



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2016/02347

In the matter between:

GEORGE COLLIN AMUSHE SHIVUTE

PLAINTIFF

and

KONRAD REDEMPTUS

DEFENDANT

Neutral citation: *Shivute v Redemptus* (HC-MD-CIV-ACT-CON-2016/02347)
[2017] NAHCMD 354 (06 December 2017)

Coram: USIKU, J

Heard on: 07 August 2017 and 10 August 2017

Delivered: 06 December 2017

Flynote: Negligence - Motor vehicle collision - Failure to keep a proper lookout

- Defendant's motor vehicle colliding with rear-end of a stationary vehicle on the road
- Defendant's driving was negligent in the circumstances.

Summary: The Defendant's motor vehicle collided with the rear-end of a stationary vehicle on the road - Defendant claiming that he could not have avoided the collision

- Court finding that the Defendant was negligent in proceeding to drive at speed at which he could not bring his vehicle to a standstill within the range of his vision.

ORDER

1. Judgment is granted for the Plaintiff for payment in the amount of N\$ 41 115.53.
- 2 The Defendant is ordered to pay interest on the said amount at the rate of 20% per annum from the date of judgment to the date of final payment.
3. The Defendant is ordered to pay the costs of suit, which costs include costs of one instructing and one instructed counsel.

JUDGMENT

USIKU, J:

Introduction

[1] This is an action instituted by the Plaintiff against the Defendant for damages arising out of a collision between a motor vehicle with registration number N155-821W then being driven by the Defendant; a motor vehicle with registration number N1634SH then being driven by another person (not a party to this action), and a motor vehicle with registration number N88800SH owned and then being driven by the Plaintiff.

[2] The collision occurred in Oshakati, on the 26 July 2015 at approximately 01h00 on the Oshakati Main Road, near a bridge, opposite the main police station.

[3] The main road in question is a dual carriage way with two lanes on each side of the carriage way. The other person's motor vehicle was stationary on the tarmac surface in the left lane, facing the north-westerly direction. The Plaintiff's motor vehicle was proceeding in the same direction, but in the right lane of the dual carriage

way. The Defendant's motor vehicle was coming from behind, heading in the same direction, on the left lane of the dual carriage way. The Defendant's motor vehicle slammed into the back of the other person's stationary motor vehicle. The impact of the collision caused the other person's vehicle to move diagonally forward and collided with the left-hand side of the Plaintiff's passing vehicle, thereby causing damage to the Plaintiff's vehicle.

[4] The Plaintiff allege that the collision was solely caused by the negligent driving of the Defendant. The Plaintiff, therefore, claims damages in the amount of N\$ 41 115.53, being the fair and reasonable costs to repair the Plaintiff's vehicle to its pre collision condition, (amounting to N\$ 39 235.28), together with the fair and reasonable assessor's fee incurred to assess the damage to the Plaintiff's vehicle in the amount of N\$ 1880.25.

[5] The Defendant defended the action and alleged that he could not have avoided the accident and argued further that the Plaintiff did not suffer any loss as he had been indemnified by his insurer.

The version of the Plaintiff

[6] The Plaintiff testified that he is the owner of the motor vehicle with registration number N88800SH. In support of his claim of such ownership, he produced in evidence a certificate of motor vehicle registration bearing his name but indicating a different registration number. Although the vehicle registration number appearing on the certificate does not match with that of the Plaintiff's motor vehicle, I am satisfied that the vehicle driven by Plaintiff at the time of the collision and the vehicle appearing on the certificate reflecting Plaintiff's ownership, is one and the same vehicle. I say so because the vehicle identification numbers ("VIN") appearing on the police report produced pursuant to the collision and the VIN on the certificate of registration are identical.

[7] According to the Plaintiff, as he was driving on the relevant road, in the right hand lane, he noticed in a distance, a stationary motor vehicle, about 100 metres ahead, on the left-hand lane. The stationery vehicle had its hazard-lights on. The

Plaintiff was travelling at a speed of about 60 kilometres per hour. It was dark, but the street lights at the sides of the road were on and visibility was good.

[8] As the Plaintiff was about to pass the stationary vehicle, he suddenly heard the sound of screeching tyres on the road surface, which was immediately followed by a crashing sound of a vehicle slamming into the stationary motor vehicle. The impact of such collision caused the stationary vehicle to career diagonally to its' right side and collided into the Plaintiff's motor vehicle.

[9] Thereafter the Plaintiff brought his motor vehicle to a standstill and got out of his motor vehicle. He observed that the motor vehicle with registration number N155-821W being driven by the Defendant had rammed into the backside of the stationary vehicle, thereby propelling it to move diagonally forward into the Plaintiff's vehicle.

