

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT

Case no: HC-MD-CIV-ACT-OTH-2019/02372

In the matter between:

**ADAM JOHANNES JACOBUS DON**

**PLAINTIFF**

and

**HOLLARD INSURANCE COMPANY OF NAMIBIA LTD**

**DEFENDANT**

**Neutral citation:** *Don v Hollard Insurance Company of Namibia Ltd* (HC-MD-CIV-ACT-OTH-2019/02372) [2020] NAHCMD 217 (10 June 2020)

**Coram:** UEITELE J

**Heard:** 6, 7, 8 & 20 May 2020

**Delivered:** 20 May 2020.

**Reasons Released** 10 June 2020

**Flynote:** Insurance - Motor vehicle policy - Repudiation of claim under insurance contract - Condition in policy that driver must not leave the scene of the accident before the police or ambulance arrives - Insurer entitled to repudiate claim.

**Summary:** The plaintiff issued combined summons against the defendant as a result of an accidental damage to his vehicle. The claim against, defendant, is grounded on a written insurance agreement (hereinafter “the agreement”) which was renewed in January 2019.

The relief sought by the plaintiff in its particulars of claim is for an order declaring the defendant liable to honour the plaintiff's insurance claim submitted under claim number 194393 in respect of the policy number SB NPA 4211000 and an order directing the defendant to honor the plaintiff's claim submitted on or about 20 December 2018 under claim number 194393 in respect of policy number SB NPA 4211000. The plaintiff also seeks costs of suit.

Defendant entered a notice to defend plaintiff's claim and pleaded to the plaintiff's particulars of claim. The defendant in its plea pleaded that it was entitled to repudiate the plaintiff's claim based on the fact that the plaintiff breached the terms of the agreement. The terms of the agreement according to the defendant that the plaintiff breached are that the plaintiff failed to provide accurate information and further information to the defendant. The defendant further pleaded that the plaintiff who was the driver of the vehicle left the scene of the accident before the ambulance of police arrived which is a ground that the defendant does not cover.

*Held that* because the insurer is totally dependent on the insured to provide an accurate picture of the risk, it is an established legal principle that the parties in an insurance contract have a higher duty than they do in an ordinary contract. This principle is called *uberrima fides*, or utmost good faith, rather than the more usual good faith, or *bona fides*.

*Held further* that the well-known legal principle of *pacta sunt servanda*, recognizes the freedom of a party to conclude a contract and thereafter the consequences that flow from the contract have to ensue.

*Held furthermore* that if an insurer denies liability in a policy on the ground of a breach by the insured of one of the terms of the policy, the *onus* is on the insurer to plead and to prove such breach.

*Held further* that the defendant showed that the plaintiff breached the clauses on which the defendant relied for purposes of repudiating of the claim.

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## ORDER

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1. The plaintiff's claim is dismissed.
  2. The plaintiff must pay the defendant's costs.
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## JUDGMENT

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**UEITELE, J:**

### Introduction

[1] Insurance offers a way for individuals or companies to mitigate risk, but only if they keep their side of the contract. When a person takes out insurance, that person is essentially transferring a certain risk to the insurance company for a fee. This is a contractual relationship and it is based on the ability of the insurance company to assess accurately the risk it is taking on. The better the information it has on the risk, the better it is able to understand it. That is the reason why an insurer asks a lot of questions before it takes anyone on as a client or before it indemnifies an insured person.

[2] The accuracy of the risk information provided by a client is always scrutinised in the event that a claim is made. Because the insurer is totally dependent on the insured to provide an accurate picture of the risk, it is an established legal principle that the parties in an insurance contract have a higher duty than they do in an ordinary contract. This principle is called *uberrima fides*, or utmost good faith, rather than the more usual good faith, or *bona fides*. It is thus very important that anybody taking out insurance is absolutely accurate when they answer these questions because they form the basis of the insurer's risk assessment. Sometimes, of course, people lie about the risk, but if these lies are discovered when a claim is made, there will be negative consequences.

[3] Dishonesty aside, many people are careless about the accuracy of their answers or do not realise just how wide the concept of “loss” is in insurance. The insurer is entitled to be informed of any loss that was suffered, whether it was your fault or not, and whether it resulted in a claim or not. It is better to err on the side of providing too much information than too little. If full disclosure is not made, then the insurance company has several options. Any insurance contract hinges on the proper assessment of a risk. If full disclosure of all pertinent information requested by the insurer is not made, then at the very least a claim will not be paid in full.

[4] In this matter the court is confronted with the question of whether or not a full disclosure of all pertinent information requested by the insurer was made by the claimant, the plaintiff, obliging the insurance company to comply with the contract of insurance and indemnify the claimant.

