



REPORTABLE

CASE NO: SA 13/2019

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

JOSEPH SHEEHAMA

Appellant

and

JOSEF STALLIN NEHUNGA

Respondent

Coram: MAINGA JA, FRANK AJA and UEITELE AJA

Heard: 12 March 2021

Delivered: 7 April 2021

Summary: This appeal emanates from an action for damages allegedly incurred to the appellant's vehicle when it was involved in a collision with the respondent's vehicle. Respondent counterclaimed against the appellant for damages he allegedly suffered to his vehicle. Both parties claimed that the other was negligent and caused the collision.

The court *a quo* rejected the appellant's version as to how the collision occurred and dismissed the claim in convention with costs. The court *a quo* accepted the respondent's counterclaim, but held that the respondent did not prove the amount of his damages. It granted absolution from the instance for the appellant in respect of

the counterclaim. The court *a quo* granted the respondent costs in respect of 75 per cent of the counterclaim. The appellant is appealing against the entire judgment of the court *a quo*.

To be determined by this court is whose negligence caused the collision and whether damages claimed (ie the difference in value between the running vehicle and the wreck) have been proved.

Held that, the appellant was negligent to overtake the respondent. In the circumstances surrounding the incident, the appellant should have forewarned the respondent of his intention to overtake (ie by flicking his lights and sounding his hooter) as his overtaking would have been unexpected considering that prior to this, appellant always followed the respondent and also that he was overtaking at a T-junction.

Held that, the respondent was equally negligent. He failed to keep a look out in his rear mirror immediately prior to making the right turn towards the side road to ensure that the appellant's vehicle was still behind him.

Held that, on the question of subrogation, the court *a quo* seriously misdirected itself when it found that it was dishonest for the appellant not to mention it in his pleadings and in his evidence. As a consequence, the whole matter will have to be considered afresh, in respect of the credibility findings and the question of damages.

Held that, the appellant failed to prove the salvage value of the vehicle immediately subsequent to the collision and hence the quantum of his damages. The evidence led by the appellant's expert witness and the document handed up (ie showing the wreck was sold at a public auction, the price raised and the payment to the insurer) in this instance was hearsay and inadmissible.

The appeal against the orders in respect of the claim in convention and in respect of the claim in reconvention succeed and the order of the court *a quo* is set aside and substituted.

APPEAL JUDGMENT

FRANK AJA (MAINGA JA and UEITELE AJA concurring):

Introduction

[1] The appellant (as plaintiff) instituted an action in the High Court against the respondent (as defendant) for damages allegedly incurred to his vehicle when it was involved in a collision with the vehicle of the respondent. Appellant alleged that the cause of the accident was the negligence of the respondent who was the driver of his (the defendant's) vehicle. The respondent denied that his negligence was the cause of the collision and averred that the appellant, who was the driver of his (appellant's) vehicle was the cause of the collision. Respondent counterclaimed against the appellant for the damages to his vehicle he allegedly suffered in this regard.

[2] The court *a quo* rejected the appellant's version as to how the collision occurred and hence rejected the claim in convention with costs. Based on the respondent's evidence, the court found that the respondent did establish that it was the appellant's negligence that caused the collision, but held that the respondent did not prove the amount of his damages and granted absolution from the instance in respect of the counterclaim. The court granted the respondent costs in respect of 75 per cent of the costs of the counterclaim.

[3] The appellant appeals the entire judgment of the court *a quo*.

The collision

[4] It is common cause that the collision occurred on 3 December 2016 at about 16h25 on Samuel Maharero Street, Okahandja. It was also common cause that the parties were driving their respective vehicles when the collision occurred.

[5] The location of the collision and how the collision occurred is also not in dispute. Appellant and respondent were driving in the same direction on Samuel Maharero Street (the main road). Appellant was behind the respondent. A smaller road (the side road) joins up with the main road where the collision occurred. Where the side road joins up with the main road, it forms a T-junction with the main road if one approaches the main road from the side road. From the perspective of the main road and the parties, if one of the parties wanted to turn into the side road from the main road, such party would have to make a right turn into the side road.

[6] The collision occurred when respondent's vehicle, in the process of turning right into the side road was hit by the appellant's vehicle who was in the process of overtaking the respondent's vehicle.

[7] Both vehicles were damaged in the collision. Appellant claimed the amount of N\$119 655 as damages caused to his vehicle, whereas the respondent counterclaimed an amount of N\$116 978,48 which he averred was the damage caused to his vehicle.

Evidence

[8] There is no evidence to suggest that either the main road or the side road had any road markings.

