

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case no: HC-MD-CIV-ACT-DEL-2020/04493

In the matter between:

RAPHAEL S M NEUMBO

PLAINTIFF

And

TIMOTHY HIMEZEBI TJIRIMUJE

DEFENDANT

Neutral citation: *Neumbo v Tjirimuje* (HC-MD-CIV-ACT-DEL-2020/04493) [2022]
NAHCMD 431 (24 August 2022)

Coram: Schimming-Chase J

Heard: 26 to 29 July 2022

Delivered: 24 August 2022

Flynote: Negligence – Motor vehicle collision – Plaintiff’s vehicle damaged in a collision occurring at a T-junction where plaintiff’s vehicle had right of way – Vehicle that collided with that of plaintiff failed to stop at a yield sign causing damage to both left doors and left rear fender of plaintiff’s vehicle – Defendant claiming mistaken identity namely that he was not the driver of nor did his vehicle collide with that of plaintiff.

Negligence – What constitutes – Duty to keep a proper lookout – Duty in executing a right-hand turn especially at a yield or stop sign – A motorist's conduct in executing a right turn is to do so when it is safe, as a prima facie case of negligence inferred in the absence of a reasonable and satisfactory explanation for such conduct.

Evidence – Witnesses – Calling, examination and refutation – Two mutually destructive versions – Onus on plaintiff – Probabilities favoured plaintiff – Defendant's evidence rejected as far-fetched and false.

Summary: The plaintiff sued the defendant for damages arising out of a motor vehicle accident which occurred at the corner of Antiochie and Agrippa Streets in Katutura, Windhoek at the intersection linking the two streets. The defendant disputed that there was a collision between his vehicle and that of plaintiff. He pleaded that he was neither present at the time of the accident nor near its vicinity. The plaintiff effectively mistakenly identified him. The defendant's version in essence was that his vehicle remained stationary and parked at Antiochie Street on the evening of 6 June 2020 (before the collision which occurred on 7 June 2020). When he returned the next morning he found that his vehicle had sustained damage to the front grill and right light in his absence, which must have been a 'hit and run'.

Held, that the defendant's evidence was farfetched and lacked credibility. His version of events was implausible and defied logic. Plaintiff's claim upheld.

ORDER

1. Judgment is granted in favour of the plaintiff against the defendant for:
 - 1.1 Payment of the amount of N\$58 112,05.
 - 1.2 Interest on the above amount at the rate of 20% per annum a tempore morae from date of judgment to date of payment.

1.3 Costs of suit.

1.4 The matter is finalised and removed from the roll.

JUDGMENT

SCHIMMING-CHASE J:

[1] This matter concerns a motor vehicle collision between the plaintiff's vehicle, a Ford Focus and the defendant's Nissan Hardbody. The collision occurred on 7 June 2020 at the corner of Antiochie Street and Agrippa Street, Katutura, Windhoek.

[2] Plaintiff claims repair costs against the defendant in the amount of N\$53 947 for the damage to his vehicle as a result of the collision, which he alleges was caused by the defendant being the driver of the Nissan Hardbody. In addition, he claims an amount of N\$4165,05 for vehicle replacement rental costs.

[3] The particulars of the negligence set out in the plaintiff's claim, allege that the defendant failed to follow the rules of the road and keep a proper lookout when he approached the T-junction on Agrippa Street with the intention to turn in an easterly direction into Antiochie Street, and failed to stop at a yield sign in the face of the plaintiff's oncoming vehicle which had right of way, and which was travelling on Antiochie Street in a westerly direction. It was further alleged that the defendant's negligent conduct caused his vehicle to collide with the plaintiff's vehicle, damaging the plaintiff's vehicle on both left doors and on the left rear fender.

[4] The defendant denied the plaintiff's assertions and pleaded that no collision took place between the parties' respective vehicles. He alleged further that the plaintiff's vehicle was involved in a collision with a vehicle unknown to the defendant. Thus, neither the defendant, nor the vehicle he was driving were involved in a collision with the plaintiff's vehicle. In amplification the defendant pleaded that on 6 June 2020, he left

his vehicle parked beside the roadside in Antiochie Street at a friend's house and did not return until the next morning. Upon his return the next morning, he found that his vehicle, a Nissan Hardbody, had sustained damage in his absence to the front grill and front right light, and that this damage was caused in a 'hit-and-run' fashion by an unknown vehicle. The defendant accordingly had not seen what happened to his vehicle.