### **Background**

[5] Sometime during the year 2018 the plaintiff, who is an adult male person, residing in Narraville, Walvis Bay and the defendant which is an insurance company registered in accordance with the laws of Namibia whose head offices are situated in Windhoek Namibia, concluded a written agreement of insurance. In terms of the written insurance agreement the defendant undertook to, on certain terms and conditions, indemnify the plaintiff against damages or losses (including damages resulting from a motor vehicle accident) that the plaintiff may suffer in respect of his motor vehicle, namely, a Toyota Hilux Pick-up with engine number 1KDA717099 and registration number N 3353 WB. On 29 January 2019 the parties renewed the insurance agreement.

[6] In the early morning hours (it was any time between 01:30 am and 2:30am) of 19 December 2018, the plaintiff's motor vehicle was involved in a motor vehicle accident. As a result of the accident the plaintiff, during December 2018 submitted a claim for indemnification in respect of the damages to his motor vehicle.

[7] On the 15<sup>th</sup> day of March 2019, the defendant informed the plaintiff that it has rejected his claim for indemnification. The defendant advanced the following reasons as the basis for refusing to indemnify the plaintiff. That the plaintiff being the driver of the motor vehicle, in breach of the insurance agreement left the scene of the accident before the ambulance or police arrived; the defendant misrepresented information regarding the circumstances that gave rise to the accident and that the plaintiff failed to cooperate with the defendant and failed to provide information in substantiation of his claim.

[8] When the plaintiff was informed that the defendant has refused to indemnify it against the damages and losses he suffered, he on 27 May 2019, caused summons to be issued against the defendant. In the summons the plaintiff seeks an order directing the defendant to honour the insurance agreement and to indemnify the plaintiff in respect of the damages that he suffered as a result of the accidental damage to his vehicle. In addition to that order the plaintiff furthermore seeks an order of costs of suit against the defendant.

### **The pleadings**

[9] The plaintiff in his particulars of claim, amongst other matters, alleged that:

(a) He and the defendant, prior to December 2018, concluded a written insurance agreement in terms whereof the defendant was to cover the plaintiff's vehicle, namely a Toyota Hilux Pick-up with engine number 1KDA717099 and registration number N 3353 WB, which vehicle was insured against various risk, including damages resulting from a motor vehicle accident. A copy of the insurance agreement was attached to the plaintiff's particulars of claim as *Annexure A*.

(b) In terms of insurance agreement the plaintiff was required to pay a monthly premium, which he paid as required, and the defendant was under obligation to honour any claim in respect of damages arising from a motor vehicle accident.

(c) On or about 19 December 2018 and at Windhoek the plaintiff's vehicle was damaged in a motor vehicle accident. The plaintiff timeously submitted a claim in respect of damages suffered to the defendant under claim number 194393 in respect of policy number SB NPA 4211000, as contemplated in terms of the insurance agreement between the parties.

(d) The defendant breached the agreement in that, despite having partially honoured the insurance contract by providing the plaintiff with an alternative vehicle for a certain period after 20 December 2018, and despite seeking to extend the insurance agreement between the parties during March 2019, unlawfully and wrongfully repudiated the plaintiff's claim as per letter dated 18 March 2019. A copy of the letter was attached to the plaintiff's particulars of claim as *Annexure B*.

(e) The defendant's repudiation is unlawful and wrongful and is in itself a breach of the insurance agreement between the parties. The defendant, in the absence of valid reasons on the part of the defendant to repudiate the plaintiff's claim, is under obligation to honour the claim submitted by the plaintiff.

[10] The defendant entered a notice to defend plaintiff's claim and pleaded to the plaintiff's particulars of claim. The defendant in its plea:

(a) Admitted that, prior to December 2018, it concluded a written insurance agreement with the plaintiff and that in terms of that agreement it had to cover the plaintiff's vehicle, against various risk, including damages resulting from a motor vehicle accident.

(b) Admitted that in terms of insurance agreement the plaintiff was required to pay a monthly premium, which he paid, and the defendant was under obligation to honour any claim in respect of damages arising from a motor vehicle accident.

(c) Admitted that on 19 December 2018 and at Windhoek the plaintiff's vehicle was damaged in a motor vehicle accident and that the plaintiff timeously submitted a claim in respect of the damages suffered to the defendant as contemplated in the insurance agreement between the parties.

(d) Denied that it breached the insurance agreement or that it unlawfully and wrongfully repudiated the plaintiff's claim. In amplification of its denial of the wrongful and unlawful repudiation of the plaintiff's claim the defendant pleaded that, despite having partially honoured the insurance contract by providing the plaintiff with an alternative vehicle for a certain period after 20 December 2018, and despite extending the insurance agreement between the parties during March 2019, it was entitled to repudiate the plaintiff's claim based on the fact that the plaintiff breached the terms of the agreement.

(e) The terms of the agreement according to the defendant which the plaintiff breached are that the plaintiff failed to provide accurate information upon submitting its claim for indemnification to the defendant. The plaintiff further failed to provide the defendant with the further information requested by the defendant in order for it to properly assess the plaintiffs claim.

