

Case No.: 1.1621/2000

IN THE HIGH COURT OF NAMIBIA

In the matter between:

JOHANNES NGHIHEPA

PLAINTIFF

and

RAES TRANSPORT

FIRST DEFENDANT

MOSES MATHEUS

SECOND DEFENDANT

MR A T NANGOLO

THIRD PARTY

CORAM: LEVY, AJ

Heard on: 18-19/10/2000

Delivered on: 3 November 2000

JUDGMENT

LEVY, AJ: The pleadings in this matter of both the plaintiff and the defendants lack particularity and the plea is in fact vague and embarrassing. Neither of the parties have availed themselves of the rules of court relating to exceptions or applications to strike out. Some of the initial defects have been

remedied by further particulars filed on request and also by the evidence itself but some remain.

In its Particulars of Claim, plaintiff alleged that on or about 26<sup>th</sup> September 1997 (at the trial this was changed to 29 September 1997) "and at or near Special Supermarket at Ondangwa a motor vehicle collision occurred between plaintiffs motor vehicle with registration number N591SA and defendant's motor vehicle with registration number N807G there and then been (sic) driven by second defendant."

Plaintiff alleges further that the collision was caused by the "sole negligence" of the driver of first defendant's vehicle and as a result plaintiff suffered damages in the sum of N\$34 160.00. Plaintiff says this amount was the "pre-collision" value of his motor vehicle.

There are no allegations whatsoever linking the first defendant to the collision, to the negligence nor to the damages alleged to have been sustained. The fact that second defendant drove the vehicle owned by first defendant does not make first defendant liable for any damages caused by the negligence of second defendant unless second defendant was driving "in the course and scope of his employment with first defendant." *Mkize v Martens* 1914 AD 382; *Feldman (Pty) Ltd v Mall* 1945 AD 733. This vital allegation is absent. There are other details absent in these particulars of claim for instance it is not alleged whether plaintiffs vehicle was in motion at the time of the collision and if not in motion whether it was standing on the road or off the road on which second defendant was driving. Furthermore there are no facts alleged why plaintiff can claim for the "pre-collision" value of his vehicle, as and for damages.

First defendant did not apply to strike out all allegations concerning himself on the grounds that there were no allegations connecting him with the claim of plaintiff. Further particulars were requested and when these were supplied they partially repaired some of the defects. But there were still no allegations of vicarious liability which are essential in the circumstances to hold first defendant liable.

In the plea, defendants admitted that the collision had occurred but denied that the collision was due to the negligent driving of second defendant. They alleged;

"..... the collision between first defendant's motor vehicle and the plaintiffs vehicle was caused as a result of the sole negligence of A T Nangolo who was the driver of motor vehicle with registration N5966SH, and more in particular, in that the said Nangolo, who was driving immediately ahead of the second defendant, turned right, without giving any indication of his intention to do so, at a time when it was dangerous and inopportune to do so, and more particularly, after the second defendant, who was driving first defendant's vehicle, was already busy overtaking the said Nangolo after giving due notice of his intention to do so. Alternatively, and only in the event that it may be found that the second defendant was also negligent, then the defendants plead that the said Nangolo was contributory negligent and that the defendants' liability for the damages to the plaintiffs vehicle should be reduced with the extent of the contributory negligence of Nangolo."

In this plea, even though defendants main allegation is that the "sole negligence of Nangolo" caused the collision, they do not allege how Nangolo's negligence caused second defendant to drive into plaintiffs vehicle. Nangolo may well have been negligent in doing what defendants allege but there is no allegation linking the negligent conduct of Nangolo with the collision between defendant's and plaintiffs vehicles. This makes the "Plea" vague and embarrassing. From these allegations plaintiff could not have known what case he had to meet. Defendants, however, instituted Third Party proceedings against Nangolo and it is only from the particulars served on Nangolo in that case, that the plaintiff could ascertain what case he had to prepare for. I shall refer to those particulars at a later stage. In cross-examination of second defendant, Mr Shikongo read to second defendant what he said in those particulars. He did not admit giving those facts to his legal adviser and it was put to him that they differed from his own plea and the evidence he had given. He replied to the cross-examination that his vehicle did not roll over. The aforesaid notwithstanding, what he pleaded did constitute an explanation by second defendant of how the collision occurred.

I now turn to the evidence that the parties placed before the Court.

There was no request by either party for an inspection *in loco*. The Court was not assisted by the

submission to the Court of a proper plan of the scene of the accident with measurements and the identification of points thereon. A sketch plan with no measurements (not even the width of the road whereon second defendant drove) was handed up to the Court. The person who drew this plan and who compiled the legend identifying certain points thereon was not called to testify. The Court cannot therefore refer to that legend or to the points identified.

