REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-CIV-ACT-DEL-2018/03499

In the matter between:

DANIEL FERNADO NGOLA **PLAINTIFF**

and

LAURENTIUS VEIYO **DEFENDANT**

Neutral Citation: *Ngola v Veiyo* (HC-MD-CIV-ACT-DEL-2018/03499) [2021] NAHCMD 526 (16 November 2021)

CORAM: SIBEYA J
Heard: **08 and 10 November 2021**
Order: **12 November 2021**
Reasons: **16 November 2021**

Flynote: Practice – Motor vehicle accident – Mutually destructive versions – Court called upon to exercise great mental exercise to determine the cause of the collision and party liable – Court drawing a negative inference when a party failed to call an available witness that would have greatly assisted the court to make a determination on the facts of the case.

Summary: The plaintiff instituted action against the defendant for damages arising out of a motor vehicle collision – Plaintiff claims that on 16 December 2017 at around 23h00, a collision between his motor vehicle and the vehicle driven by the defendant occurred at the intersection of Eugene Kakukuru Street and Marcus Siwarongo Street in Rundu – The collision was caused by the sole negligence of the defendant, plaintiff claims. The defendant disputed the material parts of the claim.

The defendant, retuned the blame to the plaintiff for solely causing the collision. The defendant alleged that plaintiff failed to stop at the traffic lights-controlled intersection which lights were red at the plaintiff's side of the road. At the side of the defendant, the traffic lights were initially red which led to the defendant to stop at the intersection and only proceeded to drive through the intersection when the traffic lights turned green, giving him the right of way.

Held – The old latin maxim *"semper necessitas probandi incumbit ei qui agit"* matures like wine, as several jurisdictions in the world endorsed the principle that "he who alleges must prove". The plaintiff therefore bears the burden of proof of allegations claimed on a balance of probabilities in order to sustain his claim.

Held – The evidence led by the plaintiff and defendant revealed clear variance between their versions just as night and day. The parties testified as sole witnesses in support of their cases, to two mutually destructive versions.

Held – Where the probabilities do not resolve the matter, the court can resort to the credibility of witnesses in order to find in favour of the one or the other party. This entails consideration of the candour and demeanour of witnesses, self-contradiction or contradiction with the evidence of other witnesses who are supposed to present the same version as him or her or contradict an established fact.

Held – There are instances where a court can draw an adverse inference against a party who fails to call an available witness whose evidence could be relevant to the resolution of the dispute or part thereof. In *casu,* the plaintiff's passenger would have undoubtedly been of great assistance to the court, especially in this matter clouded with mutually destructive versions. The plaintiff's passenger would have informed the court whether indeed the traffic lights were green at the intersection and therefore

giving the plaintiff the right of way or not. The passenger would have further clarified whether together with the plaintiff, they disembarked the vehicle, approached the defendant and called him in an aggressive manner as testified by the defendant. If for some or other reasons the passenger could not be called, the plaintiff should have placed evidence or at the very least an explanation why the passenger could not be available to testify. In *casu*, the court is in darkness on why the passenger was not called to testify. This state of affairs, in my view, calls for an adverse inference to be drawn against the plaintiff.

Held – this court accepts the version of the defendant to be credible and rejects that of the plaintiff for being highly improbable and unreliable. I thus find that the collision was caused solely by the negligence of the plaintiff and I find no contributory negligence on the part of the defendant.

ORDER

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1. The plaintiff's claim against the defendant is dismissed with costs, such costs subject to s 17 of the Legal Aid Act 29 of 1990 as amended.

2. The matter is regarded finalised and removed from the roll.

JUDGMENT

SIBEYA J:

Introduction

[1] The phrase 'he said, she said' is short, simple and cute. But that concise and catchy phrase has an unpleasant side. It is a description of totally divergent versions from different people who observed the same scene. So much so that when evidence of such versions is tendered, the court has a mammoth task to navigate through the

said different versions about one scene in order to ascertain the most probable evidence on the facts.

[2] The current matter stands on no different footing as the plaintiff and the defendant provided mutually destructive versions. The court is called upon to engage its mental faculties in order to unravel the glaring contrasting versions tendered and thereafter reach a just decision.