[11] The defendant further plead that the plaintiff instead provided the defendant with false information as to the date and time at which the accident occurred and how the accident occurred. In doing so the plaintiff withheld material facts from the defendant, which, may have influenced the defendants' assessment of the plaintiffs claim.

[12] The defendant further plead that the plaintiff fled, alternatively left the accident scene before the police or ambulance arrived at the scene of the accident. It was the defendant's further plea that the plaintiff's leaving the scene of the accident, providing false information and failing to provide information when requested amounted to a material breach of the provisions of the insurance agreement existing between the parties, as it was relevant and material to the defendants' determination of its liability in terms of the insurance policy agreement.

[13] The defendant furthermore pleaded that the terms of the insurance agreement entered into between it and the defendant, provides as follows:

'13.1 On page 5 under the heading "*Your responsibilities as the policyholder*" provides as follows:

**Give us accurate information**

You must make sure that you give us accurate information about yourself, your property and your risk profile. This will include information about your financial situation, such as insolvency. Incomplete or incorrect information could affect the validity of your policy, and may result in us voiding your policy. The same applies to any other person insured under this policy.

13.2 On page 10 under the heading "*Your responsibilities during and after a claim*".

If you haven't already dealt with this when you first reported the claim, please ensure you send us the following within 30 days after the event:

- Full written details of the claim (on our standard forms, if required);
- Particulars of any other policy covering the event;
- Any such other documentation we think is necessary to handle the claim (such as police documents, receipts, invoices or witness statements);

13.3 On page 51 under the heading "*Incidents not covered*"

**Incidents not covered**

We do not cover incidents when:

- When the driver if the vehicle leaves the scene of the accident before the ambulance or police arrived.'

[14] The matter was then subjected to case management and at the pre-trial stage, the parties, on 08 November 2019, filed a draft pre-trial order as required under rule 26 (6) of this Court's rules. On 13 November 2019, this Court made the draft pre-trial order an Order of this court. In that Order, the parties identified 13 factual issues that this court is required to determine. The core questions that the court is, required to determine, being whether the defendant's refusal to indemnify the plaintiff in respect of the damages to his motor vehicle is wrongful and unlawful.



[15] From the brief background and part of the pleadings that I have set out in the preceding paragraphs, it is clear that the plaintiff accuses the defendant of breach of the insurance contract and unlawfully and wrongfully refusing to indemnify him. The defendant on the other hand asserts that it is entitled to refuse to indemnify the plaintiff and accuses the plaintiff of misrepresenting the circumstances under which the accident took place and breaching the insurance agreement. This naturally requires this Court to determine, whether the plaintiff or the defendant, breached the insurance agreement.

[16] In order to determine who between the plaintiff and the defendant breached the insurance agreement I find it necessary, albeit briefly, to outline the evidence that was presented in Court. I will very briefly narrate the plaintiff's evidence and thereafter the defendant's evidence.

*Evidence on behalf of plaintiff*

[17] During trial the plaintiff called one witness only, himself. He testified that he seeks assistance from this court to order the defendant to honour his insurance claim as a result of an accidental damage to his vehicle, in accordance with the contract of insurance between himself and the defendant.

[18] He testified that during December 2018 he had a valid written insurance agreement with the defendant, in terms of which the defendant undertook to indemnify him against accidental damages to his vehicle, he went on to testify that in the early evening of the 18th of December 2018, he travelled with his wife from Walvis Bay to go to Kalkrand, so that they can get some sheep meat and return to Windhoek. Before they could proceed to Kalkrand, he and his wife were to pick up his wife's two brothers, being Franklin Strauss (I will, in this judgment for convenience, refer to him as Franklin) and Neville Strauss (I will, in this judgment for convenience, refer to him as Neville) in Otjomuise, Windhoek, both of whom they needed to give a lift back to the farm in Kalkrand.

[19] He testified that he got into Windhoek in the early hours of the 19th of December 2018 and on directions, he picked up Neville and Franklin in Otjomuise. Thereafter he testified that they passed by one of the service stations in Khomasdal for his wife's bothers to buy some cigarettes, cups and ice cubes.

[20] He continued to testify that, from the service station, they decided to proceed to Kalkrand. As he proceeded to drive, he drove in the road which is now known to him as Petersen Street, which crosses a traffic light (robot) controlled intersection with Hosea Kutako Road. As he passed the traffic lights, and still near the traffic lights, but in Petersen Street, a taxi made a sudden, and unexpected, U-turn in front of his vehicle, to go back where he was heading, and where it was coming from. To avoid hitting the taxi, he swerved his vehicle to the right side and as a result of the swerving, he lost control of the vehicle which left the road and hit a tree which was not far from the road, his vehicle sustained damages to its front. As a result of the accident, the vehicle could not move and he disembarked from the vehicle, and assessed the damages on both the vehicle and the passengers.

