



REPORTABLE

CASE NO: SA 24/2018

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

SOFIA DAUSAB

Appellant

and

JELEVASIU HEDIMUND

First Respondent

AFZEL SHAHBAZ

Second Respondent

WILBARD NALUPE

Third Respondent

Coram: DAMASEB DCJ, MAINGA JA and ANGULA AJA

Heard: 8 November 2019

Delivered: 7 May 2020

Summary: This matter started off as an appeal and a cross-appeal against the findings and orders made by the court *a quo*. The case before the court *a quo* concerned what is commonly referred to as a 'chain reaction' motor vehicle collision when three or more vehicles hit one another in a series of rear-end collisions that are caused primarily by the force of the first collision. In the present matter, the chain collision took place when a minibus driven by the first respondent collided with the

rear-end of the third respondent's (cross-appellant's) stationary Mercedes Benz motor vehicle driven by the third respondent, which force of collision propelled the Mercedes Benz into the rear-end of the appellant's stationary BMW motor vehicle. Both the BMW and the Mercedes Benz motor vehicles were at the traffic lights waiting for the lights to change in their favour.

The appellant appealed against the finding by the court *a quo* which found that the first respondent was not negligent towards her and that his negligent driving did not cause damages to her. The court thus dismissed her claim and ordered the appellant to pay the first and second respondents' costs.

The third respondent (cross-appellant) filed a cross-appeal against the court *a quo*'s finding that it was his negligent driving that caused the collision between the Mercedes Benz motor vehicle and the appellant's BMW motor vehicle and ordered him to pay the appellant's claim including costs.

Prior to the appeal being heard, the appellant withdrew her appeal and tendered the respondents' costs. Accordingly, only the cross-appeal remained before court.

Held that the court *a quo* misdirected itself and erred in law and fact in its application of the principle of *res ipsa loquitur* – the facts speak for themselves – in finding that the third respondent (cross-appellant) was negligent and that his negligence caused his Mercedes Benz motor vehicle to collide with the rear-end of the appellant's BMW.

Held further; that on the proper application of the *res ipsa loquitur* principle, the presumption of negligence which arises upon the application of this principle did not operate against the third respondent (cross-appellant) but against the first respondent whose minibus collided with the third respondent's stationary Mercedes Benz. It was the first respondent upon whom the evidential burden rested to negate the presumption of negligence against him.

Held further that on the evidence before court *a quo*, the court should have found that the first respondent had failed to satisfactorily explain his conduct and thus failed to discharge the evidential burden on him created by the presumption.

Held accordingly that the cross-appeal succeeded, but that there will be no order of costs both *a quo* and in the cross-appeal due to the fundamental errors committed by the court *a quo*.

APPEAL JUDGMENT

ANGULA AJA (DAMASEB DCJ and MAINGA JA concurring):

Introduction

[1] The matter before us commenced as an appeal by Ms Sofia Dausab, who was partially successful and partially unsuccessful in a damages claim in the court below. She succeeded against the third respondent, but failed against the first and second respondents. After she noted an appeal, the third respondent cross-appealed against the order of the High Court to impugn the order made in the appellant's favour against him. Since Ms Dausab withdrew her appeal, the only live issue before us is the cross-appeal by the third respondent.

[2] The matter concerns a 'chain reaction' collision of motor vehicles, which took place when the minibus driven by the first respondent collided with the rear-end of the third respondent's (now cross-appellant's) stationary Mercedes Benz, driven by the third respondent, which force of collision propelled the Mercedes Benz into the rear-end of the appellant's stationary BMW. Both the BMW and the Mercedes Benz motor vehicles were at the traffic lights waiting the traffic lights to change in their favour.

The parties

[3] The appellant is Ms Sofia Dausab, a major female resident of Windhoek. She is the owner of the BMW motor vehicle with registration number N 82230 W (the BMW), which at the time of the collision was driven by her husband. She was a passenger in the vehicle.

[4] The first respondent is Mr Jelevasiu Hedimund, a major male resident of Rehoboth. At the time of the collision he was the driver of the Toyota Hi-Ace minibus with registration number N 2200 R (the minibus).

[5] The second respondent is Mr Afzel Shahbaz, a major businessman resident of Rehoboth. He is the owner of the minibus. The first respondent was acting in the course and scope of his employment at the time of the collision.

[6] The third respondent (cross-appellant) is Mr Wilbard Nalupe, a major male resident of Swakopmund. He is the owner of the Mercedes Benz with registration number N 4920 S (the Mercedes Benz). He was the driver of the Mercedes Benz at the time of the collision.

Proceedings before the court *a quo*

[7] The facts appear from the judgment of the court *a quo*.¹ But in order to provide context, it is briefly summarised below.

¹ *Dausab v Hedimund & others* (HC-MD-CIV-ACT-DEL-2016/02446) [2018] NAHCMD 99 (19 April 2018).