[9] The parties, who are cousins, met at a carwash in Okahandja. The appellant was on his way to attend a social function in Okahandja. He had the address of the venue of this function but did not know his way to the venue. The respondent who lived in Okahandja knew how to get to the venue and undertook to show the appellant the way. He would do this by driving there whilst the appellant would be following him. It needs to be stated that the parties did not agree to meet at the carwash. The appellant knew where the respondent stayed in Okahandja and intended to drive to the respondent's house to ask him for directions to the venue of the social gathering. They however met at the carwash before the appellant could proceed to the home of the respondent. There is some dispute over the exact nature of the function that appellant intended to attend but nothing turns on this aspect as it is common cause that he wished to attend the venue to which respondent would lead him.

[10] According to the appellant they drove to an Automatic Teller Machine (ATM) from the carwash so that he could withdraw money. As it was still too early to go to the venue of the function they then drove to the respondent's house. The respondent drove in front of him. As mentioned this was about 16h25. On the way the appellant decided to overtake the respondent. As there was no oncoming traffic he put on his indicator to signify his intention, moved onto the right side of the road and while in the

process of overtaking the respondent, the latter attempted to turn right without any indication and collided with the appellant's vehicle. The accident was reported to the police and a police report was compiled. Appellant informed the respondent that he was insured and according to his understanding of the policy it would also cover the damages to the respondent's vehicle. Sometime afterwards when the respondent informed him that the insurers refused to cover his damages. He, as a measure of goodwill, seeing that his damages were covered by his insurance offered to make a payment to the respondent of N\$30 000. As far as the appellant is concerned the respondent did not keep a proper look-out for if he did, he would have realised the appellant was about to overtake him, and in the process of overtaking him when he turned right.

[11] The respondent confirmed that he met the appellant at a carwash and that the appellant had requested him to show him where the venue for the function was. According to the respondent they went to his home from the carwash for him to check-up on his daughter. From there they proceeded to the ATM so that appellant could withdraw money. Respondent led the way to the ATM. Upon leaving the ATM the respondent was again leading the way and he indicated 'duly and timeously' that he intended to turn right. As he executed his right turn the appellant who was attempting to overtake him collided with him. Appellant informed the respondent on the scene of the collision that his insurance would cover the damages to respondent's vehicle, but when he approached the insurer they refused to do so. When he informed the appellant that the insurer refused to cover his damages the appellant 'in accordance with his admission' acknowledged his indebtedness to the respondent

and agreed to pay N\$45 000 to respondent. Appellant made two payments to the respondent totalling N\$30 000 and failed to make payment of the outstanding N\$15 000. As far as the police statement is concerned he testified in his evidence-in-chief that it was brought to him by the appellant to his house for signature which he did without reading the contents as he trusted the appellant. According to him the appellant verbally accepted liability for N\$116 978,48 which amount was contained in a quotation from a motor dealer in respect of spare parts to repair his vehicle. Respondent insists that the collision was the fault of appellant as the latter should have seen him indicating a right turn if he kept a proper look-out.

[12] The police report which was handed in as an exhibit contains a section relating to the 'Description of Accident' which on the face of it contains the versions of the two parties. They both signed off on the respective versions signifying the acceptance of such versions. According to the version of the appellant he was in the process of overtaking respondent when the latter 'out of a sudden indicated a right turn' and appellant then 'bump him by accident'. According to the version of the respondent 'he decided to turn right but indicate late'. In this process the appellant 'who was overtaking him, bump him by accident'. As already mentioned, both parties signified their satisfaction with their versions on the police report by signing it.

[13] The fact that the appellant's insurance indemnified him for his damages arising from the collision became a matter of contention during the trial. In cross-examination the appellant persisted that he paid N\$30 000 to the respondent because of family pressure and out of goodwill as he already had his car back whereas the respondent

was still a pedestrian. It was then put to him that what happened to this goodwill that he was talking about if he was now suing the respondent for all his damages. Appellant's response to this statement was 'no, it is not that I am suing him. The insurance they want to recover their money'. This led to long discussions about subrogation and whether it should have been disclosed on the pleadings and in the evidence. I mention this at this stage for reasons that will become apparent below.

