above the ground such that it could come into contact with a person such as the respondent.

The evidence was further that all this happened on the afternoon of 29 August 1997, and that the pole and cable were still in this position on the morning of 1 September 1997, when the respondent, running past, came into contact with the cable, still carrying live current. On the evidence of the respondent's expert witness, not so much as traversed in cross-examination in this respect, the state of the pole and cable can only be ascribed to one of two causes. Either the pole was not properly earthed on installation, or its earthing was not properly checked and maintained thereafter. An effective earth, he testified, would mean that lightning would have been safely transmitted down the pole into the ground, without the pole being damaged (and hence the cable dropping lower as it did). The brief cross-examination of this witness was not at all directed to this aspect. Instead it focused on his earlier evidence that where, as here, the cable itself remained intact, the circuit breakers, if properly functioning, should have tripped. The witness effectively conceded that this was not necessarily so. But he said nothing to affect his earlier

evidence regarding the apparent deficiency in the earthing of the pole. All that the appellant's counsel put to him was that "there is no evidence … whether this specific pole had an electric wire or not …". There was no attempt by the appellant in evidence to establish that it had taken reasonable steps to install that basic safety measure, the need for which was implicitly conceded by its counsel, or to maintain it. Nor is there any explanation evident on the record for that failure: no evidence was addressed to suggest that no witness could testify on its behalf in that respect (either as to the particular pole, or measures taken in that area). Nor did it establish that no safety records are kept, or that any such viva voce or documentary evidence is no longer available to it. Instead, as I have indicated, the course adapted was to seek absolution from the instance and once that failed, to close the appellant's case without adducing any evidence of its own. In these circumstances, it was in my view sufficiently established that the appellant was negligent at least as regards its unexplained failure either to earth the pole in question, or to check and maintain the functioning of the earth.

[24] In these circumstances the deficiencies in the High Court's judgment become immaterial . It is also not necessary to consider whether other negligent conduct by the appellant related to the harm suffered was established. One such aspect arises from Mr. Ramakhula's evidence that the appellant already knew about the damage to the pole when, after the respondent was electrocuted, he (Ramakhula) went to report it, yet the appellant without any evidence to explain its failure to do so, had clearly in the interim not rendered the fallen cable safe (see paragraph [19] above). On the basis of the evident failure to ensure proper earthing of the pole, the appellant was negligent, and this negligence caused the electrocution of the respondent and his consequent injuries.

[25] No wider issue of causation or of contributory negligence arises in this matter. There was a faint attempt by the appellant in the evidence by the respondent and his witnesses to

suggest a greater awareness by the respondent than he owned of the dangers of electricity, but evidently it was concluded (and rightly so) that this took matters nowhere, regard being had to the unassailable facts as to how the respondent came to be injured.

[26] There was no dispute that the appellant owed a legal duty to members of the public, and more particularly a schoolchild like the respondent, "to act without negligence, i.e. to take such steps … as may have been reasonable in the circumstances to prevent them from suffering harm (see **Gouda Boerdery BK v Transnet Ltd** 2005 (5) SA 490 (SCA)", quoted in **Eskom Holdings Ltd v Hendricks** 2005 (5) SA 503 (SCA) at 508 I).

[27] It is a matter for regret that the cumulative effect of the pace at which the respondent's legal representatives have proceeded (taking nearly seven years to issue the summons), the slow progress to the High Court hearing (four years), and then the unexplained and inexplicable delay by the learned acting judge in

delivering judgment (a year) should have kept the respondent out of the full damages to which he has been entitled for twelve years now.

[28] As regards the lack of any provision in the claim for damages for loss of earning capacity, counsel for the respondent could not explain this. As already noted, the appellant has not appealed on quantum nor is there any cross-appeal. This being so, we have no power ourselves to remedy what seems to us to be an inexplicable omission in the claim. We can only refer the matter to the Law Society with the request that it investigate whether any professional negligence has been involved, which may found a claim against respondent's legal representatives involved at the relevant times in respect of a possibly culpable failure to claim for loss of earning capacity. We have also asked the counsel and attorneys for the appellant to ask the Board of the appellant whether, as a statutory body, it would consider the respondent's plight in this regard. It may not in the unfortunate circumstances

be under a legal duty to restore to the respondent his lost earning capacity, but it may, we believe, be under a moral duty to do so. We cannot believe that a public body such as the appellant would wish to be seen to snatch at the bargain the damages award in this matter clearly represents.

[29] The appeal is dismissed with costs, and the order of the court a quo confirmed.

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J.J. GAUNTLETT
JUSTICE OF APPEAL

I agree: _____
F.H. GROSSKOPF
JUSTICE OF APPEAL

I agree: _____
J.W. SMALBERGER
JUSTICE OF APPEAL

For the Appellant:	Adv. P.J. Loubser instructed by Webber and Newdigate, Maseru
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