UNIVERSITEIT VAN JOHANNESBURG

UNIVERSITY OF JOHANNESBURG

FACULTY OF LAW

AUCKLANDPARK CAMPUS

SUBMISSION OF FINAL EXAMINATION PAPERS

YEAR: 2017

COURSE AND EXAMINATION PAPER: LEGAL SKILLS / LSK41A0

Lecturer: MRS. ES. FOURIE & DR. M. ROOS

EXAMINATION PERIOD:

1. How many of the following items will be required **per student**?

   Examination script – 4 pages – 2 Y

   Scanner sheet – –

   Other – –

2. Do you grant permission that copies of this examination paper may be given to the library for inclusion in the examination books that will be made available for reference purposes to lecturers and students at a later stage?

   YES / NO – Yes

3. How many students are still attending lectures (with a view to the number of examination papers required)? – 330

SIGNATURE OF LECTURER: Efourie D S DE VILLIERS 15/5/2017

DATE: 12/05/2017

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UNIVERSITY
OF
JOHANNESBURG

PROGRAM	:	NATIONAL DEGREE: LLB; BCOM (Law); BA (Law)
SUBJECT	:	**LEGAL SKILLS**
CODE	:	LSK 41A0
DATE	:	WINTER EXAMINATION 23 May 2017
DURATION	:	16h30 – 18h30
TOTAL MARKS	:	100

EXAMINERS	:	MRS ES FOURIE AND DR M ROOS
NUMBER OF PAGES	:	The question paper consists of 4 pages including the cover page. Attached to the question paper is part of the Domestic Violence Act and the *Grootboom v Graaff-Reinet Municipality* case.

INSTRUCTIONS

1. Answer all the questions.
2. Write legibly.
3. Number your answers carefully.
4. Question 6 requires the use of a calculator. No cellphones, tablets or laptops are allowed.

QUESTION 1

"Approximately one out of every four mothers who give birth in South Africa is under 20 years old. It is also common knowledge for most of us that these women are still at school when they fall pregnant, and when they find out that they are pregnant, they are terrified to discuss the matter with their parents. In fact most parents only find out when the pregnancy is advanced – maybe when the uniform no longer fits around their daughter's waist, or sometimes when this young girl wears a jersey even when the temperature is 38°C. Her parents begin to wonder what the matter is, and then they find out that their daughter is pregnant.

What this Bill says is that if that young woman is terrified even of telling her parents about the pregnancy, she will be equally terrified if she has decided to terminate that pregnancy. Therefore if she is forced to get consent from her parents, she will still have a backstreet abortion, and she will die. The Bill says that the life of that girl is paramount. We have to save her life even if it means not getting parental consent."

Hansard, column 5047, 29 October 1996.

Consider the above and answer the following questions:

1.1 Identify the two houses of parliament in South Africa. (2)

1.2 Provide a description of each of the following concepts:

1.2.1 a white paper;

1.2.2 portfolio committee;

1.2.3 *Hansard;*

1.2.4 *Government Gazette*; and

1.2.5 bill. (5 X1 =5)

1.3 Define legislative authority. In your answer you must refer to applicable statutory provisions. (4)

[11]

../2

QUESTION 2

Refer to Act 116 of 1998, a copy of which is attached, and answer the following questions.

2.1 What is the short title of this Act? (1)

2.2 When did the Act come into force? (1)

2.3 Which text was signed by the President? What is the significance of this fact? (2)

2.4 What is the long title of this Act and what is the purpose of the long title? (2)

2.5 Ms Jane Moloi and Ms Tasmyn Peters are two women who have been living together in a flat in Melville, Johannesburg since 2015. They are currently engaged. Tasmyn is well-off and has agreed to pay the rent. Jane is currently unemployed. Tasmyn's father dies and she undergoes a dramatic change of personality. One evening, while Jane is out, Tasmyn destroys all Jane's clothing. When Jane returns, Tasmyn informs her that she is no longer prepared to pay the rent. She also calls Jane a "loser" and a "useless human being". Jane is desperate as she does not know what to do and seeks your advice.

Consider the scenario above and answer the following question with reference to Act 116 of 1998.

2.5.1 Does the above relationship constitute a "domestic relationship" as defined in Act 116 of 1998? You must motivate your answer. (3)

2.5.2 Do the above actions by Tasmyn qualify as "domestic violence" in terms of Act 116 of 1998? Motivate your answer. (3)

2.5.3 List two international instruments that are referred to in the preamble to the Act 116 of 1998. In your answer you must also explain the importance of international law in South Africa and explain the concept foreign law. (5)

2.5.4 Jane, your client, does not have any legal background and asks you to explain the concept "economic abuse" as provided for by Act 116 of 1998. Please write a letter to Jane wherein you explain this concept in plain language to your client. Your letter must not be longer than one page. (20)

