



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-DEL-2018/04431

In the matter between:

JOHANNA TAAPOPI

PLAINTIFF

and

**CHRISTINE JOHANNES JASON
WINDHOEK AIRPORT TRANSFERS TOURS
AND RENTALS CC**

1st DEFENDANT

2nd DEFENDANT

Neutral citation: *Taapopi v Jason* (HC-MD-CIV-ACT-DEL-2018/04431) [2020]
NAHCMD 321 (30 July 2020)

Coram: PARKER AJ

Heard: 15 & 17 June 2020

Delivered: 30 July 2020

Flynote: Delict – *Res ipsa loquitur* – Court held the presumption of negligence on the application of the rule operated against defendants – Defendants having failed to rebut the presumption by furnishing satisfactory explanation for the happening, defendants are negligent.

Summary: Delict – *Res ipsa loquitur* – A wheel disengaged itself from motor vehicle driven by first defendant on a public road and crashed into motor vehicle driven by plaintiff – Driver of motor vehicle and owner of the motor vehicle (defendants) failed to explain satisfactorily the happening – Consequently, court found defendants were negligent on the application of the *res ipsa loquitur* rule.

ORDER

- (a) Judgment for plaintiff.
- (b) Defendants are jointly and severally to pay plaintiffs' costs, the one paying, the other to be absolved.
- (c) The matter is considered finalised and is removed from the roll.

JUDGMENT

[1] This matter revolves around two motor vehicles at a point on the B1 national road between Windhoek and Okahandja on 12 April 2018. Mr Pretorius, counsel for plaintiff, describes what happened as 'a collision'. What happened is not a collision. A collision is an accident in which two vehicles crash into each other. (See Concise Oxford English Dictionary, 11th ed) There was a crash but not a collision. A wheel from a motor vehicle driven by first defendant disengaged itself and crashed into plaintiff's motor vehicle while the two vehicles were in motion on the B1.

[2] The pith and marrow of defendants' plea is that first defendant was not negligent for the crash. And the gravamen of the argument of Mr Theron, counsel for

defendants, is this. Plaintiff bears the burden to prove negligence of defendants, which plaintiff alleges in his pleadings, in order to succeed. I agree. That is trite. It is also trite that parties are bound by their pleadings. Plaintiff alleges that-

'8. The sole cause of the collision was the negligence of the first and/or the representatives of the second defendant/s in that they, *inter alia*:

8.1` failed to properly maintain the bus the first defendant was driving in roadworthy condition;

8.2 failed to inspect the bus, and more particularly the wheels of the bus, prior to the first defendant commencing his journey;

8.3 failed to use ordinary skill and care to secure the wheel properly to the bus so that it would not become dislodged from the bus whilst the bus was being driven and constitute a danger to traffic on the road;

8.4 failed to avoid the collision when they could have and should have done so by the exercise of reasonable care.'

[3] Defendant's plea to plaintiff's aforementioned allegation in para 8 of the particulars of claim is this:

'AD PARAGRAPH 8 THEREOF:

8.1 Each and every allegation contained herein is denied and the plaintiff is put to the proof thereof. The defendant's plead that the vehicle was properly maintained by the defendant's and was in a roadworthy condition.

8.2 Each and every allegation contained herein is denied and the plaintiff is put to the proof thereof. The first defendant inspected the tires of the vehicle at a filling station the morning of the accident. Where nothing wrong was assessed after the said inspection and the first defendant collected tourists at Hotel Avani where the vehicle was parked for some time.

8.3 Each and every allegation contained herein is denied and the plaintiff is put to the proof thereof. The defendants plead that they did all that could be reasonable expected of them to ensure that the vehicle is in a road worthy and safe condition.

8.4 Each and every allegation contained herein is denied and the plaintiff is put to the proof thereof. The defendants had no control over the tire once it dislodged from the vehicle and thus could not avoid the collision with the plaintiff vehicle.'

