



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT- DEL-2018/03345

In the matter between:

JOSEPH LIMON

PLAINTIFF

and

JOHANNES DJUULUME

DEFENDANT

Neutral citation: *Limon v Djuulume* (HC-MD-CIV-ACT-DEL-2018/03345) [2020]
NAHCMD 160 (8 May 2020)

Coram: TOMMASI J

Heard: 30 September 2019; 01 October 2019; 02 October 2019; 03
October 2019; 28 November 2019

Delivered: **8 May 2020**

Flynote: Evidence – failure to call a witness – adverse inference not always drawn but subject to the circumstances of each case.

Mutually destructive versions – only one version correct – location of damages herein points to improbability of version of the plaintiff.

Negligence – motor vehicle accident – Duty of driver when overtaking – motor vehicle ahead driving in zig zag pattern – generally not necessary to give warning to traffic by hooting ahead when overtaking – *In casu* defendant did not have the luxury of assuming that the other vehicle would remain in its lane – not opportune to pass motor vehicle under these circumstances - reasonable driver would under these circumstances not have overtaken in the manner the defendant did – defendant failed to discharge onus that the plaintiff was the sole cause of the accident and counterclaim dismissed.

Summary: Facts appear from the judgment.

ORDER

Having heard the evidence and arguments from the respective counsel for the plaintiff and defendant –

IT IS ORDERED THAT:

1. The plaintiff's claim is dismissed with costs;
2. The defendant's counterclaim is dismissed with costs.

JUDGMENT

TOMMASI J:

[1] On or about the 10 April 2016 at approximately 16h30 a collision occurred on the B4 road between Keetmanshoop and Aus. It was approximately 20 – 25 km from Aus.

The plaintiff was driving a white Toyota Fortuner and the defendant was driving a blue BMW. The plaintiff claims damages in the N\$245 534.75 and the defendant instituted a counterclaim for damages in the sum of N\$110 000.

[2] Plaintiff, the driver of the Toyota Fortuner, stated in his particulars of claim that the defendant's negligence was the sole cause of the collision in that he failed to keep a proper lookout, overtook the plaintiff's vehicle when it was inopportune to do so, failed to apply his brakes timeously or at all; drove at a speed in excess of the speed limit; failed to keep the prescribed following distance from the vehicle driving in front of him; and he failed to apply the degree of care normally expected from a reasonable driver under the same circumstances, in that he did not take cognisance of oncoming traffic before overtaking the plaintiff's vehicle.

Plaintiff's version

[4] The plaintiff testified that the defendant approached him from behind at a great speed. (More than the prescribed legal limit). The defendant, without decelerating, attempted to overtake the plaintiff's motor vehicle on the right hand side of the road, but negligently failed to provide enough space and time before moving back into the left hand side of the road. During cross-examination the plaintiff indicated that the defendant was about to bump him from behind given the high speed he was traveling but he swerved into the lane of oncoming traffic to avoid colliding with the rear of his vehicle. Defendant, according to defendant, turned sharply into the lane of oncoming traffic, moved to yellow line and onto the gravel border of that lane. This caused the defendant to lose control. The defendant's vehicle turned back into his lane and bumped the right front part of plaintiff's vehicle. When asked which part of the defendant's vehicle bumped his vehicle he stated that it was the back of defendant's vehicle which bumped into the front of his vehicle. When the pictures were shown to the plaintiff, he indicated that the defendant bumped him on his right front which caused him to lose control of his vehicle.

[5] The plaintiff testified that his vehicle went off the road and overturned three times. Three of his passengers died in the accident. The plaintiff, Mr Mololeke who was sitting in the front passenger seat and a young child survived the accident. The plaintiff confirmed that there were tyre marks/brake marks on the surface of the tar near the yellow line of the right lane indicating that the defendant applied breaks.

[6] The plaintiff handed into evidence the road accident report, a curriculum vitae of the assessor, the assessors report, a document titled, "General Release, Vehicle Write Off", two tax invoices and 11 photographs depicting the wrecked Toyota Fortuner. The handwriting of the police officer who compiled the accident report is not legible particularly on the page where the two versions of the drivers are recorded. This document is furthermore not fully completed. No sketch plan was included in the space provided for this purpose nor was any sketch plan attached to this report. Save to show that the accident was reported, this report is of little evidential value.

