REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-OTH-2017/02383

In the matter between:

FADI FADL AYOUB **FIRST PLAINTIFF**

ALGENE M MOUTON **SECOND PLAINTIFF**

and

DEON JOBS **DEFENDANT**

Neutral citation: *Ayoub v Jobs* (HC-MD-CIV-ACT-OTH-2017/02383)[2019] NAHCMD 149 (16 May 2019)

Coram: PARKER AJ

Heard: **1, 3, 23 April 2019**

Delivered: **16 May 2019**

Flynote: Damages – Damage to a residential house and loss in respect of motor vehicle – Proof of damages – Onus of establishing damages placed on plaintiffs – Nature of evidence required – Plaintiffs merely placing before court photographs to prove damage to house – Photographs not dated and no time indicated as to when they were taken – No photographs showing the state of the house before defendant took occupancy of it – Such evidence important for purposes of comparison in virtue of defendant's contrary evidence that they did not leave the house in the state that is

depicted on the photos – Insufficiency of evidence – Furthermore, no cogent evidence on cost of replacing keys to the house and keys of motor vehicle

Court held that where plaintiffs have proved patrimonial loss but has not placed before the court sufficient evidence or no evidence at all to enable precise assessment of damages, the court may in the circumstances in some instances estimate damage on the best evidence available – But where evidence was in a general sense available to the plaintiffs and plaintiffs fails to produce it, the court will not attempt to assess plaintiffs' loss out of pity for plaintiffs or out of suchlike extraneous considerations – In instant case, on the evidence, court therefore unable to assess damages in respect of the house and motor vehicle – Consequently, court dismissing plaintiffs' claim 1 and claim 2 respecting the house and the motor vehicle.

Summary: Damages – Damage to a residential house and loss in respect of motor vehicle – Proof of damages – Onus of establishing damages placed on plaintiffs – Nature of evidence required – Accommodation of house provided by plaintiffs to defendant as part of defendant's employment benefits – Plaintiffs alleging defendant damaged various items of the house – Plaintiffs relying on photographs to prove the damage – Court finding that photographs not dated and no time at which they were taken indicated on photographs – Court finding further that there were no photographs showing the state of house before its occupation by defendant for comparison purposes – Such evidence important for purposes of comparison in virtue of defendant's contrary evidence that they did not leave the house in the state that is depicted on the photographs – Court finding insufficiency of evidence to prove the damage to the house and extent thereof – Plaintiffs breaking locks of house and replacing them and replacing keys of motor vehicle because defendant failed to return to first plaintiff keys of the house and motor vehicle – Court finding no evidence establishing cost of both items – Consequently, court dismissing plaintiffs' claim 1 and claim 2 respecting the house and the motor vehicle.

ORDER

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1. Plaintiffs' claim 1 and claim 2 are dismissed.

2. Plaintiffs' claim 3 succeeds partially; and it is ordered that defendant must pay to plaintiffs the water charges shown on the invoices presented to plaintiffs by the Windhoek Municipal Council showing water charges for the period 6 November 2016 to 31 March 2017.

3. Plaintiffs must pay 50 per cent of defendant's costs.

4. The matter is finalised and removed from the roll.

JUDGMENT

PARKER AJ:

[1] The present action proceeding concerns claims for damages arising from defendant's alleged tortious conduct respecting -

(a) an immovable property ('the house') (claim 1 and part of claim 2);

(b) a movable property ('the motor vehicle') (the rest of claim 2); and

(c) Windhoek Municipal Council's bills for electricity and water consumption (claim 3).

[2] The matter relates to a contract of employment (partially written and partially oral) in terms of which first plaintiff on behalf of FA Business Solutions CC (whose members were at the relevant time the plaintiffs) employed defendant as a caterpillar operator and site inspector. The contract was concluded on 8 November 2016. As part of his conditions of service, plaintiffs availed to defendant and his family free accommodation of the house. Which persons constituted defendant's family turns on nothing significant; and so, I will not waste my time reviewing the evidence thereanent. What is relevant is that the family included defendant and Hilde

(defendant Witness 2), and they took occupation of the house so soon before or after the conclusion of the employment contract.

[3] On this point, I find that defendant and Hilde moved into the house on 6 November 2016. They remembered the day of the week was Sunday, 6 November. The 7th or 8th November 2016 did not fall on a Sunday. And they vacated the house on 31 March 2017.

[4] The 'grand' total of plaintiffs' claim is put at N$124,242.20. Of this global amount plaintiffs assigns N$4,242.20 to bills or invoices issued by the Windhoek Municipal Council ('the Council') and N$120,000.00 to the immovable property, being claim 1 and part of claim 2. It is important to note, as Mr Visser, counsel for defendant, submitted, that no attempt is made by plaintiffs in the particulars of claim to delineate what amount is claimed for the immovable property and what amount is claimed for the movable property. The significance of this note will become apparent in due course.