../3

2.6 "Early in the drafting process it was decided that the Constitution must as far as possible be drafted in simple and easily understandable language. The reasons are obvious: (a) South Africa is a country with vast differences between the educated elite and the illiterate and poorly educated masses. (b) English is the first language of a small minority of South Africans. (c) Historically the majority of South Africans were excluded by apartheid policies from many of the benefits of the law. (d) A constitution belongs to all, not only the privileged few; it has been described as "the autobiography of a nation", "a mirror of the nation's sole", and the "birth certificate" of the democratic South Africa. (e) The Constitution – specifically the Bill of Rights – can and should be a powerful educational tool. It ought to visibly feature on the walls of school classrooms, community centres, police offices and Magistrates courts. (f) Transparency, openness and accountability are constitutional values. (g) The rule of law is central to our constitutional democracy. For the law to rule, people must know and understand what the law is." Justice Van der Westhuizen

Consider the above and answer the following questions:

2.6.1 Identify two key principles of plain language. (2)

2.6.2 Identify a piece of legislation that requires the use of plain language. (1)

[40]

QUESTION 3

Refer to the copy of *Grootboom v Graaf-Reinet Municipality* which is attached and answer the following questions:

3.2.1 Identify the party/ies to this case. (2)

3.2.2 What type of case is this – a criminal or civil case? (1)

3.2.3 Define the following terms:

3.2.3.1 *ratio decidendi;* (2)

3.2.3.2 separate judgment; and (2)

3.2.3.3 *obiter dictum.* (2)

../4

3.3 When did the court in the above matter deliver judgment? (2)

3.4 In which volume of the law reports was the case reported? (2)

3.5 Summarise the facts of this case in no more than five lines. (5)

3.6 Provide the *ratio decidendi* of *Grootboom v Graaf-Reinet Municipality* in no more than two lines. (3)

3.7 The court refers to sources on 375 of this case. Cite one case and onestatute using the *TSAR* style guide format. Use of italics must be indicated by underlining the relevant section. In your answer you must indicate whether these sources are primary or secondary and what this implies. (8)

[29]

QUESTION 5

"If the constitution itself was a product of achieving dignity and security through dialogue, it followed that it should be interpreted in a way that fostered resolving disputes through dialogue." Sachs *The strange alchemy of life and law* (2009) 85.

With reference to the above quotation, critically analyse the alternative dispute resolution framework in South Africa, with specific reference to access to justice in South Africa. In your answer you must also refer to the role of *therapeutic jurisprudence* in this framework. **[10]**

QUESTION 6

In your answer you must show all calculations.

6.1 You are the liquidator of an insolvent estate. You arrange for the selling of a number of assets in the estate. The assets are sold for R34 500 including VAT charged at 14%. You must indicate what the VAT amount in the insolvent estate account is. What is the VAT amount? (4)

6.2 A, B and C are business partners in a law firm. They divide their profits on a pro rata basis of 1:3:4. The profits amount to R7 000. Calculate the amount of profit that each partner will receive. (6)

[10]

TOTAL MARKS: 100

DOMESTIC VIOLENCE ACT 116 OF 1998

[ASSENTED TO 20 NOVEMBER 1998] [DATE OF COMMENCEMENT: 15 DECEMBER 1999]

(English text signed by the President)

as amended by

Judicial Matters Second Amendment Act 55 of 2003

also amended by

Jurisdiction of Regional Courts Amendment Act 31 of 2008
[with effect from a date to be proclaimed - **see** PENDLEX]

Regulations under this Act

DOMESTIC VIOLENCE REGULATIONS, 1999 (GN R1311 in *GG* 20601 of 5 November 1999)

ACT

To provide for the issuing of protection orders with regard to domestic violence; and for matters connected therewith.

Preamble

RECOGNISING that domestic violence is a serious social evil; that there is a high incidence of domestic violence within South African society; that victims of domestic violence are among the most vulnerable members of society; that domestic violence takes on many forms; that acts of domestic violence may be committed in a wide range of domestic relationships; and that the remedies currently available to the victims of domestic violence have proved to be ineffective;

AND HAVING REGARD to the Constitution of South Africa, and in particular, the right to equality and to freedom and security of the person; and the international commitments and obligations of the State towards ending violence against women and children, including obligations under the United Nations Conventions on the Elimination of all Forms of Discrimination Against Women and the Rights of the Child;

IT IS THE PURPOSE of this Act to afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide; and to introduce measures which seek to ensure that the relevant organs of state give full effect to the provisions of this Act, and thereby to convey that the State is committed to the elimination of domestic violence,

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:-

1 Definitions

In this Act, unless the context indicates otherwise-

'arm' means any arm as defined in section 1 (1) or any armament as defined in section 32 (1) of the Arms and Ammunition Act, 1969 (Act 75 of 1969);

'clerk of the court' means a clerk of the court appointed in terms of section 13 of the Magistrates' Courts Act, 1944 (Act 32 of 1944), and includes an assistant clerk of the court so appointed;

'complainant' means any person who is or has been in a domestic relationship with a respondent and who is or has been subjected or allegedly subjected to an act of

domestic violence, including any child in the care of the complainant;

'court' means any court contemplated in the Magistrates' Courts Act, 1944 (Act 32 of 1944) or any family court established in terms of an Act of Parliament;

[NB: The definition of **'court'** has been substituted by s. 10 (2) of the Jurisdiction of Regional Courts Amendment Act 31 of 2008, a provision which will be put into operation by proclamation. See PENDLEX . **]**

