

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

APPLICATION FOR ABSOLUTION FROM THE INSTANCE

Case No: HC-MD-CIV-ACT-DEL-2018/03340

In the matter between:

TAIMI SHIIKWA

PLAINTIFF

and

ELVIS MEJANDJAKUANI KAUATA

DEFENDANT

Neutral citation: *Shiikwa v Kauata* (HC-MD-CIV-ACT-DEL-2018/03340) [2020]
NAHCMD 285 (14 July 2020)

CORAM: NDAUENDAPO J

Heard: 12 May 2020

Delivered: 14 July 2020

Flynote: Practice-Judgments and orders - Absolution from the instance - When to be granted - Test –To survive absolution, plaintiff to make out *prima facie* case of all elements of claim - No evidence led that defendant was the driver of the motor vehicle that caused the collision - Absolution granted.

Summary: The plaintiff sued the defendant for an amount of N\$ 203 015 for damages caused to her motor vehicle as a result of a motor vehicle collision that occurred on 23 December 2016 between her car (the Opel) and a car (the Ranger) allegedly driven by the defendant. The plaintiff alleges that the sole cause of the collision was the negligence of the driver of the Ranger. Mr. Ngwena who was the driver of the Opel testified that he slowed down the Opel as there was a kudu that was approaching in front, about to cross the road. He slowed the Opel and put on the hazards to warn drivers behind him that there was some danger ahead. He suddenly saw the Ranger that was behind him, overtaking the cars behind him including the Opel. As the driver was busy overtaking, the Ranger suddenly swerved back into the lane of the Opel and collided against the Opel. After the collision, the Ranger was laying on its roof. He walked to the Ranger and saw a man and woman being taken out of the Ranger. The plaintiff testified and corroborated Mr. Ngwena's evidence as to how the collision occurred. The plaintiff further testified that she assisted in pulling the defendant out of the Ranger. The defendant was on the back seat of the Ranger and not on the driver seat. She did not see who the driver of the Ranger was.

Held, that the driver of the Ranger was negligent as he overtook the Opel in circumstances where he should not have done that.

Held, further that no prima facie evidence was established that the defendant was the driver of the Ranger at the time of the collision.

Held, further that the s89 (1) of Road Traffic and Transportation Act 22 of 1999 only applies to criminal proceedings.

Held further that application for absolution is granted with costs.

ORDER

1. The application for absolution from the instance is granted.
2. The plaintiff is ordered to pay the costs of the defendant consequent upon the employment of one counsel.

JUDGMENT

NDAUENDAPO, J

Introduction

[1] Before me is an application for absolution from the instance. The plaintiff closed her case and the defendant now applies for absolution from the instance.

[2] The plaintiff, Ms. Taimi Shikwa, instituted an action for damages against the defendant, Mr. Elvis Kauata, in the amount of N\$ 203,015 for damages caused to her motor vehicle as a result of motor vehicle collision that occurred on 23 December 2016.

The pleadings

[3] In her particulars of claim she states that:

'4. At all relevant times hereto, the plaintiff was the lawful owner of an Opel motor vehicle (the Opel) with registration number N 163-295 W, and alternatively the *bona fide* possessor of such vehicle, in respect of which vehicle the risk of loss and profit has passed to the plaintiff.'

'5. On or about 23 December 2016 at approximately 12h30 on the B1 between Windhoek and Okahandja, near Osona Village, Republic of Namibia, a collision occurred between the plaintiff's aforesaid motor vehicle, then and there driven by the plaintiff's cousin Mr. Timoteus Pendapala Ngwena, and a silver Ford Ranger pick-up motor vehicle(the Ranger) with registration number N 87483 W, then and there being driven by the defendant, who was at all relevant times of the aforesaid collision the lawful owner, alternatively the *bona fide* possessor of such vehicle.

'6. The aforesaid collision was occasioned solely as a result of the negligent driving of the defendant, who was negligent in one of more of the following respects:

- 6.1 He failed to keep a proper look-out of the road;
- 6.2 He failed to apply his brakes timeously or at all.
- 6.3 He drove at a speed in excess of the speed limit;
- 6.4 He failed to keep the prescribed following distance from the vehicles driving in front of him;
- 6.5 He failed to take cognizance of the other vehicle's hazard lights whereby they indicate that there is some sort of danger in the road;
- 6.6 He failed to apply the degree of care normally expected from a reasonable driver under the same circumstances.