Background

[3] The plaintiff instituted action against the defendant for damages arising out of a motor vehicle collision. Plaintiff claims an amount of N$84,635.96 plus interest thereon calculated at the rate of 20 per cent percent per annum and costs. Plaintiff claims that on 16 December 2017 at around 23h00, a collision between his motor vehicle and the vehicle driven by the defendant occurred at the intersection of Eugene Kakukuru Street and Marcus Siwarongo Street in Rundu. The collision was caused by the sole negligence of the defendant, so the plaintiff claims.

[4] The defendant did not receive the plaintiff's claim hands down. He disputed the material parts of it.

[5] The plaintiff issued out summons on 05 September 2018. Thereafter, the court, differently constituted, went through trials and tribulations for over a period of three years which saw several postponements for mediation, status hearings, case management, legal representation for the defendant, the parties' failure to file witness statements timeously, pre-trial conference hearing, Covid-19 restrictions to mention but a few. On the roll call of 05 November 2021, the matter was allocated to me for trial on the floating roll of 08 to 12 November 2021. The trial commenced as scheduled.

The parties and their representation

[6] The plaintiff is Daniel Fernado Ngola, a major male person residing at Erf 952, Sinden Avenue, Tamariskia, Swakopmund.

[7] The defendant is Laurentuis Veiyo, a major male employed as a driver at Andara District Catholic Hospital, Kavango West Region. Where reference is made to the plaintiff and the defendant jointly, they shall be referred to as 'the parties'.

[8] The plaintiff is represented by Mr P Coetzee, while the defendant is represented by Ms V Tjivikua.

Background

[9] On 16 December 2017 at about 23h00, a collision occurred between a Chevrolet Cruze sedan motor vehicle bearing registration number N 15051 RU and a Ford Ranger pick-up bearing registration number N 7302 RU. The Chevrolet Cruze was driven by the owner, the plaintiff. The Ford Ranger, which belongs to a certain Mr Kandjiimi was driven by the defendant.

[10] Prior to the collision, the plaintiff drove from the northern to the southern direction in Eugene Kakukuru Street towards the intersection with Marcus Siwarongo Street, which is controlled by traffic lights. The defendant drove from the western to the eastern direction in Marcus Siwarongo Street and collided with the plaintiff's vehicle at the said intersection. Both vehicles sustained damages consequent upon the collision.

[11] The plaintiff pleaded in the particulars of claim, and alleged, *inter alia*, that the collision occurred from sole negligent driving of the defendant, in that:

(a) He failed to stop at the traffic light-controlled intersection which lit red for the defendant but still proceeded to cross the intersection;
(b) He failed to keep a proper look-out;
(c) He failed to apply brakes timeously or at all;
(d) He failed to avoid the collision where a reasonable person would have done so.

[12] The defendant, in his plea, returned the finger-pointing and blamed the plaintiff for solely causing the collision. The defendant alleged that it is the plaintiff who failed to stop at the traffic lights-controlled intersection which lights were initially red at his

side of the road and he stopped the vehicle. When the lights turned green, giving him the right of way, the defendant proceeded to drive through the intersection where the collision occurred with the plaintiff's vehicle.

[13] The defendant further alleged that the plaintiff drove at an excessive speed above 60km/h and, failed to keep a proper lookout.

[14] At the commencement of the hearing, the parties informed the court that they agreed that the quantum is no longer in dispute. Subsequently, the witness statement and reports of Johann Liebenberg, a motor vehicle assessor, were submitted into evidence with the defendant's consent and marked Exhibit "A". This agreement entailed that the parties were *ad idem* that the plaintiff's vehicle was damaged beyond economical repair. The total loss suffered by the plaintiff calculated from the retail value of the vehicle is N$84,635.96.

Common cause facts

[15] The following facts are common cause between the parties:

(a) That at all relevant times plaintiff was the owner of the Chevrolet Cruze bearing registration number N 15051 RU. A certificate of registration of this vehicle was also submitted into evidence;[1]

(b) That a collision occurred on 16 December 2017 at around 23h00 at the intersection of Eugene Kakukuru Street and Marcus Siwarongo Street between the plaintiff's vehicle and a Ford Ranger bearing registration number N 7302 RU driven by the defendant;

(c) That the road where the collision occurred had a dual carriage;

(d) That at the vicinity of the collision, the road had a tarred surface with visible brake marks from the vehicle driven by the plaintiff;

[1] Exhibit "D".

