

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case Title: LARISSA INVESTMENT CC PLAINTIFF V ITANA DAVID HOMATHA 1 st DEFEDANT DALA LUIS PHILLIPUS 2 nd DEFENDANT	Case No: HC-MD-CIV-ACT-DEL-2019/00104
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: Honourable Mrs Justice Rakow, J	Date of hearing: 28 September & 1 October 2020
	Date delivered: 6 November 2020
Neutral citation: <i>Larissa Investment CC v Homatha</i> (HC-MD-CIV-ACT-DEL-2019/00104) [2020] NAHCMD 508 (6 November 2020)	
Having read the record of proceedings as well as submissions made by counsels for the applicant and the respondent:	
IT IS HEREBY ORDERED THAT:	
1. Judgment is granted for the plaintiff in the amount of N\$132 507.50 (claim 1) and N\$5 187.50 (claim 2) together with cost of suit.	
2. Interest on the aforesaid amounts of N\$132 507.50 and N\$5 187.50 at 20% per annum from 1 February 2018.	

3. The counterclaim of the first defendant is dismissed.

Reasons for orders:

Introduction

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[1] The plaintiff in this matter instituted action against the defendant for damages suffered to its vehicle during an accident that took place on 16 January 2018. Larrissa Investments CC, is a close corporation duly incorporated with limited liability in the Republic of Namibia. It is the lawful owner, alternatively bona fide possessor of a Isuzu pick-up vehicle with registration number N8409W. During the evening of 16 January 2018 a collision occurred between the plaintiff's vehicle, driven by a certain Dala Luis Phillipus and a silver BMW vehicle with registration number N934W, which was driven by the defendant, Ithana David Homatha.

[2] The plaintiff claims that the defendant collided with the rear of the vehicle of the plaintiff when it indicated that it was executing a left turn at the intersection, whilst it was travelling in the same direction. It is alleged that the defendant's vehicle drove at an excessive speed and failed to reduce his speed upon approaching the intersection, it further failed to keep a proper look out, failed to apply the brakes of the vehicle timeously or at all or the brakes were not functioning at all and the defendant failed to keep control or alternatively proper control, over the vehicle. It is further alleged that the defendant failed to exercise due care and precaution whilst driving and failed to have due regard to other road users. The defendant also failed to avoid a collision in circumstances which, with the exercise of reasonable care, it could and should have done so. The damages suffered by the plaintiff amounted to N\$132 507,50 with respect to claim one and N\$5187,50 with regard to claim two, with regard to the tow-in costs.

[3] The defendant denied the allegations against him in relation to the damages caused by him. He denied that he was negligent and instituted a counter claim against the second defendant and alleged that the second defendant, the driver of the plaintiff's vehicle was the cause of the accident in that he failed to keep a proper lookout for other vehicular traffic, and specifically the vehicle of the first defendant. He failed to keep adequate control over the motor vehicle he was driving and drove his motor vehicle at an excessive speed in the prevailing circumstances. He failed to indicate his intention to switch from the left-hand lane into the right-hand lane of the dual carriage way and he

attempted to enter the right-lane of the dual carriage-way at a time when it was dangerous and inopportune to do so, specifically when regard is had for the close proximity of the first defendant's vehicle which was driving in the right-hand lane of the dual carriage way. The second defendant further failed to apply the brakes of his motor vehicle timeously or at all and as a result caused the first defendant's motor vehicle to collide with the rear end of the plaintiff's vehicle. The first defendant instituted a counter claim for damages suffered in the amount of N\$94 698.46, which included the damage suffered to the vehicle, tow-in and storage fees and reasonable assessor's fees.

[4] The second defendant pleaded that he is the sole member of the plaintiff and was the driver of the plaintiff's vehicle at the time of the collision. He further pleaded that the first defendant was the sole cause of the collision, as also pleaded in the particulars of claim of the plaintiff. In the replication to the plea of the first defendant, the plaintiff denied all allegations and put the first defendant to proof thereof. The relevant admitted facts by the parties was that the collision occurred between the vehicles with registration numbers N943W and N8409W near the intersection of Sam Nujoma Drive and the B1 National Road. The parties further admitted the identities of the parties and the jurisdiction of the court. Before the trial commenced, the parties further agreed on the damages suffered by both the plaintiff and the first defendant and that no expert evidence will be led to prove the said damages.

