IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 33378.2013
APPEAL NUMBER: A716.2016
SCA no: 623/2016

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

20.03.2020
DATE

SIGNATURE

In the appeal matter of:

MR VAN NIEKERK — **FIRST APPELLANT**
(FIRST DEFENDANT IN COURT A QUO)

ANNA MARIA VAN NIEKERK — **SECOND APPELLANT**
(SECOND DEFENDANT IN COURT A QUO)

And

JACOBA MAGDALENA LESSING — **FIRST RESPONDENT**
(PLAINITFF IN COURT A QUO)

JUDGMENT

STRIJDOM AJ

Introduction

[1] This respondent had claimed damages in the High Court from appellants as a result of certain injuries which she had allegedly sustained on 3 October 2012 when a sliding gate at the appellants' residence fell onto the respondent.

[2] The matter came before Tolmay J. The parties applied for a separation of the quantum and merits, which was granted.

[3] On 14 April 2016 the court a quo found the appellants to be liable for 100% of the damages suffered by the respondent.

[4] The appellants unsuccessfully applied for leave to appeal where after the Supreme Court of Appeal granted leave to appeal to a Full Court of this division.

The Common Cause Facts

[5] Two weeks before the incident on 3 October 2012, the appellants' took the initiative to invite the respondent and her daughter into the appellants' home. Respondent was a single parent surviving on a disability grant, recently divorced,

allegedly suffering from cancer, and looking for accommodation for her and her daughter. Respondent moved into the appellants home on the same day,

[6] The appellants invited the respondents' daughter to join their family on a casual holiday and whilst on holiday the respondent was to feed the two dogs of the appellants on the premises.

[7] Two and a half years before the incident the first appellant designed, manufactured and installed a non-motorised sliding gate separating the backyard from the rest of the property. The gate was made from tubed steel with angle iron cladding, and was welded together.

[8] This gate was in regular and frequent daily use, being hand operated by not only the appellants but also by their children who were respectively twelve and seven years old at the time when the gate was first installed.

[9] The incident with the gate falling onto the respondent on 3 October 2012 occurred when the respondent tended to the plaintiffs' dogs while they were on holiday. The first appellant had previously designed, manufactured and installed gates and he was satisfied with the design and workmanship of the said gate and that it conformed to the generally accepted norm that was safe for people to operate.

[10] It is further common cause that Mr Harrop-Allin (the respondent's expert) never inspected the relevant gate after the incident.

Evidence Presented.

[11] The respondent testified that on the day of the incident she had to operate the sliding gate in the process of feeding the dogs, that she closed the gate behind her, that she made sure that it was fully secured, that she was standing one and a half to two meters away from the gate waiting for the dogs to finish eating, and that the gate then for some inexplicable reason just fell over onto her some ten minutes later.

[12] Under cross-examination she confirmed that she was positive that the gate was appropriately bedded into the U plate receptor on the closing slide of the gate.

[13] Mr Harrop-Allin was called by the respondent to give expert opinion in support of her claim.

[14] He testified that he obtained a Production Engineering Degree at the Pretoria Technical College during 1964. He commenced employment at G Harrop-Allin & Sons (Pty) Ltd in 1964 up to 1974 working in construction and installation of fencing and gates.

[15] Mr Harrop-Allin testified about the "in-house" design specifications of his company. He testified that the frame of the gate is what gives the gate rigidity. The inner pieces are actually just supports that hold the top and the bottom of the frame apart and add to the weight of the gate, but they also give a slight amount of rigidity to the gate.

[16] He further testified that the safeness of a gate is ensured by the poles holding the gate up, and the width of the gate being 500 mm longer than what the opening of the gate is. If you do not have two gate poles, as in this instance, you could have one gate pole and an angle or a square solid bar making a U shape over the top of the gate, which then stops it and it must go past the frame of the gate to hold the gate up in a vertical position. You can also have two idling wheels to hold the gate in a more stable position to allow the gate to move freely and not get caught as it opens.

