REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 755/2016

In the matter between:

JOHANNES MATHEUS VAN WYK **PLAINTIFF**

and

JOEL CHIBUEZE **DEFENDANT**

Neutral citation: *Van Wyk v Chibueze* (I 755/2016) [2018] NAHCMD 305 (26 September 2018)

Coram: OOSTHUIZEN, J

Heard: **6 March 2018, 12 April 2018, 24 August 2018 and 4 September 2018**

Delivered: **26 September 2018**

Flynote: Motor vehicle accident. Negligence. Different and mutually destructive versions.

Summary: A motor vehicle accident occurred on 25 October 2014 between plaintiff's vehicle and that of defendant's. Both vehicles damaged. How the conflicting versions are to be resolved.

ORDER

It is ordered that defendant shall pay the plaintiff -

[1] The sum of N$448,516.92.

[2] Interest on the amount of N$448,516.92 at the rate of 20% per annum as from 26 September 2018 to date of final payment.

[3] Costs of suit, inclusive the costs of one instructing and one instructed legal practitioner.

JUDGMENT

Oosthuizen J:

[1] The case is about a motor vehicle accident which occurred on 25 October 2014 at approximately 19H30 on Mandume Ndemufayo Avenue near the University of Namibia, Windhoek.

[2] Plaintiff was driving an Audi A6 Sedan motor vehicle in a western direction on his way to the Western Bypass. Defendant was driving in the same direction on his way to the said University of Namibia (UNAM).

[3] At the time the exit and entrance from and to the University was situated next to Mandume Ndemufayo Avenue to the north (the right hand side of drivers traveling westward in Mandume Ndemufayo Avenue (hereinafter "MNA")).

[4] Exhibit "C" was introduced by the plaintiff to explain how the vicinity looked at the time period the accident occurred. Exhibit "C" is an aerial photograph with overlayed town planning markings. Relevant to the case is the real photographic evidential picture of the lay-out and design of MNA in vicinity of the exit/entrance to UNAM.

[5] In this case the plaintiff claim for damages caused as a result of the accident by the negligence of the defendant. Defendant in turn claim for damages to his motor vehicle as a result of the accident caused by the negligence of the plaintiff.

[6] The material difference between the parties are exactly where the accident occurred.

[7] According to the plaintiff the accident occurred opposite the exit from UNAM in the right hand lane of the dual lanes. According to the defendant the collision occurred opposite the entrance to UNAM in the single lane for oncoming traffic (from the direction of the Western Bypass). It is common cause between the parties that MNA situated opposite UNAM consists of 3 distinct lanes. Two for traffic in a westernly direction and one for traffic in an eastern direction.

[8] According to defendant he was moving slowly over the lane for oncoming traffic opposite the entrance to UNAM on his way to the entrance when plaintiff collided into the left side of his vehicle.

[9] According to plaintiff, plaintiff was in the process of overtaking the defendant who was driving in the left lane (southern lane) direction Western Bypass, when defendant without warning and signals traversed over the middle lane in which plaintiff was overtaking. The middle lane still for western bound traffic. According to the plaintiff the collision occurred opposite the exit from UNAM and still some

distance from the entrance to UNAM and well more east from the point indicated by defendant.

[10] Both plaintiff and defendant indicated the place of the accident on Exhibit "C" and made the difference very clear to the Court.

[11] According to plaintiff he called the City Police after the accident and was informed that they did not have an available vehicle at the time to dispatch to the scene. As a result the plaintiff arranged for a tow-in-service to remove his vehicle.

[12] At the scene of the accident both parties was of the opinion that no injuries were sustained by the drivers or their passengers.

[13] The fact that no independent traffic officer attended to the accident scene to take measurements, compile an accident report and sketch of the accident scene, contribute largely to the unresolved precise locality of the accident during the hearing of the matter.

[14] If the accident happened where and as described by defendant, the plaintiff would have been reckless, and the cause of all damages suffered by himself and the defendant.

[15] If the accident happened where and how the plaintiff alleged it did, the defendant principally caused the accident and the resultant damages.

[16] It is common cause that an accident occurred in the vicinity of UNAM and on MNA and that extensive damages result therefrom.

[17] The versions of how and precisely where on MNA the accident occurred are mutually destructive.

[18] Each party had the onus to prove his respective version.

[19] The plaintiff testified and presented exhibits to support his version. Plaintiff called one of his two witnesses. The one witness he did not call happened to be his family member and passenger when the accident occurred and also the police officer whom completed the accident report on the day after the accident.

[20] Defendant testified and did not call any of the two witnesses of whom witness statements were filed. Defendant did not present admissible evidence supporting his claimed damages and was not allowed to present a transcription of recordings of conversations between him and plaintiff. He was also not allowed to tender photographs at the hearing. Defendant had the evidential material available but did not follow prescribed procedures pre-trial entitling him to tender the aforementioned in evidence although he was at all relevant times legally represented.

[21] The parties filed a pre-trial report on 15 March 2017, which embodied their compromise and agreement of what is in dispute, what is agreed and the procedures and opportunities to file timeous notifications for material to be used at the trial. Plaintiff in essence complied with the resultant pre-trial order and the defendant not.

[22] Plaintiff requested admissions in terms of Rules 94 and 95 of the Rules of the High Court which defendant ignored. Defendant had the same opportunity in terms of Rules 94 and 95, but did not avail himself thereof.