[5] The plaintiff called the second defendant to testify during the trial. He testified that he drove about 00h20 in the early hours of 16 January 2019 from a western direction (from Otjomuise) to an eastern direction towards the intersection between Sam Nujoma Drive and the B1 Road, also known as the Western Bypass road. He was driving an Isuzu motor vehicle with registration N8409W registered in the name of the plaintiff. He testified that the road leading up to the slip way to go onto the B1 Road is a double lane but approximately 500 m from the slip way it turns into a single lane. He was driving in the single lane portion of the road when he noticed lights coming up behind him. He reduced his speed and turned on his indicator indicating that he wanted to turn left onto the slipway which feeds the Western Bypass. He was on his way to Khomasdal. He started reducing his speed approximately 200m away from the turn-off and was travelling at approximately 40km/h – 50km/h and still kept on reducing his speed when he was struck from behind by another vehicle which he later came to know as a BMW vehicle

driven by the first defendant. He felt the rear of his vehicle lift off the ground which made it very difficult for him to control his vehicle. As the parties got out of their vehicles, he realised that the impact was so violent that his vehicle landed on top of the BMW vehicle and it was wedged underneath his vehicle. None of the parties was seriously injured and the police was contacted. The police officers attended to the accident and completed a Namibia Road Accident form. His vehicle had to be towed away from the scene.

[6] He further handed up some photos up as an exhibit A. These photos show the road way coming from Otjomuise towards the turn-off to the slipway leading to the B1 Road. The second defendant testified that the accident took place approximately at the position where he was standing in Exh B1, about 30 m from the turn-off. From the photos it is also clear that it is a single carriage road but with quite a wide yellow lane area. According to the plaintiff the accident took place between the yellow line and the white line, which runs in the middle of the road. He further indicated that after the accident his vehicle came to a standstill almost at the exit way. According to the accident report completed at the scene, the vehicle of the plaintiff was turning left at the time of the accident. The damage to his vehicle was also towards the left hand side at the back. The BMW vehicle drove underneath the vehicle of the plaintiff and when the vehicles stopped, the BMW vehicle was underneath the Isuzu vehicle and the bumper of the BMW vehicle came off when they pulled the vehicles apart. The BMW vehicle had the most damage on the right hand side, the driver's side. The plaintiff further called a witness to explain that the different registration numbers on the insurance policy and that it actually refers to the same vehicle as the vehicle was initially purchased as a second hand vehicle, but received a new registration number when registered by the plaintiff. The VIN number and engine number however are of the same vehicle that was purchased by the plaintiff and eventually deregistered by the plaintiff.

[7] The first defendant testified that at all relevant times he was the owner of a BMW vehicle with registration N934W. In the early morning hours of 16 January 2020 at 00h44 he drove his vehicle from west to east in Sam Nujoma Drive towards the intersection with the B1 National Road in Windhoek. He amended his statement to state that it was a single carriage road and not a double carriage road and explained to the court that there was two lanes and that his home language is not English and he therefore misspronounced himself when he described it initially as a double carriage lane. He explained

that he noticed an Isuzu pick-up motor vehicle with registration N 8409 W which was a short distance in front of his vehicle, on the left-hand side of the yellow line. He was travelling straight within his lane when the vehicle of the plaintiff, being driven by the second defendant, suddenly swerved right into his lane, without activating any indicator. He tried to brake to avoid an accident but could not do so, and he bumped into the vehicle of the plaintiff in the lane that he was travelling in. He proceeded to list the extent to which the second defendant was negligent in that he failed to keep adequate control over the vehicle he was driving, drove the vehicle at an excessive speed, failed to indicate that he was switching from the yellow lane to the right hand lane and that he attempted to enter the right hand side of the single carriage way at a time that it was dangerous and inopportune to do so. He further failed to apply brakes at all.

[8] He testified that he was on his way from home to Ausspannplatz and that both drivers were breathalyzed and both were not under the influence of alcohol. He was driving at approximately 60km/h at the time of the accident. He explained that he was driving in the right hand lane and the second defendant in the left lane and he intended to pass the second defendant when he suddenly swerved in front of his vehicle as if he changed his mind. He could not explain why the version of negligence he testified to, was not put to the second defendant during cross-examination. The witness explained that the two vehicles drove together for some time, therefore driving at the same speed and if the allegation is that the 2nd defendant drove too fast, then similarly the 1st defendant also sped. When asked why the damage to the Isuzu vehicle is mainly on the left back side and not on the right hand side of the back of the Isuzu vehicle which swerved in front of the BMW vehicle, the first defendant explained that he moved to the left to avoid the Isuzu vehicle and applied brakes but there was not enough time for him to avoid colliding with the Isuzu vehicle. The first defendant testified that the point of impact was almost on the yellow line, meaning that the line went almost through the centre of the vehicles. In his opinion the second defendant was going to overshoot the turn-off as he was driving too fast. He realised this after the accident.

