IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case No: A97/2021

In the matter between:

RICHARD N. WALSH **APPELLANT**

and

JOHANNA A. E. BOTHA **RESPONDENT**

CORAM: CHESIWE J *et* MATSHAYA AJ

JUDGMENT BY: MATSHAYA AJ

HEARD ON: 17 JANUARY 2022

DELIVERED ON: 26 JANUARY 2022

INTRODUCTION

[1] The Appellant was unsuccessful in his claim for damages in the Magistrate's Court, sitting at Parys. He sued the Respondent for damages arising out of a

motor vehicle collision. In the court *a quo*, the matter concerned the adjudication of the merits only. He now appeals against that judgment.

THE PARTIES

[2] The Appellant is Mr Richard Walsh, an adult male person residing at 397 River Bend Road, Vaal De Grace Golf Estate, Parys. He is the owner of a BMW 3 series with registration number [….]. He was legally represented by Mr Du Plessis during the trial. The Respondent is Ms Johanna Botha, an adult female person residing at Die Plaas Grootfontein, Potchefstroom. She is the owner of a Nissan SUV with registration number [….]. She was legally represented by Mr Kritzinger during the trial and appeal hearing.

FACTUAL MATRIX

[3] On 26 April 2016 at about 18h20 the Appellant had parked his motor vehicle a BMW 3 series on the side of the road at Bree Street, Parys and entered inside Steers restaurant to order take aways. Shortly as he was still waiting for his order, he heard a bang outside and went out. He noticed that the Respondent's car, the Nissan SUV described above, had collided with his BMW. The Respondent came out of her car and informed the Appellant that she did not remember what had happened and apologised to him. The Appellant subsequently sued her for his alleged damages which claim was dismissed by the court *a quo*.

THE JUDGMENT OF THE COURT *A QUO*

[4] The court *a quo* upheld the Respondent's defence of automatism that she had suffered a black-out during the time of the collision. It reasoned that the Respondent could therefore, not be held liable for her involuntary act of colliding with the Appellant's motor vehicle and consequently, held that the Appellant had failed to prove on a balance of probabilities that the Respondent had acted voluntarily.

THE GROUNDS FOR APPEAL

[5] The grounds of appeal as extracted *verbatim* from the notice of appeal are as follows:

> *"5.1 The Learned Magistrate erred in finding on a balance of probabilities that the Respondent (Defendant) acted involuntarily and dismissed the claim of Appellant;*
>
> *5.2 The Learned Magistrate erred in making his ruling on the evidence of the Respondent alone and not expecting the Respondent to provide medical evidence to prove that she acted involuntarily;*
>
> *5.3 The Learned Magistrate erred in accepting the words; "...ek kan nie onthou wat gebeur het nie" (I cannot remember what happened) as sufficient and enough to rule that the complainant acted involuntarily even though she can remember exactly what happened just before the collision and also remember exactly what happened just after the collision;*
>
> *5.4 The learned Magistrate erred in finding that the Respondent did discharge the evidence onus without leading medical evidence with sufficient cogency to raise the defence in question as a realistic issue; and*
>
> *5.5 The Learned Magistrate erred in not finding that it was necessary for the Respondent to lead expert evidence that could provide a reason for the sudden "memory loss" by the Respondent."*

ASSESSMENT OF EVIDENCE ON APPEAL

[6] It is trite that when an appeal is lodged against a trial court's finding of fact, the appeal court takes into account that the court *a quo* was in a more favourable position than itself to form a judgment because it was able to observe witnesses during their questioning and was absorbed in the atmosphere of the trial from start to finish.[1] That notwithstanding, it thus stands to reason that the appeal court will not always submit to the lower court's findings, for this would mean that the right of appeal against such findings would be illusory.[2]

FACTS THAT ARE COMMON CAUSE

[7] The following facts are not in dispute:

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[1] Schmidt & Rademeyer, Law of Evidence, Lexisnexis ed para 3.3. See also R v Dhlumayo 1948 (2) SA 677 (A) para 3 and 4 and *S v Monyane and Others* 2008 (1) SACR 543 (SCA) at para 15.
[2] Protea Assurance Co LTD v Casey 1970 (2) SA 643 (A) at 648D-E.

7.1 That on 26 April 2016 the Respondent was the driver of the Nissan SUV with registration number [….]

7.2 That on the said date, the Respondent drove the said vehicle at Bree Street, Parys and collided with the Appellant's BMW vehicle that was stationary; and

7.3 That shortly after the collision, the Respondent alighted from her motor vehicle and apologised to the Appellant and informed the Appellant that she did not know what had happened.