[8] The facts were mainly common cause except for the issue of negligence. On or about 2 March 2014 at Windhoek, the BMW was stationary at the traffic lights at the intersection of Mandume Ndemufayo Avenue and Sam Nujoma Drive, waiting for the traffic lights to change from red to green in its favour. It was joined behind, in the same lane, by the Mercedes Benz. While so stationary, the minibus approached the Mercedes Benz from behind, bumped the Mercedes Benz's rear-end and propelled the Mercedes Benz into the rear-end of the stationary BMW.

[9] The appellant then instituted a claim for damages against the first and second respondents and the cross-appellant, jointly and severally, the one paying the other to be absolved. The cross-appellant in turn instituted a counter-claim against the first and the second respondents also jointly and severally. However, the cross-appellant had to abandon his counter-claim before the commencement of the trial as it turned out that the claim had in the meantime prescribed.

[10] At the end of the hearing, the court *a quo* found that the cross-appellant was negligent towards the appellant and that his negligence was the cause of the collision in that he did nothing to prevent the Mercedes Benz from colliding with the rear-end of the BMW.

[11] As regards the appellant's claim against the first and second respondents, the court found that because there was no contact between the BMW and the minibus, the appellant had failed to prove negligence on the part of the first respondent and

thus dismissed the appellant's claim against the first and second respondents with costs.

[12] With regard to the cross-appellant's claim against the first and second respondents, the court found that because the minibus hit the stationary Mercedes Benz from behind, the principle of *res ipsa loquitur* applied and therefore the cross-appellant's counter-claim against the first and second respondents succeeded with costs.

[13] The court then made the following orders:

- '(a) plaintiff succeeds in his claim of negligence against third defendant; and third defendant must pay plaintiff's cost.
- (b) Plaintiff's claim of negligence against first defendant and second defendant is dismissed; and plaintiff must pay first defendant's and second defendant's costs.
- (c) Third defendant's counterclaim of negligence against plaintiff is dismissed; and third defendant must pay plaintiff's cost.
- (d) Third defendant's counterclaim of negligence against first defendant and second defendant succeeds; and first defendant and second defendant must pay 50 percent only of third defendant's costs, and the costs include costs of one instructing counsel and one instructed counsel, the one paying, the other to be absolved.'

[14] Shortly after the judgment was delivered, the first and the second respondents applied that order (d) be rescinded on the ground that it had been erroneously made

because the counter-claim never served before the court as it had been withdrawn before the commencement of the hearing. That order was rescinded on 9 May 2018.

The appeal

[15] After the appellant noted an appeal, the first and second respondents filed an application in terms of rule 6 of the rules of this court by which they sought an order summarily dismissing the appeal. The application was dismissed by the Chief Justice on 12 July 2018.

[16] By the time the appeal was called for hearing, the appellant had already filed a notice of withdrawal of her appeal on 10 October 2019 and at the same time tendered the respondents' costs. My understanding is that the tender related to the opposition by the first and second respondents. What is currently serving before this court for determination, is the cross-appeal. The merits of the cross-appeal are not opposed, save for the order of costs sought by the third respondent against the first and the second respondents.

[17] As regards the remaining orders made by the court *a quo*, it follows that with the withdrawal of the appeal by appellant, order (b) is no longer in issue. It is common ground that order (c) was made erroneously as the cross-appellant never instituted a counter-claim against the appellant. Accordingly, that order has no basis and is set aside.

Grounds of appeal

[18] Amongst the multiple grounds of appeal advanced by the cross-appellant, is the ground that the court *a quo* erred in law or fact in finding that he was negligent in that he failed to take evasive action or reasonable steps in order to remove the Mercedes Benz out of the way of the minibus, notwithstanding the court's finding that the Mercedes Benz was stationary prior to it being bumped by the minibus. Mr Strydom who appeared for the cross-appellant advanced further arguments in his written submissions in support of this ground of appeal. It is unnecessary to set out counsel's submissions in any detail save to say that I will take them into consideration in my evaluation of the issues for determination.

Issue for determination

[19] The issue for determination is whether the court *a quo* misdirected itself in its application of the principle of *res ipsa loquitur* in relation to the cross-appellant.

Discussion

[20] The principle of *res ipsa loquitur* is fairly well settled. In our context, it applies where a motor vehicle collides with a stationary vehicle in circumstances which point to *prima facie* proof of negligence; and therefore a presumption of negligence arises. When *res ipsa loquitur* applies - 'the facts speak for themselves' - in that an inference of negligence is inescapable. It must follow that a driver of a vehicle which collides with a stationary vehicle is required to furnish a satisfactory explanation to negate the inference or presumption of negligence on his or her part. Should he or she fail to rebut the presumption, he or she will be held to have been negligent under the circumstances. The court *a quo* correctly set out the principle at paras 11 to 14 of the

judgment. It is the application of the principle to the facts, where I am of the respectful view, that the court *a quo* misdirected itself. I proceed to demonstrate this below.

