

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: I 1851/2014

In the matter between:

**DIONGENSIUS JOSEF**

**PLAINTIFF**

And

**HENOCK KAKUKULWA HAINDOBO**

**DEFENDANT**

**Neutral citation:** *Josef v Haindobo* (I 1851-2014) [2015] NAHCMD 263 (05 November 2015)

**Coram:** UNENGU AJ

**Heard:** 20 April 2015; 06 - 08 July 2015; 04 August 2015

**Delivered:** 05 November 2015

**Flynote:** Civil Practice – Trial – plaintiff sued defendant for damages on his motor vehicle resulting from a collision with defendant's motor vehicle – The court rejecting the evidence of the defendant – found in favour of the plaintiff and granted the relief sought in the particulars of claim with costs.

**Summary:** Civil Practice – Trial – The plaintiff sued the defendant for damages on his motor vehicle arising from a collision of his motor vehicle and that of the defendant – After a trial, the court rejected the evidence of the defendant as false and found in favour of the plaintiff and granted the relief sought in the particulars of claim.

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### ORDER

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- (i) The defendant pays the plaintiff the amount of N\$54 459.37.
- (ii) Interest on the aforesaid amount at the rate of 20% per annum, calculated from date of judgment to date of payment; and
- (iii) Costs of suit, which costs to include costs of one instructing and one instructed counsel.

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### JUDGMENT

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UNENGU AJ:

### BACKGROUND

#### The pleadings

[1] The plaintiff instituted an action against the defendant for damages suffered by the plaintiff during a collision between his motor vehicle and that of the defendant.

[2] It is not in dispute that the plaintiff was the owner of a 2005 Toyota Hilux 2.0 [V.....] motor vehicle with registration number [N 1..... S]. On 29 March 2013 and at Ongwediva, a collision occurred between plaintiff's aforesaid motor vehicle and a

white Toyota motor vehicle, with registration number [N.....], then and there driven by the defendant. It is further not disputed that plaintiff suffered damages in the amount of N\$54 459.37.

[3] The plaintiff alleged that as a result of the negligence of the defendant the plaintiff's motor vehicle was damaged beyond economical repair and that the plaintiff suffered damages in the amount of N\$54 459.37 being the difference between the fair and reasonable value of plaintiff's motor vehicle prior to the collision amounting to N\$68 899.12, less the salvage value of N\$ 12 839.75 and the missing spares amounting to N\$1 600.00.

[4] The plaintiff further alleged that the sole cause of the collision was the negligent driving of the defendant in that he *inter alia*; failed to notice plaintiff's approaching vehicle; crossed into and entered plaintiff's right of way at a time when it was dangerous and inopportune to do so; drove at an excessive speed in the circumstances; failed to apply his brakes timeously or at all; and failed to avoid a collision when he could have and should have done so.

[5] Plaintiff then prayed for judgment against the defendant for payment of N\$54 459.37; interest on the aforesaid amount at the rate of 20% per annum, calculated from date of judgment to date of final payment; and costs of suit.

## **Plea**

[6] The defendant denied that the collision was caused solely as a result of his negligent driving because the plaintiff's motor vehicle came to bump his vehicle on his lane which came from Oshakati to Ongwediva; he denied that he had failed to notice the plaintiff's approaching vehicle because he saw the plaintiff's motor vehicle when it was standing at the robots and when it was leaving the robots heading to Oshakati; the defendant denies that he drove his motor vehicle negligently because he was driving it at 20 kilometers per hour while approaching the robot and that his vehicle was bumped by the plaintiff's motor vehicle.

[7] The defendant pleaded further that his motor vehicle was bumped by the plaintiff's motor vehicle at the place and on his lane where his motor vehicle was found standing by the police, the plaintiff's driver and other members of the public as shown by the police sketch plan. He pleaded further that the collision did not take place in the lane of the plaintiff's motor vehicle as shown by the police sketch plan. That the plaintiff's motor vehicle came to stop behind his motor vehicle, that is on his lane of the road, as per sketch plan.

