REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: **248/2002**
Reportable

In the matter between:

H JORDAAN
APPELLANT

and

THE BLOEMFONTEIN TRANSITIONAL LOCAL AUTHORITY **FIRST RESPONDENT**
JOHANNES JACOBUS RAUTENBACH **SECOND RESPONDENT**

CORAM: FARLAM, MTHIYANE JJA et MOTATA AJA

HEARD: 6 NOVEMBER 2003

DELIVERED: 28 NOVEMBER 2003

SUMMARY: Civil procedure – whether magistrate's finding that defendants were liable for plaintiff's damages appealable when first defendant concedes by letter and in counsel's heads that plaintiff's allegations re quantum correct – whether *res ipsa loquitur* maxim applied – whether inference could be drawn against defendants from common cause facts where no evidence led.

JUDGMENT

FARLAM JA

[1] In this matter the appellant instituted an action in the magistrate's court Bloemfontein against the first respondent, the Bloemfontein Transitional Local Council, as first defendant, and one Johannes Jacobus Rautenbach as second defendant, suing them in the alternative as well as jointly and severally. He claimed R73 701-56 as damages, following a collision in which his motor vehicle was extensively damaged and which resulted, so he alleged, from an earlier collision which took place between two motor vehicles, one which was driven by an employee of the transitional local authority while the other was driven by the second defendant. In what follows I shall refer to the parties as they were in the magistrate's court.

[2] At the commencement of the trial the parties agreed that there was to be a separation of issues and that the trial court was to be asked first to pronounce upon the question as to whether either or both of the defendants was or were liable for the damages suffered by the plaintiff, whereafter, if there was a finding on this issue in favour of the plaintiff, the issue as to the quantum of the plaintiff's damages was to be considered, both defendants having put the plaintiff to the proof of the extent of his damages.

[3] The trial court was informed by the parties that the following facts were regarded by the parties as being common cause: viz

(1) that at the time of the collision the plaintiff's vehicle was parked in a demarcated parking place in Voortrekker Street, Bloemfontein;

(2) that Voortrekker Street at that point is divided into three lanes,

which carry traffic in a westerly direction;

(3) that a collision occurred between the first and second defendants' respective vehicles and directly thereafter and as a result of that collision one or both of the first and second defendants' vehicles collided with the plaintiff's parked vehicle;

(4) that the driver of the first defendant's vehicle had been driving it in the course and scope of his employment with the first defendant with the result that if he was negligent the first defendant would be vicariously liable therefor; and

(5) that the plaintiff did not know which of the first and second defendants was liable for the damage occasioned to his vehicle, the two defendants having been joined in the action pursuant to the provisions of section 42(1) of the Magistrate's Courts Act 32 of 1944, as amended.[1] In what follows I shall refer to Act 32 of 1944 as 'the Act'.

[4] The plaintiff's attorney thereafter requested the court to rule on the question as to who had to commence leading evidence. After this point was argued the court ordered that the duty to begin rested on the defendants in the order in which they were cited in the summons. The legal representatives for

[1] Section 42(1) of the Magistrates' Courts Act 32 of 1944 reads as follows:
'Several defendants may be sued in the alternative or both in the alternative and jointly in one action, whenever it is alleged by the plaintiff that he has suffered damages and that it is uncertain which of the defendants is in law responsible for such damages: Provided that on the application of any of the defendants the court may in its discretion order that separate trials be held, or make such other order as it may deem just and expedient.'

the first and second defendant thereupon said that they would not lead evidence at that stage but that they were placing it on record that this did not mean that the defendants were closing their cases. After reference was made to the decision in *S v Magoda* 1984(4) SA 462(C), the magistrate held that he interpreted the actions of the defendants as amounting for all practical purposes as if they had closed their cases. The plaintiff then closed his case without leading any evidence.

[5] In his judgment the magistrate held that although none of the parties had placed *viva voce* evidence before the court it was clear from the facts which were common cause that the *maxim res ipsa loquitur* applied and that there was accordingly a *prima facie* case against the defendants which was not answered, with the result that he was obliged to find that the two defendants were jointly and severally liable for the damage suffered by the plaintiff.