[5] For the sake of clarity, I propose to consider the claims one by one. In that regard I note that only three witnesses testified in the proceedings: for plaintiffs, Mr Ayoub (first plaintiff), and for defendant, Mr Jobs (the defendant) and Ms Hilde Shiimi (who described herself as 'the girlfriend of Mr Deon Jobs (defendant)'. I shall consider their individual evidence with regard to each of the claims.

[6] First plaintiff's evidence essentially is that floor carpets of the house were damaged and stained with some unidentifiable liquid and graffiti. The kitchen stove and extractor fan were damaged. The first plaintiff does not say in what manner the stove was damaged. Defendant's evidence was that they (i.e. he and his family members) did not use the stove at all because the stove was 'dirty and unusable'. They, therefore, cooked food on a stove of their own. At the close of defendant's case, their assertion remained unchallenged. This leaves the extractor fan. Defendant's evidence is that they found it like that. The first plaintiff alleges further that water taps were left running resulting in damage 'to the house'. The pleadings do not say in what manner this occurrence caused damage to the house.

[7] In his attempt to prove that defendant damaged the house, first plaintiff sought to rely on photographs he says he took so soon after defendant had left the house to support his evidence as to the extent of the damage. In my view, the photos are irrelevant. They are irrelevant because they cannot assist the court in determining the damage and the extent of the damage for the following reasons: (1) No photographs were placed before the court to establish the state of the house before defendant and his family took occupation of the house for purposes of comparison; (2) No date and time appear on any of the photos to prove conclusively when they were taken. Doubtless, such evidence is important in virtue of defendant's contrary evidence that they did not leave the house in the state that is depicted in the photographs.

[8] If plaintiffs were minded to use the photos as evidence, he should have – and this is done in this time and age – placed before the court photographs showing the time and date on which a photograph was taken. In my judgment it is unsafe and unsatisfactory to place any currency on the photograph evidence. They prove nothing upon which the court could safely stand on to determine the damage to the house and extent of the damage. I, therefore, conclude that plaintiffs have failed to prove on a preponderance of probability, on the basis of plaintiffs' evidence and the photographs, that the house was damaged to the extent the photographs would want to portray and by the defendant and his family. It follows irrefragably that whether or not defendant pointed out to first plaintiff when first plaintiff visited the house what was wrong physically with the house is of no moment. It is for plaintiffs to allege and prove what they allege. Consequently, I conclude that Claim 1 fails. I now proceed to consider Claim 2.

[9] Claim 2 comprises two items, which I shall refer to as Claim 2A and Claim 2B. Claim 2A is that because defendant 'failed to return the keys (to the house) to me (i.e. first plaintiff), I (first plaintiff) was forced to break the locks in order to gain access for which I (first plaintiff) incurred costs in repairing thereafter'. And Claim 2B is that the 'defendant did not return the key of the vehicle (the motor vehicle) to the plaintiffs, consequently, causing the plaintiffs to replace the keys of the vehicle at their cost'.

<u>Claim 2A</u>

[10] I accept first plaintiff's evidence that defendant failed to hand over to him the keys to the house; and it is more probable than not that first plaintiff broke the locks and replaced them. But first plaintiff presented no evidence – not even a phantom of evidence – tending to establish the cost of the repairs; not even the cost of the replacement locks. Plaintiff urged on the court that he was a property developer of considerable years of experience; and so, we are not here dealing with an ignoramus in matters of repairing of houses and purchases of equipment and materials for same. In sum, I am unable to say – on the evidence – how much plaintiffs spent in breaking the locks and replacing them.

[11] Indeed, what makes plaintiff's case even more untenable is that plaintiffs have lumped together Claim 1 and Claim 2 in the POC; and so, this court is not in a position to determine judicially what amount is fair and reasonable for replacing the keys of the house and the vehicle. (See *Toyi v Morrison* [1980] All SA 576 (TK), 1980 (2) SA 705 (TK)). Doubtless, in the absence of any evidence or even an estimate of the cost of replacing the keys, this court – acting judicially – is not entitled to make an assessment of the cost of replacing the keys of the house and the vehicle.

[12] I accept Mr Visser's submission that it is the burden of plaintiffs in the position of the present plaintiffs to produce sufficient evidence to sustain the exact amount resulting from curing the damage. (*Toyi v Morrison*) Where a plaintiff, as is in the instant proceeding, has proved patrimonial loss but has not placed before the court sufficient evidence or no evidence at all (as is the situation in the instant proceeding) to enable precise assessment of the damages, the court may in the circumstances in some instances estimate the damage on the best evidence available. But where evidence was in a general sense available to the plaintiffs, as is in the instant case, as I have demonstrated, and he or she fails to produce it, the court will not attempt to assess plaintiff's loss out of pity for plaintiffs or out of suchlike extraneous considerations. [See *Visser and Potgieter's Law of Damages*, 2nd ed (2003), p 489; and *Prinsloo v Luipaardsvlei Estates and Gold Mining* 1933 WLD 6, referred to the court by Mr Visser.]

[13] For the foregoing reasons in paras 9-12, I conclude that Claim 2A fails. I proceed to consider Claim 2B.

