



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case no: I 2444/2015

In the matter between:

SUSARA HELENA WENTZEL

PLAINTIFF

and

JOHN RUTABANZIBWA

DEFENDANT

Neutral citation: *Wentzel v Rutabanzibwa* (I 2444/2015) [2017] NAHCMD 195
(20 July 2017)

Coram: USIKU, J

Heard on: 29 March 2017 and 31 March 2017

Delivered: 20 July 2017

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

Summary: Plaintiff instituted action against Defendant for damages occasioned to her vehicle – Defendant denied liability – Court held that Defendant’s negligent driving was sole cause of the collision.

ORDER

1. Judgement is hereby granted for the Plaintiff for:
 - (a) payment in the amount of N\$ 70 316.00;
 - (b) interest on the aforesaid amount at the rate of 20% per annum, calculated from date of judgment to date of final payment;
 - (c) costs of suit.

JUDGMENT

USIKU, J:

INTRODUCTION

[1] In this matter the Plaintiff instituted an action against the Defendant for damages, arising out of a collision between a motor vehicle with registration number N31348W owned by the Plaintiff, and another motor vehicle with registration number N84269W owned and being driven by the Defendant.

[2] The collision occurred in Windhoek on the 14 March 2015, at approximately 19h00 on Nelson Mandela Avenue, just opposite Roof of Africa Guesthouse. The Plaintiff ‘s vehicle was being driven by her son, Mr Wayne Wentzel (“Mr Wentzel”) who was travelling along Nelson Mandela Avenue in a southerly direction, towards

Hidas Shopping Centre. The Defendant was driving from Roof of Africa Guesthouse into Nelson Mandela Avenue. The collision occurred on Nelson Mandela Avenue.

[3] The Plaintiff avers that the collision was solely caused by the negligent driving of the Defendant. The Plaintiff therefore claims damages in the amount of N\$ 78 416.00, being the difference between the fair and reasonable value of the Plaintiff's motor vehicle prior to the collision, amounting to N\$ 83 400.00, less the salvage value of N\$ 18 840.00, together with the fair and reasonable assessment fee in the amount of N\$ 650.00, and the fair and reasonable storage fees in the amount of N\$ 5 106.00, together with the fair and reasonable rental fees in the respect of a replacement vehicle for Plaintiff in the amount of N\$ 8 100.00.

[4] The Defendant defended the action and avers that the collision was solely caused by the negligent driving of Mr Wentzel.

The Version of the Plaintiff

[5] The Plaintiff testified that she is the owner of the vehicle that was being driven by Mr Wentzel. At the material time, she received a phone call from Mr Wentzel to the effect that he was involved in a car accident. She drove to the scene of the accident, where she found Mr Wentzel and the Defendant.

[6] According to her, the Defendant apologized to her and told her that the accident was his fault. She inspected the two motor vehicles. She observed that the damage on her vehicle was more serious than the damage on the Defendant's vehicle. The whole left-side of her vehicle, from the front-wheel to the back-wheel, was damaged.

[7] She further testified that she obtained the Defendant's contact details, and told him that she would contact him.

[8] When cross-examined, the Plaintiff deposed that in her view, Mr Wentzel was not intoxicated at the material time. At the scene of the accident, she had tried once to call the police, but she could not get any response. The following day Mr Wentzel, alone, went to report the accident to the police.

[9] Further, under cross-examination she related that she did not pay the N\$ 8 100.00 rental fees in respect of a replacement vehicle, however, a rental vehicle was provided to Mr Wentzel in terms of an insurance contract entered into between Mr Wentzel and the insurance company.

[10] The next witness to give evidence in support of the Plaintiff's case was Mr Wayne Wentzel. He testified that he was driving the Plaintiff's car at the material time. He was driving at a speed of approximately 50 kilometers per hour, along Nelson Mandela Avenue towards Hidas Shopping Center. As he was almost adjacent to the entrance of Roof of Africa Guesthouse, a motor vehicle driven by the Defendant moved from the parking area and collided into the left-side of his (Mr Wentzel's) vehicle. He moved his vehicle off the road to the next intersection, disembarked from the vehicle and went to where the Defendant was.