[5] At the hearing of this action Mr Lombaard, appearing for the plaintiff, and Mr Kaurivi, appearing for the defendant, submitted to court that an agreement had been reached on the ownership of the plaintiff's vehicle, as well as quantum.

[6] What remains to be determined in this matter is liability for negligence, and whether the defendant caused the damage to the plaintiff's vehicle as alleged.

The evidence

The plaintiff's evidence

[7] The plaintiff testified that he is a major male residing at Barug Street, Katutura, Windhoek not far from the area where the collision between the two vehicles took place. At all material times he was the owner of a 2016 grey Ford Focus with registration number N 40706 W. On 7 June 2020, at around 11h00, he was on his way home travelling in Antiochie Street in a westerly direction towards his house.

[8] Agrippa Street, is a side street that leads into Antiochie Street ending in a T-junction. There is a yield sign marking the end of Agrippa Street, accompanied by yield lines at the end of the street. As the plaintiff was driving in Antiochie Street in a westerly direction he had right of way and continued driving straight. When he passed the T-junction he noticed a white Nissan Hardbody motor vehicle approaching from his left (in a northerly direction) from Agrippa Street. The vehicle slowed down as though there was an intention to stop, but it did not stop at the yield sign, and instead continued in the way of the plaintiff's vehicle turning to the right (in an easterly direction towards Abraham Mashego Street) and collided with the plaintiff's vehicle with its front and right side. The plaintiff swerved to the right in an effort to avoid the collision, but he could not

avoid it and the vehicles collided. As a result of the collision, both left doors and the left rear fender of the plaintiff's vehicle were damaged.

[9] Immediately after the collision, the plaintiff brought his vehicle to a standstill on the right side pavement. He observed in his rear-view mirror that the vehicle that caused the collision had not stopped, and instead continued towards and turned right (in a southerly direction) into Abraham Mashego Street. The plaintiff made a U-turn and commenced pursuit of the Nissan vehicle.

[10] The plaintiff testified that shortly after turning right, he observed the Nissan Hardbody from the back, and recalled that the vehicle did not have Windhoek number plates. As traffic was slow-moving the driver of the Nissan Hardbody vehicle could not speed away, thus the plaintiff was able to maintain a visual of the vehicle moving in front of him. The plaintiff flashed his headlights and honked his horn at the driver and he eventually managed to stop the vehicle. Both parties pulled their vehicles over (approximately 200m after turning into Abraham Mashego Street) on the left pavement and parked there.

[11] When both vehicles came to a stop, the plaintiff exited his vehicle to confront the defendant (who he positively identified in court) about the accident and why he sped away from the scene. The defendant then apologised and informed the plaintiff that he would repair the damage to the plaintiff's vehicle. Whilst there, the plaintiff contacted his neighbour, Mr Johannes Xoagub, who is employed as a traffic officer at City Police, to come to the scene, to be present as a witness. Mr Xoagub arrived at the scene shortly thereafter.

[12] A gentleman identified as the defendant's brother, and allegedly the owner of the vehicle which the defendant was driving also came to the scene. The defendant's brother informed the plaintiff that he knew a panel beater who would be able to repair the damage to the plaintiff's vehicle and that they should go to this panel beater's workshop for a quotation. The plaintiff informed the defendant's brother that he also knew a panel beater and insisted that they rather go to the one that the plaintiff knew. The defendant, his brother and the plaintiff then headed to the panel beater suggested by the plaintiff, at Freedom Square, Katutura.

[13] They inspected the plaintiff's vehicle once they arrived at the panel beater. The plaintiff was informed by the panel beater that he would not be in a position to repair the vehicle as he does not have the parts available. The plaintiff and the defendant then exchanged contact numbers. The plaintiff took pictures of the defendant's vehicle and also noticed that it was on a temporary permit that expired the following day (this type of permit, according to the plaintiff's testimony, is one that is utilised when there is a change of ownership of vehicles). The plaintiff also took pictures of the permit, whereafter the parties left.

