



CASE NO.:I 1861/2009

REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

NAMWANDI SIMON INDONGO

PLAINTIFF

and

P ININGA

DEFENDANT

10 **CORAM: MILLER AJ**

Heard on: 14 June 2012

Delivered on: 19 June 2012

JUDGMENT

MILLER AJ: [1] This action arises from a collision to occurred on the 10th February 2009 in Independence Avenue, Windhoek and close to the intersection of Independence Avenue and Grimm street.

[2] As a result thereof the plaintiff instituted action against the defendant claiming damages sustained to his vehicle in the sum of forty eight thousand, three hundred and three Namibian Dollars and forty one cents (N\$48 303.41).

[3] I am called upon to decide only the issue of liability in view thereof that the quantum of the plaintiff's damages became separated.

10 [4] It is trite and indeed common cause that the *onus* rests upon the plaintiff to establish on a balance of probabilities that it was the negligence on the part of the defendant which caused the damage to his motor vehicle. During the course of the trial only two witnesses were called being the plaintiff and the defendant respectively.

[5] Their respective versions as to how the collision occurred differed dramatically. According to the plaintiff he was travelling in a southerly direction and had stopped at the intersection of Independence Avenue and Grimm street.

[6] He noticed the vehicle of the defendant reversing out of a parking bay
20 in the vicinity of a liquor store. According to him the vehicle thereafter moved forward and the plaintiff states that he then attempted to overtake

the defendant's vehicle. While he was in the process of overtaking the vehicle the defendant executed a sharp turn to the right causing the left front of the defendant's vehicle to collide with the left rear of the plaintiff's vehicle.

[7] The defendant's version is that he was actually travelling in the opposite direction that is in a northerly direction broadly speaking. The defendant says that he noticed the vehicle of the plaintiff approaching from the opposite direction.

[8] During the course of the defendant slowing down to stop at the
10 intersection, the plaintiffs vehicle lost direction and veered onto its incorrect side of the road and across and path of travel of the defendant

[9] As a result thereof the collision ensued. In view of the widely divergent versions as to how the collision occurred, it is incumbent upon the plaintiff to establish that his version is correct and that of the defendant is false.

[10] It was held in ***Ostriches Namibia Pty Limited v African Black Ostriches (Pty) Ltd*** that where the probabilities are evenly balanced, the party on whom the *onus* rests in this case the plaintiff must fail, unless the defendant's evidence is rejected as false and plaintiff's evidence is accepted
20 as true.

[11] When the probabilities even or there are no probabilities, the Court must have adequate and sufficient grounds before accepting the plaintiff's evidence.

[12] See also in this regard ***Caltex Oil Namibia (Pty) Ltd v Tjikune*** 1997 Namibian Reports 238 C.

[13] As far as the respective versions are concerned there is very little to choose between the evidence of either the plaintiff or the defendant. By and large the evidence of each was given in a satisfactory manner.

[14] There are no material internal contradictions or contradictions with
10 earlier statements and the demeanor of each was in my view also satisfactory.

[15] As far as the probabilities are concerned much the same applies. It was contended on behalf of the plaintiff when, that the probabilities favour his version to the extent that the defendant had attempted to make what appears to be a U-turn.

[16] On behalf of the plaintiff it was also submitted that the defendants version that the plaintiff had unexpectedly veered on to the incorrect side of the road is improbable. Both versions have a degree of improbability to it, but it is not of such a nature that I can on that basis alone find in favor of
20 either party on the probabilities.

[17] As I have indicated since the plaintiff bears the *onus* of proof he has in my view not succeeded in discharging that *onus*.

[18] In the result the plaintiff's claim is dismissed with costs.

MILLER AJ

ON BEHALF OF THE PLAINTIFF:

Mr. Elago

INSTRUCTED BY:

Shikongo Law Chambers

ON BEHALF OF THE DEFENDANT:

Mr. Erasmus

INSTRUCTED BY:

Francois Erasmus & Partners