[4] The happening that brought plaintiff to court is a wheel of a motor vehicle in motion driven on a public road at the material time disengaging itself from the said vehicle and crashing into plaintiff's motor vehicle, when also in motion and driven by plaintiff at the material time. These facts are indisputable; neither can they be disputed. I have great difficulty in reconciling Mr Theron's reliance and submission on sudden emergency with the evidence. Mr Theron relied on Cooper, *Motor Law*, 1st ed at 90. There the learned author writes:

'[a] driver who is suddenly confronted with an unexpected danger may, and probably will, act differently from a driver who does not have to act without much time to make a decision, and on the spur of the moment he may do something which causes the very collision he is anxious to avoid'

[5] I do not think Cooper, *Motor Law*, and the other authorities on the question of negligence involving sudden emergency (*Road Accident Fund v Grobler* 2007 (6) SA 230 (SCA) and on mechanical defects (*Madhosi and Another v SA Eagle Insurance Co Ltd* 1990 (3) SA 442 (A)), referred to me by Mr Theron, are of any assistance on the point under consideration.

[6] As to sudden emergency; the evidence does not establish that the driver (first defendant) was 'suddenly confronted with an unexpected danger' (Cooper, *Motor Law*, loc cit). Second, the evidence does not establish the presence of 'the spur of the moment' for first defendant' (Cooper, *Motor Law*, loc cit). Additionally, the evidence does not show that first defendant did 'something' 'on the spur of the moment' which caused 'the very collision he (was) is anxious to avoid' (Cooper, *Motor Law*, loc cit). Indeed, as I have found previously, what happened in this matter was not a collision with which Cooper, *Motor Law*; *Road Accident Fund v Grobler*; and *Madyosi and Another V SA Eagle Eagle Insurance Co Ltd* are concerned.

[7] The evidence gave rise to a consideration of the *res ipsa loquitur* rule, as Mr Pretorius argued. I agree with counsel. It is therefore, to the rule of *res ipsa loquitur* that I now direct the enquiry, that is, to consider the rule against the facts of the case, bearing in mind the nature and circumstances of the happening.

[8] I have previously noted that it is trite that plaintiff bears the onus of proving negligence on the part of the defendants, as she alleges. The rule that it is for the plaintiff to prove negligence and not for the defendant to disprove it, is in some cases troublesome and a hardship when it is impossible for the plaintiff to know what went wrong that resulted in his or her loss or injury and when the true cause of the accident is solely within the knowledge of the defendant who caused it. This hardship is to a great extent ameliorated or avoided by the rule of *res ipsa loquitur*.

[9] The application of the rule is that there is evidence of negligence where the facts established are more consistent with negligence on the part of the defendant than with other causes (*Roe v Minister of Health* [1954] 2 WLR 915; applied in *Lopez v Minister of Health and Social Services* 2019 (4) NR 972 (HC)) When plaintiff relies on the rule, what plaintiff argues is this: The facts and circumstances I have proved establish a prima facie case of negligence against defendant. There are certain happenings that do not normally occur in the absence of negligence and upon proof of these the court ought to hold that there is a case for defendant to answer. (See *Roe v Minister of Health* at 927, per Lord Morris LJ.)

[10] Thus, the rule applies where the circumstances surrounding the thing which caused the injury or loss are at the material time exclusively under the control or management of the defendant or his or her servant, and the occurrence is such as does not occur in the ordinary course of things without negligence on the defendant's part and the happening remains unexplained. (*Bolton v Stone* [1951] AC 850 (HL)) It follows as a matter of course that the rule depends upon the absence of explanation. Thus, the defendant 'is required to furnish a satisfactory explanation to negate the inference or presumption of negligence on his or her part. If he or she fails to rebut the presumption, he or she will be held to have been negligent under the circumstances'. (*Dausab v Hedimund and Others* Case No. SA 24/2018 (judgment: 7 May 2020) para 20))