[14] The following day, 8 June 2020, the plaintiff telephonically contacted the defendant and enquired from him when he could take the vehicle to the panel beater to be repaired. The defendant informed him that they should meet to discuss the matter and provided the plaintiff with an address and time for the meeting. At the scheduled meeting, the defendant arrived with another gentleman that the plaintiff had not met before. This person informed the plaintiff that he was the defendant's uncle and he would assist his nephew to repair the damage to the plaintiff's vehicle.

[15] The defendant's uncle informed the plaintiff that he would purchase the parts for the plaintiff's vehicle from another vehicle and he would request his panel beater to replace the damaged parts on the plaintiff's vehicle. The plaintiff was not comfortable with the proposal that second-hand parts would be used to repair his vehicle and accordingly demanded that the vehicle should be repaired by a reputable person. The parties were not in agreement on this aspect and the meeting turned heated, after which the plaintiff left.

[16] After leaving the meeting the plaintiff reported the accident at the police where he obtained and completed an accident report. When asked why he did not immediately submit a claim to his insurance provider, the plaintiff testified that he initially did not want to claim from his insurance, as he did not cause the accident, and that a claim would have a negative impact on his monthly premium. He was also not keen on having to pay any excess fees which would be an additional cost to him. However, given the manner in which the repairs were proposed by the defendant and his uncle, he preferred to go the insurance route. The plaintiff's claim was later approved and the

vehicle was repaired.

Witness subpoenaed by the plaintiff

[17] The plaintiff subpoenaed one witness, Mr Johannes Ludwig Xoagub. Mr Xoagub is a traffic officer employed at the Windhoek City Police. He has been a police officer since 2013. He lives on the same street as the plaintiff and knows him as a neighbour. He testified that the plaintiff called him around noon on 7 June 2020 and asked whether he was on duty, to which Mr Xoagub responded in the negative. The plaintiff further informed him that he had just been involved in a motor vehicle collision, on the corner of Antiochie and Agrippa Streets, and that he was in pursuit of the driver of the vehicle that collided with his car. The call between them then cut off.

[18] At the time of the call, Mr Xoagub was at home. As the accident happened in close vicinity to where he lived, he quickly got dressed and proceeded to the place he was informed that the accident occurred. Mr Xoagub immediately noticed debris which he observed was from a motor vehicle collision on the corner of Agrippa and Antiochie Streets, consistent with what the plaintiff had informed him about. Mr Xoagub called the plaintiff and the plaintiff informed him that he had managed to stop the vehicle he was pursuing and that they were parked down the road at Abraham Mashego Street. Mr Xoagub drove there. The drive took approximately two minutes.

[19] On arrival, Mr Xoagub found the plaintiff's vehicle as well as the Nissan Hardbody on the pavement at Abraham Mashego Street. He observed the damage to the left side of the plaintiff's vehicle as well as damage to the Nissan Hardbody's grill. He also found the plaintiff and defendant, as well as a third person there, and they were negotiating the repairs to the respective vehicles at the time.

[20] According to Mr Xoagub, the defendant said that he was the driver of the Nissan vehicle, and that he would repair the plaintiff's vehicle. Mr Xoagub advised that he was off duty and suggested that they call a traffic officer who was on duty. Mr Xoagub further advised the gentlemen that the accident must be reported within 24 hours. According to Mr Xoagub, they all drove to the panel beater in Freedom Square, Katutura, but after inspection, they were informed that the plaintiff's vehicle would be

difficult to panel beat, and they would have to replace the doors. Thereafter, Mr Xoagub left.

The defendant's evidence

[21] The defendant testified that he is the owner of a white Nissan Hardbody with registration number N 188332 W. The previous registration for the vehicle was N 5723 OT.

[22] On 6 June 2020 and at around 22h00, the defendant parked his vehicle in front of his friend's yard at Luxury Hill (on Antiochie Street). He then went to a bar in central Katutura and did not return after having spent the night with a friend.

[23] On 7 June 2020, the defendant arrived at the location of his vehicle. Upon arrival, he noticed that his vehicle had unfamiliar damage. According to the plaintiff, the damage that he saw was to the grill of the vehicle in front as well as the right head light. In short, his vehicle was damaged in his absence. He did not find any notes on, or anyone at the vehicle. He then concluded that this could only be a 'hit-and-run' that had occurred in his absence.

