

IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)

1/6/2015

DATE: 13/05/2015  
CASE NO: 26360/14

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO  
(2) OF INTEREST TO OTHERS JUDGES: YES/NO  
(3) REVISED

29/5/15

DATE

SIGNATURE

In the matter between:

**HALSTEAD-CLEAK, DEREK ANTHONY**

Plaintiff

and

**ESKOM HOLDINGS LIMITED**

Defendant

**JUDGMENT**

**Baqwa J**

[1] This is an action arising out of injuries suffered by the plaintiff in an incident which occurred on 11 August 2013.

### The Parties

- [2] The plaintiff is Derek Anthony Halstead-Cleak an investment consultant of 16 Porter Avenue, Melrose North, Johannesburg. The Defendant is Eskom Holdings Limited, a public company incorporated in terms of the Company Laws of the Republic of South Africa with its principal place of business at Megawatt Park, Sunninghill, Sandton, Johannesburg.
- [3] The Defendant has been the sole supplier of electricity on the national grid within the borders of the Republic of South Africa and a licensee in terms of and/or purposes of the Electricity Regulation Act, No. 4 of 2006. The defendant has thus been in effect and *de facto* in control of all power lines not falling under the control of any local authority or municipality or Metropolitan municipality.

### The Factual Background

- [4] On 11 August 2013 and at or near poles DN 73/13/1 and DN 73/13/2, the plaintiff, whilst riding a bicycle inadvertently came into contact with a low hanging live power line spanning a footpath adjacent to Bokmakierie Road in the Nooitgedacht area, Gauteng. During the incident the plaintiff sustained severe full-thickness electrical burns to the right forehead and burn wounds to the chest, arms and both thighs.
- [5] During the hearing plaintiff called the evidence of one Vincent Langlois who was a fellow rider on the day of the incident. Langlois testified how he and his other colleagues managed to ride under the overhanging line whilst the plaintiff was the last one at the rear of the riding party. He heard a scream and saw the plaintiff being electrocuted by the overhanging line. He tried to pull him off using the handle bars of the plaintiff's bicycle but was himself shocked.

When the other riders attempted to pull him off the cable, and even though they were wearing thick winter gloves, they received severe electric shocks when they touched him. After the plaintiff's clothing had already started burning, his fellow cyclists were able to pull him free using the rubber tyres and handlebar grips of the bicycle to release him. He fell to the ground and the flames were put out by rolling him over. His fellow cyclists performed cardio pulmonary resuscitation (CPR) and after a few minutes, the plaintiff who was not breathing, began to breathe spontaneously, albeit laboriously.

### The Issues

- [6] The parties agreed to proceed to trial on the limited issue of whether the defendant is or is not strictly liable in terms of the provisions of Section 61 of the Consumer Protection Act, 68 of 2008 ("The CPA attack").
  
- [7] The parties agreed further that the delictual part of the plaintiff's claim and the issue of the alleged quantum of damages be separated and postponed *sine die*.
  
- [8] The parties further agreed that possible contributory negligence on the part of the plaintiff is not an issue in relation to the CPA attack.

## The Pleadings

[9] Certain facts are common cause either on the pleadings or for purposes of the limited issue:

- 9.1 That the plaintiff is Derek Anthony Halstead-Cleak as described above.
- 9.2 That the defendant was and at all times material hereto, a licensee in terms of and for purposes of the Electricity Regulation Act 4 of 2006 ("The Electricity Act") and that as such the Defendant is, and at all times material hereto was, responsible for the power line in question, namely the power line spanning poles DN73/13/1 and DN73/13/2 in the Nooitgedacht area of Gauteng, through which the Defendant conducted electricity ("The power line").
- 9.3 That, for purposes of the CPA attack, the Defendant was both the producer and the distributor of the electricity generated through the power line.
- 9.4 That at the time of the incident the plaintiff was riding his bicycle on a footpath and the power line was hanging in a low-hanging position such that the plaintiff was able to come into contact with it.
- 9.5 That the defendant was made aware of the incident on 14 August 2013. That employees of defendant inspected the scene of incident on that day and found the power line in the position described (*supra*) and that the Defendant immediately switched the power line off and made it safe.
- 9.6 The plaintiff has filed Rule 36 (9) (b) summaries regarding expert witnesses Mr McKechnie (an Electrical Engineer) and Blumenthal (a Specialist Forensic Pathologist).

