



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3672/2014

In the matter between:

**HERMAN NATANGWE SALATIEL NKANDIH**

**PLAINTIFF**

and

**BRIAN KAHATJIPARA**

**DEFENDANT**

**JEREMY BEUKES**

**THIRD PARTY**

**Neutral citation:** *Nkandih v Kahatjipara* (I 3672/2014) [2017] NAHCMD 358  
(14 December 2017)

**Coram:** Bassingthwaighe AJ

**Heard:** 24 - 28 July 2017, 31 July 2017 and 12 October 2017

**Delivered:** 14 December 2017

**Flynote:** Application for absolution from the instance - Claim is for return of possession of a vehicle, alternatively, if disposed, payment in the amount of N\$150,000 being the market value of the said vehicle plus an amount of N\$18,000 being an amount paid to the defendant in terms of an agreement for repairs to be effected to the said vehicle on the ground that the repairs were not effected – The defendant denied that there was any agreement between him

and the plaintiff and alleged that the agreement was between the plaintiff and the third party – The defendant admitted that the vehicle was towed to his premises in order for repairs to be effected by the third party but denied that he was in possession of the said vehicle – The third party denied that there was any agreement between himself and the plaintiff and instead alleged that he had an agreement with the defendant to effect repairs to the vehicle.

**Summary:** The plaintiff's claim for return of possession of the vehicle is a vindicatory claim based on the allegation that the vehicle was placed in the defendant's possession, under his care and control and responsibility for purposes of effecting repairs to the vehicle in terms of an agreement entered into between the parties during or about July 2013. The plaintiff claims that the vehicle was involved in an accident during August 2013 whilst in the defendant's possession. The plaintiff claims return of possession of the vehicle alternatively, should the defendant have disposed of the vehicle with knowledge of the plaintiff's ownership, payment in an amount of N\$150,000 being the alleged value of the said vehicle. The plaintiff also alleged that although he paid the N\$18,000 to the defendant, the defendant failed to effect the repairs to the vehicle as agreed and therefore he claims a refund of the said amount.

The defendant denied that there was any agreement in terms of which he was to effect repairs to the vehicle but admitted that the vehicle was towed to his residence. He alleged that the plaintiff and the third party entered into an agreement in terms of which the third party would effect repairs to the vehicle at his (the defendant's) residence. In his plea the defendant denied receiving any payment from the plaintiff and also denied that the vehicle was in his possession, care, control and responsibility at all relevant times and in particular when the vehicle was involved in an accident. The defendant denied that he disposed of the vehicle and that the value of the vehicle is N\$150,000.

The third party who was joined to the proceedings by the defendant denied that there was any agreement between himself and the plaintiff. In his plea, he alleged that the agreement was between the plaintiff and the defendant, that the defendant requested him to effect certain repairs to the said vehicle and that

they agreed that he would be paid N\$9,000 by the defendant for effecting the said repairs. The third party also pleaded that he received N\$6,500 from the defendant who is still indebted to him in the amount of N\$2,500. The third party denied that the vehicle was ever under his care, control and responsibility and instead pleads that the vehicle was on the premises of the defendant, was driven by an employee of the defendant without his consent and was then involved in an accident during August 2013. The third party thus denied any liability.

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### ORDER

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1. Application for absolution from the instance dismissed.
2. The costs of the application shall be costs in the cause.

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### JUDGMENT

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BASSINGTHWAIGHTE AJ

#### The Pleadings

[1] The first part of the plaintiff's claim is for the return of possession of his vehicle, identified as a Toyota Quantum Micro Bus motor vehicle with registration numbers N61788W and N434OT ('the vehicle') which he claims was at all relevant times in the possession of the defendant in terms of an agreement entered into between the parties during July 2013 at Windhoek in terms of which the defendant would repair the aforesaid vehicle for an amount of N\$18,000. It is common cause that the vehicle was towed to the defendant's residence during or about July 2013 for the said repairs to be effected. The defendant however denied that there was any agreement between himself and the plaintiff

for him to effect any repairs to the said vehicle. The defendant instead pleaded that the plaintiff entered into an agreement with the third party to effect the said repairs and that the vehicle was towed to his (the defendant's) residence because the third party had no space at his own residence. The defendant therefore denied that the vehicle was in his care, control and under his responsibility or that it was in his possession. In the alternative, the plaintiff pleaded that if the vehicle was disposed of by the defendant with knowledge of his ownership, he is entitled to payment in the amount of N\$150,000, that being the value of the vehicle. The defendant denied these allegations. He did not in his plea offer any further explanation as to what happened to the vehicle after it had been towed to his premises.

