IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL NO.138/2017**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

SOUTHERN CROSS MOTORS LIMITED **Appellant**

AND

HU CHUN LING **Respondent**

Coram: Mchenga DJP, Mulongoti and Lengalenga JJA

On 22nd February, 2018 and 7th August, 2018

For the Appellants: Mr. A.D.M Mumba of A.D. Mwansa Mumba Advocates

For the Respondent: Mr. N. Ng'andu of Shamwana& Co.

J U D G M E N T

MULONGOTI, JA, delivered the Judgment of the Court

Cases referred to:

1. **Deutsch, Darling and Banda v Zambia Engineering and Construction Company Limited (1969) ZR 161**

2. **Zambia Electricity Supply Corporation Limited v Redline Haulage Limited (1990-92) ZR 170 (SC)**
3. **Eagle Charalambous Transport Limited v Phiri (1993-94) ZR 180 (SC)**
4. **Richie v Western Scottish Motor Traction Company Limited**
5. **Lusaka City Council and Leah Diana Mitaba v George Silungwe and others SCZ slected Judgment No. 7 of 2018**
6. **Kaole Contracting and Engineering Company Limited v Mindeco Small Mines Limited (1980) ZR 91 (HC)**
7. **Elios Limited v Barloworld Logistics (Z) Limited (2012) 1 ZR 97**
8. **Ng Chun Pui v Lee Chuen Tat the Privy (1988) RTR 298**
9. **Glaser v Schroeder 168 N.E 809 (Mass. 1929) (SC)**
10. **Duly Motors v. Katongo and Livingstone Motor Assemblies (1986) ZR 61 (SC)**

Other materials referred to:

1. **Rules of the Supreme Court 1999 (edition) Orders 42/3 and 28/1**
2. **Clerk and Lindsell, On Torts 17th edition paragraph 7-176**
3. **Jolowicz and Winfield, On Torts, 7th edition, P41**

This is an appeal against the High Court decision commercial list, pursuant to which the appellant was found liable for damages to the respondent's vehicle engine which occurred when the vehicle was in the appellant's garage.

The brief background to the appeal is that in 2008, the parties entered into an agreement for the appellant to service and repair the respondent's vehicle, a Jeep Cherokee, registration number ABL 7100, at a fee, payable upon production of tax invoices.

Sometime in 2012, the respondent took his vehicle for the appellant to repair a reoccurring gear box problem and malfunctioning air conditioner. However, whilst the appellant was attending to the gear box, the respondent was called and informed that the vehicle had developed an engine knock. The respondent demanded for his vehicle to be returned but the appellant refused and insisted that he should pay for the cost of repair of gear box and also repair of the engine before it could deliver the vehicle. This forced the respondent to sue for delivery of his motor vehicle plus damages caused to the engine while the vehicle was in the appellant's care and possession.

In his statement of claim, the respondent gave particulars of negligence as follows:

> ***(i) Failing to inspect or test the motor vehicle regularly or at all whilst attending to repair of the gear box.***
>
> ***(ii) Acting as aforesaid with knowledge or means of knowledge that it was unsafe to leave th***
>
> ***(iii) e plaintiff's motor vehicle engine unattended to for a considerable period of time***

He also pleaded the maxim *res ipsa locquitor* as the engine was knocked while in the appellant's care and possession.

The appellant denied that it was negligent and counter claimed K70,131.52 being the balance on the total cost of repair out of the total sum of K82,505.=82, including repairs to the engine and cost of storage.

Later, the respondent filed an amended statement of claim whereby the particulars of negligence were removed and he simply pleaded the maxim ***"res ipsa locquitor."***

The Judge allowed the amendments and noted that the appellant did not object.

The Judge considered the evidence and witness statements of the respondent (PW1) and the appellant's witness (DW1). She found that both PW1 and DW1 (workshop manager) confirmed that the respondent's motor vehicle did not have engine problems when he left it with the appellant.

She also found that as the respondent had proved that the engine knocked while the motor vehicle was in the care and possession of the appellant, it was incumbent on the appellant to provide an adequate explanation of the cause of the engine knock. She concluded that the doctrine of *res ipsa locquitor* applied on the facts of this case.