Judge a quo

[14] The first criticism against the evidence of the appellant was that in his evidence-in-chief he stated that the respondent made the right turn without indicating this at all. He eventually conceded that the respondent did indicate that he was about to turn right but that this was late as he only saw when he was beside the respondent that the front indicator on the right fender of the respondent's car was on. This is in line with what appears in the police report as signed off by both parties. Respondent's version as to why he mentioned this in the police report if he did indicate timeously is likewise not free of criticism. His initial version was that the appellant, who went to report the accident on his own, brought the report back with him and that he signed this without reading it because he trusted the appellant. He then conceded that he was in fact phoned by the policeman involved to go to the police station where he read his version before signing it. According to him, he asked why they put this version in the report and he was assured that it was only for insurance purposes. The point is he read it and he signed it. He clearly realised the import of this admission in the police report as he initially said he did not read it but trusted the appellant but later admitted to having read it and then came up with the excuse that he did not mind

signing it because it was only for the insurance purposes. This shift in stance by him is equally open to criticism.

[15] The court *a quo* further dealt with the conduct of the appellant as follows:

'The question is where was the plaintiff going to when he wanted to overtake the defendant? He did not know the location of the venue of the engagement party. The reason why the defendant was driving in front of him was to lead and take him to the place.'¹

[16] As it is clear from the portion quoted above, the court *a quo* accepted the sequence of events as testified to by the respondent. Why this was done is not stated. Based on this premise the court *a quo* found that the respondent 'must have been surprised by the plaintiff's attempt to overtake as he did not know where the defendant (respondent) was taking him'. The court *a quo* found that this was not the conduct of a reasonable driver. On the premise accepted by the court *a quo* this conclusion was no doubt justified.

[17] My problem with the finding of the court *a quo* in this regard is that there is an eminently reasonable answer to the rhetoric question posed by the court. This is provided by the evidence of the appellant namely that, at the time, they were proceeding to the home of the respondent where they were to spend time before proceeding to the venue of the function. Appellant knew where the house of the respondent was and would go there after overtaking the respondent. For him to have

¹ *Sheehama v Stallin* (HC-MD-CIV-ACT-DEL-2017/01980) [2019] NAHCMD 73 (29 March 2019) para 17.

overtaken the respondent on the way to the venue when he did not know where it was makes no sense. The probabilities thus indicate that the version of the appellant is correct on this score. The appellant's version as to the sequence of the events does not feature in the judgment at all and the respondent's version is the only one mentioned to find that the appellant acted unreasonably to overtake when he did not even know where he was going. In my view, this was not the correct way to deal with the evidence. On the probabilities, the version of the appellant is the one to be accepted in this regard.²

[18] The second criticism levelled at the evidence of the appellant is that he testified that he agreed to make a N\$30 000 payment to the respondent as a once off contribution to respondent as a gesture of goodwill. Respondent's version was that appellant accepted liability for respondent's damages and hence agreed to make a N\$45 000 contribution to respondent which the latter accepted. On respondent's version the appellant reneged on this agreement as he only made two payments adding up to N\$30 000. From the bank statement of the respondent it is clear that two payments were made, namely one of N\$24 000 and one of N\$6000. The judge *a quo* criticises appellant for saying he agreed on a once off payment of N\$30 000 and not indicating that it would be made in instalments. This treats the evidence out of context. It is clear appellant admits a contribution of N\$30 000 *in toto* on one occasion. The fact that he made two payments cannot be taken to mean that he committed to any other amount that he had to pay in instalments. This must be seen in the context where respondent avers a settlement agreement for N\$45 000

² *Matheus v Namwater Corporation Ltd & another* 2012 (1) NR 382 (HC) at 391 where Hoff J used similar reasoning to determine the probabilities.

suggesting that there is still N\$15 000 outstanding. Once again the version of the respondent is not above criticism. He suggests he settled his damages claim by agreement with appellant for N\$45 000 but claims over N\$116 000 from appellant. As with the issue as to whether there was timeous indication of the right turn by the respondent the issue as to the payment cannot be isolated and dealt with only on the basis that appellant's version should be rejected without taking cognisance of respondent's version which runs counter to his counterclaim.

[19] The main criticism of the appellant's evidence is his failure to inform the court and the respondent of the 'vital information' that he was already compensated by his insurance company. The judge *a quo* referred to two Namibian cases³ dealing with subrogation and held that it was dishonest of the appellant not to mention this in his pleadings and in his evidence. This even led to the judge *a quo* holding that the evidence relating to the damages caused to appellant's vehicle was irrelevant. The following appears from the judgment *a quo* in this regard:

'The evidence of Mr Vries called by the plaintiff as an expert witness, in my view, is irrelevant as he testified about the loss ostensibly suffered by the plaintiff to his car not about compensation the insurance company had paid the plaintiff. The plaintiff during cross-examination conceded that he was merely testifying as a witness for the insurance company. He further denied suing the defendant his cousin. Therefore, it was not proved by the plaintiff in which capacity he was suing in this matter.'⁴

³ *Marco Fishing (Pty) Ltd v Government of the Republic of Namibia & others* 2008 (2) NR 742 (HC) at 749 and *Dresselhaus Transport CC v Government of the Republic of Namibia* 2005 NR 214 (SC).