(e) That as a result of the collision, the plaintiff's vehicle was damaged on the right front corner while the vehicle driven by the defendant was damaged on the front left corner.

Issues for determination

[16] The court referred this matter for trial in terms of the pre-trial order of 23 March 2021 on the following relevant issues:

(a) Whether any of the drivers failed to stop at the traffic lights-controlled intersection when the lights were red, thereby driving negligently and colliding with another vehicle;

(b) Whether any of the drivers failed to keep a proper lookout;

(c) Whether any of the drivers failed to apply brakes timeously or at all;

(d) Whether any of the drivers failed to exercise reasonable care and control in order to avoid the collision;

(e) Whether the plaintiff drove the vehicle at an excessive speed beyond the regulated speed limit of 60km/h in the particular zone.

(f) Whether both drivers were negligent and if so, the percentage of their contribution?

[17] I find it opportune at this juncture to consider the evidence led by the parties.

Plaintiff's evidence

[18] The plaintiff testified as the only witness on the merits in support of his claim. The relevant part of his evidence was that on 16 December 2017 at around 23h00, he drove his Chevrolet Cruze from the northern to the southern direction in Eugene Kakukuru Street. The street had a dual carriage and he drove in the right lane. He approached the traffic lights-controlled intersection of Eugene Kakukuru Street and

Marcus Siwarongo Street. The traffic lights were green signalling the right of way for him.

[19] Plaintiff testified further that he drove at about 40 to 50 km/h in a zone where driving above 60km/h is prohibited. In his witness statement, which he read into the record, he stated that while driving, he suddenly noticed the Ford Ranger driven by the defendant on his right side. He testified further that the defendant drove through the intersection at speed while the traffic lights were red at defendant's side and defendant made no attempt to avoid the collision. Plaintiff attempted to avoid the collision by applying brakes and swerving to the left side but the front left side of the vehicle driven by the defendant collided against the front right side of the plaintiff's vehicle. Plaintiff's vehicle came to a standstill at the intersection while the defendant's vehicle stopped a distance away from the intersection.

[20] Plaintiff testified further that after the collision and while in shock and still seated in his vehicle, he observed the defendant disembark from the vehicle which he was driving and ran into the darkness. At around 23h15, the police officers arrived at the scene, searched for the defendant but they could not locate him. The following day, 17 December 2017, the plaintiff and the defendant met at the police station where they accused each other of causing the accident.

[21] Still in evidence in chief, plaintiff testified that he noticed that the traffic lights were green on his side while he was at a distance of about 40 meters away from the intersection. Upon reaching the intersection, the traffic lights were still green on his side. He further testified still in chief that after the collision, the defendant walked away from the scene. He called the defendant, but without any response, the defendant just continued to walk away from the scene of accident.

[22] The plaintiff produced a Namibian Police Accident Form.[2] The accident form contains the particulars of both drivers, the details of both vehicles involved in the collision and only the description of the accident provided by the plaintiff. The accident is described as follows in the accident report:

'The driver of the Chevrolet Cruze was driving from north to southern direction on Eugen Kakukuru Street and collided side swipe with a white Ford Ranger which entered the

[2] Exhibit "C".

intersection of Eugen Kakukuru and Marcus Siwarongo Road from west direction (sic) with the intention of turning to the southern direction causing damage to both vehicles.'

[23] In cross-examination by Ms Tjivikua, it was put to the plaintiff that the defendant applied brakes prior to the collision, which version the plaintiff disputed. Ms Tjivikua further put to the plaintiff that he had a passenger in Chevrolet Cruze to which plaintiff agreed. This was the first time that it came to light that the plaintiff had a passenger in the vehicle. Ms Tjivikua expanded her line of cross-examination and put to the plaintiff that the plaintiff and his passenger approached the defendant after the collision aggressively saying 'come' 'come' 'come' and in fear for his life, the defendant walked away. Plaintiff disagreed.

