

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

14/3/2017

Case number 42687/2012

In the matter between:

TRYPHINA MMABOSHADI TAU

PLAINTIFF

and

RAF

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: ☒ YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: ☒ YES/NO.	
(3) REVISED.	
17/03/17 DATE	[Signature] SIGNATURE

DEFENDANT

JUDGMENT

SWARTZ AJ

This is a delictual claim for damages arising out of injuries sustained by the plaintiff on 20 December 2010 while disembarking from a bus after a fire extinguisher on the bus discharged. At the commencement of proceedings the issues of merits and quantum were separated in terms of the provisions of rule 33 (4) of the Uniform Rules of Court. The issues for determination on liability were, whether the injuries arose out of the driving of the bus, and whether negligence can be attributed to the defendants.

The Road Accident Fund ('RAF') asserts that the injuries sustained by the plaintiff did not arise out of the driving of the motor vehicle as required by the Road Accident Fund Act no 56 ('the Act') and consequently that the RAF attracts no liability in respect of the incident. The owners of the bus on the other hand dispute liability with the assertion that the claim is rightfully one against the RAF in terms of the provisions of section 17 of the Act, and that they are excused from liability in terms of section 21 of the Act.

The facts are briefly as follows: On 20 December 2010, Mrs Dorcas Kgomo was the driver of the bus owned by the defendants ('the owners'). She was at all relevant times acting within the course and scope of her employment. The plaintiff boarded the bus at Madidi, intending to travel to Erasmus. As the bus entered the Erasmus depot, the fire extinguisher on the bus, located behind the driver's seat, discharged with a loud noise, emitting white smoke that filled the driver's cab and the front half of the bus. The plaintiff was seated directly behind the driver. In the ensuing rush to disembark from the bus the plaintiff sustained injuries. The plaintiff does not know exactly how she sustained the injuries.

The first issue for determination is whether or not the RAF can be held liable even if the injury sustained by the plaintiff did not arise out of the driving of the insured motor vehicle, in the strict sense, but on the basis of the wrongful act of the driver / owner of the insured vehicle. Stated differently, the question for determination is whether the injuries sustained by the plaintiff could be said to have arisen out of the driving of the insured vehicle in the extended meaning, i.e. caused by although not arising from. This question arises as a result of the evidence of the plaintiff who testified that, as the bus entered Erasmus depot and while the driver was still looking for a space to park the bus, the fire extinguisher exploded with a loud noise. Everyone inside the bus screamed and tried to disembark. The plaintiff tried to exit the bus but did not know what happened thereafter. She found herself outside the bus, being injured. The fire extinguisher burst while the driver was still searching for a parking bay. Only then did the driver bring the bus to a halt. She could not remember whether the doors of the bus were open at the time of the explosion.

She did not agree with the version that the bus had already stopped when the explosion occurred. The evidence of Mrs Kgomo, on the other hand, was that, as 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. She covered her face. The passengers on the bus did not know that it was the fire extinguisher that discharged. In the chaos that followed, a certain lady tried to get out of the bus and fell at the stairs. She was assisted by fellow passengers and placed on the ground. She did not speak to this lady or see the nature of the injuries sustained.

Section 17 (1) of the Act provides as follows:

‘The Fund or agent shall –

Be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as an employee.’

During argument, I was referred to instances where the RAF was found to be liable on the basis of the extended meaning of the word “driving”, such as, the failure to properly maintain the insured vehicle; a failure to check the tyre pressure and / or brake fluid level; a failure to install adequate fire-fighting equipment on the insured vehicle. It was submitted that the wrongful act itself has no relation to negligent driving, but the unlawful act must be linked to the vehicle and the driving thereof.