⁴ *Sheehama* para 35.

[20] The approach of the judge *a quo* to the issue of subrogation amounted to a serious misdirection. No issue was raised on the pleadings relating to subrogation nor was this aspect mentioned at all in the pre-trial order.⁵ This was a non-issue in the proceedings and was totally irrelevant thereto hence the appellant's failure to mention that his insurance had been paid out. There was simply no reason to mention this or to plead this. Subrogation concerns solely the parties to the insurance contract, ie the insurer and the insured. It confers no rights or liabilities on third parties who are strangers to the insurance contract. A third party retains all the rights and obligations he has against the insured irrespective of whether subrogation took place or not.⁶ As stated by Angula AJ in *Marco Fishing (Pty) Ltd v Government of the Republic of Namibia & others* at 750D-E:⁷

'It is trite law that the arrangement between the insurer and the insured is irrelevant to the opposing party. It confers no rights and imposes no obligations on third parties. . . See: *Ackerman v Loubser* 1918 OPD 31.'

[21] There is no need for a third party to be interested in the subrogation. This is so because the insured remains vested with the rights against the third party and the latter, as pointed out above, retains all the rights and obligations he or she has against the insured. The right of recourse the insurer acquires against the third party (wrongdoer in the present matter) by way of subrogation is complemented by the right to take charge of the proceedings against third parties.⁸ To allow an insurer to institute action against the third party an insurer must give notice of his intention to

⁵ *Stuurman v Mutual & Federal Insurance Company of Namibia Ltd* 2009 (1) NR 331 (SC) para 21.

⁶ *Yorkshire Insurance Co Ltd v Nisbet Shipping Co. Ltd* 1961 [2] ER 487 (QB) at 490.

⁷ 2008 (2) NR 742 (HC).

⁸ 12 *Lawsa* 2 ed para 373.

the insured⁹ and the consent of the insured must be procured to use the latter's name in the litigation.¹⁰ The insured is also obliged to assist the insurer in the litigation.¹¹ It follows that the insurer simply, by virtue of the doctrine of subrogation, enforces the rights of the insured on his or her behalf and has no claim independent of the insured. As third parties' rights and obligations as against the insured are not affected at all by subrogation, the insurance contract and the rights and obligations created therein have nothing to do with third parties and are thus *res inter alios acta* and normally irrelevant to proceedings between the insured and third parties.

[22] It thus follows that there is no duty on an insurer where it sues in the name of the insured by virtue of the doctrine of subrogation to allege or prove the subrogation. It is still the claim of the insured who is vested with the rights and the fact that it is the insurer who is in charge of the proceedings is irrelevant to the cause of action. I am thus not impressed by the South African authority cited by the counsel for the respondent which, in any event, does not seem to have been met with unanimous approval in that country, to the effect that where subrogation is relied upon it must be pleaded.¹²

⁹ *Avex Air (Pty) Ltd v Borough of Vryheid* 1973 (1) SA 617 (A).

¹⁰ *Ackerman v Loubser* 1918 OPD 31 at 34.

¹¹ 12 *Lawsa* 2 ed para 393.

¹² *Nkosi v Mbatha* (AR20/10) [2020] ZAKZPHC 38 (6 July 2020) holding that a party must plead subrogation and *Smith v Banjo* 2011 (2) SA 518 (KZP) to the contrary.

[23] It is also trite law that the wrongdoer cannot raise a defence to the effect that a person has been paid by his insurer and hence suffered no damages.¹³ As pointed out in *Lawsa*:

‘On a social level, the doctrine (subrogation) serves to safeguard the principle that a person who has caused loss to another by his unlawful conduct must bear the ultimate responsibility for that loss. This follows from the rule that, when sued by the insured, a wrongdoer cannot invoke the defence that the loss is covered by insurance.’¹⁴

[24] It follows from the way subrogation operates that the finding that the appellant’s damages was irrelevant to his claim as it did not take the payment he received from his insurer into account was likewise a serious misdirection. His insurance payment was also totally irrelevant to his damages claim. In fact, it is one of the objects of subrogation to avoid double payments, ie one from the insurer and one from the wrongdoer. The insured gets one payment which will be either from the wrongdoer or his insurer. The wrongdoer pays once, either to the insured or in the name of the insured through subrogation to the insurer. The insurer pays the insured based on a contract between it and the insured which contract had nothing to do with the wrongdoer. Once the insurer pays the insured it can in the name of the insured (subrogation) claim from the wrongdoer for the damages caused to the insured.