[21] The court *a quo* asked the right question as to whether the ‘defendant’ offered any explanation sufficient to neutralise the application of the *res ipsa loquitur* rule. The court incorrectly identified the ‘defendant’ as the cross-appellant whereas it had earlier found that his Mercedes Benz was stationary behind the BMW with his foot (cross-appellant) still pressed on the brake pedal. In my view, the correct ‘defendant’ should have been the first respondent upon whom an obligation rested to offer an explanation to neutralise the application of the *res ipsa loquitur* rule against him. It was the first respondent who initiated the chain collision.

[22] On a proper application of the *res ipsa loquitur* principle to the facts, the presumption of negligence did not operate against the third respondent, but it operated against the first respondent whose minibus collided with the third respondent’s stationary Mercedes Benz. It was the first respondent upon whom the evidential burden rested to negate the presumption of negligence.

[23] The foregoing reasoning is borne out by the fact that when the court *a quo* ‘considered’ the cross-appellant’s non-existent counter-claim against the first and second respondents, it invoked the *res ipsa loquitur* rule against the first respondent. The court found ‘that the Benz did not change lanes and that it was stationary when the minibus hit it at its rear’. It further found that ‘Hedimund [the first respondent] failed in that duty . . . to keep his vehicle under proper control and he did not drive it

with due care'. These considerations and findings should have been applied when the court was considering who caused the Mercedes Benz to collide with the BMW.

[24] In my view, the court *a quo* misdirected itself in expecting or requiring the cross-appellant to have taken steps in order to avoid the minibus colliding with the rear-end of the Mercedes Benz. This is because the court found that the Mercedes Benz was stationary and further because it was common cause that it was propelled into the rear- end of the BMW's rear-end upon being bumped from its rear-end by the minibus. On the evidence before the court *a quo*, it should have found that the first respondent had failed to satisfactorily explain his conduct and thus failed to discharge the evidential burden on him created by the presumption of *res ipsa loquitur*.

[25] In the light of the above findings and considerations, I conclude that the cross-appeal must succeed.

Costs

[26] There remains the issue of costs. Mr Strydom asked for an order of costs for the appellant against the first and second respondents. Mr Grobler for the first and second respondents pointed out that the cross-appellant cannot seek relief on behalf of the appellant who withdrew her entire appeal and tendered the cross-appellant's wasted costs. I fully agree with Mr Grobler's submission. The third respondent has no brief from the appellant. Since the appellant was successful against the cross-appellant *a quo* when that order was clearly improper, we still have to consider who

should bear the cross-appellant's costs *a quo*, now that order is liable to be set aside on appeal.

[27] The appellant alleged negligence against all drivers behind her vehicle at the time of the collision. On any view of the facts and evidence, the cross-appellant could never have been negligent but the court *a quo* found he was and absolved the first respondent who, on the evidence, objectively viewed, ought to have been found negligent. The court did so on the basis of *res ipsa loquitor* but applying it against the wrong party. When the third appellant cross appealed, the appellant never noted an opposition, thus accepting that the cross-appeal was bound to succeed. I accept that the cross-appellant had no choice but to appeal in order to correct an injustice foisted on him by the court *a quo*'s fundamentally flawed order. It is tempting to suggest that the appellant ought to have abandoned her judgment against the cross-appellant in order to render the cross-appeal unnecessary and that for that failure she ought to be mulcted in costs in the cross-appeal.

[28] The conclusions reached by the court *a quo* did not rime with either the pleadings or the evidence. Faced with that situation, it is not safe to assume that the appellant fully appreciated the choices that were open to her. To her credit, she did not oppose the cross-appeal. The judgment created such confusion that a perfectly good claim against the first and second respondents were dismissed and a party found liable who should not have been. It is most unfortunate that the first and the second respondents had to, so to speak, get-off scot-free than what it should have been otherwise.

[29] Both the appellant and the cross-appellant were therefore put to an expense which was unwarranted. An award of costs is in the discretion of the court and the circumstances of this case as described above, call for an approach that does not exacerbate the injustice suffered by either the appellant or cross-appellant. The proper order therefore is to allow the cross-appeal, but not to make any order as to costs, both *a quo* and on appeal.

[30] In the result I make the following order:

(a) The cross-appeal succeeds. Paragraph (a) of the order of the court *a quo* is substituted with the following order:

‘The plaintiff’s claim against the third defendant is dismissed and there shall be no order as to costs.’

(b) Order (c) of the court *a quo* is declared *pro non scripto* and is set aside.

(c) There is no order as to costs.

ANGULA AJA

DAMASEB DCJ

MAINGA JA

APPEARANCES

Third Respondent (cross-appellant):

J A Strydom

Instructed by PD Theron & Associates

First and Second Respondents:

Z Grobler

Grobler & Co