THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 262/2004

In the matter between:

ESKOM HOLDINGS LTD **Appellant**

and

JACOB JOHANNES HENDRICKS obo
JACQUES JUSTIN HENDRICKS **Respondent**

Coram : SCOTT, STREICHER, BRAND, LEWIS
***et* MLAMBO JJA**

Date of Hearing : 3 MAY 2005

Date of delivery : 27 MAY 2005

Summary: Child of 11 years climbing pylon supporting high voltage power lines – negligence of Eskom – failure to take reasonable steps to prevent harm to the public – especially children – anti-climbing device inadequate in the circumstances – child attempting to touch glass insulators – shocked – impulsive behaviour indicative of absence of delictual capacity.

JUDGMENT

SCOTT JA:

[1] On 4 August 1994 the respondent's minor son ('Jacques') who was then 11 years and 8 months old, sustained serious burns and other injuries when he ventured too close to a high voltage power line suspended from one of the appellant's pylons. To reach the point where the incident occurred Jacques had to climb to a height of approximately 14 metres above the ground and in doing so pass through what was referred to in evidence as an anti-climbing device ('ACD'). The manner in which he did this is dealt with more fully below. The power line carried a voltage of some 66 000 volts. Perhaps fortunately, the shock caused Jacques to be flung from his perch. He survived the fall with his clothes on fire. A passer-by had the presence of mind to cover Jacques with his jacket and so extinguish the flames.

[2] The respondent, on behalf of Jacques, subsequently instituted proceedings for damages against the appellant ('Eskom'), alleging that the latter had been negligent in various respects. In this court

the debate concerning the issue of Eskom's negligence was confined largely to the efficacy of the ACD. Eskom denied liability and in the alternative alleged contributory negligence on the part of Jacques. The court *a quo* (Jacobs AJ), which was called upon to decide only the question of liability, found that both Eskom and Jacques had been negligent and that the latter had been *culpae capax* at the time, ie he had had the necessary capacity to incur delictual liability for negligence. The learned judge apportioned liability on the basis that Eskom was two-thirds to blame and Jacques one-third. These findings were all placed in issue in this court. Eskom's application for leave to appeal was turned down by the court *a quo*, as was the respondent's application to cross-appeal. Both parties now appeal with the leave of this court.

[3] It is necessary at the outset to give a short description of both the pylon and the ACD. The pylon is of the lattice variety and is just over 21 metres high. It is square at the base, or almost square. Steel columns at each corner taper inwards as they ascend to a point about 14 metres above the ground. Thereafter the columns rise vertically until just below the apex at which stage they slope sharply inwards to form a point. The pylon has three cross-arms,

one above the other. The lowest is at the 14 metre level. The outer ends of each support a single power line; in other words, the tower supports six lines in all. Each is attached at the lower end to a line of glass (or porcelain) insulators having the appearance of glass rings which descend vertically from the end of each cross-arm. The result is that each power line is in the region of about a metre below the cross-arm from which it derives its support. The four sides of the tower are braced by cross-beams. All appear to be positioned diagonally save for three which are below the three metre level and which are horizontal. The significance of this feature is that the horizontal beams would facilitate the climbing of the pylon, while the highest of the three would appear from the photographs that were handed in to provide a useful foothold for anyone attempting to tamper with the ACD which is situated at the three metre level. The three cross-arms are of a similar lattice construction. Another significant feature is the existence of climbing pegs which were fitted to at least one of the vertical columns from a point just above the ACD. Leaving aside the ACD for the moment, it follows from what has been said that the pylon is readily climbable by an aspirant climber who would also have no difficulty traversing out to the end of

a cross-arm should he so wish. Finally, it is necessary to mention that the pylon was situated about 150 metres from the respondent's house and adjacent to the Malibu High School, Blue Downs.

(4) The ADC fitted to Eskom's pylons is a standard design. It takes the form of a horizontal fence of barbed wire and in appearance, at least, is a formidable barrier. As required by the Code of Practice for Overhead Power Lines (the NRS Code), it is installed as low as possible but 'not less than three metres above the ground'. It is constructed as follows. A horizontal bar is mounted diagonally at each corner of the tower so as to extend both outwards and inwards. In other words, the bar extends both beyond and within the frame of the tower. Ten grooves are cut into the bar on its upper side; five on the inside of the frame and five on the outside. These are cut at an angle outwards, ie away from the corner column to which the bar is attached. A length of barbed wire is fastened at the one end to one of the bars and then threaded into the grooves and drawn from one bar to the next around the structure 10 times before being fastened to the bar at which the process began. The result is a horizontal fence with five strands of barbed wire both on the inside and outside of the tower.