¹³ *Teper v McGees Motors (Pty) Ltd* 1956 (1) SA 738 (C) at 744 and *Millward v Glaser* 1949 (4) SA 931 (A) at 940.

¹⁴ 12 *Lawsa* 2 ed para 376.

[25] It follows from the above that the whole matter will have to be considered afresh by this court in respect of both the credibility findings and on the question of damages as the judge *a quo* seriously misdirected himself.

Relevant rules of the road

[26] As it is evident from what is stated above, the appellant was following the respondent and it was when he was busy overtaking the respondent and the latter was busy effecting a right turn that the collision occurred.

[27] Before overtaking a motor vehicle, a driver is under a duty to satisfy himself that it is safe to do so.¹⁵ As, on the evidence, there is no mention of any other vehicles either behind the appellant, coming from the opposite direction or approaching the main road from the side road – it is only necessary to consider the duty in relation to the vehicle of the respondent who was travelling ahead of him. Cooper¹⁶ succinctly summarises the duty of an overtaking vehicle as follows:

‘There is no general rule that an overtaking driver is under a duty to warn the driver ahead that he is about to be overtaken. On a main road an overtaking driver is generally entitled to assume that slower traffic being overtaken will continue on its course on the left of the road. A duty to warn (either by flicking headlights or by hooting) will depend inter alia on the locality, the movements of the vehicle ahead, its speed, or any other indication that its driver may be intending to move to the right. An overtaking driver may be under a duty to give a proper warning when he intends passing closely to the vehicle being overtaken or where he should anticipate that it may move laterally.

¹⁵ *Minister van Vervoer v Bekker* 1975 (3) SA 128 (O) at 130H.

¹⁶ W E Cooper *Delictual Liability in Motor Law* (1996) at 165 and the case law there cited.

An overtaking driver must keep a vehicle about to be overtaken under observation and he should not overtake when the vehicle ahead is turning, or the driver has indicated his intention to turn, to the right.'

[28] Where a driver intends to make a right turn, the law places on such a driver that by necessity turns out of his or her path a more stringent duty than that placed on a motorist who wishes to overtake:

'In a long line of cases both in the Provincial Divisions as well as in this Division, it is clearly stated that to turn across the line of oncoming or following traffic is an inherently dangerous manoeuvre and that there is a stringent duty upon a driver who intends executing such a manoeuvre to do so by properly satisfying himself that it is safe and choosing the opportune moment to do so.'¹⁷

[29] The duty of the driver cannot be determined without reference to the particular circumstances applicable to each case as illustrated by Miller J in *S v Olivier* as follows:

'... there is a vital difference, for example, between the case where a motorist is driving, of necessity very slowly, in a traffic-laden street and the case where he is driving at speed on an open highway. In the former case, where vehicles are proceeding almost as in a procession, only a few feet or yards separating each vehicle from the one behind it, a driver who wishes to turn to his right down a street intersecting the one along which he is travelling may well be entitled, in regard to the vehicles coming on slowly behind him, to do no more than give a clear and timeous signal of his intention to do so. If he assumes that his signal will be seen by the driver of the vehicle behind him who will accommodate his progress to the turn of the vehicle ahead and not run into it as it turns, such assumption may well, in the vast majority of cases, be held to be a legitimate one. But not so, I think, in the case of a motorist who

¹⁷ *A A Mutual Insurance Association Ltd v Nomeka* 1976 (3) SA 45 (A) at 52E-G and *Boots Co (Pty) Ltd v Somerset West Municipality* 1990 (3) SA 216 (C) at 224-225.

is travelling along a national road on which it is a common experience to be overtaken at high speed by other vehicles. Such a motorist would, I think, if he were reasonably diligent, before or at the time of giving a signal of his intention to turn right, make a special point of ascertaining, with the aid of his rear-view mirror, or otherwise, whether there were any vehicles coming on behind him. And, *a fortiori*, he would also keep a keen look-out ahead for vehicles approaching from the opposite direction and into whose line of travel the proposed right-turn would necessarily take him. If the road ahead were entirely free of danger but a vehicle were to be seen by him approaching from behind at not great distance but at speed, he would in my opinion be taking an unjustifiable risk if, without paying any further attention to the movements of that vehicle, he were simply to execute his right-hand turn on the blithe assumption that the driver thereof had seen and understood his signal and would heed it.¹⁸