7. As a direct consequence of the aforesaid collision and the negligent driving of the defendant, the plaintiff's motor vehicle was damaged beyond economical repair and the plaintiff suffered damage in the amount of N\$203,015.00 which amount is calculated as follows:

7.1	The fair reasonable market value to replace The plaintiff's vehicle (VAT inclusive):	N\$246,450.00
	Plus	
7.2	The fair and reasonable fees incurred by the Plaintiff to tow the damaged vehicle from the Accident scene (VAT inclusive):	N\$977.50
	Minus	
7.3	Wreck value (VAT inclusive):	(N\$49,162.50)
	Plus	
7.4	Excess payment made by the plaintiff (VAT inclusive)	N\$4,750.00
Total		N\$203, 015, 00.'

Defendant's plea

[4] The defendant pleaded that he was not the driver of the Ranger at the time of the collision. He also denied all the allegations of negligence.

Plaintiff's case

[5] Mr. Ngwena testified that on or about 23 December 2016, he was driving the plaintiff's green Opel motor vehicle with registration number N163-295W (*"the Opel"*) They were driving on the B1 Road between Windhoek and Okahandja on their way to the North for the festive season when, at approximately 12h30 and near Osona village, a collision occurred between the vehicle he was driving and a silver Ford Ranger pick-up motor vehicle with registration number N87483W, then and there being driven by the Defendant, Mr. Elvis Kauata. He testified that prior to the aforesaid collision, he saw a kudu approaching from the left side of the road, being in the process of moving onto the maid road. As a result thereof, he reduced the speed of the Opel and put on the hazard lights, to alert all other vehicles behind him.

[6] The kudu commenced onward to the road and it was clear that it was about to cross the road as they were nearing. He accordingly was forced to bring the vehicle to a standstill. He testified that all the vehicles driving behind him, except that of the defendant, acted reasonably in that they took cognizance of the hazard lights of the Opel alerting them that there was some danger approaching and they reduced their speed accordingly. The Opel and all other vehicles behind him were in a stationary position at the time of the collision. The defendant on the other hand, overtook all vehicles behind the Opel, and the Opel, at quite an excessive speed and accordingly did not take proper cognizance of the matters transpiring around him.

[7] He further testified that at the time that the defendant realized that he had to avoid the kudu, he negligently turned from the right hand lane (the lane of the

oncoming traffic) in which he was overtaking the Opel (and all other vehicles as aforesaid), into the left hand lane, which was the lane they were driving in, and collided with the right hand rear side of the Opel, which was stationary at the time. He testified that the aforesaid collision was occasioned solely as a result of the negligent driving of the defendant, who was negligent in one or more of the following respects:

- (a) he failed to keep a proper look-out of the road.
- (b) he failed to apply his brakes timeously or at all;
- (c) he drove at a speed in excess of the speed limit;
- (d) he failed to keep the prescribed following distance from the vehicles driving in front of him;
- (e) he failed to take cognizance of the other vehicles' hazard lights whereby they indicate that there is some sort of danger in the road;
- (f) he failed to apply the degree of care normally expected from a reasonable driver under the same circumstances.

[8] He further testified that should the defendant had not been overtaking the Opel (and all other vehicles behind it) at an inopportune juncture, in such a reckless manner, and at an excessive speed under the prevailing circumstances, the accident would not have occurred. He testified that after the collision he got out and went across the road. The Ranger was lying on its roof. People were pulling the occupants of the Ranger out of the Ranger. Under cross examination, he testified that he could not identify that the defendant was the driver of the Ranger.

[9] Ms. Shiikwa testified that she is the lawful owner of the green Opel motor vehicle with registration number N163-295W ("the vehicle"). On or about 23 December 2016, she was driving with her cousin, Mr. Ngwena, who was driving the Opel. She testified that they were driving on the B1 road between Windhoek and Okahandja when, at approximately 12h30 and near the Osona village, a collision occurred between the Opel and a silver Ford Ranger pick-up motor vehicle with registration number N87483W.

[10] She testified that prior to the aforesaid collision, they saw a kudu approaching from the left side of the road, in the process of moving onto the main road. As a result thereof, Mr. Ngwena reduced the speed of the Opel and put on the hazard lights to alert all other vehicles driving behind them. She testified that all the vehicles, except that of the defendant, acted reasonably and reduced their speed in accordance with the hazard in the road and the hazard signals of the Opel. She further testified that the kudu commenced onward to the road and it was clear that it was about to cross the road as they were nearing. Mr. Ngwena accordingly was forced to bring the Opel to a standstill.

