IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: A635/2017

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

22.7.2020

T.J. RAULINGA **DATE**

In the matter between:

BATSWANA-GARE TRANSPORT	**FIRST APPELLANT**
NORTHWEST STAR (PTY) LTD	**SECOND APPELLANT**

and

ENIVA TRYPHINAH MMABOSHADI TAU	**RESPONDENT**

JUDGMENT

RAULINGA J,

INTRODUCTION

1. This is an application for leave to appeal against the judgment and order of Swartz AJ ("the Court a-quo") in terms of which it upheld the argument advanced by the respondent. The court a quo had ordered that the appellants are liable for damages arising out of injuries sustained by the respondent on 20 December 2010, while disembarking from a bus, owned by the appellants, after a fire extinguisher on the said bus discharged.
2. Before the trial commenced in the Court a-quo, the aspects of the appellants' liability and the quantum of the respondent's damages were separated and, the trial proceeded on the aspects of the appellants' liability only. By agreement between the parties the aspect of liability includes the aspects of causation; whether a causal connection exists between the alleged negligence or omission of the appellants and the damages allegedly suffered by the respondent. However, it must be noted that the respondent had instituted separate actions against the appellants and the Road Accident Fund ("the RAF") for the damages that she allegedly suffered as a result of the incident. These actions were consolidated and the respondent's claim against the RAF was dismissed.

THE ISSUES FOR CONSIDERATION BY THIS COURT.

3. The court is requested to determine the following issues:
   3.1 Whether the malfunctioning of the fire extinguisher was foreseeable;
   3.2 Whether negligence on the part of the appellants can be inferred on the basis of the *maxim res ipsa loquitur*.

3.3 The Court is also called upon to determine, in the event that it be found that negligence can be inferred on the basis of the doctrine *res ipsa loquitur*, whether, on the evidence before Court, it is probable that the appellants caused the fire extinguisher in question to be duly serviced prior to the incident, and whether, in so doing, the appellants took reasonable steps to prevent the fire extinguisher from malfunctioning;

3.4 Whether, as a general rule, a principal is not liable for the wrongs committed by an independent contractor or its employees, that such appellants can be held liable for the negligent conduct or omission of the independent contractor that was contracted by the appellants to service and maintain their extinguishers; and

3.5 Whether in the absence of any evidence as to the nature of the injuries sustained by the respondent and the manner in which they were sustained, it can be assumed that it was reasonably foreseeable that the malfunction of the extinguisher would cause such harm.

BACKGROUND

4. The chronology of events of this matter can be summarised as follows:

4.1 On 20 December 2010 the respondent was a passenger on the bus owned by the appellants. As the bus entered the Erasmus Bus Depot, a fire extinguisher on the bus discharged emitting a white smoke that filled the driver's compartment and the front half of the bus. The respondent was sitting in the seat directly behind the driver. The driver's seat was separated from the rest of the bus by means of a steel mesh partitioning. The fire extinguisher that discharged was installed behind the driver's seat, within the driver's compartment.

4.2 There was no structural damage to the bus, or the driver's seat. The driver was not injured.

EVIDENCE FOR THE RESPONDENT

4.3 The respondent testified that she did not know what happened. She later found herself being outside the bus and injured.

4.4 Ms Kgomo, the bus driver, testified on behalf of the respondent, that when the fire extinguisher discharged, she covered her face and eyes by lying on her forearms. After the smoke emitting from the fire extinguisher had subsided, she opened her eyes and saw a lady outside the bus, that had apparently been injured, being supported by two men. She did not speak to the said lady nor did she look at her injuries.

EVIDENCE FOR THE APPELLANTS

4.5 The evidence of Mr Gobler, a financial controller employed by the appellants, is that he had been in the employment of the appellants for approximately 28 years when the incident occurred. As a requirement, the fire extinguishers that are installed on the appellants' buses are to be serviced once a year, but as a precaution, they service them at least every 6 (six) months. There is a label on each fire extinguisher, indicating the date of its last service. A register is kept of the fire extinguishers that are installed on the appellants' buses. This register is kept by the security guards at the gate of the depot where the appellants' buses are kept. It is the duty of theses guards to ensure that each bus leaving the depot is equipped with a fire extinguisher that has not "expired". The system implemented by the appellants ensured that all fire extinguishers used on the appellants' buses were

serviced within a 6 (six) months period. No fire extinguisher was installed on a bus if it had "expired". The said extinguishers were serviced by Tima Fire CC, an independent company that is duly accredited in terms of the SANS regulations. The appellants are not accredited to service fire extinguishers, as required by statute, and they accordingly do not attend to the service of the fire extinguishers.