[30] The test to apply for the motorists executing right turns and the one which I intend to follow is the one articulated in the *Olivier* case namely:

'This seems to me to be the ultimate test to apply in deciding whether a right-hand turn of the kind now under consideration was legitimately or culpably undertaken; the inquiry is: was it opportune and safe to attempt the turn at that particular moment and in those particular circumstances? Whether it was opportune and safe, or not, will depend upon whether a *diligens paterfamilias* in the position of the driver at that time and in the circumstances then prevailing would have regarded it as safe. (Cf. *Kruger v. Coetzee*, 1966 (2) S.A. 428 (A.D.) at p. 430). In that inquiry, assumptions which may have been made by the driver and the extent to which the driver kept under observation other vehicles, are together with other incidents relevant to the occasion, factors to be taken very much into account, but no one of these factors will necessarily or even probably provide the answer to the ultimate question.'¹⁹

¹⁸ *S v Olivier* 1969 (4) SA 78 (N) at 82C-G.

¹⁹ *S v Olivier*, at 84A-B. See also *Johannes v South West Transport (Pty) Ltd* 1992 NR 358 (HC) at 361G-J.

Whose negligence caused the collision?

[31] There is a paucity of information to consider regarding 'fault' of the respective parties. The collision occurred at around 16h25 on 3 December 2016. There is no evidence as to the weather condition and the condition of the road. The reasonable inference from this is that it was a clear day because if it was not one would have expected evidence to the effect that it was wet and/or cloudy. There is no evidence as to the surface of the road. There is evidence that there were no road markings on the road surface. One is left in the dark as to whether this was a gravel road or a tarred road. There is no evidence of the speed at which the vehicles were travelling, how far apart they were travelling or whether the front vehicle kicked up dust which would affect the visibility of the rear vehicle and also of course, the visibility of the front vehicle to ascertain what was happening behind it. As there is no evidence of other vehicles being on the road one can infer that it was a very quiet stretch of road with only the two vehicles of the parties on it driving in the same direction when the collision occurred.

[32] It follows from the discussion of the evidence above, that on the probabilities, the parties were en route to the respondent's home from the ATM where the appellant withdrew money. It is also clear that the appellant followed the respondent when they drove to the ATM from the carwash and was following respondent when they were en route to the respondent's house where they would while away time until the respondent would show the appellant the way to the venue of the social function he intended to attend later.

[33] The appellant who did not know Okahandja was following the respondent and the latter was driving to his house. Whereas appellant knew where respondent's house was he could not assume there was only one way to get there and that was along the route he knew. As he followed the respondent from the carwash to the ATM, and when leaving the ATM and seeing the lack of traffic he could also not assume that respondent would drive on the basis that faster cars from behind would regularly albeit intermittedly overtake him. This applied even more to being overtaken at the T-junction where the side road entered into the main road and where overtaking is usually forbidden. In fact a reasonable driver, not knowing which route the car in front of him was taking, should have foreseen the possibility that such car could make a turn-off to the right and into the side road. (Once again the evidence does not indicate that the respondent moved towards the centre of the road and slowed down immediately prior to making the right turn which would be the normal routine).²⁰ On the above facts, I am of the view that the appellant was negligent to overtake the respondent by simply indicating that by way of his indicator light. He should have forewarned the respondent of his intention to do so by flicking his light and sounding his hooter as his overtaking would have been unexpected seeing that prior to this he always followed the respondent and as he was to do this in the T-junction.

[34] The respondent was likewise negligent. It is clear that he did not look in his rear mirror immediately prior to turning towards the side road to ensure that the appellant's vehicle was still behind him. He did not see the appellant's vehicle that

²⁰ *Labuschagne v Cloete* 1987 (3) SA 638 (T) at 643F-G.

must have crept nearer to him before the appellant commenced with his overtaking manoeuvre, nor did he see this manoeuvre. This meant that he did not keep a proper look out to see whether it was safe to execute the right turn when he did so.²¹ He does not testify that he moved to the centre of the road or slowed down before making his turn. Thus, unless the indicator light was switched on timeously and visible to the appellant, the latter would not even have been able to gather an intention on the part of the respondent to turn to the right onto the side road.

