

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

SPECIAL PLEA

JUDGMENT

Case no: HC-MD-CIV-ACT-DEL-2018/01553

In the matter between:

NAMIBIA NEWS DISTRIBUTORS (PTY) LTD

PLAINTIFF

and

REINHARDT KASHE

DEFENDANT

J SHIKONGO

THIRD PARTY

Neutral citation: *Namibia News Distributors (Pty) Ltd v Kashe* (HC-MD-CIV-ACT-DEL-2018/01553) [2020] NAHCMD 538 (23 November 2020)

Coram: **UNENGU, AJ**

Heard: 09 – 10 November 2020

Delivered: **23 November 2020**

Flynote: Civil Practice – Plaintiff suing defendant for damages arising from a collision between his vehicle and the defendant’s vehicle – Application for Absolution from the Instance – At the close of the case for the plaintiff – Defendant applying for absolution from the instance – Test for the absolution from the instance restated – Application granted.

Summary: The plaintiff has sued the defendant for payment in the amount of N\$ 50 914.30 for damages suffered to his vehicle in a collision between his vehicle and the vehicle driven by the defendant in Independence Avenue here in Windhoek. Mr Tjiroze, the person driving the plaintiff’s vehicle testified under oath that he was driving on Independence Avenue from west to east while the defendant was driving in the opposite direction, namely from east to west in the same Independence Avenue. He testified that the traffic light for them was green and the traffic light in Willibard Kapuenene Street was red. Mr Shilongo, the third party driving from north to south in Willibard Kapuenene Street failed to stop at the intersection and collided into the defendant’s vehicle. The impact of the collision caused the defendant’s vehicle to veer off direction and bumped the plaintiff’s vehicle. The defendant lost control as a result of the collision with Mr Shilongo’s car. The defendant would not have collided with the plaintiff had it not been for Mr Shilongo colliding into his car.

Held: that the test at the close of a plaintiff’s case is whether or not the plaintiff has proved a prima facie case upon which a court acting reasonably could find in favour of the plaintiff.

Held further: that Mr Tjiroze the witness of the plaintiff essentially testified for the defendant, absolved him from any wrongdoings and heaped all blames for the collision on Mr Shilongo, the third party.

Held furthermore: that the plaintiff has failed to prove a prima facie case therefore, the application for the absolution from the instance succeeds and granted with costs.

The application for the absolution from the instance is granted with costs.

JUDGMENT

UNENGU, AJ

[1] The plaintiff sued the defendant for damages in the amount of N\$ 50 914. 34 as the reasonable and necessary costs to repair its vehicle to its pre-collision condition after the vehicle was involved in a collision with the vehicle driven by the defendant. The plaintiff is also claiming interest at a rate of 20% per annum from date of judgment to date of payment of the amount and costs of suit.

[2] In his particulars of the claim, the plaintiff has alleged that on or about 21 August at the corner of the Independence Avenue and Willibard Kapuenene Street in Windhoek, a collision occurred between its vehicle and a Toyota Etios motor vehicle with registration number N 152-155 W driven by the defendant. According to him, the defendant was the sole cause of the collision because the defendant was negligent as he failed to keep a proper look out; he failed to keep his vehicle under control; he failed to avoid a collision when, by the exercise of reasonable care, he could and should have done so.

[3] The plaintiff further alleged that the defendant drove at an excessive speed under the circumstances; that he lost control of his vehicle, moved into the lane of oncoming traffic and collided into plaintiff's oncoming vehicle and that he failed to brake timeously or at all, alternatively that he drove a vehicle with defective braking system. Initially, the defendant raised a plea of non-joinder of a certain Mr J Shilongo to the proceedings as a third party having substantial interest in the proceedings. However, the special plea was abandoned during the trial of the matter as Mr Shilongo's whereabouts could not be established to serve him with papers.

[4] On the merits the defendant pleaded and denied that his negligence was the sole cause of the collision between his vehicle and the plaintiff's vehicle. He said that the collision was caused by Mr Shilongo who was driving a Toyota Yaris with registration number N 190-763 W which negligently collided into the back left side of his vehicle causing his vehicle, as a result of the impact, to swerve and colliding into the plaintiff's vehicle. Furthermore, the defendant denied that he was liable to pay the plaintiff the amount claimed.