[5] The design of the device would appear to contemplate the barbed wire being so taut that the angle at which the grooves are cut would prevent the wire from being pushed out of one of the grooves. If this were to happen the wire would go slack and the gap between the strands could easily be increased so as to permit a person to pass through the device with relative ease. There was much debate concerning the efficacy of the device in evidence, which is unnecessary to traverse. What emerged is that while the design may have been good in theory, in practice it could not easily be implemented because of the difficulty associated with achieving the necessary tension on the barbed wire. As pointed out by Professor Reynders, an electrical engineer who testified on behalf of the respondent, the reason for this was that when attempting to pull the wire taut around the tower, the barbs would tend to catch in the grooves resulting in some slackness. If, of course, the barbed wire were to be affixed to the bars at each groove, whether by means of binders (short lengths of wire) or otherwise, the device would not have this weakness.

[6] Against this background I turn to the events of 4 August 1994. After returning from school in the early afternoon, Jacques, his

younger brother and younger friend, decided to take the family dog for a walk. At some stage they found themselves on a footpath that passes by the pylon. Jacques testified that he then challenged his companions to a race to see who could first climb the highest up the pylon. Possibly what he had in mind at that stage was to climb up as far as the ACD, but this was not clarified in evidence. He said that when he reached the ACD, he saw how the wire was spanned and that it could be pushed out of the grooves. Using both hands he pushed it first out of one groove, whereupon it went slack, and then out of another two. Testifying eight years later, he described the process as 'taamlik maklik'. He said he then had no difficulty climbing through the ACD and, using the climbing pegs, proceeding up to the first of the three cross-arms. At that stage, as he put it, he stopped to rest. While sitting there, the glass insulators caught his eye. He described them as 'greenish-coloured glass saucers'. Out of curiosity he traversed out to the end of the cross-arm and resolved to touch one to feel its texture. Holding on to the structure with his right hand he reached out to the insulators with his left when, as he described it, there was suddenly a blue flash and he fell to the ground. Judging from Jacques' injuries the experts were

satisfied that what in fact had happened was that his head had come too close to the power line suspended from the cross-arm immediately above. The voltage was such that the current had 'jumped' the space between the power line and his head in a phenomenon known as a 'flash-over'. For this to have happened, it was agreed that he must have come within a distance of some 66 mm of the power line.

[7] The ease with which Jacques negotiated his way through the ACD and proceeded up the tower is largely corroborated by Mr Henry Plaatjies who was called by Eskom and who was the only witness to have actually observed the incident. Plaatjies was then a teacher at the Malibu High School where he taught accounting and economics. (This was not the school attended by Jacques.) He testified that on the day in question while standing in the school grounds talking to a colleague, he observed, as he perceived it, a child being chased by others. The next thing he saw, he said, was the one ahead proceeding to climb the tower with the others coming on behind. Although he looked away at one point while commenting to his colleague on how dangerous it was and did not see Jacques actually negotiate his way through the ACD, his overall impression

was that it all happened very quickly and that Jacques' progress up the tower was virtually continuous. On seeing the flash and Jacques fall Plaatjies went to phone an emergency service while his colleague went to Jacques' assistance.

[8] Section 26 of the Electricity Act 41 of 1987 provides:

'26. In any civil proceedings against an undertaker arising out of damage or injury caused by induction or electrolysis or in any other manner by means of electricity generated or transmitted by or leaking from the plant or machinery of any undertaker, such damage or injury shall be presumed to have been caused by the negligence of the undertaker, unless the contrary is proved.'

It is common cause that Eskom is an 'undertaker' as defined in the Electricity Act and that Jacques' injuries were caused by means of electricity transmitted by Eskom's 'plant or machinery' in the form of the high voltage power lines. The effect of the section therefore is that Eskom bore the onus of proving on a balance of probabilities that it was not negligent or, if it was, that there was no causal link between that negligence and the injuries sustained by Jacques. It was also common cause that in the event of Eskom being found to have been negligent, its conduct would have been wrongful. In other words, Eskom owed a legal duty to would-be climbers of its pylons

to act without negligence, ie to take such steps, if any, as may have been reasonable in the circumstances to prevent them from suffering harm. (See *Gouda Boerdery BK v Transnet Ltd* [2004] 4 All SA 500 (SCA) para 12.)

