OF INTEREST

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

Case No: 2695/2017

In the matter between:

XOLELWA DUBULA **Plaintiff**

And

NELSON MANDELA BAY MUNICIPALITY **Defendant**

JUDGMENT

Govindjee AJ:

Background

[1] The plaintiff is the mother and legal guardian of Hlomla Dubula, a six-year-old child ('Hlomla'). Hlomla allegedly sustained severe burn injuries and related harm and damages when a Consumer Distribution Unit ('CDU'), licensed by the defendant municipality, exploded.

[2] The defendant is obliged to comply with health, safety and environmental standards and requirements in terms of the **Electricity Regulation Act, 2006** ('the Act').[1] The Act provides for liability for a licensee in the position of the defendant for damage and injury, as follows:

> '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.'

[3] The claim is based on the defendant's alleged breach of its legal duty, through its employees, as follows:

a) Failure to maintain the CDU or to ensure that it was in a safe condition for members of the public who were allowed to use the area around and close to the CDU;
b) Allowing the CDU to constitute a danger and hazard to members of the public in that it failed to enclose the CDU and failed to prominently display warning signs, warning the members of the public of the existence and danger of the CDU;
c) Failure to take all such steps as were reasonably required to ensure the safety of the members of the public traversing the area close to the CDU.

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[1] Act 4 of 2006. Section 14(1)(s) of the Act.

[4] It is alleged that the CDU exploded as a result of the defendant's breach of its legal obligations, resulting in the damages claimed by the plaintiff. The defendant pleaded that it had complied with all the requisite health, safety and environmental standards and requirements stipulated in the Act and denied any negligent conduct on the part of its employees. Its case was based on the explosion having been caused as a result of tampering of the CDU, in that an iron rod had been jammed inside the CDU.[2] The parties agreed to the separation of quantum and merits in terms of Rule 33(4) of the Uniform Rules of Court, and the matter proceeded on that basis.

Evidence

[5] Ms Dike, Hlomla's grandmother, testified that she had heard an explosion on 4 May 2017. She stepped outside and observed Hlomla, who was almost three years old at the time, walking towards her, dizzy, injured and touching his face with his skin peeling off. Hlomla required treatment at hospital. A neighbour, Ms Mekapi, had informed her that another young child, 'mentally disturbed' as she put it, had put something into the CDU. Officials from the municipality had visited her some time thereafter in connection with the incident.

[6] Under cross-examination, Ms Dike testified that the CDU was situated approximately 30 metres from her house. She had observed for three to four days prior to the incident that the unit was approximately 15 centimetres open, but had not reported this. The witness explained that she was aware of the dangers of a CDU.

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[2] An application for postponement in order to amend the plea to include the possibility of contributory negligence was refused, with reasons, during the trial.

Her husband is employed by the municipality and she generally reported electricity problems to him, but had not informed him about the open CDU.

[7] The witness accepted that the child referred to by her neighbour had placed a rod inside the CDU. Municipal workers attended to the CDU, and to fix the associated electricity problem, soon thereafter. During re-examination, the witness testified that she and the community had never been contacted about appropriate measures to look after the CDU.

[8] Mr Bester, the Deputy Director of the Electricity Division of the defendant testified that he had been employed for 44 years. His work included the CDUs and he was familiar with its workings. A CDU is planted on a verge next to a property and is 700 millimetres high and 450x300 millimetres in diameter. They have been made according to specification, using stainless steel two millimetres thick and consisting of a whole outer casing, for the past 25-30 years. A CDU consists of two solid plates, one of which would typically be facing the street, and two moving plates, covered by a lid. The unit is designed to be opened only by way of a special key, which opens the unit at the top. It would be difficult for any municipal official to forget to close the lid, because an open lid is clearly visible, and the unit was self-contained and sealed so that it did not require servicing or maintenance unless there had been a motor vehicle accident or vandalism. It was, for example, safe to lean or stand on a closed CDU. All CDUs were planted with an affixed aluminium warning sign, or with a danger sign painted on the unit.