4.6 Mr Johan Pretorius, a technical manager at Safequip (PTY) LTD and the Technical Chairperson of the Technical Committee of the South African Qualifications and Certification Committee of the Fire Industry, gave evidence as an expert on behalf of the appellants. His evidence is that, taking into account the manner in which the fire extinguisher discharged and the explosive sound it made when it discharged, the fact that no structural damage was caused to the bus as a result of the incident, it is impossible that the fire extinguisher on the bus exploded. The malfunctioning of this nature was not reasonably foreseeable, even to the technician that attended to the last service of the Fire extinguisher.

VERSION OF THE RESPONDENT VERSUS THAT OF THE DRIVER

5. One must at the outset mention that there is a discrepancy between the evidence of the respondent and the driver which may amount to a contradiction. The respondent testified that when the fire extinguisher malfunctioned, the bus was still in motion, as the driver was still searching for a parking bay. Whereas the driver, Ms Kgomo, testified that when she entered the Erasmus bus depot, she stopped the bus, engaged the handbrake, opened the doors to allow the passengers to disembark and switched off the engine. Thereafter the explosion occurred. It is not hard

to conclude that the version of Ms Kgomo is more probable; she was the driver of the bus and therefore she is in a better position to relate what happened. Moreover, the respondent was confused and could not recall what happened. The Court a quo correctly accepted the version of Ms Kgomo as being reasonably possibly true. I mention this because Ms Kgomo gave evidence for the respondent and, in my view the discrepancy is not of any moment, taking into consideration the speed at which the incident occurred.

SUBMISSIONS BY PARTIES

6. Concerning the foreseeability requirement, the appellants submit that in the absence of evidence as to the manner in which the respondent sustained her alleged injuries, the respondent has failed to place sufficient evidence before the Court so as to determine whether the harm that she allegedly suffered was reasonably foreseeable. They also submit that in the absence of any evidence as to the nature of the harm the respondent allegedly suffered, it cannot be assumed that it was reasonably foreseeable that the malfunction of the fire extinguisher would cause such a harm.
7. It is my considered view that the issue of the nature of the injuries, was erroneously raised by the appellants at that stage of the proceedings. The nature of the injuries only becomes relevant at the stage of the determination of the quantum.
8. The appellants also contend that the *maxim res ipsa loquitur* does not assist the respondent in the circumstances when the respondent failed to place sufficient evidence before the Court from which an inference of negligence on the part of the appellants can be drawn.

9. On the other hand, the respondent submits that, if regard is had to the amended plea of the appellants, foreseeability was not challenged but, in the defence being that reasonable steps were taken to guard against the occurrence. Therefore, the occurrence was foreseeable in that the appellants took steps to guard against such an event. Furthermore, that a reasonable man would have foreseen that the failure to properly maintain a fire extinguisher could cause a malfunctioning thereof.

FORESEEABILITY

10. Regarding reasonable foreseeability, the Court a quo agrees with the submissions of the respondent that the argument of the appellants is that foreseeability of the harm was not an issue, because they had taken reasonable steps to guard against the occurrence. This is apparent from the amended plea of the appellants in which they seem to admit that foreseeability is not challenged, but instead advanced a defence that reasonable steps were taken through the frequent servicing of the fire extinguisher at an interval of six months. According to the appellants, this they did beyond the requirement of service once every year. It is therefore clear that the appellants took these extraordinary steps in order to prevent the event from occurring. They took these steps because they foresaw that the event would occur.
11. One is inclined to agree with the submission of the respondent that Mr Grobler's evidence was of a general nature regarding the policy and procedure of the appellants pertaining to the servicing of the fire extinguishers. Moreover, he was unable to tell the Court a quo whether an enquiry into the incident was held, and whether the appellants engaged with Tima Fire CC regarding the malfunctioning of the fire

extinguisher. He also could not tender evidence as to when the fire extinguisher was manufactured. According to Mr Grobler, the appellants anticipated the action and, in fact reported the incident to their insurers. Furthermore, the extinguisher was not retained for inspection; nor was it produced in Court as an exhibit. The register allegedly kept by the security department of the appellants was not made available. The appellants also failed to elicit from the driver whether the fire extinguisher had been checked before departing from the depot as required by the appellants' procedures, nor was any security guard called to testify on this aspect. The appellants failed to produce documentary proof containing information of the service of the fire extinguisher that exploded.