'damage to property' means the wilful damaging or destruction of property belonging to a complainant or in which the complainant has a vested interest;

'dangerous weapon' means any weapon as defined in section 1 of the Dangerous Weapons Act, 1968 (Act 71 of 1968);

'domestic relationship' means a relationship between a complainant and a respondent in any of the following ways:

(a) they are or were married to each other, including marriage according to any law, custom or religion;

(b) they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;

(c) they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);

(d) they are family members related by consanguinity, affinity or adoption;

(e) they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration; or

(f) they share or recently shared the same residence;

'domestic violence' means-

(a) physical abuse;

(b) sexual abuse;

(c) emotional, verbal and psychological abuse;

(d) economic abuse;

(e) intimidation;

(f) harassment;

(g) stalking;

(h) damage to property;

(i) entry into the complainant's residence without consent, where the parties do not share the same residence; or

(j) any other controlling or abusive behaviour towards a complainant,

where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant;

'economic abuse' includes-

(a) the unreasonable deprivation of economic or financial resources to which a complainant is entitled under law or which the complainant requires out of necessity, including household necessities for the complainant, and mortgage bond repayments or payment of rent in respect of the shared residence;

(b) the unreasonable disposal of household effects or other property in which the complainant has an interest;

'emergency monetary relief' means compensation for monetary losses suffered by a complainant at the time of the issue of a protection order as a result of the domestic violence, including-

(a) loss of earnings;

(b) medical and dental expenses;

(c) relocation and accommodation expenses; or

(d) household necessities;

'emotional, verbal and psychological abuse' means a pattern of degrading or humiliating conduct towards a complainant, including-

(a) repeated insults, ridicule or name calling;

(b) repeated threats to cause emotional pain; or

(c) the repeated exhibition of obsessive possessiveness or jealousy, which is such as to constitute a serious invasion of the complainant's privacy, liberty, integrity or security;

'harassment' means engaging in a pattern of conduct that induces the fear of harm to a complainant including-

(a) repeatedly watching, or loitering outside of or near the building or place where the complainant resides, works, carries on business, studies or happens to be;

(b) repeatedly making telephone calls or inducing another person to make telephone calls to the complainant, whether or not conversation ensues;

(c) repeatedly sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant;

'intimidation' means uttering or conveying a threat, or causing a complainant to receive a threat, which induces fear;

'member of the South African Police Service' means any member as defined in section 1 of the South African Police Service Act, 1995 (Act 68 of 1995);

'peace officer' means a peace officer as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977);

'physical abuse' means any act or threatened act of physical violence towards a complainant;

'prescribed' means prescribed in terms of a regulation made under section 19;

'protection order' means an order issued in terms of section 5 or 6 but, in section 6, excludes an interim protection order;

'residence' includes institutions for children, the elderly and the disabled;

'respondent' means any person who is or has been in a domestic relationship with a complainant and who has committed or allegedly committed an act of domestic violence against the complainant;

'sexual abuse' means any conduct that abuses, humiliates, degrades or otherwise violates the sexual integrity of the complainant;

'sheriff' means a sheriff appointed in terms of section 2 (1) of the Sheriffs Act, 1986 (Act 90 of 1986), or an acting sheriff appointed in terms of section 5 (1) of the said Act;

'stalking' means repeatedly following, pursuing, or accosting the complainant;

'this Act' includes the regulations.

2 Duty to assist and inform complainant of rights

Any member of the South African Police Service must, at the scene of an incident of domestic violence or as soon thereafter as is reasonably possible, or when the incident of domestic violence is reported-

(a) render such assistance to the complainant as may be required in the circumstances, including assisting or making arrangements for the complainant to find a suitable shelter and to obtain medical treatment;

(b) if it is reasonably possible to do so, hand a notice containing information as prescribed to the complainant in the official language of the complainant's choice; and

(c) if it is reasonably possible to do so, explain to the complainant the content of such notice in the prescribed manner, including the remedies at his or her disposal in terms of this Act and the right to lodge a criminal complaint, if applicable.

3 Arrest by peace officer without warrant

A peace officer may without warrant arrest any respondent at the scene of an incident of domestic violence whom he or she reasonably suspects of having committed an offence containing an element of violence against a complainant.

4 Application for protection order

(1) Any complainant may in the prescribed manner apply to the court for a protection order.

(2) If the complainant is not represented by a legal representative, the clerk of the court must inform the complainant, in the prescribed manner-

(a) of the relief available in terms of this Act; and

(b) of the right to also lodge a criminal complaint against the respondent, if a criminal offence has been committed by the respondent.

GROOTBOOM v GRAAFF-REINET MUNICIPALITY 2001 (3) SA 373 (E)

Citation	2001 (3) SA 373 (E)
Case No	175/99
Court	Eastern Cape Division
Judge	Ponnan AJ
Heard	January 30, 2001
Judgment	February 22, 2001
Counsel	E A S Ford for the plaintiff. J T Whitehead SC for the defendant.
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Negligence - What constitutes - Failure to take reasonable precautions against foreseeable risk - Conceivable that reasonable man, E having foreseen possibility of harm, taking no precautionary action because of slightness of chance of its occurrence, correlated with probable lack of seriousness if it did - Two variables existing, namely seriousness of harm and chances of its happening - Reasonable man taking precautions against probable serious harm, unless chances of its happening very slight - Reasonable man taking no precautions against F probable trivial harm, even if chances of its happening being fair or substantial.