[9] The Electricity Division would only attend to the unit if a fault had been reported, for example because lights in the vicinity were flickering. In this case, the lid was in a closed position and still in line with the rest of the unit. A side panel was forced open and bent down through vandalism. The warning sign might also have been stolen or taken off by a member of the public. No protective fence was used to enclose CDUs or substations anywhere in the metropolitan area because of the concern that such an enclosure would itself be vandalised.

[10] Mr Bester confirmed that a person could be electrocuted if a hand was placed inside an open unit. In this case, a rod had been inserted, as indicated on pictures placed before the court, and had resulted in a short. Despite accepting that vandalism was a common occurrence, the municipality's approach was to replace vandalised units when these were observed by employees, by chance when they were in the area, or when problems were reported, for example because street lights were not working. Because the units were self-contained, regular maintenance or checks did not take place even in residential areas. The units were placed every 30 to 40 metres apart, servicing five or six houses so that each street contained a few of the units.

[11] Mr Dwane, a qualified electrician, testified that he had worked for the defendant as an artisan since 2006. His responsibilities included work on municipal underground and overhead cables, ensuring electricity supply from substations to consumers.

[12] He had received a call from the control officer that a few houses in Mpofu Street were without electricity. Protocol had been followed so that the matter could be investigated. Upon arrival, a rod was observed protruding from the CDU, which was burnt out. A side panel of the CDU had been forced over the bottom plate so that an opening had been created near the top of the unit. It was clear that the top lid had neither been left open, nor had the side panel dropped down on its own. The substation was then switched off so that work on the unit could commence and photographs were taken with a cell phone. A temporary fix occurred in order to restore supply of energy to the community. The damaged inside was replaced a few days after the incident and the CDU had since been replaced with a new unit. Prior to this call out, there had been no information received by defendant suggesting that the CDU was open, as evidenced from the call centre logs.

[13] Mr Dwane confirmed that the defendant relied upon community members to report problems with CDUs, given that there were thousands of units all over the city which were designed to be maintenance- and rust-free. There was a general challenge with people tampering with electricity and trying to steal supply. A separate department informed the community, during public meetings and using pamphlets and the like, about the associated dangers.

[14] The plaintiff placed reliance on a report pertaining to the incident, dated 16 May 2017 and signed on behalf of the defendant's Acting Executive Director: Electricity and Energy, Mr Gadlamba. The recommendation contained in this report is as follows:

- ‘Regular inspection to be carried out to ensure that the CDU’s are in a locked position and all the side panels are in correct position and safe condition and that there are no signs of exterior damaged (sic). Where defects are noted CDU to be replaced immediately.
- Investigate ways and means to monitor the CDU’s against intrusion and damages.
- Educate communities on dangers of electricity installations when tempered with, especially young children (sic).
- Community members must report damaged or open CDU to the Call Centre of Cllr office immediately.’

[15] The witness’ response to this report was: ‘To make this real, we need commensurate staff, because we have thousands of these…’

[16] Mr Tyeke, a customer information officer employed by the defendant, testified that he had been working in this role since 2007. The job included public education, customer liaison and creation of awareness within the community.

[17] He confirmed that the defendant relied heavily on community members to report problems with CDUs. Booklets relating to energy saving, and including municipal contact numbers were distributed, together with keychains containing ‘0800’ and ‘041’ contact numbers. In Motherwell, meetings were held at the Raymond Mhlaba Centre, which is the biggest hall available. The defendant would be given a platform to speak when politicians made use of that venue. Shopping centres would also be utilised to disseminate information, also when ward councillors

invited the defendant to accompany them in communicating with the public. Loud hailers or whistles were used to invite people to such gatherings.

