



CASE NO.: I4025/2010

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**SANDRA**

**INDONGO**

**PLAINTIFF**

Versus

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**SWARITE (PTY) LIMITED AND ANOTHER**

**DEFENDANT**

CORAM: MILLER, AJ

HEARD ON: 2011.11.11

DELIVERED ON: 2011.11.11 (*Ex Tempore*)

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**JUDGMENT:**

**MILLER, J:** On the 23<sup>rd</sup> of October 2008, at about midday, a collision occurred between two vehicles, both travelling at the time, in Hosea Kutako Drive in a northerly direction. The vehicle owned by the Plaintiff, was driven at the time by Mr Andries Indongo. The vehicle owned by the Defendant, was driven at the time by Mr Martin Philander and it is common cause that Mr Philander at the time was acting in the course and scope of his employment with the 1<sup>st</sup> Defendant.

10 At the outset of the trial, the issues that remained in dispute were whether the collision was occasioned by the negligence of either Mr Indongo or Mr Philander, and whether the damages claimed were those sustained as a result of the collision. At the close of the Plaintiff's case, I ordered absolution from the instance, as far as the Plaintiff's claim is concerned and indicated that I will provide my reasons at the conclusion of the hearing. That I will now proceed to do.

It was incumbent upon the Plaintiff to establish, as far as  
20 damages are concerned, that the amount claimed in respect of the damage to the vehicle itself was the reasonable cost of repair thereof. Insofar as the second claim is concerned, it was incumbent upon the Plaintiff to establish that the loss of income

was, the net income that the Plaintiff would have derived from the fact that the vehicle was at times utilised as a taxi. On both these scores, the Plaintiff failed to tender any evidence to establish those facts. The reasonable costs of repair of the Plaintiff's vehicle, was a matter of expert testimony. No attempt was made by the Plaintiff to establish through expert testimony what the reasonable costs to repair the damage would amount to.

10 The closest the Plaintiff's came in this regard, was by calling a certain Mr Christoff Josef. He was, however, not qualified as an expert. There was no expert notice filed and clearly the Plaintiff did not seek to tender his evidence as that of an expert. His evidence goes no further than to say he provided a quotation for the repairs of the vehicle. That in my view is totally insufficient. As far as the claim based on the, loss of income is concerned, the only evidence the Plaintiff tendered was that on an average daily basis, the gross income generated by the use of the vehicle as a taxi was three hundred Namibian Dollars (N\$300-  
20 00) per day. That in my view is insufficient. It would have been necessary for the Plaintiff to take into account the expenses that were incurred by using the vehicle as a taxi and she would have been entitled only to the net income and not the gross income.

For those reasons I found that the Plaintiff had failed to prove her damages and I grant absolution from the instance.

What remained was the Counter-claim instituted by the Defendant in which the 1<sup>st</sup> Defendant claims damages in the amount of twenty nine thousand three hundred and twelve Namibian Dollars and forty-four cents (N\$29 312-44). Although at the outset of the trial, this issue remained in dispute, I was  
10 advised by the parties prior to the Defendant opening its case, that the Plaintiff had conceded the fact that the Damages suffered by the 1<sup>st</sup> Defendant as a result of the collision, was in fact the amount of twenty nine thousand three hundred and twelve Namibian Dollars forty-four cents (N\$29 312-44).

It follows therefore that, all that I am left to decide is whether the collision is attributable to the negligence of the driver of Plaintiff's vehicle or not. There is one other matter. The 1<sup>st</sup> Defendant alleges that at the time of the collision, the Plaintiff's  
20 vehicle was being driven by her son, who was acting with the permission of the Plaintiff and in the furtherance of the Plaintiff's interest. This allegation was admitted by the Plaintiff and I must therefore accept that the first Plaintiff is in the

circumstances vicariously liable, if I should find that the driver of the vehicle was negligent.

I turn to a consideration of the evidence tendered. According to Mr Andries Indongo, who was the driver of the Plaintiff's vehicle, he travelled in a northerly direction, as I have indicated, along Hosea Kutako road. Where that road intersects with Ooievaar street, he intended to turn to his right in order to go and pick up a friend Mr Leonardo Shungu, who lives in that vicinity. Mr  
10 Indongo testified that, as he approached the intersection he was travelling in the eastern-most lane and he indicated that at some stage prior to reaching the intersection where his intention was to turn to his right, he passed some road works, which he says were on his left-hand side. He testified further that having reached the intersection, he brought his vehicle to a standstill waiting for oncoming traffic to pass in order for him to execute a right-hand turn. He says that while he was so stationary the Defendant's vehicle, driven by Mr Philander, collided with the left rear corner of his vehicle. He remains adamant that the  
20 Defendant's vehicle had been travelling in the lane immediately to his left and adjacent to the lane in which he was. He says he was accompanied at the time by his father, Mr Petrus Malumbu.

