



**REPUBLIC OF NAMIBIA**

CASE NO.: I 2325/2011

***“Not Reportable”***

**IN THE HIGH COURT OF NAMIBIA  
MAIN DIVISION  
HELD AT WINDHOEK**

In the matter between:

10 **BUSH EVENTS & ADVENTURES (PTY) LTD** **PLAINTIFF**

**and**

**N M THERON** **1<sup>ST</sup> DEFENDANT**

**WILLEM DU PLESSIS** **2<sup>ND</sup> DEFENDANT**

CORAM: **DAMASEB, JP**

Heard on: **2012.06.05**

Delivered on: **2012.06.05 [ex tempore]**

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20 **JUDGMENT:**

**DAMASEB, JP:**

[1] This is a claim for damages arising from a motor vehicle accident. The quantum is not disputed and the

only issue that I have to determine is whether there was negligence on the part of the 2<sup>nd</sup> Defendant that caused the alleged damage to the Plaintiff's vehicle.

[2] The Plaintiff alleges that on or about 29<sup>th</sup> January 2010 on Robert Mugabe Drive in Windhoek a collision occurred between Plaintiff's motor vehicle and the vehicle then and there driven by the 2<sup>nd</sup> Defendant and belonging to the 1<sup>st</sup> Defendant. It is alleged that the 2<sup>nd</sup> Defendant was acting within the course and scope of his employment with 1<sup>st</sup> Defendant, an allegation which is denied.

[3] It is further alleged that the sole cause of the accident was the collision caused by the negligent driving of the 2<sup>nd</sup> Defendant as follows:

(a) That the 2<sup>nd</sup> Defendant failed to take cognisance of the Plaintiff's vehicle travelling in the lane to the Defendant's right hand side, and that the 2<sup>nd</sup> Defendant entered Plaintiff's lane at a time when it was dangerous and inopportune to do so.

(b) That the 2<sup>nd</sup> Defendant failed to indicate his intention to change lanes.

(c) 2<sup>nd</sup> Defendant failed to apply his brakes timeously or at all.

(d) 2<sup>nd</sup> Defendant drove at an excessive speed in the circumstances.

(e) 2<sup>nd</sup> Defendant failed to avoid the collision when he could have and should have done so.

10 [4] The 2<sup>nd</sup> Defendant's plea is that there was no collision in the first place and that, secondly, to the extent that damage may have been caused to the vehicle of the Plaintiff, it was as a result of the negligence of the driver of the Plaintiff's vehicle who drove at an excessive speed or failed to take cognisance of 2<sup>nd</sup> Defendant's vehicle, failed to take cognisance when approaching an uphill curve, lost control of his vehicle and veered off the road and collided against a pavement.

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**THE PLEA:**

[5] As I understand the plea, the 2<sup>nd</sup> Defendant's case is that the driver of the Plaintiff's vehicle approached 2<sup>nd</sup> Defendant's vehicle from behind and intended to overtake that vehicle when it was unsafe to do so and

therefore veered off the road and the damage to Plaintiff's vehicle was sustained as a result.

[6] At the trial of the matter both sides gave evidence. The Plaintiff called one Witness being Mr Moyo, the driver of the vehicle of the Plaintiff at the time. Mr Moyo's evidence, in brief, is that he was driving from north to south in Robert Mugabe Drive on the material day. He was in the right hand lane and the 10 2<sup>nd</sup> Defendant in the left hand lane. Having passed the traffic lights at Centaurus, somewhere around Maeura Mall and moving on in the southerly direction alongside State House, the 2<sup>nd</sup> Defendant who was then in the left hand lane, without warning or any indication, turned into the right hand lane in front of Mr Moyo. This allegedly all happened in a split second, and that he was therefore unable to control the car and as a result veered to the right and on to the pavement resulting in the accident as a result of 20 which the damage was caused to the Plaintiff's vehicle.

[7] The Defendant called two Witnesses who were at the time in the 1<sup>st</sup> Defendant's vehicle, the one, of course, being the driver. The version of the Defendant's witness is materially the same as that

given in the Pleadings. Such contradiction in their versions as is suggested by Counsel for the Plaintiff in argument is immaterial in my view, and in any event, does not point to collusion or fabrication on their part. In fact, it points to the fact that their evidence is not rehearsed.

[8] The 2<sup>nd</sup> Defendant testified, together with one Bertus Beukes who was a passenger in the 1<sup>st</sup> Defendant's vehicle at the time of the accident. Both maintained that they were driving along Robert Mugabe from north to south when the Plaintiff's driver approached from behind in the same left lane they were in. They both testified that the 2<sup>nd</sup> Defendant then moved the vehicle slightly to the left to give the Plaintiff's driver enough space to pass to their right. They then realised that the Plaintiff's driver was travelling at a very high speed and lost control of the vehicle, veered to the right hand lane, over the island, onto the road moving in the opposite direction where the vehicle tipped over, or collided against a hard object and came to a stop.