[2] The plaintiff furthermore alleged in his particulars of claim that he paid an amount of N\$18,000 to the defendant but that the defendant failed to effect the said repairs. This is also denied by the defendant who alleged that the plaintiff paid N\$6,500 to the third party. The third party denied in his plea that he received any payment from the plaintiff, and instead alleged that the N\$6,500 was paid to him by the defendant in terms of an agreement concluded between the two of them in terms of which the third party would effect certain repairs to the said vehicle. The full amount which the third party alleged to have been agreed between himself and the defendant is N\$9,000. The third party also pleaded that he repaired the vehicle but did not receive the balance of what was agreed between himself and the defendant.

[3] It is common cause that the vehicle was involved in an accident during or about July/August 2013. The plaintiff alleged that the vehicle was at the time of the accident being driven by the defendant or one of his assistants without his consent and whilst under the care and control of the defendant. The plaintiff furthermore alleged that he learned subsequently that the vehicle was deserted at or near a dam in Windhoek in the Katutura/Gorengab area. These allegations were denied by the defendant.

[4] The plaintiff testified and called two other witnesses being a certain Simon Elifas Shikongo and an expert, Mr Mervis Murize Katjepunda to testify on

his behalf. The third party also testified whereafter the defendant moved for absolution from the instance.

### The issues

[5] In order to succeed the plaintiff had to prove that he is the owner of the said vehicle and that the defendant was in possession of the vehicle when the action was instituted. Although the defendant admitted that the vehicle was towed to his residence, he denied that the vehicle was in his possession or that he disposed of the said vehicle.

[6] The question of the market value of the vehicle would only become relevant in the event that the defendant disposes of the vehicle with the knowledge of the plaintiff's ownership. In such event, the plaintiff would be entitled to damages calculated on the basis of the value of the vehicle at the date of trial or judgment.

[7] For the second part of the plaintiff's claim, he needed to prove the terms of the agreement that he relied on, that he performed in terms of the agreement i.e. that he paid the said N\$18,000 and that the defendant failed to effect the repairs to the said vehicle.

### The law

[8] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights SA Ltd v Daniel*<sup>1</sup> and approved by the Supreme Court in *Stier and Another v Hencke*<sup>2</sup> in these terms:

' ... When absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, **could or might (not should, nor ought to)** find for the plaintiff (*Gascoyne v Paul & Hunter* 1917 TPD 170 at 173; *Ruto*

<sup>1</sup> 1976 (4) SA 403 (A) at 409 G-H.

<sup>2</sup> 2012 (1) NR 370 (SC) [4].

Flour Mills (Pty) Ltd v Adolsohn (2) (1958) (4) (SA) 307 (T)).' (emphasis supplied)

[9] Harms JA<sup>3</sup> explained further that this implies that a plaintiff has to make out a *prima facie* case in the sense that there is evidence relating to all elements of the claim to survive absolution because without such evidence no court could find for the plaintiff. In *Bidoli v Ellistron t/a Ellistron Truck & Plant*<sup>4</sup> the court explained that the phrase 'applying its mind reasonably' requires the court to consider the admissible evidence in the context of the pleadings and the requirements of the law applicable to the particular case.

[10] As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one and not the only reasonable one.

'The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is 'evidence upon which a reasonable man might find for the plaintiff'. (*Gascoyne (loc cit)* – a test which had its origin in jury trial when the "reasonable man" was a reasonable member of the jury (*Ruto Flour Mills*). Such a formulation tends to cloud the issue. The court ought not to be concerned of what someone else might think; it should rather be concerned with its own judgment and not that of another "reasonable" person or court. Having said this, absolution at the end of a plaintiff's case in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises a court should order it in the interests of justice...<sup>5</sup>

[11] The established criterion for ascertaining whether or not a plaintiff has adduced sufficient evidence to avert a ruling of absolution from the instance (*prima facie* evidence, *prima facie* proof or a *prima facie* case) is not free from ambiguity. It appears that there is not, in the case of an application for absolution at the close of a plaintiff's case, a weighing up of different possible inferences, but merely a determination whether one of the reasonable

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<sup>3</sup> In *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA) at 92H; See also *Stier supra*.

