REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-DEL-2019/03318

In the matter between:

PRUDENCIO KANDIDO **PLAINTIFF**

And

MARKS KARONGEE **DEFENDANT**

Neutral citation: *Kandido v Karongee* (HC-MD-CIV-ACT-DEL-2019/03318) [2021] NAHCMD 110 (3 March 2021)

Coram:	TOMMASI J
Heard:	**2 – 5 November 2020**
Oral Submissions:	**6 November 2020**
Delivered:	**3 March 2021**

Flynote: Practice - Motor Vehicle Accident – Where there are two mutually destructive versions – Test to be applied on a balance of probability – Expert evidence considered vis-à-vis physical evidence before court.

Summary: On 01 September 2018 a motor vehicle accident occurred near Brakwater Service Road, Windhoek between a Volkswagen Polo (referred to as the Polo) and an Isuzu Pick-Up (referred to as the Isuzu). The plaintiff was the driver and owner of the Polo and the defendant the driver of the Isuzu. The plaintiff claims the sole cause of the accident is the negligent driving of the defendant. The defendant, on the other hand, claims that the sole cause of the accident is the negligent driving of the plaintiff. Both parties claim damages.

Held: that the physical evidence, on a balance of probabilities, supports the version of the plaintiff.

Held that: the defendant was the sole cause of the collision in that he failed to keep a proper look out particularly of the vehicle of the plaintiff in front of him.

Held further that: the defendant failed to keep a safe distance behind plaintiff's vehicle.

Held that: the defendant drove without reasonable consideration for any other person using the road.

ORDER

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1. The court grants judgement for the plaintiff against the defendant in the following terms:
    (a) Payment in the amount of N$133 010.00.
    (b) Interest on the aforesaid amount at the rate of 20% per annum from date of judgment to date of final payment.
    (c) Costs of suit

2. The defendant's counterclaim is dismissed with costs.

JUDGMENT

TOMMASI J:

[1] On 1 September 2018 a motor vehicle accident occurred near Brakwater Service Road, Windhoek, between a Volkswagen Polo (referred to as the Polo) and an Isuzu Pick-Up (referred to as the Isuzu). The plaintiff was the driver and owner of the Polo and the defendant the driver of the Isuzu. The plaintiff claims the sole cause of the accident is the negligent driving of the defendant whereas the latter and he defendant claims that the sole cause of the accident is the negligent driving of the plaintiff. Both parties claim damages.

[2] The plaintiff's version is that on this fateful evening, he fetched his friend from a service station in Monte Christo, Windhoek and they both travelled in a northern direction on the Brakwater Service Road. His friend was seated in the front left passenger seat. He noticed the lights, of a fast approaching car coming from behind him, in his left and review mirror as he approached a bend in the road. The vehicle was traveling in the same lane and in the same direction as his vehicle. He was driving approximately 38 km/h. Shortly after he noticed the lights he felt a huge collision from behind as the approaching vehicle collided with the rear end of his vehicle. He immediately lost consciousness and regained consciousness for the first time in the hospital. Sadly his friend Charles passed away. He did not complete the accident report form as he was unconscious.

[3] The defendant's version of the collision differ materially from that of the plaintiff. According to the defendant, he went to pick up his girlfriend who was visiting in Brakwater. When he arrived there, the gate was locked and he had to phone his girlfriend to arrange for the gate to be opened but he was unable to get hold of her. He returned to Windhoek traveling on the Brakwater Service Road in a Southerly direction towards Windhoek. He was traveling at a speed of approximately 80 – 100km/h.

[4] He came to a bend in the road and it straightened out in the area known as “paaltjies”. He noticed head lights of a vehicle approaching him, traveling in the opposite direction. Another set of lights appeared from behind the first oncoming vehicle as it overtook the vehicle. The overtaking manoeuvre happened suddenly and without warning as no indicator lights gave warning of the driver’s intention to overtake. He had no opportunity to slow down and/or leave the road as there are embankments on both sides of the road. He was unable to avoid the accident as the overtaking manoeuvre happened so fast and in relative close proximity to him. The last thing he recalls seeing is the plaintiff’s vehicle veering straight into and across his lane and collided with the front end of his vehicle. He realised a collision was inevitable and instinctively closed his eyes and covered his head with his arms to protect his face and brace for impact. It was a huge impact and he immediately felt that he was injured.

