

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-ACT-CON-2021/00287

In the matter between:

MARTIN NAMPOLO

PLAINTIFF

and

HOLLARD INSURANCE COMPANY OF NAMIBIA LTD

DEFENDANT

Neutral citation: *Nampolo v Hollard Insurance Company of Namibia Ltd* (HC-MD-CIV-ACT-CON-2021/00287) [2023] NAHCMD 2 (20 January 2023)

Coram: PRINSLOO J

Heard: 6 -9 December 2021; 25 – 29 July 2022; 14 September 2022

Delivered: 20 January 2023

Flynote: Insurance - Motor vehicle policy - Repudiation of claim under insurance contract - Condition in policy insured was obliged to give accurate information about himself, his property and his risk profile – Further condition in policy is that all dealings concerning the policy must be done honestly and in good faith, and if the insured is found to have engaged in fraudulent or dishonest behaviour, he or she will lose all rights

to claim and premiums Insurer entitled to repudiate claim – By submitting a fraudulent claim for indemnification with the defendant insurer entitled to repudiate claim.

Summary: The plaintiff instituted an action against the defendant as a result of damages sustained to the plaintiff's vehicle following a motor vehicle accident. The plaintiff's claim against the defendant is premised on a policy contract entered into between the plaintiff and the defendant in terms of which the plaintiff's vehicle was covered under the policy contract.

The relief sought by the plaintiff in its particulars of claim is for an order declaring that the defendant dishonouring the Plaintiff's claim under claim number 229272 is unlawful, and an order directing the defendant to compensate the Plaintiff in accordance with the policy of insurance between the parties, for all damages sustained by the plaintiff as a result of the happening of the insured event/accident.

The Defendant entered appearance to defend the matter and pleaded to the plaintiff's particulars of claim. The defendant in its plea pleaded that it was entitled to repudiate the plaintiff's claim based on the fact that the plaintiff breached the terms of the agreement. The defendant pleaded that the plaintiff failed to provide truthful and accurate information upon submitting its claim for indemnification and that the plaintiff provided the defendant with false information on how the accident occurred.

Held that the contract of insurance is the primary illustration of a category of contracts described as *uberrimae fidei*, i.e. of utmost good faith. Misrepresentation made by an insured when claiming entitles an insurer to repudiate a claim.

Held that where there are two stories mutually destructive, before the onus is discharged the Court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false.

Held that the plaintiff's version was fraught with improbabilities and inconsistencies.

Held that the defendant discharged the onus resting on it on a balance of probabilities and that the plaintiff breached the clauses in the agreement on which the defendant relied to repudiate the plaintiff's claim.

ORDER

1. The plaintiff's claim is dismissed with costs.
2. The defendant's counterclaim is granted in the following terms:
 - 2.1. Payment in the amount of N\$18 221.75 and N\$37 375.
 - 2.2. Interest on the aforesaid amounts at a rate of 20% per annum calculated from 12 November 2020.
 - 2.3. Cost of suit.
3. The matter is regarded as finalised.

JUDGMENT

PRINSLOO J:

Introduction

[1] The plaintiff is Martin Nampolo, an adult male residing in Windhoek, Republic of Namibia. The plaintiff issued a summons against Hollard Insurance Company of Namibia, a short-term insurer duly incorporated as such in accordance with the

applicable laws of Namibia and having its principal place of business in Windhoek, Republic of Namibia.

Background

[2] The plaintiff and the defendant entered into a written insurance policy agreement on 14 August 2020 under policy number WK NPM 4319977. The personal policy document and the policy schedule constituted the agreement between the parties, in terms of which the defendant insured the plaintiff against losses incurred as a result of loss or damages to the plaintiff's properties listed under the insured items scheduled. One of those items was the plaintiff's motor vehicle, a silver Honda Ballade sedan motor vehicle, with registration number N215-280W and VIN number MAKGM65G0F4000291.

[3] The material terms of the agreement were that:

- a) The defendant undertakes to insure the plaintiff's vehicle and indemnify the plaintiff against losses and damage caused by or as a result of an insured event. (The insured event would depend on the type of item and the cover chosen by the plaintiff);
- b) The plaintiff, in turn, shall pay the defendant a premium, payable monthly in advance;
- c) If an insured event occurs, the plaintiff shall be entitled to compensation by the defendant for the loss or damage caused by the insured event after submitting a claim in accordance with the applicable provisions of the agreement;
- d) Upon submission of a claim, as prescribed, the defendant shall settle the claim by either of the following methods, namely:
 - i) Repairing the motor vehicle;

- ii) Replacement of the motor vehicle, and/or
- iii) A cash payment to the plaintiff.

[4] On 4 October 2020, an accident occurred on the D1972 road between Gross Barmen and Okahandja, during which incident the plaintiff's vehicle collided with a tree next to the road. No other vehicles were involved in the accident.

[5] The plaintiff pleads that whilst driving within the legal speed limit of 120 km/h and exercising proper control of the vehicle, an accident occurred due to him swerving to avoid hitting a warthog, which unexpectedly ran onto the road.

[6] As a result of the accident, the plaintiff's vehicle was damaged beyond economical repair.

[7] The plaintiff submitted a claim under claim number 229272 to the defendant in the amount of N\$172 000 as the insured value of the said motor vehicle. The defendant, however, declined to pay out the plaintiff's claim.

[8] The defendant's refusal to honour the plaintiff's claim gave rise to the institution of the action against the defendant.

[9] The plaintiff seeks the following relief against the defendant:

- a) An order declaring that the defendant's dishonouring of the plaintiff's claim is unlawful;
- b) An order ordering the defendant to compensate the plaintiff in accordance with the insurance policy for the damages sustained by the plaintiff as a result of the happening of an insured event/accident;
- c) Cost of suit on an attorney and own client scale.

