

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

APPLICATION FOR ABSOLUTION FROM THE INSTANCE

Case No: HC-MD-CIV-ACT-DEL-2018/00861

In the matter between:

PZN PANELBEATERS CC

PLAINTIFF

and

KRAFT HOLDINGS (PTY) LTD

DEFENDANT

Neutral citation: *PZN Panel beaters CC v Kraft Holdings (Pty) Ltd* (HC-MD-CIV-ACT-DEL-2018/00861) [2021] NAHCMD 69 (5 February 2021)

Coram: NDAUENDAPO J

Heard: 16 September 2020

Delivered: 5 February 2021

Reasons: 23 February 2021

Flynote: Practice - Judgments and orders - Absolution from the instance - In order to escape absolution, plaintiff must make out a *prima facie* case in the sense that there was evidence relating to all elements of the claim, without which no court

can find for plaintiff - inference from evidence relied on by plaintiff to be reasonable one - Court to be concerned with own judgment in this respect and not with that of another 'reasonable' person or court - Absolution not to be granted lightly but when occasion comes about - to be granted in interest of justice - Plaintiff fails to establish *prima facie* case - Absolution ordered.

Summary: The plaintiff instituted action against the defendant claiming an amount of N\$397,306.46 for damages caused to its truck as a result of a collision that allegedly occurred between its truck and a truck allegedly owned by the defendant and driven by its employee. Plaintiff alleges that the sole cause of the collision was caused by the negligent driving of the defendant's driver. The driver of the plaintiff's truck testified as to how the collision occurred, blaming the driver of the other truck as the sole cause of the collision. He, however, testified that the driver is unknown to him and does not know whether he was employed by the defendant.

Held that, in order to survive absolution, a plaintiff has to make out a *prima facie* case in the sense that there was evidence relating to all elements of the claim because, without such evidence, no court could find for the plaintiff.

Held further, that absolution should not be granted lightly, but when the occasion arises it must be granted in the interest of justice.

Held further, that no evidence was adduced by the plaintiff that the defendant was the owner or *bona fide* possessor of the Mercedes Benz truck with registration number N146-832W that collided with the plaintiff's truck.

Held further, that no evidence was adduced to demonstrate that the unknown driver of the Mercedes Benz truck was employed by the defendant.

Held further, that the application for absolution is granted with costs.

ORDER

1. The application for absolution from the instance is upheld.
2. The plaintiff is ordered to pay the costs of the defendant, such costs to include the costs of one instructing and one instructed counsel.

JUDGMENT

NDAUENDAPO, J

Introduction

[1] Before me is an application for absolution from the instance. The plaintiff closed its case and the defendant now applies for absolution from the instance. The case concerns a claim for damages instituted by the plaintiff against the defendant for damages caused to its truck as a result of a collision that allegedly occurred between the plaintiff's truck and a truck allegedly belonging to the defendant and driven by the defendant's driver.

The pleadings

[2] The plaintiff is PZN Panel beaters CC, a close corporation duly incorporated as such in terms of the applicable laws in the Republic of Namibia with its principal place of business situated at Anton Rupert Street, Northern Industrial Area, Windhoek, Republic of Namibia.

[3] The defendant is Kraft Holdings (Pty) Ltd, a private company with limited liability duly incorporated as such in terms of the applicable laws in the Republic of Namibia with its principal place of business situated at No. 9 Eider Street, Lafrenz Industrial Area, Windhoek, Republic of Namibia.

[4] The whole cause of action arose within the jurisdiction of the above mentioned Honorable court.

[5] In the particulars of claim, the plaintiff alleges that 'at all relevant times hereto the plaintiff was the owner of a Hino Truck Tractor with registration number N108-

981W and two Henred Fruehauf trailers with registration number N150-329W and N150-330W, respectively, (hereinafter collectively referred to as “the Plaintiff’s truck-trailer combination”), alternatively the bona fide possessor of such truck-trailer combination, in respect of which truck-trailer combination the risk of loss and profit has passed to the Plaintiff.’

[6] On or about 10 April 2015 at approximately 13h08 and on the Trans-Kalahari Highway near Windhoek, a collision occurred between the Plaintiff’s truck-trailer combination and a Mercedes Benz truck with registration number N146-832W and trailers with registration numbers and letters DSK 815MP and DSK 805MP belonging to the defendant, there and then being driven by an employee of the defendant whilst acting within the course and scope of his employment with the defendant, alternatively within the ambit of risk created by such employment, further alternatively, whilst acting in the furtherance of the interest, with the consent and to the benefit of the defendant.

