

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-ACT-DEL-2019/01077

In the matter between:

STEPHANUS ALWEENDO

PLAINTIFF

and

VILHO SHINDINGE

FIRST DEFENDANT

SIMEON SHINDINGE

SECOND DEFENDANT

Neutral citation: *Alweendo v Shindinge* (HC-MD-CIV-ACT-DEL-2019/01077) [2020] NAHCMD 501 (29 October 2020)

Coram: PRINSLOO J

Heard: 25-26 June 2020; 17 August 2020

Delivered: 29 October 2020

Reasons: 6 November 2020

Flynote: Law of contract – Claim based on an alleged partly written partly oral agreement – First defendant alleged to have indemnified the plaintiff and assumed liability for damages caused by the first defendant to the plaintiff's motor vehicle in a

motor vehicle collision – First defendant's failure to uphold the material obligations forming part of the agreement – Lack of evidence – Onus not discharged.

Summary: A partly oral partly written agreement allegedly came about as a result of a motor vehicle collision that occurred on 5 November 2016 on the main road of Oshakati, opposite the scrap yard. Although the claim emanates from a motor vehicle collision, it appears from the particulars of claim that the plaintiff is not basing his claim on the motor vehicle collision but rather on the partly written and partly oral agreement that the parties allegedly entered into after the accident.

The plaintiff's case is based on breach of contract (in respect of the first defendant only) in terms of which the plaintiff claims contractual damages (payment for damages in respect of loss of profit) and *rei vindicatio*, the return of his motor vehicle, alternatively payment for damages in the event his vehicle is not returned.

The plaintiff alleges that the parties entered into an agreement whereby the first defendant indemnified the plaintiff against the damages suffered. The plaintiff was called by his driver to attend to the police station where he found a written agreement drawn up and the plaintiff signed it. The plaintiff is unable to say who drafted the agreement or whether the first defendant signed it but maintains that the purported agreement was drafted by the first defendant. The plaintiff drew certain conclusions from the fact that the written document in question contained some personal information of the first defendant and the plaintiff further testified that he was 'told' at the police station that the first defendant drafted the agreement. No witnesses was called to confirm the drafting and signing of the agreement. The plaintiff failed to call any witnesses in support of his case.

The first defendant alleged that the plaintiff and Mr Crespo (driver of the other vehicle) brought a copy of the agreement to his house the day after the accident. He in turn is adamant that he was not a party to the agreement and that he neither drafted nor

signed it. The first defendant stated that he felt coerced and that he gave the plaintiff a car to use or transfer into his own name to generate an income as a taxi.

The wreck of the vehicle was collected from the home of the plaintiff by the second defendant after it was allegedly sold to the second defendant by the first defendant for N\$ 3000. The vehicle was repaired and is currently in the possession of the second defendant and is used as a taxi.

Held that a party who institutes proceedings based on *rei vindicatio* and claims that he is the owner of a movable or immovable property need no more than allege and prove that he is the owner and that the defendant is holding the *res*. The onus is then on the defendant to allege and establish any right to continue to hold the *res* against the owner.

Held that the parties presented two mutually destructive versions. The version of the plaintiff is irreconcilable with that of the defendant. Accepting the one means of necessity a rejection of the other.

ORDER

1. In respect of the claims against the first defendant:
 - a) Both claims are dismissed with cost.
2. In respect of the claim against the second defendant:
 - b) Default judgment is granted against the second defendant only in respect of the return of vehicle to wit a Toyota RunX, with registration number N 32295 SH.
 - c) Costs on a party and party scale.
3. In the event that the Second Defendant fails to return the vehicle within thirty (30) days from date of this judgment then the Deputy Sheriff for the district of Oshakati is hereby authorized to enforce this court's order.
4. Matter is removed from the roll: Judgment Delivered.

