

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-CIV-ACT-DEL-2017/03118

In the matter between:

WESTERN ADMINISTRATION SERVICES (PTY) LTD T/A

WESTERN INSURANCE

RIX TRANSPORT CC

FIRST PLAINTIFF

SECOND PLAINTIFF

and

ALFINIUS SWARTBOOI

DEFENDANT

Neutral citation: *Western Administration Services (PTY) LTD t/a Western Insurance v Swartbooi* (HC-MD-CIV-ACT-DEL-2017/03118) [2019] NAHCMD 544 (06 December 2019)

Coram: **PRINSLOO J**

Heard: 24 - 26 June 2019 and 01 October 2019

Delivered: 06 December 2019

Reasons: 12 December 2019

Flynote: Law of delict – Motor vehicle collision – Damages – Negligence alleged - Two mutually destructive versions – Onus on the Plaintiff to prove on a balance of probabilities that his version is to be believed.

Summary: The first plaintiff's claim is based upon the provisions of an insurance policy which is entered into between the first plaintiff and the second plaintiff in favour of the latter wherein the first plaintiff undertook, inter alia, to indemnify the second plaintiff against the loss of or damage to a 2013 Scania Truck with registration number N 198-403 W. The first plaintiff, as a result of the policy, carried the risk of damages and/or loss in respect of the second plaintiff's truck. The claim arises from an accident that occurred on 12 May 2017 at about 20h30 at a bridge on the B1 main road, approximately 31 kilometres from the Gibeon t-junction with the B1 road. The said collision occurred between the second plaintiff's truck and the motor vehicle driven by the defendant, namely a Ford Ranger Pickup with registration number N 93036 W. As a result of the collision the second plaintiff's motor vehicle was damaged to the tune of N\$ 132 9620.37.

Held that Mr Vleermuis (driver of second plaintiff's truck) made a very favourable impression on this court and his evidence was clear and concise without inherent improbabilities. The same cannot be said for the evidence of the defendant. If one considers the version of the defendant that was put to Mr Vleermuis it is clear that there is a substantial difference from the version testified to by Mr Swartbooi (the defendant) under cross-examination.

Held further that the version put to Mr Vleermuis and the version of the defendant is directly opposite one another. The version of the defendant is inconsistent with what happened on that fateful night and I am satisfied that the defendant's version cannot be relied upon.

ORDER

Judgment is granted in favour of the First and Second Plaintiff in the following terms:

1. Payment in the amount of N\$ 114 964.91 to the First Plaintiff.
2. Payment in the amount of N\$ 17 997.46 to the Second Plaintiff.
3. Interest to be calculated on the aforesaid amounts at the prescribed rate of 20% per annum from date of judgment to date of payment.
4. Cost of suit.

Counterclaim:

5. The Defendant's counterclaim is dismissed.

JUDGMENT

PRINSLOO J

Introduction

[1] The first plaintiff is Western Administration Services (Pty) Ltd, a company with limited liability and duly registered and established in accordance with the company laws applicable to the Republic of Namibia and is a registered insurer trading under the name and style of Western Insurance.

[2] The second plaintiff is Rix Transport Close Corporation which is duly registered and incorporated in terms of the Close Corporation Act applicable in Namibia.

[3] The defendant is Alinius Swartbooi an adult male residing in Windhoek.

[4] The first plaintiff's claim is based upon the provisions of an insurance policy which is entered into between the first plaintiff and the second plaintiff in favour of the latter wherein the first plaintiff undertook, inter alia, to indemnify the second plaintiff against the loss of or damage to a 2013 Scania Truck with registration number N 198-403 W. The first plaintiff, as a result of the policy, carried the risk of damages and/or loss in respect of the second plaintiff's truck.

[5] The claim arises from an accident that occurred on 12 May 2017 at about 20h30 at a bridge on the B1 main road, approximately 31 kilometres from the Gibeon T-junction with the B1 road. The said collision occurred between the second plaintiff's truck and the motor vehicle driven by the defendant, namely a Ford Ranger Pickup with registration number N 93036 W.

[6] As a result of the collision the second plaintiff's motor vehicle was damaged to the tune of N\$ 132 9620.37.