Negligence - What constitutes - Foreseeability - Risk of harm that is unlikely to occur might nevertheless be plainly foreseeable - To describe risk as 'foreseeable' suggesting only that it was neither far-fetched nor fanciful, but not bearing upon probability or improbability of its occurrence - Fifteen-year-old boy climbing G electrical installation under control of defendant and being severely injured upon contact with high voltage electricity - Such incident unprecedented, wherefore defendant having taken no precautions to prevent it - In circumstances incident nonetheless foreseeable. H

Costs - Reservation of - When appropriate - Separation of issues of liability and *quantum* in terms of Rule 33(4) of Uniform Rules of Court - Plaintiff succeeding on issue of liability - Whether costs to be reserved for determination of Court finalising case - Advantage of separation of issues in terms of Rule 33(4), in matters of delict, being saving of costs, *inter alia* because I issue of *quantum* often settled when plaintiff succeeding on merits - Such advantage not bolstered by reservation of costs - Costs to be awarded forthwith.

Electricity - Action for damages against undertaker - Fifteen-year-old boy climbing electrical installation under control of defendant and being severely injured upon contact with high voltage electricity - Such incident unprecedented, wherefore defendant having taken no precautions to prevent it - Risk of harm that is unlikely to occur might nevertheless be plainly foreseeable - To describe risk as 'foreseeable' suggesting only that it was neither far-fetched nor fanciful, but not bearing upon probability or improbability of its occurrence - In circumstances incident nonetheless foreseeable - Undertaker liable.

Headnote : Kopnota

The plaintiff's son, M, a boy of 15 years, climbed an electrical transformer installation which was under the control of the defendant and suffered J

severe injuries when he came into contact with high voltage electricity. The plaintiff thereupon sought to recover damages A from the defendant. By agreement between the parties an order was granted in terms of Rule 33(4) that the issues of liability and *quantum* be separately determined. The evidence established that the transformer installation was in close proximity to a residential area, that it was easy to climb, and that neither safety notices nor anti-climbing devices had been installed to prevent such an incident. Safety notices and anti-climbing devices would have been B inexpensive and easy to install. The defendant nonetheless denied liability on the basis it had not been negligent: it adopted the attitude that the incident was altogether unprecedented and that it had therefore reasonably failed to take precautionary steps to guard against such an eventuality. In terms of s 26 of the Electricity Act 41 of 1987 the *onus* rested upon the defendant (an 'undertaker' as defined in the Act) to prove its defence, ie C to establish that the injury suffered by M had not been caused by its negligence.
Held, that negligence arose if *(a)* a *diligens paterfamilias* in the position of the defendant (i) would have foreseen the reasonable possibility of his conduct injuring another in his person or property; and (ii) would have taken reasonable steps to guard against such occurrence; and *(b)* the defendant failed to take such steps. (At 377D/E - F.) D
The *dictum* in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E - G applied.
Held, further, as to the question whether the harm suffered by M had been foreseeable, that the risk of an injury which was unlikely to occur might nevertheless be plainly foreseeable. To say of a risk of injury that it was 'foreseeable' was not to make any statement about the probability or improbability of its occurrence, E save to assert that the risk was not one that was far-fetched or fanciful. Although it was true that the greater the degree of probability of the occurrence of risk, the more readily it would be perceived to be a risk, it certainly did not follow that a risk which was unlikely to occur was not foreseeable. (At 377J - 378B/C.)
Held, further, on the facts, that a *diligens paterfamilias* in the position of the defendant would have foreseen F the reasonable possibility of a person such as M being injured as a direct consequence of climbing the installation in question. (At 380B/C - C.)
Held, further, as to the question whether steps should have been taken by the defendant to avoid harm to persons such as M, that there were no doubt many cases where once harm was foreseen it would be obvious to the reasonable man that he ought to take appropriate G avoiding action. The circumstances could also be such that a reasonable man would foresee the possibility of harm but would nevertheless consider that the slightness of the chance that the risk would turn into actual harm, correlated with the probable lack of seriousness if it did, would require no precautionary action on his part. There were two variables, the seriousness of the harm and the H chances of its happening. If the harm would probably be serious if it happened, the reasonable man would guard against it unless the chances of its happening were very slight. If, on the other hand, the harm, if it happened, would probably be trivial, the reasonable man might not guard against it, even if the chances of its happening were fair or substantial. (At 380C - F.) I
The *dictum* in *Herschel v Mrupe* 1954 (3) SA 464 (A) at 477A - C applied.
Held, further, on the facts, that the defendant had not discharged the *onus*, cast upon it by s 26 of the Act, of establishing that, notwithstanding the exercise of such care as the circumstances reasonably required, it could not have prevented the incident from occurring. (At 380H/I - J.)
Held, further, on the facts, that M had himself been negligent, and that the J