JUDGMENT

PRINSLOO J

Introduction

[1] This is a claim based on an alleged partly written partly oral agreement whereby the first defendant indemnified the plaintiff and assumed liability for damages caused by the first defendant to the plaintiff's motor vehicle in a motor vehicle collision and the first defendant's failure to uphold the material obligations forming part of the agreement. The material terms alleged are as follows:

7.1 The first defendant agreed to pay for the repair of the damages to the plaintiff's vehicle;

7.2 The first defendant further agreed to tender all expenses and repairs necessary to bring the plaintiff's vehicle back to the state it was prior to the collision;

7.3 The first defendant would – whilst he was repairing the plaintiff's vehicle – provide the plaintiff with an alternative vehicle to make use of;

7.4 The repairs would be conducted within a reasonable time; and

7.5 The repairs would be conducted in a reasonable and workmanlike manner.'

[2] It was further allegedly agreed between the parties that the plaintiff uses the defendant's vehicle as a taxi and as such generated revenue therefrom.

[3] It was further agreed by the parties that a delay in the repair and/or a failure to repair the plaintiff's vehicle properly and/or at all and/or to return the plaintiff's vehicle would cause the plaintiff to suffer loss of revenue.

[4] The above agreement came about as a result of a motor vehicle collision that occurred on 5 November 2016 on the main road of Oshakati, opposite the scrap yard, whereby the first defendant caused a motor vehicle collision between: (a) the plaintiff's vehicle, a Toyota RunX which was at all material times used as a taxi; and (b) the first defendant's vehicle and a third party vehicle, a Toyota Hilux 2.4 bakkie.

[5] The plaintiff alleges in his particulars of claim that the said collision was occasioned solely as a result of the negligent driving of the first defendant, who was negligent in one or more of the following respects:

- 6.1 He failed to keep a proper look out;
- 6.2 He failed to stop, alternatively apply his breaks timeously or at all;
- 6.3 He drove his motor vehicle at an excessive speed in the prevailing circumstances'
- 6.4 He failed to prevent the collision while he was reasonably in a position to do so.'

[6] The plaintiff issued summons against the first and second defendant and claims the following:

Claims against first defendant

- a) The plaintiff alleges that the first defendant failed to comply with the material obligations in terms of the agreement in that he failed to return the plaintiff's vehicle within a reasonable time and/or at all, alternatively he has sold the vehicle to the second defendant. Plaintiff further alleges that it was reasonable for the first defendant to spend one month repairing the vehicle and as such the vehicle should have been repaired to the state it was prior to the collision by 1 January 2017. However as a result of first defendant's failure to return the vehicle the plaintiff is suffering loss of income which he would have generated from the taxi business had his vehicle been returned. He is claiming damages in the amount of N\$ 10 000 per month from 1 January 2017 until the return of his

vehicle, which is the loss of profit he would have made out of the operation of his taxi business. He also claims interest at a rate of 20% a *tempore morae* calculated on the abovementioned amount from 1 January 2017 until date of payment in full.

- b) Delivery of the plaintiff's vehicle, to wit a Toyota RunX.

Claim against second defendant

- a) In the event of it being held that the plaintiff's vehicle was sold to the second defendant by the first defendant, the plaintiff claims delivery of the plaintiff's vehicle, alternatively payment in the amount of N\$ 59 400, being the fair and reasonable value of the vehicle to date.

[7] The first defendant defended the claims against him and filed a plea to the plaintiff's particulars of claim. The second defendant however did not defend the matter.

The plea

[8] In his plea the first defendant denies any negligence on his part but pleaded that should the court find that he was negligent, which he denies, then he denies that his negligence was the cause of the collision and avers that the collision was caused by the negligence of the driver of the plaintiff's vehicle and the driver's negligence contributed to the collision.

[9] The first defendant admits agreeing to give the plaintiff an alternative vehicle to make use of but denies that he is liable to the plaintiff for payment of any amount or that any agreement, either oral or written was entered into. The first defendant state that the provision of the alternative vehicle to the plaintiff was based on the fact that the plaintiff insisted that his vehicle was damaged beyond repair and it was his only livelihood which his family relied upon. The first defendant pleaded that he was under duress of threat to make payments for the vehicle hence he gave an alternative vehicle to the plaintiff.

[10] The first defendant denies agreeing to tender all expenses and repairs necessary to the plaintiff's vehicle. He further denies having possession of the plaintiff's vehicle alternatively loaned it to the second defendant.