[7] The respective payments by the first and second plaintiffs, in terms of the damage suffered as a result of the collision, is set out as follows:

(a) The first plaintiff suffered damages in the total amount of N\$ 114 964.91 which is calculated as follows:

- i. N\$ 111 977.21 representing the reasonable costs of repairs paid to the insured, i.e. the second plaintiff, as per the Agreement of Loss.
- ii. N\$ 2 987.70 representing the assessor's fee paid.

(b) The second plaintiff suffered damages in the amount of N\$ 17 997.46 representing the excess payment made to the repairer, which is due to be paid by the second plaintiff in terms of the Agreement of Loss.

[8] The defendant in turn filed a counterclaim in the amount of N\$ 75 780.56 for the damage and reasonable cost of repair to the Ford Ranger to its pre-accident condition.

Pleadings

[9] The plaintiff pleaded that the collision was occasioned solely as a result of the negligence of the defendant, in that he (the defendant):

- (c) Failed to keep a proper look-out for other traffic and more specifically the second plaintiff's motor vehicle which was driving on the oncoming lane.
- (d) Failed to exercise proper control over the motor vehicle which he was driving.
- (e) Failed to apply his motor vehicle's brakes timeously.
- (f) Failed to take reasonable and necessary steps to avoid the said collision whilst he was able to do so.
- (g) Failed to exercise the degree of care normally expected from a reasonable driver under the same circumstances.

[10] The defendant on the other hand pleaded that it is the driver of the second plaintiff's vehicle who was the sole cause of the collision and who drove negligently. His plea and counterclaim is premised on the following:

- (a) He denied that he was negligent but pleaded that in the event that the court finds that he was negligent he denies that his negligence was the sole cause of the collision or that he contributed thereto.
- (b) He further pleaded that it was the driver of the second plaintiff's vehicle who failed to keep the truck he was driving in his lane and drove in both lane on the bridge. The defendant pleaded that he exercised the proper degree of care by

applying the brakes of his vehicle and that it was in fact the driver of the second plaintiff's vehicle that failed to apply his brakes timeously under the prevailing circumstances.

- (c) He further pleaded that he did everything he could to avoid the collision, not only by applying his brakes but also keeping as far possible to the left of the road but could not avoid the truck that was utilising both lanes inside the bridge when it was approaching him.
- (d) He pleaded that the driver of the second plaintiff's vehicle failed to exercise care and proceeded on the bridge while incessantly flashing his lights and blinding the defendant.

The pre-trial order

[11] The parties managed to limit the issues in dispute substantially prior to the commencement of the trial. The following issues of facts that were previously in dispute were resolved between the parties at the commencement of the trial and need no longer be adjudicated upon:

- (a) The *locus standi* of the parties.
- (b) The first plaintiff is a company with limited liability, duly incorporated, registered and established in accordance with the company laws of the Republic of Namibia, and a registered insurer, which company trades under the name and style of Western Insurance with its principal place of business situated at Western Square, Ballot Street, Windhoek.
- (c) The second plaintiff is a close corporation duly registered and incorporated in accordance with the close corporation laws applicable to the Republic of Namibia with its principal place of business situated at No 6 Anton Rupert Street, Northern Industrial Area, Windhoek.
- (d) The first plaintiff was and remains the insurer of a white 2013 Scania Truck motor vehicle with registration Number N 198-403 W, in terms of an agreement of insurance, entered into by and between the first plaintiff and the second plaintiff;

- (e) The second plaintiff was and remains the owner alternatively bona fide possessor of a white 2013 Scania truck with VIN Number 9BSR6X40003827204 and registration number N 198-403 W.
- (f) The first plaintiff, as a result of the policy, carried the risk of damages and/or loss in or to the second plaintiff's truck.
- (g) The second plaintiff's truck was damaged and the reasonable cost to repair the vehicle to its pre-collision condition amounted to N\$ 129 974.67.
- (h) The first plaintiff suffered damages in the total amount of N\$ 114 964.91, representing the reasonable costs of repair paid to the repairer.
- (i) The second plaintiff suffered damages in the amount of N\$ 17 997.46 representing the excess payment.
- (j) The defendant is the owner, alternatively the bona fide possessor who bore the risk of loss or damage to a Ford Ranger motor vehicle with registration number N 93036 W.