Having weighed up the evidence of the plaintiff and the insured driver, in my view, the probabilities on whether the engine was running or not, favours the insured driver. Shock and panic reigned when the fire extinguisher erupted with a loud noise, filling the air with white smoke. All the passengers, including the plaintiff, hurriedly made their exit from the bus. It is not hard to imagine that the plaintiff would not, under those circumstances, be in a position to describe the events in detail. She cannot possibly be certain that the engine of the bus was either running or not. The bus driver on the other hand, was adamant that the engine was switched off when the fire extinguisher erupted. Be that as it may, whether the engine was running or not, there is not a shred of evidence to suggest that the insured driver drove the bus in a negligent manner. There is no evidence to suggest that the plaintiff sustained the injuries arising from the driving of the insured vehicle, either in the strict sense, or in the extended meaning of the word

“driving”. Over and above that, if the malfunction to the fire extinguisher would nevertheless have occurred, even if the engine of the insured vehicle was running, then the driving of the vehicle would not be causally connected. The injury would nevertheless have occurred. Thus, there is no causal connection between any alleged negligent driving of the insured driver, which has in any event not been proven, and damages suffered. **Mokoele v National Employers’ General Insurance Co Ltd and Another 1984 (1) SA 27 (T)**: ‘...the test to be applied was that, if the injury would have resulted irrespective of whether the driving had occurred, such injury could not be said to have arisen out of the driving.’”

I am satisfied that the RAF attracts no liability in respect of the incident.

The question that now arises is whether the plaintiff has a claim for damages against the owners of the bus as a result of the wrongful act or omission by the owners of the bus, i.e. the injuries suffered as a result of the explosion. Counsel on behalf of the owners submitted that, in order to succeed with a claim for delictual damages against the owners, the plaintiff must prove a wrongful act or omission; that the defendants were negligent; that the plaintiff suffered the loss or damages, and that a causal connection exists between the negligent act or omission relied on and the damages suffered.

The plaintiff relies on the maxim *res ipsa loquitur*, i.e. the facts proclaim negligence. The fire extinguisher exploded. A fire extinguisher does not explode without negligence. The fire extinguisher was at all times in the custody of the defendant who were in control of it. A *diligence paterfamilias* in the position of the defendant would have foreseen the reasonable possibility of his conduct injuring another and causing patrimonial loss; would have taken reasonable steps to guard against such occurrence and, the defendant failed to take such steps. Furthermore, there are rights and duties between a bus driver and a passenger. **Ndhlov and Others v Durban City Council 1970 (1) SA 39**, wherein it was held that:

- ‘ 1. A bus driver (as indeed any driver of a vehicle) must take reasonable precautions against damages to his passengers known or reasonably to be apprehended.
2. A bus driver is entitled to regulate the manner in which he drives his bus upon the assumption that his passengers will take such steps to protect themselves against the ordinary risks and difficulties attendant upon travelling in a bus as may reasonably be expected of such passengers.
3. What may reasonably be expected of a passenger of a bus will depend on a number of circumstances, including the age, physical condition and the apparent ability of the passenger to cope with such ordinary risks and difficulties.’

Mr Patel argued on behalf of the plaintiff that the bus driver, Mrs Kgomo, did nothing to assist the screaming and obviously panic stricken passengers. She covered her head and did not do anything until the situation had calmed down. In my view, under the prevailing circumstances at the time, the bus driver cannot be criticized for her failure to come to the assistance of the plaintiff. She was herself overcome with fear and surprise. Nothing more needs to be said in this regard.

The argument of the defendant is that, although foreseeability of the harm was not in issue, they had indeed taken reasonable steps to guard against the occurrence. The evidence of Mr Grobbelaar, the defendants' first witness, was that, at the time of the incident, he was in the employ of the second defendant for a period of twenty-eight years. All their busses are equipped with fire extinguishers, normally installed in the driver's cage. All the fire extinguishers are serviced on a six-monthly basis. An independent duly accredited company services these fire extinguishers. To his knowledge, the fire extinguisher on this particular bus would also have been serviced. He did not know if an investigation had been conducted to determine the cause of the explosion, or the result of any investigation. In the twenty-eight years of his employment with the defendant, never before had such an incident occurred. It is policy and procedure at the company that the fire extinguishers are serviced every six months. He could not say whether the particular fire extinguisher in issue had been serviced in 2010.