[18] Given that everyone does not attend such public meetings, radio slots were utilised as part of the education process.[3] Sometimes these slots were late in the evening. Municipal Bay News, a municipal newspaper, was also employed to distribute information, and was delivered with the Express newspaper or left at the entrance of malls or in the offices of councillors. No booklets or pamphlets were presented as supporting evidence and the witness confirmed that the CDU contained no telephone number for reporting any problems.

[19] Mr Tyeke testified that the defendant was obliged to adhere to plans which protect customers and ensure the effectiveness of the industry, including consumer / public and staff safety / education, in terms of its temporary distribution licence with the National Electricity Regulator of South Africa (NERSA). A report was compiled after each public session and submitted to the infrastructure and energy standing committee, to be approved by the mayoral committee and submitted to NERSA and ESKOM. The 2015, 2016 and 2017 reports were provided, reflecting monthly engagements with the community and infrastructural issues. The following entry (dated 14 November 2015) is illustrative of the type of information contained in the reports:

[3] During re-examination, the witness testified that four local radio stations were utilised, with broadcasts in both English and isiXhosa. He also indicated, without providing further detail, that churches and schools were occasionally visited for purposes of community education.

- ‘Random walkabout was conducted in the three informal settlements with the assistance of the ward Councillor and his structures.
- The purpose was to educate and show the dangers of illegal connections, theft of electricity infrastructure and encouraged to exercise safety precautions where electricity is concerned.
- The community was aware of the dangers of illegal connection however the extent of the dangers were not clearly understood as they have built their shacks under the medium voltage power lines…’

[20] The documentation illustrates that some educational awareness took place in NU 30, Motherwell (but not in Mpofu Street itself) on 23 November 2016 and a councillor in that area had reported street lighting issues during January / February 2017.

Analysis

[21] The plaintiff’s claim is founded in delict. The well-known elements to be established are the conduct of the defendant; the wrongfulness of that conduct; fault on the part of the defendant (in this case in the form of negligence); that harm was suffered and that there was a causal connection between such harm and the

defendant's conduct that is the subject of the complaint.[4] Delictual liability cannot ensue without the convergence of all these elements.[5]

[22] The conduct that is the cause of the complaint relates, essentially, to the failure of the defendant to maintain the CDU in a safe condition, its failure to enclose the CDU and to display appropriate warning signs and to take all reasonable steps to ensure public safety. It is convenient to assume that there exists a legal duty on the defendant, so that it is not free in law to refrain from any action in respect of the CDUs.[6] The focus may then turn, somewhat insequentially, to the existence of blameworthiness (*culpa*) and causation.[7]

[23] In this regard, the wording of section 25 of the Act is the clear starting point. That section provides that in civil proceedings of this nature, the injury caused 'is deemed to have been caused by the negligence of the licensee, unless there is credible evidence to the contrary'.[8] Deeming provisions are often used in statutes to

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[4] *MTO Forestry (Pty) Ltd v Swart NO* [2017] 3 All SA 502 (SCA).

[5] FDJ Brand 'Aspects of wrongfulness: A series of lectures' (2014) 25 *Stellenbosch LR* 451 at 455, as cited in *MTO Forestry supra* at para 15.

[6] See *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) at footnote 5. Also see *MTO Forestry supra* at para 14.

[7] *Administrateur, Transvaal v Van der Merwe* 1994 (4) SA 347 (A) at 364G. On the intersection between wrongfulness and fault in the context of a negligent omission, see *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 12. See *Bergrivier Municipality v Van Ryn* Beck 2019 (4) SA 127 (SCA) at para 44: without negligence the issue of wrongfulness does not arise, for conduct will not be wrongful if there is no negligence. Also see *Cape Town City v Carelse and Others* 2021 (1) SA 355 (SCA) at para 48. It is well-established that wrongfulness and negligence are two separate and discreet elements of delictual liability, notwithstanding some academic criticism: see *Le Roux and others v Dey (Freedom of Expression Institute and Restorative Justice Centre as amici curiae)* [2011] ZACC 4 at para 122.