12. As the Court a quo correctly observed, the expert, Mr Pretorius, described the workings and mechanisms of fire extinguishers, in general. He did not inspect the particular fire extinguisher in issue in the matter, to determine the cause of the admitted malfunctioning. Although he and Mr Grobler testified about the meticulous maintenance and servicing of fire extinguishers by the appellants, there was no evidence to prove that the fire extinguisher that was placed on the bus on 20 December 2020, was serviced. Mr Pretorius made conclusions from a photograph about how the fire extinguisher malfunctioned without inspecting the said fire extinguisher. His conclusions contradict the accepted evidence of an eye witness, Mrs Kgomo who was the driver of the bus. She testified that the fire extinguisher exploded, with a loud noise, and that white powder filled the air. She also testified that the smoke filled the front –half of the bus and that the discharge of the smoke lasted for about three minutes. One is bound to accept the Court a quo's reception of the direct evidence of

Ms Kgomo over that of the expert witness who drew his unsatisfactory conclusions from unreliable sources.

13. There are many reasons why one would choose to rely on the eye witness rather than that of Mr Pretorius. He testified that he had never inspected a similar blast or investigated a rupture of a fire –extinguisher. As counsel for the respondent correctly submitted, a Court cannot lay itself bare to mere theory and a recital of degree and diplomas and be blinded by it, which is uncontested by knowledge or practice. The expert must either himself have knowledge or experience in the special field on which he testifies or he must rely on the knowledge or experience of others who themselves are shown to be acceptable experts in the field. All these are lacking in Mr Pretorius[1]. When confronted with a conflict between the opinion of an expert and the direct evidence of a credible eye witness, the court may prefer the evidence of the latter[2]. In casu the factual witness, Ms Kgomo was not challenged on what Mr Pretorius opined. Moreover, Mr Pretorius was not even placed in the possession of the driver's statement as to how the incident occurred nor did he attempt to secure the records of Tima Fire CC. He could not tell the Court when the fire extinguisher in question was last serviced nor when it was manufactured and under cross examination concluded that the invoices of Tima Fire CC were of no value. Consequently, his expert evidence, unsupported by logic and reason, must be rejected.

THE MAXIM RES IPSA LOQUITOR

[1] Mondey v Protea Assurance 1976 SA 565 AT 569C.
[2] Stacy v Kent 1995 (3) SA 344 at 349 A-C.

14. Concerning the *maxim res ipsa loquitur*, the respondent submits that the maxim applies to the facts of this case because the fire extinguisher was at all material times under the care, control and custody of the appellants. From the outset, the Court a quo upheld the arguments advanced by the respondent on all the aspects raised by the parties. In my view, there is no reason why the finding of the court a quo can be faltered. The *maxim res ipsa loquitor* assists a plaintiff where the plaintiff is not in a position to produce evidence on a particular aspect, which usually but, not necessarily, is within the peculiar knowledge of the defendant[3]. The respondent relies on this maxim. She contends that the events in her case, are such that the thing speaks for itself and therefore the facts proclaim negligence. In other words, the issues are obvious or are a matter of common sense.

15. In Goliath V MEC for Health, Eastern Cape[4], the court stated the following:

> *"Broadly stated, res ipsa loquitur (the thing speaks for itself) is a convenient Latin phrase used to describe the proof of facts which are sufficient to support an inference that a defendant was negligent and thereby to establish a prima facie case against him. The maxim is no magic formula. It is not a presumption of law, but merely a permissible inference which the Court may employ if upon all the facts it appears to be justified. It is usually invoked in circumstances when the only known facts, relating to negligence, consist of the occurrence itself where the occurrence may be of such a nature as to warrant an inference of negligence. The maxim alters*

[3] Montedi V Woolworths (Pty) Ltd 2000 (4) SA 735 (W).
[4] 2015(2) SA 97 (SCA) at page 103 G- J

neither the incident of the onus nor the rules of pleading, it being trite that the onus resting on the plaintiff never shifts. Nothing about is invocation or application. I dare say, is not intended to displace 'common sense'

The enquiry at the end of the case is whether the respondent has discharged the onus resting upon her in connection with the issue of negligence.

