



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: HC-MD-CIV-ACT-DEL-2017/01980

In the matter between:

**JOSEPH SHEEHAMA**

**PLAINTIFF**

and

**JOSEPH NEHUNGA STALLIN**

**DEFENDANT**

**Neutral citation:**     *Sheehama v Stallin* (HC-MD-CIV-ACT-DEL-2017/01980)  
[2019] NAHCMD 73 (29 March 2019)

**Coram:**       Unengu, AJ

**Heard:**       11 October 2018

**Delivered:**   29 March 2019

**Flynote:**     Civil – Practice – Motor-vehicle – Claim arising from collision – Plaintiff suing defendant for loss suffered to his motor-vehicle – Evidence not showing plaintiff already indemnified by insurance company – Not the plaintiff nor the

pleadings made mention of indemnification – Plaintiff not truthful – Gave contradicting versions – Plaintiff's version rejected as false.

Counter-claim: Defendant a reliable, and credible witness – Version accepted – Counter-claim on the merits proved on a balance of probabilities – Loss suffered or quantum not proved, therefore, absolution from the instance granted to the defendant.

**Summary:** The plaintiff issued summons against the defendant claiming from him damages to his vehicle suffered in a collision between his and the defendant's vehicle. The plaintiff, however, presented contradicting and inconsistent versions before court. That being the case, the court found him an untruthful witness and rejected his version.

The defendant on the other hand managed to prove the merits of his counter-claim on a balance of probabilities but failed to do so in respect of the loss or quantum.

*Held:* plaintiff's claim dismissed with costs. *Held further:* counter-claim granted on merits with costs at the rate of 75 percent and absolution from the instance in respect of the loss or quantum.

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### ORDER

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- (i) The plaintiff's claim against the defendant is dismissed with costs.
- (ii) The counter-claim succeeds on the merits with costs at the rate of 75%.
- (iii) Absolution from the instance is granted in respect of the loss (quantum) claimed.

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### JUDGMENT

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**UNENGU, AJ**

[1] The plaintiff, Mr Joseph Sheehama issued summons against his cousin Joseph Nehunga Stallin in which he is claiming payment in the amount of N\$131 475; interest on the amount at the rate of 20% per annum from date of judgment until the date of final payments; costs of suit and further and/or alternative relief.

[2] As the cause of action, the plaintiff alleged that a collision occurred between his motor vehicle with a registration number N 4923 W and the defendant's motor vehicle with registration number N 7605 UP on or about 3 December 2016 on Samuel Maharero Street at Okahandja.

[3] He alleged further that the sole cause of the collision was the negligent driving of the defendant in that the defendant, amongst other:

- '1. Failed to keep a proper lookout;
2. Failed to take cognisance of the Plaintiff's vehicle behind him;
3. Failed to take notice of the Plaintiff indicating his intention to overtake his vehicle;
4. Failed to take notice of the Plaintiff's vehicle which had moved into the right hand lane and was in the process of overtaking his vehicle;
5. Failed to indicate his intention to turn right;
6. attempted to turn right at a time when it was dangerous and inopportune to do so, having regard to the close proximity of the Plaintiff's vehicle to his at the time and as a result collided with the left side of the Plaintiff's vehicle;
7. Failed to apply his brake timeously or at all;
8. Failed to avoid the collision when he would have and should have done so by the exercise of reasonable care.'

[4] The defendant on the other hand in his plea denied that he failed to indicate his intentions to turn right and that he attempted to turn at a time when it was dangerous and inopportune to do so.

[5] He pleaded further that in fact it is the plaintiff who was negligent in one or more of the following aspects:

- '(i) That he failed to keep a proper lookout;
- (ii) That he failed to take cognizance of the defendant's vehicle driving in front of his;

- (iii) That he failed to take notice of the defendant indicating his intention to turn right;
- (iv) He attempted to overtake the defendant when it was dangerous and inopportune to do so, having regard to the fact that the defendant's indicator showed that the defendant intended to turn into an upcoming road to the right;
- (v) That he failed to apply his brakes timeously or at all;
- (vi) That the plaintiff was the sole cause of the accident; and
- (vii) That the plaintiff failed to prevent an accident where a reasonable and a prudent driver would have been able to do so.'

[6] The defendant counter-claimed and in his counter-claim re-iterated the contents of paras 1-3 of plaintiff's particulars of claim with the necessary changes subject to paras 1-8 of his plea.