[11] According to him, the Defendant apologized to him. Furthermore, he testified that he phoned the Plaintiff, who arrived at the scene of the accident later and the Defendant furnished his contact details to the Plaintiff.

[12] The following day, which was a Sunday, Mr Wentzel accompanied by the Plaintiff went to report the accident to the police.

[13] In his view, the accident was caused by the negligence of the Defendant, in that the Defendant failed to take cognizance of his (Mr Wentzel's) motor vehicle, and attempted to enter Nelson Mandela Avenue, while it was dangerous and inopportune to do so, having regard to the close proximity of his motor vehicle and where the Defendant's vehicle was at the time.

[14] He further explained that due to the close proximity of his vehicle and Defendant's vehicle at the material time, it was not possible for him to avoid the collision by either applying the brakes or by swerving his vehicle in any direction.

[15] When cross-examined, Mr Wentzel denied that he was intoxicated at the material time and insisted that, from the damage occasioned on his vehicle, it was apparent that it was the Defendant who drove into his vehicle.

[16] The last witness to give evidence for the Plaintiff was Mr Gunter Karl Schutz, who gave his evidence as an expert witness. In his evidence, he intimated that he inspected the Plaintiff's vehicle on or about the 1st April 2015, and in his expert view, the Plaintiff's vehicle was damaged beyond economical repair. The vehicle was damaged on its left-side and the following parts were damaged, namely: the left-side bumper, the left front-fender, the left front-door, the left back-door, the left door-moulding, the left rear-fender and the left front suspension. The damage suffered amounted to N\$ 78 416.00, calculated as follows:

- (a) fair and reasonable market value of the Plaintiff's vehicle: N\$ 83 400.00
- (b) fair and reasonable salvage value of the wreckage subsequent to the collision:
N\$ 18 840.00
- (c) fair and reasonable towing and storage costs incurred by the Plaintiff: N\$ 5 106.00
- (d) fair and reasonable fees incurred by the Plaintiff for rental of a replacement vehicle for a period of 27 days: N\$ 8 100.00
- (e) fair and reasonable fees incurred by the Plaintiff to assess the damage to her vehicle: N\$ 650.00.

[17] Based on the above considerations, his expert opinion is that the Plaintiff suffered actual damage to the amount of N\$ 78 416.00.

The version of the Defendant

[18] The Defendant testified that on the material day he was exiting from the Roof of Africa Guesthouse into Nelson Mandela Avenue. As he was entering Nelson Mandela Avenue, he observed the vehicle, he later came to know as the Plaintiff's vehicle being driven by Mr Wentzel, moving at a high speed towards the direction of Hidas Shopping Center. The defendant immediately applied brakes, and the Plaintiff's vehicle crashed into the Defendant's vehicle.

[19] The Plaintiff's vehicle proceeded and went to stop at the next intersection from the scene of the accident.

[20] The Defendant got out of his vehicle, assessed the damage to his vehicle, and observed that his vehicle was slightly damaged in that the bumper was loose.

[21] He went to where Mr Wentzel had stopped. When he got to where Mr Wentzel had stopped, Mr Wentzel was coming out of his vehicle, and looked confused, restless, unstable and smelt of alcohol. According to him, Mr Wentzel told him, he was coming from a party and had been drinking with friends. Mr Wentzel also informed him that he did not see the Defendant's vehicle coming into the road, that's why he could not stop his vehicle immediately.

[22] In addition, the Defendant related that Mr Wentzel informed him that the vehicle belonged to his mother (the Plaintiff in this case), and the Plaintiff arrived at the scene about two hours later.

[23] The Defendant testified further that by that time, he had phoned Mr Renatus Shilangale, who was in the Roof of Africa Guesthouse, to come to the scene.