[9] Counsel for the plaintiff and second defendant argued that the first defendant through-out the pleadings referred to the road as a dual carriage way. This version was changed during the evidence presented by the first defendant when he testified that it is a single carriage way. When asked about his change regarding the description of the road,

he indicated that he might not have had a proper understanding of what a single and dual carriage way is.

Legal considerations

[10] The plaintiff bears the onus to prove that the first defendant was negligent on a balance of probabilities. On the reverse side, the same onus rests on the first defendant in order for the counter claim to succeed, to prove that the second defendant was similarly negligent based on a balance of probabilities.

[11] The general approach when dealing with rear-end collisions is described by HB Kloppers in *The Law of Collisions in South Africa*¹ at page 78 as follows:

‘A driver who collides with the rear of a vehicle in front of him is prima facie negligent unless he or she can give an explanation indicating that he or she was not negligent.’

Accordingly, as stated in *Ninteretse v Road Accident Fund*²

‘(t)he driver who collides with another from the rear can escape *prima facie* liability for negligence by providing an explanation that shows that the collision occurred because of the negligence of the driver of the other vehicle or due to other intervening circumstances.’

The first defendant therefore needs to provide an explanation which shows that it was the negligence of the second defendant, who drove the vehicle of the plaintiff, that caused the accident. The versions put forward by the first and second defendant differed and can be considered as mutually destructive. If the court finds that the version set forward by the second defendant is true and correct, the plaintiff’s claim must succeed and the counter claim of the defendant dismissed, if the version of the first defendant is correct, then the claim against the second defendant must succeed and the plaintiff’s claim be dismissed.

[12] *In Absolute Logistics (Pty) Ltd v Elite Security Services CC*³ Paker J said the

¹ 7th Edition; 2003 published by Butterworths.

² (29586/13) [2018] ZAGPPHC 439 (2 February 2018).

³ (I 1497/2008) [2011] NAHC 82 (17 March 2011).

following at para 6 –

'I must follow the approach that has been beaten by the authorities in dealing with such eventuality; that is to say, the proper approach is for the court to apply its mind not only to the merits and demerits of the two mutually destructive versions but also their probabilities and it is only after so applying its mind that the court would be justified in reaching the conclusion as to which opinion to accept and which to reject. (See *Harold Schmidt t/a Prestige Home Innovations v Heita* 2006 (2) NR 555 at 559D.) Additionally, from the authorities it also emerges that where the onus rests on the plaintiff and there are two mutually destructive stories he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the version advanced by the defendant is therefore false or mistaken and falls to be rejected. (*National Employers' General Insurance Co. Ltd v Jagers* 1984 (4) SA 437 (E)); *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA); *Shakusheka and Another v Minister of Home Affairs* 2009 (2) NR 524; *U v Minister of Education, Sports and Culture* 2006 (1) NR 168)'

[13] In *Mabona and Another v Minister of Law and Order and Others* ⁴Jones J describes the process in dealing with two conflicting versions as follows:

'The upshot is that I am faced with two conflicting versions, only one of which can be correct. The onus is on each plaintiff to prove on a preponderance of probability that her version is the truth. This onus is discharged if the plaintiff can show by credible evidence that her version is the more probable and acceptable version. The credibility of the witnesses and the probability or improbability of what they say should not be regarded as separate enquiries to be considered piecemeal. They are part of a single investigation into the acceptability or otherwise of a plaintiff's version, an investigation where questions of demeanour and impression are measure against the content of a witness's evidence, where the importance of any discrepancies or contradictions are assessed and where a particular story is tested against facts which cannot be disputed and against the inherent probabilities, so that at the end of the day one can say with conviction that one version is more probable and should be accepted, and that therefore the other version is false and may be rejected with safety (*National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E)).'

[14] When making inferences in civil cases Holmes JA said in *Ocean Accident and Guarantee Corporation Ltd v Koch*⁵:

⁴ 1988 (2) SA 654 (SE) at 662 C-F.

⁵ 1963 (4) SA 147 (A) at 159B-D.