[8] The defendant denied having crossed into and entered plaintiff's right of way at a time when it was dangerous and inopportune to do so because he did not enter the plaintiff's right of way or lane and his motor vehicle has been travelling on its lane from Oshakati up to the place where it was bumped.

[9] The defendant further denied having failed to apply his brakes timeously or at all because there was no time to apply brakes for plaintiff's motor vehicle suddenly hit his vehicle resulting in the damage of N\$61 819.53 as a result of plaintiff's negligent driving.

[10] The defendant denied having failed to avoid a collision when he could have and should have done so because, according to him, the plaintiff's motor vehicle suddenly hit his motor vehicle. The defendant also denied having received any letter of demand from the plaintiff or his legal representative and prayed that the damage caused to the plaintiff's motor vehicle as stated in the particulars of claim was not caused by his negligence.

## **Evidence**

### **Testimony of Mr Simon Simon**

[11] He testified that he was driving a 2005 Toyota Hilux 2.0 motor vehicle with registration number N 10667 S belonging to the plaintiff. The plaintiff had lent him the vehicle to travel to Ovamboland.

[12] He was traveling from Ondangwa towards Oshakati on the main road approximately 00h43 at night and was dark as a result. The lights of his vehicle were on and the vehicle was therefore clearly visible to all oncoming traffic.

[13] He testified that he was just about to accelerate the vehicle from the robot controlled intersection and was traveling at about 60 kilometres per hour. The road was very quiet as it was late at night about 300 metres away from the robot controlled section he noticed a Toyota VVTi vehicle, driven by the defendant, driving in the bush on the right hand side of the road surface. The vehicle was moving towards the road surface at a slow speed. As the lights of the vehicle he was driving were turned on, he was not concerned about the defendant as his vehicle was clearly visible for him to see.

[14] He testified that as the defendant neared the road surface, he suddenly turned onto the road surface just as he was about to pass the defendant. He was at that time travelling in the left hand lane of the road. Whilst turning onto the surface, the defendant encroached into the lane in which he was traveling and collided with the right side of his vehicle. At the time the rear-end of the defendant's vehicle was still partially off the road surface.

[15] He testified that due to the fact that the defendant swerved so suddenly onto the road surface and entered the lane in which he was travelling, it was not possible for him to apply brakes or swerve to the left to avoid the collision.

[16] He testified further that when the vehicles came to a standstill, the defendant apologised to him for the collision and told him that he was a bit drunk. He said: *'when I looked at him, the way he was talking I could see that he was under the influence of alcohol'* .Both the plaintiff and the defendant were tested for alcohol at the scene and his (Simon) results were negative. When he went to give his statement to the police the following morning, he saw the defendant was still held by the police in one of their holding cells.

[17] Mr Simon was cross-examined extensively by Mr Haindobo on how the accident happened. He spent more time on how his vehicle came onto the road according to him. However, he failed to cross-examine the witness about his evidence that he (Mr Haindobo) was arrested and taken to the charge office and detained there. A question was put to the witness by Mr Haindobo in this fashion: *'Let me put it to him that I was not drunk and I was moving perfectly and I was talking perfectly. The witness answered: 'My answer is that if you were not drunk then you were not supposed to be taken to (sic) along with the police and to sleep there'.* Mr Haindobo did not follow up this question nor denied being taken along by the police and slept at the police station for being drunk.

**Constable Hans Shigwedha:**

[18] He testified that he has been a police officer for 7 years, that when he arrived at the scene of the accident, he found the traffic officers were already at the scene. It took him approximately 20 minutes to arrive at the scene. While at the scene, he compiled a rough sketch of the accident scene (exhibit D). He confirmed that the point of impact was in the left lane. He testified that he was aided by the drivers of the vehicles in question to prepare the rough sketch plan. He asked both drivers to show him the point of impact, and recalled that Mr Simon showed him the point of impact, however Mr Haindobo, the defendant, at that point, was very quiet, and did not say anything concerning the point of impact. He testified further that there were a bit of glasses and oil or water at the point he was pointed out and proceeded to mark the point as the point of impact. He confirmed that Mr Haindobo did not deny the point of impact at the scene. He testified that he did not observe any break marks at the scene of the accident.