degrees of fault of M and the defendant in relation to what had occurred were one-third and two-thirds A respectively. (At 381G.)
Held, further, as to whether costs had to be reserved for decision by the Court finalising the case, that a separation of issues in terms of Rule 33(4) of the Uniform Rules of Court by its nature fragmented a hearing. This undesirable feature was counterbalanced by the prospective advantage of a saving of costs. One of the great advantages of the Rule was that in matters of delict, depending on the B outcome of the hearing on the merits, the issue of *quantum* might never arise. Also, in those instances where the plaintiff succeeded on the merits, the matter of *quantum* was

often settled. Reserved costs orders could not bolster this advantage, but might detract from it. (At 381H - 382A/B.)
Held, therefore, that costs had to be awarded against the defendant forthwith. (At 382B - C.) C

Cases Considered

Annotations

Reported cases

Barnard v Santam Bpk 1999 (1) SA 202 (SCA): dictum at 214A - C applied

Cape Town Municipality v Butters 1996 (1) SA 473 (C): referred to D

Cape Town Municipality v Paine 1923 AD 207: dictum at 217 applied

Faiga v Body Corporate of Dumbarton Oaks and Another 1997 (2) SA 651 (W): dictum at 669G - I applied

Gouws NO v Minister van Gemeenskapsbou 1976 (1) PH J33 (N): dictum in approved

Groenewald v Groenewald 1998 (2) SA 1106 (SCA): referred to

Herschel v Mrupe 1954 (3) SA 464 (A): dictum at 477A - C applied E

Joffe & Co Ltd v Hoskins and Another; Joffe & Co Ltd v Bonamour NO and Another 1941 AD 431: dictum at 451 applied

Kruger v Coetzee 1966 (2) SA 428 (A): dictum at 430E - G applied

Pietermaritzburg City Council v PMB Armature Winders 1983 (3) SA 19 (A): referred to F

Sea Harvest Corporation v Duncan Dock Cold Storage (Pty) Ltd and Another 2000 (1) SA 827 (SCA): referred to

South British Insurance Co Ltd v Smit 1962 (3) SA 826 (A): referred to

Stratton v Spoornet 1994 (1) SA 803 (T): dictum at 810G - H approved

The Council of the Shire of Wyong v Shirt and Others 146 CLR 40 (HC of A): dictum at 47 applied. G

Statutes Considered

Statutes

The Electricity Act 41 of 1987, s 26: see *Juta's Statutes of South Africa 1999* vol 6 at 3-20.

Rules Considered

Rules of Court

The Uniform Rules of Court, Rule 33(4): see *The Supreme Court Act 59 of 1959 and the Magistrates' Courts Act* H *32 of 1944* (Juta, 2001) Part A at 48.

Case Information

Civil trial in an action for damages for bodily injuries. The facts appear from the reasons for judgment.

E A S Ford for the plaintiff. I

J T Whitehead SC for the defendant.

Cur adv vult.

Postea (22 February).

Judgment

Ponnan AJ: On 3 May 1997, the plaintiff's son Martin, who was then J

PONNAN AJ

15 years and three months, climbed an electrical transformer installation, came into contact with A high voltage electricity and sustained a severe shock resulting, *inter alia,* in the amputation of both his arms. Those stark, undisputed facts conceal a problem of considerable public interest and no little legal complexity.

The transformer installation in question, initially erected in 1972, B comprises two vertical wooden poles with steel angle-iron cross-arms on which a 11 000/400 volt transformer is mounted. Above the transformer is a further cross-arm, to which three dropout fuses are attached. The installation is fed by bare conductor overhead lines to the fuses, and in turn from the fuses to the transformer bushings.

Electricity in South Africa is distributed at a voltage of approximately 11 000 volts (11kv), by either an overhead line system C or by means of underground cables. Consumers, however, require power at the standard South African voltage of 400 volts or 230 volts. A transformer is thus employed to convert the 11 000 volts to the lower consumable voltage. D

Two low-voltage cables and an earth wire lead off the one side of the transformer down the length of one wooden vertical pole into the ground below. The one cable, a paper-insulated lead-screened cable, was not in use at the time of the incident, but had been retained as a backup cable after the transformer was updated in 1996. The other is a PVC-insulated cable protected down the length of the pole by means of E an angle-iron.

On the day in question, to enable him to get a better look at the whereabouts of his father's goats, which he was herding, Martin climbed the pole to which the cables were affixed and stood on one or both of the cross-arm/s that supported the transformer, when he apparently lost his balance and came into contact with one or more of the live conductors, presumably, at or near the transformer's F bushings.

By agreement between the parties an order was sought and granted that the issues of liability and *quantum* be separated. At this stage I am required to decide only the issue of liability. Liability entails a determination of whether the defendant is liable to the plaintiff for the consequences of the incident to which reference has G been made and, if so, then whether Martin was also at fault in relation thereto.