[7] As it is a requirement in a claim arising from collisions of motor vehicles this matter also went through judicial case management proceedings whereafter the matter was referred to mediation, which unfortunately, was unsuccessful.

[8] A proposed pre-trial report by the parties dated 27 November 2018 was adopted and made an order of the court on 30 November 2018. In this pre-trial order, a long list of issues of fact were identified by the parties to be resolved at the trial, most of these issues are, if not all, a reproduction of what is contained in the particulars of claim of the plaintiff and issues raised by the defendant in his counter-claim.

[9] In view of the length of the list of the issues in the pre-trial order, I have avoided to copy them in the judgment. I will refer to some of the issues therein if and when necessary to do so, in particular with regard to the alleged collision between the two motor vehicles.

[10] As already said, a collision occurred between the plaintiff's motor vehicle and that of the defendant in Okahandja. The accident happened in an intersection of a street joining the road where the plaintiff and the defendant were driving with the plaintiff driving behind the defendant's vehicle. According to the evidence tendered in court the plaintiff is a resident of Windhoek who was invited to an engagement party in Okahandja, but did not know the venue where the party would take place. The

defendant, his cousin who lives in Okahandja knew the place where this engagement party would take place. That being the case, it was arranged that the defendant would drive in front and the plaintiff behind him to show the plaintiff the venue of the party. While driving to the venue with the defendant still in front and while the defendant was busy turning right into an intersection of a street leading to the venue, a collision occurred.

[11] According to the plaintiff, he was in the process of overtaking the defendant's vehicle using the right hand lane with his indicator on when the defendant attempted to turn right and collided with the left side of his vehicle. He further testified that he paid the defendant N\$30 000 a once off payment out of goodwill but not as a sign of an acknowledgment of liability. He said that the accident was solely caused by the negligence of the defendant by not keeping a proper lookout.

[12] On his part the defendant denied causing the collision and blamed the plaintiff for causing the collision negligently by not keeping a proper lookout alternatively by overtaking when it was not opportune time to do so.

[13] It is apparent from the evidence presented by the plaintiff and the defendant that their versions are mutually destructive – on the issue of who caused the collision. The plaintiff is saying the defendant is the culprit who caused the accident while the defendant is saying the plaintiff is to blame for the collision.

[14] However, when one looks at the testimony of the plaintiff, one will realize that his testimony is inaccurate and inconsistent compared to the testimony of the defendant. In my view, the plaintiff did not tell the court the truth, therefore, I doubt his credibility.

[15] On one occasion, the plaintiff told the court that the defendant did not indicate his intention that he was turning right but on exhibit "B",<sup>1</sup> he told the Police Officer that the defendant, *albeit* late, indeed indicated that he was turning right.

[16] When asked by his counsel Mr Erasmus to tell the court what he meant by 'out of a sudden driver indicate' what he intended to convey to the Police Officer

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<sup>1</sup> At page 16 of the record.

there, the plaintiff replied: 'we were driving straight then I indicated to overtake, then out of a sudden while I was in the process of overtaking the driver, B indicated late prior to my overtaking and out of a sudden in the process of him he was trying to turn to the right and I bumped him'.

[17] The question is where was the plaintiff going to when he wanted to overtake the defendant? He did not know the location of the venue of the engagement party. The reason why the defendant was driving in front of him was to lead and take him to the place.

[18] His conduct in my view, was not consonant with the behaviour of a reasonable, careful and prudent driver. The defendant must have been surprised by the plaintiff's attempt to overtake him as he did not know where the defendant was taking him. It is common cause that the collision occurred at an intersection of a T-junction of a street leading to Shamo's house where to they were going.

[19] Mr Mhata is correct in criticizing the plaintiff's driving as falling short of the driving of a careful and a reasonable driver who would have taken steps to prevent the accident from happening.

[20] That is the first problem in the plaintiff's testimony. The second is with regard to the payment of N\$30 000 into the account of the defendant. Plaintiff gave varied reasons why and how he paid the money to defendant. He said that he paid the money out of goodwill and was a once off payment because they are related to one another. Another reason he gave for the payment is that it was just a mere contribution towards the repair of the defendant's vehicle after his insurer refused to cover damages to the defendant's vehicle, and also because he was under pressure to pay.