She rejected the evidence of DW1 that the expert determined the cause of the engine knock as oil starvation by the oil pump due to wear caused by time in service, particularly that it was a 2001 year model.

The Judge reasoned that the appellant should have called the expert to explain his or her findings. She further observed that the burden of proof shifts in cases where *res ipsa locquitor* applies. Accordingly, that the appellant failed to adduce evidence that it had taken reasonable care of the respondent's motor vehicle.

The Judge allowed all of the respondent's claims and dismissed the appellant's counter claim. She ordered that the appellant do deliver the respondent's motor vehicle and awarded damages for any harm caused to the engine, to be assessed. Furthermore, that the appellant should bear the cost of the repair of the respondent's vehicle and that the respondent is not liable for costs of storage.

Dissatisfied with the judgment, the appellant filed six grounds of appeal before us as follows:

1. ***The court below erred and misdirected itself in law and fact by failing to find that the appellant denied negligence by pleading that the engine knock was due to the usual and inevitable natural wearing out of the main bearing also known as wear due to time in service, encompassing oil starvation which occurs***

over a period of time thereby negaviting the mere proof of a result and the test of the doctrine of res ipsa locquitor.

2. ***The learned Judge erred and misdirected herself in law and fact when she found that the effective cause of the knock engine was the appellant's act or omission on the ground that the appellant failed to call the expert who deduced the cause of oil starvation by the pump as a result of wear due to time in service, a fact stated by DW2 in his witness statement which was never objected to nor discredited by the plaintiff in cross-examination.***
3. ***The learned trial Judge in the Court below erred and misdirected herself in law and fact when she found and held that clearly the repairs and the goods maintenance which normally prolong the life span of a motor vehicle was not afforded to the respondent's motor vehicle by the appellant by failing to consider the appellant's evidence that the motor vehicle in question was a grey import and whose year of make was not placed before the court.***
4. ***The court below erred and misdirected itself in law and fact when it ordered that the appellant shall bear the cost of repair of the respondent's motor vehicle thereby including the cost of repairs unrelated to the engine knock.***
5. ***The court below erred and misdirected itself in law and fact when it dismissed with costs the appellant's claims on the counterclaim, including for payment for the repairs to the respondent's motor vehicle other than those for repairs to the engine knock.***
6. ***The Court below erred and misdirected itself in law and fact by ordering that the motor vehicle be delivered to the respondent's forthwith before settling the monies due to the appellant on the counterclaim contrary to the parties' agreement.***

Both parties filed Heads of Argument. In his arguments counsel for the appellant, Mr. Mumba, who appeared for the appellant began by arguing that the trial Judge erred in her Judgment when she referred to her earlier ruling and held that the respondent had amended his statement of claim. Counsel contends that even though leave to amend was granted, the plaintiff failed to draw up the formal order granting leave so the Judge erred when she referred to the amended statement of claim.

In relation to grounds one, two and three learned counsel argued that although the particulars of negligence were pleaded, the learned trial Judge applied the doctrine of *res ipsa loquitor* in order to impute liability on the appellant. Relying on the Supreme Court decision in **Eagle Charalambous Transport Limited v Phiri**[1] which held that the doctrine of *res ipsa locquitor* entails that the plaintiff had no affirmative evidence of negligence and that it is inappropriate for a plaintiff to assert and give particulars of negligence and at the same time or in the alternative rely on the doctrine. According to counsel, the respondent asserted and gave

particulars of negligence while at the same time relied on the doctrine which was wrong as the essential conditions of the doctrine were not met. Quoting **Clerk and Lindsell**, **On Torts** that:

> *"(1) the occurrence is such that it would not have happened without negligence and (2) the thing that* ***inflicted the damage*** *was under the sole management and control of the defendant or someone for whom he is responsible and whom he has a right to control.* ***There is however a further negative condition*** *(3) there must be no evidence as to why or how the occurrence took place.* ***If there is****, then appeal to res ipsa loquitor is inappropriate, for the question of the defendant's negligence must be determined on the evidence. In other words the res ipsa loquitor* ***does not apply when the cause of the accident is known*** *(emphasis by counsel)*

It is argued that the appellant, in this case, gave an explanation that the cause of the knock engine was oil starvation to the engine due to wear and tear of the motor vehicle in service especially that it was a second hand or grey import.