By reason of the evidence given by second defendant and his witness Jospeh Nelembu who was a passenger in the vehicle sitting next to the driver at the time, the Court is aware that the road in question is the Main Road from Ondangwa to Oluno, that it is tarred but that it has gravel shoulders on either side of the tarred surface. While there is no evidence of the width of the road there is evidence that it consists of a carriage-way running from Ondangwa to Oluno and a carriage-way running from Oluno to Ondangwa and that cars approaching from opposite directions can pass each other comfortably in the normal course. The width of the shoulders are not known but the shoulders are wide enough to permit a motor vehicle to drive thereon with all four wheels. The road is raised approximately half a metre above the surrounding country-side.

The plaintiff testified that on 29<sup>th</sup> September 1997, he had been shopping at the Special Supermarket at Ondangwa, (also referred to in this matter as a cuca shop) situated some 20 metres from the Main Road. He drove his vehicle N591SH from the shop, along the dirt road and then stopped and waited at the T-junction of the dirt road and the Main Road (he demonstrated this in Court) some 3 to 4 metres off the Main Road for traffic to pass so that he could enter upon the said Main Road. While waiting there vehicle N807G coming from his left, came straight at him striking his vehicle on its left and turning it over so that the wheels of this vehicle were in the air.

In his evidence, second defendant said that he was driving truck N807G along this road in the direction from Ondangwa to Oluno when a Toyota Corolla (hereafter Toyota) about 15 metres in front of him

activated its indicator to show it was turning left, its rear lights went on and the Toyota slowed down and left the tarred surface of the road and proceeded with all four wheels on the gravel shoulder. Second defendant says that this gave him the impression that the Toyota was stopping but unexpectedly the Toyota entered on the tarred surface again and without indicating turned right as second defendant was about to pass. He says his vehicle either scraped the Toyota or just missed it. He demonstrated in Court so that it looked like a scrape. His witness who sat on his left Mr Joseph Nelembu says the vehicles hit each other. Second defendant says his vehicle then shot across the road and into and on to plaintiff's vehicle.

In his plea second defendant made no allegations whatsoever about Nangolo activating his left indicator and leaving the tarred surface with all four wheels. There was no mention of his rear lights going on and that he was given the impression that Nangolo was stopping. There is no allegation that Nangolo thereafter entered on the road in front of him. In his plea he said Nangolo was driving "immediately" ahead "of him and turned right without giving any indication of his intention so to do when second defendant was already busy overtaking him after giving due notice of his intention to do so". There is no allegation of the vehicles having hit. And certainly no suggestion that such a collision be it ever so slight preceded and perhaps caused second defendant to hit plaintiff's vehicle.

The aforesaid notwithstanding when second defendant was cross-examined he did not admit that he told his attorney the version which was pleaded in his Third Party Particulars. He said his vehicle did not roll. I quote specifically what was put to him by Mr Shikongo and what was alleged in his Third Party particulars:

"Without keeping any lookout for the second defendant's vehicle and without observing that second defendant was in the process of overtaking his vehicle, and without giving any indication of his intention to do so, the Third Party started to execute a right turn at a time when it was totally inappropriate and inopportune to do so, and more particularly when the second defendant was already next to the Third Party's vehicle, busy overtaking him, which caused first defendant's vehicle to leave the road whereafter second defendant lost control of the vehicle and it overturned where it collided

with the plaintiffs vehicle."

A case must be judged on the evidence and not on the pleadings. The pleadings, however, can cast doubt as to the accuracy of the evidence and I approach the evidence of second defendant with caution.

Defendant's witness, Joseph Nelembu, did not make a good impression on the Court. He said he looked at the speedometer at the time of the collision and saw that second defendant was driving at 60 kph. He had no reason to look at the speedometer and was nonplussed when the court questioned him about this. He also related that the Toyota's rear lights and flicker went on when it was 15 metres in front of them and that the vehicle left the road and drove on the gravel shoulders before returning and driving in front of them and then turning right. If he was watching this manoeuvre by the Toyota one wonders at what stage he was looking at the speedometer.