The pre-trial order

[11] In the pre-trial order the issues of fact the court was called upon to adjudicate, which are summarized hereunder, are as follows:

- a) Whether the first defendant caused the motor vehicle collision between the plaintiff's motor vehicle and a Toyota Hilux 2.4 bakkie with registration number N 93806 SH.
- b) Whether the plaintiff is the owner of the motor vehicle with registration number N 32295 SH.
- c) Whether the plaintiff was negligent, if any at all, when his vehicle bumped into the rear end of the Toyota Hilux 2.4 and contributed to the collision.
- d) Whether plaintiff suffered the damages as alleged in his particulars of claim.
- e) Whether the parties entered into an agreement for the repair and payment for damages sustained by the plaintiff's motor vehicle and whether the first defendant agreed to tender all expenses and repairs necessary for the damages occasioned to the plaintiff's vehicle and to bring the vehicle to a state prior to the accident.
- f) Whether the first defendant agreed to indemnify the plaintiff and assume liability for his damage.
- g) Whether the first defendant has possession of plaintiff's vehicle.

[12] The main issues of law to be resolved at the trial were as follows:

- a) Whether the first defendant acted negligently and whether such negligent driving was the sole cause of the collision.

- b) Whether the conduct of the driver of the plaintiff's vehicle contributed to the collision.
- c) Whether the parties entered into an agreement and whether there is a valid agreement between the parties.
- d) Whether the first defendant is in breach of the agreement between the parties.
- e) Whether first defendant is liable for any damages and/or payment towards the plaintiff.

Facts not in dispute

[13] The following facts appear to be common cause between the parties:

- a) A motor vehicle collision occurred on 5 November 2016 at Oshakati on the main road at a T junction opposite the scrap yard between plaintiff's motor vehicle used as a taxi, which was driven by an employee of the plaintiff and a Toyota Hilux 2.4 bakkie.
- b) The first defendant caused a motor vehicle collision between his vehicle and that of a Toyota Hilux 2.4 bakkie
- c) The first defendant agreed to provide the plaintiff with an alternative vehicle to make use of on the basis that his vehicle was damaged beyond repair.

Evidence adduced

Plaintiff

[14] Only the plaintiff was called to testify in support of his claim.

[15] The plaintiff testified that on 5 November 2016 and at or near the main road of Oshakati, opposite the scrap yard, the first defendant was the cause of a motor vehicle collision involving three motor vehicles, namely the first defendant's vehicle, the

plaintiff's vehicle, to wit a Toyota RunX with registration number N 32295 SH, and the vehicle of a third party.

[16] He testified that the first defendant was the sole cause of the collision as he made a right turn from the Ongwediva direction into on-coming traffic without indicating his intention to do so. At the time when a collision occurred the plaintiff's motor vehicle was rightfully travelling straight on the Oshakati main road, as was the third party's motor vehicle, to wit a white Toyota Hilux 2.4 bakkie. The bakkie was driven by a certain Mr Casimiro Crespo. The plaintiff testified that the first defendant admitted that he was in the wrong as per the information appearing on the accident report. The accident report was submitted during trial evidencing the occurrence of the collision. The plaintiff however did concede that he was not personally present when the accident occurred as his driver of was the one driving his vehicle at the time of the collision. The plaintiff testified that his vehicle was at all material times being used as a taxi.

[17] The plaintiff further testified that on the same date of the collision a partly written and partly oral agreement was concluded between himself, the first defendant and Mr Crespo, in terms of which the first defendant undertook to indemnify both the plaintiff and Mr Crespo for damage caused by the first defendant's negligent driving. In this regard the plaintiff submitted into evidence a written agreement in terms of which the first defendant agreed to compensate the damage caused to the two vehicles during the accident.