[5] Meanwhile, the parties in their draft pre-trial order which was made an order of court agreed that only those issues contained in paras (a) and (b) thereof are to be resolved by the court during the trial. These issues are basically whose negligence caused the collision; whether or not all the three drivers were negligent and contributed to the collision, if so, to what degree they had contributed, the quantum of damages and the liability of the three drivers.

[6] During the trial, the plaintiff was represented by Mr Diedericks assisted by Mr Viljoen while Mr Tjituri represented the defendant. The third party was not present at the trial and as a result did not take part in the proceedings.

[7] A summary of the facts of the matter is briefly as follows. On 11 April 2017 at approximately 17h00, Mr Tjiroze was driving the vehicle of the plaintiff, a Ford Panel Van with registration number DP 16MJ GP from west to east in Independence Avenue in Katutura. The defendant was also driving his vehicle in the same Independence Avenue but from the opposite direction, namely, from the eastern to the western direction. At the intersection of Independence Avenue and Willibard Kapuenene Street, still in Katutura, another vehicle with registration number N 190-768 W driven by Mr Shilongo, the third party, approached the intersection from the northern to the southern direction in Willibard Kapuenene Steet.

[8] The traffic light for the traffic in Willibard Kapuenene Street was red while the traffic light for the plaintiff and the defendant in Independence Avenue was green. Mr Shilongo failed to stop at the intersection, drove against the red light into Independence Avenue and collided with the vehicle of the defendant. As a result of the collision, the

defendant lost control of his vehicle and went over the pavement towards the plaintiff's vehicle and collided into its left side.

[9] Mr Tjiroze who was the only witness called to testify on behalf of the plaintiff in fact testified for the defendant. He said that Mr Shilongo jumped a red light and hit the defendant's vehicle causing it ricocheting in the direction of the plaintiff's vehicle and bumped into it. He further testified that because of the impact of the collision, the defendant lost control of the vehicle. During cross examination, Mr Tjiroze testified that the defendant would not have collided into the plaintiff's vehicle if he was not bumped by the vehicle of Mr Shilongo. He testified further that the defendant was driving from east to west in Independence Avenue and that the traffic light at the intersection was green for him not to stop.

[10] After his evidence in chief and cross examination by Mr Tjituri, the plaintiff closed its case prompting Mr Tjituri to apply for absolution from the instance. Mr Tjituri argued that the plaintiff failed to prove a prima facie case against his client, therefore, his client should be absolved from the matter. Meanwhile, Mr Diederich argued that the plaintiff has proved a prima facie case against the defendant. He argued further that the principle of *res ipsa loquitur* was applicable in the matter thus proving a prima facie case.

[11] It is trite that at the stage of the closure of the plaintiff's case, the test is not whether the plaintiff has proved his case on a balance of probabilities but whether he has managed to establish a prima facie case. Put differently, whether there is evidence upon which a court acting reasonably could find in favour of the plaintiff. In this instance, the answer to the question is negative, meaning, there is no prima facie case proved by the plaintiff, therefore the application for the absolution must succeed.

[12] I have already pointed out above that the plaintiff in essence testified in favour of the defendant. He absolved him from causing the collision and heaped all the blame on Mr Shilongo, the third party. Therefore, I accept the version of the plaintiff that he was driving from west to east with the defendant driving in the opposite direction in Independence Avenue; that the traffic light was green for them to proceed while Mr

Shilongo who was driving in Kapuenene Street from north to south was supposed to stop at the intersection because the traffic light was red for him. I will also accept his version that Mr Shilongo failed to stop at the intersection and collided on the left back side of the defendant's vehicle; that as a result of the collision, the defendant lost control and caused the defendant's vehicle to swerve in the direction of the plaintiff and a collision occurred between their vehicles. I also accept the version that was it not for the collision into his car by Mr Shilongo's vehicle, the defendant would not have bumped the plaintiff's vehicle.

[13] In that regard and taking into consideration all the above mentioned, it is my humble opinion that the plaintiff has failed to establish a prima facie case upon which a court acting reasonably could find in his fair. Consequently, the application for the absolution from the instance succeeds and I make the following order:

The application for the absolution from the instance is granted with costs.

E P UNENGU
Acting Judge

APPEARANCES:

PLAINTIFF: J Diedericks (with him B Viljoen)
Viljoen & Associates, Windhoek

DEFENDANTS: M Tjituri
Tjituri Law Chambers, Windhoek.