



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

Case no: I 3240/2015

In the matter between:

TATE-ATI KOMESHO

PLAINTIFF

and

HOFNI NEGONGA

DEFENDANT

Neutral citation: *Komesho v Negonga* (I 3240/2015) [2017] NAHCMD 171
(21 June 2017)

Coram: USIKU, AJ

Heard on: 13 – 14 March 2017

Delivered: 21 June 2017

Flynote: Damages – Motor vehicle collision – negligence – Two mutually destructive versions – Onus is on the Plaintiff to prove on the balance of probabilities that his version is to be believed.

Counterclaim – Damages – Negligence – Defendant should be the owner of the vehicle in question in order to claim damages from the Plaintiff.

Summary: The Plaintiff instituted action against the Defendant for damages occasioned to his vehicle. The Defendant filed a counterclaim in respect of which he alleges that the Plaintiff was the sole cause of the collision and that he has suffered damages as a result.

Held, that on the evidence the court is satisfied that the Plaintiff's negligent driving is sole cause of the accident and that the Plaintiff's claim is dismissed with costs.

Held, that a claim for damages must be sought by the owner of the motor vehicle so damaged. Accordingly, defendant's counterclaim is dismissed, as he has not proved the he suffered damages.

ORDER

1. The Plaintiff's claim is hereby dismissed and the Plaintiff is ordered to pay the Defendant's costs.
 2. The Defendant's counterclaim is hereby dismissed, each party to bear its own costs.
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JUDGMENT

USIKU, AJ:

Introduction

[1] On the 12 July 2017 at approximately 03h00 am, on the Ondangwa main road, opposite the Punyu Centre, a collision occurred between a motor vehicle with registration number N103-775 W, owned and being driven by the Plaintiff, and another motor vehicle with registration number N10474 SH, owned by certain Thomas Indji, but which was being driven by the Defendant.

[2] Both vehicles were travelling on the dual carriageway from the southerly direction towards the northerly direction. The Plaintiff's vehicle collided with the Defendant's vehicle at the rear-end on the left-side.

[3] The Plaintiff instituted an action for damages in the amount of N\$ 86 562.76 arising from the aforesaid collision, on the basis that the sole cause of the collision was the negligent driving of the Defendant.

[4] The Defendant, in turn, defended the action and lodged a counter-claim for damages in the amount of N\$ 8 636.50, arising from the collision, on the basis that the Plaintiff was the sole cause of the collision.

The Version of the Plaintiff

[5] The Plaintiff testified that on that fateful day he was travelling in the left lane of the dual carriageway. He observed the vehicle being driven by the Defendant in front of him, travelling in the right lane. The Plaintiff was driving at a speed of approximately 50 to 60 kilometers per hour, which was higher than the speed of the Defendant's vehicle. As the Plaintiff was about to pass the Defendant's motor vehicle, the Defendant suddenly swerved into the left lane, without prior indication of his intention to do so. The Plaintiff applied brakes and attempted to swerve to the left-side to avoid the accident, however, the Plaintiff's vehicle was already near the Defendant's vehicle and the front side of Plaintiff's vehicle collided with the left-side of the rear-end of Defendant's vehicle causing the aforesaid damage.

[6] The Plaintiff alighted from his vehicle. He noted that there were about four to five passengers in the Defendant's vehicle. The Defendant demanded that the Plaintiff pay him N\$ 3000.00 as in his opinion, Defendant believed the Plaintiff was the cause of the accident. The Plaintiff agreed to pay the N\$ 3000.00 to the Defendant because in this opinion, the Defendant and his passengers were aggressive towards the Plaintiff, and the Plaintiff feared for his well-being.

[7] During cross-examination, the Plaintiff conceded that he did not inform the Defendant after the accident that he was of the view that the Defendant caused the accident. The Plaintiff did not pay the N\$ 3000.00 he previously agreed to.

The version of the Defendant

[8] The Defendant testified that on the material day, he was travelling in the right-lane at a speed of approximately 40 kilometers per hour. While so driving, a speeding motor vehicle being driven by the Plaintiff approached from behind and rammed into the rear-end, left-side of Defendant's vehicle. The impact of the collision propelled the Defendant's vehicle over the pavement onto other side of on-coming traffic.

[9] The Defendant was travelling with three females and one male passengers. The Defendant alighted and approached the Plaintiff. The Plaintiff pleaded with the Defendant that the Defendant should not call the police and that the Defendant should "cut a deal" with the Plaintiff. The Defendant "demanded" that the Plaintiff pays him N\$ 3000.00, as the Defendant reckoned that such amount should be sufficient to cover the damage sustained to the Defendant's vehicle. Furthermore, the Defendant observed that the Plaintiff appeared off-balance, reeked of alcohol, and in his opinion, the Plaintiff was under the influence of alcohol.

[10] The Plaintiff agreed to pay the N\$ 3000.00, he however indicated that he has exceeded his daily bank-withdrawal limit and would only be able to make money-withdrawals once the banks open later that morning.

[11] The Defendant followed the Plaintiff to the Plaintiff's residence for the purpose of getting the money once the banks open. However, the Plaintiff later indicated he was not feeling well and needed medical attention, as result of the accident.