[24] The Defendant had some discussion with the Plaintiff, and according to him, they both agreed that each repairs own vehicle, and they parted ways.

[25] When cross-examined, the Defendant testified that when he noticed the approaching vehicle being driven by Mr Wentzel, he was just about to enter into Nelson Mandela Avenue, and he braked his vehicle, however Mr Wentzel smashed his vehicle into his. He further deposed, that the Plaintiff's vehicle did not leave the main-road, (i.e. Nelson Mandela Avenue) to go to where the Defendant had stopped.¹

[26] Mr Renatus Shilangale gave evidence for the Defendant. He testified that the Defendant, himself and other persons, had a meeting in the Roof of Africa Guesthouse. Later, the Defendant decided to leave. About ten (10) minutes later the Defendant came back and told him he had an accident, and Mr Shilangale joined him outside.

¹ Page 85 of the record of the proceedings.

[27] Outside, he came across some persons, one of them being Mr Wentzel. According to him, Mr Wentzel looked confused and appeared drunk, however, he could not say he was drunk.

Submissions

Plaintiff's submissions

[28] At the end of the Defendant's case, counsel on both sides made oral submissions to the court, for which this court is greatly indebted to both counsel for their assistance.

[29] Counsel for the Plaintiff submitted that the Plaintiff has proven her case and showed that the collision was solely due to the negligent driving of the Defendant in that he failed to:

(a) take cognisance of the Plaintiff's approaching vehicle, when the Defendant attempted to enter into the Plaintiff's right of way when it was inopportune or dangerous to do so, and

(b) apply his brakes timeously and failed to avoid the collision when he should have by exercise of reasonable care.

[30] In addition, counsel for the Plaintiff submitted that, if one looks at the photographs which the Plaintiff discovered, one could clearly see that the version of the Defendant cannot be accepted. If the Defendant's version was correct, there would have been damage to the front-section of the Plaintiff's vehicle. From the photographs it is evident that the Defendant's vehicle drove into Plaintiff's left-side, while the Plaintiff's vehicle was in motion, causing the damage depicted in the photographs.

[31] Counsel for the Plaintiff later conceded that the Plaintiff would not be able to claim benefit for the replacement rental car, as the insurance policy that facilitated for that benefit was not in her name.

Defendant's submissions

[32] Counsel for the Defendant submitted that the version of the Plaintiff must be rejected in that the Plaintiff and Mr Wentzel contradicted each other in material respects namely:

(a) the Plaintiff testified that she tried to phone the police at the scene of the collision, while Mr Wentzel disputed that she had done so, and

(b) the Plaintiff related that she did not accompany Mr Wentzel the next day, when he went to report the accident to the police, whereas Mr Wentzel testified that he went to report the accident to the police in the company of the Plaintiff.

[33] Furthermore, counsel for the Defendant submitted that the collision was solely caused by the negligent driving of Mr Wentzel in that he failed to;

(a) keep a proper look-out; and,

(b) apply his brakes, alternatively, he failed to swerve and avoid the collision.

Analysis

[34] In terms of the Pre-Trial Order made by the court on the 17th August 2016, the court is required to determine the following main questions, namely:

(a) whether the cause of the collision is attributable to the Defendant's negligent driving, and if so, to what degree was the Defendant negligent?

(b) whether, as a result of the aforesaid negligence, the Plaintiff suffered damages in the amount of N\$ 78 416.00? or,

(c) whether the cause of the collision is attributable to the negligent driving of Mr Wentzel, and if so, to what degree?

[35] It is apparent from the versions of the Plaintiff and the Defendant as outlined above, that they are mutually destructive. The Plaintiff claims the Defendant was the sole cause of the collision, whereas the Defendant claims otherwise.