[8] For similar wording, couched as a 'presumption of negligence', see section 34 of the National Veld and Forest Fire Act, 1998 (Act 101 of 1998). The provision does not create strict liability: *cf* section 61 of the Consumer Protection Act, 2008; *Eskom Holdings Ltd v Halstead-Cleak* [2016] ZASCA 150 at para 17.

give the subject-matter a meaning not ordinarily associated with it.[9] As Trollip JA held in ***S v Rosenthal***:[10]

> 'The words…are a familiar and useful expression often used in legislation in order to predicate that a certain subject-matter, eg a person, thing, situation, or matter, shall be regarded as accepted for the purposes of the statute in question as being of a particular, specified kind whether or not the subject-matter is ordinarily of that kind. The expression has no technical or uniform connotation. Its precise meaning, and especially its effect, must be ascertained from its context and the ordinary canons of construction. Some of the usual meanings and effect it can have are the following. That which is deemed shall be regarded or accepted (i) as being exhaustive of the subject-matter in question and thus excluding what would or might otherwise have been included therein but for the deeming, or (ii) in contradistinction thereto, as being merely supplementary, ie, extending and not curtailing what the subject-matter includes, or iii) as being conclusive or irrebuttable, or (iv) contrarily thereto, as being merely *prima facie* or rebuttable. I should add that, in the absence of any indication in the statute to the contrary, a deeming that is exhaustive is also usually conclusive, and one which is merely *prima facie* or rebuttable is likely to be supplementary and not exhaustive.'

[24] As in ***R v Haffejee and Another***,[11] the statutory provision in question is clearly a provision to facilitate proof of matters which might otherwise be difficult to

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[9] See the minority judgment of Cachalia AJ in *Assign Services (Pty) Ltd v NUMSA and others* [2018] ZACC 22 at para 92.
[10] 1980 (1) SA 65 at 75G *et seq*.
[11] 1945 AD 345 at 352-3.

prove in a court of law. In the case at hand, the deeming provision appears to relate, in particular, to the elements of negligence on the part of the defendant and causation.[12] A CDU that exploded of its own accord due to an electrical fault and causing injury would be an example of a scenario where the deeming provision would be of assistance in establishing the requirements of causation and negligence. The deeming provision is, however, clearly rebuttable provided that there is 'credible evidence' to the contrary and the Act does not provide for strict liability of the municipality. Although I make no determination in that regard, the effect in this case appears to be akin to the evidential aid provided by a presumption.[13] Indeed, the wording of section 26 of the now repealed **Electricity Act, 1987**[14] is almost identical to section 25 of the Act, other than substitution of 'presumed' for 'deemed', and the replacement of 'credible evidence' with 'unless the contrary is proved.'[15]

[25] It may be accepted that the defendant bears the onus to adduce such evidence. It sought to discharge that onus by relying on the manner in which the CDU has been constructed, to serve as a self-contained unit. It may also be accepted that the 'credible' evidence demonstrates on a balance of probabilities that the CDU in question was vandalised, resulting in an opening in the unit. Another child placed a rod inside the unit, resulting in the injuries sustained by Hlomla. Despite these findings, which relate to the direct cause of the harm suffered, can it

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[12] For an example of a presumption relating only to the negligence component, see *MTO Forestry supra* at para 33.

[13] See *MTO Forestry supra* at para 25.

[14] Act 41 of 1987.

[15] Section 26 of the Electricity Act, 1987 reads: '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.'

nevertheless be concluded that the defendant was negligent in the various ways alleged, so that it is liable to the plaintiff?

[26] Various recent decisions of the SCA appear to provide useful guidance in addressing that issue, and the related issue of wrongfulness. In ***Bakkerud***, for example, one of the questions to be addressed was whether the municipality was under a legal duty to repair potholes on the sidewalk of a busy Cape Town street, or to warn the public of their existence, and whether its failure to do either was negligent.[16] The potholes had been visible for many months and no evidence was adduced on behalf of the municipality, so that the court concluded that there was a factual foundation for the finding that there was *culpa* on the part of the municipality in failing to fulfil its legal duty.