[12] As a result the issues of facts as set out in para 9 above as well as the following facts remained to be resolved during the trial:

- (a) The collision was caused solely as a result of the negligence of the second plaintiff's driver in that he:
 - i. Failed to apply his brakes timeously and/or under the prevailing conditions.
 - ii. Failed to keep a proper look-out for oncoming traffic in light of the fact that he was driving the truck on both lanes before and on the bridge.
 - iii. Started to flash his lights incessantly when approaching the vehicle driven by the defendant.
 - iv. Failed to exercise proper control over the truck which he was driving under the circumstances.

- v. Failed to exercise the degree of care which would normally be expected from a driver of a heavy truck approaching and entering a bridge and driving night hours.

(b) That the defendant's motor vehicle was damaged and the reasonable cost to repair the vehicle to its pre-collision condition amounted to N\$ 75 780.56.

(c) That a demand was made to the plaintiffs in this regard.

Evidence adduced

Plaintiff's case

Michael Vleermuis

[13] Mr Vleermuis testified that on 12 May 2017 he was employed as a driver at Rix Transport CC and he was the driver of the Scania truck registration number N 198-403 W.

[14] He testified that on the date in question he was driving from south to north on the B 1 main road and approximately 31 kilometres from the Gibeon t-junction he saw the vehicle driven by the defendant approaching from the front.

[15] At the time the truck was in the curve making its way through the bridge and was about to exit and he flashed his lights once. He did so to alert the oncoming vehicle that he was on the bridge and also because the oncoming vehicle's lights was blinding him. He testified that it would appear that the defendant's vehicle was heavily loaded at the back which caused the lights to shine upward and as a result blinding him. As he was about to exit the bridge the defendant appeared to lose control over his vehicle and his vehicle skidded at an angle into his lane of travel and sideswiped the truck as a result.

[16] The witness stated that the defendant's vehicle collided with the side of the trucks bulbar and as a result caused the right front tyre's axle/rod to break and the vehicle came to a standstill with the right front side of the vehicle lying on its under carriage. He managed to bring his truck to a standstill but as the bridge is just after a curve he decided to remove the truck from the road surface and parked it next to the road. The defendant's vehicle was partially across the centreline in the road into the lane of the oncoming traffic and therefore the witness together with the assistance of the defendant and people who came to the defendant's assistance, lifted the front part of the defendant's vehicle and moved it into the defendant's lane of travel. This was done in order to clear at least one lane to allow other traffic to pass by.

[17] Mr Vleermuis indicated that the defendant had approximately 11 passengers in his vehicle and the majority of these passengers appeared to be above the age of 13. He however stated under cross-examination that it was dark and he cannot be too sure about the exact numbers but testified that the vehicle was heavily loaded with passengers and goods.

[18] During cross-examination Mr Kasper, counsel for the defendant, put the scenario of a vehicle skidding to the witness. The witness was asked whether the driver of a skidding vehicle would be at fault if an accident occur. The witness was of the opinion that such a driver would be liable in case of excessive speed or overloading.

[19] The witness was adamant that his truck never encroached in the lane of the oncoming traffic. He testified that the defendant lost control of his vehicle and sideswiped the truck. On a statement put to the witness by Mr Kasper that that is the reason why the defendant's vehicle was pinned against the bridge wall, the witness testified that the accident happened right in the middle of the road and stated that after the impact, the defendant's vehicle stood at an angle and because of the impact the right front wheel axle/rod broke and the front part of the vehicle had to be physically lifted so as to move the vehicle out of the way. That is why the vehicle was standing next to the bridge wall.

[20] The witness further testified that when two reasonable drivers approach the bridge from opposite directions and enter the bridge slowly and cautiously, the vehicles would pass one another safely in spite of the narrowness of the bridge.