[23] *Nienaber, JA in Stellenbosch Farmers' Winery Group and Another v Martell et Cie and Others 2003(1) SA 11 (SCA)* at para 5 states the technique generally employed by courts in resolving factual disputes where there are two irreconcilable versions. Namibian courts have adopted the approach[1]

[24] The court consider the credibility, reliability and probability of a witness and his version. The credibility of a witness relates to *inter alia* the candour and demeanour, bias, contradictions, probability or improbability of his evidence and the calibre and cogency of the witness compared to other witnesses. The reliability of a witness will also depend on the opportunity to observe and the quality, integrity and independence of his recall thereof. The probabilities of a witness' version

[1] *Ndabeni v Nandu* (I 343/2013)[2015] NAHCMD 110 (11 May 2015), paragraph [26].

necessitates an evaluation of each (conflicting) version's probabilities or improbabilities on the disputed issues. The court will then determine whether the party bearing the onus has succeeded in discharging it. Probabilities prevail when all factors equipoised[2].

[25] In this case the plaintiff and defendant both and respectively had the onus to prove their conflicting claims on a preponderance of probabilities.

[26] Plaintiff testified that he was traveling in a westernly direction at approximately 60km/h behind the defendant in the single lane of MNA before it became double lanes. When the road became double the defendant remained in the left lane and plaintiff moved over to the right lane in order to overtake the defendant. Plaintiff said that just about when he was to pass the defendant's motor vehicle, the defendant suddenly swerved into the right lane without indication. Plaintiff applied the brakes of his vehicle but the proximity of the two vehicles to each other was too close and plaintiff's attempt to avoid the collision was fruitless. The front of plaintiff's vehicle collided with the left of the defendant's vehicle.

[27] The damages profile on the photographs of plaintiff's vehicle (Exhibits D1 and D2) shows collision damage on the left side front of the Audi. The visible damage is left front from behind the wheel arch of the left front wheel around to the left frontal side of the vehicle. The real evidence thus support the version of the plaintiff of how the accident occurred.

[28] According to defendant's description of how and where the accident occurred, the defendant's vehicle would have been in front of the plaintiff's vehicle, moving over the lane of oncoming eastbound traffic while entering to the entrance of UNAM. That would have placed defendants vehicle at a ninety degrees angle in relation to plaintiff's vehicle. The real evidence (damage profile on plaintiff's vehicle) would show a frontal impact and damage to the whole of the front of the Audi, which it did not.

[2] Extract from the summary of Nienaber, JA, op cit, not the complete text. It was also said that in a hard case a court's credibility findings may compel the court in one direction and the general probabilities in another. The more credible a witness, the less convincing will be the probabilities.

[29] On probabilities therefore the defendant's version is not as probable as that of the plaintiff.

[30] On probabilities the version of the plaintiff is accepted as the more probable. From this reasoning it follows that the explanation of plaintiff of where the accident happened rings more true than the explanation of the defendant. Although not completely independent, plaintiff's version is supported by his witness travelling with him as passenger.

[31] On plaintiff's version the accident occurred more opposite the exit from UNAM. That being so the court should decide whether the "turn right" arrows in the middle lane of MNA, prohibited the plaintiff from attempting to pass the vehicle of the defendant. After obtaining further argument and submissions from the parties as a result of this court's order dated 16 July 2018[3], the court concluded that the road markings in close proximity of the accident scene was of an informative, regulatory and advisory nature, and not prohibitive of the actions of the plaintiff.

[32] If the reasonable man (driver) —

> [32.1] would have foreseen the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
>
> [32.2] would have taken reasonable steps to guard against the occurrence; but
>
> [32.3] failed to do so, then he would be negligent[4].

[33] The reasonable man 'is not…. a timorous faintheart always in trepidation lest he or others suffer some injury; on the contrary, he ventures into the world, engaged

---

[3] Written legal submissions shall be advanced on the regulatory meaning of the "turn right" arrows on the road surface of the right hand lane in the direction to the Western Bypass from where the single lane become double to where the right hand lane ended against a traffic island opposite the entrance to Unam, as depicted on Exhibit C. The written submissions should also take account of the regulatory meaning of the "straight" arrows in the left lane.

[4] Motor Law, Cooper, Volume 2, 1987,page 49.

in affairs and takes reasonable chances. He takes reasonable precautions to protect his person and property and expects others to do likewise[5]'.

[34] In accepting the version of the plaintiff the court had regard to the totality of the facts and evidence placed before it by both plaintiff and defendant[6] and the restated dictum in *Von Wielligh v Shaumbwako* at paragraph [16][7]. The court also found the plaintiff to have been more candid than the defendant. The demeanour of plaintiff in court was more impressive than the defendant's.

[35] The court therefore find that the evidence and the version of the defendant is to be rejected and the evidence and the version of the plaintiff is accepted. The defendant was negligent and his negligence caused the accident and the resultant damages.

[36] The evidence of witness Wynjeterp is uncontradicted and accepted.

[37] Costs will follow the result.

[38] It is ordered that defendant shall pay the plaintiff —

[38.1] The sum of N$448,516.92.

[38.2] Interest on the amount of N$448,516.92 at the rate of 20% per annum as from 26 September 2018 to date of final payment.

[38.3] Costs of suit, inclusive the costs of one instructing and one instructed legal practitioner.

GH Oosthuizen

Judge

[5] Motor Law, Cooper, op cit, p50.

[6] Johannes v South West Transport (Pty) Ltd 1992 NR 358 at 361 I.

[7] (I2499/2014)[2015] NAHCMD 168 (22 July 2015).

APPEARANCES

PLAINTIFF:	Van Zyl of Francois Erasmus & Partners, Windhoek
DEFENDANT:	Mcleod of Shikongo law Chambers, Windhoek