[7] The sole cause of the collision was the negligent driving of the defendant’s employee in that, he, inter alia:

- (a) Failed to keep a proper look out for other traffic particularly, the truck-trailer combination of the plaintiff;
- (b) Drove at an excessive speed in the prevailing circumstances;
- (c) Failed to notice the plaintiff’s truck-trailer combination which had-
 - i) Jack-knifed on the road surface causing an obstruction to traffic travelling in the same direction as it;
 - ii) Activated its hazard lights to warn approaching traffic of the obstruction on the road surface.
- (d) Failed to apply his brakes timeously or at all;
- (e) Failed to bring his truck to a standstill whilst there was sufficient distance between the plaintiff’s truck-trailer combination and his truck to enable him to do so and therefore collided with the plaintiff’s rear trailer;
- (f) Failed to avoid a collision when he could have and should have done so by the exercise of reasonable care.

[8] As a result of the negligence of the defendant's employee, as aforesaid, the plaintiff's truck-trailer combination was damaged and the plaintiff suffered damages in an amount of N\$397,306.46.

Defendant's Plea to the amended Particulars of Claim

[9] 9.1 The defendant pleaded and denied the allegations. More specifically it pleaded that 'the Mercedes Benz truck identified with registration number N146-832W and letters DSK 815 MP and DSK 805 MP does not belong to the defendant. The said registration details in particular the registration number N146-832W is registered in the name of a certain vehicle, attached hereto is a printout from the ENATIS system of the Namibia Traffic Information System that evidence same, attached hereto as annexure "KH1" and "KH2".

9.2 It pleaded that it is evident therefrom that the said registration number was first registered under an entity known as JAN JAPAN MOTORS CC and thereafter transferred into the name of the said JP Stephanus. Moreover, the ENATIS search in respect of the defendant is attached hereto as annexure "KH3" and it is clear therefrom that the defendant had no vehicle registered in its name at all.

9.3 It further pleaded that it is quite evident that the plaintiff is in no position to provide a name of the alleged employee of the defendant that was operating the truck as alleged as such defendant is unable to adequately deal with the said allegation and to the extent necessary, rendering the allegation vague and embarrassing.

9.4 The defendant is consequently unable to ascertain who the employee was, whether or not an employer and employee relationship existed between the defendant and the unknown employee, whether or not the alleged unknown employee was acting during the course and scope of his/her employment with the defendant or alternatively within the risk created by such employment if any.

9.5 It further pleaded that no employee of the defendant was operating a Mercedes Benz with registration number N146-832W and letters DSK 815 MP and DSK 805 MP on or about 10 April 2015 or at all.

[10] The defendant pleaded that it has no knowledge as to the allegations pertaining to the damages sustained to the plaintiff's truck and trailer combination and accordingly could not deny or admit same and consequently put the plaintiff to the proof thereof.

The issues

[11] In terms of the pre-trial order, the Court has to determine, *Inter alia*,

'1. Whether at all relevant times the defendant was the owner of a Mercedes Truck Tractor with registration number N146-832W and two trailers with letters DSK 815 MP and DSK 805MP, respectively, alternatively the *bona fide* possessor of such truck-trailer combination.

2. Whether on or about 10 April 2015 at approximately 13h08 and on the Trans-Kalahari Highway near Windhoek, the unknown driver who was driving the truck was an employee of the defendant alternatively whether an employer and employee relationship existed between the defendant and the unknown driver.'

For the purpose of the application for absolution, the Court will only consider those two issues as a finding in the negative will result in the absolution application being upheld.

Plaintiff's evidence

Mr. Johannes Immanuel

[12] Testified that he is a truck driver and at all times relevant hereto was employed by the plaintiff as a truck driver. On 10 April 2015 he was driving the plaintiff's Hino Truck Tractor with registration number N108-981W, whilst towing two Henred Fruehauf trailers belonging to the plaintiff with registration number N150-329W and N150-330W, respectively. He was travelling on the Trans-Kalahari

Highway towards Windhoek on his way back from Johannesburg. As he neared Windhoek, the road surface was wet, because it had rained earlier in the day. He testified that as he was approaching Windhoek, at just after 13h00 he travelled around a bend in the road approaching the intersection to River Crossing Lodge, his truck began to slide to the left and collided with the barrier next to the road on the left hand side.