[21] It was also put to the witness that it is the defendant's testimony that he stepped hard on his brakes to bring the vehicle to a standstill. In response thereto the witness testified that when he spoke to the defendant after the accident he (the defendant) said to the witness that he applied his brakes and the vehicle moved towards the right. According to the witness there were skid marks on the tarmac that went into the direction of the truck.

[22] Mr Kasper further put it to the witness that the fact that he continuously flashed his headlights caused the defendant to be disoriented. The witness was however adamant that he flashed his lights only once.

Roan Gideon Swiegers

[23] A Damages affidavit by Roan Gideon Swiegers was filed of record and at the commencement of the trial, the plaintiffs by agreement between the parties, submitted the said affidavit into evidence as the defendant does not contest the quantum of plaintiff's claim

Defendant's case

Alfinus Swartboo

[24] Mr Alfinus Swartboo was the only witness who testified in support of his case.

[25] He testified that on Friday, 12 May 2017 at about 20h30 he was travelling to Tses Village from Windhoek, which is from the northern to the southern direction. While

traveling between Gibeon village and Asab settlement a collision occurred between the Ford Ranger pickup driven by him and a white Scania truck driven by Michael Vleermuis.

[26] The witness testified that he bought the Ford Ranger motor vehicle earlier that week from his brother in-law Mr JP De Cruz for N\$ 110 000 and this trip to the south was the first trip that he took with the vehicle.

[27] Mr Swartbooi testified that approximately 31 kilometres south of the Gibeon juncture near two bridges, a truck was approaching from the southern direction. As the truck was approaching it was continuously flashing with its headlights which blinded the witness. Mr Swartbooi also testified that he applied the brakes of his motor vehicle as he was approaching the bridge.

[28] The witness testified that a collision occurred between his vehicle and the truck just before entering the bridge on the northern side of the bridge. He further testified that the collision occurred in his lane and the truck, driven by Mr Vleermuis, made contact with his vehicle on its right side and his vehicle came to a standstill within the bridge.

[29] Mr Swartbooi testified that both the vehicles sustained damage as a result of the accident. The accident scene was attended to by the traffic officers and police officers and the passengers in the witness' vehicle were taken to Tses Clinic to be attended to. The Ford Ranger was subsequently removed from the scene of the accident by a tow-in service from Keetmanshoop.

[30] During cross-examination the witness testified that he was quite familiar with the area where the accident occurred as his family resides there and he grew up in the area but testified that he was not familiar with driving with the Ford Ranger on that road.

[31] When asked as to how the accident happened the defendant testified that he saw the truck approaching from the curve about to exit the bridge. The driver of the

truck flashed his headlights continuously and when he saw the truck was nearby (approximately 13 to 15 meters away) he applied his brakes, but not firmly, causing the vehicle to gradually slow down whilst he continuously concentrated on his lane.

[32] The witness denied that his vehicle skidded or that he lost control of his vehicle and testified that the truck left its lane and collided with the defendant's vehicle in his lane of travel. On a question asked by the court as to the point of impact the witness testified that the impact occurred because the truck's tyres were on the white line and the bulbar of the truck protruded into his lane and that was the portion of the truck that impacted with the defendant's vehicle. The defendant further stated that he firmly stepped on his brakes after the impact and kept a firm hold of the steering wheel and brought the vehicle to a standstill inside the bridge.

[33] On the issue of ownership of the vehicle concerned ie the Ford Ranger, the defendant testified that he bought the vehicle from his brother in-law the same week as the accident occurred and at the time of the accident the ownership of the vehicle was not yet transferred into his name. He testified that the vehicle to date is still registered in the name of Mr Da Cruz, his brother in-law, as the vehicle has not been repaired as yet and once repaired the vehicle must go through a roadworthy test before ownership can be transferred.

Onus

[34] The plaintiffs claim against the defendant is based on delict and in order to succeed in their claim the plaintiffs will have to prove that the defendant was guilty of conduct which is both wrongful and culpable and which caused the plaintiff patrimonial loss¹.

¹ *Natal Fresh Produce Growers' Association and Others v Agroserve (Pty) Ltd and Others* 1990 (4) SA 749 (N) at 756 I-757 A.