<sup>4</sup> 2002 NR 451 (HC) at 453.

<sup>5</sup> At 93A; *Factcrown v Namibian Broadcasting Corporation* 2014 (2) NR 447 (SC) at par 72.

inferences is in favour of the plaintiff.<sup>6</sup>

[12] A court should be extremely chary of granting absolution at the close of the plaintiff's case. In deciding whether or not absolution should be granted, the court must assume that in the absence of very special considerations, such as the inherent unacceptability of the evidence adduced, the evidence is true. The court should not at this stage evaluate and reject the plaintiff's evidence.<sup>7</sup>

[13] The principles applicable to a claim based on a *rei vindicatio* are set out in the case of *Shukifeni v Tow In Specialists CC*.<sup>8</sup> They need no repetition. At this stage, the plaintiff need not show that he is in fact the owner. All that he has to do is to produce sufficient admissible evidence to show that a reasonable court might find that he is the owner.<sup>9</sup>

#### The evidence

[14] The plaintiff testified that he is the owner of the Toyota Quantum Micro Bus motor vehicle with its last registration numbers being N61788W and N434OT. Although ownership was put in dispute in the plea in that the defendant alleged that he could not admit or deny the allegations, the plaintiff was not questioned about this under cross-examination. No different version was placed to him under cross-examination.

[15] When the expert testified, he referred to a VIN (vehicle identification number) which he found on the vehicle he was requested to inspect to prepare his expert report. It was put to him during cross-examination that this number differed from the VIN appearing on a deregistration certificate discovered by the plaintiff. The expert said he cannot dispute that but conceded that he may have made a mistake when he wrote the number down. This issue was not raised

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<sup>6</sup> *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 25 (A) at 38; *Herbstein & van Winsen The Civil Practice of the Supreme Court of South Africa* 4<sup>th</sup> ed at 682-683; "Die maatstaaf is dus 'n rapsie laer as die van 'n *prima facie* –saak: die getuienis hoef nie 'n antwoord te verg ('call for an answer) nie": See: *Rosherville Vehicle Services v BFN Plaaslike Oorgangsraad* 1998 (2) SA 289(OFS) at 293 F-G and the authorities there collected.

<sup>7</sup> *Atlantic Continental Assurance Co of SA v Vermaak* 1973 (2) SA 525 (E) at 526-527.

<sup>8</sup> 2012 (1) NR 219 (HC) at 224-225 par 18-25.

<sup>9</sup> *Bidolj supra* at 454.

with the plaintiff when he testified.

[16] After the expert testified, the plaintiff recalled Mr Shikongo who had been requested to inspect the vehicle after the expert's evidence. When Mr Shikongo returned, he provided a photograph of a bracket which he said was pasted on one of the passenger seats in the vehicle. He testified that the VIN number on this bracket corresponded with the number which appeared on the deregistration certificate. He confirmed that it is the plaintiff's vehicle. The photograph was admitted into evidence but the deregistration certificate was not admitted into evidence. This matter was however not taken any further by the defendant's counsel in argument.<sup>10</sup> The vehicle was at the plaintiff's premises and in his possesses until it was towed to the defendant's premises for repairs.<sup>11</sup>

[17] It is common cause that the vehicle was towed to the defendant's premises. Prior to the vehicle being towed away, a person who the plaintiff identified as McDonald came to his premises to remove a throttle from the vehicle. Plaintiff testified that when he asked him who he is, he said that he is an employee of the defendant and that the defendant sent him to remove the part.

[18] According to the evidence of the plaintiff as well as the third party the initial discussions regarding the repairs to the said vehicle were between the plaintiff and the defendant. The plaintiff testified that he was told by a certain Erenst Kavari that the defendant is a part-time mechanic who would be able to repair the vehicle. Plaintiff subsequently realised that he knew the defendant because they worked together in the past. When the vehicle was towed away from the plaintiff's premises for purposes of repairs being effected, the third party was present but was on this occasion not introduced to the plaintiff.

[19] According to the third party the defendant at some point informed him

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<sup>10</sup> Counsel questioned the witness in cross-examination on why he could not take the picture in such a way that it is clear that it is of the same vehicle or take the expert with him. This aspect was also not taken any further in argument.