Claim 2B

[14] As to claim 2B; I presume 'keys of the vehicle' meaning the ignition key and keys to the doors and the boot. Under this head, too, I accept first plaintiff's evidence that defendant did not return the keys of the motor vehicle to plaintiffs from whom he had obtained them in the first place. I also accept that it is more probable than not that the plaintiffs were forced to replace those keys. But here, too, plaintiffs do not tell the court how much it cost to replace the vehicle's keys.

[15] It is common human experience that replacing a key of a motor vehicle is done by professionals who sell the replacement keys and those who fix them on the vehicle. It is more probable than not that the sellers of motor vehicle parts and those who fix the parts issue receipts for the purchase of the parts and the fixing of the parts; and so, plaintiff, who is legally represented at the relevant times, has no excuse – none at all – not to have placed before the court cogent evidence as to the cost of the replacement keys and the cost of fixing them on the motor vehicle.

[16] All that is before the court is first plaintiff's *ipse dixit* that he purchased the replacement keys from Durban (South Africa). I do not think that in Durban ordinary people, walking in the streets, sell car keys; and, what is more, plaintiffs did not testify as to who fixed the locks on the motor vehicle. To leave such critical matters unsupported by cogent and credible evidence cannot assist plaintiffs – plaintiffs who are legally represented. Such crucial failure must be fatal to plaintiffs' case.

[17] Doubtless, the application of the law through the authorities and the analysis made and conclusions reached thereanent with regard to Claim 2A apply with equal force to the want of proof of cost of loss suffered by plaintiffs with regard to replacing the keys of the motor vehicle. It, therefore, serves no purpose to rehearse here what I have set out in paras 10 – 12 with regard to Claim 2A. On a parity of reasoning, it follows inevitably that Claim 2B should suffer the same fate as Claim 2A. Accordingly, in my judgment Claim 2B also fails. I proceed to consider Claim 3.

[18] In the pleadings, plaintiffs aver that defendant failed to settle outstanding bills charged in respect of the house in breach of an agreement he had with defendant in terms of which (according to his evidence), while accommodation in the house was free, defendant agreed to pay electricity and water charges presented by Windhoek Municipal Council ('the Council'). Defendant's plea was that he took occupation of the house 'free from any rent and charges subject only to the defendant paying for electricity per pre-paid meter installed for the duration of the agreement'. Defendant gave evidence along those lines. And Hilde's evidence was that 'we bought our pre-paid electricity directly from the City of Windhoek'. While Hilde would not know what the terms of the oral agreement between plaintiffs and defendant were, as she was not privy to the contract, I would accept her evidence as true that they used pre-paid electricity. This piece of evidence remained unimpeached at the close of defendant's case. That leaves the water charges.

[19] On the evidence, I am prepared to find that defendant was not responsible for 'post-paid' electricity charges shown on the Council's invoices addressed to AM Mouton (second plaintiff) because defendant and the family used the prepaid system. On the same evidence and on the other side of the coin I am prepared to find on that score that the largesse about the free accommodation that plaintiffs extended to defendant did not include free electricity and free water; otherwise, defendant and Hilde would not have testified that they used prepaid electricity. Indeed, Deon and Hilde did not testify that they paid for water charges, too. Therefore, I conclude that plaintiffs have produced sufficient evidence regarding the water charges that are shown on the Council's invoices, and that defendant was responsible for paying the water charges, even if defendant did not receive the invoices. Of course, defendant did not receive the invoices. He was just a licensee permitted by plaintiffs, the owners of the house, to occupy the house as part of his employment benefits. Accordingly, I incline to hold that defendant is responsible for paying for water supplied by the Council during defendant's occupancy of the house, as indicated on the Council's invoices produced in evidence.

[20] Since both parties are legally represented, it does not behove me to trawl through the Council's invoices for the water charges. This, the legal practitioners must do. I have decided that defendant is responsible for paying for water, that he and the family consumed while they occupied the house, that is, from 7 November

2016 to 31 March 2017. It follows that Claim 3 succeeds in respect of water charges only.

Costs

[21] I note that plaintiffs have been successful partially. I, therefore, think it is just and fair that plaintiffs pay only one half of defendant's costs.

Conclusion

[22] Plaintiffs succeed only to some extent in Claim 3; and they fail in Claims 1 and 2.

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

1. Plaintiffs' claim 1 and claim 2 are dismissed.

2. Plaintiffs' claim 3 succeeds partially; and it is ordered that defendant must pay to plaintiffs the water charges shown on the invoices presented to plaintiffs by the Windhoek Municipal Council showing water charges for the period 6 November 2016 to 31 March 2017.

3. Plaintiffs must pay 50 per cent of defendant's costs.

4. The matter is finalised and removed from the roll.

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C Parker

Acting Judge

APPEARANCES:

PLAINTIFFS:	G KASPER Of Murorua Kurtz Kasper Inc., Windhoek
DEFENDANT:	J VISSER Of Koep & Partners, Windhoek