IN THE HIGH COURT OF SOUTH AFRICA **REPORTABLE**

KWAZULU-NATAL, PIETERMARITZBURG

CASE NO: 6923/2004
AR 408/08

In the matter between:

THE MSUNDUZI MUNICIPALITY **Appellant**

and

TELKOM SA LIMITED **Respondent**

JUDGMENT

MSIMANG, J:

1] In South Africa utilities are provided by various service providers and, for the purpose of providing those services, those service providers have to lay underground cables and pipes. To avoid the destruction of those cables and pipes, the providers have devised methods of co-operation with each other. It is this co-operation which forms the subject of the present appeal.

2] The appellant (defendant in the Court *a quo)* is a local authority, the duties of which constitute, *inter alia,* the provision of water services to the residents of its area and the respondent (the plaintiff in the Court *a quo)* is a para-statal body responsible for the provision of telephone services to the public.

3] It would appear that, during 2002, a need arose for the replacement of the appellant's underground water mains in the Cedar Road vicinity of the Pietermaritzburg suburb of Mountain Rise. On 11 November 2002 while the appellant's employees were digging trenches for the laying of the water pipes, they damaged respondent's cable, causing the respondent to suffer financial loss. It was for this reason that the respondent instituted action for damages against the appellant out of the Pietermaritzburg Magistrate's Court, alleging that its cable had been damaged through the negligence of appellant's employees acting within the scope of their authority as such.

4] In its plea, while it admitted that, at all material times, its employees had acted in their capacity and within the scope of their authority as such and that the respondent was the owner of a 600 PR underground cable which had been damaged during the appellant's excavations at or near 17 Cedar Road, Mountain Rise, Pietermaritzburg on 11 November 2002, the appellant denied that the said damage had been caused by the negligence of its aforesaid employees. In the alternative and in the event of the Court finding that the appellant's employees had been negligent, and only in that event, the appellant pleaded that the damage was caused also by the negligence of the respondent which had not laid its cables in terms of appellant's approved plan and therefore that respondent's claim be dismissed with costs or, alternatively, that any amount awarded to the respondent as damages be reduced in terms of the Apportionment of Damages Act, 1956.

5] At the commencement of the trial in the Court *a quo* the parties agreed that the issues of liability and quantum would be separated and that the trial would proceed only on

the issue of liability. However, on 18 August 2008, respondent's attorney appeared before the learned Magistrate and informed her that the issue of quantum had been settled by the parties, the appellant having consented to the quantum of respondent's claim. Judgment was accordingly granted in favour of the respondent for the said amount plus interest and costs.

6] The only issue which then had to be determined by the Court *a quo* was whether the respondent's cable had been damaged through the negligence of appellant's employees and, if so, whether the respondent was also negligent and whether the negligence had also contributed to the damage, in which latter event, respondent's agreed amount of damages would be reduced in relation to the degree of that party's own negligence.

7] The issue upon which the Court *a quo* found for the respondent on the question of negligence and the issue which engaged the parties' substantial argument before us is the issue, which the parties termed, the wayleave procedure. The procedure constitutes one of the methods of co-operation between the service providers. It was common cause, pursuant to this procedure, that since the appellant had intended to perform excavation works in the Cedar Road area, before engaging in those excavations, it had to inform the respondent of its intentions. It would draw what is termed an AO plan upon which would be depicted the remedial work proposed to be done and dispatch that plan to the respondent.

8] Upon receipt of this plan from the appellant, the respondent would cause to be affixed on the same its red rubber stamp, indicate its existing service thereon, prepare a covering minute and, thereafter and under cover of the said minute, send the plan back to the appellant. The completed plan would enable the appellant to become aware of the location of the respondent's services in the area and therefore avoid damaging same during its excavation works.

9] In the Court *a quo* the respondent's official, occupying the position of operations manager, testified on the issue. He had been in respondent's employ for approximately twenty five years and, during that period, he had acted as a wayleaves manager for a period of four years. In that capacity, all the wayleave applications made to the respondent would be directed to him. He had searched through respondent's records, both manual and on computer, but could not find any record of any wayleave application having been made by the appellant for the Cedar Road operations either prior to or during November 2002. It was this appellant's failure to comply with, what it termed, an established trade practice, which led the Court *a quo* to find for the respondent on the issue of negligence, finding that such a failure on the appellant's part amounted to negligence which caused the damage to respondent's cable.

10] In its grounds of appeal, and during argument before us, the appellant submitted that the learned Magistrate erred in accepting that official's evidence that respondent never received a wayleave application from the appellant. This submission is apparently based on that official's responses to the questions put to him during cross-examination

by appellant's counsel in the Court *a quo* as well as on the contents of a document which was entered in evidence and marked Exhibit "C".

11] Dealing first with the official's responses during cross-examination, Mr. **van Rooyen,** who appeared for the appellant, submitted that, in those responses, the official had conceded that the information relating to respondent's services reflected on the document could only have emanated from the respondent. He accordingly argued that this concession was sufficient to sustain a finding, at least on a preponderance of probability, that a wayleave application relating to appellant's November 2002 excavations in the Cedar Road area had been given to the respondent. I have carefully perused and considered the record of the proceedings in the Court *a quo* and I can find no such concession in the official's responses. Much as the official conceded that the information would be obtainable at the respondent's wayleave office, he made it clear that he did not know how the appellant had obtained the same.

12] Besides, I am at a loss to fathom how the contents of the document could have advanced appellant's case. The document constitutes a reconstruction by the appellant's official of a plan and the information contained on the original AO plan after it had been returned to the appellant by the respondent's wayleave office. Upon perusing that official's evidence, I had initially gained an impression that he had based that reconstruction on the information which he had stored on his computer. However, as ably demonstrated by Mr. **Dayal,** who argued the appeal on behalf of the respondent, a close reading of the record shows that this was not the case. What the official had stored on his computer had been a blank plan. The information contained

therein was gathered by him from other departments. The information accordingly constituted inadmissible hearsay evidence.