ISSUES IN DISPUTE

[8] The following aspects are in dispute:

8.1 Whether the court *a quo* erred in sustaining the Respondent's defence of automatism without medical or expert evidence;

8.2 Whether the court *a quo* erred by not invoking the *maxim Res Ipsa Loquitur* and find that the Respondent was negligent;

8.3 Whether the Appellant had succeeded to discharge the onus that rested upon him to prove on a balance of probabilities that the Respondent acted voluntarily and thus, negligently; and

8.4 In general, whether the defence of automatism can succeed in the absence of medical or expert evidence to support it.

THE DEFENCE OF AUTOMATISM

[9] Even though the following is a criminal case, the principle enunciated therein pertaining to the defence of automatism finds relevance here. In **Humphreys**[3], the court stated the following:

> *"When the defence of automatism is raised, the onus is on the State to establish the element of voluntariness beyond reasonable doubt...However, as was pointed out in Cunningham, the State is assisted (in discharging this onus) by the inference dictated by common experience that a sane person who becomes involved in conduct which attracts the attention of the criminal law ordinarily does so consciously and voluntarily. In order to*

[3] Humphreys v The State (424/12) [2013] ZASCA 20 (22 March 2013), para 9.

disturb this natural inference, an accused person who seeks to rely on the defence of automatism is thus required to establish a factual foundation, sufficient at least to raise reasonable doubt as to the voluntary nature of the alleged criminal conduct."

[10] Further, "…a defendant's involuntary act does not give rise to *delictual* liability (see **Neethling *et al Deliktereg* 3rd Ed at 24-26**). Defences based on automatism have to be scrutinised with great care but this requirement has no bearing on the question of *onus*. However, in ***The Government v Marine and Trade Insurance Co Ltd* 1973 (3) SA 797 (D)**, James JP expressed the view (at 799 A-B) that the *onus* was on defendant insurance company to establish that the driver of the insured vehicle had suffered a black-out which resulted in his being unable to manage and control the car that he was driving. This condition, the learned Judge went on to say;

amounts to a defence of automatism and in my opinion it is for the defence to establish the existence of this state of affairs on a balance of probabilities".[4]

[11] Although the plaintiff's onus to prove her case on a preponderance of probability does not shift, the establishment of a *prima facie* case coupled with the invoking of the defence of automatism by the defendant, the material essence of which reposes within the driver's personal knowledge, places an evidential burden on the defendant to adduce and tender rebuttal evidence which negatives the *prima facie* case of negligence.[5]

[12] Proof of a sudden blackout raises the question whether there was conduct on the part of the defendant.[6]

ONUS OF PROOF

[13] In a case like the present where the Respondent (Defendant) raised the defence of automatism, the onus still rests on the Appellant (Plaintiff) to prove on a balance of probabilities the voluntariness of the Respondent's actions which gave rise to a *delict,* in order to succeed on his claim. Once the Plaintiff

[4] Molefe v Mahaeng 1999 (1) SA 562 (SCA), para 13.

5 Sibeko v Road Accident Fund (43241/08) [2012] ZAGPJHC 43 (28 March 2012), para 10.

[6] HB Klopper: The Law of Collisions in South Africa, 8TH edition, page 118.

establishes a *prima facie* case of negligence, the Defendant must then lead evidence that lays a factual foundation to prove the cogency of his defence.

ANALYSIS

[14] Counsel for the Appellant submitted that the *maxim*, ***Res Ipsa Loquitur*** finds application in this case in that the conduct of the Respondent of colliding with a stationary vehicle that was parked on a parking bay *prima facie* indicates negligence on her part. This implies that the facts of the case indicate negligence where the proven facts are the only available evidence.[7] I find merit on this argument. This then creates an *onus* on the part of the Respondent to explain her alleged involuntary conduct particularly that she is the only one who can testify about her state of mind during the time of the collision. On this aspect, the Respondent merely explained that she could not remember what had happened. She then explained a long day that she had at work and that she did not even have lunch thereby trying to explain her black-out.

[15] The Respondent testified that upon her arrival at home post the collision, as a professional nurse herself, tested her blood pressure and sugar (presumably glucose) levels and found them to be normal. Her employer who was a medical doctor also performed the same tests the following morning and found everything normal. As a starting point, the court *a quo* erred in allowing the hearsay evidence as tendered by the Respondent during the trial pertaining to the doctor's findings because the said doctor did not testify since he had since passed away.[8]

[16] Furthermore, it seems from the record that the court *a quo* placed undue weight to the Respondent's testimony pertaining to the medical tests she performed unto herself upon her arrival at home. This should not have been the case hence Mr Kritzinger who appeared for the Respondent even conceded that the Respondent was not an expert in the medical sphere.

[7] Sardi v Standard & General Insurance Co LTD 1977 (3) SA 776 (A).
[8] For definition of hearsay evidence, see Schwikkard & Van Der Merwe: Principles of Evidence, 3rd edition, page 269, para 13.1.