[9] It was conceded both in this court and in the court below that a reasonable person in the position of Eskom would foresee that persons, especially children, might climb Eskom's lattice-type pylons and come close enough to the power lines to put themselves in danger of receiving a shock. This concession was inevitable in view of the provisions of Regulation 16 of the Electrical Machinery Regulations (promulgated under the Machinery and Occupational Safety Act 6 of 1983 and continuing to apply under the Occupational Health and Safety Act 85 of 1993). The regulation which is of direct application to Eskom reads:

'The user shall ensure that all supports of the lattice type which are used to carry overhead conductors are adequately protected in order to prevent any unauthorised person from coming into dangerous proximity of the conductors by climbing such supports, and an inspector may require a user to protect a support of any other type similarly.'

(By way of explanation it is necessary to record that the reference to

‘supports of the lattice type’ is a reference to what I have called ‘pylons’ of the lattice type. Similarly the reference to ‘conductors’ is a reference to what I have called power lines.) A similar provision is to be found in the NRS Code. It is unnecessary to quote the provision in full. It is sufficient to note that it requires that pylons of the type in issue ‘shall be adequately protected to prevent unauthorised persons from reaching a live conductor’. The installation of the ACD is, in any event, a clear indication that Eskom was in fact alert to the possibility of harm to members of the public if they climbed the pylons.

[10] What remains of the inquiry regarding Eskom’s alleged negligence, therefore, is what is generally referred to as the second leg of the inquiry, namely whether a reasonable person would have taken steps to guard against the danger and, if so, whether the steps taken by the defendant were reasonable in the circumstances. What is to be regarded as reasonable must depend upon a consideration of all the relevant circumstances. It is inappropriate to place any limitation on these, but the inquiry would ordinarily involve a consideration of:

‘(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.'

See *Ngubane v South African Transport Services* 1991 (1) SA 756 (A) at 776H-J. Ultimately the court is obliged to make a value judgment by balancing various competing considerations. But if a reasonable person would have done no more than was in fact done there would be no negligence.

[11] Before considering the effectiveness or otherwise of the ACD it is necessary to deal briefly with a ground of negligence which was found by the court *a quo* to have been established and which was touched upon only in passing in this court. The ground concerned Eskom's failure to place a warning sign at the foot of the tower indicating the presence of live conductors. The sign envisaged was the well-known one depicting a flash of lightning. While the Electrical Machinery Regulations require notices to be displayed in certain specified circumstances, there is no requirement that a notice be displayed on pylons. Counsel for the appellant contended that the reason for this was that as a general proposition it was common knowledge that pylons carried electricity. He pointed out that where notices were required by the regulations, the circumstances were

such that there was a danger of accidental contact resulting from a person not expecting the presence of a bare conductor. He argued that if the standards adopted in the industry do not require warning signs in a particular location, the inference may be drawn that this was not a step which a reasonable person would take to avoid harm. There is no doubt much to be said for counsel's contentions, but for the reasons that follow it is unnecessary to consider further the question of warning signs.

[12] The debate in this court as to whether Eskom was negligent or not ultimately centred around whether the ADC it installed on the pylon in question was one which was reasonable in the circumstances. As I have indicated, both the NRS code and the Electrical Machinery Regulations require lattice-type pylons to be 'adequately protected'. However, neither provides an indication of what is to be regarded as adequate. Nonetheless, this requirement of the industry does provide some assistance.

[13] It was emphasized in evidence and argued before us that it would be virtually impossible to erect a barrier that was impenetrable. That is no doubt so, but it is not suggested that the ACD should have been impenetrable. In the present case, Jacques

was able to pass through the ACD simply by pushing the wire out of the grooves. He required no tool to do so, not even an ordinary pair of household pliers. The evidence suggests that the device hardly retarded his progress up the tower. Some eight years later, Professor Reynders, who described himself as about to retire, was similarly able to push the wire out of the grooves and climb through the device ‘without any difficulty’. The angle at which the grooves were cut is indicative of a design that was intended to prevent the device from being dismantled in this way. But whether it was possible to do so by reason of faulty design or improper installation need not be decided. The point is that although formidable in appearance, the device in reality did not constitute an effective barrier. Nor could it be contended that, although properly installed, the wire had become slack with the passage of time. Mr Arthur Gullan, a former employee of Eskom who gave evidence on its behalf, testified that the wire would not become slack of its own accord. In the circumstances, the device installed by Eskom cannot in my view be regarded as having ‘adequately’ protected the pylon within the meaning of the regulations and the NRS code. If for any reason the barbed wire could not have been made sufficiently taut,