[11] The next level of the enquiry, therefore, calls for the weighing of the evidence to see whether defendants have furnished satisfactory explanation'. (*Dausab v Hedimund and Others*, loc cit) There are certain happenings that do not normally occur in the absence of negligence and upon proof of these, a court will probably hold that there is a case to answer' (*Roe v Minister of Health*, loc cit)

[12] In the instant case, I should say, wheels disengaging themselves from motor vehicles that are being driven 'do not normally occur in the absence of negligence; and plaintiff having proved that the wheel that crashed in to plaintiff's motor vehicle had disengaged itself from the bus driven at the material time by defendant, on the probabilities, defendants have a case to answer (see *Roe v Minister of Health*, loc cit). *Dausab v Hedimund and Others* says, in such a situation, defendants are required to furnish a satisfactory explanation to negate the inference or presumption of negligence on the part of defendants.

[13] What is defendants' explanation? Only this. First defendant testified that he was driving a bus on the B1 road when the left rear wheel of the bus disengaged itself from the bus and crashed into a nearby wall on the left side of the road. The wheel crossed the road and crashed into plaintiff's motor vehicle. The wheel nuts which had held the wheel to the motor vehicle were not damaged; and so, he concluded the wheel nuts were either 'loose or removed'. He offered no explanation why 'the nuts could have been loosened or removed'. Mr Mouton, the owner of the motor vehicle and second defendant, testified that the bus first defendant was driving, like all the busses of second defendant, was maintained and serviced regularly.

[14] It was Mouton's further evidence that first defendant informed him that the mechanic at the workshop assured him that the bus was safe to drive. The mechanic had also assured him that he had inspected the bus the day before the tour and that the bus was 'in excellent condition'. No evidence was led by defendants to explain what the mechanic meant when he said the bus was 'safe to drive'. The absence of such explanation is crucial. We do not know what the mechanic meant. He did not give evidence.

[15] In his cross-examination-evidence, Mouton sought to embellish his examination-in-chief-evidence by testifying that he had checked the wheel nuts himself before first defendant drove the bus. I accept Mr Pretorius's submission that the embellishment was tainted. Mouton did not seek to amend his witness statement on the point when testifying in-chief. This evidence is not, as Mr Theron suggested, an amplification of Mouton's examination-in-chief-evidence; it is new evidence. Consequently, I pay no heed to it. It is, accordingly rejected as irrelevant.

[16] Moreover, Mouton's testimony that the mechanic had informed him that he had inspected the bus and all was well is rejected as a textbook example of inadmissible hearsay evidence. In any case, as I have found previously, that piece of evidence is not cogent. No evidence was led to explain what the mechanic meant when he said that the bus was safe to drive. And what is more; Mouton does not testify that the mechanic told him also that he had checked specifically the wheel nuts. All these pieces of evidence are not cogent; they are not satisfactory. They cannot assist defendants' case.

[17] On the totality of the evidence, I find that what comes out clearly from the testimonies of Mouton and first defendant is that they have no explanation as to why the wheel dislodged itself from the moving bus. That is all that there is to it. Accordingly, I hold that defendants have failed to 'furnish a satisfactory explanation to negate the inference or presumption of negligence' on the part of the defendants (see *Dausab v Hedimund and Others*, loc cit). They have not answered the case they were required to answer (see *Roe v Minister of Health*, loc cit). Consequently, I conclude that plaintiff has proved negligence on the part of defendants for the happening on 12 April 2018.

[18] Based on these reasons, I order as follows:

- (a) Judgment for plaintiff.
- (b) Defendants are jointly and severally to pay plaintiffs' costs, the one paying, the other to be absolved.
- (c) The matter is considered finalised and is removed from the roll.

C PARKER
Acting Judge

APPEARANCES:

PLAINTIFF: F ERASMUS
Of Francois Erasmus & Partner,
Windhoek.

DEFENDANT: PD THERON
Of PD Theron & Associates,
Windhoek