- 9.7 The defendant made the following admission of the aforesaid summaries:

*“To the extent that the contents of the Rule 36 (9) (b) summaries of Mr McKechnie and of Dr Blumenthal are relevant to the limited issue on which the parties have agreed to proceed, namely the liability or otherwise of the defendant in terms of Section 61 of the Consumer Protection Act, 68 of 2008, and for the purposes of that dispute only, without being bound thereby should this matter proceed at any stage on any other disputes, the Defendant admits the correctness of the contents of the summaries in question.”*

- 9.8 The defendant, in conjunction with its duty to inspect, rectify and/or repair deficiencies or dangerous situations was reliant on dangerous situations being drawn to its attention which was less likely to occur where the line was not being used to conduct electricity to a user thereof. A user was more likely to report an obvious dangerous situation or an interruption.
- 9.9 Electricity is a dangerous commodity especially in the context of inadvertent contact with live conductors (power lines) by humans or animals. This was confirmed in the defendant's training documentation which warns about the risk of fatal electrocution and the importance of minimum clearance to prevent inadvertent contact with live power lines which minimum clearance ranges from 4.9 to 10.4 metres depending on the voltage being conducted.
- 9.10 The photographs of the plaintiff's injuries in the trial bundle demonstrate a pattern of burns mainly of an electrical nature (especially over the head and neck) and of the “open flame” type from secondary direct flame due to open fire or ignited clothing. The appearance of the injuries are of an “electro thermal nature” falling within the high voltage realm of more than 100 volts.

- 9.11 Also common cause is the fact that the issue of contributory negligence does not arise for determination of the defendant's liability in terms of Section 61 of the Consumer Protection Act.

### The Law

- [10] One of the relevant provisions of the CPA to be considered in this case is Section 61 which must be read with Section 53 in which certain terms used in Section 61 are utilised.

Section 53 reads as follows:

***“53. Definitions applicable to this Part***

*(1) In this Part, when used with respect to any goods... -*

*(a) “defect” means –*

*(i) any material imperfection in the manufacture of the goods..., ... that renders the goods ... less acceptable than persons generally would be reasonably entitled to expect in the circumstances;  
or*

*(ii) any characteristic of the goods ... that renders the goods ... less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances;*

*(b) “failure” means inability of the goods to perform in the intended manner or to the intended effect;*

- (c) **“hazard”** means a characteristic that -
- (i) has been identified as, or declared to be, a hazard in terms of any other law; or
  - (ii) presents a significant risk of personal injury to any person, or damage to property, when the goods are utilised; and
- (d) **“unsafe”** means that, due to a characteristic, failure, defect or hazard, particular goods present an extreme risk of personal injury or property damage to the consumer or to other persons.”

[11] Although not the whole of Section 61 is relevant *in casu*, the whole section has to be quoted in its entirety in order to give a contextual meaning to the relevant portions. Consequently what follows is Section 61 in its entirety:

**“61. Liability for damage caused by goods:**

- (1) Except to the extent contemplated in section (4), the producer, distributor or retailer of any goods is liable for any harm, as described in subsection (5), caused wholly or partly as a consequence of –
- (a) supplying any unsafe goods;
  - (b) a product failure, defect or hazard in any goods; or

(c) *inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods,*

*irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be.*

(2) *A supplier of services who, in conjunction with the performance of those services, applies, supplies, installs or provides access to any goods, must be regarded as a supplier of those goods to the consumer, for the purposes of this section.*

(3) *If, in a particular case, more than one person is liable in terms of this section, their liability is joint and several.*

(4) *Liability of a particular person in terms of this section does not arise if-*

(a) *the unsafe product characteristics, failure, defect or hazard that results is wholly attributable to compliance with any public regulation;*

(b) *the alleged unsafe product characteristic, failure, defect or hazard-*

(i) *did not exist in the goods at the time it was supplied by that person to another person alleged to be liable; or*

(ii) *was wholly attributable to compliance by that person with instructions provided by the person who supplied the goods to that person, in which case subparagraph (i) does not apply;*