It is common cause that the defendant is an undertaker as defined in the Electricity Act 41 of 1987 (the said Act) and that s 26 of the said Act is of application to this action. Section 26, which is headed 'Liability of undertaker for damage or injury', reads: H

> '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 has been proved.' I

Mr *Whitehead,* for the defendant, conceded, properly so, in my view, that s 26 of the said Act disposes of the necessity on the part of the plaintiff to establish the existence of a specific duty of care towards Martin as is envisaged in decisions such as *Cape Town Municipality v Butters* 1996 (1) SA 473 (C). J

PONNAN AJ

The alleged negligence of the defendant is set out in para 4 of the A plaintiff's particulars of claim, which reads:

> '4. Accordingly and by reason of its ownership and control of the said electrical installation the defendant was under a duty to the public at large and to Martin in particular to ensure that:
>
> 4.1 those parts of the electrical installation, which posed a danger, were situated at a safe height above the ground; B
>
> 4.2 the said electrical installation was maintained in a safe and satisfactory condition;
>
> 4.3 sufficient warning signs were displayed on or in the vicinity of the electrical installation to ensure that members of the public were aware of the danger constituted thereby; C

> 4.4 sufficient deterrent barriers were erected around and/or attached to the electrical installation to prevent members of the public, more particularly children such as Martin, from attempting to climb the poles and reaching the transformer and electrical cables.' D

It is accepted that the incident giving rise to the action occurred on the property of the defendant alternatively on property under the control of the defendant.

The test for negligence is to be found in the oft-quoted statement of Holmes JA in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E - G.

> 'For the purposes of liability, *culpa* arises if - E
>
> *(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.' F

Ultimately the true test for determining negligence is whether, in the particular circumstances of the case, the conduct complained of falls short of that of the reasonable person. Inevitably, the answer will only emerge from a close consideration of the facts in each case. Having regard to the particular circumstances of this case, it seems to me that the question of culpability must be determined by asking the question whether a reasonable man or woman in the position of the G defendant would have foreseen the likelihood of harm and governed his or her conduct accordingly.

In *Cape Town Municipality v Paine* 1923 AD 207 at 217, Innes CJ explained: H

> 'The question whether, in any given situation a reasonable man would have foreseen the likelihood of harm and governed his conduct accordingly, is one to be decided in each case upon a consideration of all the circumstances.
>
> The word "likelihood" which is used in the first sentence of the above quotation is, it seems to me, not used in the ordinary dictionary sense of "probability" but in the sense of a possibility of harm to another against the happening of which a reasonable man would take precautions.' I

(*Per* Centlivres JA in *Joffe & Co Ltd v Hoskins and Another; Joffe & Co Ltd v Bonamour NO and Another* 1941 AD 431 at 451.)

In *The Council of the Shire of Wyong v Shirt and Others* 146 CLR 40 (HC of A) Mason J held: J

PONNAN AJ

> 'A risk of injury which is quite unlikely to occur . . . may nevertheless be plainly foreseeable. Consequently, when we speak of a A risk of injury as being "foreseeable" we are not making any statement as to the probability or improbability of its occurrence, save that we are implicitly asserting that the risk is not one that is far-fetched or fanciful. Although it is true to say in many cases the greater the degree of probability of the occurrence of the risk the more readily it will be perceived to be a risk, it certainly does not follow that a risk which is unlikely to occur is not foreseeable.' B

(Cited with approval in *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA) at 214B - C.)

The installation in question is located approximately 400 m to the west of houses which form the perimeter of the township. Approximately C 19 m to the south is a well-worn pedestrian thoroughfare. A similar distance to the west is the bank of the Sundays River. An unproclaimed cemetery has taken root in the immediate vicinity of the installation.

Martin's testimony, which could not be disputed by the defendant, was that four metal straps were employed, roughly equidistant apart, to D secure the cables to the pole. Aided by the angle-iron, the cable and the metal straps he climbed to the cross-arm, on his version, with relative ease.

Whilst electrification brings with it great convenience and, I am sure, much joy, its unmistakable potential for grave peril cannot be ignored. Many people from our deprived socio-economic communities (and I dare say, the majority of this country's populace falls into that E category) are oblivious to the inherent dangers posed by

electricity. The potential danger inherent in electricity is instilled in children by caregivers from the time they first develop the capacity to comprehend. It is that taught and learnt behaviour which inculcates in a young impressionable mind, from its earliest recollection, a respect F for the life-threatening power of electricity. It is inconceivable that a caregiver would school a child on the dangers of a commodity to which they have no ready access. Regrettably, young Martin is one such child, having been raised without the convenience of electricity, it being common cause that electrification of his neighbourhood occurred during G the mid to late 1990s.

It is well known, as was conceded by all the defendant's witnesses, that children, especially young boys, have a penchant for climbing. For in the words of Van Heerden J, *Gouws NO v Minister van Gemeenskapsbou* 1976 (1) PH J33 (N): H

> 'Vir 'n kind en veral 'n seun om in bome en op dakke en mure te klim is geen onredelike of impulsiewe daad nie. Inteendeel, dit is juis die soort avontuur wat enige lewenslustige kind in sy normale gang sal aankap.'

As Preiss J said in *Stratton v Spoornet* 1994 (1) SA 803 (T) at 810G - N:

> 'The issue of foreseeability can be charted with almost I mathematical accuracy. That children, especially young boys at an adventurous or exploratory age, would stray onto railway premises is virtually certain. There is no difficulty in ranging such conduct within the realm of reasonable foreseeability.'