[21] The plaintiff continued and testified that he immediately realised that Franklin was seriously injured and needed urgent medical attention. Since he is not from Windhoek, he decided to seek help from the passing by vehicles in order to get assistance and get Franklin to the hospital. He subsequently waved down a sedan vehicle which vehicle stopped and he loaded Franklin into that vehicle and accompanied Franklin to the hospital.

[22] He furthermore testified and admitted that; it is true that he left the accident scene before the police or ambulance arrived, and his reason for leaving the accident was that as the driver of the vehicle, he needed to take his brother-in-law to the hospital. His brother-in-law had a serious injury which ultimately resulted in a total hip replacement and needed urgent medical attention. He testified that he could not just stand there and offer no help to an injured passenger. He testified that he had a duty to ensure that he render the necessary assistance to an injured passenger.

[23] The plaintiff continued to testify that, although the accident was reported on the night of the accident (i.e. on 19 December 2018), on the 20<sup>th</sup> of December 2018 he attended to complete the accident report. He stated that due to the timing and events, he communicated to the Police that the accident happened in the early mornings of the 20<sup>th</sup> of December 2018, but the correct date was actually the early morning of the 19<sup>th</sup> December 2018. He stated that he must have confused the dates at the time.

[24] The plaintiff denied that he made any misrepresentation to the defendant, he maintained that he has given all the information to the defendant, including the accident report, medical records of Franklin, Tow in (breakdown services) services information and all the information which was required by the defendant. The defendant simply refused to consider the information he has given to it objectively and assess his accident claim fairly, the plaintiff's testimony concluded.

Evidence on behalf of defendant:

[25] In support of the defences raised in the plea and as recorded in the pre-trial report, the defendant called two witnesses, the first witness was Michel Laker, the Head: Claims National for the defendant, who testified that at the time of the accident and claim, the plaintiff's agreement with the defendant was valid and that the accident indeed took place. He further confirmed that he was directly involved in the decision to reject the plaintiff's claim.

[26] Laker further testified that upon receipt of the plaintiff's indemnification claim he instructed Leon Wiese of Surveillance Service to investigate whether information provided by the plaintiff in the claim form was accurate. Wiese, did as instructed, conducted an investigation and produced a report. The report which Wiese provided to the defendant was the basis upon which the defendant rejected the plaintiff's claim.

[27] Laker testified that the decision to repudiate the plaintiff's claim was based on the report that the defendant received from Wiese, particularly the report that the plaintiff had left the accident scene. Laker testified that the importance of a driver remaining at the scene of the accident until the police arrives is for the defendant to,

amongst other matters, confirm details of the accident, for the driver to undergo a test to confirm whether or not the driver was under the influence intoxicating substances, to confirm who the actual driver was at the time of the accident, and whether the driver had a valid driving license.

[28] Laker concluded his testimony by stating that the defendant was entitled to repudiate the claim because of the plaintiff's dishonesty and misrepresentations made when he submitted his claim. Laker furthermore said the dishonesty and misrepresentations of the plaintiff were compounded by the plaintiff's refusal to cooperate with the defendant's duly appointed private investigator and the fact that the plaintiff, in breach of his contractual obligations, left the scene of the accident before the ambulance or police arrived, thereby prejudicing the defendant in its investigation.

[29] The second witness who testified on behalf of the defendant was Leon Wiese who testified that he is a private investigator and surveillance consultant plying his trade under the name and style of Surveillance Services and he has been a private investigator for the last 15 years. In his testimony Wiese confirmed that he received the instructions from the defendant's Laker on or about 04 January 2019 to investigate and prepare a report to confirm whether or not the information provided by the plaintiff in his claim form which he submitted to the defendant that an accident allegedly occurred on 20 December 2018 at approximately 03h00 at the robot controlled intersection at Petersen Street, Windhoek, when a taxi allegedly made a U-turn in front of him was accurate and whether the plaintiff had provided complete and honest details of his claim to the defendant when submitting his claim.

[30] Wiese testified that at the time when he received the instructions he was advised that the accident allegedly occurred on 20 December 2018 at 03h00 at the traffic light controlled intersection at Petersen Street (now Mahatma Gandhi Street) and Hosea Kutako Road, Windhoek. He continued and testified that he commenced his investigations by perusing the City Police and Namibian Police's records as regards the details of the accident. He thereafter interviewed the three persons that is, Mrs Don the plaintiff's wife, Franklin and Neville who were the passengers in the plaintiff's vehicle on

the day of the accident. He also testified that he interviewed the person who removed the plaintiff's vehicle from the accident scene and also visited the accident scene.