[35] The learned author, H.B. Klopper in his book titled *The Law of Collisions in South Africa* said the following with regard to the test of negligence:

'The test for negligence is whether a person's conduct complies with the standard of the reasonable person. In order for a person to be liable the damage resulting from the negligence must be foreseeable and preventable. If these principles are applied to a motor vehicle accident, the driver must act like a reasonable person under the prevailing circumstances, be capable of reasonably foreseeing the damage flowing from his negligent act and must also take reasonable steps to prevent damage from occurring. Failure to do so will constitute negligence.

..²

[36] In order to succeed in its claim for damages, the plaintiffs must establish both the factual and legal causation. The question in relation to the former is whether the defendant's negligent act or omission caused or materially contributed to the harm giving rise to the claim. If it did, the second question is whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue, or whether the harm is too remote.³

Mutually destructive versions

[37] In *Van Wyk v Chibueze*⁴ Oosthuizen J discussed the approach to mutually destructive versions as follows:

'[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.⁵

² H.B. Kloppers *The Law of Collision in South Africa* 7 ed at 11 para f.

³ *Gibson v Berkowitz and Another* 1996 (4) SA 1029 (W) at 1039 F–G. See also *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34 E-F; *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700 E.

⁴ (I 755/2016) [2018] NAHCMD 305 (26 September 2018).

⁵ *Ndabeni v Nandu* (I 343/2013) [2015] NAHCMD 110 (11 May 2015) para 26.

[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 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 equipoised⁶.

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

Evaluation of the evidence adduced

[38] Before this court is the evidence of the two drivers of the respective vehicles involved in the collision and an accident report which was admitted into evidence by agreement. There are no independent witnesses called in support of either the plaintiffs or defendant's case. Apart from the evidence led by and on behalf of the and the accident report, the court also received a number of photographs depicting the damage to the vehicles and some taken after the fact to illustrate to the court the general area where the accident took place.

[39] Both witnesses filed very condensed witness statements and a lot of new evidence was elicited during cross-examination and as a result counsel the defendant advanced an argument that the witness, specifically Mr Vleermuis was not steadfast and forthright in his version of events and that he contradicted himself under cross-examination and kept on changing his version. This is exactly the problem that the court is faced with the fact that some legal practitioners do not draft witness statements as required by the rules and they lose sight of the fact that the witness statement constitutes the witness's evidence in chief once read into the record.

⁶ Extract from the summary of Nienaber, JA, op cit, and not the complete text. It was also said that in a difficult 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.

[40] In *Josea v Ahrens*⁷ Schimming-Chase AJ stated the following in respect of a witness statement:

[11] Before evaluating the evidence led by and on behalf of the parties, it is necessary to deal with what should be contained in a witness statement, so as to meet the overriding objectives of the case management process. The witness statements filed on behalf of both parties leaves much to be desired. They contain summaries of the events that occurred without any form of elaboration, especially taking into consideration that apart from the plaintiff, all witnesses who testified were eye witnesses to the accident. At the trial, most of the witnesses called by the litigants made significant additions to their evidence in chief, when a proper preparation of the witness statements at the outset would make this wholly unnecessary. In effect these additions were not simple amplification (as is permissible during evidence in chief with leave of the court), but related to material aspects observed by the witnesses at the time of the collision.'

[12] [T]his statement essentially constitutes the evidence in chief of the witness and is read into the record at the beginning of the witness' testimony

and

[16] I think parties should attempt as much as possible to prepare the witness statement as if the witness is giving evidence in chief already, and telling the story which brought the litigants to court in the first place, in a simple and chronological fashion.'

[41] I have carefully considered the evidence of Mr Vleermuis and cannot agree with Mr Kasper's argument about the contradictions complained about. The witness was required to elaborate on his evidence during cross-examination, which he did. Elaboration is not equal to contradiction.

[42] Mr Vleermuis actually made a very favourable impression on this court and his evidence was clear and concise without inherent improbabilities.

⁷ (I 3821-2013) [2015] NAHCMD 157 (2 July 2015).