[5] The defendant’s vehicle came to a standstill on the shoulder of the road still facing the direction he was travelling in i.e. in a Southerly direction. He hobbled over to the vehicle which collided with him and which was 10 meters behind him. The vehicle had landed on its roof. The driver and the passenger were not moving. He went looking for his mobile phone but could not find it. The first vehicle which arrived at the scene was the vehicle which the plaintiff overtook. He was in such a state of shock that he omitted to take the names of the occupants of the vehicle. That vehicle remained on the scene until the tow-in service arrived. He was taken to hospital and later that week completed the police accident report. He indicated that his understanding of a head-on collision is one where the head of his vehicle hits an oncoming vehicle.

[6] Plaintiff called an expert witness, Johan Joubert, who specialises in Traffic Accident Reconstruction. He obtained his information from the accident report, photographs taken by Detective Sergeant Karondore, a statement made by Detective Sergeant Alweendo, the statements made by the plaintiff and the defendant to the police, an e-mail from the plaintiff to Securitas and an email to Alexander Forbes from the defendant.

[7] He describes details he gleaned from the Accident Report and same are summarised as follows:

7.1 The collision occurred on a dual carriage way,

7.2 It was night time with no street lights.

7.3 The road surface was tarmac and dry and in good quality.

7.4 The condition of the road markings was marked “N/A” but he observed a double barrier line.

7.5 The direction of travel of the Isuzu was indicated as turning right, but he later learned that it meant that the Isuzu swerved to the right.

7.6 The direction of travel of the Polo was indicated as traveling straight.

7.7 The type of accident was not indicated e.g. head-on or rear-end.

7.8 The damages to the Isuzu was from the right front, centre and windscreen but he observed that the damage was in fact to the entire front, with impact to the left front.

7.9 The damage to the Polo was not indicated.

[8] He noted a description of the accident recorded as it appears on the report verbatim as follows:

Road User A:

‘The driver of the Isuzu bakkie, registration no N191 363W was traveling from North to South direction while head-on collision with a Polo Vivo with registration no N190 762 W, after the driver of the silver Polo loss control over his vehicle.’

Road User B:

‘I was driving vehicle N191 362W from North to South when the other vehicle N190 762W driving from South to North collided head on with me.’

It is evident that both these defendants’ versions above reflect the version of the driver of the Isuzu’

[9] The expert’s His analysis is that there are 2 mutually destructive versions of how the accident occurred i.e. firstly; that the vehicles were traveling in opposite directions according to the driver of the Isuzu and, that the vehicles were traveling in the same direction according to the version of the driver of the Polo, secondly; that

the driver of the Polo was overtaking another vehicle. He suggests that the only way to determine which of the above versions is correct is to test these versions against the physical evidence found on the accident scene.

[10] He held the view that the direction of travel as indicated by Detective Sergeant Karondere is questionable as it appears to be based solely on the information received from the driver of the Isuzu.

[11] He secondly had an issue with the point of impact. He observed that the point of impact was a gouge mark. He explained that this type of mark is made when part of the undercarriage of a vehicle digs or scrapes an amount of tar out of the road surface during maximum engagement. His difficulty with the gouge mark on the photo plan of Sgt Karondere is that it does not appear to be a fresh gouge mark. He theorised that if there was a head-on collision one would have expected tyre scuff marks. The absence of the tyre scuff marks led him to conclude that the version of a head-on collision is unlikely. He explained that a gouge mark is more likely to be found in a head-on collision as the force is significantly higher given the combined speed of the vehicles and the fact that they are traveling in opposite directions. He concludes that, in the absence of any other gouge marks, a rear end impact is more likely since the force is transferred forward and into acceleration of the leading vehicle thus leaving no gouge marks.

[12] He referred to a photograph of a service road which, according to him, was the service road referred to by the driver of the Polo. According to his report the driver stated that the accident occurred just prior to what was called a Service Road which according to him is an entrance to a farm. As it turns out, this is not where the accident occurred but where he believed the accident occurred when he came to inspect the scene.

[13] He noted that the damage to the Isuzu is to the left front corner, the left-side front panel is crumbled rearwards and the bonnet buckled rearwards. In his opinion the left front of the Isuzu collided with the Polo.

[14] He observed that the left front wheel hub of the Polo was intact. He pointed out that the photograph of the Polo after the collision shows minimal damages to the front of the Polo. He further observed damages to the left rear corner of the Polo. The damages to the right rear corner of the Polo according to him, was induced damage caused by the damage to the left rear corner. The roof is buckled forward at an angle of approximately 35 degrees on the left rear corner.

[15] It is his opinion that the position of the damage on both vehicle as can be seen from the photographs shows that it could not have been a head-on collision in any way. The front number plate of the Polo is still intact.