[18] The plaintiff testified that the first defendant was the one who drafted the agreement because he was informed by his driver on the day of the collision that the driver, the first defendant and Mr Crespo were on their way to the police station to draw up the agreement. The plaintiff testified that when he arrived at the police station he found the first defendant and Mr Crespo there and testified further that it was the first defendant who gave him the agreement to sign. He also testified that he does not know how the first defendant's signature looks like and would not know whether certain signatures appearing on the agreement was that of the first defendant because by the

time he arrived at the station the agreement was already signed. On a question posed to him as to who drafted the agreement, he testified that he had already found the agreement drawn up by the time he arrived at the police station and he merely affixed his signature on the agreement.

[19] The plaintiff was adamant that it is the first defendant who drafted the agreement because the details appearing on the agreement i.e. full names, street address, work address and ID number were that of the first defendant. During cross-examination the plaintiff also testified that when he enquired at the station as to who drafted the agreement, he was informed that it was the first defendant.

[20] The plaintiff further testified that in addition to the written agreement, the following were the terms of the oral agreement: (a) that the first defendant agreed to pay for the repair of the damages to the plaintiff's vehicle; (b) that first defendant further agreed to tender all expenses and repairs necessary to bring plaintiff's vehicle back to its pre-collision state; (c) that first defendant would – whilst repairing the plaintiff's vehicle – provide the plaintiff with an alternative vehicle to utilize; (d) that first defendant undertook that the repairs to the plaintiff's vehicle will be conducted within a reasonable time and in a reasonable and workmanlike manner.

[21] The plaintiff also testified that the parties (plaintiff and first defendant) had contemplated that a delay in the repairs and/or failure to repair the plaintiff's vehicle properly and/or at all and/or to return his vehicle will cause the plaintiff to suffer loss of revenue as the vehicle was used as a taxi business. He testified that due to the first defendant's failure to return his vehicle he has suffered loss of income in the amount of N\$ 10 000 per month which he would have generated from the taxi business had his vehicle been returned to him. The plaintiff submitted into evidence entries of two months, which according to the plaintiff's evidence, gave an average calculation of how much he used to earn per month from the taxi business. He testified that the taxi driver would at the end of the each day record the amount that he received for that day in a

booklet, which the driver would confirm with his signature. A witness would then also sign to confirm the amount received from the taxi driver.

[22] When the plaintiff was asked what happened to his vehicle after the collision he testified that the first defendant sent two gentlemen who were family members of his to collect the vehicle from the plaintiff's premises and took it to the garage to get it repaired and that one of them was the second defendant. He also testified that he spoke to the first defendant when the vehicle was collected and informed him that the car was picked up by the gentleman he had sent.

[23] His further evidence was that he and the first defendant orally agreed that the first defendant would give him an alternate car to use while first defendant repaired his vehicle, which would then enable the plaintiff to take his children to school whilst waiting for the return of his vehicle. He also received this vehicle's renewal papers in case he needed to renew the license disc. The plaintiff denies that he was ever given the vehicle registration documents to enable him to register the vehicle in his name. The plaintiff testified that he has however returned the vehicle to the first defendant in 2019 and although the plaintiff has requested the return of his own vehicle, the first defendant told him that the vehicle was with his brother.

[24] His further evidence was that the first defendant failed and/or refuses to honor the terms of the agreement in that he failed to return the plaintiff's vehicle and that he has sold the vehicle to the second defendant, alternatively handed it over to the second defendant, who disposed of the vehicle, without the plaintiff's knowledge and permission whilst having knowledge that the plaintiff is the lawful owner. He testified that he was informed at a meeting held after the collision between first defendant's family and the plaintiff and Mr Crespo and their spouses that the first defendant sold the vehicle to the second defendant for N\$ 3000.

[25] He further testified that the only time he saw his vehicle after it was collected from his premises in 2016 was when he saw it being driven in 2017 alternatively 2018

by the second defendant and the vehicle looked fully repaired. When he was asked during cross-examination whether he only started insisting on the return of his vehicle when he saw it being driven, he answered that he has been demanding that his vehicle be returned from the 6th of November 2016 but to no avail. The plaintiff also testified that he has never seen the first defendant driving his vehicle.

