Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: A605/09
(CPD Case No: 630/07)

In the matter between:

2 PRODUCTIONS	First Appellant
ANTHONY FITZGERALD	Second Appellant

and

MIRIAM BRIGITTE KLUGMAN	Respondent

JUDGMENT: FRIDAY, 04 NOVEMBER 2011

DESAI J

[1] This matter comes before us with the leave of the Supreme Court of Appeal. It is, in effect, an appeal against the finding by Maqubela AJ that the motor accident which underpins this action was

caused solely by the negligence of second appellant and that the first appellant was vicariously liable for the delict of the second appellant.

[2] The respondent was the successful plaintiff in the proceedings before Maqubela AJ. She is a Swiss citizen. It appears that at the time of the accident she was living in Berlin and working for the German magazine, *Journal fur die Frau.* She was in Cape Town for a "photo shoot" as part of a team. On 30 January 2004 the German group, which included the respondent, were to be transported to the local airport by the second appellant. He parked his vehicle on a relatively steep incline at 6 Prima Avenue Camps Bay.

[3] At some stage the respondent entered the vehicle. On her version she got into the vehicle and sat down on one of the seats at the rear end of the vehicle. The vehicle started moving backwards, first slowly and then more rapidly. The appellants' version is that the respondent was inside the vehicle for about fifteen minutes moving around and looking for something when the vehicle started moving backwards. In any event it is common cause that the vehicle rolled backwards with the respondent still inside and eventually landed on the roof of a house.

[4] The respondent was injured in the said accident. As a consequence thereof she sued the appellants for damages in an amount in excess of R8 million. The parties agreed to separate the merits and quantum of respondent's claim and the matter proceeded before the trial court only with regard to its merits.

[5] The respondent sought to hold the first appellant vicariously liable for the damages on the basis that at the time of the accident the second appellant was acting within the course and scope of his duties with the first appellant. This was denied by the appellants who contended that the first appellant could not be liable as alleged as the second appellant had been employed as an independent contractor. I shall revert to this aspect in due course.

[6] The respondent, the owner of first appellant, one Robert McClelland, the second appellant and the expert witnesses called by the respective parties, all testified at the trial.

[7] The trial court did not evaluate the evidence of each witness. It elected not to make any credibility findings and ultimately found that applying the *res ipsa loquitur* maxim justified the conclusion that the

accident was caused by second appellant's negligence. Mr TD Potgieter SC, who appeared before us on behalf of the appellants, argued that the trial court erred in finding that the *res ipsa loquitur* maxim applied in this instance as this was not a case where the "only known fact" with regard to negligence is the accident itself.

[8] The respondent's evidence is susceptible to some criticism as Mr Potgieter has correctly pointed out but it appears that there are only two material aspects upon which the respondent and the appellants differ. Both Mr McClelland and second appellant contended that the respondent was in the parked vehicle for about fifteen minutes before it started moving backwards. This was denied by the respondent. Secondly, they differ as to precisely where the vehicle was parked before it started rolling. These differences are not of any real significance in the resolution of this matter.

[9] It is apparent from the photographs handed up in evidence that the driveway is on a steep incline. On second appellant's version the precise spot where the vehicle was parked is on an incline of at least six degrees. The respondent contended that the vehicle was parked at a spot further down where the incline was greater. The difference,

if such, was not material in that second appellant parked the vehicle on a steep incline which led to a steep and possibly dangerous driveway.

[10] The trial court concluded that in the aforementioned circumstances it was incumbent upon the second appellant to secure the vehicle by way of applying the handbrake and engaging the gear lever. This finding cannot be faulted.

[11] The vehicle was parked at a place which respondent's expert conceded was a safe parking area. It had been safely parked at or near the same spot on several earlier occasions. If second appellant had engaged the handbrake, it would have been sufficient to secure a fully loaded combi – this one only had some cooler boxes in it and, of course, at a later stage the respondent – parked at an incline twice as steep (twelve degrees) provided that the handbrake was fully functional.

[12] Mr Potgieter argued that the combi's handbrake, although properly engaged, may not have been functioning properly. This was pure conjecture on his part. There was no evidence whatsoever to

that effect. Moreover, it was apparent that the vehicle had been serviced some weeks before the accident and there was nothing to suggest that there was anything wrong with the brakes of the vehicle when it was serviced.

[13] Second appellant's testimony with regard to whether he engaged the vehicle's handbrake that day is not entirely satisfactory. He does not recall specifically pulling up the handbrake or putting the combi in gear. All he can say is that he always engaged the handbrake and put the combi in gear when he parked at that spot and that he had done so many times before. The effect of what he says is that he recognises the need to put the vehicle into gear under such circumstances but in this instance he cannot remember doing so.

