

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-DEL-2019/00181

In the matter between:

WILHELMINE MOUTON

PLAINTIFF

and

NELSON HAUFIKU

DEFENDANT

Neutral citation: *Mouton v Haufiku* HC-MD-CIV-ACT-DEL-2019/00181 [2020]
NAHCMD 115 (25 March 2020)

Coram: TOMMASI, J

Heard: 27 January 2020

Delivered: 23 March 2020

Reasons delivered: 25 March 2020

Flynote: Evidence – Identity of driver and vehicle which caused the damages – defendant denies that it was his vehicle – plaintiff bears onus, on a balance of probability to prove that the defendant's vehicle cause the collision -

Summary: The plaintiff claims damages occasioned to her motor vehicle in a collision that occurred on or about 13 August 2018 at a robot controlled intersection in Bach Street, Windhoek. The plaintiff alleged that the defendant or alternatively an unknown third party authorized by the defendant, drove into the rear of her vehicle whilst it was stationary at the time of the collision. The driver drove away from the scene. The passenger saw the driver briefly at the scene and both the driver and the passenger recorded the registration number. The defendant denied that he or anyone in his household was involved in a collision during the month of August. These two versions are irreconcilable.

Held that the court, in light of denial of the mutually destructive versions, the court must consider the weight of the evidence adduced; determine the credibility of the various factual witnesses; their reliability; and the probabilities.

Held further that the court, when considering evidence relating to identification, should approach it with caution. In casu the evidence is corroborated by the fact that the defendant's vehicle match the description the witness gave to the police and which was recorded in the Police Accident Report directly after the collision. This renders the version of the defendant that his vehicle was not involved in accident at all, less probable.

Held further that the plaintiff had proven her case on a balance of probabilities that it was the defendant who drove his vehicle in a manner that was negligent and therefore liable for the damages as proven by the plaintiff'.

ORDER

1. Judgment is for the plaintiff in the amount of N\$41 287.02.
2. Interest on the aforesaid amount at the rate of 20% per annum calculated as from the date of judgment until the date of final payment.

3. Costs of suit.

JUDGMENT

TOMMASI, J:

[1] The plaintiff instituted action against the defendant for damages suffered as a result of a motor vehicle collision that occurred on or about 13 August 2018 at a robot controlled intersection in Bach Street, Windhoek. The plaintiff claims that the collision was caused by the defendant, or alternatively a third party acting at the behest and to the benefit of the defendant. The plaintiff claims damages in the sum of N\$41 287.02 plus interest on that amount, in respect of damages occasioned to her motor vehicle in collision

[2] The plaintiff's motor vehicle, a Mazda 2 Active motor vehicle, registration number N 79681 W, was at the time of the collision driven by a Ms Melandrie Hein (the plaintiff's son's fiancé), while it is alleged that the defendant or a third party acting on his authority, drove a Toyota Hilux motor vehicle, registration Number N 3669 W. The Toyota Hilux motor vehicle belongs to the defendant. The parties agreed before the commencement of the trial that the ownership of the plaintiff's vehicle and the quantum of damages were no longer in dispute. These issues are therefore considered as settled.

[3] The plaintiff's particulars of claim allege that defendant or a third party authorized by the defendant was the sole cause of the collision in that he was negligent in one or more of the following respects:

6.1 he failed to keep a proper lookout for other vehicles, particularly the vehicle of the plaintiff;

6.2 drove at an excessive speed in the circumstances;

- 6.3 failed to keep a safe following distance behind the plaintiff's vehicle which was stationary at the red traffic light in front of him;
- 6.4 failed to apply his brakes timeously or at all and as a result collided with the rear end of the plaintiff's vehicle, thereby causing damage to the vehicle of the plaintiff;
- 6.5 failed to avoid the collision when they could have and should have done so by exercise of reasonable care.'

[4] The defendant in his plea denied that he nor anyone authorised by him was involved in the collision as he did not drive or authorise anyone to drive his motor vehicle at 23h30 during the month of August 2018. He denied that he is liable to pay for the any damages caused to the plaintiff's motor vehicle.