- (c) *it is unreasonable to expect the distributor or retailer to have to discover the unsafe product characteristic, failure, defect or hazard, having regard to that person's role in marketing the goods to consumers; or*
  - (d) *The claim for damages is brought more than three years after the-*
    - (i) *death or injury of person contemplated in subsection (5)(a);*
    - (ii) *earliest time at which a person had knowledge of the material facts about an illness contemplated in subsection (5)(b); or*
    - (iii) *earliest time at which a person with an interest in any property had knowledge of the material facts about the loss or damage to that property contemplated in subsection (5)(c); or*
    - (iv) *the latest date on which a person suffered any economic loss contemplated in subsection (5)(d).*
- (5) *Harm for which a person may be held liable in terms of this section includes-*
- (a) *the death of, or injury to, any natural person;*
  - (b) *an illness of any natural person;*
  - (c) *any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable; and*

(d) *any economic loss that results from harm contemplated in paragraph (a), (b) or (c).*

(6) *Nothing in this section limits the authority of a court to-*

(a) *assess whether any harm has been proven and adequately mitigated;*

(b) *determine the extent and monetary value of any damages, including economic loss; or*

(c) *apportion liability among persons who are found to be jointly and severally liable.”*

[12] Section 1 defines concepts such as “consumer”, “distributor”, “goods”, “market”, “producer”, “supplier”, and “supply” as follows:

“5.3.1 “Consumer”:

**“consumer”**, in respect of any particular goods or services, means-

(a) *a person to whom those particular goods or services are marketed in the ordinary course of the supplier’s business;*

(b) *a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3);*

- (c) *if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and*
- (d) *a franchise in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e);*

### 5.3.2 “Distributor”:

**“distributor”**, in relation to any particular goods, means a person who, in the ordinary course of business -

- (a) *is supplied with those goods by a producer, importer or other distributor; and*
- (b) *in turn, supplies those goods to either another distributor or to a retailer;*

### 5.3.3 “Goods”:

**“goods”** includes-

- (a) *anything marketed for human consumption;*
- (b) *any tangible object not otherwise contemplated in paragraph (a), including any medium on which anything is or may be written or encoded;*
- (c) *any literature music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium, or a licence to use any such intangible product;*

- (d) *a legal interest in land or any other immovable property, other than an interest that falls within the definition of “service” in this section; and*
- (e) *gas, water and electricity;*

#### 5.3.4 “Market”

*“market”, when used as a verb, means to promote or supply goods or services;*

#### 5.3.5 “Producer”:

*“producer”, with respect to any particular goods means a person who-*

- (a) *grows, nurtures, harvests, mines, generates, refines, creates, manufactures or otherwise produces the goods within the Republic, or causes any of those things to be done, with the intention of making them available for supply in the ordinary course of business; or*
- (b) *by applying a personal or business name, trade mark, trade description or other visual representation on or in relation to the goods, has created or established a reasonable expectation that the person is a person contemplated in paragraph (a);*

#### 5.3.6 “Supplier”:

*“supplier” means a person who markets any goods and services;*

### 5.3.7 "Supply":

**"supply"**, when used as a verb-

- (a) *in relation to goods, includes sell, rent, exchange and hire in the ordinary course of business for consideration; or*
- (b) *in relation to services, means to sell the services, or to perform or cause them to be performed or provided, or to grant access to any premises, event, activity or facility in the ordinary course of business for consideration.*

[13] Another statutory provision that has some relevance is Section 25 of the Electricity Act which provides as follows:

**"Liability of licensee for damage or injury**

*In any civil proceedings against an 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 shall be presumed to have been caused by the negligence of the licensee, unless there is credible evidence to the contrary."*

Defences raised by the Defendant

[14] The defendant contends that the CPA is about consumerism and the protection of consumers and that had the Plaintiff suffered the electrical burns that he did in the course of utilising the supply of electricity to his home, or otherwise in the course of his use of electricity, then the CPA might well have applied. The defendant's counsel submits further that all analysis of Section

61 itself, let alone Sections 53 and 61 within the context of the CPA reveals that the CPA and Section 61 in particular was not intended to apply to circumstances such as the present case.

### Discussion

[15] It has been observed worldwide that the design, manufacture and distribution of products are activities that occupy the centre stage for the wealth and welfare of society. As a matter of fact owing to the unpredictable nature of man-made products this at times may result in death, disease or injury for a wide range of parties, for example workers in factories or along distribution channels, users of defective products and third parties like consumers and innocent bystanders.