However, despite this, the trial Judge held that:

> *"It is more likely than not that the effective cause of the knock engine which developed in the plaintiff's motor vehicle while in the care and possession of the defendant was some act or omission on the part of the defendant or of someone for whom the defendant is responsible,*

which act or omission constitutes a failure to take care of the plaintiff's motor vehicle while in the care and possession of the defendant. Therefore, as the plaintiff has proved the happening of the engine knock occurred while the motor vehicle was in the care and possession of the defendant it is incumbent upon the defendant to provide an adequate explanation of the cause of an engine knock to protect itself from the ***doctrine of res ipsa loquitor, as pleaded by the plaintiff***."

Counsel argues that in her analysis of the engine knock issue in the Judgment the learned trial Judge failed to refer to, and analyze the fact that the motor vehicle's main bearings on the crankshaft journals on the last cylinder, do wear out due to time in service thereby causing engine knocks. The trial Judge also erred by failing to give reasons as to why she failed to find that the main bearing had worn out or not due to time in service and further whether or not the main bearing could not have naturally worn out at all. Counsel amplified that the learned trial Judge further failed to consider that the explanation as to the cause of the engine knock was pleaded and also to consider DW1's witness statement and *viva voce* evidence, which remained uncontroverted in any way by the respondent.

In the opinion of counsel, it is common knowledge that starvation of oil in a motor vehicle leading to an engine knock whilst in time of service, is latent which may not be easily discovered nor could it be prevented at all. That wearing out of motor vehicle bearings due to time in service are inevitable and that such occurrence lead to engine knocks.

In the premises, the appellant negatived the doctrine of *res ipsa locquitor* by giving the explanation and identifying the cause for the accident or occurrence.

In his oral submission, during the hearing, Mr. Mumba augmented his Heads of Argument. He submitted that at page 193 lines 8 to 10 in the record of appeal, DW1 stated that expert analysis was done by himself (DW1) and confirmed by the technical advisor, contrary to the trial Judge's finding that the appellant did not call the expert who examined the motor vehicle and thus failed to sufficiently explain the cause of the engine knock. Counsel contends that this testimony was sufficient, as DW1 testified that he too was an

expert. DW1 testified as to the cause of the engine knock being due to wearing out of the bearings, which evidence was not considered.

Mr. Ng'andu who appeared for the respondent also filed Heads of Argument. He argued grounds one, two and three together, contending that on 8th October, 2015, the appellant filed into the lower court summons for leave to amend statement of claim, affidavit in support and skeleton arguments which appear in the record of appeal. As can be seen from the draft amended statement of claim, exhibited in the affidavit in support of summons for leave to amend statement of claim, appearing on page 131 of the record of appeal, the amendment being sought was the deletion of certain statements from paragraph 9, as follows:

> ***"9. Due to the negligence of the defendant, the plaintiff will plead the maxim res ipsa loquitor, the engine of the plaintiff's motor vehicle was damaged whilst in the defendant's care and possession.***
>
> ~~***Particulars of negligence***~~
>
> ~~***a) Failing to inspect the plaintiff's motor vehicle regularly or at all whilst attending to the repair of the gear box;***~~

b) Acting as aforesaid with knowledge or means of knowledge that it was unsafe to leave the plaintiff's motor vehicle unattended for a considerable period of time."

Counsel stated that the application for leave to amend the statement of claim was heard and determined on 5th May, 2016 as can be seen on pages 200-202 of the record of appeal, where all parties through their respective counsel, were present. In the ruling of the Court, which starts from page 200 line 22 of the record of appeal, it was held that:

"There being no objection, the application to amend the statement of claim is hereby granted and the statement of claim is amended as appropriate." (Underlining for emphasis)

The statement of claim was accordingly amended as ordered by the court thereby deleting the particulars of negligence.