[26] The plaintiff testified that he deregistered his vehicle on 23 November 2016 after he was approached by the second defendant on the instruction of the first defendant to come and collect the vehicle registration documents as the first defendant apparently wanted to transfer the vehicle in his name. The plaintiff stated that he was not amenable to such an arrangement and he insisted that the first defendant return his vehicle but to no avail.

[27] During re-examination the plaintiff was asked whether he has made any enquiries at Natis whether his vehicle was registered to a new owner after he saw it being driven by the second defendant. The plaintiff confirmed that he made enquiries and he determined that the vehicle still appears as deregistered and that it was not registered in anyone's name.

[28] Initially the amount claimed in the particulars of claim for the replacement value of the plaintiff's vehicle was N\$ 100 000, but during examination in chief the plaintiff testified that the replacement value of his vehicle is N\$ 59 400 as per the TransUnion evaluation report that was handed up as evidence. He testified that he got the evaluation report from Pupkewitz Oshakati.

[29] In conclusion plaintiff prayed for the relief as set out in his particulars of claim against the first and second defendant.

Defendant

[30] Only the first defendant testified in support of the dismissal of the plaintiff's case.

[31] The first defendant testified and confirmed that on the 5th of November 2016 at the T-junction towards the scrap yard on the Oshakati main road and at 21h15 a motor vehicle collision occurred between his motor vehicle and a Toyota Hilux bakkie driven by a certain Mr Crespo. He testified that he was driving from the Ongwediva direction and at a T-junction opposite the scrapyard he approached the Toyota Hilux 2.4 at an angle turning into the Toyota Hilux as he was turning right to travel onto the Oshakati main road. He did not see the Toyota Hilux approaching before he connected onto the Oshakati main road.

[32] His evidence was that a Toyota RunX driven by a certain Mr J Kamati collided into the stationary Toyota Hilux's rear end. His further evidence was that the accident scene was investigated by a certain Constable Namupala and a road accident report was completed.

[33] The first defendant testified that during the month of November 2016 he received various calls and text messages from the plaintiff informing him that he is the owner of the Toyota RunX that was involved in the accident and that the vehicle was his only form of income that was generated from using the motor vehicle as a taxi business. The plaintiff also informed the first defendant that that latter was indebted to him as he bumped the plaintiff's Toyota RunX.

[34] The first defendant testified that he repeatedly informed the plaintiff that he was not liable for the damage caused to his motor vehicle and that he was only liable for damages caused to Mr Crespo's vehicle, which was settled with Mr Crespo.

[35] The first defendant testified that the agreement that was allegedly drafted on the date of the accident and signed by Mr Alweendo and Mr Crespo was only provided to him the next day, on the 6th of November 2016. A copy was brought to him at his house by the plaintiff and Mr Crespo, accompanied by their spouses. The first defendant denies that he agreed to pay for the two motor vehicles that he allegedly bumped. He

testified that he did not sign the agreement nor had he any knowledge of the agreement until it was presented to him at his house. He further testified that when he met the plaintiff on the date of the accident the plaintiff informed him that he is owner of the Toyota RunX and that was the end of it. He never presented the plaintiff the agreement to sign when the plaintiff arrived at the police station. The first defendant also denied ever drafting the agreement in question and testified that the handwriting appearing on the agreement is not his.

[36] The first defendant testified that a meeting was convened by the plaintiff, and during the said meeting the plaintiff insisted that he was responsible for the damage caused to the plaintiff's vehicle. He testified that he denied any liability but felt so pressured and coerced that he offered the plaintiff one of his cars, a Nissan sedan, to take as compensation for his loss of income and to drive the vehicle to the value of the damage sustained on his motor vehicle, alternatively to change the ownership of the vehicle from that of the first defendant's name to that of the plaintiff. The first defendant testified that he even went as far as handing over the vehicles car registration documents to the plaintiff to enable him to transfer the vehicle into his own name and do his taxi business with the said vehicle.

[37] The witness testified that he decided to give his vehicle for the sake of humanity and because the plaintiff was in dire need of a vehicle to transport his children to and from school and because the plaintiff's damaged vehicle was the only form of income. He emphasized that he did not offer the vehicle because he felt he was any way liable towards the plaintiff.