**See Van Eden E: Consumer Protection Law in South Africa (2013) 367.**

[16] To an extent this is what constituted the reasoning behind formulation of the CPA. The preamble to the CPA confirms recognition of the fact, *inter alia* that “it is necessary to develop and employ innovative means to... (b) protect the interests of consumers, to ensure accessible, transparent and efficient redress for consumers who are subject to abuse or exploitation in the market place and (c) to give effect to internationally recognised custom rights.” The preamble then states that the enactment into the CPA is intended to, *inter alia*, “protect consumers against hazards to their wellbeing and safety, develop effective means of redress for consumers ...”

[17] The CPA provides protection to and redress for “any person” in a number of its provisions, that is, not only in respect of “consumers” or a “consumer”. An example regarding the application of the CPA to “consumers” as defined in Section 1, is section (5)(5) which provides that sections 60 and 61 are applicable and even in respect of transactions exempt from the provisions of the CPA. The submission therefore, by the defendant that an innocent third

party who is not necessarily a “consumer” *stricto sensu*, who suffers loss (such as a dependant of a breadwinner who is or may be a consumer who is killed by a defective product) cannot claim redress because he or she is not the consumer would be contrary to the spirit and purpose of the CPA.

#### Application of the CPA: Section 5

[18] Section 5 provides for the scope and ambit of the CPA. In terms of Section 5(1) the CPA applies to:

- 18.1 every transaction occurring within the Republic (unless it is exempted in terms of the CPA) Section 5(1) (a).
- 18.2 the promotion of any goods or services, or the supplier of any goods or services, within the Republic, unless the goods or services have been exempted in terms of the CPA Section 5(1) (b) (iii).
- 18.3 it is also clear from a reading of Section 5(8) of the CPA that the Act applies *“irrespective whether the supplier is... a juristic person....organ of state, an entity owned or directed by an organ of state, a person contracted or licensed by an organ of state to.... supply any goods or services, or is a public-private partnership, or is required or licensed in terms of any public regulation to make the supply of particular goods or services available to all or part of the public.”*
- 18.4 in terms of Section 5(5) the provisions of Section 61 apply even to exempted transactions which is indicative of its “wider” application, thus affording redress to persons who would not enjoy the advantage of other provisions of the CPA, and render liable those producer, suppliers, promoters and the like who would otherwise not be liable in terms of any other provisions of the CPA.

[19] Despite the existence of common cause facts and the admissions by the defendant regarding certain facts alleged by the plaintiff it is necessary to consider certain aspects regarding the application of the CPA in more detail namely:

19.1 whether “goods” and/or “services” as defined are involved?

19.2 if so, the capacity in which the defendant stands in relation to such “goods” and/or “services”?

19.3 the relationship occupied by the Plaintiff in relation to such “goods” and/or “services”.

19.1.1 Regarding the first issue and with reference to Section 1 of the Act in which “goods” are defined, the definition is clearly intended to go under the concepts set out in subsections (a) to (e) under the definition of “goods”. The use of the word “includes” is indicative of this fact. There can be no doubt however that electricity constitutes “goods” for purposes of the CPA as it is clear from subsection (e) which includes goods, water and electricity as part of the definition. It can therefore be accepted that the electricity which caused the Plaintiff’s injuries constitutes “goods” for purposes of Section 61 of the CPA.

19.2.1 Regarding the second issue, the following definitions require consideration:

19.2.1.1 In terms of Section 1 “producer” with respect to any particular goods means a person who “...*generates... creates, manufactures or otherwise produces the goods within the Republic, or causes any of those things to be done, with the intention of making them*”



*available for supply in the ordinary course of its business; ...*” It is common cause that the defendant generated the electricity (and therefore the “goods”) for purposes of this distribution, and that its intention at all times is and was to supply the electricity in the ordinary cause of business.

19.2.1.2 “retailer” with respect to any particular goods, is defined as *“a person who in the ordinary cause of business, supplies those goods to a consumer.”* Based on the definition of “supplier” and “supply” dealt with hereunder, the defendant was a “retailer” in respect of the electricity supplied to consumers in general. This does not mean that the “consumer” has to be the injured party in this instance as such an interpretation would not be in accordance with the spirit and purpose of the CPA.

19.2.1.3 In terms of Section 1 “supplier” means a person who markets any goods or services. “market”, when used as a verb, is defined as meaning *“to promote or supply any goods or services”*. In terms of Section 1 “supply” when used as a verb in relation to goods, includes sell *“...in the ordinary cause of business for consideration;...”* Taking all these definitions into consideration it would appear that the defendant’s claim that the CPA is not applicable has no merit.