[21] Meanwhile, the defendant's version is that the plaintiff acknowledged causing the collision on the scene of the accident and it is why he made the payment into his bank account in two separate instalments of N\$24 000 and N\$6 000 contrary to the plaintiff's version of once of payment. The defendant was vindicated by the bank statement of his bank account with First National Bank showing that the money was paid in two different instalments by the plaintiff.

[22] In his written heads of argument in para 8 thereof, Mr Erasmus counsel for the plaintiff also argued that the amount of N\$30 000 was paid by the plaintiff in two payments of N\$24 000 and N\$6 000 to the defendant early in 2017.

[23] That shows how unreliable and untrustworthy the plaintiff is. Even his own counsel disagrees with him that the payment was not a once off payment out of goodwill but was paid to the defendant in two payments of N\$24 000 and N\$6 000 to support the version and testimony of the defendant.

[24] Another issue the plaintiff was not honest with the court is that he failed to disclose in his evidence-in-chief that he was already compensated by the insurance company for damages suffered to his motor-vehicle in the collision and how much the insurance company paid to settle his claim. He was completely silent on the payment made by the insurance company.

[25] The defendant who is a third party in the matter was deprived of that vital information as the plaintiff was suing on behalf of the insurance company. The pleadings also do not mention that the plaintiff was indemnified by the insurance company and with how much.

[26] It is a requirement that for the insurer, (insurance company) in this instance Hollard Insurance Company, to exercise its right of recourse against the defendant, it must obtain either cession from the insured (the plaintiff) or bring a subrogated claim against the defendant after it had paid compensation in full to the insured in this case, the plaintiff.<sup>2</sup>

[27] I reiterate what I have pointed out above that even the pleadings did not mention subrogation nor the admission of liability by the insurance company and payment of compensation in full to the insured who is now suing the defendant.

[28] An insurer which has not yet paid the insured the amount of the loss is not entitled to be subrogated to the insured's position. The insurer would plainly prefer to proceed in the insured's name whether it has paid him or not. The policy will

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<sup>2</sup> Rand Mutual Assurance Co LTD v Road Accident Fund 2008 (6) 511 at p 516 I- 517 A.

therefore frequently contain in a clause entitling the insurer 'if it so desires, to take sole charge of and conduct in the name of the insured any action involving the company's interests. It is not a defence available to the third party that the insured has suffered no loss because he has been indemnified by the insurer'.<sup>3</sup> It was not known to the defendant that the plaintiff has been indemnified by the Insurance Company.

[29] In *Dresselhouse Transport CC v The Government of the Republic of Namibia*<sup>4</sup> the Supreme Court said that once the insurance company has paid the insured in accordance with the agreement between them, the insurer was entitled on the principle of subrogation to sue the third party in the name of the insured.

[30] It is apparent from the authorities cited above that the insurance company can sue the third party and claim from him/her either in its own name or in the name of the insured, the plaintiff in this case, after it had paid compensation for damages suffered by the insured (plaintiff) to his vehicle in the collision or if it has obtained cession of the claim from the insured.

[31] In the particulars of claim in para 7 thereof, the plaintiff is claiming damages in the amount of N\$131, 475 from the defendant, calculated as indicated in para 7.1 to para 7.5. Nowhere, in the particulars of claim was it stated that the amount so claimed is the amount paid to the insured (plaintiff) as compensation to indemnify him for loss suffered in the collision between his motor-vehicle and that of the defendant.

[32] It is therefore, incorrect for counsel for the plaintiff in his written heads of argument in paras 7 and 8 to submit as a fact that the plaintiff's insurer indemnified plaintiff for the damage he suffered to his motor-vehicle as a result of the collision and that subsequent to such indemnification, plaintiff paid an amount of N\$30 000 in two payments of (N\$24 000 and N\$6 000) respectively to defendant early in 2017.

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<sup>3</sup> *Marco Fishing (Pty) LTD v Government of the Republic of Namibia* 2008 (2) NR 742 at 749.

<sup>4</sup> 2005 NR 214 (SC).



[33] Not in the pleadings nor in his evidence-in-chief did the plaintiff mention that he was indemnified by his insurer for the damage which he suffered to his vehicle as a result of the collision.

[34] Similarly, the plaintiff never testified that he paid the N\$30 000 to the defendant in two payments of N\$24 000 and N\$6 000 after indemnification as counsel is attempting to portray in his heads of argument. It is the defendant's testimony that the amount of N\$30 000 was paid into his bank account in two payments of N\$24 000 and N\$6 000 respectively. The plaintiff's version is that the amount was a once off payment as a sign of goodwill.