Defendant's evidence

[24] The defendant testified in his defence and stated that on the date of the collision, he drove alone from the parking area at Standard Bank towards the intersection of Eugene Kakukuru Street and Marcus Siwarongo Street. He intended to drive straight into Marcus Siwarongo Street. Upon reaching the intersection, the traffic lights were red, he stopped and waited for the lights to turn green. Upon turning green, he proceeded to drive through the intersection. He noticed that the plaintiff's vehicle driven from the northern direction would not stop at the traffic lights, he applied brakes but could not avoid the collision.

[25] After the collision, the plaintiff's vehicle stopped at about 10 – 13 meters away from the point of impact. He stated that the plaintiff drove in excess of 60km/h. He testified further that after the collision, he walked away as he considered that his life was in danger because the plaintiff and his passenger (another man) disembarked from their vehicle and approached him in an aggressive manner saying 'come' 'come' 'come'. He later returned to the scene of the collision with the owner of the Ford Ranger.

[26] Mr Coetzee extensively cross-examined the defendant on the reason why he walked away from the scene. It must be stated that although the defendant said that he walked away, at some stage he said that he ran away. Mr Coetzee questioned the defendant that after being threatened, why did he not run to the police station or to Standard Bank where there was a security guard. The defendant responded that

Standard Bank was behind him while the plaintiff and his passenger were in between the defendant and Standard Bank and thus he had to bypass them in order to get to the Standard Bank. On the question why he did not run to the police station which was about 300 meters away, the defendant said in order to reach the police station, he had to return back to the area where the collision occurred, which is the direction where the threat emanated from.

[27] When further questioned by Mr Coetzee on why he did not provide this version of the collision to the police so that it could be recorded in the accident report, the defendant testified that he did not provide his version as the vehicle which he drove was not insured. It was his understanding that providing an accident report was voluntary. After receiving summons of this matter, he provided the description of the collision to the police officers, which was recorded in the accident report. This accident report, the defendant provided to his legal representative but was never discovered. The defendant also changed legal representation and suggested that the said accident report might have been misplaced during his legal aid application as he sent it to the Directorate of Legal Aid.

Brief submissions by counsel

[28] In arguments, Mr Coetzee submitted that no concrete evidence was led to suggest that the plaintiff drove at an excessive speed other than 40 – 50 km/h. The plaintiff had the right of way as the traffic lights were green on his side and before the collision, he applied brakes and swerved to the left side in attempt to avoid the collision, so it was argued. Mr Coetzee concluded his arguments by stating that the behaviour of the defendant to walk away from the scene is suspicious and demonstrated a guilty mind. He invited the court to find in favour of the plaintiff.

[29] Ms Tjivukua was not to be outmuscled. She submitted that the plaintiff failed to keep a proper lookout as he testified that he did not notice the defendant's vehicle at a distance of about 40 meters away from the intersection but only observed the defendant's vehicle at a distance of about 10 meters away. She further submitted that it was the defendant who had the right of way as the traffic lights were green on his side. The defendant further walked away from the scene out of necessity in fear of his life, so she argued. She asked the court to dismiss the plaintiff's claim with costs.

Burden of proof

[30] The old latin maxim *'semper necessitas probandi incumbit ei qui agit'* matures like wine, as several jurisdictions the world over have endorsed the principle that 'he who alleges must prove'. The plaintiff therefore bears the burden of proof of the allegations claimed, on a balance of probabilities, in order to sustain his claim.[3]

[31] The plaintiff bears the onus to prove that the defendant was negligent on a balance of probabilities. The Supreme Court in *Motor Vehicle Accident Fund of Namibia v Lukatezi Kulubone*[4] found that even in the absence of a counterclaim, where each party alleges negligence on the other, such party must prove its allegations. Where allegations of negligence are made by both parties even if there is no counterclaim, like in the present matter, the defendant has the duty to lead evidence in order to prove its allegations. Failure to do so may, where the plaintiff has established negligence on the part of the defendant, result in judgment being given in favour of the plaintiff.

[32] The Supreme Court in *M Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz Megabuild v Kurz* 2008 (2) NR 775 (SC) at 790B-E cited with approval the following passage from Govan v Skidmore 1952 (1) SA732 (N) at 734A – D:

'Now it is trite law that, in general, in finding facts and making inferences in a civil case, the Court may go upon a mere preponderance of probability, even although its so doing does not exclude every reasonable doubt … for, in finding facts or making inferences in a civil case, it seems to me that one may … 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.'

