

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-CIV-ACT-DEL-2016/02446

In the matter between:

SOFIA DAUSAB

PLAINTIFF

and

JELEVASIU HEDIMUND

1ST DEFENDANT

AFZEL SHAHBAZ

2ND DEFENDANT

WILBARD NALUPE

3RD DEFENDANT

Neutral citation: *Dausab v Hedimund* (HC-MD-CIV-ACT-DEL-2016/02446) [2018]
NAHCMD 99 (19 April 2018)

Coram: PARKER, AJ

Heard: 04 - 05 April 2018

Delivered: 19 April 2018

Flynote: Negligence – Motor vehicle in a stream of traffic colliding with motor vehicle travelling ahead which has not stopped suddenly is *res ipsa liquitur* – Where *res ipsa liquitur* applies there is presumption that the event is caused by negligence on the

part of defendant and plaintiff succeeds unless defendant can rebut this presumption. *Barkway v South Wales Transport Co* [1948] 2 All ER 460 applied.

Summary: Negligence - Motor vehicle in a stream of traffic colliding with motor vehicle travelling ahead which has not stopped suddenly is *res ipsa loquitur* – Where *res ipsa loquitur* applies there is presumption that the event is caused by negligence on the part of defendant and plaintiff succeeds unless defendant can rebut this presumption – Court found that plaintiff's motor vehicle was stationary before intersection controlled by traffic lights which showed red in his direction – Third defendant's motor vehicle hit rear of plaintiff's motor vehicle – Court rejected third defendant's evidence that first defendant's vehicle hit third defendant's vehicle propelling it forward and making it hit plaintiff's vehicle – Court found that third defendant did nothing to prevent his vehicle from hitting plaintiff's vehicle, albeit he had ample time to take reasonable steps to avoid the collision after his vehicle had been hit by first defendant's vehicle.

ORDER

- (a) Plaintiff succeeds in his claim of negligence against third defendant; and third defendant must pay plaintiff's costs.
- (b) Plaintiff's claim of negligence against first defendant and second defendant is dismissed; and plaintiff must pay first defendant's and second defendant's costs.
- (c) Third defendant's counterclaim of negligence against plaintiff is dismissed; and third defendant must pay plaintiff's costs.
- (d) Third defendant's counterclaim of negligence against first defendant and second defendant succeeds; and first defendant and second defendant must pay 50 per cent only of third defendant's costs, and the costs include costs of one instructing counsel and one instructed counsel, the other paying, the other to be absolved.

JUDGMENT

PARKER AJ:

[1] In this matter, plaintiff claims from first and second defendants and/or third defendant N\$28,727, 20, plus interest on that amount at the rate of 20 % per annum, calculated from the date of judgement to the date of full and final payment. The cause of action arose from a collision of motor vehicles as described below.

[2] The plaintiff avers in his amended particulars of claim that the collision was caused by the negligent driving of first defendant and/or third defendant. In his amended plea, first defendant and second defendant deny that first defendant drove his vehicle (the Toyota) (see para 8 below) negligently and denies further that his driving was the cause of the collision as alleged by plaintiff. They accordingly, deny' each and every' allegation set out by the plaintiff to prove her claim.

[3] For the sake of clarify, I shall treat the present matter in this order and under the heads indicated:

A: Plaintiff's claim against third defendant and third defendant's counterclaim against plaintiff;

B: Plaintiff's claim against first defendant and second defendant;

C: Third defendant's counterclaim against first defendant and second defendant.

A. Plaintiff's claim against third defendant and third defendant's counterclaim against plaintiff

A (1) Introduction

[4] In his plea, third defendant – and this is extremely significant – *does not deny that he was the cause of the collision* (Italicized for emphasis). He says: ‘Third defendant denies that he was *the sole* cause of the accident (i.e. the collision)’ Thus, all that third defendant does – to put it simply – is to unmistakably admit this: Yes, I caused the collision but I am not the ‘sole’ causer. But that cannot absolve him from liability as between him and plaintiff, as I shall demonstrate shortly based on the facts.

[5] As a matter of law, third defendant’s defence is that he has no defence to plaintiff’s allegation against him that his negligence caused the collision, which resulted in the damage of the BMW; except that, according to him, he is not the only one who is blameable. The cruciality of this irrefragable fact is brought to sharper focus when one considers paragraph 5.1 to 5.10 of third defendant’s counterclaim. Not a single reference is made, even parenthetically, to plaintiff, albeit third defendant makes a counterclaim against Sofia Dausab, the plaintiff, as first defendant in reconvention, and against Hedimund, first defendant in convention and second defendant in reconvention.