[7] The Assessor's evidence largely turned on the report compiled in respect of the damages sustained to the Toyota Fortuner. Of interest in the report is the following note: "Investigation details: A TP overtook insured's vehicle and swerve away for an oncoming vehicle and caused insured vehicle to drove (sic) off from the road."

The defendant's version

[8] The defendant in his counterclaim avers that the plaintiff's negligence was the sole cause of the collision in that he drove recklessly for some distance by continuously and impermissibly encroaching on the right hand lane of the road; he failed to keep a proper lookout for other vehicular traffic, in particular the plaintiff's vehicle; he failed to apply the degree of care normally expected from a reasonable driver under the circumstances; and he failed to keep his motor vehicle on the left lane of the road while defendant overtook his motor vehicle.

[9] According to the defendant, he followed the plaintiff's vehicle for some distance (approximately 25km) and observed how he was driving in a zig-zag pattern and kept driving on both sides of the road. He waited for the plaintiff's vehicle to return to its lane. After he was satisfied that the Fortuner was back in its lane, he came closer, flickered his lights to indicate his intention to overtake, put on his indicator and proceeded to pass to the right side of the road. At the time there were no vehicles approaching. According to the defendant he was driving a speed of approximately between 70 and 80km/h before he overtook and accelerated to approximately 90 km/h to 100km/h at the time he overtook.

[10] Defendant testified that, immediately when he started to overtake, the plaintiff began to drive to the right side again. He moved to the far side of the right side onto the gravel road driving with his right tyres on the gravel road and his left tyres on the tarmac. The plaintiff's vehicle however "bumped" into the left front side just behind the front left tyre. He held onto the steering wheel whilst applying brakes. He lost control and his vehicle came to a standstill on a bridge facing the direction he came from. He recalled that his vehicle spun around but was unable to say in which direction it spun. The plaintiff's vehicle left the road on the left hand side.

[11] The defendant called Mr Joseph S Gideon who was a passenger in his vehicle. He was seated in the front passenger seat. His statement was remarkably similar to that of defendant and his explanation for this is that they witnessed the same thing. Mr Gideon testified during cross-examination that he was sleeping in the vehicle. He was awoken by the other occupants (his grandchildren) of the vehicle in discussing the manner in which the vehicle ahead of them was driving. He noticed that the defendant was driving 110 at the time but slowed down afterwards. He saw the plaintiff's vehicle swaying across the road in a zig zag pattern. According to him the defendant followed the plaintiff's vehicle for about 5km whilst the plaintiff's vehicle was driving in a zig zag pattern. He testified during cross-examination as follow: "Of course we were trying to overtake him and while we were just doing so his car moved toward the right lane. And

of course for you to avoid a collision you would move to the far right and that is then later when the car collided.” This version is consistent with the version of the defendant.

[12] Mr Jones, counsel for the plaintiff, referred to *National Employers' General Insurance Co Ltd v Jagers 1984 (4) SA 437 (E)*, page 449 E-G where it is stated:

‘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.’ [my emphasis]

[13] The same onus is of course applicable to the defendant in respect of the counterclaim.

[14] The proven facts are that the plaintiff and the defendant were traveling in the same direction, the plaintiff in front and the defendant following the plaintiff's vehicle. The defendant commenced an overtaking manoeuvre at a time when there were no oncoming vehicles. The right front corner of the Toyota Fortuner was damaged and was the part which came into contact with defendant's vehicle. An indentation was clearly visible on the left front part of the BMW just behind the left front wheel and this is where defendant's vehicle came into contact with plaintiff's vehicle. The defendant was

traveling on the yellow line with the two right wheels on the gravel and the other two on the tarmac. The defendant applied brakes in this position. Immediately after the collision the plaintiff's vehicle veered to the left, overturned three times and came to a standstill some distance. The defendant's vehicle turned around and came to a standstill with its rear against a bridge facing the direction it came from.

[15] The clear issues in dispute are where the point of impact was and who bumped into whom. The plaintiff is saying that the defendant bumped into him after a botched up overtaking manoeuvre resulting from the excessive speed. The defendant is saying that the plaintiff bumped him because the plaintiff, for some inexplicable reason, veered over to the lane of oncoming traffic and practically pushed him off the road. These are two mutually destructive versions. Both these versions cannot be true. One of the parties is not telling the truth.

