

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
REASONS

Case No: HC-MD-CIV-ACT-DEL-2017/01042

In the matter between:

MOSES V SHUUDENI

PLAINTIFF

and

MINISTER OF ENVIRONMENT AND TOURISM

1ST DEFENDANT

KAREL NDUMBA

2ND DEFENDANT

Neutral Citation: *Shuudeni vs Minister of Environment and Tourism* (HC-MD-CIV-ACT-DEL-2017/01042) [2018] NAHCMD 107 (20 April 2018)

CORAM: PRINSLOO J

Heard: 07 March 2018 and 16 April 2018

Delivered: 20 April 2018

Reasons: 23 April 2018

Flynote: Civil Procedure – Motor vehicle collision – Elements – Factors to be proven to successfully raise a claim for damages – Court to decide whether on all evidence and probabilities and inferences, plaintiff discharged onus of proof on the pleadings on a preponderance of probability

Summary: The plaintiff instituted an action for damages against the first and second defendant for payment in the amount of N\$ 30 096.86, plus interest on the aforesaid amount at the rate of 20% per annum, calculated from the date of judgment to the date of final payment.

The plaintiff drove his motor vehicle, a 2015 Ford Ranger with registration number N 104472W, at the time of the collision, whereas the second defendant, who is employed by the Ministry of Environment and Tourism, was acting within the course and scope of his employment with first defendant, driving a 2013 Toyota Pickup, registration number GRN 3829. The issue of quantum was agreed upon between the parties and the trial concerned primarily on the question of liability.

The plaintiff submitted that its version is more probable than that of the second defendant and should be accepted. The plaintiff submitted that the negligence should be solely attributed to the second defendant.

The defendants submitted that the plaintiff's and the second defendant's versions, gave rise to mutually destructive versions of the incident. The defendants submit that the version of the plaintiff and that of the second defendant's differ so radically from each other that the conclusion that one of them must be a complete fabrication is almost inescapable. In this light, the defendants submit that the plaintiff's version is fatally improbable, illogic and untrue for a number of reasons. They further submit that the second defendant's version is more probable and a more acceptable account of how the collision could have occurred as compared to that of the plaintiff.

Held – The proper approach is for the court to apply its mind not only to the merits and demerits of the two mutually destructive versions but also their probabilities and it is only after so applying its mind that the court would be justified in reaching the conclusion as to which opinion to accept and which to reject.

Held – Once the plaintiff proves an occurrence giving rise to an inference of negligence on the part of the defendant, the latter must produce evidence to the contrary, he must tell the remainder of the story, or take a risk that judgment be given against him.

Held further – When a driver wishing to reverse, he must keep a proper lookout, give an indication of his intention to reverse, execute his manoeuvre at the opportune moment having regard to other traffic, when it is absolutely safe to do so.

ORDER

- a) Payment in the amount of NS 30 096.86;
 - b) Interest on the aforesaid amount at the rate of 20% per annum *a tempore morae* from date of judgment to date of final payment;
 - c) Cost of suit.
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REASONS

PRINSLOO J:

[1] In this action plaintiff claims damages. The plaintiff drove his motor vehicle, a 2015 Ford Ranger with registration number N 104472W, at the time of the collision, whereas the second defendant, who is employed by the Ministry of Environment and Tourism, was acting within the course and scope of his employment with first defendant, drove a 2013 Toyota Pickup, registration number

GRN 3829. The quantum of damages for the plaintiff's motor vehicle was agreed between the parties this being an amount of N\$30 096.86.

Background facts

[2] The plaintiff instituted an action for damages against the first and second defendant jointly and severally, the one paying the other to be absolved for payment in the amount of N\$ 30 096.86, plus interest on the aforesaid amount at the rate of 20% per annum, calculated from the date of judgment to the date of final payment.

[3] The action is premised on a collision that occurred on 16 May 2016 at approximately 10h25 in Gutenberg Street, Ausspannplatz, Windhoek.