[31] The investigations, however, revealed that; the accident was not on 20 December 2018 and also not at or near the robot at the intersection of Hosea Kutako and Mahatma Gandhi Streets as reported by the plaintiff, and that the plaintiff had 'fled' the scene of the accident. After he completed his investigations he compiled a report for the defendant. The report indicates that there are discrepancies between the statements of the plaintiff and that of the three persons who were passengers in the plaintiff's vehicle. I will return to the details of the alleged discrepancies in the course of this judgment.

[32] Wiese continued and testified that because of the differences and discrepancies in the information that came to light as a result of his investigation and the information contained in the plaintiff's claim form, Wiese and Laker invited the plaintiff to a meeting, on 05 March 2019, at the defendant's office for the plaintiff to clarify the differences in the information and shed more light on the discrepancies.

[33] Wiese continued to testify that during the meeting of 05 March 2019, the plaintiff was advised by defendant's Laker that there were discrepancies in respect of the information contained in the plaintiff's claim form and information which came to the defendant's attention and that the defendant wanted to discuss those discrepancies and differences with the plaintiff. The plaintiff refused to discuss the matter and referred defendant to his police report and statement which he previously made. The plaintiff left the meeting without providing the clarity requested and threatened to cancel all his insurance contracts with the defendant and to consult with his 'lawyers'.

[34] Wiese further indicated that he had requested documentation relating to the admission to the hospital dated at the time of the accident, and documents in relation to the time and date of the accident from the plaintiff, which he had not received at the time of preparing the report.

## **Discussion**

[35] In the pre-trial Order the parties agreed that the legal questions that this Court is required to determine relates to the general principles applicable to the law of contract in general and insurance agreements in particular. The parties furthermore indicated that amongst the facts, that are not in dispute are the following:

(a) That the plaintiff and the defendant, prior to December 2018 concluded a written insurance agreement, in terms of which the defendant undertook to, on certain conditions cover the plaintiff's vehicle against various risks including damages resulting from a motor vehicle accident.

(b) That the plaintiff was required to pay monthly installments which he regularly paid and the defendant was under an obligation to honour any lawful claim in respect of damages arising from a motor vehicle accident.

(c) That on 19 December 2018 and at Windhoek the plaintiff's vehicle was damaged in a motor vehicle collision and that the plaintiff timeously submitted a claim in respect of the damages suffered by the defendant under claim number 194393.

(d) That the plaintiff left the accident scene after the accident occurred and before the police or the ambulance arrived at the scene of the accident.

(e) That the defendant provided the plaintiff with an alternative vehicle for a certain period after 20 December 2018.

(f) That the defendant repudiated the plaintiff's claim on 15 March 2019.

(g) The insurance agreement between the parties contains some exclusionary terms as pleaded by the defendant.

[36] I am of the view that the pleadings have defined and adequately set out the dispute between the parties and what this court is required to resolve. There is no doubt that that the plaintiff and the defendant had a valid insurance agreement and that

the plaintiff's vehicle was damaged. It is true that the defendant was not present when the accident occurred and as such has no knowledge of the circumstances and the events surrounding the vehicle accident. The defendant did, however, investigate the circumstances surrounding the accident and unearthed facts that it alleges contradicts the version presented by the plaintiff.

[37] On the pleadings and on the evidence that was presented in this case it cannot be disputed that the vehicle of the plaintiff was involved in an accident and that a valid insurance agreement existed between the plaintiff and the defendant. This leads to the inescapable conclusion that the plaintiff indeed suffered the losses that are envisaged in the insurance agreement.

[38] In the matter of *Sprangers v FGI Namibia Ltd*<sup>1</sup> this Court per Maritz J (as he then was) said:

'In its plea the defendant denies that the plaintiff has complied with his obligations in terms of the insurance agreement. In the context of insurance claims, litigants will be well advised to bear the remarks of Hoexter JA in *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1963 (1) SA 632 (A) at 645A-B in mind before pleading a denial of contractual compliance in such sweeping terms:

'There are many cases in our reports in which it has been held or assumed that, if an insurer denies liability in a policy on the ground of a breach by the insured of one of the terms of the policy, the *onus* is on the insurer to plead and to prove such breach.'"

[39] It is accordingly clear, that the onus was on the plaintiff to bring his claim within the four corners of the insurance contract, and that, if the defendant wanted to repudiate the claim on the basis of the relevant clauses of the insurance agreement, the *onus* is on it (the defendant) to prove that it was, on a balance of probabilities, entitled to repudiate the claim. On this point Mr Ntinda, who appeared for the plaintiff and Mr Erasmus who appeared for the defendant are agreed.

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<sup>1</sup> *Sprangers v FGI Namibia Ltd* 2002 NR 128 (HC).

[40] I found as a fact that the plaintiff in this matter did bring his claim within the four corners of the insurance agreement, so what is then left for me to decide is whether the defendant, has on a balance of probabilities proven that it was entitled to repudiate the plaintiff's claim.