Thus the respondent properly invoked the doctrine of *res ipsa loquitor* against the appellant in his pleadings. Secondly, the respondent did give evidence proving the occurrence of the engine knock which was not contested by the appellant. In particular, the

respondent stated under paragraph 12 of his witness statement, appearing at page 125 of the record of appeal that:

> ***"As my motor vehicle was in the care and possession of the defendant for a considerable period of time prior to the engine knock, the defendant was responsible for my motor vehicle and is aware of the circumstances that led to the engine knock."***

As a result, the burden of proof shifted to the appellant. It was therefore, incumbent upon the appellant to provide an adequate explanation of the cause of the engine knock, to protect itself from the application of the doctrine of *res ipsa loquitor.*

It is the further submission of counsel that the learned trial Judge in the lower court found that the appellant had failed to discharge its burden of proof. The learned trial Judge at page 18 line 16 of the record of appeal, stated that:

> ***"The defendant cannot rely on the defence that the engine knock was as a result of an inevitable consequence of the plaintiff's motor vehicle's natural wearing out or wear due to time in service, when there is no evidence from the expert who determined the cause of the engine knock to that effect."***

And since it is a long held position of the law that an appellate court will always be loathe to disturb or interfere with findings of fact of a lower court, unless they are perverse or not supported by the evidence or made in the absence of any relevant evidence or upon a misapprehension of the facts, or the findings are such that no trial Court, acting reasonably can make, we should not interfere with that finding.

In addition, that this was the position even with the trial Judge's finding that there was no evidence from the expert who determined the alleged cause of the engine knock, which as a consequence, precluded the defendant from relying on the defence.

Our attention was drawn to the appellant's case in the court below as follows:

Firstly, in paragraphs 2 and 4 of the appellant's defence, appearing at page 29 of the record of appeal, it was alleged that:

"***2. The defendant (appellant) admits the contents of paragraph 7 of the statement of claim in so far as it states that the defendant discovered that the plaintiff's (respondent) motor***

vehicle had developed an engine knock whilst the defendant attended to the repair of the gear box but will aver at trial that the engine knock was due to time in service.

3. .....

4. ***The defendant (appellant) denies paragraph 9 of the statement of claim and will aver at trial that though the knock was discovered whilst in its care and possession the knock was an inevitable consequence of the motor vehicle's natural wearing out or wear due to time in service and will put the plaintiff to strict proof."***

From the foregoing, there is clearly an allegation that the engine knock was as a result of the motor vehicle's wear due to time in service which was observed by the learned trial Judge in her judgment.

Secondly, the learned trial Judge concluded that the alleged cause of the engine was determined by an expert and DW1. According to the testimony of DW1, at page 142 of the record of appeal:

> **"18.** ***The defendant (appellant) then made a test drive only to discover that the engine had developed a knock sound.***
>
> ***19. That upon inspection the defendant (appellant) discovered that the main bearing on the crankshaft journal on the last cylinder had worn out, hence the knock.***

20. ***That upon an expert analysis it was deduced that the cause to oil starvation by the oil pump was as a result of wear caused by time in service particularly that it was 2001 model.*** *" (Underlining for emphasis)*

It is the further submission of counsel that when the appellant's witness (DW1) was questioned on who conducted the expert analysis, he professed at page 193 of the record that:

> ***"The expert analysis was done by myself and confirmed by Technical expert."***

Further, in cross examination, the attention of DW1 was drawn to a letter dated 10th July, 2013 appearing on pages 120-121 of the record of appeal, in particular at page 121 line 1, which reads:

> ***"After the gear box was returned and the waited spares received and fitted, we still faced a challenge with the air conditioning system and therefore decided to involve an expert from Chrysler South Africa to check the concern. It was at this moment that while test driving the vehicle, the engine developed a knocking sound. Upon inspection, we saw that the main bearings on the crankshaft journal on the last cylinder had worn out, hence the knock. The expert immediately deduced the cause to oil starvation by the oil pump as a result of wear caused by time in service. The vehicle is a 2001 model year."***

Thus, in his response, DW1 not only verified to have authored the letter but also confirmed that the expert is the one who determined the engine knock. DW1 stated as follows at the same page 193 of the record of appeal:

> ***"I signed all the documents. I did carry out the inspection. The expert is the one who deduced."***

According to Mr. Ng'andu, it is evident that the expert and not DW1, determined what the alleged cause of the engine knock was. However, the oral testimony of DW1 as to who determined the cause of the engine knock was most certainly at variance with his own letter dated 10th July 2013.