[35] The evidence of Mr Vries called by the plaintiff as an expert witness, in my view, is irrelevant as he testified about the loss ostensibly suffered by the plaintiff to his car not about compensation the insurance company had paid the plaintiff. The plaintiff during cross-examination conceded that he was merely testifying as a witness for the insurance company. He further denied suing the defendant his cousin. Therefore, it was not proved by the plaintiff in which capacity he was suing in this matter.

[36] In addition, it is the plaintiff's testimony that he does not know how much the insurance company paid out because the company paid the bank instead of him. He only got an amount of N\$30 000 the difference of what was paid to the bank. Therefore, Mr Vries' evidence about the loss suffered by the plaintiff without the amount the plaintiff was compensated for by the insurance company is irrelevant.

[37] In any event, had Mr Vries testified about the amount the company had paid to the bank and to the plaintiff as compensation, his evidence would have been hearsay. Other people in the company paid out the money and none of these people were called as a witness to tell the court for what purpose the money was paid, how much was paid and to whom.

[38] These inconsistencies and contradictions between the client and legal practitioner are just some of the improbabilities in the testimony of the plaintiff. Therefore, and for the reasons stated above, I do not accept the evidence of the

plaintiff. He failed to persuade me on a balance of probabilities to find in his favour. I reject his version and dismiss his claim with costs.

[39] Meanwhile, the testimony of the defendant is that he stays in Okahandja, that on 3 December 2016, the plaintiff met him at a carwash where he was waiting for his vehicle to be washed. The plaintiff requested him to escort him to Shambo's place where he (plaintiff) was invited to attend an engagement party. The plaintiff did not know the place.

[40] After the defendant's vehicle was done, the two drove to his (defendant) house to check on his daughter. Having checked on the wellbeing of his daughter, they then drove to the venue of the engagement party. However, and while *en route* to the place, the plaintiff asked him to go to a Standard Bank Automatic Teller Machine to withdraw money. According to him, he was driving in front of the plaintiff because the plaintiff did not know where they were going.

[41] Still on the way to the venue and while driving in front of the plaintiff, he put on his indicator timeously to warn the plaintiff that he was going to turn right. However, while turning right, a collision between his vehicle and that of the plaintiff occurred. He did not expect the plaintiff to overtake him at that dangerous place and also as the plaintiff did not know where he was taking him.

[42] According to the defendant, immediately after the collision, the plaintiff admitted that he was at fault and told him that his insurance covers third parties and his own vehicle.

[43] Approached by the defendant to pay him the damage to his vehicle suffered in the collision, Hollard, the plaintiff's insurance company refused to pay. The plaintiff in view of him accepting liability of causing the collision at the scene of the accident, paid two separate payments of N\$24 000 and N\$6 000 into the defendant's bank account with First National Bank as part payment of N\$116 978-48, the amount he was quoted for by Danric Autos.

[44] As already pointed out above the evidence of the defendant regarding the payment of the N\$30 000 into his account by the plaintiff in two separate payments

on different dates, is vindicated by the bank statement produced before court and marked as exhibit “D” and by Mr Erasmus, counsel for the plaintiff. The evidence refutes the allegation by the plaintiff that it was a once off payment made out of goodwill.

[45] Further, the issue with regard to whether they were going to the venue of the engagement party or to the defendant's house when the collision occurred, the evidence of the defendant to the effect that it happened while on their way to the venue of the engagement party is more probable than the version of the plaintiff. I accept the defendant's version on that aspect.

[46] Having regard to what is said above, I come to the conclusion that the defendant on the merits has proven his counter-claim on a balance of probabilities but failed to prove the loss suffered as a result of the collision.

[47] The defendant did not present credible and admissible evidence to prove the quantum or the loss suffered to his vehicle as a result of the accident with the plaintiff's vehicle.

[48] Consequently, the following order is made:

- (i) The plaintiff's claim against the defendant is dismissed with costs.
- (ii) The counter-claim succeeds on the merits with costs at the rate of 75%.
- (iii) Absolution from the instance is granted in respect of the loss (quantum) claimed.

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E P UNENGU

## APPEARANCES:

PLAINTIFF: F Erasmus  
Francois Erasmus & Partners, Windhoek

DEFENDANT: N Mhata  
Sisa Namandje & Co. Inc, Windhoek