[24] The defendant maintained that he was not involved in a collision with any vehicle on 6 or 7 June 2020. The defendant also denied having caused damage to the plaintiff's vehicle. He denied that he sped away from the accident and further denied that the plaintiff pursued him as alleged. He also denied that he apologised to the plaintiff or that he informed the plaintiff that he would repair the damage to his vehicle.

[25] The defendant testified that the events unfolded as follows: after his return on the morning of 7 June 2020, at around 11h00 at which time he found the damage to his vehicle, he immediately decided to take his vehicle to a local panel beater for repair. Whilst he was on his way to the panel beater, driving on Abraham Mashego Street in a southerly direction, he noticed a random vehicle behind him which was flashing in a bid to stop him. Initially he ignored this vehicle as he did not know who was following him. However, a while later he decided to stop and listen to what the driver of the vehicle had to say.

[26] After he alighted his vehicle, the defendant testified that the plaintiff approached him and informed him that he had noticed the damage on the defendant's vehicle earlier, and wanted to know whether the defendant was involved in an accident and where / when it happened. The plaintiff also asked the defendant whether the defendant had insurance and if the accident was reported.

[27] The defendant testified that he explained to the plaintiff that his vehicle was involved in a hit-and-run incident earlier, and that the defendant did not know who caused the damage to his vehicle, as the defendant was not present at the time. The defendant also informed the plaintiff that he was not insured and that he was on his way to a panel beater to see how much it would cost to repair the damage. The plaintiff then suggested that his insurers could fix both their vehicles and that the defendant's vehicle can be fixed as a 'third party' as long as the defendant pays the excess fees for the repairs. The defendant advised the plaintiff that he did not like that idea as it involved insurance companies and paperwork.

[28] The defendant then suggested that instead of taking the insurance route, both the plaintiff and the defendant could have their vehicles repaired at cheaper rates using panel beaters in Katutura. The plaintiff and the defendant could then both obtain the necessary parts for their respective vehicles from second-hand scrap yards and have them fitted onto their vehicles at the said panel beaters.

[29] The plaintiff then called a policeman friend of his, and so the defendant decided to call his brother also.

[30] Shortly thereafter, the plaintiff's policeman friend and the defendant's brother arrived at the scene where the two vehicles had stopped on Abraham Mashego Street. The defendant testified that, he and his brother were not keen on the plaintiff's suggestion to use the insurance agents to repair the vehicles as that would require paperwork. The plaintiff maintained that this would be the cheaper option for both of them. The defendant and his brother maintained that they would rather use local panel beaters to repair the vehicles.

[31] The defendant testified that the plaintiff informed him and his brother that he had a panel beater that he knew and he suggested that they use that panel beater to repair the vehicles. The parties went to the said panel beater (at Freedom Square, Katutura) who informed them after inspecting the plaintiff's vehicle, that he did not have the parts that were required to repair the plaintiff's vehicle. The plaintiff and the defendant then agreed to help each other look for parts at different scrap yards. The plaintiff would look for parts for his vehicle as well as the defendant's vehicle, and the defendant would do the same. The plaintiff and the defendant exchanged numbers, and they each agreed to inform each other once they found parts.

[32] On 8 June 2020, the plaintiff and the defendant met again, and they proceeded to look for parts in scrap yards. The defendant found a panel beater who was willing to repair his vehicle, but they could not find parts for the plaintiff's vehicle. The defendant decided to take his vehicle to the said panel beater for repairs, which was ready for collection by 10 June 2020.

[33] On 15 June 2020, the plaintiff called the defendant to discuss the insurance arrangements further. The defendant informed the plaintiff that he had already had his vehicle repaired, and that he had no interest in having his vehicle repaired via insurance agents.

[34] On 17 June 2020, the defendant started receiving calls and emails from the plaintiff's insurance provider, demanding that he pay damages for the plaintiff's vehicle. Among the documents sent by the plaintiff's insurer to the defendant, was the accident report completed by the plaintiff dated 8 June 2020. The defendant informed the plaintiff's insurer that they should get the 'correct story' from their client as he was not involved in any accident with the plaintiff. The damage to the defendant's vehicle was as a result of a 'hit-and-run' accident and the defendant did not know who caused it.