[38] The first defendant further testified that after the plaintiff agreed to take the alternative vehicle, the plaintiff informed the second defendant and another gentleman called Simeon to go collect the plaintiff's damaged vehicle from his premises as it was written off and he cannot do anything with it and needed it to be removed from his property. The first defendant testified that he indicated to them that he wanted nothing

to do with the wreck and he never gave instructions to anyone to go pick up wreck from the plaintiff's premises for whatever reason.

[39] The first defendant testified that the plaintiff took possession of the Nissan and was in possession of the said vehicle since November 2016 until November/December 2019 when he returned the vehicle.

[40] During cross examination the witness was questioned as to why he decided to give the plaintiff a vehicle with monetary value when he strongly believes he wasn't liable for the damage caused to the plaintiff's vehicle. The first defendant remained adamant in his answer that his action was a mere good humanitarian act.

[41] When the first defendant was confronted during cross-examination with the fact that he sold the plaintiff's vehicle to the second defendant for N\$ 3000 the witness testified that he did not receive any money from the second defendant and there was neither an oral nor written agreement to sell the vehicle.

[42] The first defendant also testified that he was informed that the plaintiff's vehicle, the Toyota RunX, was taken to the scrapyard and it was written off. The witness also testified that it would appear that the owner of the scrapyard and/or panel beater repaired the Toyota RunX as the plaintiff saw his car being driven by the second defendant around Oshakati and ever since the plaintiff saw his car he has been insisting that the first defendant return his vehicle.

Onus of proof and assessment of evidence

[43] In civil cases the measure of proof is proof on a preponderance of probabilities. When two competing versions traverse, the question of credibility comes into play as well.

[44] It is common cause that the plaintiff bears the overall onus of proof, i.e. he must prove his version. The onus of proof in the overall case never shifts and remains on the plaintiff. If a court is to rule in favour of the plaintiff it must be satisfied that sufficient reliance can be placed on his version for there to exist a strong probability that his version is the true one.

[45] I have before me two mutually destructive versions relating to the existence or not of a contractual relationship between the plaintiff and the defendant. The plaintiff says there was a legally enforceable agreement in place between them, which provided for the first defendant to compensate the plaintiff for the damage to his vehicle. The first defendant denies that there was such an agreement in place.

[46] It must be decided whether, on all the evidence, the plaintiff's version is more probable than that of the defendant.

[47] It is trite law that a party who asserts has a duty to discharge the onus of proof. In *African Eagle Life Assurance Co Ltd v Cainer*¹, Coetzee J applied the principle set out in *National Employers' General Insurance Association v Gany*² as follows:

'Where there are two stories mutually destructive, before the onus is discharged the Court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false. It is not enough to say that the story told by Clarke is not satisfactory in every respect, it must be clear to the Court of first instance that the version of the litigant upon whom the onus rests is the true version . . . '

¹ *African Eagle Life Assurance Co Ltd v Cainer* (2) SA 234 (W) at 237D-H.

² *National Employers' General Insurance Association v Gany* 1931 AD 187. Also *African Eagle Life Assurance Co Ltd v Cainer* 1980 see *Sakusheka and Another v Minister Of Home Affairs* 2009 (2) NR 524 (HC) at 37.

[48] The approach to be adopted when dealing with the question of onus and the probabilities was outlined by Eksteen JP in *National Employers' General v Jagers*,³ as follows:

'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 satisfied 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 favors 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 favor 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.'

Evaluation and analyses of the evidence

[49] As pointed earlier I have before me two mutually destructive versions. The version of the plaintiff is irreconcilable with that of the defendant. Accepting the one means of necessity, a rejection of the other.

[50] In considering the issues before me it is important to point out that although the claim emanates from a motor vehicle collision, it appears from the particulars of claim that the plaintiff is not basing his claim on the motor vehicle collision but rather on the

³ *National Employers' General Insurance v Jagers* 1984 (4) SA 437 (E) at 440D. See also *Stellenbosch Farmers' Winery Group Ltd v Martell et cie* 2003 (1) SA 1 (SCA) para 5 and *Dreyer v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA) at 558E-G. Cited with approval in the matter of *Prosecutor-General v Hategekimana* [2015] NAHCMD 238 (POCA 5/2014; 8 October 2015) and *Prosecutor-General v Kennedy* 2017 (1) NR 228 (HC).

partly written and partly oral agreement that the parties allegedly entered into after the accident.