Those sentiments apply with equal or perhaps even greater force to structures, which hold an allure to would-be young climbers. In fact, I J

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may venture to suggest that the more challenging the climb and the less A accessible the structure, the greater its attraction and charm to young boys.

It was submitted by Mr *Whitehead* that we should guard against *ex post facto* wisdom. For as held by Scott JA:

> 'With the benefit of hindsight the situation my seem otherwise; it usually does. But that is not the test. In *S v Bochris* B *Investments (Pty) Ltd and Another (supra* at 866J - 867B) Nicholas AJA said the following:
>
> "In considering this question [what was reasonably foreseeable], one must guard against what Williamson JA called 'the insidious subconscious influence of *ex post facto* knowledge' (in *S v Mini* 1963 (3) SA 188 (A) at 196E - F). Negligence is not established by showing merely that the occurrence happened (unless the case is one where *res ipsa loquitur*), or by showing after it happened how it could have been prevented. The C *diligens paterfamilias* does not have 'prophetic foresight'. (*S v Burger (supra* at 879 D).) In *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co (The Wagon Mound)* [1961] AC 388 (PC) ([1961] 1 All ER 404) Viscount Simonds said at 424 (AC) and at 414G - H (in All ER):
>
> 'After the event, even a fool is wise. But it is not the D hindsight of a fool; it is the foresight of the reasonable man which alone can determine responsibility.' ' ' '

(*Sea Harvest Corporation v Duncan Dock Cold Storage (Pty) Ltd and Another* 2000 (1) SA 827 (SCA) at 842F - H.)

The transformer was some five metres above the ground. The wooden E vertical pole, with the two cables, the angle iron and the metal straps affixed to it, was eminently climbable. The effect that a particular consequence seldom occurs, which was the defendant's case, does not necessarily mean that it cannot be regarded as a reasonable possibility. *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA) at 214A - B. All of the witnesses called by the defendant, who were in the F employ of other undertakers as defined in s 26 of the said Act, such as adjoining municipalities, testified that no other similar incident of an installation being climbed had ever come to their attention. They accordingly did not anticipate such an occurrence, thus no steps were taken to guard against such an eventuality. Mr Timothy Wyndham King, who at the relevant time was the Eskom customer service centre manager G (Grahamstown), testified on behalf of the plaintiff that it was a specified Eskom requirement that installations of the nature in question were fitted with anti-climbing devices and warning signs. Eskom was forced to introduce such safety measures after a young herdsman climbed a similar installation and was electrocuted. It was not

disputed by the defendant's witnesses that the Public Works H Department also subscribes to similar safety measures as Eskom. The implementation by other undertakers of additional safety standards such as warning signs and anti-climbing devices leads logically to the inescapable conclusion that they perceived the likelihood of harm and governed their conduct accordingly. I

In *Groenewald v Groenewald* 1998 (2) SA 1106 (SCA) at 1112I - J it was held that fault would be established

> '(i)f a reasonable person in the position of the defendant would have realised that harm to the plaintiff might be caused by such conduct, even if he would not have realised that the consequences of that conduct would be to cause the plaintiff the J

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> very harm she actually suffered or harm of that general nature'. A

Having regard to the general location of the installation, the absence of any playground and other play facilities in the township (for that was the evidence of the defendant's witness), the presence on the wooden horizontal pole of cables, an angle iron and metal straps, the installation must have been seductively inviting to any adventurous young boy who prided himself on his climbing ability. B

I accordingly conclude that a *diligens paterfamilias* in the position of the defendant should have foreseen the reasonable possibility of a person such as Martin being injured in the manner described by him as a direct consequence of him climbing the installation in question.

In *Herschel v Mrupe* 1954 (3) SA 464 (A) at 477A - C the inter-relationship between the foreseeability of the harm and the C appropriateness of taking avoiding action was explained by Schreiner JA in the following terms:

> 'No doubt there are many cases where once harm is foreseen it must be obvious to the reasonable man that he ought to take appropriate avoiding action. But the circumstances may be such that a reasonable D man would foresee the possibility of harm but would nevertheless consider that the slightness of the chance that the risk would turn into actual harm, correlated with the probable lack of seriousness if it did, would require no precautionary action on his part. Apart from the cost or difficulty of taking precautions, which may be a factor to be considered by the reasonable man, there are two variables, the seriousness of the harm and the chances of its happening. If the harm E would probably be serious if it happened the reasonable man would guard against it unless the chances of its happening were very slight. If, on the other hand, the harm, if it happened, would probably be trivial the reasonable man might not guard against it even if the chances of its happening were fair or substantial. An extensive gradation from remote possibility to near certainty and from insignificant inconvenience to F deadly harm can, by way of illustration, be envisaged in relation to uneven patches and excavations in or near ways used by other persons.'