[14] Mr Potgieter submitted that "some combination of factors" set in motion by the respondent's entry into the combi, and moving around in it, caused the combi to roll down the incline after it had been safely parked by the second appellant. This submission does not explain why a properly secured combi would have started rolling backwards.

[15] Mr Potgieter also suggested that it was possible that the respondent could have pushed against and engaged the gear lever causing it to disengage. As Mr N van der Walt SC, who appeared before us on behalf of the respondent, has pointed out, it was not put to the respondent that she had interfered with the gear lever or the handbrake. She did not have the opportunity to deal with this proposition. In any event, the evidence of the experts was to the effect that the handbrake could not be released accidentally. It must be mechanically lifted for the button to be disengaged. Accidentally disengaging the handbrake was accordingly not a real possibility.

[16] At best for the appellants there is no explanation for the vehicle running or rolling down the incline. However, it is more likely that the handbrake was not properly secured and the vehicle was not placed in gear. The respondent's expert witness, Mr Barry Grobbelaar, expressed the view that on the second appellant's version the handbrake could not have been properly secured. The appellants' expert, Professor Tom Dreyer, did not express any contrary view in this regard. He simply did not deal with this aspect of Grobbelaar's testimony.

[17] Mr Potgieter argued that it could not have been foreseen by second appellant when he parked the vehicle in the same way and place as he had done many times before, that the vehicle would start rolling down the incline about two hours later when the respondent entered it. The fact that the vehicle may have been stationery for some time, is not of any significance. Again, as Mr van der Walt pointed out, it simply means that the vehicle was sufficiently secure for it to resist gravity for that period of time, but the handbrake was not sufficiently secure for it to resist gravity for as long as it should have (see **Watt v van der Walt 1947(2) SA 1216(WLD) at 1224**). With regard to foreseeability it need only be stated that a vehicle will run down a steep incline if it is not properly secured. That is foreseeable.

[18] Respondent's expert witness, Grobbelaar, testified *inter alia* that a properly applied working handbrake was sufficient to keep a vehicle stationery on a six degree incline with or without passengers and movement inside the vehicle and should not impact upon the efficacy of a properly working and applied handbrake. Should the gear lever have been engaged it would have assisted in preventing the vehicle from rolling down the incline. Furthermore it was not easily

possible to knock the vehicle out of gear should it have been placed in gear. On the other hand if the handbrake had not been applied properly the movement of the respondent getting into the vehicle and, I suppose, moving around in it, could have caused the vehicle to run backwards.

[19] In the circumstances, the probabilities are overwhelming that second appellant did not put the vehicle into gear and that the handbrake started slipping. This is the most probable inference and there was no evidential basis upon which the trial court could come to any different conclusion.

[20] Mr Potgieter contended that the *onus* to prove negligence remained on the respondent. He is correct in this regard. The *res ipsa loquitur* maxim does not affect the incidence of proof on the pleadings. The *onus* is still on the plaintiff at the end of the case and the court having regard to all the evidence has to decide whether the *onus* of proving the alleged negligence has been discharged on a preponderance of probabilities (**see Madyosi and Another v SA Eagle Insurance Company Ltd 1990 (3 SA 442 at 444**)).

[21] Relying upon the *onus* resting on the plaintiff, Mr Potgieter argued that in this instance where the main facts surrounding the incident are known and it remains unclear why or how the accident happened, it does not mean that the *onus* has been discharged.

[22] The argument that in this case more is known relating to the negligence than the accident itself is misplaced. It is also the basis upon which Mr Potgieter contended that the trial court erred in finding the *res ipsa loquitur* maxim applicable herein.

[23] Mr Potgieter refers to the facts and circumstances leading up to the vehicle still rolling, such as when and how the vehicle was parked, the allegation by the second appellant that the handbrake was engaged and the vehicle started to move when the respondent entered it, and submits that at least these facts are known about the accident. This somehow rebuts the conclusion that the only known fact relating to negligence is the incident itself, making the *res ipsa loquitur* maxim applicable in this instance.

[24] The only known fact about the occurrence is that the vehicle started rolling backwards after the respondent got into it. If properly

secured, even on a steep incline the vehicle should not have rolled backwards. This leads to an inference of negligence. The remainder of the story may displace that inference however if the remainder of the story does not displace the inference, the inference remains (see **Arthur v Bezuidenhout and Mieny 1962 (2) SA 566 (AD)**).

[25] In this case the vehicle rolling backwards gives rise to a prima facie inference of negligence. It is clearly an occurrence of which it could properly be said *res ipsa loquitur*. The inference of negligence is the most probable inference and there was nothing before the trial court to displace this said inference.