[19] Constable Shigwedha further testified that after preparing the rough sketch, he did all his preliminary investigations. He testified that Constable Joshua Wading, a traffic officer at the scene called both drivers and conducted breathalyser tests. He further testified that the defendant's reading was over the legal limit for him to drive a motor vehicle with the required skill.

[20] He prepared Exhibit C, the second sketch plan the next day, 30 March 2013 with reference to the rough sketch he drew up the previous morning at the accident scene.

[21] He testified further that the damage to the plaintiff's vehicle was on the front side of the right side and the damage to the defendant's vehicle was also to the right front side of the vehicle.

[22] During cross examination constable was asked to explain why there was a difference with regard the point of impact on his rough sketch and the second sketch of the scene of the accident, further why he changed the "X" and put it behind his motor vehicle to be on the side of the other driver instead of being parallel? The witness responded that it was a rough sketch and that it was not precise to the point.

[23] It was also further put to him that he changed the point of impact to where it was not supposed to be on exhibit C'? His response was yes.

[24] When put to him again that the point of impact was in his lane, the witness responded: *'no the point of impact was on the other side which is not your lane'*.

[25] It was further put to him as follows: *'it was not on my lane that is why your sketch plans you have contradictory points of the lane for the point of impact'... the witness responded: 'but even though, the point of impact on both the sketch plan area still on the other lane, they are both on the same lane'*.

[26] Witness conceded that he did not have formal training on how to prepare a sketchplan but did the best he could to prepare the sketch.

### **Testimony of Ms Ester Ndahafa Ndeutapo**

[27] She confirmed that she was a passenger in one of the vehicles involved in the said accident on 29 March 2015. She testified that she was on her way from Swakopmund to Ongwediva, and was seated in front on the passenger side. She testified that when the accident occurred she saw a white Toyota bakkie entering the road from the right side of the road on an emergency situation, because it entered the road fast, and heard a bump on their vehicle. The accident happened in the lane where their car was traveling. She further testified that the defendant appeared to be under the influence of alcohol. This she could see from the way the defendant was moving. The witness was also cross-examined by the defendant. However, the witness stood by her evidence-in-chief.

#### **DEFENDANT'S CASE**

[28] In his evidence Mr Haindobo repeated what he stated in the pleadings and said that the road was busy on the day of the incident. He testified that his and the plaintiff's motor vehicles were involved in a collision on the main road, namely Oshakati Ongwediva road on 29 March 2013. He testified that the collision was caused by the negligent driving of the plaintiff's driver, because the plaintiff's motor vehicle came to bump his car on his lane, which came from Oshakati to Ongwediva. He further testified that he noticed the plaintiff's approaching vehicle, because he saw it standing at the robots and when it was leaving the robots heading to Oshakati.

[29] He testified further that he did not drive his vehicle negligently, because he was driving it at 20 km/per hour because he was approaching the robot and that at the time his vehicle was bumped by the plaintiff's motor vehicle, he did not drive from the bush, because there were no bushes on the side of the road.

[30] He testified that his vehicle was bumped by the plaintiff at his lane where his vehicle was found standing by the police as clearly shown by the sketch plan. The collision did not take place on the lane of the plaintiff. He did not suddenly turn into the road surface as the plaintiff's motor vehicle was about to approach his vehicle. After the collision, the plaintiff's motor vehicle came to a stop behind his vehicle on



his lane. At the time of the collision the rear end of his motor vehicle was not partially off the road surface. The motor vehicle did not swerve so suddenly into the road surface to enter the lane where the motor vehicle of the plaintiff was travelling. He never apologised to Mr Simon about the collision and he never told him that he was drunk. He further testified that he was not driving negligently or under the influence of alcohol.

[31] He further testified that he did not cross into or enter the plaintiff's right of way at the time it was dangerous and inopportune, because his vehicle had been travelling on its lane from Oshakati up to the place where it was bumped by the plaintiff's motor vehicle.