[51] Plaintiff's case is therefore one based on breach of contract (in respect of the first defendant only) in terms of which the plaintiff claims contractual damages (payment for damages in respect of loss of profit) and *rei vindicatio*, the return of his motor vehicle, alternatively payment for damages in the event his vehicle is not returned.

[52] The main issue of contention between the parties is therefore the partly written and partly oral agreement.

[53] The onus of proving the existence of a contract rests on the person who alleges that the contract exists, ie the plaintiff. The plaintiff maintains that the purported agreement was drafted by the defendant. However, the plaintiff conceded that he had already found the written agreement drawn up when he arrived at the police station and does not know who drafted it. The plaintiff can also not say whose signatures are appearing on the document apart from his signature and that of Mr Kamati who signed as a witness.

[54] The plaintiff drew certain conclusions from the fact that the written document in question contained some personal information of the first defendant and the plaintiff further testified that he was 'told' at the police station that the first defendant drafted the agreement. The plaintiff for reasons that is not clear to me failed to call any of the persons who witnessed the drafting and signing of this very important document. Whatever was conveyed to the plaintiff regarding the drafter of the agreement is hearsay as the person who gave the plaintiff information was not called to testify and one must remember the plaintiff was not at the police station at the time of the discussion of the so-called agreement or the signing thereof, by whomever else signed it.

[55] The plaintiff also failed to call any witnesses who was privy to the oral agreement that was reached. From the plea of the defendant it was clear that he disputed the purported agreement, yet plaintiff failed to call any witnesses in support of his case. I find it baffling that if all the terms was agreed upon between the parties as the plaintiff wants this court to belief, then why the plaintiff and Mr Crespo went searching for the first defendant the next day. The repair of the vehicle by the first defendant should have been a mere formality.

[56] The first defendant's evidence with regards to the agreement stand directly opposed to that of the plaintiff. The first defendant alleged that the plaintiff and Mr Crespo brought a copy of the agreement to his house the next day. He in turn is adamant that he was not a party to the agreement and that he neither drafted nor signed it.

[57] In order to decide whether a contract exists, one has to look at whether there was an agreement by consent as consent is the foundation of a contact. There must be *consensus ad idem*, in other words a meeting of the minds. On this score alone and the evidence adduced by the plaintiff the court is not satisfied that the plaintiff has discharged the onus in establishing that indeed the first defendant was part of the agreement. The agreement was in any event not signed by the first defendant and the plaintiff conceded that he does not know how the first defendant signs, he therefore cannot testify that the first defendant was a party to the agreement. It would therefore appear that there was no contract between the parties because they were never *ad idem*, in agreement. It could therefore not be established whether the first defendant agreed to repair the damages caused to the plaintiff's vehicle.

[58] Although the court has found that the plaintiff could not prove on a preponderance of probability that there was a written agreement between himself and the first defendant in respect of the repairs to be done on the plaintiff's vehicle, the court is satisfied with the evidence adduced, which was also not disputed, that the first defendant had agreed to give the plaintiff his Nissan. But what is somewhat puzzling is

why would someone who believes he is not liable give the plaintiff his vehicle if he did not believe he was liable? This question was also posed to the first defendant by counsel for the plaintiff. It is inherently improbable for a person to give a total stranger his vehicle for alleged compensation for loss of income and to drive the vehicle to the value of the damage sustained on the vehicle, alternatively change the ownership of the vehicle from that of his name to that of another. Logic suggests that if you are not liable and stand by your ground, you would not be coerced, as the first defendant testified, into giving away your car. On this score alone one can infer that the first defendant impliedly agreed that he is liable for the damages caused to the plaintiff's vehicle. However since the plaintiff is not claiming for the repair of the vehicle but for the return of his vehicle, the *rei vindicatio* principle comes into play.