[17] Mr Allin gave the following reasons why the gate could have come off.

17.1 Firstly that the U bracket at the end of the gate is not sufficient, it simply stops the gate.

17.2 Secondly, the brackets holding the gate up, the U bracket or two poles, are not strong enough to hold the gate up and it would come down.

17.3 Thirdly, if the gate is not sufficiently long enough to stop it when it gets to the stopper that it does not go past the end, the gate is going to come off.

[18] He further testified that the gate was flimsy and that the U bracket was not sufficient in length to hold the gate in position. You could also put a stopper at the back wheel that the gate cannot pass that point because the gate is not the right length. To stop the gate from passing you would have to put a stopper at the front with a solid U bracket of at least 75 to 100 mm that the gate slides into and that would stop the gate from falling over.

[19] Respondents' daughter, (EM Lessing) testified that she could only vouch that the stopper on the open side (keeping the gate from moving beyond a maximum point

when being opened was absent, not knowing whether the stopper on the closing side had been present or not. It is common cause that the absence of the stopper on the open side would not have played any role in the incident as the gate ostensibly malfunctioned when it was in the closed position.

[20] The first appellant testified that he manufactured the said gate and also installed it. This was not the first gate that he manufactured and installed. According to him the gate was safe in all respects.

[21] He testified that the said gate had the following features;

21.1 A bracket over the gate, attached to the open side gate post, with two guide wheel rollers to stabilise the gate in the upright position.

21.2 A U-shape receptor approximately 40 mm deep on the closed side gate post and in line with the track (the guide rail).

21.3 Stoppers welded to the track (the guide rail), on both the opening and closing sides to stop the gate from rolling off the track.

21.4 Installation of the track at an angle of approximately 2 degrees from the horizontal which angle was negligible and had no influence on the operation of the gate and;

21.5 the gate was hand operated.

[22] He further testified that the gate was in regular and frequent daily use, being hand operated by not only the appellants, but also by their children who were respectively twelve and seven years old when the gate was first installed.

[23] He testified that prior to the incident he regularly inspected and serviced the gate, and that over a period of two and a half years the gate was operated anything between 3,650 and 8000 times without any malfunctioning.

[24] The following morning after the incident, the first appellant inspected the gate and found no apparent damage or fault that could have caused the incident. He reinstalled the gate and found that it was operating as flawlessly as before. Being proactively vigilant he added two vertical bars for rigidity, extended the U plate receptor on the closing side.

[25] The second appellant also testified that the said gate was used by her and her children on a daily basis and she never encountered any problems with the gate.

Evaluation of the evidence.

[26] The court a quo based its findings mainly on the expert evidence of Mr Harrop-Allin and the maxim of res ipsa loquitur.

[27] The court a quo concluded that the fact of the gate falling over justified the conclusion of negligence and the res ipsa loquitur was therefore applicable.

[28] The respondent testified that she was positive that the gate was appropriately bedded into the U-plate receptor on the closing side of the gate. The expert Mr Harrop-Allin conceded that if the version of the respondent was correct, then it would have been totally impossible for the gate to fall over. The respondents' version is

therefore not reconcilable with the fact that the gate had fallen over, however the court a quo did not reject her evidence on the basis that it is improbable.

[29] In my view the court a quo failed to consider the implication of the respondents' evidence with regard to the closing of the gate and that the gate fell over only ten minutes after having closed the gate.

[30] Mr Harrop-Allin conceded in cross examination that he never inspected the relevant gate. He further conceded that, given the fact that the gate was still available for inspection and that it could even be restored to its original condition (as it was at the time of the incident) for expert assessment purposes, a proper expert inspection could therefore have been undertaken not only to exclude speculation, but to ascertain the real probable cause of the incident.