[4] The plaintiff's particulars of claim allege that second defendant was the sole cause of the collision in that he was negligent in one or more of the following respects:

- a) failed to keep a proper lookout;
- b) attempted to make a u-turn and whilst doing so collided with the front side of the plaintiff's vehicle;
- c) entered the plaintiff's right of way at a time when it was dangerous and inopportune to do so;
- d) failed to avoid a collision when by the exercise of reasonable care he could have and should have been able to do so.

[5] In the plea of the defendants the allegations of the plaintiff were denied and in amplification of said denial the defendants pleaded that the collision was the

caused by the negligence of the plaintiff, who was negligent in one or more of the following respects:

- a) he failed to keep a proper look-out;
- b) he failed to take cognisance of the fact that the defendant was indicating to turn and drove into the defendant's path without ascertaining first that it was safe to do so.
- c) he failed to keep his vehicle under proper control;
- d) he failed to avoid a collision when, by exercise of reasonable care, he could and should have done so.

[6] In the alternative the defendants plead that the plaintiff contributory negligence contributed to the collision and that as a result the damages must be apportioned in terms of Apportionment of Damages Act, 34 of 1956.

[7] The defendant pleaded that the plaintiff contributed in the following manner:

- a) He failed to keep a proper look out for defendant's vehicle turning which had its indication on.
- b) He failed to keep his motor vehicle under proper control when he failed to give the defendant's vehicle right of way.
- c) He failed to avoid a collision, when by the exercise of reasonable care, he should have done so.
- d) He failed to give defendant's vehicle the right of way, when it clearly and visibly had its indicators on.

- e) He drove his motor vehicle at an excessive speed under the prevailing circumstances.
- f) He failed to satisfy himself as to the presence of the defendant's vehicle which was already turning.
- g) He failed to break timeously or at all.
- h) He drove into defendant's path without satisfying himself that it was safe and or opportune to do so.
- i) He failed to exercise the degree of care normally expected from a reasonable driver under the same circumstance.

[8] It is apposite to mention at this juncture that the issue of quantum was agreed upon between the parties and the trial concerns liability only. This court will therefore for obvious reasons not discuss the pleadings relating to the quantum.

Evidence adduced

Plaintiff

[9] The plaintiff testified on his own behalf and his evidence in a nutshell was that he drove from the westerly to the easterly direction in Gutenberg Strasse in the vicinity of Ausspannplatz, Windhoek. He was driving a Ford Ranger pick-up, traveling at the speed of approximately 40 kilometres per hour.

[10] Whilst traveling towards Tiger Wheel & Tyre, the plaintiff testified that he noticed a Toyota pick-up standing on the opposite side of the street. At this stage, he was more than 30 metres from the Toyota pick-up. The plaintiff further testifies

that as he was approximately 10 metres away from the Toyota pick-up, he noticed the Toyota pick-up pulling away from its stand-still position and attempting to make a U-turn to its right across Gutenberg Street and across the plaintiff's right of way.

[11] The plaintiff further testified that he braked and attempted to swerve slightly to his left, but could not swerve much as there were vehicles parked in the parking bays to his left. The second defendant's vehicle was more or less at a 90 degree to plaintiff's vehicle. The plaintiff further testified that there were no brake marks from either vehicle because both moved at a slow speed. The plaintiff further testified that despite his efforts to avoid the collision, the vehicles collided in the lane in which the plaintiff was travelling and at that moment, the front portion of the second defendant's vehicle was already in the lane in which the plaintiff was travelling. The plaintiff further submits that the point of impact was admitted by the defendant and was uncontested.

[12] The plaintiff stated that whilst the parties were waiting for the Namibian Police to arrive, the second defendant admitted to the plaintiff that he did not see the plaintiff's vehicle. The plaintiff further testified that the second defendant offered to pay the plaintiff's excess in respect of his insurance claim and thereto exchanged phone numbers.

[13] The plaintiff vehemently denies the second defendant's version providing that the second defendant was attempting to park at the time of the collision.