[16] I must express my disappointment that the court was not provided with a sketch-plan of the accident scene which would have assisted this court greatly in determining the accuracy of the versions advanced by both parties. Both parties raised the reluctance of the police to disclose the contents of their investigation. The sketch plan however forms part of the police accident report and I am not entirely persuaded that it was impossible to obtain this document. Under the circumstances the court is called upon to make do with the two completely different versions of where the point of impact was.

[17] Mr Jones submitted that the version of the plaintiff is the more probable version and should be accepted as being probably true.

[18] Ms Hamunyela, counsel for the defendant, submitted that the plaintiff's version is not credible as it was not corroborated by the Mr Mololeke, a passenger in the vehicle of the plaintiff. She submitted that the court should draw an adverse inference from the failure of the plaintiff to call Mr Mololeke who was a passenger in plaintiff's vehicle. She

referred this court to *Botes v McLean* (I 853/2014) [2019] NAHCMD 330 (2 September 2019). Judge Masuku on page 41, para 143, states as follow:

'The failure of the defendants to call these witnesses, who appear to have been available and able to testify, must be held against them. In following this approach, the court walks in the footsteps of the remarks followed in *Conrard v Dohrmann*¹, where the court relied on *Elgin Fireclay v Webb*², where the court remarked as follows:

“ . . . it is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial court, this failure leads naturally to the inference that he fears such evidence will expose facts unfavourable to him. . . .’ See also *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd*’

[19] In that case the witnesses were listed but not called. There was no explanation offered why the witnesses were not called. In this case the plaintiff, during cross-examination, testified that the witness was asleep prior to the accident and cannot offer any useful evidence in this matter. Ms Hamunyela argues that this is very convenient and submitted that he still should have been called to dispel the defendant’s allegations that alcohol was found in the vehicle and to rebut the defendant’s allegation that the plaintiff was driving in a zig zag manner.

[20] It is not always justified to draw an adverse inference from the failure to call a witness and the court must consider the circumstances of each case. There is merit in the submissions by Ms Hamunyela but this court is reluctant to draw an adverse inference having regard to the explanation offered by plaintiff for not calling this witness.

[21] A further issue raised by Ms Hamunyela was the testimony of both the defendant and Mr Gideon that they saw bottles of alcohol in the motor vehicle of the plaintiff. Assuming this to be correct, this court cannot reasonable infer that plaintiff consumed

¹ 2018 (2) NR 535 (HC)

² 1947 (4) SA 744 (A) at 745.

this alcohol in light of the fact that there were other passengers in the vehicle. The presence of alcohol bottles in the vehicle of the plaintiff is therefore of no consequence.

[22] The defendant also suggested that a case against the plaintiff is pending before the Aus Magistrate Court. This was denied by the plaintiff. I am in any event of the view that pending charges in a criminal court has no probative value in the matter before me.

[23] The plaintiff's reason as to why defendant careered into his vehicle is twofold. The first is that he did allow sufficient time and space to return to the left lane. The second explanation is that the defendant approached his vehicle at such high speed that he almost drove into the rear of his vehicle. In order to avoid this collision defendant swerved sharply to the right causing him to go to the yellow line and the gravel on the far right. The defendant lost control and swerved into his vehicle.

[24] Ms Hamunyela suggested that there was a third explanation gleaned from the assessor's report i.e that the defendant avoided a head on collision with another vehicle causing the plaintiff's vehicle to drive off the road. The assessor was unable to explain the origin of this information but ventured an educated guess that it was furnished by the plaintiff. This explains why paragraph 6.5 in the plaintiff's particulars of claim makes the averment that the defendant did not take cognisance of oncoming traffic before overtaking the plaintiff. It was not disputed that there was no oncoming vehicle at the time the collision occurred. The statement made by the plaintiff to the insurance, in support of his claim, was not disclosed. In light of the relationship which exists between the plaintiff and his insurance, it would not be unreasonable under the circumstances to infer that the plaintiff indeed provided the information in the assessor's report when he claimed.