DW1 was therefore, not competent to speak on the alleged cause of the engine knock. For the appellant to insist that the lower court should have accepted the testimony of the appellant's witness in so far as the alleged cause of the engine knock is concerned, would have amounted to the lower court accepting hearsay evidence.

In any event, whilst the letter dated 10th July 2013 is explicit as to who determined the cause of the engine knock, there was no testimony from DW1 as to the source of his information. DW1 was entitled to speak of what he saw when he inspected the respondent's motor vehicle after the engine knock.

Given that the alleged cause of the engine knock was determined by the technical expert and not DW1, it is contended that the learned trial Judge was justified in disregarding the testimony of DW1 with respect to the cause of the engine knock. Thus, this is not a fit and proper case for us as an appellate court, to disturb the findings of the learned trial Judge.

Furthermore, that if we were to accept the appellant's argument that the engine knock was due to oil starvation by the oil pump as a result of wear caused by time in service, the respondent would nonetheless contend that the engine knock was not an inevitable accident but was attributable to the appellant's negligence.

The case of **Deutsch, Darling and Banda v Zambia Engineering and Construction Co. Ltd**[2] was referred to where it is stated, with respect to inevitable accident in accordance with **Jolowicz & Winfield On Tort (7thed)** at p. 41 that:

> ***"Inevitable accident is defined by Sir Frederick Pollock as an accident 'not avoidable by any such precautions as a reasonable man, doing such an act then and there, could be expected to table.' It does not mean a catastrophe which could not have been avoided by any precaution whatever, but such as could not have been avoided by a reasonable man at the moment at which it occurred, and it is common knowledge that a reasonable man is not credited for by the law with perfection of judgment. 'people must guard against reasonable probabilities, but they are not bound to guard against fantastis possibilities' (Lord Dunedin in Hardon v Harcourt Rivington (1932) 146 LT 391.***

Additionally, that **Jolowicz & Winfield** go on to say:

> ***"To speak of inevitable accident as a defence, therefore, is to say that there are cases in which the defendant will escape liability if he succeeds in proving that the accident occurred despite the exercise of reasonable care on his part, but it is also to say that there are cases in which the burden of proving this is placed upon him...." (Underlining for emphasis)***

Undoubtedly, the question that arises is what reasonable care did the appellant exercise towards the respondent's motor vehicle before the engine knock. The testimony of DW1 was:

"...It was while on road test, that the engine developed a knock. It was not me driving when the car developed a knock. It was the technical expert from South Africa. *The vehicle was inspected prior to test driving. I personally inspected the vehicle in the presence of technical experts. I checked the oil, heater and coolant level, power steering oil, gear box oil, the fan belt and the tyre pressure.*

***We have a job card, it is not before court today. It would have assisted the court. The findings were that the belt was ok, all fluid levels were ok. But the tyre pressure needed to be adjusted. All these are on the sheet attached to the job card, but not before court."* Underlining for emphasis)**

It is the respondent's contention that if the appellant had indeed conducted inspections prior to the respondent's motor vehicle developing an engine knock, and those inspections together with the results were recorded in writing, one would wonder why these documents were not presented before the court below. As observed by the learned trial Judge in her judgment, at page 18 of the record of appeal:

***"Further during cross-examination, DW1 testified to having inspected the plaintiff's motor vehicle which inspections were duly recorded on job cards. However, the defendant failed to produce these cards before the Court. <u>If indeed inspections were conducted on the plaintiff's motor vehicle by any person in the employ of the defendant company, including DW1, I see no reason as to why the job cards were not submitted to the court to confirm inspection on the Plaintiff's motor vehicles for the many test drives</u>."* (Underlining for emphasis)**

Counsel concludes that given the foregoing, the appellant did not exercise any reasonable care towards the respondent's motor vehicle whilst in the appellant's care and possession. But for the appellant's negligence, the respondent's motor vehicle would not have developed an engine knock.

Regarding the appellant's submissions that the accident was as a consequence of a latent defect, Mr. Ng'andu relied on the case of **Zambia Electricity Supply Corporation Limited v Redline Haulage Limited**[3] as authority on a defence of latent defect, where the Supreme Court stated that:

"Mr. Zulu's emphasis on the words "got out off" seems to us to be an attempt to say that a latent defect in the chain or mechanism connecting the tank to the truck caused the chain or mechanism to

break. Even if latent defect was the intended defence the onus was still on the defendant to show this by expert or other evidence."