[35] On 18 June 2020, the defendant contacted the plaintiff to confront him about the information he provided in the accident report, and to determine why the plaintiff's insurers were contacting him. The plaintiff said that he should not worry about it. He assured the defendant that his insurers were only calling as a formality and would not take the matter any further.

[36] The defendant denied that there was any meeting where his uncle offered to pay any part of the plaintiff's vehicle repair costs. He reiterated his denial that he caused any accident with the plaintiff's vehicle and maintained that his vehicle was involved in a 'hit and run' incident.

[37] At the close of the parties' respective evidence the following is not in dispute between the parties:

- (a) The plaintiff is the owner and was the driver at the material time, of a Ford Focus motor vehicle with registration number N 40706 W. The defendant was the driver at the material time of a Nissan Hardbody motor vehicle with registration number at the time of the collision being N 5723 OT.
- (b) The parties did not know each other prior to the incident on 7 June 2020.
- (c) Each of the parties' sustained damage to their respective vehicles on 7 June 2020. (The plaintiff testified about a motor vehicle collision with a vehicle being driven by the defendant. The defendant testified that his vehicle was involved in some sort of 'hit and run').
- (d) On 7 June 2020, and on Abraham Mashego Street, Katutura, and whilst travelling in a southerly direction, the plaintiff flashed his vehicle's lights at the defendant from behind him and the defendant stopped his vehicle on the pavement to the left of the road. The parties engaged as set out further below.
- (e) There were discussions around repairing the plaintiff's and defendant's respective vehicles at a panel beater suggested by the plaintiff, and the parties attended at that panel beater at Freedom Square Katutura on 7 June 2020.
- (f) The parties exchanged cell phone numbers.
- (g) The plaintiff later insisted on having his vehicle repaired by his insurance company.

- (h) The defendant's brother came to meet with the parties at the area where both vehicles stopped on the side of Abraham Mashego Street, and Mr Xoagub, a traffic officer who was off duty at the time arrived there a couple of minutes thereafter.
- (i) The panel beater suggested by the plaintiff, whom the parties visited on 7 June 2020 did not have the parts required to properly repair the plaintiff's vehicle.
- (j) The defendant had his vehicle privately repaired at a panel beater known to his uncle on or about 10 June 2020.

[38] Apart from the above facts not in dispute mentioned above, the plaintiff and defendant's versions of the events that unfolded on 7 June 2020 relating to how the accident occurred and the conversations that ensued subsequent to the collision at Abraham Mashego Street are mutually destructive, and the court has to evaluate the evidence of the parties to determine whose version is more probable.

[39] The question to be determined here, is whether the plaintiff (in the Ford Focus) was involved in the collision as alleged with a Nissan Hardbody with registration number N 5723 OT, there and then being driven by the defendant who sped away and was stopped by the plaintiff after which the defendant apologised and admitted liability; or whether the defendant's vehicle was hit in his absence. Also falling for determination is whether the plaintiff stopped the defendant to engage in negotiations to have both vehicles repaired, in the manner and as alleged by the defendant.

[40] That being the case, I apply the tried and tested approach to evaluating the evidence. The proper approach is for the court to apply its mind not only to the merits and demerits of the two mutually destructive versions, but also their probabilities, and it is only after so applying its mind that the court would be justified in reaching the conclusion as to which version to accept and which to reject. Where the onus rests on the plaintiff as in this case, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the version on the opposite side is false or mistaken and should,

therefore, be rejected.¹

[41] I must state at the outset, that the plaintiff's evidence was cogent and credible. He recalled the events of the collision and how it happened. He recalled the Nissan Hardbody and that it did not have Windhoek number plates at the time. He also recalled a temporary license disk that had expired (after he had opportunity to observe the defendant's vehicle when they both stopped on Abraham Mashego Street). In this regard the defendant testified that he was currently the owner of the same Nissan Hardbody with Windhoek number plates, and that it previously bore the registration number N 5723 OT. The plaintiff's evidence was also substantially contained in the accident report that he completed (apart from the time of the accident, stated therein to be around 15:00).