The latter was also called to give evidence and by and large confirmed the evidence of Mr Indongo.

Mr Leonardo Shungu testified that he had been standing outside in the proximity of the intersection waiting for the Plaintiff's driver Mr Indongo to arrive. He noticed the Plaintiff's vehicle approaching and stopping at the intersection. He then said that at that stage, 1<sup>st</sup> Defendant's vehicle collided with the Plaintiff's vehicle. According to the driver of the 1<sup>st</sup> Defendant's vehicle, Mr  
10 Philander, the collision occurred in quite a different manner. He testifies that he had been travelling behind the Plaintiff's vehicle in the lane immediately adjacent to the lane in which the Plaintiff's vehicle was travelling at the time. He confirms that the Plaintiff's vehicle at that stage was travelling in the eastern-most lane of Hosea Kutako Drive, travelling north.

According to Mr Philander, the collision was occasioned by the fact that in the proximity of the intersection with Ooievaar Street, there were road works in progress and that the particular  
20 lane in which Plaintiff's vehicle was travelling was obstructed by traffic cones which had been placed in the lane. Mr Philander says that the Plaintiff's vehicle, upon approaching this obstruction, moved over to its left, into the path of travel in

which Mr Philander was travelling. The Plaintiff's vehicle was steered past the traffic cones and was then in the process up again moving to the eastern-most lane. The vehicle then slowed down and in the result a collision became unavoidable and in fact occurred.

A further Witness Mr Hammerslacht was called by the Defendant. He could take the matter not much further since he only arrived on the scene after the collision had occurred. He  
10 does say, however, that he observed the traffic cones obstructing one lane of traffic as testified to by Mr Philander.

As far as the witnesses themselves are concerned, I was not particularly impressed with the evidence of Mr Nelumba. The witness was at times evasive and not always consistent.

As far as the presence of Mr Shungu near the scene of the collision is concerned, there is a dispute between himself and Mr Indongo as to why he was there. According to Mr Indongo, he  
20 was going to pick up Mr Shungu, presumably to continue the journey to Katutura where Mr Indongo was heading ultimately.

Mr Shungu explains his presence at the scene by saying that he had been waiting outside for Mr Indongo, who was to deliver some papers to him. These papers related to a vehicle. According to Mr Shungu, he was not going to accompany Mr Indongo on the remainder of the journey. I got the impression from his evidence that he was going to collect the papers and remain at his home.

Mr Philander and Mr Hameischlicht gave evidence in a manner  
10 which remained consistent. What ultimately sways the balance in my view are the probabilities of the case. It is common knowledge that vehicles travelling in the same direction in different lanes, do not ordinarily collide with one another. Plaintiff's Witnesses were at a totally loss to explain how the 1<sup>st</sup> Defendant's vehicle travelling in a completely different lane, managed to come into contact with the Plaintiff's vehicle. There is no suggestion that at the time when, according to the Plaintiff's witnesses, the vehicle was stationary a portion of that vehicle protruded into the lane in which the first Defendant's  
20 vehicle was being driven.

There is also no evidence that indicate that for one reason or another, the 1st Defendant's vehicle had diverged from its path



of travel immediately prior to the collision. That leaves unexplained on the probabilities how the collision occurred in the first place. On the other hand, the version offered by the Defendant, is a probable version of how the collision occurred.

I find in the circumstances that the collision was caused by the driver of the Plaintiff's vehicle and consequently the Plaintiff is liable to compensate the 1<sup>st</sup> Defendant for the damage, that was incurred.

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In the result, I make the following orders:

1. The Plaintiff is ordered to pay the 1<sup>st</sup> Defendant the amount of twenty nine thousand Namibian Dollars and forty-four (N\$29 312.44).
2. Interest at the rate of 20% per annum calculated from the date of Judgment until the date of final payment and the costs of suit with respect of the Counter-claim as well.

**ON BEHALF OF THE PLAINTIFF**

**HAIFIDI**

**Standing in for:**

**INDONGO**

**Instructed by:**

**DAMASEB**

**MR**

**MS**

**CONRADIE &**

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**ON BEHALF OF THE DEFENDANTS**

**BOTES**

**Instructed by:**

**ERASMUS&PARTNERS**

**FRANCOIS**

**MS**