The supply of electricity was not accompanied by any drive to educate the community about its dangers. The installation in question was neither accompanied by any warning signs nor anti-climbing devices. It was readily admitted by the defendant's witnesses that safety notices and anti-climbing devices would have been inexpensive and easy G to install. An anti-climbing device such as two meters of barbed wire wrapped around the pole immediately below the transformer, would certainly have deterred would-be climbers such as young Martin.

Quite clearly, the defendant was carrying out an inherently dangerous H undertaking (*Pietermaritzburg City Council v PMB Armature Winders* 1983 (3) SA 19 (A) at 26G). Inexpensive measures which could have been easily installed were available to the defendant to guard against the harm. By virtue of s 26 of the said Act, the *onus* rests upon the defendant to establish either that, in the particular circumstances of this case, harm to the plaintiff was not, and could not reasonably have been foreseen, or alternatively that I notwithstanding the exercise of such care as the circumstances reasonably required the defendant could not prevent the incident from occurring, thereby occasioning harm to the plaintiff. In my opinion, the defendant has not discharged the *onus* which the section casts upon it. J

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The defendant has alleged that Martin was negligent in relation to the incident giving rise to the claim for damages. I have to decide A whether Martin was also at fault in relation to the incident, and if so, to what extent. Negligence implies a capacity to apprehend intelligently. That capacity is informed by the knowledge, experience and maturity of the individual concerned. Did Martin's emotional and intellectual development render him sufficiently mature in regard to the situation at issue? B

Martin, who was in standard 6 when the incident occurred, had been taught at school, according to him, since standard 3, about electricity. There he was exposed to the luxury of electricity and came into contact with certain minor electrical appliances. Under cross-examination Martin conceded that he knew that the installation conveyed electricity and was therefore dangerous. He further conceded C that he should not have climbed the pole. Undoubtedly, on his own version, he was thus at fault.

> 'From the very nature of the enquiry, apportionment of damages imports a considerable measure of individual judgment: the assessment of "the degree in which the claimant was at fault in relation to the damage" is necessarily a matter upon which opinions may vary.' D

(*South British Insurance Co Ltd v Smit* 1962 (3) SA 826 (A) at 837F - G.)

In my view, he was sufficiently well developed, emotionally and intellectually, to have resisted climbing the pole, thereby averting the risk of harm. That notwithstanding, his appreciation of the danger inherent in the installation, it would seem, was premised on the rather vague notion that all electrical installations are dangerous as opposed E to a concrete and tangible understanding that contact with the live conductors of the installation in question could maim or kill him.

In the final analysis, however, it was perhaps the impetuosity and exuberance of youth which motivated him to utilise the installation as a vantage point in preference to safer and more viable alternatives. In F those circumstances, the urge to place an old head on Martin's relatively immature and apparently unsophisticated shoulders must be resisted.

Martin's fault has to be assessed on the basis of what is to be expected of a *diligens paterfamilias* and taking an overall view of the proven facts in this case I assess the degrees of fault of Martin and the defendant in relation to what occurred at one-third and G two-thirds respectively.

That leaves the matter of costs. Mr *Ford* for the plaintiff, urged that, in the event of my coming to a decision favourable to the plaintiff, I should make an award in favour of the plaintiff with regard to the costs incurred in determining the issue of liability. Mr *Whitehead*, however, submitted that the issue H of costs should be reserved for decision by the Court finalising this case.

In *Faiga v Body Corporate of Dumbarton Oaks and Another* 1997 (2) SA 651 (W) at 669G - I, A P Joubert AJ stated:

> 'The issues raised in these proceedings were not without difficulty; both factually and in law. Some of the answers in law had I to be found without the guiding light of precedent. These considerations tend to support this matter having been brought in the Supreme Court. Then there is the principle of finality. A separation of issues in terms of the provisions of Rule 33(4), by its very nature, fragments a hearing. This undesirable feature is counterbalanced by the prospective advantage of a saving in costs. One of the great advantages of J

> the Rule is that in matters of delict, depending on the outcome of the hearing on the merits, the issue of *quantum* might A never arise. Also, in those instances where the plaintiff succeeds on the merits, the matter of *quantum* is often settled. Reserved costs orders cannot bolster this advantage, but might detract from it. Evidence and argument is this matter lasted eight days. It is in my judgment time to bring the curtain down on this part of the proceedings and not to have decisions on costs left in abeyance.' B

Whilst I am in respectful agreement with those sentiments, I am also acutely aware of the onerous burden that litigation on this scale must place on the plaintiff's meagre financial resources. Indubitably, the plaintiff can ill afford to await the finalisation of

the matter. I accordingly find myself compelled to make an award of costs at this stage. C

In the result, I order as follows:

(a) the defendant is held liable for the damages, if any, that the plaintiff has suffered in consequence of the electric shock sustained by the plaintiff's minor son Martin Kleinbooi on 3 May 1997, with the degrees of fault in relation thereto being apportioned two-thirds to the defendant and one-third to Martin; D

(b) the defendant is ordered to pay the plaintiff's costs occasioned by this hearing, such costs to include the qualifying fees of Mr John Laurier Kidson and Mr Timothy Wyndham King;

(c) the matter is postponed *sine die*.

Plaintiff's Attorneys: *Netteltons*. Defendant's Attorneys: *Dold & Stone*. E

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