[43] The same cannot be said for the evidence of the defendant and I will qualify this finding as follows: If one considers the version of the defendant that was put to Mr Vleermuis it is clear that there is a substantial difference from the version testified to by Mr Swartbooï under cross-examination. Mr Swartbooï's witness statement relating as to how the accident happened consists of one paragraph, which I will reproduce for purposes of this judgment:

'11. As the truck was approaching, it was continuously flashing me with its head lights which blinded me. I applied brakes to my motor vehicle as I was approaching the bridge. Our motor vehicle collided just before the entrance of the bridge on the northern side of the bridge. This collision happened in my lane. His truck made contact with my motor vehicle on its right side and my vehicle came to a stop within the bridge.'

[44] The gist of the line of questioning of Mr Vleermuis was that the defendant saw the truck and he stepped hard on his brakes and his vehicle skidded as a result thereof. It was further put to Mr Vleermuis that because the truck veered into the defendant's lane of travel the Ford Ranger was pinned to the bridge wall after the collision. It was further put to Mr Vleermuis that as a result of his incessant flashing of his lights the defendant was disorientated which then contributed to the accident.

[45] Mr Swartbooï in turn testified that he saw the truck and he was blinded by the flashing lights of the truck but he could observe everything and concentrated on his side of the road. He gradually reduced his speed and only stepped on his brakes after the accident. The witness testified that his vehicle came to a standstill in his lane. He denied that his vehicle skidded at any stage or that he stepped hard on the brakes prior to the accident. His evidence is also that his vehicle was pinned to the bridge wall.

[46] The allegation that the Ford Ranger was struck by the trucks bulbar was only canvassed with Mr Vleermuis after certain questions were directed to Mr Vleermuis by the court. This was not initially put to the witness during cross-examination that his

bulbar protruded into the lane of the oncoming traffic and that as a result the bulbar collided with the defendant's vehicle.

[47] One would expect that these issues would have been canvassed during consultation and whatever is put to the witness is in line with counsel's instructions. This court has no doubt that that is exactly what Mr Kasper did as an officer of this court, which means that the defendant adapted his version subsequent to his consultation with counsel.

Accident report

[48] What is further of importance is the accident report that was admitted into evidence as exhibit B. The description of how the accident happened was furnished to D/Sgt Homseb and was recorded in the following terms:

'The Driver A⁸ lost control of his vehicle when he had approached a bridge after applying brakes and side-swiped into oncoming vehicle of Driver B'⁹

[49] The accident type is indicated as sideswipe: opposite direction. The sketch plan of the accident depicts the position of the vehicles as vehicle A inside the bridge and vehicle B parked outside the bridge. This corroborates the evidence of Mr Vleermuis.

[50] What is interesting is that at the time when Mr Schurz, counsel for the plaintiffs, applied that the court admits the accident report into evidence as an exhibit, Mr Kasper indicated that the defendant deposed to a statement under this accident report that was much more elaborate and which could not fit into the designated block in the accident form. Mr Kasper further indicated that the document was discovered and at the appropriate time he would make application to have the said statement admitted into evidence to form part of the accident report.

⁸ The defendant.

⁹ The driver of the second plaintiff's vehicle.

[51] However, it is important to note that the document was neither discovered nor incorporated in the defendant's witness statement, or presented in court as evidence.

[52] The version put to Mr Vleermuis and the version of the defendant is directly opposite one another.

[53] With all this aforementioned in mind the court must consider the probabilities and the improbabilities. On the one hand there is the driver of the truck with 30 years' experience as a driver and 26 years' experience driving a truck on that specific stretch of road and another driver of the Ford Ranger with approximately one year driving experience, who did not know the road or road surface at all. It is improbable that the defendant would have only gradually applied his brakes if it appeared to him that the approaching truck is veering into his lane. The defendant's version that he only stepped on the brake after the accident is just as improbable. The defendant went through great pains to try and convince the court that he had control over the vehicle at all material times. This is further improbable because the moment that the vehicle skidded, and I do find that the vehicle skidded, then the defendant had no control over the vehicle anymore. In any event the fact that the right front tyre axle/roll broke meant that the vehicle was lying on its undercarriage and could not be controlled.