[13] Thereafter the cab “jack-knifed” to the right into the direction of the road and could not drive any further. The trailers which he was towing at the time stood on the road surface in the lane in which he was travelling prior to colliding. He immediately activated the hazard lights of his truck. Whilst he was still in the process of climbing out of the truck cab a Mercedes Benz truck, with registration number N146 832W, collided with the rear end of rear trailer he was towing. He would later learn that the Mercedes truck that collided with the truck-trailer combination which he was driving, belongs to the defendant.

[14] The accident happened before it was possible for him to display warning triangles on the road surface. He noticed that the trailers towed by the defendant’s truck did not carry a load at the time of the accident. He further did not hear the brakes of the defendant’s truck being applied by the driver thereof prior to him colliding with his rear trailer. Therefore the defendant’s truck collided with his rear trailer whilst still travelling at a reasonably high speed.

[15] He further testified that after the defendant’s truck collided with his rear trailer, it caused both trailers to collide against each other and thereafter the front trailer collided with the truck tractor. The driver of the defendant’s truck left the accident scene prior to police officials arriving at the scene. Shortly, afterwards a police official attended to the accident scene and reported the accident to the Windhoek City Police. A copy of the Windhoek City Police Traffic Unit radio message recorded after the accident is annexed hereto as annexure “A”. He thereafter completed an accident report, a copy of which is annexed hereto as annexure “B”. He testified that he noted that the date and time of the accident is incorrectly recorded on the

accident report. The date on which the accident occurred was 10 April 2015 and the time of accident was approximately 13h08, as per annexure "A".

[16] He testified that in his view, had the driver of the defendant's truck noticed his truck standing stationary on the road surface timeously and applied his brakes upon noticing his truck, the defendant's truck would have been able to either come to a standstill behind his truck-trailer combination or swerve to its right to avoid a collision. The driver of the defendant's truck was negligent in not doing so and therefore caused the collision with his truck-trailer combination.

Mr. Andrew Thompson

[17] He testified that he was currently employed by Weatherly International PLC (hereinafter "Weatherly") as a General Manager of the Otjihase and Matchless Mines.

[18] He has been involved with the mining operations at Otjihase and Matchless mines on the outskirts of Windhoek for over 30 years, including acting as General Manager during full-scale operations.

[19] He testified that Weatherly has over the years contracted various transport agencies to render transport services to it, from and to its mines across Namibia. The defendant was similarly contracted by Weatherly to carry out the ore haulage from Matchless Mine to Otjihase Mine. A haulage record was kept in respect of each of the trucks and trailers used by the defendant to transport the ore on behalf of Weatherly.

[20] He testified that he had been advised that on 10 April 2015 a motor vehicle accident occurred on the Trans-Kalahari Highway, just before Windhoek at approximately 13h08, which accident involved a Mercedes Benz truck of the defendant with registration number N146-832W. Due to the fact that the defendant's trucks travelled on the Trans-Kalahari Highway daily to transport the ore on behalf of Weatherly, he was requested to investigate the haulage record of the defendant for 10 April 2015. He attached a copy of Weatherly's haulage report in respect of the

defendant's trucks for the said date as annexure "AT1". From the report the following is evident:

20.1 Five different truck tractors were used by the defendant on 10 April 2015 to transport the ore on behalf of Weatherly, being:

20.1.1 Truck tractor with registration number N176-297W;

20.1.2 Truck tractor with registration number N62509W;

20.1.3 Truck tractor with registration number N14355;

20.1.4 Truck tractor with registration number N146-832W;

20.1.5 Truck tractor with registration number N51174W;

20.2 Of the five tractors used by the defendant all but one of them, being truck tractor with registration number N146 832W, successfully transported three loads of ore on 10 April 2015;

20.3 The truck tractor with registration number N146 832W only transported two loads of ore on 10 April 2015, of which the second load was off-loaded at Otjihase Mine at approximately 12h22.

[21] He further testified that the defendant's truck tractor with registration number N146 832 W was required to return to Matchless Mine thereafter and collect a further load to transport to Otjihase Mine, however, the said truck tractor did not return to Matchless Mine after it left Otjihase Mine on that day.

[22] During cross examination, he testified that he was not the author of the report and the signature and the handwriting was not his. He also testified that he had not seen any registration document in respect of Mercedes Benz Truck N146-832W showing the defendant to be the owner. He also testified that he did not know who drove the Mercedes Benz truck on the date of the collision.