Mutually destructive versions

[3] *National Employers Mutual General Insurance Association v Gany* 1931 AD 187; *Dannecker v Leopard Tours Car and Camping Hire CC* (I2909/2016) [2016] NAHCMD 381 (5 December 2016) at para 44-45.

[4] Case No SA 13/2008 (at para16 - 17) delivered on 09 February 2009.

[33] Bearing the above principle in mind, I proceed to consider the versions of the parties. The evidence led by the plaintiff and defendant demonstrated clear variance between their versions just as night and day. The plaintiff testified as the sole witness for his case while the defendant was also the only witness for his case and parties testified to two mutually destructive versions.

[34] In *Ndabeni v Nandu*[5] and *Life Office of Namibia v Amakali,*[6] Masuku AJ (as he then was) was faced with two mutually destructive versions and quoted with approval the following from remarks from *SFW Group Ltd and Another v Martell Et Cie and Others*:[7]

'The technique generally employed by our courts in resolving factual disputes of this nature may conveniently be summarised 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 a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour; (ii) his bias, latent and blatant; (iii) internal contradictions in his evidence; (iv) external contradictions with what was pleaded or what was put on his behalf, or with established fact and his 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 about the same incident or events. . .'

[35] It is apparent from the above passage that where the probabilities do not resolve the matter, the court can resort to the credibility of witnesses in order to find in favour of the one or the other party. This will entail consideration of the candour and demeanour of witnesses, self-contradiction or contradiction with the evidence of other witnesses who are supposed to present the same version as him or her or contradict an established fact. Consideration must also be made of actions and performance in comparison to other witnesses.

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[5] (I 343/2013) [2015] NAHCMD 110 (11 May 2015).
[6] (LCA78/2013) [2014] NALCMD 17 (17 April 2014).
[7] 2003 (1) SA 11 (SCA) at page 14H – 15E.

[36] In *National Employers' General Insurance v Jagers*,[8] Eksteen AJP discussed the approach to mutually destructive evidence and stated the following:

'In a civil case … 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.'

Analysis of the evidence

[37] Both drivers claim that the traffic lights lit green in their respective directions. Suffice to state that except for the mere say so, no other evidence, expert or otherwise, was led by any of the parties regarding the functionality of the traffic lights or the position of the lighting at the time of the collision. In a situation like this, the court must turn to the evidence led, guided by the approach set out in assessing mutually destructive evidence in order to resolve the impasse between the parties.

[38] I find it crucial to commence with evidence of the plaintiff where he testified that he drove at a speed of 40 – 50 km/h and observed the green traffic lights on his side from about 40 meters away and could only notice the defendant's vehicle when he was 10 meters away from the intersection. In the written statement read into the record, the plaintiff states that: 'As I entered the intersection, I suddenly noticed that from my right side a Ford Ranger motor vehicle, now known to me as the motor vehicle belonging to one, Mr Kandjiimi, was driven by the defendant.' The written statement suggests that the plaintiff only noticed the defendant's vehicle suddenly as he entered the intersection. This is contrary to noticing the said vehicle at about 10 meters away.

[39] It is critical to note that the defendant testified that before he entered the intersection in question, he stopped the vehicle as the traffic lights were red. He only proceeded to drive through the intersection upon the traffic lights turning green. This evidence adduced by the defendant was left unchallenged in cross-examination.

[8] 1984 (4) SA 437 (E) at 440E-F.

[40] Hoff JA in the Supreme Court matter of *Namdeb (Pty) Ltd v Gaseb*[9] remarked as follows regarding failure to challenge the version of the opposing witness:

'It is trite law that a party who calls a witness is entitled to assume that such a witness's evidence has been accepted as correct if it has not been challenged in cross-examination. In *Small v Smith* 1954 (3) SA 434 (S.W.A) at 438E-G the following was said in respect of this aspect:

> "It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved. Once a witness's evidence on a point in dispute has been deliberately left unchallenged in cross-examination and particularly by a legal practitioner, the party calling that witness is normally entitled to assume in the absence of a notice to the contrary that the witness's testimony is accepted as correct.
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> . . . unless the testimony is so manifestly absurd, fantastic or of so romancing a character that no reasonable person can attach any credence to it whatsoever." '[10]

[41] The failure by the plaintiff to challenge the said evidence of the defendant permits the court to accept as highly probable that the defendant stopped at the traffic lights as they were red and only proceeded through the intersection after the traffic lights turned green.

