REPUBLIC OF NAMIBIA

CASE NO. I 4262/2010

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION

In the matter between:

POPFACE PROPERTIES CC **Plaintiff**

and

J K E BEILER **First Defendant**

S W SCHNEBEL **Second Defendant**

CORAM: **VAN NIEKERK, J**

Heard: 21, 22 November 2011

Delivered: 5 September 2012

JUDGMENT

VAN NIEKERK, J: [1] The plaintiff instituted action against the two defendants jointly and severally for damages arising from a motor vehicle collision which allegedly occurred on 26 May 2010 on the tarred service road leading past the Brakwater Shopping Centre north of Windhoek. In its particulars

of claim read with the further particulars the plaintiff alleges that the collision occurred between its motor vehicle, a Toyota Hilux bakkie with registration number N8382W driven by Mr J M P Haufiku and "a Suzuki Samurai motor vehicle with registration number N85779W, then and there being driven by the Second Defendant with the necessary permission from the First Defendant."

[2] In paragraph 6 of the particulars of claim the plaintiff avers as follows:

> "6. The sole cause of the collision was the negligent driving of the Second Defendant in that he, *inter alia*:
>
> 1. failed to take cognisance of plaintiff's oncoming vehicle;
> 2. entered Plaintiff's lane at a time when it was dangerous and inopportune to do so;
> 3. failed to apply his brakes timeously or at all;
> 4. drove at an excessive speed in the circumstances;
> 5. failed to avoid a collision when he could have and should have done so.

[3] In paragraph 7 of the particulars of claim there is an averment that the plaintiff's vehicle was damaged beyond economical repair as a result of the second defendant's negligence and details are given of how the damages are made up. Apart from alleging in paragraph 8 that the defendants, despite proper demand, refuse and/or neglect to pay the damages, no further averments are made against the first defendant.

[4] The defendants entered appearance to defend. In their amended plea they *inter alia* state in paragraph 3 that a collision occurred on the said date between plaintiff's vehicle and a truck with registration number N65751W which was stationary next to the intersection. They deny that any collision whatsoever

occurred between the plaintiff's vehicle and the first defendant's vehicle at the time driven by the second defendant.

[5] The defendants further deny the allegations contained in paragraph 6 of the particulars of claim and in particular that the second defendant was negligent in any way or that he caused the collision, even if he be found to be negligent. They plead that the collision was caused by the driver of plaintiff's vehicle, who was allegedly negligent in one or more of the following respects, namely (i) he failed to keep a proper lookout; (ii) he failed to apply his brakes timeously or at all; (iii) he failed to exercise proper or adequate control over his vehicle; (iv) he drove at an excessive speed under the prevailing circumstances. They further plead that if the Court finds that the second defendant was negligent and that his negligence caused the collision, then and in that event the defendants aver that the driver of the plaintiff' vehicle was also negligent and that his negligence contributed to the collision.

[6] The parties agreed before the trial that the citation of the parties, the plaintiff's *locus standi* and the quantum of the plaintiff's damages are not in dispute.

[7] In the pre-trial order it was determined that the following issues of fact are to be resolved during the trial: (i) whether the plaintiff's vehicle was involved in a collision with the first defendant's vehicle driven by the second defendant (ii) whether the second defendant's negligence caused the collision and/or damage to the plaintiff' vehicle; and (iii) whether the negligence of the driver of the plaintiff's vehicle caused or contributed to the collision.

[8] The pre-trial order determined the issues of law to be resolved during the trial to be (i) whether negligence, if any, on the part of plaintiff's driver entitles the defendants to indemnification without joinder of the plaintiff's driver; and (ii) whether the plaintiff sets out sufficient averments in its particulars of claim to sustain a cause of action against the first defendant. (The second issue was added by the Court.)

[9] Before I turn to the evidence it is convenient to deal with the second issue of law at this stage. The vicarious liability of a vehicle owner who is not the driver is conveniently summarized by Neethling, Potgieter, Visser, Law of Delict, (5th ed) at p344 as follows:

> "Where a motor car owner allows someone else (who is not his employee) to drive his car and the driver negligently causes an accident, the owner is fully liable for the loss provided that the following three requirements are met: (a) the owner must *request* the driver to drive the vehicle or *supervise* his driving; (b) the vehicle must be driven in the *interest of the owner*; and (c) the owner must retain a *right (power) of control* over the manner in which the vehicle is driven."

[10] As I understand it, Mr *Erasmus* for the plaintiff conceded after presenting argument on the issue that, apart from the allegation that the second defendant drove the vehicle with the permission of the first defendant, no other allegations regarding vicarious liability of the first defendant are made. As such the particulars of claim do not sustain any cause of action against the first defendant. I agree with Mr *Vaatz* for the defendants that the claim against the first defendant should be dismissed, but in my view an exception should have been raised timeously. The matter was also already raised at early stage by the

Court during case management. The first defendant's costs will therefore be limited.