[31] Mr Harrop –Allin conceded that in his experience other manufacturers of sliding gates very rarely follow the peculiar "in-house" design specifications of his company. He testified that there are no regulations or applicable law to provide guidelines for the manufacturing or installation of sliding gates.

[32] Mr Harrop-Allin was not present in court when oral evidence was presented in court. He relied entirely on photographs of the gate which photographs he conceded were not in all respects of a quality that one could see all detail.

[33] The gate that the first appellant designed, manufactured and installed complied with the Rule 36 (9) (b) defined requirements of Mr Harrop-Allin in the following respects;

33.1 There were stoppers welded onto the track.

33.2 There was a guide wheel (two rollers) with a bracket over the gate on the open side gate post.

[34] The gate did not comply with the Rule 36(9)(b) defined requirements of Mr Harrop-Allin only in the following respect, namely that less than 500 millimetres of the gate remained behind the post after the gate is closed.

Facts in dispute

[35] The relevant disputes of fact were limited to the following questions.

35.1 Whether at the time of the incident any stoppers had been welded onto the track, and

35.2 The number of vertical components added by the first appellant after the incident.

[36] The evidence of respondents' daughter was that she could only vouch that the stopper on the open side was absent. The first appellant testified that both stoppers had been installed prior to the incident. It is common cause that the "stoppers" on the open side would not have played any role in the incident as the gate osetensibly malfunctioned when it was in closed position.

[37] Mr Harrop-Allin testified that the additional vertical members would in any event not have served to provide any substantial stability to the structure of the gate.

[38] The court a quo made no finding on the disputed facts.

The judgment of the court a quo

[39] It was submitted by counsel for the appellants that the court a quo erred when it failed to give proper consideration to the onus of proof on the respondent and that the respondent on her own version failed to prove any negligence. It was further submitted that the court a quo erred when it accepted the opinion of Mr Harrop- Allin when it should have been apparent that it was basically little more than the "in-house" design specifications of the experts' own company. It was also contended that the court a quo erred to apply the maxim res ipsa loquitur.

[40] It was submitted on behalf of the respondent that the courts only deduction could be that due to the gate not being properly installed and not being properly manufactured, was the only reason it fell and as a result of this the respondent has a prima facie case on a balance of probabilities before court.

[41] The court a quo made no finding on the issue of credibility of the respondent and it must therefore be accepted as conceded by counsel for the respondent that the court accepted her evidence. The respondents' version as already stated is not reconcilable with any form of negligence on the part of the appellants'.

[42] In my view the court a quo erred in relying on the "in –house" design specifications of the expert witness in ascertaining the alleged malfunctioning of the gate. Mr Harrop-Allin's evidence was based on speculation as to how the gate fell over. He could not assist the court a quo in ascertaining any reason for the alleged malfunctioning of the gate. The speculation could have been avoided if the expert had examined the said gate.

[43] The essential difference between the scientific and the judicial measure of proof was aptly highlighted by the house of Lords in the Scottish case of Dingley v The Chief Constable Strathclyde Police 2000 SC (HL) 77 and the warning given at 89 D-E that.

> *"One cannot entirely discount the risk that by immersing himself in every detail and by looking deeply into the minds of the experts, a Judge may be seduced into a position where he applies to the expert evidence the standards which the expert himself will apply to the question whether a particular thesis has been proved or disproved- instead of assessing, as a judge must do, where the balance of probabilities lies on a review of the whole of the evidence."*

[44] The court a quo erred in not considering the uncontested evidence of the first appellant regarding his design, manufacture , installation, maintenance of the gate and its uneventful usage over an extended period of two and a half years before the incident.

[45] The test for determining negligence is as follows:

45.1 Would a reasonable person, in the same circumstances as the defendant, have foreseen the possibility of harm to the plaintiff?