16. The appellants seem to misconstrue instances in which the *maxim res ipsa loquitur* applies. They submit that the maxim does not assist the respondent in the circumstances when the respondent failed to place sufficient evidence before the Court from which an inference of negligence on the part of the appellants can be drawn. It is my view that the maxim assists the respondent in this case.

17. The appellants seem to assess the evidence of the respondent separately from that of the driver, Ms Kgomo. One must be mindful of the fact that Ms Kgomo testified for the respondent. Where the evidence of the respondent leaves a gap, that gap is filled by the evidence of Ms Kgomo. Moreover, when the respondent is not in a position to produce evidence on a particular aspect, such as her lack of knowledge of how the accident occurred, that is when the maxim res ipsa loquitur kicks in.

18. In this regard, one finds solace from quotations of W.E Coopers[5]:

"the most frequently quoted formulations of the judicial doctrine of res ipsa loquitor is that of Chief Justice Erle in 1865:

'There must be reasonable evidence of negligence but, where the thing is shown to be under the management of the defendant or his servants, an accident is such as is in the ordinary course of things does not happen if

[5] Delitual Liability in Motor Law – VOL 2 revised edition.

those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants that the accident arose from want of care[6]".

19. In casu, there is reasonable evidence of negligence in that the respondent testified that she was a passenger on the bus when the fire extinguisher installed behind the driver's seat exploded. The accident in the ordinary course of things could not have happened, if the appellants had managed proper care.

20. *'The two basic requirements for res ipsa loquitur are that the occurrence must be of such a kind which ordinarily does not occur unless, someone has been negligent, and it must be due to a thing or means within the exclusive control of the defendant*[7]'.

21. When the extinguisher malfunctioned, it was in the exclusive control of the appellants. Furthermore, the appellants failed to adduce evidence to negative inference of negligence. Such failure tilts the scale in the respondent's favour and she is entitled to succeed against the appellants[8].

INDEPENDENT CONTRACTOR

22. Mr Grober who adduced evidence for the appellants was surprised that they raised the defence of the negligence of the independent contractor or that the fire extinguisher in question was in fact serviced by Tima Fire CC. Tima Fire CC was not joined as a Third Party Defendant. This defence must be dismissed as it is not valid.

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[6] Supra 3 at page 99.
[7] Supra 3 at page 100.
[8] Supra 5 at page 104.

CAUSATION

23. The appellants from their pleadings submit that there was an accident on or about 20 December 2010 involving the respondent. Although the appellants allege in their pleadings that the injuries sustained by the respondent were caused through her own negligence, evidence points to the fact that it was through the negligence of the appellants that she was injured. She was injured while disembarking from the appellants' bus after the fire extinguisher exploded. This is common cause between the parties. The injuries are connected to the fire extinguisher which was under the control of the appellants. The facts establish a sufficient close link between the causation and the unreasonable omission[9]. Oppelt v Department of Health, Western Cape.

24. As such the principles applicable to causation have been established by the respondent. As a matter of common sense, one fact follows from another[10].

CONCLUSION

25. It is clear that the versions of the appellants and the respondent are incompatible. In order to resolve this impasse, the Court a quo had to consider and weigh the probabilities to determine which version is more probable than the other, based on the facts narrated in this judgment above. In any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus obviously is not as heavy as it is in a criminal case, but nevertheless where the onus rests

[9] 2016 (6) (1) SA 323 CC.
[10] Supra 9.

on the plaintiff as in the present case, she can only succeed if she satisfied the court on a preponderance of probabilities that her version is true and accurate and therefore acceptable, and that the other version advanced by the appellants is therefore false or mistaken and falls to be rejected[11].

26. Having regard to the above dictum, the finding of the Court a quo in supporting the version of the respondent is correct. In the premises her claims against the appellant must succeed.

ORDER

27. The following order is made:

The appeal is dismissed with costs including the costs of two counsel.

JUDGE T. J RAULINGA

JUDGE OF THE HIGH COURT

I agree

JUDGE V.V TLHAPI

JUDGE OF THE HIGH COURT

I agree

JUDGE A.C BASSON

JUDGE OF THE HIGH COURT

[11] National Employers' General Insurance V Jagers 1984 (4) SA 437 (ECD) at 440 D-441 A.

APPEARENCES

For the Appellant	:	Adv J.S Griessel
Instructed by	:	Savage Jooste & Adams INC.
For the Respondents	:	Adv M Patel
		Adv G Shabangu
Instructed by	:	Molaudzi Attorneys
Matter heard on	:	06 May 2020
Date of Judgment	:	24 July 2020