[11] Before evidence was led an inspection *in loco* was held at the scene. It is common cause that the scene of the alleged collision is located at a place called Brakwater Shopping Centre where a side entrance from the shopping centre running from east to west enters the tarred main service road between Windhoek and Brakwater, running along the north/south axis. The intersection is in the shape of a T with the long leg of the T running roughly from east-north-east to west-south-west. There is a stop sign on the left side and a stop line painted on the road surface, indicating to a driver driving from east to west and entering the service road that he or she should stop at the intersection. To the north of the intersection the service road goes straight for a short distance and gently uphill for about 250 paces, where after it makes a curve towards the northeast while continuing to climb. North of the intersection along the side of the southbound lane of the service road there are two *prosopis* trees a short distance apart. During the inspection *in loco* they had been cut back, but the second defendant testified that on the day of the alleged collision, these trees were much higher and also wider in their circumference, which led thereto that his view of the curving road to the north was obscured. The speed limit along the service road was 90kph.

[12] The plaintiff called the driver of its vehicle, Mr Haufiku, to testify. His testimony, in summary, is this: On the date in question he drove the plaintiff's vehicle on the service road from north to south in the direction of Windhoek. His brother and sister were passengers in the vehicle. The Toyota bakkie, a single cab, had a canopy on the back, on which was loaded a large roll of cable. He

drove at a speed of about 60kph, but slowed down to 50 - 40kph just before the collision. He observed the first defendant's Suzuki stationary at the stop street at the intersection. The driver of the Suzuki then moved forward slowly into the southbound lane, i.e. the lane in which Mr Haufiku was travelling. Mr Haufiku hooted and moved to his right with part of the Toyota in the opposite lane, but the Suzuki continued forward and collided with its front bumper against the plaintiff's bakkie between the left rear wheel fender and the left door. Mr Haufiku lost control and the Toyota overturned on its right side. It slid across the road and hit a truck that was stationary just to the south of the intersection on the left side of the lane in which the Toyota was travelling. The truck was halfway on the gravel shoulder of the service road and halfway on the tarred surface of the surface road, facing in a southern direction. The distance between the point of impact with the Suzuki to where the truck was standing was about 20 metres.

[13] Mr Haufiku was injured but managed to get out of the bakkie. He then noticed that the Suzuki was no longer at the scene. It is common cause that the second defendant drove away from the scene in a northern direction along the service road. According to Mr Haufiku police officers who happened to be close by in a police vehicle travelled in the direction that that the second defendant drove and later brought him back to the scene. Later Sergeant Hangula of the Namibian Police arrived and took down statements from the three drivers.

[14] A rough sketch plan (Exhibit "A") was handed in on which point X indicates the point of impact between the Toyota bakkie and the Suzuki. This point is at the intersection about in the middle of the southbound lane, i.e. the lane in which Mr Haufiku was travelling.

[15] Sergeant R S Hangula of the Namibian Police testified that he was called to the scene on 26 May 2010. He observed that the bakkie had collided with the truck. The vehicles had not been moved by the time he arrived. The second defendant was also at the scene. Sergeant Hangula interviewed the three drivers and wrote down their explanations on a pro forma form. Later at the police station he copied the explanations and other information recorded at the scene on an official Namibia Road Accident Form which was handed in as Exhibit "C". The explanation he recorded from the second defendant reads as follows:

> "According to Mr S W Schnebel he was driving a Suzuki reg N 85779 W entering service road from the Brakwater Bullewater turning right facing northern direction. He collided with the vehicle that was coming from the north reg N 8382 W and my vehicle got damaged in front."

[16] On 4 June 2012 Sergeant Hangula obtained the second defendant's warning statement (Exhibit "D") in which the latter stated the following:

> "On 26.05.2010 at about 13h00 I was driving out of the super market with my vehicle registration N 85779W Suzuki at the intersection with services road, before I entered the main road I checked both side (sic)and it was clear. I checked again and show *(sic)* big rolly *(sic)* (truck) approaching from the northern direction. At the same time I was entering the road turning right the the *(sic)* truck collided slightly with my vehicle. The Toyota VXTI N8382W that was also coming from the northern direction swerved and lost control and collided into the truck. The one driver came out and asked me if I was alright."

[17] When it was suggested to Sergeant Hangula during cross-examination that he might have made a mistake when he was recording the second defendant's explanation in the *pro forma* form, he most firmly answered in the

negative. He confirmed Mr Haufiku's evidence that the bakkie had overturned on its right side and then slid on its side to collide with the truck.

[18] This concluded the plaintiff's case.