[23] The plaintiff called two expert witnesses Mr. Martin Graham and Mr. Gunther Skutsch to testify, but their evidence is not relevant to the two issues for

determination before me and therefore their evidence will not be considered in this judgment.

Submissions by defendant

[24] Counsel for the defendant argued that no evidence was adduced by plaintiff or on behalf of the plaintiff that the defendant was the owner of the Mercedes Benz truck. Johannes Immanuel did not know who the driver of the Mercedes Benz truck was. There was also no evidence tendered that the driver of the Mercedes Benz truck was employed by the defendant.

[25] Counsel further argued that no evidence was adduced by the plaintiff that at the time of the accident, the Mercedes Benz truck was in the defendant's possession. Mr. Andrew Thomson testified that a haulage record was kept being annexure "AT1", but it was not compiled by Mr. Thompson. Assuming that the truck was used to transport ore as indicated on annexure "AT1", he does not know the employment relationship between the defendant and the truck driver and he does not know who drove the Mercedes Benz truck.

Submissions by plaintiff

[26] Counsel argued that the main issue is that the defendant was the owner of the Mercedes Benz truck alternatively the *bona fide* possessor. He submitted that the inference to be drawn from the evidence of Thompson is that the defendant was contracted to transport ore and that the Mercedes Benz truck was used by the driver of the defendant on the date of the collision.

The applicable legal principles for absolution from the instance

[27] The test for absolution was aptly stated in *Gordon Lloyd Page & Associates v Rivera and Another*¹ where the court said:

'In order to survive absolution a plaintiff had to make out a prima facie case in the sense that there was evidence relating to all elements of the claim because, without such evidence, no court could find for plaintiff. As far as the inferences from the evidence were

¹*Gordon Lloyd Page & Associates v Rivera and Another* 2001(1) SA 88 (SCA) at 89H.

concerned, the inference relied upon by the plaintiff had to be a reasonable one, not the only reasonable one. In this respect, a court ought not to be concerned with what someone else might think, that is another 'reasonable' person or court, but rather with its own judgment. Absolution should be granted sparingly but when the occasion arose, a court should order it in the interest of justice.'

Analysis of the evidence

[28] Mr. Immanuel, the driver of the plaintiff's truck testified that after the collision, the driver of the Mercedes Benz truck disappeared from the scene and consequently he does not know who the driver was of the Mercedes Benz truck. The defendant is a company and no evidence was adduced by the plaintiff to demonstrate that the defendant was the owner of the Mercedes Benz truck that collided with the plaintiff's truck. No registration document of ownership of the Mercedes Benz truck with registration N146-832W was presented to show that the defendant was the owner. There was also no evidence adduced that the defendant was a bona fide possessor of the truck. In *Marine Time Incorp v MFV 'Rybak leningrada (North Star)*² the court said:

'It is common cause that at the time of arrest of the vessel she was in the possession of Lenrybprom. As a rebuttable presumption of law exists that the possessor of a movable thing is also the owner thereof the burden of proof was on the applicant to rebut this presumption of ownership arising from the possession.'

[29] Counsel for the defendant correctly submitted that no evidence was adduced by the plaintiff that at the time of the accident, the Mercedes Benz truck was in possession of the defendant. On the second issue, no evidence was adduced to show that the unknown driver of the Mercedes Benz Truck was employed by the defendant nor that an employer-employee relationship existed between the defendant and the unknown driver.

[30] Mr. Thompson testified that a haulage record was kept for each truck and trailer of the defendant which transported ore for Weatherly. Annexure "AT1" of the haulage report of the alleged trucks of the defendant that allegedly transported the

² *Marine Time Incorp v MFV 'Rybak leningrada (North Star)* 1996 NR 162 at 165C-D.

haulage on 10 April 2015 showing that the Mercedes Benz with registration number N146-832W that allegedly transported ore is not enough to show that the truck was owned by the defendant. Mr. Thompson did not prepare annexure "AT1", he is not the author of the document and the author has not been called to testify as such that document is not admissible. In the result no evidence has been adduced to show that the defendant was the owner or *bona fide* possessor or that that an employer-employee relationship existed between the unknown driver and the defendant. Consequently the application for absolution from the instance should succeed.

The order

1. The application for absolution from the instance is upheld.
2. The plaintiff is ordered to pay the costs of the defendant, such costs to include the costs of one instructing and one instructed counsel.

G N NDAUENDAPO

Judge

APPEARANCES:

FOR THE PLAINTIFF

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FOR THE DEFENDANT

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