[26] The trial court's finding in this regard should accordingly be upheld.

[27] With regard to the vicarious liability of the first appellant, the trial court concluded on the facts before it that the relationship between the first appellant and second appellant was that of an employer and employee. Mr Potgieter disagreed with this conclusion and contended that applying the "dominant impression test" formulated in **Smit v Workmen's Compensation Commissioner**

1979 (1) SA 51 (AD) to the said facts, the court should have arrived at a finding that second appellant was in fact an independent sub-contractor and not a servant of the first appellant at the relevant time.

[28] The test traditionally used by our courts to identify a contract of employment was the so-called "control test" according to which the employee worked under the control of another who told him or her what to do and "how" and "when" to do so. This is no longer an indispensable requirement for the existence of a contract of service. It remains, however, an important indicator of the nature of the contract between the parties.

[29] In this instance it is apparent from the evidence that the second appellant considered McClelland to be his boss. In the accident report form he indicated that "the vehicle fell on his boss's house". He in fact considered McClelland to be his boss for most of the summer season. If he needed anything, he would phone McClelland and McClelland would phone him from time to time to find out how the shoot was progressing. The second appellant would also phone McClelland for instructions and if there were differences he would

accept McClelland's point of view. This was hardly the conduct of a sub-contractor.

[30] The claim form indicates that he was employed by the first appellant and was driving the vehicle with the owner's permission. That is how they understood their relationship to be prior to the issue of summons in these proceedings.

[31] It is correct that the second appellant was not in the permanent employ of first appellant. He was employed by the first appellant as a production manager for this particular "photo shoot" which was to last about two weeks and he was to be paid a fixed amount. Although there was an agreed schedule, second appellant could deviate from it if instructed to do so by the client.

[32] Whatever the latitude given to the second appellant to adjust the schedule of work, the nature of the contract concluded by them is of greater importance. It was a service contract with second appellant at all times operating according to McClelland's instructions and McClelland in turn acting on behalf of the first appellant. The second appellant's discretion was no different from that of any other

employee. McClelland was in contact with second appellant on a daily basis during shoots and would occasionally go to the shoots. Quite patently second appellant acted on the instructions of McClelland and discussed problems with him.

[33] There are several indications that second appellant was an employee rather than an entrepreneur. This is an aspect of "the dominant impression test" which Mr Potgieter referred to.

[33.1] Second appellant did not use his own vehicle to transport the Germans. First appellant hired the vehicle from a third party and paid for such hire. It is also apparent from the accounts that the petrol for the vehicle was paid for by the first appellant.

[33.2] Second appellant totally identified himself with first appellant he even wore a t-shirt identifying him with the company. He saw himself as part and parcel of 2 Productions and wore his t-shirt at all times during the two weeks.

[33.3] The Germans had a contract with the first appellant and none with the second appellant.

[33.4] Besides the company paying for the petrol, the invoices also show that first appellant paid for the cool drinks.

[33.5] The second appellant was in fact given a float by the first appellant to pay for incidental expenses.

[33.6] Second appellant did not go around to any other production company for a period of three months. Though he was not employed on a full-time basis, he worked for first appellant on a continuous basis throughout the summer.

[34] It was apparent from second appellant's cross-examination that he did not fully appreciate the notion of an independent sub-contractor. He identified himself as a non-permanent employee and, as I have already stated, he regarded McClelland as his boss.

[35] The fact that second appellant was not permanently employed by the first appellant makes no difference to the nature of the contract

concluded by the parties. The second appellant was given a service contract for the duration of the shoot. He identified himself with first appellant. He was not an independent sub-contractor working independent from the contractor.

[36] It was also apparent from McClelland's testimony, despite him protesting the contrary, that his contract with second appellant was not a sub-contract but a contract of service.

[37] There was also no real explanation as to why second appellant is cited in first appellant's documents under "staff loans". This is how they perceived their relationship to be, namely a service relationship.

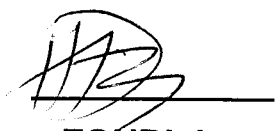
[38] Mr van der Walt argued that it appears that the appellants are *ex post facto* endeavouring to represent the contract between them as one of a totally independent sub-contractor. I agree with counsel and moreover the facts do not show it to be so.

[39] The trial court's finding that first appellant is vicariously liable for second appellant's negligence is in my view correct.

[40] In the result the appeal is dismissed with costs.

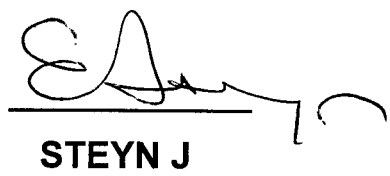
DESAI J

I agree .



ZONDI J

I agree.



STEYN J