[19] The second defendant was the only witness for the defendants. His evidence in chief and under cross-examination is summarized as follows. He testified that he stopped at the stop sign, intending to turn right into the service road. He looked north. His view was obstructed by the two trees, the closest of which was about 50 metres away. He entered the service road and when he was about 1 metre over the stop line, a truck appeared from the north from behind the trees. The second defendant stopped immediately about halfway into the southbound lane of the service road. The truck swerved, but a slight collision occurred between the front of the Suzuki and the rear left tyre of the truck. The truck came to a standstill at point C about 20 metres away on the left of the intersection. The second defendant left the Suzuki at the point (XX on Exhibit "F") where it collided with the truck. He explained that he did not think about moving it out of the way at the time. The second defendant got out of the Suzuki. A person who he thinks was the driver of the truck asked him if he was alright. The second respondent replied in the affirmative. The damage to the Suzuki was slight. At that stage the second defendant did not notice that the number plate had been ripped off.

[20] He got back into the Suzuki. He then looked north and then south, but observed no oncoming traffic. He then pulled away without looking north again and entered the lane running from south to north. He was already completely in that lane (at point XXX on Exhibit "F") but with his vehicle facing about north-

north-west when he observed a white vehicle for the first time about 20 metres away (at point Y on Exhibit “F”) travelling in the same lane from north to south. As I understand his evidence he did not realize at the time that it was the Toyota bakkie. However, in the witness box he accepted that it was indeed the Toyota. It swerved left and passed the Suzuki on its left side. The Toyota travelled at a very high speed which he estimated to be at least 90kph. The second defendant continued to explain in greater detail that the Toyota moved more to the west, while he moved more to the east. In fact, he was under the impression that the Toyota actually went onto the gravel shoulder on the western side, but that it could not go further west because there was a metal railing. Curiously, he stated that the Toyota passed his vehicle on the left side at point Z. This point is further north away from point Y where the Toyota was when he first saw it at point Y. This does not make any sense although the second defendant was given an opportunity to mark the point on Exhibit “F”. It was not clarified in re-examination and during oral argument at the end of the case Mr *Vaatz* was unable to explain his client’s evidence on this aspect. It would have made sense if the second defendant first saw the Toyota when it was at Z, and that it passed him at point Y, but this is not the second defendant’s evidence.

[21] According to the second defendant, no collision occurred between his vehicle and the Toyota. The second defendant continued driving to the plot where he resides about 3 km away. He then noticed that the vehicle’s number plate was missing and decided to return to the intersection to look for it. At the scene he observed many police officers. The truck was still at the place where he had left it. He denied that the Toyota was at the scene.

[22] He explained that the reason that his first explanation to Sergeant Hangula is different to the later explanation and to his testimony is because Sergeant Hangula asked him if there had been a collision between his vehicle and “the Toyota”. The second defendant thought that “the Toyota” was the truck. He thereupon gave an explanation of what had occurred between him and the truck, while Sergeant Hangula thought that he was talking about the bakkie.

[23] During cross-examination he further explained that the reason why paragraph 3.1 of the initial plea by the defendants had admitted the allegations in paragraph 5 of the particulars of claim was also because he thought all along that the reference to a Toyota motor vehicle was a reference to the truck. He also testified that he had not consulted with the erstwhile legal practitioners for the defendants who drafted the initial plea. When it was pointed out to him by counsel for the plaintiff that the summons refers to a Toyota Hilux and not to a truck or lorry, he readily acknowledged that he should have read the summons more carefully.

[24] He was also confronted with the contradiction in Exhibit “D” and his testimony concerning the driver who asked him if he was alright. According to Exhibit “D” this occurred after the incident with the bakkie, but according to his testimony, this occurred before the incident with the bakkie. He explained that the sequence as stated in his testimony is the correct sequence, but could not adequately explain why the wrong sequence was given in Exhibit “D”, except that he did not think this detail to be important. Although the second defendant may have been confused at the scene, he certainly had no reason to be confused when the warning statement was taken down.

[25] He further explained that the sentence in Exhibit “D” which reads, “The Toyota VXTI N8382W that was also coming from the northern direction swerved and lost control and collided into the truck” was based on what he had learnt later and on assumption. He did not state when had learnt this, but I understood that he allegedly did not know this yet at the time that he gave his first explanation to Sergeant Angula at the scene.

[26] While I accept that the second defendant may not have known that the reference to “the Toyota” was a reference to the bakkie and not to the truck, I must mention, as was emphasized by Mr *Erasmus* during submissions, that it was never disputed by defendant’s counsel during cross-examination of the plaintiff’s witnesses that the Toyota was still exactly in the same position where it had collided with the truck while Sergeant Hangula and the second defendant were at the scene. Not only is it highly probable that this was indeed the case, I find that there is no reason to doubt Sergeant’s Hangula’s testimony on this point.