[14] With the above, the plaintiff submits that his version of events are more probable compared to that of the second defendant and as a result, should be accepted by this court. The plaintiff submits that with the physical evidence provided, i.e. the evidence depicted on the photographs handed in during trial, his version of events is the only probable possibility compared to that of the second defendant.

Defendant

[15] The second defendant stated that he was driving to Nedbank Head Quarters and was driving in Gutenberg Street from the eastern direction towards the Western direction. He saw a parking space on the opposite side of the road. He stopped across the road, checked and executed a turn into the empty parking space.

[16] As he entered the parking space he realised that the parking space was not adequate to accommodate his vehicle and he needed to adjust his vehicle. He checked the rear and the front directions of the vehicle including blind spots and at the time there was no vehicles approaching from either directions.

[17] He then reversed the vehicle back into the left lane in order to park properly. He reversed the vehicle until only his front wheel and left front part of the vehicle was in the lane of the plaintiff, the remainder of the vehicle was in the lane of the defendant's original travel.

[18] Before starting to drive forward to place his vehicle in a reverse parking position he indicated to his left and checked both mirrors as well as blind spots over his shoulder and did not see the vehicle of the plaintiff approaching from behind. Whilst proceeding forward he heard a slight bang and slid forward due to the impact.

[19] He noted a Ford Ranger that struck the first defendant's vehicle on the left front fender. The second defendant stated that there was only a little space between his vehicle and the vehicles parked to his left. He further stated that he was shocked that the Ford pickup could try and squeeze in between his vehicle and the other vehicle.

Closing arguments

On behalf of the Plaintiff

[20] Mr. Erasmus submitted on behalf of the plaintiff that the version of the plaintiff is more probable than that of the second defendant and should be accepted. He further submitted that when the plaintiff came around the bend in the road the second defendant's vehicle was still stationary on the opposite side of the road. When the plaintiff was approximately 10 meters away the second defendant made a u-turn in front of him and the damage was consistent with second defendant making a u-turn immediately prior to the collision. He argued that the allegation that the plaintiff tried to squeeze between the vehicle of the second defendant and the stationary vehicles parked in the parking bays was devoid of truth. He submitted that the negligence should be solely attributed to the second defendant.

On behalf of the Defendant

[21] Mr. Khadila submitted plaintiff's and the defendant's versions, give rise to mutually destructive versions of the incident. He submits that the version of the plaintiff and that of the second defendant's differ so radically from each other that the conclusion that one of them must be a complete fabrication is almost inescapable. In this light, Mr. Khadila submits that the plaintiff's version is fatally improbable, illogic and untrue for a number of reasons. He further submits that the second defendant's version is more probable and a more acceptable account of how the collision could have occurred as compared to that of the plaintiff. He also submitted that second defendant's vehicle front left wheel was still in the northern lane when the plaintiff attempted to overtake him on the left side.

Applicable Law

[22] The plaintiff bears the onus to prove that the defendant's driver was negligent on a balance of probabilities.

[23] Once the plaintiff proves an occurrence giving rise to an inference of negligence on the part of the defendant, the latter must produce evidence to the contrary, he must tell the remainder of the story, or take a risk that judgment be given against him.

[24] The Court must decide whether on all of the evidence and the probabilities and the inferences, the plaintiff has discharged the onus of proof on the pleadings on a preponderance of probability. The Court does not adopt a piecemeal approach of first drawing the inference of negligence from the occurrence itself and regarding this as a *prima facie* case and then deciding whether it has been rebutted by the defendant's explanation.

Evaluation of evidence

[25] The plaintiff was a credible witness who remained steadfast in his version of events and did not contradict himself.

[26] Although the second defendant remained steadfast in his version, he did not strike me as being entirely candid and honest, and I will demonstrate hereunder why I make this statement. During cross-examination the second defendant was evasive and counsel for the plaintiff had to spend considerable time on certain issues to get a direct answer from the second defendant.