And in **Richie v. Western Scottish Motor Traction Company Ltd**[4] a case also referred to in **Deutsch Darling and Banda**[2] where it was observed that:

"if latent defect is the nature of the defence, then it is inherent in the word 'latent' that the defender prove by his evidence that the defect...was truly latent'- that is, not discoverable by reasonable care."

It was submitted that in the absence of any evidence supporting the assertion of a latent defect, we should not accept the appellant's argument on this point.

We have considered the arguments by both counsel in grounds one, two and three. The issues arising in this regard are when does a court order take effect? Is it once it is pronounced or is it after filing of a formal order? And whether the maxim *res ipsa locquitor* is applicable to this case.

We will first consider the issue of whether the statement of claim was validly amended. Upon perusal of the record of appeal we note that leave to amend was granted and this is not in dispute. The contention by the appellant is that the respondent did not draw up nor file the formal order granting leave to amend. Thus, in the circumstances there was no amendment of the statement of claim at all. In **Lusaka City Council and Leah Diana Mitaba v George Silungwe and others**[5] the Supreme Court was confronted with a similar issue. The 1st appellant's counsel contended that the effective date of the order was 30th December, 2013 (being the date when the formal or drawn up order was filed.)

The Supreme Court observed that the 1st appellant's counsel had misapprehended and totally missed the point as to the manner in which court orders take effect. Citing **Order 42 Rule 3 of the White Book** that:

> ***"3. (1) subject to the provisions of Rule 3A, a Judgment or order of the court, takes effect from the day of its date.***
>
> ***(2) Such a Judgment or order shall be dated as of the day on which it is pronounced, given or made unless the***

court...orders it to be dated as of same earlier or later day, in which case it shall be dated as of that other day."

The Supreme Court held that Court orders take effect from the date when they are pronounced unless a contrary intention is expressed by the Court granting the same or appears from the order itself. The Court was also persuaded by Moodley, J in **Kaole Contracting and Engineering Company Limited v Mindeco Small Mines Limited**[6] that:

"Orders made in chambers must be dated on the day they were actually made, unless the court otherwise orders."

The Supreme Court found that the order granting leave to appeal was pronounced on 26th November, 2013. Therefore, although the formal drawn up order was filed on 30th December, 2013, the order had long taken effect following its pronouncement on 26th November, 2013.

It follows therefore, that in this case once the Judge granted leave to amend the statement of claim, the order took effect immediately. It is immaterial that the formal order was never drawn up nor filed.

Furthermore, according to **Order 28 Rule 2(1)** of the White Book:

> ***"An amendment duly made with or without leave, takes effect not from the date when the amendment is made but from the date of the original document which it amends, and this rule applies to every successive amendment of whatever nature and whatever state the amendment is made. Thus, when an amendment is made to the writ, the amendment dates back to the date of the original issue of the writ and the action continues, as though the amendment had been inserted from the beginning..."***

We therefore agree with Mr. Ng'andu on this score. The net effect is that the statement of claim was amended to remove the particulars of negligence and the plaintiff (respondent's) case was thus anchored on *res ipsa locquitor* only.

Though we agree with Mr. Mumba that the trial Judge erred when she made reference to the particulars of negligence at page J3 of the judgment, it is clear she only mentioned them in the introduction and properly found the appellant liable under the doctrine of *res ipsa locquitor.*

Res ipsa locquitor is latin, literally meaning ***"the thing speaks for itself"***. As submitted by Mr. Mumba, and held in a plethora of cases like **Elios Limited v Barloworld Logistics (Z) Limited**[7], three conditions must be met for the doctrine to apply: *(1) the defendant had exclusive control of the thing that caused damage (2) the accident could not have occurred without lack of care and (3) there is no other direct evidence of what caused the accident.*

In **Ng Chun Pui v Lee Chuen Tat**[8] the Privy Council held that:

> ***"the doctrine is no more than the use of a latin maxim to describe the state of the evidence from which it is proper to draw an inference of negligence."***

It is settled law that all that is necessary is that the defendant had exclusive control of the factors which apparently caused the accident. The character of the accident, determines whether the doctrine applies.