[32] Mr Haindobo was a poor witness compared to the witnesses called by the plaintiff. Witnesses called by plaintiff including the police officer appeared to be not educated people like the defendant, but acquitted themselves well in their testimony and during cross-examination. They did not deviate from their evidence-in-chief even though, at times, they did not give satisfactory answers to questions put to them during cross-examination. Mr Haindobo alleged that the witnesses for the plaintiff contradicted themselves with regard the point of impact. However, when asked to point out the contradictions in the testimony of the witnesses, he failed to point out such contradictions in the evidence of the witnesses. Only after a lengthy explanation by Mr Van Zyl that Mr Haindobo conceded that all testified that the point of accident (impact) was in the left lane. He again failed to give satisfactory explanation why only him was required to pay bail the following morning.

[33] After the cross-examination of Mr Haindobo, the matter was postponed for the parties to prepare and file written heads of argument. Both Mr Van Zyl and Mr Haindobo complied and written heads of argument were filed as directed. The defendant, Mr Haindobo elected not to give oral submission while his colleague Mr Van Zyl did.

[34] As previously said in the judgment, the plaintiff in his particulars of claim has alleged that he had suffered damages in the amount of N\$54,459.37 arising from a collision of his vehicle and the vehicle driven by the defendant, that the collision occurred as a result of the negligent driving of the defendant. Therefore, he has sought from the defendant payment in the amount of N\$54,459.37, interest on the aforesaid amount at the rate of 20% per annum, calculated from date of judgment to date of payment; costs of suit and further and/or alternative relief.

[35] In his plea, the defendant has denied negligence and prayed for the dismissal of the plaintiff's claim with costs. He (defendant) alleged further that he did not file a counter-claim because the damages he suffered in the collision were paid by the insurance. Mr Haindobo did not elaborate whose insurance paid the damages and if his own insurance did, whether steps have been or will be taken to recover the amount paid from the plaintiff. It would seem from what transpired during the trial though that no steps have been taken by or on behalf of the defendant to recover the damages paid by the insurance.

[36] The pre-trial report as provided for in Rule 26(6) of the Rules of the High Court, was prepared and signed by the legal representative for the plaintiff alone without the input of the defendant. That being the case, issues contained in the pre-trial report are not binding on the defendant as he is not a party to the report. However, there are issues in the report which are not in dispute. These are the identity of the parties as cited, the jurisdiction of the court to hear the matter, that the plaintiff is the owner of the 2005 Toyota Hilux 2.0 [V.....] motor vehicle with registration N 8177 S, and 29 March 2013 at Ongwediva as the date and place of collision respectively. The damage suffered by the plaintiff to his motor vehicle in the collision is also not in dispute. The dispute is who, between the witness, Simon Simon and the defendant, Mr Haindobo caused the collision and whether or not it happened as a result of the negligent driving of Mr Simon or the defendant.

[37] It is trite law that negligence is tested objectively, on the standard of a reasonable man. In *Jones N.O v S.A.N.T.A. M, Bpk*<sup>1</sup>, it was held that a person is guilty of *culpa* if his conduct is short of that of the standard of the *diligens*

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<sup>1</sup> 1965 (2) SA 542 (AD) at 551.

*paterfamilias* – arising in any particular circumstances. Mr Van Zyl and the defendant in their written heads of argument also referred the court to *The Law on Collisions in South Africa* by H B Klopper 7<sup>th</sup> Ed p11 – where it is stated amongst others, that in order for a person to be liable for the damage resulting from the negligence, the act must be foreseeable and preventable. In this regard, the defendant further, referred to cases of *SANTAM v Zeal*<sup>2</sup> and *Botes v Van Deventer*<sup>3</sup> in which cases the principle of reasonable foreseeability of damages resulting from the negligent conduct or act and the taking of reasonable steps to prevent such damage from occurring, were discussed.

[38] In his heads Mr Van Zyl is of the view that there are two mutually destructive versions before court with regard the collision itself. Counsel has therefore, invited the court to consider and apply the principle set out in the matter of *National Employer's General Insurance Co. Ltd v Jagers*<sup>4</sup> where the following was said:

'In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do to the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.' I agree.