13] It seems to me that the Court *a quo* concluded that the incidence of onus was a determining factor in deciding the issue between the parties in this matter and, in that connection, it pronounced itself, *inter alia,* as follows :-

> "In these circumstances my inclination would be to hold that the overall onus to prove that it did comply with the trade usage rests upon the defendant as the alleged compliance would be within its peculiar knowledge."

14] The passage attracted heavy criticism from Mr. **van Rooyen** who submitted that the learned Magistrate misconstrued the incidence of the onus of proving negligence and that she should have found that the *onus* rested upon the respondent to prove that the damage was caused negligently by the appellant due to a failure to comply with the wayleave procedure.

15] The *locus classicus* on the rules governing the incidence of proof is **Pillay v Krishna and another.** [1] Dealing with the different senses in which the word *onus* is often used, **Davis AJA** had the following to say :-

> "…..the only correct use of the word 'onus' is that which I believe to be its true and original sense ….. namely, the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim, or defence, as the case may be, and not in the sense merely of his duty to adduce evidence to combat a *prima facie* case made by his opponent…… this duty alone unlike a true onus, shifts or is transferred ….." [2]

16] The second sense in which the word is often used is sometimes referred to as "the evidentiary burden" and :-

> "…..may shift, or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other." [3]

17] Upon perusing the above-quoted passage in the judgment of the Court *a quo,* I gained an impression that what the learned Magistrate was probably referring to in that passage was not the *onus* in its true and original sense but that she had in mind the duty to adduce evidence to combat the *prima facie* case made by the respondent (the plaintiff in the Court *a quo).* This may well have been a situation referred to by **Corbett JA** in **South Cape Corporation (supra)** where :-

> "The use, without proper definition of the term *onus* in this context has, I believe, been a source of some confusion". [4]

18] When this proposition was put to Mr. **van Rooyen** I did not understand him to dispute the same. It must therefore be accepted, for purposes of the present appeal, that what the learned Magistrate contemplated by her use of the word *onus* in the above quoted passage was the duty to adduce evidence to combat the *prima facie* case which had been made by the respondent in the Court *a quo.*

19] In appropriate cases, where a party fails to adduce evidence or adduces unsatisfactory evidence to rebut such a *prima facie* case, the Court may find in favour of a party upon which the *onus* proper rests. But it must be borne in mind that the evidence which sustains a *prima facie* case amounts to a mere inference casting upon

the other party a burden of adducing –

> "….. evidence of facts ….. which tended to displace the inference of no irreparable harm". [5]

and that such evidence does not alter the original *onus* which, in the present case, throughout, rested upon the respondent to show, on a preponderance of probability, that the appellant's employees were negligent. [6]

20] In the Court *a quo* the respondent had adduced evidence, which was accepted by the appellant, that there existed a practice which required the latter to make a wayleave application to the respondent before commencing with the excavation works so as to avoid the destruction of respondent's cables located in the area of intended excavation. The respondent's further evidence was that the appellant had failed to comply with this practice and proceeded with its excavations, in the process, damaging respondent's cables and therefore that the appellant was negligent.

21] Clearly this evidence called for a rebuttal from the appellant in respect of which rebuttal the appellant adduced evidence of its official who relied on the document which was marked Exhibit "C" and which, as I have indicated, amounted to inadmissible hearsay evidence. Regarding the original AO plan which had been allegedly completed by the respondent and dispatched back to the appellant, the official testified that the same had been destroyed. The official, however, acknowledged that there existed in appellant's possession, correspondence which had accompanied appellant's wayleave application to the respondent as well as the

completed AO plan back to the appellant. It was when he was later questioned regarding that correspondence that this official made a startling remark which led the learned Magistrate, in her judgment, to characterize the appellant's failure to timeously obtain those documents as displaying "a totally lackadaisical attitude" and consequently to find that the plaintiff had established that the appellant had not complied with the wayleave procedure and therefore that it was negligent.

22] I can find no fault in the learned Magistrate's approach in dealing with the evidence in this matter neither could I fault her in her finding on the appellant's non-compliance with the wayleave procedure, which finding is, in my judgment, consonant with the rules relating to the incidence of *onus* which have been enunciated above.

23] The quantity of proof required for delictual liability based on negligence was propounded as follows in the well-known decision in **Kruger v Coetsee :-** [7]

> "(a) a *diligens paterfamilias* 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 defendant failed to take such steps."

24] Clearly the evidence adduced by the respondent in the Court *a quo* was sufficient to sustain such proof. That Court therefore did not err when it found that the appellant

was negligent and that such negligence led to the damage of respondent's cable.

I would accordingly dismiss the appeal with costs.

MSIMANG, J

TSHABALALA, JP

It is so ordered

For the Appellant: Adv. R M van Rooyen (instructed by Lister & Lister)

For the Respondent: Adv. S K Dayal (instructed by Siva Chetty & Co.)

Matter argued: 6 March 2009

Judgment delivered: 17 March 2009

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[1] 1946 AD 946;

[2] Ibid. at 952 – 953;

[3] Per Corbett JA in South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977(3) SA 534 (A) at 548 B;

[4] Ibid. at 547 – 548A;

[5] Ibid. at 548 G;

[6] See also Venter v Bophuthatswana Transport Holdings (Edms) Bpk 1997(3) SA 374 (A) at 388 C-E;

[7] 1966(2) SA 428 (A) at 430 E-G.