<sup>11</sup> A person who is in possession of a movable is presumed to be the owner thereof – Bidoli supra at 455.



that he obtained a deposit from the plaintiff. He also testified that he received payment in the amount of N\$6,500 from the defendant for the repairs that he had to effect to the said vehicle. The third party also testified that he and the defendant had in the past worked on several other vehicles together, that the defendant would get the customers with whom he would agree a price for the repairs to be effected and that the two of them would then agree on what he as the third party would receive for the work that he is to do on the said vehicle.

[20] Both the plaintiff and the third party testified that the third party was only introduced to the plaintiff when they came back to the plaintiff to inform him that the vehicle is in a running condition but that it still has problems with its brakes. The vehicle remained at defendant's premises so they could try and repair the brakes. According to the third party he had recommended that the vehicle be taken to CBS for the brakes to be repaired but the defendant insisted that they try to which the plaintiff agreed. He also said that if they cannot repair the brakes, they should return the vehicle so he could take it to CBS.

[21] The plaintiff testified that he paid a total of N\$16,100 to the defendant on 6 different occasions and these were always made as and when the defendant would ask for money. During argument, Mr Andima for the defendant stated that the defendant does not deny that payments were made. He stated that the defendant only denied that the payments were made to him. The defendant's case, according to Mr Andima, is that the payments were made to the third party.

[22] The vehicle was in an accident in early August 2013. Both the plaintiff and the third party testified that the person who was driving the vehicle at the time of the accident was an employee of the defendant. This was not disturbed in cross-examination. What seems to be in dispute is whether the said employee was driving the vehicle on the instructions of the third party or whether the vehicle was being driven by the said employee in the course and scope of his employment with the defendant.

[23] From the evidence and what was put to the plaintiff under cross-

examination it is common cause that on the day that the accident happened, the defendant called the plaintiff and informed him that the vehicle had been in an accident and that he wanted to know whether he should tow the vehicle to the plaintiff's place of business. It was put to the plaintiff that he told the defendant that he does not have space on his premises and asked the defendant to find a place where he could leave the vehicle. Plaintiff denied this and testified that he had enough space at his premises and that he told the defendant to keep the car at his place so they could first talk.

[24] The plaintiff furthermore testified that the parties met some time during February 2014 at which meeting according to the plaintiff it was agreed that the defendant would replace the differential control which had apparently been removed from the vehicle and that defendant would thereafter return the vehicle to the plaintiff. This does not seem to be in dispute. The only issue which seemed to be in dispute is whether the part would be replaced at plaintiff's costs or defendant's costs. Plaintiff testified that defendant agreed to do it at his costs as the vehicle was in his care when the part went missing.

[25] The vehicle was not returned by the time that this matter was heard in court. The plaintiff testified that he was informed by Erenst Kavari that the defendant had towed the vehicle to his (Erenst's). It was put to plaintiff that defendant had requested Erenst to store the vehicle at his place at plaintiff's request and that he (defendant) had informed the plaintiff that he towed the vehicle there. Plaintiff testified that he did not ask defendant to find a place and that he only came to know of the fact that the vehicle had been towed to Erenst's place when Ernst informed. Mr Shikongo basically confirmed the discussions at the meeting as testified to by the plaintiff.

[26] The expert testified that the vehicle in its current condition as he found it is probably worth N\$35,000. He testified that in order to repair the vehicle for it to be in the condition of a complete vehicle it would cost about N\$106,760.32 for the parts, between N\$15,000 and N\$20,000 for the interior of the said vehicle and if he was to be requested to repair the said vehicle he would charge about N\$8,000 (to replace the parts) plus N\$7,000 for panel beating. According to the

expert the market value of the vehicle is about N\$80,000.

### Submissions

[27] Mr Andima on behalf of the defendant questioned the credibility of the witnesses and also argued that they contradicted themselves on a number of facts. For this reason he argued that the court must hold that the agreement was between the plaintiff and the third party and that it was merely on the defendant's premises because the third party did not have a place to do the repairs. He also argued that the vehicle was being driven by defendant's employee on the instructions of the third party and therefore the defendant cannot be held liable for the damages to the vehicle caused during the accident. He also argued that there was not sufficient evidence placed before the court in order for it to make any findings as to the fair market value of the said vehicle as the court was provided no basis for the value which was given by the said expert. Mr Andima insisted that the best method of determining the market value of the vehicle is to provide the court with the average between the retail value and the book value of the vehicle which the plaintiff's expert failed to do without providing any explanation why it could not be provided. He also argued that the expert did not know what the condition of the vehicle was prior to the collision and prior to the time that he inspected the said vehicle and therefore he could not say what parts were in the vehicle before. Therefore, he submitted, plaintiff failed to establish a *prima facie* case that the value of the vehicle is N\$150,000 and that absolution should for this reason also be granted.