[5] The negligence of the driver of the Toyota Hilux was not aggressively pursued during cross-examination of the witness and correctly so as the defendant alleges that his vehicle was not involved in the motor vehicle accident. The proven facts are that of the plaintiff's vehicle was stationary at a red traffic light when a Toyota Hilux bumped the rear of plaintiff's vehicle. The driver of the said Toyota Hilux was unmistakably negligent for failing to keep a proper lookout and failing to apply his breaks timeously or at all. It is an accepted rule that a driver who collides with the rear of a vehicle in front of him is *prima facie* negligent unless he or she can give an explanation indicating the contrary.¹

Issues in dispute

[6] The remaining issues as per the pre-trial report of the parties in terms of Rule 26(2) and (3) filed a joint pre-trial order on 09 August 2019 are the following:

¹ *Goldstein v Jackson's Taxi Service* 1954 (4) SA 14 (N); Klopper, *The Law of Collisions in South Africa* (7th ed), p78.

1.3 Whether on or about 11 August 2018 at approximately 23h30 and at the a robot controlled intersection in Bach Street, Windhoek, a collision occurred between the plaintiff's motor vehicle, being driven by Ms Hein, and the defendant's motor vehicle being driven by the defendant or alternatively an unknown third party with the consent of the defendant.

'1.2 Whether the sole cause of the collision was the negligent driving of the defendant or alternatively the unknown third party authorized by the defendant.

1.3 Whether as a result of the negligence of the defendant or alternatively the unknown third party authorized by the defendant, the plaintiff vehicle was damaged.

[7] In a nutshell, the court must determine whether plaintiff has discharge its burden to prove, on a balance of probability, that it was the defendant's vehicle which collided with the vehicle of the plaintiff.

The plaintiff's case

[8] The plaintiff called two witnesses namely, the driver of the vehicle Ms. Hein and the plaintiff's son Mr Mouton who was a passenger in the vehicle at the time of the collision.

Melandrie Hein

[9] Ms Hein testimony, in summary, is as follow: On or about 11 August 2020 at approximately 23h30 she was driving the plaintiff car. Her fiancé Mr Yorick Mouton was traveling with her in the front passenger's seat. She brought her vehicle to a standstill at a red traffic light intersection in Bach Street, Windhoek. Whilst still stationary, she suddenly felt another motor vehicle bump into the rear end of their vehicle. She then noticed a Toyota Hilux motor vehicle which had failed to come to a standstill behind their vehicle and had, as a result, collided with their vehicle.

[10] Immediately after the collision Mr Mouton alighted from their vehicle and walked to the driver's door of the Toyota Hilux, she followed shortly. The driver of the Toyota Hilux reversed and drove off when Mr Mouton reached the driver's door, leaving the accident scene. She heard Mr Mouton shouting at the driver of the Toyota Hilux to stop, to no avail. She noticed that the registration number of vehicle was N 3669 W. They both returned to their vehicle and pursued the Toyota Hilux to no avail. They drove to the police station instead where she completed an accident report. The said report was handed up in court as exhibit A. Of importance is a note which appears on the accident report which reads as follow: I was standing at a red robot in Bach Str when a grey Hilux reg no N3669W new shape chased against me reversed and drove off."

[11] Approximately two weeks after the collision, she received a phone call from the defendant, who at that point introduced himself to her as Nelson Haufiku. The defendant enquired from her what damages were caused to her vehicle as a result of the collision. She explained the extent of the damage caused to the plaintiff's car and the defendant asked her how the damages could be so severe if his vehicle had almost no damage. The defendant then sought permission to come to her house in order for him to inspect the damage caused to the plaintiff's car himself, in order to see if he could negotiate a settlement.

[12] She was subsequently advised that the defendant was the owner of the Toyota Hilux motor vehicle, Registration Number N 3669 W, which collided with the plaintiff's vehicle. After the mediation she obtained a photograph of the defendant from his facebook profile, which was received as exhibit B. She forwarded this photograph to Mr Mouton without any indication of the identity of the person in the photograph. Mr Mouton confirmed that he recognized the person in the photograph as the driver of the Toyota Hilux at the time of the collision. The person in the photograph was the same person who was present at the mediation session. In her view, the defendant was the sole cause of the accident.