[6] To put it simply, on the facts, what plaintiff did or omit to do, delictually speaking, against, or in relation to, third defendant is not established at all. On the facts, I can see no legal basis upon which third defendant can be the injured party and plaintiff the tortfeasor when it was the third defendant’s motor vehicle (the Benz) that hit the rear of the BMW. At that moment, the BMW was at a complete stop, as the law required it to be at the intersection. Moreover, the BMW did not stop suddenly ahead of the Benz, as I have found in para 10 below. I shall return to these crucial considerations in due course.

A (2) The Facts

[7] The facts set out in this and the next paragraphs are not in dispute. On 2 March 2014, at a spot some six to ten metres to the intersection of Sam Nujoma Drive and Mandume Ndemufayo Avenue (in Windhoek) between 18h00 and 18h10, a collision occurred. Traffic lights control the intersection. There was light rain at the time of the

collision and the road surface was wet. The road leading northwards towards the intersection is in a declivity.

[8] Three motor vehicles were involved in the collision. I shall refer to each vehicle by name according to make. I shall also indicate who drove the vehicles at all material times. The vehicles were a BMW 116i, driven by Mr Dausab, husband of the plaintiff; a Mercedes Benz, driven by Mr Wilbard Nalupe, third defendant; and a Toyota HI – ACE Minibus, driven by Mr Jelevasiu Hedimund, first defendant. Second defendant appears to be the owner of the Toyota. He was at all material times the employer of Hedimund, and he is joint as a party based on vicarious liability.

[9] Having taken into account all the evidence placed before the court, I make the following factual findings, which have probative value.

[10] The northbound traffic towards and directly beyond the intersection is carried by three lanes, and the collision occurred in the middle lane. The BMW was stationary at the time of the impact because the driver, Mr Dausab, had brought the vehicle to a complete stop because of the traffic lights having turned red against him as he approached the traffic lights. I also accept Dausab's evidence that he continued to hold down the brakes of the BMW as he waited for the green lights of the traffic lights to give right of way. It was when the BMW was in such motionless position in the middle lane that the Mercedes Benz hit the rear of the BMW: The BMW had not stopped suddenly. These are very crucial findings. I now proceed to consider the law.

A (3) The Law

[11] It has been said:

'Where during daytime a motor vehicle collided with a parked or a stationary vehicle (which had not stopped suddenly) it was held *res ipsa loquitur* because in the ordinary course of events this does not occur if the defendant's vehicle is under proper control and is being driven with due care.'

[W E Cooper, *Delictual Liability in Motor Law* (1996) P 102; and the cases there cited]

[12] I accept Cooper's proposition of law as apropos to the facts of this case. The collision occurred at about 18h00 to 18h10. It could not have been after sunset or in the night. No evidence was led that the collision occurred in the night.

[13] In that regard, it has been said that in order to neutralize *res ipsa loquitur* and escape its consequences, the defendant must give an explanation sufficient to negative the probability of negligence. If the explanation is insufficient, the occurrence proclaims negligence – *res ipsa loquitur* – and, being unrebutted, the plaintiff is entitled to succeed, as the defendant's failure tilts the probabilities in the plaintiff's favour'. See *Arthur v Bezuidenhout & Miency* [1962] (2) (SA 566 (A) at 574 B). And it need hardly saying that the defendant's explanation should not be considered in isolation but with due regard to the evidence as a whole and the probabilities. (*Delictual Liability in Motor Law*, *ibid.* p 107).

[14] Thus, where *res ipsa loquitur* applies, there is a presumption that the event is caused by negligence on the part of the defendant, and the plaintiff succeeds, unless the defendant can rebut this presumption. *Barkway v South Wales Transport Co.* [1948] (2 ALL ER 460 at 471)

A (4) Application of the law to the facts

[15] The BMW was stationary in the manner as I have accepted in paragraph 10 above, when the Mercedes Benz hit it at its rear; and what is more, the BMW had not stopped suddenly; and so, *res ipsa loquitur*. Has the defendant offered any explanation sufficient to neutralize the application of *res ipsa loquitur*? I now proceed to consider that question.

[16] Nalupe (the driver of the Mercedes Benz) put forth this explanation. He saw that the BMW was stationary ahead of him because of the traffic lights showing red in their direction. As he sat in the Mercedes Benz and had applied the brakes of the vehicle,

with his foot still pressed on the brake-pedal, the Toyota driven by Hedimund hit the Mercedes Benz; whereupon the Mercedes Benz, to use Nalupe's own words, 'propelled my vehicle into the stationary vehicle in front of me'.