[35] Although the parties differ on their versions as to how the payment of N\$30 000 to the respondent came about, it is in my view also indicative of the fact that both parties accept that they were at fault with regard to the collision. For the appellant to suggest that his contribution of N\$30 000 was a mere gesture of goodwill seems a bit rich if he was really of the opinion that the negligence of the respondent was the sole cause of the collision. Conversely, why would the respondent accept N\$45 000 on his version as settlement of his claim against the appellant where his damages exceeded N\$116 000 when he was of the view that the negligence of the appellant was the sole cause of the collision? It seems to me that the parties both accepted some blame for the collision prior to the litigation.

[36] In conclusion and in respect of the damages caused to the motor vehicles I am of the view that the parties were equally at fault. In the claim in convention the apportionment of the damages or joint negligence is not mentioned at all. The counterclaim does however raise this possibility. As the appellant's fault was put in

²¹ *Brown v Santam Insurance Co Ltd & another* 1979 (4) SA 370 (W) at 378F.

issue, the court can *mero motu* determine both parties' fault in relation to the damages caused as I have done above.²²

Damages

[37] In respect of the counterclaim the court *a quo* held that the respondent failed to prove his damages and ordered absolution from the instance as far as the amount of the damages are concerned. There is no quarrel with the fact that the respondent failed to prove the amount of his damages. The extent of the quantum of his damages need thus not be considered further.

[38] As mentioned above the expert called on behalf of the appellant to establish his damages was wrongly held to be irrelevant to the proceedings as he did not consider the payment made by the insurer to the appellant. As pointed out above this was a misdirection. Objections were raised against the evidence of the expert witness on the basis that it amounted to hearsay as his opinion was not premised on an admissible factual basis.

[39] Mr Vries testified that he was an estimator, assessor and loss adjustor employed as such by Hollard Insurance and that he has been doing this work for five years during which time he gained experience in relation to the costs of repairs to vehicles, tow-in costs, market values of vehicles both pre and post collisions, labour costs to repair vehicles and scrap values of vehicles. He prepared an assessor's report in the matter in which he sets out how he went about to establish the damages.

²² See *A A Mutual Insurance Association Ltd; Ndaba v Purchase* 1991 (3) SA 640 (N) at 641H and *Bata Shoe Co Ltd (South Africa) v Moss* 1977 (4) SA 16 (W).

This report was handed in as an exhibit in the court *a quo* but does not form part of the record in this appeal.

[40] He was led very cryptically in his evidence-in-chief. He simply said he established the pre-collision value from a certificate and handed in a certificate from a business known as TransUnion, a scrap value was supported by a payment from a business known as Aucor, proof of which he handed in, the tow-in value from the invoice of a business in this field and lastly an invoice relating to the rental of a substitute vehicle from a car rental company. On top of this he also added his fee for his assessment. It is doubtful whether he established appellant's damages on this evidence. He however in cross-examination and re-examination explained the items.

[41] As far as the TransUnion business is concerned he explained that it is used by all motor dealers to establish the marked value of vehicles. They keep a database of vehicles sold in Southern Africa which they update continuously. Thus, if anyone wants to sell a vehicle the details of such vehicle eg make, year, model and condition would be entered into the system which would indicate a market value for such vehicle. As mentioned this system is used by all motor dealers. This method of establishing the value of the vehicle was not disputed at all. The objection was that it was all hearsay and Mr Vries did not do the valuation himself but it was done by TransUnion. Whereas it is correct that where an expert relies on the valuation given by others, this can be suspect, especially where the factual correctness of such information is not established and this plays a role in the forming of the opinion of an expert. This is not what happened in the present matter. Mr Vries testified that the

values are calculated across a large number of vehicles and that this is in fact what the market uses. He knows because he has been operating in the market for more than five years. He was thus entitled to rely on the report. As mentioned, the fact that the industry determines the market value on this basis was not challenged at all.

[42] The pre-collision value of the appellant's vehicle was thus established to have been N\$151 100. From this value, must be deducted the value of the damaged vehicle (wreck) which appellant still possessed. As mentioned, Mr Vries handed in a document from Aucor indicating payment to the insurer of N\$38 000 in this regard. In cross-examination he conceded that he did not attend the auction where the wreck was sold and cannot confirm out of his own knowledge that the N\$38 000 was actually paid to the insurer. There were two ways for the appellant to approach this issue. First, it could have called a witness from Aucor to testify that it sold the wreck at a public auction hence the document and payment to the insurer. Without this, what is mentioned in the document is hearsay and inadmissible as evidence. Second, Mr Vries who in evidence-in-chief testified that he, through his experience, was qualified to express an opinion on 'the scrap value of vehicles' could have done this in respect of the appellant's vehicle with reference to the condition of the wreck and what was economically extractable from it in terms of spare parts. For reasons unknown this latter route was not followed. What was done was to suggest Aucor is in the business of public auctions and hence that the wreck must have been sold at a public auction for a price of N\$38 000. This, as mentioned above, was hearsay and did not constitute proof of either a public auction or of a price raised at that auction. The unfortunate result of this omission is that the quantum of the direct loss caused to

appellant as a result of his vehicle being damaged beyond repair was not established. To repeat, this was the difference in the value of the vehicle immediately prior to the collision and the value thereafter, ie the difference in value between the running vehicle and the wreck.