[9] Although it was initially alleged in the particulars of claim that there was a collision between the two vehicles allegedly caused by the 2<sup>nd</sup> Defendant, it is

now conceded by the Plaintiff that there was no physical contact between the two vehicles. The Plaintiff's Counsel in fact sought to amend paragraph 5 of the Particulars of Claim wherein that allegation of contact appears. I refused the request to amend from the bar which was made without warning or any explanation why it was sought so late in the day when the Plaintiff's Counsel knew from the beginning when the plea was filed, that such physical contact was denied. The Court even raised this matter at the Pre-trial Conference and expressed surprise at the unusual nature of the dispute between the parties. The Plaintiff's Counsel had ample time to consider the matter, take proper instructions and to amend the Pleadings. They failed to do that. The attempt to only seek amendment so late in the day undermines, in my view, - and in a material way, the Plaintiff's case. The version seems to change as events unfolded.

20 [10] Another significant variance between the Plaintiff's evidence and the Pleadings is the following: The evidence now led on behalf of the Plaintiff amply demonstrates that the allegations made in the Particulars of Claim that the 2<sup>nd</sup> Defendant failed to apply his brakes timeously or at all, and that he drove at an excessive speed at the time of the

collision, is inconsistent with the proven facts and the probabilities in the case. It is now common cause that the 2<sup>nd</sup> Defendant's vehicle was carrying a heavy load and was travelling very slow. Moyo who testified on behalf of the Plaintiff conceded that had 2<sup>nd</sup> Defendant applied brakes the situation would have been even worse. That is inconsistent with the version in the Pleadings that the 2<sup>nd</sup> Defendant drove at high speed and failed to apply brakes timeously or at all.

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[11] Another improbability in the Plaintiff's case is the evidence by Moyo that at the traffic lights opposite the Centaurus Secondary School, the 2<sup>nd</sup> Defendant drove past red lights while Moyo stopped and that a Landcruiser (allegedly moving in front of the 2<sup>nd</sup> Defendant) passed the same traffic lights also moving north to south. Moyo maintained rather implausibly in my view, that he had stopped at the same traffic lights but thereafter caught up with both 2<sup>nd</sup> Defendant and the Landcruiser just before the accident happened.

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The 2<sup>nd</sup> Defendant denied that there was a Landcruiser in front of him at the time. If I have to accept Moyo's version I must conclude that when he left the traffic lights opposite the school, he took off at

very high speed. How else could he make up the distance between him and the 2<sup>nd</sup> Defendant and especially the Landcruiser, that had, on his own version, passed the traffic lights at Centaurus even before the 2<sup>nd</sup> Defendant did?

[12] I am persuaded by the argument on behalf of the Defendants that it is most improbable that if Moyo was travelling at about 60km/h, as he says he was, he could have failed to control the vehicle. The position at which the car landed and the resultant damage also point to the fact that he was driving at excessive speed.

[13] Some reliance was placed by the Plaintiff on a statement allegedly made by 2<sup>nd</sup> Defendant to the police, which seemed to suggest that the 2<sup>nd</sup> Defendant was sick and that he might have acted in a manner that was negligent. This statement is, at best, incoherent and ambiguous. In any event, the taker of the statement did not testify and its evidential value is at best minimal. Be that as it may, the 2<sup>nd</sup> Defendant has denied the contents attributed to him in the statement and therefore I place no reliance on it, in so far as it is suggested that it points to the



Defendant admitting at the time that he acted in a fashion that was negligent.

[14] I find the Plaintiff's version of how the accident happened is in conflict with his Pleadings. I also find that the version of Moyo is implausible in the light of all the circumstances and inconsistencies I pointed out. On the contrary, the Defendant's case was not dented in cross-examination. The Plaintiff bears the onus and has failed to prove that it is more probable than not that the 2<sup>nd</sup> Defendant drove in a negligent manner as alleged by the Plaintiff.

**ORDER:**

[15] The Plaintiff's claim is dismissed with costs.

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**DAMASEB, JP**

**ON BEHALF OF THE PLAINTIFF:**

**MS A**

**BOTES**

**INSTRUCTED BY:**

**FRANCOIS ERASMUS & PARTNERS**

**ON BEHALF OF THE 2<sup>ND</sup> DEFENDANT:**

**MR M TJITURI**

10 **INSTRUCTED BY:**

**HENGARI, KANGUEEHI & KAVENDJII INC.**