Analyses

[27] What is before me is based on the evidence of two single witnesses. I have considered the evidence and submissions and in weighing the evidence on both side it is evident that the versions of the plaintiff and the defendants are mutually destructive.

[28] The proper approach is for the court to apply its mind not only to the merits and demerits of the two mutually destructive versions but also their probabilities

and it is only after so applying its mind that the court would be justified in reaching the conclusion as to which opinion to accept and which to reject.¹

[29] When a driver wishing to reverse, he must keep a proper lookout, give an indication of his intention to reverse, execute his manoeuvre at the opportune moment having regard to other traffic, when it is absolutely safe to do so.²

[30] The defendant maintains that he did that and more by checking his blind spots before he proceeded to reverse.

[31] Plaintiff vehemently denies that the defendant reversed shortly prior to the accident and maintained throughout the second defendant executed a sudden u-turn and he was unable to take evasive action due to the vehicles parked in the parking bays to the left.

[32] It is therefore important to consider what the second defendant explained as to his manoeuvres on the said day.

[33] Second defendant alleges he enter into parking bay only to find the space to be inadequate due to length of his vehicle as he entered the parking nose first, and therefore the vehicle was at an angle. He then reversed the vehicle out of parking bay.

[34] What is interesting is that the defendant did not reverse out of parking bay corrected his vehicles direction and then reversed parallel to the vehicles already parked. If he did that it would have allowed the second defendant then to proceed forward, line his vehicle up with the vehicle parked in front where after he could proceed to execute the intended parallel parking.

¹ *Harold Schmidt t/a Prestige Home Innovations v Heita* 2006 (2) NR 555 at 559D.

² HB Klopper in *The Law of Collisions in South Africa* Seventh Edition on page 64.

[35] The second defendant chose to reverse out parking bay across the lane (in which Plaintiff was traveling) over the white middle line into the lane of the traffic driving from the opposite direction. He reversed so far back into the lane of the oncoming traffic, that only a small portion of the left front part of the vehicle was across the white middle line, protruding into the plaintiff lane of travel.

[36] It would appear that the vehicle of the second defendant was at such an awkward angle that he was actually able to check for oncoming traffic (from Plaintiff direction) through the passenger window of the vehicle. From this position the second defendant then proceeded to move forward in order to line up the vehicle to execute parallel parking.

[37] I find the explanation of the second defendant of how he executed this manoeuver completely improbable. It does not make sense to reverse into the lane of oncoming traffic if the second defendant could without much difficulty reverse out of parking bay, correct his vehicles line of travel to enable him to drive straight forward to line up his vehicle and park. This is what the reasonable driver would do. It is not necessary to cross two lane to prepare for parallel parking.

[38] It is common cause that point of impact has close to the middle line in Plaintiff lane of travel. The angle which 2nd defendant vehicle was us is also common cause. I got the distinct impression that the 2nd defendant had to explain the awkward angle that his vehicle was in at the time of the collision and he then came up with the tall tale of how he wanted to correct his vehicles position to parallel park.

[39] The angle at which vehicles stood post-collision and general area where damage was situated on the vehicles support the version of the plaintiff that second defendant was in process of executing a U-Turn. If second defendant reversed out of the parking bay there was nothing preventing plaintiff to see him doing so, which would in turn cause the plaintiff to slow down and if necessary to bring his vehicle to a standstill to allow the second defendant to park. There would

be no reason for the plaintiff to try and squeeze past as the second defendant is alleging.

[40] The probabilities does not favour the version of the second defendant in this regard.

[41] A further interesting issue is the version of the second defendant is that he did not see the plaintiff's vehicle approaching. Second defendant went to great length in explaining to the court that he checked his mirrors and blind-spots but did not see the plaintiff's vehicle. The parties were however in agreement that the second defendant was able to have an unobstructed view of the road for approximately 50 meters in the direction the plaintiff was travelling from.