[10] According to the Plaintiff, the Defendant "fled" the scene of the accident on foot and left his motor vehicle at the scene unattended. The Plaintiff and the driver of the stationary vehicle remained at the scene till the police officers arrived. The police arrived soon thereafter and completed an accident report. Furthermore the police caused the motor vehicle of the Defendant to be towed to the police station.

[11] After the accident the Plaintiff submitted a claim for his insurers; Hollard Insurance Company. In terms of the insurance agreement, the Plaintiff had signed a subrogation clause in terms of which the Plaintiff had agreed to permit Hollard Insurance to acquire all rights that the Plaintiff may have against a third party. The Plaintiff confirms that he has been paid in full for the damage caused to his vehicle as a result of the accident of 26 July 2015, and that his vehicle has been repaired at the expense of Hollard Insurance Company.

[12] The Plaintiff contends that the accident was solely caused by the negligent driving of the Defendant, in that the Defendant:

- (a) failed to keep a proper lookout;
- (b) failed to keep a reasonable and safe driving distance between his vehicle and the stationary vehicle;
- (c) failed to exercise proper control over the vehicle in which he was travelling;
- (d) failed to apply his brakes timeously;

- (e) drove at an excessive speed in the circumstances;
- (f) collided with the rear-end of the stationary vehicle, in the road with its hazard lights on as warning to other road users, causing the stationary vehicle move to the right and collide with the left side of the Plaintiff's vehicle;
- (g) failed to avoid the collision when by the exercise of reasonable care he could have and should have been able to do so.

[13] As a result of the negligence of the Defendant as aforesaid, the Plaintiff motor vehicle was damaged and the Plaintiff suffered damages in the total amount of N\$ 41 115.53, being the fair and reasonable costs (**N\$ 39 235.28**) to repair the Plaintiff's vehicle to its pre-collision condition, together with the fair and reasonable assessor's fee incurred to assess the damage to the Plaintiff's vehicle in the amount of **N\$ 1 880.25**.

[14] The next witness to give evidence in support of the Plaintiff was Mr Reinhold Hamunyela ("Mr Hamunyela") who was the driver of the stationary vehicle in question. Mr Hamunyela testified that on the day in question, he was driving the motor vehicle with registration number N1634SH on the Oshakati main road heading in the north-westerly direction and was travelling on the left-lane of the dual carriage way. As he was driving he noticed that one of the tyres of his motor vehicle had become deflated and he brought his vehicle to a standstill, in order to attend to the deflated tyre. He activated the hazard-lights and got out of his vehicle.

[15] As he was about to inspect the deflated tyre, he noticed a motor vehicle approaching from behind, in the left-hand lane which was not reducing its speed and he ran away from his vehicle to avoid being struck by the oncoming vehicle. The approaching vehicle smashed into the rear-side of his stationary vehicle, and propelled it to move diagonally forward into the Plaintiff's passing vehicle. Mr Hamunyela later learned that the troublesome motor vehicle was being driven by the Defendant in this matter. After the collision the Defendant got out of his vehicle and "fled" the scene on foot. The police later arrived and took a statement from Mr Hamunyela.

[16] The last witness for the Plaintiff was Mr Francois Marx Du Plessis ("Mr du Plessis"), who gave his evidence as an expert witness. He testified that he is an

estimator and insurance assessor. On or about the 28 August 2015 he inspected the motor vehicle of the Plaintiff bearing registration number N88800SH after it was involved in an accident. Having assessed the vehicle, Mr du Plessis confirms that the motor vehicle was damaged and suffered damage amounting to N\$ 41 115.53. He further confirms that, in his expert opinion, the charges are fair, reasonable and market related and that the actual damage suffered by the Plaintiff, amounts to N\$ 41 111.53.

The version of the Defendant

[17] The Defendant testified that on the material day he was driving from Ongwediva to Oshakati, along the dual-carriage main road, on the left-hand lane. He was travelling at a speed of about 60 kilometres per hour. The Plaintiff was driving on the inside (right-hand side) lane when the defendant saw the Plaintiff's vehicle. As he was driving he saw at a very close range, about 5 metres away, a dark figure on the road. He applied brakes but it was too late and he hit the dark figure on the road. After he came to a standstill he realised he had hit another vehicle which was stationary on the main road. The Defendant explained that there was no warning that a stationary vehicle was on the road; there was no hazard-lights on; no red triangle and there was no way he could have avoided the stationary vehicle. He could not swerve to the left-side of the road as there were bridge-barriers and to his right-side there was Plaintiff's vehicle.