[42] Both parties accused each other of excessively speeding. Defendant claims that the plaintiff drove in excess of 60km/h without any evidence to back up such allegation. The plaintiff equally accused the defendant of entering the intersection at speed similarly with no backing, thus being true to the phrase 'he said' 'she said'. What stands out from the evidence of the defendant is the undisputed fact that the defendant stopped at the traffic lights before crossing the intersection. I am of the view that starting to drive through the intersection only after the traffic lights turned

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[9] 2019 (4) NR 1007 (SC) at p 1021 – 1022 para 61.

[10] See also *President of the Republic of South Africa & others v South Africa Rugby Football Union and others* 2000 (1) SA 1 CC at 36J-38B – 'cross-examination not only constituted a right; it also imposed certain obligations'

green would ordinarily not result in the defendant driving fast, unless otherwise proven. No such evidence to prove the contrary was tendered in this matter.

[43] It was apparent from the cross-examination of the defendant that the plaintiff interminably questioned the defendant on the reason why he walked away from the scene. Mr Coetzee relentlessly argued that an adverse inference be drawn against the defendant for fleeing from the scene and that together with other factors, be found to be indicative that the defendant drove negligently.

[44] It is trite that the behaviour of a person after an event may signal his intent or state of mind during the occurrence of the event. While this principle is correct, it is pivotal for the court to analyse the circumstances that led to such behaviour and determine the compatibility of such behaviour with the allegations claimed against such party. It is only after being found to be unreasonable and relevant to the allegations against a party that the behaviour after the event becomes a factor for consideration.

[45] The defendant stated that he fled the scene out of necessity as he felt that his life was in danger. He could not flee to the police station which was distanced about 300 meters away as the route to the police station would have required that he must return to the area where a threat to his life emanated from. He could not return to Standard Bank where there was a security guard as the defendant together with his passenger were positioned in between Standard Bank and the plaintiff. Despite spirited questions on fleeing from the scene by Mr Coetzee, the defendant stood his ground and emphasised that the plaintiff and his male passenger, disembarked from plaintiff's vehicle and called him in an aggressive manner to come to them.

[46] The collision occurred at the late hour of 23h00. The plaintiff testified that there was little to no traffic at that hour. After the collision, while at a distance of about 10 – 13 meters apart, the plaintiff and his male passenger disembarked from the plaintiff's vehicle and aggressively called the defendant 'come' 'come' 'come'. The defendant was alone in his motor vehicle. In his witness statement and evidence in chief, the plaintiff made no reference to having a passenger in the vehicle.

[47] The plaintiff states that after the collision, still in shock and while seated in his vehicle, he observed the defendant disembark from his vehicle and run from the scene into the darkness. Ms Tjivikua questioned the plaintiff that after the collision, the plaintiff and his male passenger disembarked from the plaintiff's vehicle and approached the defendant calling him in an aggressive manner that 'come' 'come' 'come'. The defendant further repeated this version in his testimony. Despite being questioned on whether the actions of the plaintiff and his passenger threatened the defendant, no real dispute was mounted against the defendant's aforesaid version. This evidence flies in the face of the evidence of the plaintiff that when the defendant fled the scene, the plaintiff was still seated in his vehicle in a state of shock.

[48] I find it highly probable that following a collision at the late hour of 23h00, the defendant, being a sole occupant of the Ford Ranger, after being approached by the two male persons who just disembarked from the Chevrolet Cruze, and who shouted 'come' 'come' 'come' in an aggressive manner would trigger a fear in the defendant. I therefore find merit in the fact that the defendant felt threatened by the plaintiff and his passenger. I further find that the plaintiff failed to establish that the defendant fled the scene due to the fact that he drove negligently prior to the collision. By law, the defendant should not have fled the scene. However, in the circumstances of this matter, it is probable that he fled the scene out of necessity in fear of his life or safety.

Plaintiff's failure to call his passenger

[49] The plaintiff's passenger was not called to testify, despite having been present at the scene of the collision.