[11] She testified that all the vehicles driving behind them, except that of the defendant, acted reasonably in that they took cognizance of the hazard lights of Opel alerting them that there was some danger approaching and they then reduced their speed accordingly. She testified that the Opel and the vehicles behind them were in a stationary position at the time of the collision.

[12] She testified that the defendant on the other hand, overtook all vehicles behind the Opel at quite an excessive speed and accordingly did not take proper cognizance of the matters transpiring around him. She testified that at the time that the defendant realized that he had to avoid the kudu, he negligently turned from the right hand lane (the lane of the oncoming traffic) in which he was overtaking the Opel (and all other vehicles as aforesaid), into the left hand lane, which was the lane they were driving in, and collided with the right hand rear side of the Opel, which was stationary at the time. She testified that the aforesaid collision was occasioned solely as a result of the negligent driving of the defendant, who was negligent in one or more of the following respects:

- (a) he failed to keep a proper look-out of the road;
- (b) he failed to apply his brakes timeously or at all;
- (c) he drove at a speed in excess of the speed limit;
- (d) he failed to keep the prescribed following distance from the vehicles driving in front of him;

As a direct consequence of the aforesaid collision and the negligent driving of the defendant, her vehicle was damaged and she suffered damages in the amount of N\$203,015.

[13] Under cross examination, she testified that after the collision she went across the road where the Ranger was and it was lying on its roof. She went to the driver side and saw that the window was broken. She then went to the passenger side and she saw people pulling a person out and she kneeled down to help pull the person out. The person who was the defendant, was being pulled from the back seat on the right passenger side.

[14] Under cross examination, she testified that she saw the defendant at the back seat. She testified that she did not find the defendant on the front seat or driver seat and that she did not know who the driver was. She testified that the defendant was pulled from the back seat of the double cab. It was also put to her that a certain Mr. Kauzandinge was the driver of the ranger, she responded by saying that they concluded that the driver fled the scene. Mr. Eysele was called as an expert witness. He in short testified about the damages caused to the Opel and how he arrived at the claim amount.

Submissions by defendant

[15] Mr. Counsel argued that this case is based on a delict and one of the elements of delict is conduct. If conduct is not proven, then the claim cannot succeed. The allegation is that the vehicle of the defendant was driven by defendant but it was denied by the defendant. Counsel submitted that s89 (1) of the Road Traffic and Transportation Act only applies in criminal proceedings.

[16] The provisions of s89 (1) are couched in the following terms:

‘Where in any criminal proceedings in terms of the common law relating to the driving of a vehicle on a public road, or in terms of this Act, it is necessary to prove the identity of the driver of such vehicle, it shall be presumed, in the absence of evidence to the contrary, but subject to subsection (4), that such vehicle was driven by the owner thereof.

'(4) For the purpose of subsections (1),(2) and (3), it shall be considered to be sufficient rebuttal of the presumption created by the relevant provision, if , on account of evidence adduced by the accused, reasonable doubt exists whether the vehicle was driven or parked, as the case may be , by the accused.'

It refers to an accused in criminal proceedings not plaintiff or defendant. It is only meant for criminal proceedings and not civil proceedings as submitted by counsel for the plaintiff.

[17] Counsel argued that the driver of the Opel testified that he could not identify the driver of the Ranger, because he was standing far from the Ranger. He only saw a man and a woman being pulled out of the Ranger. The plaintiff testified that the man was being pulled out of the back seat of the vehicle and she assisted in the pulling. In her statement to Santam she stated that the driver disappeared from the scene. The plaintiff had to prove *prima facie*, that this defendant drove the vehicle (the Ranger). At no stage did the plaintiff or Mr. Ngwena see this defendant behind the steering wheel. Counsel further argued that the plaintiff had an opportunity to amend her claim to include vicarious liability, it had to be pleaded, but the plaintiff did not do that.

Counsel submitted that the application be dismissed with costs.

Submissions by plaintiff

[18] Counsel argued that the test for absolution was set out in *Claude Neon Lights (S.A.) LTD v Daniel*¹ where the court held that:

'When absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for plaintiff.'

Counsel argued that it is common cause that the plaintiff's car was stationery and the Ranger caused the damages to the Opel. After the collision, the defendant was in the Ranger and he was pulled out of the Ranger. Counsel argued that the

¹ 1976(4)SA 403 at 409G-H.

reasonable inference to be drawn is that the defendant was the driver of the Ranger. The Ranger rolled and the possibility cannot be excluded that as a result, he was thrown at the back seat. Counsel submitted that the fact that the defendant was in the Ranger and is the owner, the reasonable inference to be drawn is that he was the driver of the Ranger.