19.3.1 With regard to the third consideration i.e. the relationship in which the plaintiff stands to the defendant and the “goods”, the wording of Section 61(5) makes it clear that liability arises not only in respect of “consumers” as defined in the CPA or consumers in the general sense, but to “any natural

person” (Section 61(5)(a)). The plaintiff need not, therefore be a “consumer” in the contractual sense as defined in order for the Defendant to be liable to him.

[20] Section 53(1) provides that *“defect” when used with respect to any goods, component of any goods or components, or in the performance of the services,* refers to any aspect *“that renders the goods or the results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances”*.

[21] In the context of electricity being conducted along a line which is not required or used to supply any other consumer, this constitutes *“goods or results of the services less acceptable than persons generally would be reasonably entitled to expect in the circumstances.”*

[22] Further, considering the inherent dangers or characteristics of electricity, by permitting such a danger to exist, that constituted *“goods or components less... safe than persons generally would be reasonably entitled to expect in the circumstances.”* Logic accordingly dictates that the defendant cannot introduce a source of danger and thereafter seek exoneration when injury is caused as a result thereof.

[23] It is common cause that the defendant allowed the presence of electricity in the lines spanning the foot path used by the plaintiff on the day of the incident. Upon learning of the incident the defendant rectified the situation by causing electricity to be switched off and the lines dismantled. I am fortified to use the same principle used in the case of **Coppejans v Bosman (34676/2013) [2014] ZAGPHC 1833** to establish liability. In an action based on the *action de pauperie* the defendant had denied liability on the basis that the dog which had bitten the plaintiff was a stray dog. Yet the defendant had not only salvaged the

plaintiff from the mauling, he took her to hospital, paid the bill, visited her in hospital and eventually killed the dog. If the defendant was not guilty he would not have incurred such expenses for a matter that does not concern him. The same applies to the defendant in the present case. Its actions after the incident reinforce the notion that it had introduced the source of danger which led to the plaintiff's injuries for which it would be held liable.

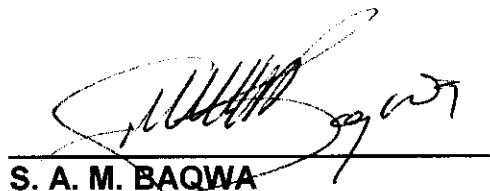
- [24] Lastly, it is notable that the defendant neither pleaded nor adduced any evidence to substantiate the non-applicability of the CPA. The defendant was content to put this in issue by way of a bare denial which is not sufficient to rebut the plaintiff's case.
- [25] Section 61(1) provides for strict liability and it does not matter whether the harm resulted from any negligence on the part of the defendant as a producer, distributor or retailer. In the circumstances I am satisfied that the plaintiff has succeeded to prove that the defendant is liable in terms of Section 61(1) of the CPA.
- [26] Further, I find that the plaintiff is entitled to the costs consequent upon consulting with his expert witness, Mr Mckechnie and Dr Blumenthal, and the costs occasioned by their reports and the expert summaries drawn on their behalf.
- [27] In the result I make the following order:
- 27.1 The defendant is declared to be 100% (one hundred per cent) liable to the plaintiff for and in respect of the injuries sustained by the plaintiff on the 11 August 2013 in terms of Section 61 of the Consumer Protection Act, No 68 of 2008.

27.2 The defendant is ordered to pay the reasonable taxable party and party costs of the plaintiff on the High Court scale, such costs to include:

27.2.1 The reasonable fees of senior counsel

27.2.2 The reasonable costs, fees and/or disbursements occasioned in respect of the plaintiff's expert witnesses, Mr I Mckechnie and Dr R Blumenthal (including preparation of their reports and the drafting of expert summaries in respect thereof).

27.3 It is ordered that the taxable or agreed costs payable by the defendant shall bear interest at 9% per annum calculated from agreement in respect thereof, alternatively from the date of affixing of the allocatur of the taxing master, to date of payment.



**S. A. M. BAQWA**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG DIVISION, PRETORIA**

For the Plaintiff:  
Instructed by:

Adv. W. P. De Waal SC  
 Joseph's Inc.

For the Defendant:  
Instructed by:

Adv. J. F. Mullins SC  
 Mothle Jooma Sabdia Incorporated

Date of Judgment:

1 June 2015