45.2 Would a reasonable person have taken steps to guard against that possibility?

45.3 Did the defendant fail to take the steps which he or she should reasonably have taken to guard against it?

[46] The criterion of the reasonable person (or diligens paterfamilias) was described by Holmes JA in S v Burger 1975(4) 877 (A) at 879 D-E in these terms;

> *"One does not expect of a diligens paterfamilias any extremes such as Solomonic wisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity, or trained reflexes of a racing driver. I short, a diligens paterfamilias treads lifes pathway with moderation and prudent common sense."*

The Maxim res ipsa loquitur.

[47] The court a quo concluded that the fact of the gate falling over justified the conclusion of negligence and that res ipsa loquitur was applicable.

[48] In our law the maxim res ipsa loquitur has no bearing on the incidence of proof on the pleadings and it is invoked where the only known facts, relating to negligence are those of the occurrence itself.

[49] The court has to decide whether on all the evidence and the probabilities and the inferences, the plaintiff has discharged the onus of proof on the pleadings on a preponderance of probabilities. In this final analysis, the court does not adopt the piecemeal approach of (a) first drawing the inference of negligence from the occurrence itself, and regarding this as a prima facie case, and then (b) deciding whether this has been rebutted by the defendants' explanation.

[50] It was decided in Arthur v Bezuidenhout and Mieny 1962 (2) SA 566 (A) at 574 B where Ogilvie Thompson JA said:

"There is in my opinion, only one enquiry namely: has the plaintiff having regard to all the evidence in the case discharged the onus of proving, on a balance of probabilities the negligence he has avered against the defendant."

[51] In my view the court a quo erred in finding that the maxim res ipsa loquitur is applicable in circumstances where other evidence was readily available and a deliberate decision was taken not to utilise it.

[52] Mr Harrop-Allin concede that a proper expert inspection of the gate could have been undertaken to ascertain the real probable cause of the incident.

[53] The maxim res ipsa loquitur can only be applicable when no other evidence to explain the event is available. See Madyosi and Another v SA Eagle Insurance Co Ltd 1990 (3) SA 442 AD.

[54] On a conspectus of all the evidence I am of the view that the Court a quo erred in finding that a reasonable person in the same circumstances as the appellants would have foreseen the possibility of harm to the respondent for the following reasons.

54.1 The first appellants' evidence was not rejected by the court a quo whereas the experts evidence was based on speculation.

54.2 The uncontested evidence of the first appellant was that he designed manufactured and installed the said gate.

54.3 He testified that the said gate was installed two and a half years before the incident. This was not the first gate that he manufactured and installed.

54.4 He testified that the gate had the generally accepted safety features.

54.5 The gate was in regular and frequent daily use, being hand operated by the appellants and their children.

54.6 Prior to the incident the first appellant regularly inspected and serviced the gate and that over a period of two and a half years the gate was operated between 3650 and 8000 times without having any malfunctioning.

[55] The evidence makes it clear that the reasonable man in the situation of the appellants had no cause to contemplate or foresee the possibility of harm to respondent.

[56] In my view the respondent failed to discharge the onus to prove on a balance of probabilities that the appellants were negligent.

[57] In the result I propose that the appeal must be upheld with costs.

[58] In the premises we submit that the following order should be made;

58.1 The appeal is upheld with costs.

58.2 The order of the court a quo is substituted with the following order;

58.1.1 The claim is dismissed.

58.1.2 The plaintiff is ordered to pay the costs of the defendants,

58.3 The respondent is ordered to pay the costs of the appellants including the costs consequent upon the employment of two counsel.

JJ STRIJDOM

ACTING JUDGE OF THE HIGH COURT

I Agree,

N.P. MNGQIBISA-THUSI

JUDGE OF THE HIGH COURT

I Agree,

S.A.M BAQWA

JUDGE OF THE HIGH COURT

MATTER HEARD: **29 January 2020**

Judgment delivered: 20 March 2020.

COUNSEL FOR 1ST AND 2ND APPELLANT: **Adv B Rossouw (SC)**

Adv HP Hattingh

Instructed by:
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