[41] The defendant testified that by letter dated 15 March 2019, it repudiated the plaintiff's claim for the following reasons:

- (a) The driver of the vehicle left the scene of the accident before the ambulance or police arrived.
- (b) Misrepresentation regarding claim information pertaining to the event.
- (c) None co-operation in that you failed to supply information in substantiation of your claim.

I will now proceed to consider the reasons advanced by the defendant in the light of the evidence led at the trial.

*The driver of the vehicle left the scene of the accident before the ambulance or police arrived.*

[42] The defendant testified that the driver of the vehicle, in breach of the term set out on page 51 of the insurance agreement which provide that "*we do not cover incidents when the driver of the vehicle leaves the scene of the accident before the ambulance or police arrived*", left the scene of the accident before the ambulance or police arrived and on that basis it was entitled to repudiate the plaintiff's claim.

[43] Mr Ntinda who appeared on behalf of the plaintiff argued that the available and un-contradicted evidence on this aspect is that, the plaintiff left the accident scene to take Franklin to the hospital. There is, argued Mr Ntinda, un-contradicted evidence that Franklin was injured in a motor vehicle accident on the date of the accident, and that he was admitted in Katutura hospital. Apart from the plaintiff's evidence (as confirmed by Wiese through interviews he had with other witnesses who were at the accident scene



including Franklin himself) that the plaintiff is the one who took Franklin to the hospital, there is no other evidence that someone else took Franklin to the hospital.

[44] Mr Ntinda continued and argued that the insurance contract between the parties, at page 12 of that contract, under the heading "**Keeping within the law**" states that '*If any of the terms or conditions of this policy are in breach of existing legislation, they will not be enforced and the law of the country will apply*'. He (Ntinda) therefore argued that s 78(1)(c) of the Road Traffic and Transport Act, 1999 (Act No. 22 of 1999), imposes a duty on the driver of a vehicle on a public road, which is involved in or contributes to an accident and in which any person is killed or injured or suffers damage in respect of any property or animal, to immediately stop the vehicle; ascertain the nature and extent of any injury sustained by any person and render such assistance to any injured person as he or she may be capable of rendering.

[45] Counsel (Ntinda) further argued that s106 the Road Traffic and Transport Act, 1999 creates a criminal offences at pains of being fined an amount of N\$12 000 or being imprisoned for a period not exceeding three years or to both such fine and imprisonment in respect of a person who contravenes s 78. He thus concluded that the plaintiff, who was the driver at the time of the accident (and there is no contest or contrary evidence to this evidence) had a duty and obligation in law to render such assistance to any injured person as he may be capable of rendering.

[46] This argument of Mr Ntinda overlooks the fact on the day of the accident there were four people in the vehicle, three of whom were two brothers and one sister. The argument further overlooks the fact that the duty to render assistance does not necessarily mean the driver of a vehicle must abandon the scene of an accident. The duty to render assistance also encompasses the duty to summon medical assistance or to ensure that the injured passenger does receive medical attention. I am of the further view that the term of the insurance agreement which requires the driver of a motor vehicle not to leave the scene of an accident before the police or ambulance arrives does not in any way breach the Road Traffic and Transport Act, 1999.

[47] The plaintiff did not satisfactorily explain why only he had to leave the scene of the accident to accompany the injured passenger to hospital and not his brother in law (Neville) or his wife. I say he did not satisfactorily explain why it is him who had to accompany Franklin to hospital because in response to a question as to why Neville or his wife did not accompany Franklin to hospital he stated that both Neville and his wife refused to accompany Franklin to hospital. I pause here to remark that Mr Ntinda strenuously argued that I must disregard Wiese's testimony with respect to the contents of his interview with Mrs Don, Franklin Neville and the MTC records because those persons were not called to testify and their evidence is accordingly hearsay. The saying that *'what goes for the goose must go for the gander'* finds application. The plaintiff's testimony that his wife and her brother refused is equally hearsay, because they have not been called to come and confirm that they indeed refused to take Franklin to hospital.

[48] In re-examination he attempted to explain that he is a fisherman and captain and in terms of the Marine Law there is a duty on him to save the lives of those who are involved in an accident. I find the explanation by the plaintiff to be improbable and is an afterthought and I accordingly reject the explanation. I say so because the plaintiff testified that the reason why he ended up in Petersen Street (now Mahatma Gandhi Street) where the accident occurred is because he did not know Windhoek and he lost his way on the way to Kalkrand (I pause here to comment that Kalkrand is situated to the South of Windhoek and both the Otjomuise and Khomasdal Townships are situated on the western part of Windhoek. Petersen Street carries traffic that travels west to east or east to west in Windhoek and the plaintiff was travelling in the easterly direction at the time of the accident instead of the southerly direction where Kalkrand is situated). So if the plaintiff did not know Windhoek why would Neville, (who knew Windhoek better than the plaintiff and whose brother was injured in the accident) refuse to accompany his brother to hospital, and why would the plaintiff provide three different explanations as to why he allegedly accompanied Franklin to hospital.