[12] The Defendant denies that anyone showed aggression towards the plaintiff and underlined that it was the Plaintiff who initiated that an amicable deal be struck between the Defendant and the Plaintiff.

[13] Mr Sebbi Asino, a witness called by the Defendant, corroborated the Defendant's version in material respects. He testified that he was a passenger in the Defendant's vehicle, and while travelling in a straight lane, a motor vehicle driven by the Plaintiff hit their vehicle from behind. The Defendant and Mr Asino alighted and approached the Plaintiff. Mr Asino noticed that the Plaintiff's vehicle was severely

damaged on the front right-side. When the Plaintiff got out of his vehicle, Mr Asino observed the Plaintiff stumbled, was shaking and appeared to be in a state of shock. The Plaintiff also smelt of alcohol and Mr Asino was of the view that the Plaintiff was drunk. Later on, Mr Asino went back to their vehicle, and the Defendant later on informed him that the Plaintiff and the Defendant agreed that the Plaintiff shall pay the Defendant N\$ 3000.00 in full and final settlement of the incident.

Analysis

[14] The Plaintiff and Defendant informed the court that the quantum of damages claimed is no longer an issue between the parties, as they have settled that aspect themselves. The court should therefore only deal with the issue of liability i.e. whose driving between the Plaintiff and the Defendant was negligent and therefore caused the accident.

[15] As can be seen above, the version of the Plaintiff and the Defendant are mutually destructive. It is trite law that where there are two mutually destructive accounts, the Plaintiff may only succeed if he satisfies the court on a preponderance of probabilities that his version is true and therefore acceptable and that the Defendant's version is false or mistaken and falls to be rejected.¹

[16] On the evidence, I find that the probabilities favour the version of the Defendant, that he was travelling in the right lane and did not swerve into the left lane. Had the Defendant swerved into the left lane, as alleged by the Plaintiff, then in all likelihood, the foremost part of his vehicle that would have protruded first into the left lane, would have been the frontal part, not the rear-part. In such a scenario, if the Plaintiff had swerved to the left and braked to avoid the accident, as he alleged, then the Plaintiff would have collided with the left side of the Defendant's vehicle, not the hind-part.

[17] In addition, there is evidence that the Plaintiff agreed to pay the Defendant N\$ 3000.00 in full and final settlement of any claim that the Defendant might have

¹ *Mugunda v Wilhelmus* (I2354/2014) [2015] NAHCMD 149 (Unreported) delivered on 25 June 2015 par: 12.

had against the Plaintiff. The undertaking to pay, in the circumstances, amounts in my opinion, to a tacit acknowledgement of liability². On his version, the Plaintiff never disputed liability for the accident at the scene and was content to undertake to make payment in the amount demanded, which undertaking he later reneged on. On the evidence, there is no indication that the Plaintiff was threatened or coerced before he undertook to pay. All indications are that he tacitly accepted liability for the accident and willfully agreed to pay for the damage caused to the Defendant's vehicle.³ On this score as well, the probabilities favour the version of the Defendant, and I accept the version of the Defendant as the correct version.

[18] In view of the fact that I accept the version of the Defendant as the correct version, I find that the accident is attributable to the negligent driving of the Plaintiff, in that the Plaintiff did not show reasonable consideration to the Defendant who was driving on the same road. Furthermore, the Plaintiff did not in the circumstances keep a proper look out and drove onto the lane being used by the Defendant thus causing the accident and the Plaintiff's negligence was the sole cause of such accident. The Plaintiff's claim, therefore, falls to be dismissed with costs.

Defendant's counter-claim

[19] Insofar as the counter-claim is concerned, it is common cause that the Defendant is not the owner of the motor vehicle with registration number N 10474 SH.

[20] It is trite law that it is only the owner of the property that may claim for damages in respect of harm occasioned to his property. The Defendant is not the owner of the vehicle in question, and cannot therefore claim damages in respect of the collision, and the counter-claim is therefore dismissed. In view of my finding that

² See HP Klopper: *The Law of Collisions in South Africa*, 8th edition, at page 150 where the learned authors opine that a tacit admission of liability may be used as evidence to prove negligence.

³ See: *Sinfwa v Shipahu* (I1326/2011) NAHCMD 127(16 May 2013) (Unreported) where the court held that the agreement between Defendant and Plaintiff whereby Defendant undertook to repair Plaintiff's vehicle extinguished a cause of action based on delict and Plaintiff could not sue Defendant on basis of a delict which may have existed previously.

the Plaintiff's negligence was the sole cause of the accident, I do not deem it necessary to award any costs in regard to the counter-claim.

[21] In the result, I make the following order:

1. The Plaintiff's claim is dismissed and the Plaintiff is ordered to pay the Defendant's costs.
2. The Defendant's counter-claim is dismissed, and each party to bear own costs, in respect of the counter claim.

B Usiku
Acting Judge

APPEARANCES

PLAINTIFF

A Small
of Francois, Erasmus & Partners
Windhoek

DEFENDANT:

K Kamwi
of Sibeya & Partners
Windhoek

