'Not Reportable'

CASE NO.: I 2249/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

PAULO DE AZEVEDO **Plaintiff**

and

STAR BODY WORKS (PTY) LTD **Defendant**

***CORAM*:** **PARKER J**

Heard on: 2011 July 6 – 8

Delivered on: 2011 August 2

JUDGMENT

PARKER J: [1] In this matter the plaintiff, represented by Ms Van der Westhuizen, instituted action against the defendant, represented by Mr. Mouton, in which the plaintiff claims (1) payment of an amount of N$49,402.71, (2) interest on the amount of N$49,402.71 at 20% per annum *a tempore morae*, (3) costs of suit, and (4) further and/or alternative relief.

[2] At first brush it is difficult to see clearly on what basis the plaintiff has instituted the action, that is to say, whether the claim is based on (1) delict, or (2) contract, or (3) delict and theft. It is in connection with this conundrum that, I think, Mr. Mouton submitted that the plaintiff's claim must fail on the ground that a party must stand or fall by his pleadings. Mr. Mouton's submission is predicated on the evidence as pointing to the opposite way, particularly as respects the particulars of claim contained in paras (4) and (5) and alternative para (6) thereof that four racing hard rims together with corresponding Michelin tyres were stolen.

[3] The evidence is clear and credible, and, above all, indisputable that the plaintiff himself requested the defendant to remove those 'superior' rims and tyres from the plaintiff's motor vehicle which had been taken to the defendant to be repaired at the defendant's premises after the motor vehicle had been involved in an accident, and to replace them with the 'inferior' ones. That being the case, the claim based on theft is rejected: the evidence does not support the claim at all. This conclusion concerns paras 4, 6 and any reference to 'theft' in para 5 of the particulars of claim; and this conclusion accepts Mr. Mouton's submission that theft has not, and cannot, be proved.

[4] But that is not the end of the matter. It seems to me that the plaintiff's claim is based also on delict; and so it is to that basis that I now direct the enquiry. If the inelegancies are excised from the relevant parts of the particulars of claim, I discern the following delictual claim, namely, that the missing of the –

> the (aforesaid rims and corresponding tyres was caused by the gross negligence of the Defendant, and/or persons employed by the defendant

> and acting in the course of his/her/their duties as such and/or in the furtherance of instructions and/or interest of the defendant. In that ...

[5] In this regard, and accepting Mr. Mouton's submission, I think the delictual claim is based on the 'negligence' of the defendant or the defendant and a person or persons in respect of whose delictual act the defendant is vicariously liable. On the issue of negligence, I cannot do any better than to respectfully rehearse and adopt what Hoff J stated as the test of 'negligence' in *Vivier NO v Minister of Basic Education, Sport and Culture* 2007 (2) NR 725 at 742F-H:

> [46] The authoritative test for negligence was formulated by Holmes JA in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-G as follows:
>
> For the purposes of liability culpa arises if –
> (a) a *diligens paterfamilias* in the position of the defendant –
>
> (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
>
> (ii) would take reasonable steps to guard against such occurrence; and
>
> (b) the defendant filed to take such steps.
>
> This has been constantly stated by this Court for some 50 years. Requirement (a) (ii) is sometimes overlooked. Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down.

[6] On the evidence, I find that the defendant – through Mr. Cornelissen – foresaw the reasonable possibility that if the 'superior' rims and accompanying

tyres were left in the reception area of its business premises, they would go missing, and his conduct would injure the plaintiff in his property and cause the plaintiff patrimonial loss (i.e. test (a) (i) in *Vivier NO supra)*. Did the defendant fail to take reasonable steps to guard against such occurrence (i.e. tests (a) (ii) and (b) in the *Vivier NO* supra)? Mr. Mouton says the defendant satisfied the crucial tests of (a) (ii) and (b), because, counsel submitted, the defendant took reasonable steps in that behalf. What is the evidence in support of Mr. Mouton's submission?

[7] I accept the evidence placed before the Court on behalf of the defendant; and *a priori* I make the following factual findings. The business premises of the defendant has a wall and a security fence around it; and, furthermore, there is a twenty-four-hours-guard posted at the business premises. To reinforce the guarding of the 'superior' rims ad tyres, these items were removed from the reception area and kept under lock and key in an 'old house' on the business premises (I take it to be a 'storeroom'). Only the Secretary to Mr. Cornelissen had control over the keys to the storeroom.

[8] I do not think that on the facts I have found to exist it can seriously be argued that the defendant failed to take reasonable steps to guard against the missing of the tyres. In this regard, it must be remembered that the word "reasonable" has in law the *prima facie* meaning of reasonableness in regard to those existing circumstances of which the actor called upon to act reasonably, knows or ought to know (*Trustco Insurance Limited t/a Legal Shield Namibia and Another v The Deeds Registries Regulations Board and Others* Case No. A150/2008 at [31] (Unreported). As Mr. Mouton asked rhetorically in his submission, 'What more could the defendant have done?' That is, in the

circumstances of the case, it is my view that what the defendant did to guard against the possible occurrence of the missing of the ‘superior’ rim and tyres is what any reasonable man (*diligens paterfamilias)* or woman in the position of the defendant would have done: the defendant did not fail to take reasonable steps to guard against the occurrence of the ‘superior’ rims and tyres missing from the business premises of the defendant.

[9] The law expects the defendant to do what is reasonable in the circumstances. Thus, a person is negligent if he did not act as a reasonable man (*diligens paterfamilias*) would have done in the same circumstances. Negligence is a question of fact, and must be proved by the party alleging it. (Boberg, *The Law of Delict*, Vol. 1 (1984): p 274). In the instant case the evidence that I have previously found to be credible and unchallenged point to only one reasonable conclusion: the defendant took reasonable steps to guard against the ‘superior’ rims and tyres missing. And as I say, the plaintiff failed to prove negligence, which he alleges in his particulars of claim: the plaintiff has failed to discharge the onus cast on him to establish that the defendant failed to take reasonable steps to guard against the occurrence of the missing of the ‘superior’ rims and tyres belonging to the plaintiff.

[10] In the result, the plaintiff’s claim is dismissed with costs; such costs to include costs occasioned by the employment of one instructing counsel and one instructed counsel.

_____

PARKER J

COUNSEL ON BEHALF OF THE PLAINTIFF:

Adv. C Van der Westhuizen

Instructed by: Koep & Partners

COUNSEL ON BEHALF OF THE DEFENDANT:

Adv. C Mouton

Instructed by: Diekmann Associates