[27] It is normally the case that the plaintiff must allege and prove the defendant's negligence by establishing that a reasonable person in the position of the defendant:

a. Would foresee the reasonable possibility that the conduct (whether an act or omission) would injure another person's property and cause that person patrimonial loss;
b. Would take reasonable steps to guard against such occurrence; and
c. That the defendant failed to take such steps.[17]

[28] For the defendant to discharge the reverse onus in this situation requires credible evidence that a reasonable person in the position of the defendant would

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[16] *Bakkerud supra* at para 32.
[17] *Kruger v Coetzee* 1966 (2) SA 428 (A). See *Bergrivier Municipality supra* at para 48.

not have foreseen the reasonable possibility that the conduct (in this case an omission) would cause injury or patrimonial loss; alternatively would not have taken further reasonable steps to guard against such occurrence.[18] The defendant would also be able to avoid liability by producing credible evidence that its negligence was not the cause of the injury. In ***Eskom Holdings Ltd v Hendricks***,[19] (and with reference to the now repealed **Electricity Act, 1987**) the SCA framed the position as follows:

> '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…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.'

[29] Whether the precautions taken to guard against foreseeable harm can be regarded as reasonable or not depends on a consideration of all the relevant circumstances. The question of negligence involves a value judgment which is to be made by balancing various competing considerations. These would ordinarily be:[20]

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[18] Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case: *Kruger supra* at 430E-F.
[19] 2005 (5) SA 503 at para 8.
[20] *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA) at para 7.

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

[30] If the defendant can demonstrate that a reasonable person in its position would have done no more than was actually done, there is no negligence.[21] The evidence demonstrates that CDUs are deliberately constructed to be self-contained so as to require no maintenance or servicing. An aluminium warning sign or painted danger sign appears on the units and a special key is required to open the top of the unit. It is only motor vehicle accidents and vandalism that result in the units being opened, and the warning sign removed. The units are not enclosed by a further protective fence because of the likelihood of vandalism.

[31] Given the frequency of acts of vandalism in society, it must be foreseeable to the defendant that failure to conduct regular inspections could result in an open unit, which has not been reported by a community member, causing the type of harm suffered by Hlomla.[22] It must further be accepted that injuries related to electricity transmission or distribution are likely to result in grave consequences. Bester's testimony confirms both these points. By installing units of the kind described, the defendant would appear to have gone a long way to prevent routine instances of electrocution, but without taking further steps to arrange for systematic monitoring

[21] *Ibid*.
[22] For an example of vandalism resulting in injury, in the context of a claim based on section 61 of the Consumer Protection Act, 2008, see *Eskom Holdings Ltd* at para 7.

and inspection of all units in order to check for acts of vandalism. Despite the Acting Executive Director's recommendation to that effect, the evidence suggests that the units number stretches into the thousands and that there would need to be an injection of staff, with the resultant budgetary consequences, in order to make this realistic. The court in ***Bergrivier Municipality*** has confirmed that municipalities are not given licence to ignore the fulfilment of their obligations to residents merely by asserting budgetary constraints.[23] Nevertheless, the full bench of the High Court was criticised by the SCA in that case for being too dismissive of budgetary realities and for imposing too onerous a duty on the municipality.

[32] The defendant has not stopped there, and has produced credible evidence to demonstrate its various attempts to continue to educate the community about the dangers associated with electricity.[24] Those attempts are inevitably fraught with a sense of incompleteness, particularly if the expectation is that the municipality is responsible for ensuring that each and every person is actually reached. To move in that direction would require door-to-door training about the dangers of electricity (possibly together with other civic responsibilities such as responsible water usage), and possibly even testing, to ensure compliance. As attractive a proposition as that may be, it must be accepted that the burden of eliminating the risk of harm completely is extremely onerous, in the least, if not, practically speaking, impossible.