it would have been a simple matter to affix it to the horizontal bars at each groove. This could have been done at very little cost and effort. Perhaps the simplest (but not the only) method would have been to use binders of the kind that one encounters in an ordinary fence. In that event, a child, or other aspirant climber, would at least have had to go to the extent of arming himself with a tool of some kind to dismantle the device. In my judgment a reasonable person would at least have ensured that the ACD could not be dismantled simply by pushing the wire out of one or more of the grooves. Indeed, it is not without significance that in the case of the devices fitted to the pylons belonging to the Cape Town City Council, the strands of barbed wire are made fast to the horizontal bars so that they can not simply be pushed out of the way.

[14] It follows, therefore, that in my view Eskom failed to rebut the presumption of negligence. On the contrary, negligence on its part was established on the evidence. Eskom's appeal must accordingly fail.

[15] I turn now to the cross-appeal. The first and, in my view, decisive issue is whether the court *a quo* was correct in its finding that Jacques was *culpae capax* in relation to his conduct. In *Weber*

v Santam Versekeringsmaatskappy Bpk 1983 (1) SA 381 (A) this court affirmed the distinction previously drawn in *Jones NO v Santam Bpk* 1965 (2) SA 542 (A) between, on the one hand, the issue of capacity on the part of a child to commit a wrong and, on the other, the issue of fault. In doing so, it declined to follow a view widely held, particularly in academic circles, that there was a need to introduce a subjective element into the concept of negligence in the case of children by requiring no more than a degree of care expected of a child of the age and maturity of the one in question. Instead, the court in *Weber* held that the first inquiry, ie as to capacity, was subjective, while the second, ie as to fault, was objective. In other words, once a child was found to have the necessary capacity, its negligence or otherwise, was to be determined in accordance with the standard of the ordinary (adult) reasonable person.

[16] Following an exhaustive analysis of the Roman and subsequent authorities by both Jansen JA and Joubert JA (whose separate judgments were concurred in by the other three judges) the court affirmed the rule that *infantes* (children under seven years of age) are *culpae incapax* while, more significantly, children

between the ages of seven and puberty (12 in the case of girls and 14 in the case of boys) were presumed to lack capacity until the contrary was proved by the party alleging negligence. (The existence or otherwise of the presumption was not decided in the *Jones* case, *supra* at 552A-C.) In passing, it is worthy of note that this gender-based distinction between girls and boys may well be unjustifiable. The more appropriate cut-off point would seem to be 14 years for children of both sexes, as would appear to be the case in the criminal law. See *eg Rex v K* 1956 (3) 353 (A); *Attorney-General Transvaal v Additional Magistrate for Johannesburg* 1924 (AD) 421 at 434.

[17] The application of an adult standard in judging the negligence of a child has been strongly criticized. (See eg J D van der Vyver *SALJ* 100 (1983) 575; Andrew Caiger (1983) 46 *THRHR* 477; Boberg *The Law of Delict* at 679.) Nonetheless, the force of the criticism is to some extent overcome by the emphasis placed by the court in *Weber* on the subjective nature of the inquiry into the element of capacity. It was stressed (at 389H-400A) that the inquiry was one of fact. In each case what had to be determined was whether the child in question had developed the emotional and

intellectual maturity to appreciate the particular danger to be avoided and, if so, to act accordingly. Jansen JA (at 390H) referred with approval to the observation by Corbett JA in *Roxa v Mtshayi* 1975 (3) SA 761 (A) at 766A-B that the enquiry had to be related to 'the particular acts or omissions complained of in the particular circumstances'. In the passage referred to, Corbett JA added:

'It is not capacity in the abstract but capacity in relation to a particular duty situation that is of relevance.'

In the *Weber* case Jansen JA (at 400B-E) warned against over-emphasising the intelligence and schooling of the child as opposed to the inherent weaknesses associated with tender age and the propensity of children, however well schooled, to commit irrational and impulsive acts. (See also the remarks of Joubert JA at 410D-E.) Experience revealed, Jansen JA said (at 400C-D) that although children may be able to distinguish between right and wrong, they will often not be able to act in accordance with that appreciation; they became so engrossed in their play that they become oblivious of other considerations and acted impulsively. The learned judge accordingly warned against 'placing an old head on young shoulders'. (400F-G.)