Mr Yorick Mouton

[13] Mr Mouton corroborated in material respects the version of events as testified to by Ms Hein. He added that he got out of the vehicle and walked to the driver's side. He knocked on the window of the vehicle and saw the face of the defendant. He too noted the registration number to be N 3669 W. He was subsequently informed that the defendant is the owner of the Toyota Hilux motor vehicle. Ms Hein forwarded a photograph of the defendant to him and that he recognized him as the same man who was driving the Toyota Hilux at the time of the collision. According to him, the defendant was the sole cause of the collision.

The defendant's case

Nelson Haufiku

[14] The defendant testified in his defense and called no other witnesses. He confirmed that he is the lawful owner of a Toyota Hilux motor vehicle, registration number N 3669 W. He denied having been involved in a motor vehicle collision with the plaintiff's motor vehicle on 13 August 2018 or on any other date, nor did he authorize any third party to drive his motor vehicle during the month of August 2018.

[15] According to him, he received a call from an unknown police officer during October or November 2018, informing him that he had allegedly been involved in a motor vehicle collision with a vehicle belonging to a lady. He then took it upon himself to find out more about the accident and asked for the telephone number of the lady, in order for him to get clarity about the alleged accident.

[16] He contacted the lady and offered to meet with her so he can get more clarity on the alleged collision involving their motor vehicles. She informed him that she was out of town but would contact him upon her return to Windhoek. She however never contacted him.

[17] He avers that he does not drive the Toyota Hilux motor vehicle. It was mostly driven by his wife or her brother when they collect the children from school when he is

not in Windhoek. According to him, none of them drove the vehicle at night. He therefore testified that it was impossible for anyone to have driven the Toyota Hilux on the night of 11 August 2018, as he was at home with his wife and two minor children during the month of August 2018 and he had the keys to the vehicle with him. There was no damage to his vehicle and his vehicle only has a small custom front bumper and could not cause the type of damage which was caused to the plaintiff's vehicle.

[18] The plaintiff, according to him mistakenly recorded his registration. He had observed a lot of Toyota Hilux motor vehicles with registration number which are similar to his.

Applicable law

[19] The court is called upon to assess the two mutually destructive versions and evaluate the evidence to determine whether the plaintiff has discharged the onus to prove on a balance of probability that it was the vehicle of the defendant who collided with her vehicle.

[20] Mr Erasmus, counsel for the plaintiff, referred this court to *Sakusheka and Another v Minister of Home Affairs 2009 (2) NR 524 (HC)* where Muller J referred to the case of *National Employers General Insurance Co Ltd v Jagers 1984 (4) SA 437* where the following approach was formulated: at 440D - G:

'It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against

the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

[21] He also referred to the oft quoted dictum from *Stellenbosch Farmers' Winery Group G Ltd and Another v Martell et Cie and Others* 2003 (1) 11 (SCA) at 14I - 15D para 5.

[22] The court is called to evaluate the disputed evidence of identity. It is trite that evidence of identification should be treated with caution given the fallibility of human observation. In *S v Mthetwa* 1972 (3) SA 766 (A) the following guidelines for identification evidence as it finds application in criminal matters:

'Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest. The reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait and dress; the result of identification parades, if any; and of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities.'

[23] Ms Amunyela submitted that Mr Mouton and Ms Hein gave almost identical statements, that they were out late at night and the vehicle of someone else which was damaged and they needed to give an account of what had happened to the vehicle. She further submitted that the date stamp on the police accident report was not clear and it

was possible that the parties made the statement on another date. Mr Erasmus submitted that they made the same statements as they observed the same event.

[24] It was not disputed that the accident happened on 11 August 2018 at approximately 23h30 at a traffic light in Bach Street. The fact that the report was compiled on another day and not the same evening was not canvassed at pre-trial stage when the accident report was disclosed and the original of the document could easily have been requested at that stage.

[25] No evidence was adduced to support an inference that the witnesses colluded to implicate the defendant. I am satisfied that the Mr Mouton and Ms Hein were telling what they observed that evening and that they reported the incident to the police the same evening.