[25] Ms Hamunyela further submitted that the plaintiff's explanation of how the accident occurred is inconsistent with the location of the damage shown in the photographs. It is common cause that the right front of the plaintiff's vehicle was damaged. She submitted that it is this part which caused the indentation in the

defendant's vehicle on the left passenger side i.e which "bumped" into defendant's vehicle. Mr Jones argued that it is highly improbable that plaintiff's vehicle driving at a speed (on defendant's version) between 70 and 80km/h could collide with the defendant's vehicle on the far right hand side whilst having two wheels on the gravel and despite the deceleration still have momentum to swing around virtually in the opposite direction again, veer off the left hand side of the road and rolling several times.

[26] The effect of momentum would largely depend on factors such as the weight of the object, the speed and direction which the object travelled. These factors were not before the court. This court is ill equipped nor qualified to make a finding in this regard. The court was however provided with evidence of the location of the damages to the respective vehicle. It is sometimes possible to determine fault by looking at the location of the damages. If a vehicle traveling in front has damages at the rear, it would support a claim that a vehicle following it is at fault if that vehicle shows damages in front. Similarly common sense dictates that in this instance it is improbable that defendant "bumped" the plaintiff with his left passenger side. It is far more likely that the plaintiff "bumped" the defendant with the right front of his vehicle and that the indentation was caused by the rounded edge of the front of plaintiff's vehicle.

[27] Mr Jones submitted that the defendant, on his own version, acted negligently. When asked why he overtook when the plaintiff had driven in a zig zag pattern for 25km gave inconsistent explanations. He explained: 'It is not really that I was in a hurry, that I wanted to get there immediately but my purpose was to reach home.' He also testified that the purpose of overtaking the plaintiff was to: 'leave him behind so that he could continue driving that way.' He also indicated that he did not expect the plaintiff to come into the lane of oncoming traffic despite his previous zig zag driving.

[28] During cross-examination, the defendant indicated that he left around 13h00. Mr Jones wanted to determine the time it took for the defendant to travel from Keetmanshoop to the point where the collision occurred. It was accepted that the distance between Keetmanshoop and Aus was approximately 200km. It would have

been possible to gage an average speed of the defendant if the time it took him to cover the distance was established. The defendant however would not commit himself to a specific time he left Keetmanshoop. The defendant furthermore insisted during cross-examination that he has never driven faster than 120km/h in his entire life. His testimony was that was driving between 90 – 100 km/h. His testimony in respect of the speed he was traveling was contradicted by his own witness who observed him driving 110 km/h prior to the overtaking the plaintiff's vehicle. Having regard to the evidence adduced it is unavoidable to conclude that the defendant was not candid about the speed he was traveling.

[29] When considering the version of the defendant, the court is reminded of the general rule of the road that drivers should drive on left side of the road and that the plaintiff was not permitted under the circumstances to drive on the right hand side. Under normal circumstances a driver would be not be required give a warning to traffic ahead by hooting to indicate that he/she is about to overtake. (See *Beswick v Crews* 1965 (2) SA 690 (A)).

[30] In this matter the defendant, on his own version, was acutely aware that it would be dangerous under the circumstances to overtake. He had a host of options to avoid taking that risk. A reasonable response to the situation described by the defendant would have been to follow at a safe distance and not to overtake. It was not opportune under these circumstances to execute an overtaking manoeuvre. The fact that the defendant was lawfully entitled to execute an overtaking manoeuvre does not mean that he may do so in the face of what was clearly a dangerous situation. He is still required to consider the safety of his passengers and the other road users. (See *Gerber v Minister of Defence and Another* 2014 (4) NR 1147 (HC))

[31] The defendant ought to have reasonably expected the plaintiff to again stray into the right lane and should have been prepared when overtaking to avoid a collision. He did not have the luxury of the assumption that the plaintiff will continue his course on the left side of the road. The defendant could have adopted reasonable safeguards when

overtaking under these circumstance i.e to sound the hooter, giving the driver a clear warning that he would overtake and to driver at a speed which would allow him to stop or swerve out of harm's way safely.

[32] Having considered the evidence, I am not persuaded that the collision occurred in the manner the plaintiff described and the plaintiff thus failed to discharge the onus which rested on him. The defendant however cannot claim, on his version, which I find probable, that the plaintiff's conduct was the sole cause of the collision given the speed he travelled and his failure to avoid the collision when he had ample opportunity to do so. He equally failed to discharge the onus which rested on him.

[33] In the result, the following order is made:

1. The plaintiff's claim is dismissed with costs;
2. The defendant's counterclaim is dismissed with costs.

M A TOMMASI

Judge