In **Glaser v Schroeder**[9] the rule applied. Briefly, the facts were that a car was left standing (parked) for some time, then two passengers got into the back seat and the car then rolled backwards. It was

held that this was evidence of a defect or want of repair and negligence in failing to discover and remedy the same. That the doctrine or rule applies where the plaintiff is powerless to determine the cause. See **Duly Motors v. Katongo and Livingstone Motor Assemblies**[10].

In *casu*, the trial Judge found that it was not in contention that the plaintiff's motor vehicle developed a knock engine while it was in the care and possession of the appellant. She observed that on the evidence adduced, "*at the relevant time, it is more likely than not, that the effective cause of the knock engine was some act or omission on the part of the defendant (appellant) or someone for whom the defendant is responsible..*" The Judge concluded that the doctrine applied on the facts before her.

She reasoned that the appellant cannot rely on the defence that the engine knock was as a result of an inevitable consequence of the plaintiff's motor vehicle's natural wear due to time in service, when there was no evidence from the expert who determined the cause of the engine knock to that effect.

We are alive to the arguments by both counsel in this regard. We are of the considered view that the trial Judge was on firm ground when she held that it was imperative for the appellant to have called the expert who determined the cause of the engine knock. As argued by Mr. Ng'andu, the testimony of DW1 as to who determined the cause of the engine knock was at variance with his own letter of 10th July, 2013 in which he does not state that he was involved in determining the cause of the engine knock. It is clear that the expert, who was not called to testify, ultimately determined the cause of the engine knock. DW1 only testified as to what he saw.

As orally argued by Mr. Mumba that the analysis was a group work done by DW1 and the other expert, all the more reason that the other expert should have been called to state his findings as well. DW1 stated what he saw which was confirmed by the other expert. It is clear that whatever DW1 did after the engine knock was confirmed by the expert. The trial judge rightly concluded that DW1 was not competent to speak of matters he did not have competence of. It would be hearsay for him to speak for the expert.

Be that as it may, we are of the considered view that given the testimony of DW1 that he checked the vehicle before the test driving, he should have detected the oil starvation and thus, prevented the engine knock. This goes to show that the appellant cannot escape the inference of guilt on its part. In addition if really the vehicle was regularly inspected, it was encumbered on the appellant to prove so. This was not done as found by the trial judge that no job cards were produced to that effect.

Thus, the appellant failed to adduce evidence to satisfactorily explain the cause of the accident and that it had taken reasonable care of the respondent's vehicle as held by the trial Court. The respondent proved that at the time of the accident the car was under the management and control of the appellant, we, therefore, agree with the trial Judge that the maxim *res ipsa locquitor* applied on the facts of this case.

It is settled law that in *res ipsa locquitor* cases, the evidential burden shifts not the legal burden. Such that where the defendant

provided a plausible explanation the Court must still decide, in light of the strength of the inference of negligence raised by the maxim, whether the defendant has sufficiently rebutted the inference.

On the facts of this case, the Judge properly found that the doctrine applied, as the appellant failed to sufficiently rebut the inference of negligence. We cannot fault her.

Regarding the defence of latent defect, we agree in *toto* with Mr. Ng'andu's submissions and authorities cited. The onus was on the appellant to prove latent defect by adducing evidence or calling an expert. Accordingly, grounds one, two and three must fail.

In relation to grounds four, five and six, the appellant contends that the Judge erred when she dismissed the counterclaim on the premise that the engine knock was due to negligence. Counsel argued that the counterclaim included repairs to: the air condition, driver's window, leaking second account line and gear box repair which the trial Judge overlooked and concentrated on repair to the

engine. Therefore, we should consider the other repair works done and allow grounds four, five and six.

To put grounds four, five and six into perspective, Mr. Ng'andu drew our attention to the appellant's counterclaim appearing on page 30 of the record of appeal, which stated that:

> ***"counter-claim***
>
> ***(i) Payment of the sum of K70,131.52n being the balance due and owing on total cost of repairs on the total sum of K82,505.82n***
>
> ***(ii) Damages for storage of plaintiff's motor vehicle from 31st May, 2013 when plaintiff presented with an invoice for the same.***
>
> ***(iii) Interest on (i) and (ii)***
>
> ***(iv) Costs of, and incidental to this action, and***
>
> ***(v) Any other relief the court may deem fit."***

It is submitted that the basis of the appellant's claim to be paid the balance for the cost of repair is the tax invoice dated 31st May 2013.