[6] The first defendant appealed against the magistrate's judgment to the Orange Free State Provincial Division. Before the appeal was heard it conceded the quantum of the plaintiff's claim by letter and again in its advocate's heads of argument.

[7] The issues argued before the court *a quo* were: (1) whether the magistrate's judgment was appealable; and (2) whether the magistrate was correct in holding, on the basis of the *maxim res ipsa loquitur,* in the absence of any evidence from any of the parties that the first defendant's employee was negligent.

[8] The judgment of the court *a quo* was delivered by Danzfuss, AJ with whom Hancke J concurred. On the appealability point Danzfuss AJ referred to section 87(d) of the Act, which deals with the powers of the High Court sitting on appeal from a judgment of a magistrate's court in a civil matter and which (as far as is material) provides:

'The court of appeal may –

…

(d) take any other course which may lead to the just, speedy and as much as may be inexpensive settlement of the case ….'

He pointed out that the courses referred to in the Act are not limited to courses which ensure the speedy disposal of the appeal but include those which may

lead to the speedy disposal of the case. He referred, *inter alia,* to the decision of the Natal Provincial Division in *Durban City Council v Kistan* 1972(4) SA 465(N) and said that it had been held in that case that the abandonment of an order for costs by letter, and not in terms of the rules, had brought the *lis* between the parties to an end, so that an appeal against the cost order could no longer proceed as there was no longer a dispute between the parties.

[9] The court *a quo* held that section 87(d) of the Act empowered the court of appeal to amend the order of the magistrate on appeal so as to bring it in line with the present state of affairs, to wit that there were no longer any disputes between the plaintiff and the first defendant, but expressed the view that it was not necessary for the court to do so and that it could merely proceed to hear the appeal without altering the order. The appealability point was accordingly decided in favour of the first defendant.

[10] Turning to the merits, Danzfuss AJ held that the magistrate had erred in holding that the maxim *res ipsa loquitur* (the occurrence speaks for itself) applied. He referred to the decision of this Court in *Madyosi and Another v SA Eagle Insurance Co Ltd* 1990(3) SA 442(A), where Milne JA said that he had some doubt whether in a case where a bus left the road and overturned and it was known that one of the bus's tyres had burst the maxim applied. Applying the reasoning in that case to the present, Danzfuss AJ pointed out that it is known that one or both of the first and second defendants' vehicles collided with the plaintiff's vehicle, where it was stationary in a demarcated parking area. The cause of this collision is also known: it was an earlier collision between the first and second defendants' vehicles. He said that no evidence was led which indicated that either of the two drivers involved in that earlier collision was negligent with regard to that collision and that the occurrence itself did not justify such an inference.

[11] Danzfuss AJ acknowledged that the facts relating to the first collision are within the exclusive knowledge of the defendants and that the plaintiff clearly has no personal knowledge about them, with the result that much less evidence is necessary to make out a *prima facie* case, but there must be sufficient evidence. He referred to the decision of this Court in *Mazibuko v*

Santam Insurance Co Ltd and Another 1982(3) SA 125(A), on which the magistrate had strongly relied in his judgment. In *Mazibuko*'s case the plaintiff sued two defendants, as was done in this case, in the alternative and also in the further alternative, (under Rule 10(3) of the Uniform Rules of Court, which are similarly worded to section 42(1) of the Act) jointly and severally, for damages sustained by her as a result of a collision between two vehicles. Each of them denied liability (as was the case here) and said that the driver in respect of whom the other defendant was liable had been negligent (an averment made here by the second defendant and, in the alternative to a general denial, also by the first defendant). At the end of the plaintiff's case there was no evidence as to exactly where or how the collision took place and the plaintiff had not established a *prima facie* case that her injuries were sustained as a result of the first defendant's driver. She also had not established that her injuries were caused by the negligence of the second defendant's driver. She had led evidence, however, which established *prima facie* that either the first defendant's driver or the second defendant's driver or both had been negligent and that such negligence had caused her injuries. The trial court thereupon granted absolution from the instance as against both defendants.