[50] There are instances where a court can draw an adverse inference from the failure to call a witness whose evidence could be relevant to the resolution of the dispute or part thereof. In *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd*[11], the court said the following on failure to call a witness:

'The learned Judge a quo drew an inference adverse to the plaintiff from its failure to call Gerson as a witness, notwithstanding the fact that he was available and in a position to testify on the crucial issue in the case, ie what was discussed at the meeting which took place on 4 August 1972. Before this Court, it was submitted on the plaintiff's behalf that he

[11] 1979 (1) SA 621 (A).

had erred in doing so. We were referred to a number of authorities which set out the principles governing the question in issue. See, eg, Elgin Fireclays Ltd v Webb 1947 (4) SA 744 (A) in which WATERMEYER CJ stated (at 749, 750): “It is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial Court, this failure leads naturally to the inference that he fears that such evidence will expose facts unafvourable to him. (See Wigmore ss 285 and 286.) But the inference is only a proper one if the evidence is available and if it would elucidate the facts.’ See also *Botes v Mclean* 2019 (4) NR 1070 (HC) para 143.

[51] In *casu,* the plaintiff’s passenger would have undoubtedly been of great assistance to the court, particularly in this matter which is clouded with mutually destructive versions. The plaintiff’s passenger would have informed the court whether indeed the traffic lights were green at the intersection and therefore giving the plaintiff the right of way or not. The passenger would have clarified whether together with the plaintiff, they disembarked the vehicle, approached the defendant and called him in an aggressive manner as testified by the defendant. If for some or other good and acceptable reasons the passenger could not be called, the plaintiff should have placed evidence or at the very least an explanation why the passenger could not come to testify. As at present, the court is in darkness on why the passenger was not called to testify. This state of affairs, I am of the view, calls for an adverse inference to be drawn against the plaintiff for not calling a witness who appears on all accounts to have been available to testify and shed light on the events of the night in question.

[52] I do not find that the fact that there were brake marks on the tarred road surface caused by the plaintiff’s vehicle, and that the plaintiff swerved his vehicle to the far left prior to the collision, establishes that the defendant was negligent and that the plaintiff was not, or that there was contributory negligence from both parties.

[53] The defendant maintained his position in cross-examination that he had the right of way after he had stopped and waited for the traffic lights to turn green. The defendant’s evidence is reliable where he explains the reasons why he fled the scene. I find that the defendant was credible as he testified in a forthright manner and stuck to his testimony like a postage stamp to an envelope. To the contrary, the plaintiff was not impressive as a witness, as he contradicted his written statement, did not dispute crucial evidence adduced by the defendant as alluded to hereinabove, and failed to call his passenger as a witness. The defendant could further not explain

why despite noticing that the traffic lights were green on his side at a distance of about 40 meters away, he could only notice the defendant's vehicle at about 10 meters away while at the same time stating that he only noticed the defendant's vehicle while he was already at the intersection. The conclusion that he drove without due care and attention appears inexorable and is proper to draw in the circumstances.

[54] In the premises, I find the plaintiff's version of the events that he had the right of way and did not negligently cause the collision highly improbable. I reject the evidence of the plaintiff that the defendant drove through red lights without consideration of other road users and solely caused the collision. I accept the defendant's version as it is more probable than that of the plaintiff, that he stopped at the traffic lights when the lights were red and only proceeded to cross the intersection after the lights turned green thus giving him the right of way, after which a collision occurred.

Conclusion

[55] In view of the above conclusions and findings, this court accepts the version of the defendant to be credible on a balance of probabilities and rejects that of the plaintiff for being highly improbable and unreliable. I thus find that the collision was caused solely by the negligence of the plaintiff and I find no contributory negligence on the part of the defendant.

Costs

[56] No reasons were advanced before court why costs should not follow the event. The court could further not find compelling reasons to deviate from the said established principle on costs, namely, that costs follow the event. As a result, the defendant is awarded costs.

[57] In the result, I make the following order:

1. The plaintiff's claim against the defendant is dismissed with costs, such costs subject to s 17 of the Legal Aid Act 29 of 1990 as amended.

2. The matter is regarded finalised and removed from the roll.

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O S SIBEYA

Judge

APPEARANCES:

PLAINTIFF:	P COETZEE Of PD Theron & Associates, Windhoek
DEFENDANT:	V TJIVIKUA Of the Directorate of Legal Aid, Windhoek