*Misrepresentation regarding claim information pertaining to the event (i.e. the accident) and no cooperation by the plaintiff.*

[49] Mr Ntinda for the plaintiff criticised the reasons advanced by the defendant for repudiation the plaintiff's claim on the basis of misrepresentation. He argued that this reasons are in themselves silent and conclusive statements, they contain no specific allegations of misrepresentation or state which information ought to be substantiated. Further despite the defendant having the *onus* to prove this allegations, the defendant has failed to show which material information was not in its possession at the time of repudiating the claim, the criticism went.

[50] Ntinda continued and argued that Laker who was the decision maker on behalf of the defendant indicated that the date of accident was submitted as 20<sup>th</sup> as opposed to 19<sup>th</sup> December 2018, and that the time of accident differs, and the exact spot of the accident was not clear as the traffic lights were about 150 meters away from the point of impact. Mr. Laker could, however, not explain the materiality of that information to the claim as the insured event indeed happened, argued Mr Ntinda. Mr Ntinda relied on the case of *Malakia v Alexander Forbes Insurance Company*<sup>2</sup> where this Court per Parker AJ held that the differences in time were not in hours but minutes, the plaintiff prefixed each time with 'about' or +/- indicating that he could not place the time of the accident to the exact hour, minute and seconds. *The Court in that case said:*

'I do not see the significance of it at all. More important, it cannot be part of common human experience that when a person is involved in a motor vehicle accident, he or she would there and then upon the occurrence of the accident look at his or her watch, if she or he has one on her or him, or look at the watch on the dashboard of the vehicle, if the watch is in working order, in order to note the exact time of the accident to the hour, minute, and seconds.

For any insurance company to expect such exercise from an insured is unjust, unfair and unreasonable in the extreme, because it does not accord with common human experience. Such requirement is definitely perverse. Plaintiff's inability to give the exact time of the accident to the hour, minute and seconds cannot amount to failure to give full and complete information. I therefore conclude that defendant cannot stand on plaintiff's failure to give exact the time of the accident to the hour, minute, and seconds to repudiate liability.'

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<sup>2</sup> An unreported judgement of this Court *Malakia v Alexander Forbes Insurance Company* (HC-MD-CIV ACT-OTH-2017/03868) [2018] NAHCMD 365 (delivered on 16 November 2018).

[51] In order to assess whether the criticism by Ntinda of the defendant's reason is valid I will at the risk of being repetitive briefly analyse the defendant's testimony. The defendant testified that the plaintiff, in breach of the term set out on page 10 of the insurance agreement which provides that,

**'Give us accurate information**

You must make sure that you give us accurate information about yourself, your property and your risk profile. This will include information about your financial situation, such as insolvency. Incomplete or incorrect information could affect the validity of your policy, and may result in us voiding your policy. The same applies to any other person insured under this policy.

**Your responsibilities during and after a claim**

If you haven't already dealt with this when you first reported the claim, please ensure you send us the following within 30 days after the event:

- full written details of the claim (on our standard forms, if required);
- particulars of any other policy covering the event;
- any other documentation we think is necessary to handle the claim (such as police documents, receipts, invoices or witness statements)',

misrepresented information pertaining to the circumstances relating the accident.

[52] It was the defendant's further evidence that on 20 December 2018 the plaintiff reported to the police that '*A taxi made a U-in front of me at the robot and I swing (sic) my car out off the road to avoid an accident*'. On 24 December 2018 the plaintiff handed a copy of the police report to his broker in Walvis Bay and after the broker completed a claim form, plaintiff signed it and instructed his broker to submit a claim for indemnification with defendant. In cross examination the plaintiff admitted that directly above his signature he declared that the particulars in the claim form were true and correct in every respect. On 15 January 2019 Wiese conducted an interview with plaintiff and the plaintiff repeated his version that accident occurred at the robot when a taxi made a U-turn in front of him and he swerved his car to the right to avoid a collision with the Taxi. On 05 March 2019 the plaintiff was invited to a meeting at the defendant's office and at that meeting he insisted that the accident occurred in the manner and under the circumstances that he has stated in his statement to the police.

[53] During October 2019 the plaintiff, filed his witness statement and in his witness statement he stated in paragraph 6 as follows:

'As I passed the traffic lights (*sic*), and still near the traffic lights, but in Petersen Street, a taxi made a sudden, and unexpected, U-Turn turn in front of me, to go back where I was heading, and where it was coming from. To avoid hitting the taxi, I swerved my vehicle. As a result of the swerving, my vehicle went off the road and I lost control. The vehicle hit the tree which was not far from the road, and the vehicle sustained damages to its front'.

[54] During cross-examination the plaintiff reiterated that the incident with the taxi occurred shortly after the robot and that he swerved to his right immediately, lost control and hit a tree. But he could not explain why in his statement to the police he stated that the incident with the taxi occurred at the robots.