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<sup>2</sup> 1968 (4) SA 645 (A).

<sup>3</sup> 1966 (3) SA 182 (A).

<sup>4</sup> 1984 (4) SA 437 € at 440E-G.

[39] That there are two different versions on record, there is no doubt about it. The court will keep it in mind and will apply the guidelines laid down in the matter of *National Employer's General Insurance Co. Ltd v Jagers* above. Similarly, I shall also not forget that the court when evaluating and assessing the evidence, it must not do so piecemeal but must consider the evidence as a whole. (See *S v Hadebe* 1998 (2) SACR 22).

[40] As alluded to earlier in the judgment, Mr Haindobo was a poor witness. Instead of telling the court the facts of what happened, how and why the collision occurred, Mr Haindobo preferred to use his legal knowledge of traffic cases he had accumulated during his tenure of office for over a period of two decades as a deputy prosecutor-general to persuade the court that it was the other driver who hit his car. Not only that Mr Simon and Ms Ndeutapo corroborated each other on the point of impact to be in the left lane of the road where plaintiff's car was being driven, but also positive that Mr Haindobo was drunk or under the influence of alcohol and the cause of the collision. Constable Shigwedha who attended the scene of accident also observed that the point of impact of the two vehicles was on the left side of the road in the lane of the plaintiff's vehicle. It is the place where he observed some glasses and oil or water.

[41] The impression created upon me by the witnesses of the plaintiff was good and I believed what they were telling as the truth. I could observe from their demeanour that they were telling what they saw happening. They were credible, truthful and reliable witnesses in my opinion.

[42] The same cannot be said about Mr Haindobo. It is because he was either drunk or under the influence of alcohol that he did not know how the accident happened. Mr Haindobo in cross-examination of witnesses attempted to suggest that his neck or head was injured as a consequence of the accident. This could not, however, be confirmed by the accident report drawn up by the police. Meaning that he was not injured and holding his head when the police arrived on the scene of

accident. And if he was indeed injured in the accident, he did not tell the court why he did not inform the police on the scene of the accident about his injuries.

[43] There are so many improbabilities in the testimony of the defendant. The excuse he gives why he did not counterclaim is flimsy. He says that he could not claim from the plaintiff the damage he suffered in the collision because the insurance paid him but could not tell why the insurance did not recover the amount paid to him from the plaintiff if the plaintiff's driver was the cause of the collision? I find his evidence unreliable, false, incredible and therefore rejected. He was the source and cause of the collision in that he drove his vehicle negligently in one or all the other ways the plaintiff alleged in the particulars of claim; and is possible that the alleged causes of the collision were brought about by the fact that Mr Haindobo was drunk or under the influence of liquor, which diminished his driving skills and judgment.

[44] Behold, driving a motor vehicle while drunk or under the influence of intoxicating liquor is no difference from driving a motor vehicle negligently. There is an element of negligence in the driving of a vehicle under the influence of intoxicating liquor.

[45] In traffic cases like the present matter, if it were a criminal case, the defendant could have been charged with driving a motor vehicle on a public road negligently as the main charge and driving under the influence of alcohol in the alternative. In *S v Nekongo*<sup>5</sup> an accused was charged with and convicted of negligent driving and driving under influence of alcohol, on review, Maritz J set aside the conviction on drunken driving count and held that such a conviction on both negligent driving and driving under influence of alcohol amounted to a duplication of charges. I agree with the principle and approve of it.

[46] Having said that, it is my humble opinion that the plaintiff had managed, on a balance of probabilities, to prove his claim against the defendant as set out in the particulars of claim and grant him the relief sought.

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<sup>5</sup> 2001 NR 96 (HC).

[47] In the result, I make the following orders:

- (i) The defendant pays the plaintiff the amount of N\$54 459.37.
- (ii) Interest on the aforesaid amount at the rate of 20% per annum, calculated from date of judgment to date of payment; and
- (iii) Costs of suit, which costs to include costs of one instructing and one instructed counsel.

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E P UNENGU  
Acting Judge

## APPEARANCES

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