[17] This now brings us to the acceptance of the Respondent's defence of automatism without supporting evidence. Counsel for the Appellant submitted that the court *a quo* (like this court) does not know what a black-out is within the context of this case, what are its symptoms and what causes it, thereby trying to criticise the acceptance of the Respondent's defence without supporting medical or expert evidence to support it.

[18] In **Sibeko**[9], the court went further and stated the following:

> *"The mere assertion that the driver experienced a black-out at the time of the collision, that consequently, she was not in control of her faculties and volition, does not per se suffice to rebut the prima facie case of negligence. The defendant is enjoined in discharging the evidence onus to tender evidence either through a medical or other expert which will have sufficient cogency to raise the defence in question as a realistic issue and from which it may be shown or reasonably be inferred on all the evidence and probabilities that the driver suffered a sudden unexpected black-out which resulted in her temporary loss of consciousness, thus rendering her actus reus involuntary."*

[19] I cannot agree more with the above sentiments especially in view of *inter alia*, the following:

19.1 The Respondent's state of mind is best known to her during the time of the collision;

19.2 If such a defence were to be accepted solely on the basis of the Defendant/Respondent's word only without more, it would be subject to abuse;

19.3 The law would fail to protect innocent victims of accidents from negligent drivers who would find easy refuge under the guise of 'blackout'.

[20] It would be remiss of me not to deal with the Respondent's conduct shortly before and after the collision in view of **Cunningham**[10] where the court stated the following:

> *"But ultimately it is for the court to decide the issue of the voluntary nature or otherwise of the alleged act and indeed the accused's criminal responsibility for his actions. In doing*

[9] Supra, para 11.
[10] S v Cunningham 1996 (1) SACR 631 (A). My underlining.

so it will have regard not only to the expert evidence but to all the facts of the case, including the nature of the accused's actions during the relevant period."

[21] In *casu*, the following observations pertaining to the Respondent's conduct shortly before and after the collision are very crucial:

20.1 The Respondent testified that she drove a distance of about 39 kilometres from her workplace in Sasolburg until the point of collision in Parys without causing an accident;

20.2 Further, it is her testimony that shortly before the scene of this collision there is a 4 way stop where she stopped and waited for a car that was approaching from her right hand side to pass after which she drove off;

20.3 She remembered engaging the second gear as she was in the process of driving away. This was when all of a sudden she lost her consciousness;

20.4 Shortly after the collision the Respondent regained her consciousness and alighted from her car, apologised to the Appellant and gave an explanation for the accident like any other normal person would do;

20.5 She had the consciousness to phone her husband to come and fetch her which was another logical thing to do in the circumstances; and

20.6 Later, when she arrived at home she checked her blood pressure and sugar levels.

[22] In my view, the above conduct was consistent with that of a normal person especially in the absence of medical/expert evidence suggesting otherwise.

[23] In addition to the above, the Respondent was a professional nurse with 18 years- experience at the time. It seems from the record that she was not bothered by the fact that she had a black-out whose cause she did not know and yet she never performed any blood tests to investigate at a professional level what was the cause of her alleged 'black-out' during the evening in question. This was crucial in the sense that had those tests detected an underlying medical condition then it would be attended to so as to eliminate the

risk of another black-out whilst driving. Such conduct by her is inconsistent with probabilities.

[24] The above conduct in my view, in the absence of medical or expert evidence to suggest otherwise, leads me to only one reasonable inference that the Respondent acted voluntarily and failed to keep a proper lookout as alleged by the Appellant in his particulars of claim hence she caused the collision negligently so.

CONCLUSION

[25] In view of the above, the trial court misdirected itself when it sustained the Respondent's defence of automatism without medical or expert evidence to support it. Further, it erred by attaching undue weight to the testimony of the Respondent regarding the medical tests that she conducted on herself post the collision. Further, it erred by not invoking the maxim of *Res Ipsa Loquitor* and consequently, erred by finding that the Appellant had failed to discharge the onus that rested upon him that is, to prove that the Respondent acted voluntarily. In my view, it follows that the appeal should succeed with costs.

[26] Therefore, I propose the following order:

ORDER

1. The appeal is upheld with costs;
2. The order of the Magistrate dismissing the Appellant's claim is set aside and replaced with the following:
   "Plaintiff's claim on the merits succeeds with costs and the Defendant is liable for the damages sustained by the Plaintiff";
3. The matter is remitted to the Magistrate for the adjudication of quantum.

M.M. MATSHAYA AJ

I concur.

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C. CHESIWE J

APPEARANCES:

Counsel for the appellant:	Adv. R Van Wyk
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