[18] The correctness of the decision in *Weber* was not challenged in this court or the court below. The issue to be determined, therefore, is whether Eskom succeeded in discharging the burden of rebutting the presumption against capacity. The court *a quo* dealt with the issue as follows:

'I am of the view that Jacques had the necessary delictual capacity on the day in question. This conclusion is manifested by the evidence of Jacques who testified that he decided to race his brother to see who could climb the highest. Jacques was approximately 11 years and 8 months old at the time when the incident occurred. Jacques was also taught by his parents of the dangers of electricity although his parents did not deem it necessary to inform him of the particular dangers associated with the pylon.'

I am unpersuaded that the reasoning of the learned judge justifies the conclusion to which he came.

[19] From what has been said above, it is clear that the enquiry must in each case be related to the particular conduct which gave rise to the loss forming the subject matter of the claim. It is necessary therefore to return to the facts. There can be no doubt that Jacques appreciated that by climbing beyond the ACD he ran the risk of falling and hurting himself. Experience tells one that the

fear of falling from a height is one that develops early in childhood and the risk of such a fall is unlikely to be one that would be taken impulsively and without regard to the possible consequences. Indeed, this much was conceded by Jacques in evidence. Had he simply lost his footing and fallen Eskom, would, therefore, have had little difficulty in rebutting the presumption. But that is not what happened. The evidence was that while walking the dog and on coming to the pylon, Jacques and the other two decided to race to see who could climb the highest. Jacques climbed to the cross-arm and stopped. The other two were then still close to the base. It was at that stage that the glass insulators attracted his attention. They had nothing to do with the race and the reason for Jacques climbing the tower. Fascinated by the insulators and disregarding the race, he then proceeded to traverse out along the cross-arm in order to touch one of the insulators for no better reason than to feel its texture. It was this conduct that resulted in his injuries and it follows that it is in relation to this conduct that his emotional and intellectual maturity must be assessed.

[20] It is hardly necessary to observe that Jacques' attempt to touch one of the insulators was foolhardy in the extreme. Its only

purpose could have been to satisfy his curiosity. His conduct gives rise to two possible inferences: either he did not appreciate the danger to which he was exposing himself or its possible consequence, or his curiosity was so overwhelming that he became oblivious of the danger and succumbed to an impulse to touch one of the insulators. The only other possibility is that he was fully aware of the danger but was unconcerned by it. This is highly unlikely; it would amount to a conscious disregard for his own life.

[21] Jacques testified that it was only after the event that he learnt that the pylons supported live electricity wires. This strikes me as improbable. The most likely inference arising from his conduct would seem to be that he lacked an appreciation of the full import of the danger and became so engrossed in his fascination for the insulators that he forgot all about the danger of which he may have been aware.

[22] An analysis of the facts reveals, therefore, that Jacques' conduct giving rise to his injuries was typical of the impulsive behaviour in which children of tender age sometimes engage and which Jansen JA had in mind when he warned against placing an old head on young shoulders. In my view, the very conduct in

question is indicative of an inability on the part of Jacques to act in accordance with any appreciation he may have had of the danger involved.

[23] It was established in evidence that at the time of the incident Jacques was at primary school in grade five and that he had been taught the dangers of electricity. But there was little, if any, cross-examination of Jacques himself or his parents to determine his intellectual and emotional maturity at the time, nor was any evidence led to rebut the inference of childish impulsive behaviour that arose from his conduct or, for that matter, to assist in the

determination of the issue of his maturity. In all the circumstances, I am unpersuaded that Eskom succeeded in rebutting the presumption that Jacques was *culpae incapax* at the time of the incident. It follows that the cross-appeal must succeed.

24] The following order is made:

(a) The appeal is dismissed with costs, including the costs of two counsel.

(b) The cross-appeal is upheld with costs, including the costs of two counsel.

(c) The order of the court *a quo* is altered so as to read as follows:

(a) The defendant is held liable for the damages, if any, that the plaintiff's minor son, Jacques, is found to have suffered in consequence of the electric shock the latter sustained on 4 August 1994;

(b) The defendant is ordered to pay the plaintiff's costs of suit occasioned by the hearing on the merits, such costs to include the qualifying fees of those experts who testified at the trial on behalf of the plaintiff.

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D G SCOTT
JUDGE OF APPEAL

CONCUR:

STREICHER JA
BRAND JA
LEWIS JA
MLAMBO JA
PAGE