[17] On the evidence, I find that Nalupe did nothing to prevent the Benz hitting the BMW, albeit he had ample time to take some reasonable steps. He had time to look into the Mercedes Benz's rear mirror and to tell Ms Nalupe, a defence witness, who sat next to him as a passenger that the Toyota would not be able to stop in time to prevent it from hitting the Benz. It is not that without noticing anything, all of a sudden the Toyota came from nowhere to hit the Mercedes Benz. There is no evidence tending to show that Nalupe, who had ample time to do what I have described previously, did anything, for instance, by steering the Mercedes Benz out of the way of the Toyota in order to avoid the collision. He says the Benz was 'propelled into the BMW'. He does not say that the Benz was catapulted towards the BMW in such a manner that the tyres of the Mercedes Benz were not touching the road surface, making it impossible for him to apply the brakes of the motor vehicle or manoeuvre it into either of the two lanes that lay to his left or right. There is no evidence that those two lanes carried any traffic at the material time. Indeed, the unchallenged evidence of Mr Nalupe was that there was not much traffic moving on the road at the material time. Furthermore, in Mr Nalupe's evidence and in the evidence of Ms Nalupe, a defence witness, the Mercedes Benz was parked some three to four metres behind the BMW. It follows reasonably and inevitably from all this that Mr Nalupe had ample time to carry out any of the aforementioned manoeuvres or others in order to avoid the collision.

[18] I am alive to the caution that in matters as the present, I should not judge the inaction of Mr Nalupe with hindsight. I have not judged him with hindsight but on the facts. Merely on the facts, it is clear that Mr Nalupe failed to keep his vehicle under proper control and he did not drive it with due care in the circumstances. 'The defendant's vehicle is under proper control and is being driven with due care'.

A (5) Conclusion

[19] Based on these reasons, it is satisfactory and reasonable to hold that third defendant has not given explanation sufficient to negative the probability of negligence, and so, plaintiff should succeed in his claim against third defendant.

[20] Furthermore, on the facts and the analysis made and conclusions reached on the application of the law to the facts, I can see no basis on which third defendant's counterclaim can succeed. As I have said previously, third defendant has not shown, on the facts, what plaintiff did or omitted to do, delictually speaking, against or in relation to third defendant regarding the collision.

[21] It follows inevitably that plaintiff succeeds in his claim of negligence against third defendant, but third defendant fails in his counterclaim against plaintiff. I now proceed to treat plaintiff's claim against first and second defendants.

B. Plaintiff's claim against first and second defendants

B (1) The facts

[22] The undisputed facts set out in paras 7 and 8 under item A apply to the present item B, too. Therefore, it serves no purpose to rehearse them under item B.

[23] Having considered all the evidence relevant to item B, I make the following factual findings. Of course, I might have considered some of those facts already under item A.

[24] I respectfully reject Mr Dausab's evidence that first defendant's negligent driving caused the collision. First, there was no collision at all between the BMW and the Toyota Mini Bus. Mr Dausab's evidence that driver Hedimund drove the Toyota at excessive speed is unproven. Furthermore, sitting in the BMW close to the intersection

and waiting for the traffic lights to turn green for him to proceed, as has been found to be the case, it was humanly impossible for Mr Dausab to have gauged the speed at which the Toyota, which was driving behind the Benz, travelled; let alone testify that driver Hedimund failed to apply the brakes of the Toyota 'timeously or at all'. Mr Dausab's averments on those aspects remained unproven: they are mere speculative irrelevancies.

[25] Based on these reasons, I conclude that this is a good case where plaintiff's claim of negligence against first defendant and second defendant must fail merely on the facts; and it fails.

B (2) Conclusion

[26] Accordingly, plaintiff's claim of negligence against first defendant and second defendant is soundly rejected.

C. Third defendant's counterclaim against first defendant and second defendant

C (1) The facts

[27] The undisputed facts set out in paras 7 and 8 under item A apply to the present item C, too; and so, I shall not repeat them here.

[28] As before with regard to item A and item B, I have considered all the evidence placed before the court, and having done that I make the following factual findings as respects this leg of the matter.