[54] Mr Vleermuis testified that he was out of the curve and almost out of the bridge when the accident happened. He stated that the accident happened right on the centre line. There is no evidence that Mr Vleermuis encroached into the lane of the oncoming traffic. As already pointed out the version that the bulbar of the truck protruded into the defendant's lane of travel was never mentioned until such time that the defendant's counsel was given the opportunity to ask follow up questions on those asked by the court. This version was not put to Mr Vleermuis from the onset during cross-examination and the question must be, why was this version not put to the defendant?

[55] The impression created with the line of cross-examination by Mr Kasper was that a sudden emergency arose and that the defendant's vehicle skidded and therefor the defendant cannot be held liable in any way as he was not negligent. This is clearly not the version of the defendant.

[56] Then there is the issue of the defendant's vehicle that was allegedly pinned to the bridge wall. That clearly did not happen and for counsel to put that version to Mr Vleermuis that must have been his instructions. The instructions to counsel that was put to Mr Vleermuis in cross-examination and the defendant's evidence does not correspond and the only explanation for that would be the fact that defendant adapted his version as the trial progressed. The version of the defendant is inconsistent with what happened on that fateful night and I am satisfied that the defendant's version cannot be relied upon.

Claim in reconvention

[57] The defendant filed a counterclaim in the amount of N\$ 75 780.56 for the damage and reasonable cost of repair to the Ford Ranger to its pre-accident condition. The issue of ownership was taken up with the defendant who stated that he purchased the vehicle from his brother in-law in that week of the accident. When questioned as to why that information was not contained in the witness statement he testified that it slipped his mind. Not for a moment can this court believe that the defendant forgot to mention to counsel that he was the new owner of the vehicle, which he incidentally bought during the week on which the accident occurred. One must bear in mind that the defendant in effect lost the N\$ 110 000 he just paid for the vehicle. This must have been a huge financial blow to the defendant and surely not something that would slip the mind, yet in his witness statement Mr Da Cruz is still indicated as the owner of the vehicle. With this in mind the question was rightfully raised as to the capacity in which the defendant sues in his counterclaim.

[58] The defendant submitted two quotations in support of his claim however no evidence was tendered in support thereof. The onus is on the defendant to prove the

extent of his damages and to do so on a balance of probabilities. No expert was called to testify on the value of the damage to the vehicle and thus it has not been proven.

[59] In *Abner v KL Construction and Another*¹⁰ Van Niekerk J found as follows:

'It is so that the opinion of the owner of a thing may be accepted as an estimation of its value, but where the estimate is challenged only an expert's testimony carries weight.'

Conclusion

[60] Having regard to all the evidence adduced, I am of the considered view that the plaintiffs have shown on a balance of probability that its version is correct. I also find that the second plaintiff's vehicle which was driven by Mr Vleermuis, which was travelling from south to north, was suddenly confronted by the defendant's vehicle veering into its lane just as it exited the curve and ultimately the bridge, where the accident occurred. I accept that the reason for flashing the head lights of the truck once was to warn the oncoming vehicle of the dangers of the narrow bridge.

[61] I am satisfied that the accident occurred as a result of the defendant's negligence and that the defendant was the sole cause of the accident. In light of this finding the defendant's claim in reconvention cannot succeed.

[62] Further, there is no proof that the second plaintiff's driver may have been contributorily negligent to any degree requiring the apportionment of damages in this case.

[63] My order is therefore as follows:

Judgment is granted in favour of the First and Second Defendant in the following terms:

1. Payment in the amount of N\$ 114 964.91 to the First Plaintiff;

¹⁰ (I 1676-2011) [2013] NAHCMD 139 (27 May 2013) at paragraph 7.

2. Payment in the amount of N\$ 17 997.46 to the Second Plaintiff;
3. Interest to be calculated on the aforesaid amounts at the prescribed rate of 20% per annum from date of judgment to date of payment;
4. Cost of suit.

Counterclaim:

5. The Defendant's counterclaim is dismissed with costs.

JS Prinsloo
Judge

APPEARANCES:

Plaintiff: Mr M Schurz
Of Delport Legal Practitioners

Defendant: Mr G L Kasper
Of Murorua Kurtz Kasper Incorporated