[12] An appeal to this Court was allowed. Corbett JA, with whom Jansen, Kotze, Diemont and Trengove JJA concurred, held that where there was evidence upon which a court applying its mind reasonably could hold that it

had been established that either the first defendant or the second defendant or both of them were legally liable (even though it was uncertain as to which of the alternatives was the correct one) the court hearing the matter should not grant absolution. Corbett JA said (at 135 E-G):

'In such a case, which is in effect a tripartite suit between three adversaries, it is, in my opinion, in the interests of justice that the case should be decided on the evidence which all the parties might choose to place before the Court, provided, as I say, that the plaintiff, when presenting his case, has laid the necessary foundation of showing, *prima facie,* that one or other or both of the defendants are legally liable. To hold otherwise would, in many instances, defeat the object of the Rule which permits a plaintiff who is uncertain as to the legal responsibility of two defendants to sue them both in the alternative and, in the further alternative, jointly and severally.'

[13] Danzfuss AJ distinguished the *Mazibuko* case on the basis that it was concerned with the situation at the end of the plaintiff's case, when the test was whether there was sufficient evidence on which a reasonable man could decide in favour of the plaintiff, while the test to be applied at the end of the defendant's case was whether a reasonable man should find for the plaintiff. He found that there was no evidence placed before the court on the strength of which a reasonable man should find in favour of the plaintiff. He said that it was clear that one of the two drivers (the first defendant's driver and the second defendant) or both of them was or were negligent but the plaintiff had not succeeded in showing which one was negligent or that both were negligent. He stated that it was very possible that only one of the two was negligent and it was not clear which one. In the circumstances the appeal was allowed with costs and the finding of the magistrate was set aside and replaced by an order of absolution from the instance.

[14] Mr Colditz, who appeared before us for the plaintiff, contended that the court *a quo* had erred in two respects. It should have found that the magistrate's finding was not appealable and alternatively, that the magistrate's finding on the merits should have been confirmed.

[15] On the appealability point he referred to the decision of this Court in *Steenkamp v South African Broadcasting Corporation* 2002(1) SA 625 (SCA), in which it was held that a magistrate's order on the issue of liability only, where that issue has been separated from the issue of quantum in terms of rule 29(4) of the Magistrates' Courts Rules, was not appealable. He submitted that the principle laid down in that case still applies in this matter, despite the first defendant's concession by letter and in its counsel's heads of argument before the court *a quo,* and that the first defendant should have waited until the magistrate gave judgment against it before appealing.

[16] In my view this contention is correct. Section 83(b), the provisions of

which were considered by this Court in *Steenkamp v South African Broadcasting Corporation, supra*, provides that a party to any civil suit or proceeding in a magistrate's court may appeal to the provincial or local division of the High Court having jurisdiction against 'any rule or order made in such suit or proceedings and having the effect of a final judgment'. The finding made by the magistrate in this case was, on the authority of the *Steenkamp* decision, not a rule or order having the effect of a final judgment and the first defendant's concession regarding the quantum of the plaintiff's claim did not convert it into such a rule or order. The court *a quo*'s reliance on the decision in *Durban City Council v Kistan, supra*, was misplaced. In my view it misread the judgment in that case because the abandonment of the costs order under consideration there was by notice and was held at (469 H) to be one made under section 83 of the Act. Reference was made (at 469 D-G) to *Scrooby v Engelbrecht* 1940 TPD 100 where it was pointed out that abandonments can take place under section 83 as well as outside the section. Where an abandonment of a judgment takes place outside the section and the party so abandoning undertakes not to take the objection of *res judicata* in further proceedings on the same cause of action it was envisaged that an appeal against the judgment so abandoned could proceed but it was said (at 105) that the court in the exercise of its discretion would probably refuse the appellant his costs of appeal. In other words an abandonment of a judgment 'outside the section' does not render the judgment non-appealable as the court *a quo* appears to have thought. I also do not think that the power conferred on the court of appeal by section 87(d) of the Act 'to take any other course which may lead to the just, speedy and as much as may be inexpensive settlement of the case' extends to doing something to a non-appealable order to make it appealable. In the circumstances I am of the view that the court *a quo*'s decision that the magistrate's finding in this case was appealable was incorrect and that it should have made no order in the case save for an order that the first defendant should pay the costs.

[17] The legal representatives of the parties requested us, if we were to hold that in favour of the plaintiff on the appealability point, to express our views on the merits of the case in view of the fact that the matter was fully argued. They pointed out that this Court expressed its views on the magistrate's ruling on liability in *Steenkamp's* case, *supra.* In my view this is an appropriate case for this request to be granted. I accordingly now turn to consider the question as to whether the magistrate's finding was correct.