[36] It is trite law, that where there are two mutually destructive accounts, the Plaintiff may only succeed if she satisfies the court on a preponderance of probabilities that her version is true and therefore acceptable and that the Defendant's version is false or mistaken and falls to be rejected.²

[37] On the evidence, I find that the probabilities favour the version of the Plaintiff in that the driver of the Plaintiff's vehicle drove in the correct side of the road towards the southerly direction. The Defendant did not testify that the driver of the Plaintiff's vehicle strayed from the main road to where the Defendant was supposed to have stopped. On the contrary, the Defendant indicated that after the collision he stopped his vehicle in the middle of the road.³ The Defendant did not explain how in the circumstances, his vehicle which was stationary according to his version, proceeded to stop in the middle of the road.

[38] A motorist about to enter into a street, like the Defendant was, has a duty to stop before entering such street. The Defendant had a duty to wait until the traffic that was already in Nelson Mandela Avenue had passed or until it had signified its willingness to make way for him, before he could proceed into the avenue.⁴

[39] On the version of the Defendant, the driver of the Plaintiff's vehicle smashed into his stationary vehicle. However, this version is not supported by the photographs discovered by the Plaintiff depicting the damage caused to the Plaintiff's vehicle. Indeed, the Defendant was at great pains to explain how such damage could occur in the context of his version. His explanation was that, he was surprised to see the photographs in court, as such photographs were not taken at

² *Mungunda v Wilhelmus* (12354/2014) [2015] NAHCMD 149 (Unreported) delivered on 25 June 2015 para 12.

³ Page 88 of the record of proceedings.

⁴ See Isaacs and Leveson: *The Law of Collision in South Africa*, 8th Edition, at page 63.

the scene of the accident. He further explained that he could not confirm whether the damage depicted on the photographs was actually caused during the collision in question. However, the Defendant did not put forth the nature of the damage that he observed on the Plaintiff's vehicle at the time of the collision.

[40] If the version of the Defendant were to be accepted, then one would expect the Plaintiff's vehicle to be damaged on its frontal part, and not squarely on its left side. Photograph "C4" depicts the frontal part of the Plaintiff's vehicle intact, and this situation supports the Plaintiff's version that the Defendant drove into the left side of the Plaintiff's passing vehicle.

[41] On the evidence adduced, I find that the collision was solely caused by the negligent driving of the Defendant in that he:

(a) exited the Guesthouse and entered Nelson Mandela Avenue when it was dangerous and inopportune to do so, and

(b) failed to avoid the collision, when he could have and should have done so by exercising reasonable care.

[42] I am further satisfied on the evidence adduced, and I find that, as a result of such negligence the Plaintiff suffered damages in the amount as set out hereunder.

[43] In regard to the contradictions between Plaintiff's witnesses, as outlined by counsel for the Defendant, I am not satisfied that such contradictions are material, and do not detract from the negligence of the Defendant referred to above. Furthermore, I find that there is no sufficient evidence showing that the driver of the Plaintiff's vehicle was intoxicated and could not as a result, exercise adequate control over his vehicle. Such allegations are therefore not accepted.

[44] It is common ground that the Plaintiff did not pay the N\$ 8 100.00 in respect of the replacement rental vehicle, therefore, the Defendant cannot reasonably be held liable to pay such amount. The amount of N\$ 8 100.00 should therefore be subtracted from the total amount claimed.

[45] In the circumstances, I find that the collision was solely caused by the negligent driving of the Defendant, and that as a result of such negligence, the Plaintiff suffered damages in the amount of N\$ 70 316.00, (i.e. N\$ 78 416.00 minus N\$ 8 100.00).

[46] As regards to the costs of suit, the general rule is that costs follow the event and therefore in this matter, I would award costs to the successful party.

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

1. Judgement is hereby granted for the Plaintiff for:
 - (a) payment in the amount of N\$ 70 316.00;
 - (b) interest on the aforesaid amount at the rate of 20% per annum, calculated from date of judgment to date of final payment;
 - (c) costs of suit.

B Usiku
Judge

APPEARANCES

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