Assuming that the Toyota was being driven in this inexplicable way, one could expect a driver in the position of second defendant driving only at 60 kph to slow down when the Toyota returned to the Main Road and not attempt to pass him. Notwithstanding, second defendant believing that the Toyota was going to stop was entitled to pass him having satisfied himself that it was safe so to do and the driver of the Toyota should not have "deviated to his right" nor thereafter do a right turn while second defendant was overtaking him. (cf *Bester v A.A. Mutual* 1972(2) SA 234 (Q))

Second defendant testified that he was in fact driving at 60 kph. There is no evidence to the contrary and the Court must accept this. He said he was dragging a trailer which made sudden braking difficult as the trailer would bump against the rear of his vehicle. He does not testify that lic did brake suddenly (which one could expect in the circumstances), and that the trailer rammed his vehicle. He does, however, say that he braked. No one testified of tyre marks on the road. He does not testify why it is that he did not stop on the road or on the shoulder of the road after scraping Nangolo (or just missing him). He does not testify why after their vehicles scraped in the middle of the road he could not stop in

the opposite carriage-way or on the shoulder or drive at a slower speed or perhaps a faster speed so as to pass the Toyota (if it was still turning). The explanation as to what actually happened would appear to be the one he gave in the Third Party Proceedings.

In circumstances such as these when a plaintiff's vehicle is stationary off the road, whereon a defendant is driving and the defendant leaves the road and collides with the plaintiff's stationary vehicle, an inference arises that the collision is due to negligence of the defendant. If the defendant wishes to escape liability, he would have to produce some evidence which on a balance of probability at the end of the case shows that he was not negligent.

*Goode v SA Mutual Fire & General Insurance Co Ltd* 1979(4) SA 301 at 306 (C); *Naude N.O. v Tranvaal Boot & Shoe Manufacturing Co.* 1938 AD 379 at 399 *Arthur v Bezuidenhout & Mieny* 1962(2) SA 566 at 574B.

In *Blake v Harden* 1918, S.R. 41, Hopley, J said;

"People conducting operations in which care skill and courage are required - among which must be numbered the driving of vehicles in populous centres - cannot be excused if their judgment or courage should without justification fail them at the very moment when these were most required to avert accident or disaster."

This was quoted with approval by Davis, AJA in *Rex v du Toit* 1947(3) SA 141 at 146 but Davis

AJA added;

".....but it does not seem to me to matter whether the place where the car is driven be a populous centre or a country road."

In *Goode's* case *supra* at 306E, King, J said;

"Where it is a person's duty to exercise proper skill and correct judgment, a failure to do so is

undoubtedly negligence."

Where a person drags a trailer he must travel at a speed which will enable him to stop in an emergency without the trailer either colliding with his vehicle from behind or in anyway hampering him in the control of his vehicle or preventing him from avoiding a collision. I am satisfied that at 60 kph a reasonable motorist driving a vehicle without a trailer would have been able to avoid colliding with plaintiff and would certainly not have lost control after a collision with the Toyota. On his own showing second defendant was negligent after the collision in the middle of the road. Despite the balance of the wide carriage-way and a wide shoulder he did not control his vehicle.

Applying the aforesaid principles expressed in the above-mentioned cases of *Naude N.O.supra* and *Goode supra* there was a "tactical" *onus* on defendants to place such evidence before this Court which would displace the inference of negligence which arises from the objective circumstances of the collision. The only relevant evidence which second defendant placed before this Court was that Nangolo negligently turned right colliding with second defendant but as I have said, I am satisfied that driving at 60 kph with the exercise of proper care after such collision second defendant should not have lost control of his vehicle and thereby collided with plaintiffs vehicle. While Nangolo's negligence contributed to the collision and perhaps even initiated it, second defendant's negligence was equally to blame. If I must apportion blame between the two, I would say that each was 50% to blame.

Where there are joint wrongdoers as in this case who are responsible for the plaintiffs damages, the plaintiff can elect to sue both jointly and severally or he can elect to sue either one of them. Plaintiff is therefore entitled to hold second defendant liable for all his damages irrespective of Nangolo's contributory negligence.

Nangolo, however, did not come to Court and Mr Mueller asked for a judgment in respect of the damages which defendants proved they had suffered.



I have already dealt with the negligence of Nangolo vis-a-vis second defendant. This negligence was responsible for the damages sustained by first defendant to his motor vehicle N807G. On behalf of first defendant two experts testified. Mr Rainier Arangies testified that he had examined N807G and that N\$18 565-15 was the reasonable cost of repairs to the body of the vehicle to put it into its pre-collision condition. Mr Hendrik Phillipus Potgieter testified that he too examined the vehicle and that the reasonable cost of mechanical repairs to the vehicle to put it into its pre-collision condition was N\$5 697-09.

First defendant is accordingly entitled to a judgment by default against A T Nangolo in the sum of N\$24 262-24. An amendment of his claim to reduce it to this amount was granted.

I turn now to consider the damages plaintiff is claiming from first and second defendants.