[55] The defendant testified that the investigation by Wiese revealed that the accident did not occur at the robot or near the robot as alleged by the plaintiff. During the trial the Court initiated an inspection *in loco* and the inspection confirmed the version of Wiese that the accident did not occur at or even near the robot as the plaintiff testified at the hearing. The inspection *in loco* actually revealed that the plaintiff's vehicle left the road at a sharp (90 degree bend to the northern direction), a distance of approximately 150 meters further away from the traffic controlled intersection and the tree into which the vehicle collided was approximately twenty five meters away from the road shoulder.

[56] The warranty which the plaintiff gave to the police and resultantly to the defendant is factually incorrect and the plaintiff when he realised that the defendant had more information about the accident started to adjust his version of how the accident took place. The plaintiff's attempt to adjust his evidence was also apparent during the trial. As an example he was provided with a Google map and was asked to indicate at what point his vehicle left the road. He was unable to pinpoint the spot where he hit the tree. He did point on the Google maps to the area leading up between the robot and the sharp bend, still in Mahatma Ghandi Street. But as I indicated after

the inspection *in loco* it became apparent that the plaintiff's vehicle left the road after the sharp bend.

[57] In my view the criticism by Mr Ntinda is unwarranted for the following reasons. First the defendant elaborated on what it regarded as the misrepresentation by the plaintiff. Mr Wiese testified that he interviewed the plaintiff with respect to the circumstances around the accident and the objective information which he (Wiese) gathered conflicted with the information the plaintiff provided to Wiese. As an example of the conflicting information is the information which the plaintiff provided in his claim form. In the claim form the plaintiff stated that the accident occurred on 20 December 2018 at around 03:00, but the objective information which Wiese gathered revealed that the accident occurred on 19 December 2018 at any time between 01:25 and 01:40.

[58] When the plaintiff was interviewed by Wiese he informed Wiese that he did not stop anywhere when he arrived in Windhoek because he had filled up his vehicle in Okahandja, but the objective facts revealed that the plaintiff, at 01:23, stopped at a service station in Khomasdal where one of the passengers in the plaintiff's vehicle bought ice cubes and three foam cups. In his statement to the police the plaintiff stated that the accident took place at the traffic control intersection when the objective facts revealed that the accident occurred about 150 meters away from the robots. The statement that the accident occurred at the robots when in fact and in truth it did not occur there is not just an insignificant statement relating to the location of the accident as Mr Ntinda wants the court to accept, but is a clear misrepresentation of where the accident took place.

[59] I am therefore of the view that this matter is distinguishable from the case of *Malakia v Alexander Forbes*. In that case Alexander Forbes repudiated a claim on the basis of the difference in time of the occurring of the accident. In this matter the defendant has been adjusting his version of how the accident happened to suite his claim and this adjustment of the evidence leads me to conclude that the plaintiff is either untruthful or is attempting to conceal the true circumstances under which the accident took place. I therefore have no doubt in mind that the plaintiff was determined

to hoodwink the defendant with respect to the circumstances surrounding the occurrence of the accident.

[60] As I have pointed out, the terms of the insurance agreement determines that, if the plaintiff wants to claim, he must please ensure he send to the defendant the 'full written details of the claim' and if he leaves the scene of the accident before the police or the ambulance arrives the claim will not be paid. The well-known legal principle of *pacta sunt servanda*, recognizes the freedom of a party to conclude a contract and thereafter the consequences that flow from the contract have to ensue. <sup>3</sup>

[61] An insurance contract is based on utmost good faith. As confirmed by a Full Bench of the High Court of Namibia<sup>4</sup> :

'The contract of insurance is the primary illustration of a category of contracts described as *uberrimae fidei*, i.e. of utmost good faith. Misrepresentation made by an insured when claiming entitles an insurer to repudiate a claim.'

[62] For the reasons that I have set out in this judgement I am of the view that the defendant did show that the plaintiff breached the clauses on which the defendant relied for purposes of repudiating of the claim and the plaintiffs claim therefore fails and must be dismissed as I hereby dismiss it.

[63] Finally regarding the question of costs. The normal rule is that the granting of costs is in the discretion of the court and that the costs must follow the course. No reasons have been advanced to me why I must not follow the general a rule.

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

- a) The plaintiff's claim is dismissed.
- b) The plaintiff must pay the defendant's costs.

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<sup>3</sup> *Nzianga v Fortunato* (I 1077/2014) [2019] NAHCMD 157 (9 May 2019).

<sup>4</sup> *Wilke No v Swabou Life Insurance Co. Ltd* 2000 NR23 (HC).

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**UEITELE SFI**

**Judge**



**APPEARANCES**

**PLAINTIFF:**

M NTINDA

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Legal Practitioners, Windhoek

**DEFENDANT:**

F ERASMUS

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