The defendants' second witness, Mr Johan Pretorius, the National Technical Manager at Safequip, testified that he is involved in the manufacturing of fire extinguishers since 1994. In preparing a report to testify in this matter, he had regard to photographs of the bus. The photographs depicted dry chemical powder that settled on the dashboard of the bus. He also had regard to an invoice from the independent company that services the fire extinguishers on a six-monthly basis. According to him, it was impossible that the fire extinguisher would have exploded. Had it exploded, substantial structural damage to the bus and serious personal injury would have occurred. The powder was released, probably because the copper tube coil inside the pressure indicator that screws into the operating head, had failed. Alternatively, the "o-ring" sealing the screw joint between the operating head and the cylinder could have popped out due to pressure and gas escaping. The defendants' servicing and maintenance of its fire extinguishers exceeded the requirements of the national standard for servicing of portable fire extinguishers.

The evidence of Mr Pretorius described the workings and mechanisms of fire extinguishers in general. He did not inspect the particular fire extinguisher, in issue in this matter, to determine the cause of the admitted malfunction. Although him and Grobbelaar testified about the

meticulous maintenance and servicing of fire extinguishers by the defendant, in general, there was no evidence to prove that the fire extinguisher that was placed on the bus on 20 December 2010, was serviced. I find it startling that Pretorius is able to conclude, from a photograph, that “it appears that (the discharge) was of short duration because there is no evidence of large residue powder inside the bus or against the windows. There is only a little powder on the dashboard where it has settled, as shown in the picture”. The accepted evidence of Mrs Kgomo was that the fire extinguisher exploded, with a loud noise, and white powder filled the air. The smoke-filled area covered the front-half of the bus. The discharge of smoke lasted for about three minutes. I accept that the duration suggested by Mrs Kgomo is only an estimate made under frightening and confusing circumstances. I nevertheless accept her direct evidence over that of the expert witness who draws his unsatisfactory conclusions from unreliable resources. The facts speak for itself: The explosion would have startled passengers not knowing what the cause of it was. As a result of the panic that followed, the passengers, including the plaintiff, disembarked from the bus. In the process the plaintiff was injured. Mrs Kgomo confirms that, when the dust settled, she noticed fellow passengers assisting the injured lady, obviously referring to the plaintiff. This is not speculation, as referred to by defendant’s counsel, who counsel argues that there is no evidence, at all, of how and if the plaintiff was injured when disembarking from the bus. In my view, that is ignoring the obvious. It is only a matter of common sense. **Goliath v MEC for Health, Eastern Cape, 2015 (2) SA 97 (SCA) at 103 G-J:**

‘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 neither the incidence of the onus nor the rules of pleading – it being trite that the onus resting on the plaintiff never shifts. Nothing about its invocation or application, I dare say, is intended to displace common sense’.

The enquiry at the end of the case is whether the plaintiff has discharged the onus resting upon her in connection with the issue of negligence. The matter must be approached on the basis that the reason for the chaotic exit from the bus and the subsequent injury of the plaintiff, was set in motion by the discharge of the fire extinguisher. The fire extinguisher was under the control of the defendant. I am satisfied that the maxim *res ipsa loquitur* finds application in this case, as it is

the sensible common sense approach to causation that quells the defence that causation has not been established. The compelling inference is that the incident could only have been caused by some act of negligence of the defendant.

I am satisfied that after hearing all the evidence, the plaintiff has discharged the onus of proving on a balance of probabilities that the defendant (owner) was negligent. The evidence in rebuttal presented by the defendant was nothing more than evidence of practice and procedure employed at the company, in general. It was of no assistance to the defendant's arguments that it took all reasonable steps to safeguard against the occurrence, in this particular bus, relating to this particular fire extinguisher.

ORDER:

1. The plaintiff's claim against the Road Accident Fund is dismissed with costs.
2. The plaintiff's case against the first and second defendants (owners) succeeds, with costs.

A handwritten signature in black ink, consisting of a large, stylized 'E' and 'S' intertwined, with a horizontal line underneath.

E SWARTZ

Acting Judge of the High Court