With respect to the other tax invoice exhibited by both parties in their respective bundle of documents in the record of appeal, there was neither any claim nor evidence, documentary or oral, from the

appellant, to the effect that the respondent was indebted to the appellant on the said tax invoices. As a matter of fact, DW1's testimony at page 194 line 3 of the record of appeal was that:

> **"Prior to engine knock, the plaintiff (respondent) paid his bills. Plaintiff refused to pay for this repair."**

Therefore, that there was never a claim for any outstanding tax invoice prior to the tax invoice dated 31st May, 2013.

Further, at paragraph 28 of the appellant's witness statement, which appears at page 143 line 22 of the record of appeal, it is stated that:

> ***"28. However, the defendant has denied being responsible for settling the motor vehicle repair costs and maintains that the balance of K70,131=52n out of the total of K82,505=82n prior to the releasing the motor vehicle."***(Underlining for emphasis)

Accordingly, that from the testimony of the appellant' own witness, it is clear that the counterclaim for payment in relation to the cost of repairs revolved around the tax invoice dated 31st May 2013

exhibited at pages 113 to 117 in the record of appeal, for the sum of K82,505.82.

It is therefore, incomprehensible for the appellant to argue at this stage that the respondent is liable for repairs to air-conditioning system, dysfunctional driver's window, leaking second account line and gear box, without any evidence of the respondent not paying for the service.

In paragraph 28 of the appellant's witness statement referred to above, the appellant's witness did allege that from the sum of K82,505.82 due, there was an outstanding balance of K70,131.52 payable by the respondent, which suggests that the respondent made a payment of about K12,374.3 towards settling the cost of repair for the engine knock. If indeed the respondent had agreed to pay for the cost of repair, the appellant would have provided some documentary evidence showing proof of payment from the respondent. The Court could not therefore have made a finding that the respondent by his conduct agreed to make payment for the repair of his motor vehicle's engine. As the respondent is not liable

for the cost of repair following the engine knock, it only follows that the respondent is equally not liable for storage cost.

Mr. Ng'andu argues that from the documentary and oral evidence before the court below, the appellant's claim for the cost of repair was restricted to the full settlement of the tax invoice dated 31st May, 2013 for the amount of K82,505.82 and nothing else. The learned trial Judge did not wrongly evaluate the evidence before her in so far as the appellant's counterclaim was concerned.

It is clear to us that the vehicle was in the possession of the appellant for repairs to the gear box and air conditioner etc. These repairs had to be paid for by the respondent. Regarding repairs to the engine as a result of the engine knock for which the appellant is liable, it must bear these costs.

The issue then is whether the respondent paid for the repair costs of the gear box, air conditioner etc. The testimony of DW1 at page 194 line 3 of the record of appeal was that: ***"prior to the accident, the plaintiff (respondent) paid for his bills. Plaintiff refused to***

pay for this repair." Clearly, the repair the respondent refused to pay for is the engine repair. We note also that the counter-claim was for the balance of K70,131.52 out of the total of K82,505.82. The appellant did not state what the repairs for this balance were for. Going by the testimony of DW1, that all bills were paid, except for repairs to the engine, we cannot fault the trial Judge for dismissing the counter-claim. As contended by the respondent the balance of K70,131.52 is therefore for the engine repair, which as determined is to be borne by the appellant, not the respondent.

The trial judge was equally on firm ground when she dismissed the claim for storage. We wish to state though, that since the engine was repaired, the Judge misdirected herself to have awarded ***"damages for any harm caused to the engine, to be assessed by the Deputy Registrar."***

Clearly, the appellant fixed the engine and there is no need to assess any damages. The appellant should therefore release the vehicle as ordered, if it has not done so. Grounds four, five and six equally, fail.

In the net result, the appeal is dismissed with costs to the respondent.

C.F.R. MCHENGA
DEPUTY JUDGE PRESIDENT

J.Z. MULONGOTI
COURT OF APPEAL JUDGE

F.M. LENGALENGA
COURT OF APPEAL JUDGE