[43] As far as the tow-in costs are concerned Mr Vries was adamant that these costs were reasonable taking the distance that the vehicle had to be towed-in. Once again he was criticised because he was not present when the car was towed-in. He caustically answered that he inspected the vehicle at the Windhoek premises of the business and the car could not have gotten there unless it was brought from the place where the collision occurred in Okahandja. He explained that the rate was the usual rate for such services and hence in his view reasonable. The rate was not challenged at all. I am thus satisfied that these damages were established. It thus follows that damages to the extent of N\$5232,50 in respect of tow-in costs is the only damages proved by the appellant.

[44] The evidence relating to the rental of the substituted vehicle and the costs thereof needs no consideration as the costs thereof are not claimed as part of the damages. This was clearly special damages for which a case was never made out on the pleadings. The costs of the assessor should in my view also not be allowed. He was the expert witness and if these expenses are to be claimed in addition to the normal witness fees the court *a quo* should have been asked to allow a qualifying fee for this witness.²³ As this was not done nothing further needs to be said in this regard.

²³ *Donaldson v Seaward* 1958 (2) SA 198 (O) at 200.

[45] It follows from the foregoing that the appellant is entitled to 50 per cent of his proven damages, namely an amount of N\$2616,25 (5232,50 / 2).

Counterclaim

[46] In respect of the counterclaim the court *a quo* ordered that it succeeded on the merits, but granted absolution from the instance in respect of the quantum of the damages claimed. The court *a quo* also made a costs order in favour of the respondent allowing 75 per cent of the costs of the respondent. Appellant appeals against both these orders.

[47] The court *a quo* provided no reasons for the costs order when the claim, which was a damages claim, did not succeed as the quantum of the damages was not proved. The normal order would have been to order an absolution from the instance inclusive of an adverse costs order only. The court *a quo* obviously took the view that as the determination of whose negligence caused the collision was a necessary prerequisite to determine who was responsible for the damages and as this took up the bulk of the time at the trial it could, once it determined that the appellant was the sole culprit, make the costs order in favour of the respondent.

[48] There is no need to dwell further on this subject as it was not the sole negligence of the appellant that caused the collision as pointed out above – and, the respondent was unsuccessful in his claim for damages despite being able to show contributory negligence on the part of the appellant for the unquantified damages he

suffered. There is no reason in my view why the normal order should not follow in respect of the counterclaim.

Costs in convention

[49] Where in an action there is no counterclaim the normal rule is that the court will not deprive a party of any part of his costs merely because the damages were reduced on account of his or her contributory negligence.²⁴ This is so because the claimant is compelled to go to court to recover any damages. This same principle should apply, in my view, to a case where an unsuccessful counterclaim is raised as its practical effect is the same as if no counterclaim was raised.

[50] I am however of the view that as the damages awarded is so out of proportion to the damages claimed and in an amount that would normally fall within the jurisdiction of a lower court, the costs should be granted on the scale of the Magistrates Court.

Conclusion

[51] In the result, both the appeal against the claim in convention and the claim in reconvention succeeds and the following order is made:

- (a) The appeals against the orders in respect of the claim in convention and in respect of the claim in reconvention succeed and the order of the court *a quo* is set aside and substituted with the following order:

²⁴ Eg *Norwich Union Fire Insurance Society Ltd v Tutt* 1960 (4) SA 851 (A) at 854 and *Roxa v Mtshayi* 1975 (3) SA 761 (A).

- (i) The claim in convention succeeds in the amount of N\$2616,25 with costs, such costs to be determined on a Magistrates' Court's scale.
- (ii) An order of absolution from the instance with costs is granted in respect of the claim in reconvention.'
- (b) The respondent is to pay the costs of the appeal inclusive of the costs of one instructing and one instructed legal practitioner.

FRANK AJA

MAINGA JA

UEITELE AJA

APPEARANCES

APPELLANT:

C J van Zyl

Instructed by Francois Erasmus &
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RESPONDENT:

N Mhata

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