I have already pointed out that plaintiff is confined to a claim for damages against second defendant only. In plaintiff's Particulars of Claim there are no allegations to establish a legal basis for holding first defendant liable. There is also no evidence to this effect. Plaintiff had to allege and prove that when second defendant collided with him, second defendant was acting in the course and scope of his employment with first defendant. He did not do so and he cannot succeed in a claim against him.

In a motor collision case, a plaintiff is entitled to claim from the person liable for his damages, the reasonable costs of repair to put his damaged motor vehicle in the same condition which it was before the collision.

Where the vehicle is beyond economic repair, he can claim the difference between the market value of the vehicle at the time of the collision and the value of the wreck after the collision. The latter course is the course chosen by plaintiff.

Plaintiff gave defendants notice in terms of Rule of Court 36(9)(b) of his intention to call Mr Christian Theron de Wit to give expert evidence in respect of his damages which he alleged he sustained.

When he was called, Mr de Wit testified that he had been a motor vehicle assessor in Namibia for twelve years and carried on business as Countrywide Assessing Services. His business involved the assessment of the value of motor vehicles involved in collisions.

1 Ic testified that he was asked on 17 July 2000 to assess what the value of plaintiff s vehicle N591SH was before the collision and after the collision so that the damages sustained by plaintiff could be ascertained. He said he had not seen the vehicle either before or after the collision but he was shown photographs of the vehicle taken before and after the collision. These photographs were submitted to the Court. He said he also received reports concerning the vehicle from plaintiff. In reply to defendant's request for further particulars, plaintiff alleged that his vehicle was a complete "write off"and annexed an invoice from a garage in support of this allegation. Plaintiff had testified that his vehicle prior to the collision was in sound condition and that after the collision it was a "write-off. Defendants did not give evidence contradicting this.

Mr de Wit testified that in the motor trade in Namibia and in South Africa, there is a publication known as "The South Africa Vehicle Value Guide" of "MWV Publishers South Africa" which is accepted in the trade as authoritative and reliable in regard to the value of vehicles and he accepted it as such. He said using this guide, the photographs aforesaid and the reports from plaintiff, he assessed the value of plaintiff s vehicle before the collision as N\$38 610-08. He testified that the wrecks of vehicles of this type, this model and this vintage which were not economically repairable was approximately N\$8 122-00. He stressed that both figures were averages. Under special circumstances these figures could vary but not by very much. He said pursuant to reports about the condition of this vehicle before and after the collision and in the light of his own experience he considered the figures which he had given were

reasonable.

(cf *Erasmus v Davis* 1969(2) SA 1(A) particularly the reasoning for calculation of damages by Van Blerk and Potgieter AJJ.)

In the cross-examination of Mr de Wit, Mr Mueller did not question Mr de Wit's qualifications nor as to the nature of the reports he had received concerning the vehicles condition. He did, however, question him as to whether he could judge the mechanical condition of a vehicle without examining it and whether this would affect the value of a vehicle. Mr de Wit replied that he could not assess the mechanical condition of a vehicle without an examination. Obviously a vehicle in sound condition would have a higher valuation than one in poor condition. From his replies it is clear that "wrecks" would have different values depending on the extent of their damage. Mr de Wit stressed that his figures were averages and that in individual cases values could vary.

When it comes to estimates of value for the calculation of damages, pinpoint accuracy is not possible except when vehicles or other goods have been sold on the open market when the price obtained represents market value. Reasonable averages are acceptable by the Courts and most awards are reasonable estimates. A plaintiff should not be non-suited merely because his loss is difficult to quantify. The court must do the best it can with the materials to hand. This view has frequently been expressed by learned judges.

I am satisfied that the estimate of damages sustained by plaintiff is reasonable and there is no evidence to contradict it. Plaintiff has reduced his claim accordingly.

The Order of this Court is:

- A.        1.        The plaintiffs claim against first defendant is dismissed with costs but such costs are limited to the costs of an exception as at the date of service of the Particulars

of Claim.

- 2.(a) Second defendant shall pay to plaintiff the sum of NS30 488-08 as and for damages;
- (b) Second defendant shall pay interest at the rate of 20% per annum on the aforesaid sum from date hereof to date of payment;
- (c) Second defendant must pay plaintiffs costs which will include the costs of the expert Mr de Wit.

B. 1. First Defendant is granted default judgment in the sum of N\$24 262-24 against the Third Party A.T. Nangolo.

2. A.T. Nangolo, the Third Party herein, shall pay the costs of first defendant.

For the Plaintiff:

Instructed by:

Mr E Shikongo Shikongo Law Chambers

Instructed by:

For first and second Defendant:

Messrs P F Koep & Co

Mr R Mueller

For Third

No

Party:

Appearance