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[23] See, for example, *Van Vuuren v Ethekwini Municipality* 2018 (1) SA 189 (SCA) at para 25. In that case, access to the slides leading into a communal swimming pool could easily have been controlled at the top of the stairhead by a single official, as occurred at other public pools. Also see *Carelse supra* at para 56: the municipality could have taken the reasonable step of employing access control measures and to ensure that security arrangements relative to crowd size at the public facility were adequate. A fence or placing of a guard would have sufficed.

[24] In *A.F.A. v Blue Crane Route Municipality* [2017] ZAECGHC 86 at paras 55 and 56, Plasket J (as he then was) dismissed various suggestions that staff of the municipality had been negligent, including that the defendant was under a duty to have educated an eight-year-old girl about the dangers of electricity, despite having lived in an electrified house and being well aware of the dangers of electricity.

Balancing the various factors, namely the degree and gravity of the risk with the utility of the municipality's actions and burden of eliminating the risk of harm, a value judgment must be exercised in favour of the municipality in this instance. Even if the municipality were negligent in any way, I am unable to conclude, given the facts at hand, that such negligence was the cause of the harm suffered.[25]

[33] Hlomla's injuries are most regrettable and, without implying negligence on the part of any family member, could have been prevented. While accidents do happen,[26] at the level of the community, there is clearly a need to be alive to the dangers caused by acts of criminality, and the side effects on innocent people, including children. A single call by any community member advising the defendant of the act of vandalism that had resulted in an opened CDU would in all likelihood have resulted in the type of response that would have prevented the incident. Yet, for at least three to four days, if not more, that call was not forthcoming. It is insufficient to suggest that this is because there is no telephone number displayed on CDUs. Families too need to take ownership of their surrounds, particularly when young children are allowed to roam the streets unaccompanied by adult supervision.[27] This would add substance to the constitutional rights of children, including their rights to human dignity, bodily integrity and to have their best interests considered, respected, protected, promoted and fulfilled by those around them, including their immediate family, extended family and community.[28] Ms Dike was certainly aware of the

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[25] *Cf Hirschman NO & Hirschman v Kroonstad Municipality* 1914 OPD 37, where a municipality's failure to take any precautions to avoid accidents on an open, unfenced and unprotected piece of ground close to a public street amounted to an act of negligence.
[26] See *Stedall and another v Aspeling and another* [2017] ZASCA 172 at para 37.
[27] See *Stedall supra* at para 36.
[28] Section 7(2) read with sections 8(2), 10, 12(2), 28(1)(b) and 28(2) of the Constitution of the Republic of South Africa, 1996.

dangers of an open CDU and it is unfortunate that she did not think to report that problem to her husband, who works for the defendant.[29] The defendant cannot be held liable for those failures. They have succeeded in demonstrating, on a balance of probabilities, that a reasonable person in their position would have done no more than what was actually done, so that there is no negligence on their part, and certainly no negligence which was the cause of the harm suffered.

Order

[34] The plaintiff's claim is dismissed with costs.

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A. GOVINDJEE

ACTING JUDGE OF THE HIGH COURT

[29] On the duties of grandparents in relation to children, see *SS v Presiding Officer, Children's Court, Krugersdorp* 2012 (6) SA 45; Also see section 32 of the Children's Act, 2005 (Act 38 of 2005), on the duty of care by a person not holding parental responsibilities, also in respect of safeguarding a child's health and well-being. Those duties should include the extended family: A Skelton 'Children' in I Currie and J de Waal *The Bill of Rights Handbook* (6th Ed) (Juta) 606.

Appearances:

Obo the Plaintiff:	*Adv N. Msizi*
Instructed by:	*T.M Pitana Attorneys*
Obo the Defendant:	*Adv M. Pango*
Instructed by:	*Lexicon Attorneys*
Heard:	*15 & 16 March 2021; 24 May 2021*
Delivered:	*27 May 2021*