[16] In a figure using the principle direction of force of both vehicles, he demonstrates the position of each of the vehicles at the point of impact on the strength of the position of the damage. This demonstrates a collision of the left front of the Isuzu with the rear left corner of the Polo.

[17] He, in a second figure, indicates the movement of both vehicles from point of impact to their final rest position. In this scenario both vehicles are traveling in the same direction with the Isuzu behind the Polo. The figure indicates that the Isuzu is on the gravel shoulder thereafter swerving to the right so that his left front collides with the left rear of the Polo. The position of the Polo after the collision is indicated at two different positions of rest.

[18] It is his opinion that the thrust line (principle direction of force – PDOF) passed just right, very close to the gravitational centre point of the Isuzu, there was very little anti-clockwise rotation of the Isuzu from point of impact to its final rest position; and similarly, as the thrust line (PDOF) passed the distance to the right of the gravitational centre point of the Polo, the Polo rotated anti-clockwise, and more rapidly from point of impact to its final rest position. The Isuzu's final rest position however differs from the photographs as it faces North instead of South. The witness however introduced a new sketch to reflect the position of the Isuzu to face a Southern direction. The new sketch accords with the written report which indicates that there was little anti-clockwise rotation by the Isuzu.

[19] In conclusion, he stated that only the version of the driver of the Polo is supported by physical evidence and scientific principles with reference to the laws of motion. He found no evidence of a head-on collision as there is barely any damage to the front of the Polo. He states further that the front end of the Isuzu is compromised and destroyed and there is no impact damage visible to the front of the Polo. Taking this damage profile into consideration, it is clear that the Isuzu collided with its left front into the left rear of the Polo. This, according to him means that the vehicles were traveling in the same direction prior to the accident. He makes reference to the statement of the driver of the Polo which states that he saw lights on his left rear, from behind as "correlating" with the angle from the rear. He concludes that the gouge mark was an old one and erroneously identified as the point of impact.

[20] He further elaborated that the laws of motion which he referred to is Sir Isaac Newton's 2nd law of motion. In terms of this law the force of the Isuzu would propel the Polo forward and to the right. He held the view that the shearing/splitting of the Polo would not occur on impact but that the Polo would be propelled forward first and the splitting was likely caused by the Polo hitting the rock and occurred after the collision.

[21] During cross examination he conceded that he based his conclusion that there are two mutually destructive versions on the statement of the two drivers and e-mails which were not attached to his report. He also conceded that the accident did not occur near the service road as indicated in his photograph and that the plaintiff did not state that the defendant came from behind in his warning statement given to the Police. When questioned on the various positions pointed out in the photo plan he indicated that he does not have any issue with the various positions of rest of the vehicles but only with the point of impact reflecting a gouge mark which was taken 9 months after the accident.

Mr Strydom, counsel for the Defendant put to the expert that the version of the impact is indeed where the gouge mark was and that the Isuzu hit the Polo on the side. It was recorded by Mr Erasmus, counsel for the Plaintiff that this version was not presented in the pleadings. He was asked to give his view on the defendant

version. He insisted that the damage profile does not support a side swipe and that he would exclude that possibility. When asked what would actually occur in a side swipe as proposed by Mr Strydom, he indicated that in that case the entire Polo would end up behind the point of impact. In this instance the front part is almost next to the point of impact and the back of the Polo is ahead of the point of impact. He maintained that, in light of the damage profile and the respective rest positions of the vehicles, this particular scenario is not possible.

[22] This court does not require an expert to determine that there are two mutually destructive versions before court. The evidence before this court clearly indicates that there are two mutually destructive versions before. Common sense dictates that only one of these versions can be correct. In *National Employers' General Insurance Co Ltd v Jagers 1984 (4) SA 437 (E) at 440E – F* the following is stated:

> '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 satisfies the Court on a preponderance of probability 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.'

[23] For purposes of this judgment I'll deal with the plaintiff's claim in convention. The case consists of the plaintiff's version of the collision, the expert witness' report and testimony and the various documents handed into evidence i.e the photographs taken on the date of the accident and photographs taken about 9 months after the accident.

The Plaintiff and the defendant agree that the plaintiff was driving in a northern direction. The difference between the two versions relate to the direction of travel of the defendant.

[24] Ownership of the plaintiff's vehicle was placed out of dispute and this court is satisfied that plaintiff is indeed the owner of the Volkswagen Polo bearing Registration No N190 762W. I am also satisfied that the plaintiff was traveling in a northern direction.