‘As to the balancing of probabilities, I agree with the remarks of SELKE, J, in *Govan v Skidmore*, 1952 (1) SA 732 (N) at p. 734, namely “. . . in finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work *on Evidence*, 3rd ed., para. 32, by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one”. I need hardly add that “plausible” is not here used in its bad sense of “specious”, but in the connotation which is conveyed by words such as acceptable, credible, suitable. (Oxford Dictionary, and Websters’s International Dictionary).’

[15] The process the courts in Namibia apply is perhaps best summarized in *Ndabeni v Nandu*⁶ where Masuku AJ said the following regarding the approach to make a finding on these issues:

‘The question is, how should the court approach the issues so as to make a finding on the disputed issues? In *SFW Group Ltd And Another v Martell Et Cie And Others* (2003 (1) SA 11 (SCA) at page 14H – 15E) Nienaber JA suggested the following formula, which has been adopted as applicable even in this jurisdiction in the case of *Life Office of Namibia Ltd v Amakali* (2014 NR 1119 (LC) page 1129-1130):

‘The technique generally employed by our courts in resolving factual disputes of this nature may conveniently be summarized as follows. To come to a conclusion on the disputed issues, a court must make findings on

(a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.

As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on variety of subsidiary factors, not necessarily in order of importance, such as

- (i) the witness’s candour and demeanour;
- (ii) his bias, latent and blatant,
- (iii) internal contradictions in his evidence,
- (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra-curial statements or actions,
- (v) the probability or improbability of particular aspects of his version,
- (vi) the calibre and cogency of his performance compared to that of other witnesses testifying

⁶ (I343/2013)[2015]NAHCMD 110 (11 May 2015).

about the same incident or events . . .’

Evaluation of evidence

[16] The second defendant was a credible witness who remained steadfast in his version of events and did not contradict himself, although the first defendant remained steadfast in his version, he did not strike me as being entirely candid and honest. During cross-examination the first defendant was evasive and answered more than once that he simply cannot remember. His version of the accident was also never put to the witness of the plaintiff and he could therefore not respond on the allegation that he swerved into the lane of the BMW as well as that the driver of the BMW tried to avoid the accident by swerving left, and that is why most of the damages to the Isuzu vehicle was on the left rear end.

[17] What is before me is based on the evidence of two single witnesses. I have considered the evidence and submissions and in weighing the evidence on both sides it is evident that the versions of the plaintiff and the defendants are mutually destructive. The version of the second defendant on behalf of the plaintiff and that of the first defendant cannot be reconciled with one another as they differ as to where the accident occurred and how the accident occurred.

[18] The proper approach is for the court to apply its mind not only to the merits and demerits of the two mutually destructive versions but also their probabilities and it is only after so applying its mind that the court would be justified in reaching the conclusion as to which opinion to accept and which to reject. The court finds that the damages that was sustained by both the vehicles and the location of such damages is more in line with the explanation put forward by the second defendant. The court accepts the evidence of the second defendant that he was driving on the single carriage way between the yellow line and the white line and also finds that he indicated from the start that the accident took place inside this lane. The court further finds that it is highly improbable that the first defendant would, after the second defendant on the version of the first defendant, swerved into the lane where he was travelling in, in an attempt to avoid the accident swerve left in the direction of the barrier. The fact that the BMW vehicle ended up driving underneath the back of the Isuzu vehicle is further an indication that the driver either

approached the vehicle in front of him too fast or failed to keep a proper look-out, taken into account that the evidence of the first defendant is that he applied his brakes. The version of the second defendant that he had indicated his intention to turn left was also not challenged by the first defendant and should therefore stand. The first defendant should therefore have noted the intention of the second defendant and approached the Isuzu vehicle, which was in front of him with more caution and therefore failed to exercise due care and precaution whilst driving the vehicle as well as failed to have due regard to other road users.

[19] For those reasons, I make the following orders:

1. Judgment is granted for the plaintiff in the amount of N\$132 507.50 (claim 1) and N\$5 187.50 (claim 2) together with cost of suit.
2. Interest on the aforesaid amounts of N\$132 507.50 and N\$5 187.50 at 20% per annum from 1 February 2018.
3. The counterclaim of the first defendant is dismissed.

E Rakow

Acting Judge

	Note to the parties:
	Not applicable.
Counsel:	
Plaintiff/ Respondent	Defendants/ Applicants
Mr Diedericks instructed by PD Theron & Associates Windhoek	Mr Pretorius of Francois Erasmus & Partners Windhoek