[26] Mr Mouton was the only witness who “saw” the driver at the scene of accident. He did not know the defendant before and he saw him for a brief moment before he drove away. It was night time but according to both witnesses, there were street lights. Ms Hamunyela challenged Mr Mouton’s averment that he saw the defendant in view of the fact that it was improbable for the defendant to roll down the window if he did not want to be recognized and because he did not mention the fact that the defendant rolled down the window in his statement. It was further highlighted during cross-examination that Mr Mouton was given a single photograph from which he identified the driver instead of picking his face from a number of photographs. This identification evidence, on its own, is insufficient and requires some corroboration. By corroboration is meant other evidence which supports the evidence of the witness and which renders the version of the defendant less probable on the issue in dispute.²

[27] This corroboration comes in the form of the fact that the witnesses recorded a registration number. Ms Hein during cross-examination testified that they followed the vehicle for a while and there were two lights near the vehicle’s number plate. She was

² See S v Gentle 2005 (1) SACR 420 (SCA) para 27

able to recall the number as it was an easy number to recall. She further recalled that the colour of the vehicle was charcoal/dark grey.

[28] The description given in the police accident report to a large extent correspond with the testimony in court save for the slight difference in the description of the colour. The defendant admits that he has a charcoal Toyota Hilux as described by Ms Hein. It was suggested that perhaps Ms Hein and Mr Mouton could have seen the car somewhere earlier that day and decided to use the registration number. This is highly improbable as Ms Hein reported the make, registration number and the colour that same evening to the police. The fact that the vehicle of the defendant correspond with the description they gave immediately after the collision lends credence to the testimony of both Ms Hein and Mr Mouton.

[29] A further factor which connects the defendant to the incident was a telephone call which he made to Ms Hein after the accident. The telephone call was not disputed. What transpired during this call however was disputed. Ms Hein testified that the defendant informed her he was not in town at the time but it could have been his wife or his brother in law who was driving the car at the time. He wanted to come and inspect the vehicle.

[30] The Defendant was cross-examined extensively on this issue and it transpired during cross-examination that he wanted to know the extent of the damage and the cost thereof. During his testimony he left a sentence unfinished when he testified saying: 'Maybe the damage was small, damage, just a scratch that we can.... maybe wife was driving it.' The defendant's explanation why he wanted to examine the vehicle and ascertain the extent of the damages is vague and his answers evasive. His version furthermore differs. He denies that he or someone in his household drove the vehicle but at the same time suggests that maybe his wife was driving the car. These discrepancies impacts on his credibility adversely. The fact is that there is no plausible reason for him to have called Ms Hein. The version of Ms Hein that he called to try and negotiate is far more credible.

[31] The identification of the defendant by Mr Mouton alone does not suffice to place the defendant on the scene but the testimony of Ms Hein and Mr Mouton in respect of the registration number places his vehicle on the scene. In the absence of a plausible explanation the unavoidable inference is that the defendant or someone authorized by him was driving his vehicle. This inference is consistent with the proven facts and it is the only reasonable inference which can be drawn. The vehicle of the defendant not only bears the same registration number, but is the same make and colour. His discussion with Ms Hein after the fact confirms his personal knowledge of the details of the accident.

[32] It is my considered view that, on the balance of probability, the plaintiff's version is corroborated by objective facts, the witness' testimonies, and documentary evidence is the true and accurate description of what transpired at the scene and that their observations can be trusted. Defendant's response to the report that his vehicle was involved in a collision is improbable in light of the fact his vehicle matched the description and registration number given shortly after the accident. If the registration number was wrong, it would not have matched the type of vehicle and the colour.

[33] Having regard to the evidence, it is clear that the plaintiff suffered damage to her motor vehicle as, as the value of her vehicle was diminished. It is an accepted method to use the reasonable costs of repairs to assess the damage caused. This is based on the assumption that such costs represent the reduction in value of the plaintiff's motor vehicle.³

[34] In the circumstances, I agree with the above mentioned principles and come to the conclusion that the plaintiff has proven on a balance of probabilities that she has suffered damage to her motor vehicle occasion by a collision, and that the defendant or alternatively an authorized third party was negligently the sole cause of the collision.

³ Cooper, *Motor Law*, (Vol Two), p388; Klopper, *The Law of Collisions in South Africa* (7th ed), p13.

[35] In the result I make the following order:

1. Judgment is for the plaintiff in the amount of N\$41 287.02.
2. Interest on the aforesaid amount at the rate of 20% per annum calculated as from the date of judgment until the date of final payment.
3. Costs of suit.

M TOMMASI
Judge

APPEARANCES

PLAINTIFF:

F G Erasmus
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FIRST AND SECOND DEFENDANTS:

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