[18] Mr *Reinders,* who appeared on behalf of the first defendant, contended that the court *a quo* correctly distinguished this Court's decision in *Mazibuko v Santam Insurance Co Ltd and Another, supra.* He submitted also that what was described in the passage from Corbett JA's judgment which I have quoted above as the 'tripartite suit between three adversaries' had at the end of the case to be decided 'on the evidence which all the parties might choose to place

before the Court'. In this case there was, he contended, no evidence placed before the trial court, pleadings not being evidence. He submitted further that, as the court *a quo* had found, section 42(1) of the Act did not create liability for a defendant which did not otherwise exist; it merely created a procedure for the joinder of several defendants. He also contended that the court *a quo's* finding that the *res ipsa loquitur* maxim did not apply was correct.

[19] In my opinion the court *a quo* was correct in holding that the *res ipsa loquitur* maxim did not apply. It overlooked, however, the fact that both defendants, each of whom had exclusive knowledge as to what happened (as opposed to the plaintiff who did not know how the two collisions occurred), had both decided to place no evidence before the trial court and were, correctly in my view, regarded as having closed their cases. The plaintiff had succeeded in showing that one or both of the drivers concerned were negligent. It is true that the plaintiff led no evidence but certain facts, summarized in para [3] above, were common cause. The plaintiff presumably had no other evidence to put before the court but the common cause facts gave rise, in my view, to four possible inferences, viz: (a) neither driver was negligent; (b) the first defendant's driver was negligent; (c) the second defendant was negligent; (d) both drivers were negligent.

[20] The failure by both defendants to lead evidence brings into play the *Galante* rule, which was formulated by this Court in the decision of *Galante v Dickinson* 1950(2) SA 460(A) at 465, as follows:

'[W]here the defendant was himself the driver of the vehicle the driving of which the plaintiff alleges was negligent and caused the accident, the court is entitled, in the absence of evidence from the defendant, to select out of two alternative explanations of the cause of the accident which are more or less equally open on the evidence, that one which favours the plaintiff as opposed to the defendant.'

In considering which of the possible inferences is to be preferred in this case it is trite law that the court may 'by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one' (*Govan v Skidmore* 1952(1) SA 732 (N) at 734 C-D, approved by this Court in *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963(4) SA 147(A), in which it was pointed out (at 159 C) that by 'plausible' is meant 'acceptable, credible, suitable'). The application of the *Galante* rule in this case means, in my judgment, that the more natural or plausible inference was that both drivers were negligent.

[22] A situation similar to the present was considered by Denning LJ in *Baker v Market Harborough Industrial Co-operative Society Ltd* [1953] 1 WLR 1472 (CA). This was a case where there was a collision in the centre of a straight road at night. Both drivers were killed. It was held that, in the absence of evidence enabling the Court to draw a distinction between the two drivers, the inference to be drawn was that both were equally to blame. At 1476 Denning LJ said:

'It is pertinent to ask, what would have been the position if there had been a passenger in the back of one of the vehicles who was injured in the collision? He could have brought an action against both vehicles. On proof of the collision in the centre of the road, the natural inference would be that one or other or both were to blame. If there was no other evidence given in the case, because both drivers were killed, would the court, simply because it could not say whether it was only one vehicle that was to blame or both of them, refuse to give the passenger any compensation? The practice of the courts is to the contrary. Every day, proof of the collision is held to be sufficient to call on the two defendants for an answer. Never do they both escape liability. One or other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape simply because the court had nothing by which to draw any distinction between them.'

[23] In my opinion the magistrate correctly held on the common cause facts before him, read with the failure of both defendants to lead evidence, that both defendants were jointly and severally liable for the plaintiff's damages.

[24] The following order is made:

1. The appeal succeeds with costs.

2. The judgment of the court *a quo* is set aside and replaced by the following:

   'Geen bevel word ten opsigte van hierdie verrigtinge gemaak nie behalwe dat die appellant die koste daarvan moet betaal.'

……..

IG FARLAM

JUDGE OF APPEAL

CONCURRING

MTHIYANE JA

MOTATA AJA