[42] The second defendant's version that he did not see the plaintiff's vehicle but only heard a slight bang is improbable. Plaintiff's vehicle had to be clearly visible and had the second defendant kept a proper lookout he would have seen the vehicle approaching.

[43] During cross-examination the second defendant was extremely evasive as to where the bigger part of his vehicle was before and after the accident, although the point of impact is common cause. Counsel for the plaintiff had to canvass this issue repeatedly with the second defendant, who continuously avoided answering the question. It would appear that the second defendant realized that any concessions in that regard would show that the vehicles did not move in more or less the same direction, as averred by him, but that the damage and resting positions of the vehicles were consistent with a vehicle executing a u-turn and that said vehicle was more or less at an 90 degree angle with the oncoming vehicle. The damage to the vehicles and the resting positions of the vehicle therefore did not support the version of the second defendant.

[44] According to the plaintiff, the second defendant admitted to him after the accident that he did not see the vehicle of the plaintiff and even offered to assist in

paying the plaintiff's excess payable to the insurance company. This conversation is now denied by the second defendant. What is interesting is that the passenger in the vehicle driven by the second defendant, who saw the accident as well as who might have been privy to the conversation between the two drivers, was never called to testify and no explanation was advanced as to why he was not called. The passenger would have been able to corroborate the version of the second defendant, unless he was not called because his evidence would not be favourable to the defendant?

[45] The second defendant's explanation was that he exercised due care by taking precautions against damage to other traffic, therefore the court must test the evidence against the probabilities of the case and having done so, I reject the version of the second defendant as improbable and false. I am satisfied that the second defendant did not reverse his vehicle as he wanted the court to believe but indeed made a sudden U-turn in front of the vehicle of the plaintiff in order to park his vehicle at the open parking bay across the road and by doing so he acted in a negligent manner.

Contributory Negligence

[46] The next issue to consider is if the plaintiff was contributory negligent.

[47] The evidence of plaintiff made it clear that the U-turn attempt by defendant was unexpected and caused a situation of an imminent collision. He applied brakes but could not take evasive action as there were vehicles parked on the left hand side of the road.

[48] The defendant's negligent driving by executing the unexpected U-turn obstructed the right of way of plaintiff and is the main cause of the collision and the resultant damages.

[49] I can find no contributory negligence on the part of the plaintiff.

Vicarious liability

[50] In our law there are three requirements for vicarious liability, namely:

- a) there must be an employer-employee relationship;
- b) the employee must commit a delict; and
- c) the employee must act within the scope of his employment when the delict was committed.³

[51] The fact that there was an employer-employee relationship is of no doubt and also that a delict was committed is common cause. The second defendant was in the employ of the first defendant at the time of the incident and was driving a government vehicle.

[52] What needs to be determined is if the accident occurred whilst second defendant acted in the execution of his duties and within course and scope of his employment. In order to determine if this requirement has been met, it must be determined whether at the time of causing damage, an employee has:

- a) Not exclusively pursued his own interest; and
- b) Not completely abandoned his duties as determined by his contract of employment.⁴

[53] In the matter *in casu* the second defendant was driving an official vehicle and was making his way to the bank to go and sign documents on behalf of the first defendant in the performance of his duties.

³ HB Klopper in *The Law of Collisions in South Africa* Seventh Edition on page 91.

⁴ *Supra* at page 93-94

[54] I am therefor satisfied that the first defendant would be vicariously liable as the second defendant acted within course and scope of his duties.

[55] In the result the following order is made against the first and second defendant, jointly and severally, the one paying the other to be absolved, for:

- d) Payment in the amount of NS 30 096.86;
- e) Interest on the aforesaid amount at the rate of 20% per annum *a tempore morae* from date of judgment to date of final payment;
- f) Cost of suit.

JS Prinsloo
Judge

APPEARANCES

PLAINTIFF:

F Erasmus

Francois Erasmus & Partners, Windhoek

DEFENDANT:

F Kadhila

Government Attorney, Windhoek