[27] An aspect of the second defendant’s evidence which I find improbable is his evidence that he was not aware of any collision apart from the one between him and the truck. His explanation of what had occurred after he collided with the truck is relevant here. On this explanation he had an incredibly close shave with the Toyota in what could only be described as a hair-raising experience. Nevertheless, on the second defendant’s version he then continued driving towards his plot, blissfully unaware of what was happening behind him. Even if I take into consideration the second defendant’s advanced age and that he was hard of hearing and that he might not have heard any collision, I find it improbable that he did not even look behind him to see what was happening after the Toyota had passed him. Indeed, the second defendant himself testified that

he time and again asked Sergeant Hangula why there were so many police officers at the scene and that he stated to Hangula that there must have been two collisions, but that the latter never answered him. Apart from the fact that this version was also not put to Sergeant Hangula during cross-examination, this evidence does indicate a greater extent of knowledge about what had occurred than the second defendant was willing to admit. Furthermore, in the light of my finding that the Toyota was still at the scene when the second defendant returned, I find it improbable that the second defendant did not put two and two together.

[28] The second defendant's explanation for why the Toyota overturned is the following: He assumed that the Toyota saw two vehicles, i.e. the truck and the Suzuki, blocking his way when he came around the curve and down the hill. He went into the opposite lane to avoid them, but then the second defendant moved into that lane. The driver of the Toyota was driving at a very high speed and over-reacted to the situation and therefore overturned the vehicle. When it was put to him that it was the fact that the Suzuki collided with the Toyota that caused it to overturn, he stated that it was impossible, as such a collision would have moved the Toyota more west and not east towards the truck.

[29] In my view it is not necessary to determine whether it was the collision only which caused the plaintiff's vehicle to overturn. On the second defendant's evidence he was stationary in the Toyota's lane and moved forward further into that lane while his view to the right was obscured by the trees. In spite of the fact that he just before had a slight collision with the truck which should have made it very clear how dangerous the intersection is, he pulled away from his position after looking only right and then left. In the circumstances he should have looked

to the right again before pulling away. This fact and the fact that he only saw the Toyota for the first time when it was 20 metres away clearly indicate that he did not keep a proper lookout and entered the service road without making sure that it was safe to do so, as was his duty to do. Mr *Vaatz*, correctly in my view, conceded that the second defendant was negligent in this respect and created a dangerous situation for Mr Haufiku.

[30] However, he submitted that it is unlikely that a collision between the Toyota and the Suzuki had occurred as the Suzuki was only slightly damaged and as a collision would have pushed the stationary Suzuki to the left, of which there is no evidence. However, I do not agree. The fact that the Suzuki had slight damage does not mean that there was no collision. The issue of the Suzuki being pushed to any side is in my view mere speculation. In contrast to the second defendant Mr Haufiku gave his evidence in a clear and straightforward manner. The photographs he produced in evidence show clear damage on the Toyota which fits in with the description he gave of where the Suzuki hit the bakkie. In the circumstances I am of the view that the plaintiff has proved on a balance of probabilities that a collision did occur between the Suzuki and the Toyota.

[31] Mr *Vaatz* submitted that Mr Haufiku was also negligent to a major degree and contributed by far the greatest degree to the plaintiff's damage. He submitted that Mr Haufiku must have had a clear view of the road ahead and drove too fast in the circumstances, bearing in mind the heavy load he had on the bakkie. He submitted that Mr Haufiku's evidence that he drove 60 kph is improbable as the speed limit is 90kph and there was no reason for him to drive so slowly on that stretch of road. When Mr Haufiku saw that there was an

obstruction in the road, he should have slowed down substantially, which he failed to do. It was his speed combined with the heavy load which caused the Toyota to overturn and collide with the truck. As such, counsel submitted, there should be an apportionment of damage with the minor part attributed to the negligence of the second defendant.

[32] Mr *Erasmus* on the other hand submitted that even if Mr Haufiku drove at the speed of 90kph as estimated by the second defendant, he still drove within the speed limit. Moreover, there was no duty on Mr Haufiku to adjust his speed as he was entitled to assume that the second defendant would not enter the service road when it was not safe to do so. I agree with this submission and conclude that there was no negligence on the part of Mr Haufiku.

[33] As a result of my finding it is not necessary to deal with the first issue of law set out in the pre-trial order.

[34] The result in this matter is, then, that the plaintiff's claim against the first defendant is dismissed with costs, which costs shall be limited as if the first defendant excepted to the plaintiff's claim. In respect of the second defendant judgment is given for the plaintiff in terms of prayers 1, 2, and 3 of the particulars of claim.

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VAN NIEKERK, J

Appearance for the parties

For the plaintiff: Mr F G Erasmus

(Francois Erasmus and Partners)

For the defendants: Mr A Vaatz

(Andreas Vaatz & Partners)