[18] According to the Defendant, he was informed later that the stationary vehicle he hit into had moved upon impact and damaged the Plaintiff's vehicle. After the accident, the Defendant related, he noticed that his hand was injured, he then took a taxi and went to Oshakati hospital for medical attention.

[19] The Defendant saw the Plaintiff some weeks later, who indicated that he had been compensated by this insurers. For that reason, the Defendant argues that, it would amount to unjustified enrichment for the Plaintiff to claim again from the Defendant same damage for which he is already compensated.

Analysis

[20] The Defendant in essence raised two defences, namely that:-

(a) the Plaintiff was compensated in full for the damages caused to his vehicle and cannot claim any further damages from the Defendant as same would amount to unjust enrichment, and that,

(b) the stationary vehicle was parked on the road without hazard-lights on and without displaying any warning sign, in the dark.

[21] Counsel for the Plaintiff argued that the Defendant cannot in law raise the defence that the Plaintiff suffered no loss because the Plaintiff had been indemnified by the insurer. The insurer has the right to recover from the Defendant damages for any wrong done to the Plaintiff even though the Plaintiff has already been compensated by the insurer.

[22] The insured, however, is obliged to pay any compensation paid to him by the wrongdoer, to the insurer after deducting the amount he has received under the contract of insurance whatever money he receives from such wrongdoer over and above the actual loss he has sustained.¹

[23] I agree with the above contention by counsel for the Plaintiff, and the argument by the Defendant on that score is rejected as having no basis in law.

[24] As regards the second leg of the Defendant's defence, the Defendant argues that he was not negligent because he did not see or could not have seen the stationary vehicle which suddenly and without prior warning appeared as a dark figure in front of him.

[25] The driver of the stationary vehicle gave evidence that he had activated the hazard-lights of his vehicle soon after he came to a standstill. The Plaintiff testified that he saw the stationary vehicle with its hazard-lights on, about 100 metres in a distance. The Defendant testified that he was only able to see the dark figure in front of him about 5 metres away.

¹ Kloppe, The Law of Collisions in South Africa, Lexisnexis, 7th Edition at page 173

[26] On the weight of the evidence given I am satisfied that the version of the Plaintiff is more credible in the circumstances. I therefore accept the Plaintiff version that the street-lights were on and visibility was good. I also accept that the hazard lights of the stationary vehicle were on.

[27] The fact that the Defendant did not see the stationary vehicle is indicative that he failed to keep a proper lookout. The Defendant did not explaining how he could not see the stationary vehicle in time, with the aid of his head-lights and the street lights.

[28] If the Defendant had kept a proper lookout, he would have seen the stationary vehicle earlier and could have had a sufficient time to decide how far to apply his brakes and could have proceeded as a reasonably careful and skilful driver would have done and would have avoided the stationary vehicle. A reasonably careful and skilful driver would not have proceeded driving at a speed at which he could not bring his vehicle to a standstill within a distance of his vision. Therefore any emergency that the Defendant claims has confronted him in the circumstances, was an emergency of his own making and does not provide him with a lawful excuse for the collision.

[29] For the above reasons, I find that the sole cause of the collision in question was the negligent driving of the Defendant, in that he:-

- (a) failed to keep a proper lookout;
- (b) collided with the rear-end of the stationary vehicle, which had its hazard-lights on, as warning to other road users, and thereby propelled that vehicle into the Plaintiff's vehicle, causing the damages complained of,
- (c) failed to avoid a collision when by exercise of reasonable care, he could and should have been able to do so, and
- (d) drove at a an excessive speed in the circumstances.

[30] As regards the issue of the quantum of the damages, the evidence of the expert witness has not been contradicted and I, therefore, accept it.

[31] As regards costs of suit, the general rule that costs follow the event must apply and I would allow costs for the successful party.

[32] In the result I find that the collision was solely caused by the negligent driving of the Defendant and as a result of such negligence, the Plaintiff suffered damages in the amount of N\$ 41 115.53.

[33] I therefore make the following order:

1. Judgment is granted for the Plaintiff for payment in the amount of N\$ 41 115.53.
- 2 The Defendant is ordered to pay interest on the said amount at the rate of 20% per annum from the date of judgment to the date of final payment.
3. The Defendant is ordered to pay the costs of suit, which costs include costs of one instructing and one instructed counsel.

A handwritten signature in black ink, appearing to read 'B Usiku', is written over a horizontal dashed line.

B Usiku
Judge

A PPEARANCES:

PLAINTIFF:

Y Campbell

Instructed by Francois Erasmus and
Partners Windhoek

DEFENDANT:

M Ntinda

Instructed by Sisa Namandje & Co
Inc. Windhoek