[59] According to this principle, a party who institutes proceedings based on *rei vindicatio* and claims that he is the owner of a movable or immovable property need no more than allege and prove that he is the owner and that the other party is holding the *res*. The onus is then on the defendant to allege and establish any right to continue to hold the *res* against the owner.

[60] In the case of *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty)*⁴ van der Westhuizen, AJ held the following:

'The plaintiff's claim is –in the first place – based upon the *rei vindicatio*, which is the applicable action available to an owner, who has been deprived of his or her property against his or her will and who wishes to recover the property from any person who retain possession of it without the owner's consent. The plaintiff in order to succeed is required to allege and prove: a) that he is the owner of the thing or items in issue; and b) that the items were in the possession of the defendant at the commencement of the action.'⁵

[61] However the plaintiff could not prove that at the time he instituted the proceedings the vehicle was in the first defendant's possession as it was the plaintiff's

⁴ *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) van der Westhuizen* 1999 (2) SA 986 (T).

⁵ At 996.

evidence that he saw the car being driven by the second defendant and that he never saw the first defendant driving the vehicle. Furthermore, it was the first defendant's evidence that he never drove the plaintiff's vehicle. He testified that the only time he saw the vehicle was on the 5th of November 2016 at the accident scene. Based on the principle of *rei vindicatio* the plaintiff cannot succeed in claiming the return of the vehicle from the first defendant as it is not in his possession nor was it ~~in~~ in his possession when the plaintiff instituted the proceedings and there is no evidence before court that the vehicle was ever in the first defendant's possession.

[62] On the issue of loss of profit the plaintiff submitted into evidence entries of two months which he testified gave an average calculation of how much he used to earn per month from the taxi business. Although the plaintiff showed on paper that the taxi generated an income during those two months the plaintiff yet again called no witness to confirm the correctness of these documents. The plaintiff was neither the author of the document, nor was he the witness thereto. Two months recording of the amount that the taxi generated cannot be sufficient evidence upon which the plaintiff can rely to confirm that he indeed lost N\$ 10 000 income per month. This amount is subject to vary every month and the court did not have the benefit to consider the other months and cannot make an assumption and based on that assumption make a finding that the plaintiff indeed made an amount of N\$ 10 000 per month.

[63] With regard to the claim against the second defendant for the return of the vehicle, the second defendant failed to file a notice of intention to defend although he was duly served with the summons as per the return of service filed of record. Based on his failure to file such a notice, default judgment will apply in this regard. Having considered the evidence of the plaintiff as well that he saw the second defendant driving his car and the fact that the second defendant has possession or was in possession of the vehicle, the second defendant is ordered to return the plaintiff's vehicle.

[64] I do not deem it necessary to pronounce myself on the evidence of the replacement value of the plaintiff's vehicle to the value of N\$ 59 400 as the plaintiff

tendered into evidence a TransUnion evaluation report that is equivalent to a quotation. No evidence was tendered in support of the amount. The onus is on the plaintiff to prove the extent of his damages and to do so on a balance of probabilities. No expert was called to testify on the value of the vehicle as per the report and thus the amount has not been proven.

[65] As to the issue of costs, the costs will follow the result in respect of the first defendant. Since the second defendant did not defend the matter the cost is awarded to the plaintiff on a party and party scale.

[66] My order is therefore as follows:

1. In respect of the claims against the first defendant:
 - a) Both claims are dismissed with cost.
2. In respect of the claim against the second defendant:
 - b) Default judgment is granted against the second defendant only in respect of the return of vehicle to wit a Toyota RunX, with registration number N 32295 SH.
 - c) Costs on a party and party scale.
3. In the event that the Second Defendant fails to return the vehicle within thirty (30) days from date of this judgment then the Deputy Sheriff for the district of Oshakati is hereby authorized to enforce this court's order.
4. Matter is removed from the roll: Judgment Delivered.

JS Prinsloo
Judge

APPEARANCES

APPELLANT: T Iлека-Amupanda
Of Sisa Namandje Co Inc.
Windhoek

RESPONDENT: K Angula
Of Angula Co Inc.
Windhoek