[25] For this court to determine whether or not the defendant is the sole cause of the collision, the court must have regard to the body of the evidence adduced. I am in agreement with the remark of the expert witness that the physical evidence in this matter would be the determining factor as both the version of the plaintiff and the defendant rings true. The court will thus examine the physical evidence and the testimony of the expert witness to determine whether the physical evidence adduced supports/corroborates the version of the plaintiff or the defendant.

[26] In this matter the qualifications and expertise of the expert witness was not challenged. It is accepted that experts are generally called to assist the court to give evidence on matters calling for specialised skill or knowledge. It was necessary for the facts upon which the expert opinion was based to be proved by admissible evidence, which facts had to be either within the personal knowledge of the expert or based on facts proved by others. (See S v Munuma and others 2018 (2) NR 521 (HC)).

[27] The photograph of the gouge mark in the road as indicated by Sgt Karondore was taken 9 months after the accident. The photographs taken the night of the accident indicate position D (rest position of the front section of the Polo); E, (the rest position of the back part of the Polo) and F (the rest position of the Isuzu). The point of impact i.e. position “C” is not indicated on these photographs. It is evident that both Sgt Karondore and Sgt Alweendo who attended the scene of the accident on 1 September 2018 and who could shed light on why this point was not photographed the night of the accident or the next morning, were not called to testify. I am unable to conclusively determine whether this was in fact the point of impact or not. The absence or presence of the gouge mark therefore cannot support the version of the defendant nor is the absence thereof a factor which can support the version of the plaintiff.

[28] The reliance placed on the absence of the gouge mark by the expert diminishes the value of his findings somewhat and must therefore be disregarded. The only undisputed and conclusive physical evidence this court has is the final resting positions of the two vehicles and the damage which is apparent from the photographs handed into evidence. The expert’s assessment or profiling of the

damage is premised on these proven facts which are largely undisputed. It is also visible in the photographs. His expert opinion in this regard thus has persuasive value.

[29] It is evident from the photographs that the Polo actually split/seared into two parts. The rear end was situated near a rock on the opposite side of road (eastern side). The parties agreed that the searing did not take place on impact. The only logical inference is that the splitting was caused by the rock and that the natural sequence of events is the collision of the Polo with the Isuzu first and searing afterwards. The direction of the front of the Polo after splitting can only have been in a northerly direction.

[30] The defendant, in the counterclaim and in the accident report claimed that it was a head-on collision. It was argued that it is generally accepted that a head-on collision is when two vehicles moving in opposite directions collide bumper to bumper or front to front. The defendant however claims that it was not his understanding. It is evident that absence of damage to the front of the Polo would not support a head-on collision as defined hereinbefore. Thus the version of the defendant, insofar as it purports to be a head-on collision, would be false.

[31] If the court however considers his version that he braced himself by closing his eyes and did not see which part of his vehicle collided with that of the plaintiff, it must have regard to the findings of the expert. The expert considered the possibility that the plaintiff swerved in front of defendant and that he collided with him in a side swipe. He insisted that the profile of the damage does not support this possibility. The damage profile according to him, was that the front, left of the Isuzu collided with the left rear of the Polo at a 35 degree angle. In that scenario the Isuzu would propel the Polo forward and the resting position of the Polo would be ahead of the Isuzu corresponding with the resting position of the Polo in relation to the Isuzu. The anti-clockwise rotation adequately explains the resting position of the Isuzu.

[32] I am of the view that this explanation, in light of the photographs taken, on a balance of probabilities supports the version of the plaintiff. In light of the fact that there are two mutually destructive versions, I conclude that the defendant was the

sole cause of the collision in that; he failed to keep a proper look out particularly of the vehicle of the plaintiff in front of him; he failed to keep a safe distance behind plaintiff's vehicle; generally drove without reasonable consideration for any other person using the road.

[33] In these circumstances no negligence can be attributed to the plaintiff and he is thus entitled to his damages in full. The quantum of plaintiff's damages were not in dispute. The defendant's counterclaim consequently stands to be dismissed.

[34] In the premises:

1. The court grants judgement for the plaintiff against the defendant in the following terms:
    (a). Payment in the amount of N$133 010.00.
    (b). Interest on the aforesaid amount at the rate of 20% per annum from date of judgment to date of final payment.
    (c) Costs of suit
2. The defendant's counterclaim is dismissed with costs.

M A TOMMASI

Judge

APPEARANCES

PLAINTIFF:	Francois Pretorius of Francois Erasmus & Partners
DEFENDANT:	Borris Erasmus of by PD Theron & Associates