[19] Counsel further argued that s89 (1) of the Road Traffic Transportation Act 22 Of 1999 applies. He is the owner and according to s89 (1) of Act 22 of 1999, he is presumed to have been the driver. Counsel argued that it is a presumption in law, why should it not apply to civil matters?

[20] Counsel further submitted that at this stage there is enough evidence for the defendant to rebut it. It is common cause the vehicles were involved in a collision, the defendant was in the Ranger and there is no evidence that a third person was removed from the Ranger. The reasonable inference to be drawn is that the owner of the vehicle drives his vehicle and therefore to seek absolution is premature.

Discussion.

[21] The test for absolution was succinctly stated in *Gordon Lloyd Page & Associates v Rivera and Another*² where the court stated as follows:

'In order to survive absolution a plaintiff had to make out a prima facie case in the sense that there was evidence relating to all elements of the claim because, without such evidence, no court could find for plaintiff.'

[22] The evidence of Mr. Ngwena and the plaintiff clearly established a *prima facie* case of negligence on the part of the person who was the driver of the Ranger. Both those witnesses testified that they saw a kudu approaching the road in front of them. To avoid colliding against the Kudu, Mr. Ngwena, the driver of the Opel, reduced the speed of the Opel and also put on the hazards of the Opel to warn the drivers of vehicles behind him of the danger ahead. As the kudu was approaching the road to cross, he brought the Opel to a standstill. The vehicles behind him also reduced their speed and came to a standstill. Suddenly, instead of reducing his speed, the driver

² 2001 (1) SA 88(SCA) at 89H.

of the Ranger overtook the vehicles behind the Opel, including the Opel, and moved into the lane of oncoming vehicles. As the driver of the Ranger saw the Kudu in the road, he suddenly swerved back into the lane of the Opel and collided against the Opel. He was driving at an excessive speed under the prevailing circumstances and overtook other vehicles in circumstances not allowed. Under those circumstances, the driver of the Ranger was negligent and solely caused the collision. The next issue is whether the defendant was the driver of the Ranger at the time when the collision occurred. The defendant denied that he was the driver. His counsel put it to the plaintiff that the driver was a certain Mr. Kauzandinge.

[23] Mr. Ngwena testified that after the collision, he got off the Opel and went across the road and saw the Ranger lying on its roof. People were helping the occupants of the Ranger to be taken out of the Ranger. He saw a man and a woman being taken out. He testified that he is not sure that it was the defendant who was the driver of Ranger. The plaintiff testified that after the collision, she got out of the Opel and went to the Ranger. She saw people pulling out a man from the back passenger seat and she kneeled down and helped pull out the man from the back. That man was the defendant and he was pulled from the back seat, that side of the passenger seat. She testified that she did not see who the driver was. The window on the side of the driver's door was broken and the people at the scene were talking that the driver of the Ranger disappeared from the scene. In her statement to Santam (in support of a claim to be indemnified for the loss), the plaintiff stated that: "The driver disappeared (fled from incident)". From the evidence of both witnesses, it is my considered view that no *prima facie* case has been established that the defendant was indeed the driver of the Ranger at the time of the collision.

[24] Counsel for the plaintiff submitted that in terms of s89 (1) of the Road Traffic Transportation Act 22 of 1999, there is a rebuttable presumption that the owner of the vehicle is the driver of the vehicle and urged this court to find that the defendant as owner of the Ranger was the driver at the time of the collision. I disagree. That presumption is clearly only applicable in criminal proceedings. The section clearly states that it is in' criminal proceedings 'that it applies. That interpretation is further supported by the use of the word "accused" in s4 of s89 (1). In addition, if the

intention of the legislature was that the Act must apply to civil proceedings, it would have stated so. The Act does not apply to civil matters.

[25] For all those reasons, the application for absolution is granted with costs.

Order:

1. The application for absolution from the instance is granted.
2. The plaintiff is ordered to pay the costs of the defendant consequent upon the employment of one counsel.

G N NDAUENDAPO

Judge

APPEARANCES:

FOR THE PLAINTIFF

Advocate Jones (Assisted by Mr. Gaya)
Of Fischer, Quarmby and Pfeifer
Windhoek

FOR THE DEFENDANT

Mr. Theron
Of PD Theron & Associates
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