[42] The plaintiff's evidence did not change during cross examination, and the defendant's version put to the plaintiff was met with simple and straightforward denials and cogent explanations for the events that happened. It is apparent that the plaintiff kept a proper lookout.

[43] Cross examination of the plaintiff about a possible friendship between the plaintiff and Mr Xoagub which resulted in Mr Xoagub's evidence corroborating that of the plaintiff was met with credible answers. In this regard, Mr Xoagub's evidence was also entirely credible, and not disturbed in cross examination apart from the suggestion of concocted evidence to help his friend, the plaintiff, which I do not believe is the case at all.

[44] The same could not be said of the defendant's evidence. Firstly, it is to be noted that on the defendant's version, he was stopped by the plaintiff at random, and from behind whilst en route to the panel beater, having sustained damage to the front grill and right headlight of his vehicle through a 'hit-and-run' incident, which occurred in his absence when he left his vehicle parked overnight in Antiochie Street. (emphasis added)

¹ See: *PDS Holdings Ltd (BVI) Ltd v Zaire* 2014 (3) NR 676 (HC) para. 7; *National Employers General Insurance v Jagers* 1984 (4) SA 437 (E) at 440 E; *Harold Schmidt t/a Prestige Home Innovations v Heita* 2006 (2) NR 555 at 559D.

[45] The defendant testified that the damage to his right light was not consistent with his vehicle making a right turn into Antiochie Street, as alleged by the plaintiff. In fact, much was made of the plaintiff's failure to discover the pictures he took of the defendant's vehicle in cross examination. The plaintiff in this regard testified that he took pictures of the defendant's vehicle and submitted them to his insurer when he lodged his claim. The defendant also never requested discovery of those pictures in terms of rule 28(8)(a) of the High Court Rules. In any event and considering the damage occasioned to the plaintiff's vehicle, the damage to the Nissan Hardbody was not inconsistent with the defendant's testimony regarding the damage to the front grill and to the front right light. This is also evidenced by the dent on the left rear fender of the plaintiff's vehicle.

[46] What makes the defendant's evidence farfetched, is that without the plaintiff even seeing the damage to the front of vehicle driving in front of him, the plaintiff managed to randomly identify the defendant's vehicle, flash him to stop, and then after the defendant stopped, the plaintiff managed to make a suggestion for the repair of their vehicles through a fictitious claim to the plaintiff's insurance, so that the plaintiff could avoid an excess payment. The effect of the suggestion as testified by the defendant, would amount the commission by the parties of insurance fraud. To this must be added that the plaintiff could have successfully claimed the repair of his vehicle without the participation of the defendant.

[47] In this regard, the defendant was asked in cross examination why the plaintiff would stop his vehicle, given that the plaintiff was driving behind him and the damage was to the front of the Nissan Hardbody. The defendant replied that it was possible that the plaintiff saw the damage earlier and then spotted and followed him.

[48] Added to this is the suggestion that the agreement between the parties as testified by the defendant, was to be committed between two random strangers who essentially sustained damage to their respective vehicles that substantially corresponds with a collision that occurred between the same two vehicles on the same date.

[49] I find, after evaluating the evidence of the parties, that the plaintiff has satisfied

the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the version of the defendant is completely false and falls to be rejected. The defendant's explanations were evasive and far-fetched. It can only in the circumstances therefore, be concluded that the defendant was the driver of the vehicle that failed to keep a proper lookout and collided with the plaintiff's vehicle. I also find that the defendant did, on the evidence, admit that he was at fault.

[50] In light of the foregoing, I make the following order:

Judgment is granted in favour of the plaintiff against the defendant for:

- 1.1 Payment of the amount of N\$58 112,05.
- 1.2 Interest on the above amount at the rate of 20% per annum a tempore morae from date of judgment to date of payment.
- 1.3 Costs of suit.
- 1.4 The matter is finalised and removed from the roll.

EM SCHIMMING-CHASE

Judge

APPEARANCES

PLAINTIFF:

J Lombaard

Of PD Theron & Associates, Windhoek.

DEFENDANT:

T Kaurivi

Of TK Kaurivi Legal Practitioners, Windhoek.