[29] I repeat this finding of fact I made at the beginning of paragraph 10 under item A, namely, that the northbound traffic towards and directly beyond the intersection is carried by three lanes and the collision occurred in the middle lane. Because of the wet condition of the road surface, it is probable that driver Hedimund was travelling about 20

kph. Even if it were to be accepted that the Benz 'squeezed' between the Toyota Hedimund was driving and the stationary BMW, these facts should tell against his driving. Upon a question for clarification from the Bench, Hedimund testified that he saw the Benz maneuvering its way from the lane right to the middle lane without making any indication that it was turning into the middle lane. Since driver Hedimund was travelling at the safe speed of about 20 kph and he saw that the Benz was turning into his lane of travel without any indicating of such of its intention, he had ample time to hoot the Toyota's horn to warn the driver of the Benz that it was not safe for him to turn into the Toyota's lane of travel. Hedimund's evidence was not that the Benz suddenly drove into the middle lane, making it too late to hoot to alert the driver of the Benz or making it impossible for the Toyota to avoid hitting the Benz. Indeed, when the Toyota hit the Benz, Nalupe had completed the manoeuvre and positioned the Benz in the middle lane.

[30] In any case, having considered the Namibia Road Accident Form (Exh A), I think it is safe for me to accept, in the absence of credible evidence to the contrary, that the Benz did not change lanes and that it was stationary when the Toyota hit it at its rear. It is important to note the following: The fact that a driver of a motor vehicle has right of way as Hedimund did, does not absolve that driver from his or her duty to keep other vehicles about under reasonable observation take proper steps when necessary to do so in order to avoid a collision. As I have found previously, Hedimund failed in that duty. He failed to keep his vehicle under proper control and he did not drive it with due care.

C (2) The Law

[31] The law I should apply to the facts under the present item is that discussed in paras 11 to 14 under item A, above.

C (3) Application of the law to the facts

[32] Having applied the law to the facts, I hold that the Toyota hitting the Benz is *res ipsa loquitur*. There is, therefore, the presumption that the event (i.e. the collision) was caused by negligence on the part of the first defendant. From what I have said about the conduct of driver Hedimund in the circumstances in paragraph 28 above, I conclude that Hedimund has not rebutted the presumption; and so third defendant should succeed.

C (4) Conclusion

[33] Based on the foregoing reasons, I conclude that third defendant should succeed in his claim of negligence against first and second defendants.

[34] But that is not the end of the matter. In terms of rule 48 (3) of the rules of court, third defendant should have obtained leave of the court to counterclaim, as he did, in these proceedings against first defendant and second defendant and plaintiff. It appears third defendant did not. There appears to be no indication on the papers filed of record that third defendant sought and obtain such leave. On the authority of *Camponia Romana De Pescuit (SA) v Rosteve Fishing (Pty) Ltd and Tsasos Shipping Namibia (Pty) Ltd (Intervening): In Re Rosteve Fishing (Pty) Ltd v MFV 'Captain B1', Her Owners and All Others Interested in Her* 2002 NR 297 (HC), I hold that that provision is peremptory. It appears also that plaintiff and first and second defendants did not seriously raise such failure on the papers or through their individual counsel's oral submissions. In sum, the issue was not raised and argued; and so, the court did not think it was safe, satisfactory, and fair to have excluded third defendant from pursuing the counterclaim. However, that does not mean that, having allowed third defendant to participate in the proceedings and to prove his counterclaim, I am barred from marking my disapproval of his failure to comply with rule 48(3). The failure should become relevant to the issue of costs. Indeed, this is a good case where, although third defendant has been successful in his counterclaim against first and second defendants, the court should decline to award him all his costs.

Costs

[35] It remains to consider the issue of costs: and in that regard, I should note that I have not held against any party that he or she contributed negligently to the collision as it relates to him or her. That being the case, the general principle that costs follow the event should apply, subject to what I have held in paragraph 34 above about third defendant.

Overall conclusion

[36] In view of the agreement between the parties, I have treated the question of liability only; that is to say, I have determined only which party's blameable negligence caused the collisions. Based on all the foregoing reasoning and conclusions, in the result, I make the following order:

- (a) Plaintiff succeeds in his claim of negligence against third defendant; and third defendant must pay plaintiff's costs.
- (b) Plaintiff's claim of negligence against first defendant and second defendant is dismissed; and plaintiff must pay first defendant's and second defendant's costs.
- (c) Third defendant's counterclaim of negligence against plaintiff is dismissed; and third defendant must pay plaintiff's costs.
- (d) Third defendant's counterclaim of negligence against first defendant and second defendant succeeds; and first defendant and second defendant must pay 50 per cent only of third defendant's costs, and the costs include costs of one instructing counsel and one instructed counsel, the other paying, the other to be absolved.

C Parker
Acting Judge

APPEARANCES

For plaintiff:

F Erasmus

Francois Erasmus and Partners, Windhoek

For 1st and 2nd defendants:

Z J Grobler

Grobler & CO., Windhoek

For 3rd defendant:

I Strydom

instructed by P D Theron & Associates, Windhoek