[28] Mr van Greunen argued that it is common cause that there was an agreement and that the only issue in dispute is with whom the agreement was entered into. He pointed out that the initial discussions were between the plaintiff and defendant, that the third party was only introduced when they came to tell him that the vehicle is in a running condition and that it still has a brake problem and that all payments were made to the defendant at the defendant's request. He argued that the fact that there were no discussions between the plaintiff and the third party after the vehicle was damaged and only between the plaintiff and the defendant supports his contention that the agreement was

between the plaintiff and the defendant. He added that after the plaintiff spoke to the defendant the first time, defendant sent an employee to collect a part and that this is further support for the plaintiff's case.

[29] Mr van Greunen characterised the plaintiff's claim as a claim based on the defendant's breach of a verbal contract of *locatio conductio operis* and a claim for damages caused to plaintiff's vehicle during an accident whilst in the defendant's care and control. He conceded in argument that the plaintiff did not prove the full extent of the damages or loss he suffered but that there was sufficient evidence before the court to make an assessment of the damages which plaintiff clearly suffered when the vehicle was driven by an employee of the defendant.

#### Application of the law to the facts

[30] As indicated above, the matter must be considered within the context of the pleadings before court. I have already stated that the plaintiff's case is firstly a claim for return of possession of the vehicle which is a vindicatory claim. The defendant denied having disposed of the vehicle and from the evidence before the court, although there is evidence of the vehicle being stripped of parts and being damaged, it was not disposed of. Therefore, the issue of the value of the vehicle does not arise at this stage.

[31] The plaintiff's claim is not a claim for damages caused during the collision or as a result of having been abandoned. Therefore, I also do not have to consider that issue.

[32] The only issues which I had to decide in this case appear above. I have to accept the evidence presented thus far by the plaintiff and his witnesses and the third party as true. There is no basis to find the evidence to be inherently unacceptable and the evidence should not at this stage be evaluated and rejected.

[33] I am of the view that there is sufficient evidence before the court thus far

on which a court, applying its mind reasonably, might find for the plaintiff. I have already dealt with the question of ownership above. I am satisfied that a court might find that the plaintiff is the owner of the vehicle. Ownership was not at all argued. Furthermore, when the vehicle was in an accident, defendant called plaintiff and asked to tow the vehicle to plaintiff's premises. This was in all probability done because plaintiff is the owner of the vehicle.

[34] The vehicle was towed to defendant's premises and was there until it was in a collision. I have to accept plaintiff's evidence that the defendant took the vehicle to Erenst's premises without his knowledge. I must also accept that the agreement was that defendant would return the vehicle after the differential control was replaced. It is not necessary for the person to be in physical control of the item in order for him to be said to be in possession thereof. Someone else can exercise physical control on behalf of the one possessing. There is no evidence before me to suggest that Erenst was holding the vehicle on behalf of anyone other than the defendant.

[35] As for the claim for the refund of the amount paid by plaintiff for the repairs, the evidence was that plaintiff was informed that the vehicle was repaired. However, the defendant retained the vehicle to effect further repairs. Apart from being told that repairs were effected, the plaintiff did not receive a repaired vehicle. Thus, even in this regard, plaintiff might succeed with his claim to the extent of N\$16,100 being the amount which plaintiff has paid. For these reasons the application for absolution is dismissed, costs to be costs in the cause.

[36] In the result I make the following order:

1. Application for absolution from the instance dismissed.
  2. The costs of the application shall be costs in the cause.
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N BASSINGTHWAIGHTE  
Acting Judge

**APPEARANCES**

**PLAINTIFF:**

Mr van Greunen  
Instructed by Köpplinger Boltman,  
Windhoek

**DEFENDANT:**

Mr Andima  
Van der Merwe-Greeff Andima Inc,  
Windhoek