[10] The defendant pleads that it was justified in not honouring the plaintiff's claim as the damages caused to the plaintiff's vehicle were not as a result of an insured event but that the accident was caused under questionable circumstances. The defendant pleads that the plaintiff did not swerve from the road surface to avoid colliding with a warthog, causing him to lose control of his vehicle. Instead, the plaintiff brought his vehicle to a standstill on the gravel next to the road and then accelerated from that position into the direction of the tree and intentionally collided with the tree.

[11] The defendant pleads that the plaintiff, therefore, breached the terms of the insurance policy agreement in his attempt to obtain a benefit from the insurance policy to which he was not entitled, by submitting a fraudulent claim for indemnification with the defendant.

[12] The defendant further pleads that in order to establish the true facts relating to the plaintiff's claim for indemnification and as a result of the plaintiff's material misrepresentation, the defendant had to incur further costs over and above those that it bona fide believed was due to the plaintiff in indemnifying the plaintiff before it determined that the claim was fraudulent. Said costs entail the costs incurred to appoint an independent investigator to investigate the circumstances surrounding the alleged insured event and the plaintiff's subsequent claim for indemnification, amounting to N\$9 200, and the costs incurred to appoint expert accident reconstructionists to reconstruct the scene of the accident, which amounts to N\$28 175.

[13] The defendant pleads that the total costs incurred by the defendant as a result of the misrepresentation by the plaintiff amounts to N\$37 375.

[14] It is the case of the defendant that, if not for the material misrepresentation by the plaintiff, the defendant would not have indemnified the plaintiff in the amount of N\$18 221.75 and would not have incurred costs in the amount of N\$ 37 375,

[15] The defendant accordingly instituted a counterclaim against the plaintiff to recover the abovementioned amounts, plus interest on the said amounts at a rate of 20% per annum and cost of suit.

Facts that are common cause

[16] From the joint pre-trial report and the evidence adduced, the following are undisputed between the parties:

16.1 on 14 August 2020, the parties entered into a written agreement in terms of which the defendant agreed to cover the plaintiff's vehicle, a silver Honda Ballade and the said vehicle was a build-up vehicle;

16.2 less than two months after entering into the said agreement, the accident occurred, causing the Honda Ballade to be destroyed beyond economical repair;

16.3 the plaintiff left the scene of the accident before the police arrived on the scene;

16.4 that the following terms and conditions formed part of the written insurance policy agreement:

a. that the insured was obliged to give accurate information about himself, his property and his risk profile. Incomplete or incorrect information could affect the policy's validity and may result in the defendant voiding the policy.

b. that all dealings concerning the policy must be done honestly and in good faith, and if the insured is found to have engaged in fraudulent or dishonest behaviour, he or she will lose all rights to claim and premiums, and the policy will be cancelled from the date of fraud. In addition, the insurer may take legal steps to recover damages from the policyholder under those circumstances.

c. the insured is obliged to take reasonable steps to prevent loss or damage to the insured property, or the insurer might not compensate the insured for any loss or damage;

d. the insurer does not cover incidents when the driver of the motor vehicle leaves the scene of the accident before the ambulance or police arrive;

e. the policy shall be voidable in the event of any material misrepresentation, misdescription or non-disclosure.

16.5 the plaintiff paid his insurance premiums to the defendant and submitted his claim for indemnification within the prescribed period.

16.6 the representation made by the plaintiff to the defendant was material and was made to induce the defendant to act thereon and indemnify the plaintiff in respect of the damages to the insured vehicle.

16.7 the defendant, whilst being under the bona fide impression and belief that the representation made by the plaintiff was correct, indemnified the plaintiff in the following amounts:

a) N\$11 820 in respect of the rental of a replacement vehicle for the plaintiff;

b) N\$1 891.75 in respect of the costs incurred to appoint an assessor to assess the damage to the insured vehicle;

c) N\$4 510 in respect of the tow-in and storage fees incurred in respect of the insured vehicle.

The evidence

[17] The plaintiff testified to support his claim against the defendant and elected not to call any other witnesses. Five witnesses testified on behalf of the defendant.

Plaintiff's case

[18] As the terms of the agreement between the parties are common cause, I will proceed to summarise the evidence of the plaintiff with regard to the accident on 4 October 2020 and the events that followed after that.

[19] According to the plaintiff, he was en route from Outapi back to Windhoek. As per a prior arrangement with his girlfriend, he would meet her at the Gross Barmen Resort, approximately 25 kilometres outside Okahandja on the D 1972 road (a tarred road). They would spend some time together at Gross Barmen and then travel to Windhoek, where they reside.

[20] As he was close to reaching Gross Barmen, the plaintiff got a call from his girlfriend informing him that the transport she travelled with from Windhoek would drop her at the service station in Okahandja, and he needed to fetch her from there. The plaintiff testified that he then turned around and travelled back toward Okahandja.

[21] The plaintiff testified that he drove for about 10 minutes and was approximately 15 kilometres away from Okahandja when a warthog ran into the road, causing him to lose control of the vehicle and swerve to the left side of the road. As a result, the vehicle left the tarred road, went onto the gravel and collided with a tree standing next to the road.

[22] When the warthog ran into the road, the plaintiff travelled within the legal speed limit of 120 km/h but could not say at what speed the vehicle collided with the tree. The plaintiff testified that he could not recall precisely what happened after the vehicle left the tar road but testified that he did not apply the vehicle's brakes. The plaintiff testified

that when the vehicle left the tar road, his hands left the steering wheel, he could not control his legs to perform any evasive manoeuvres, and the vehicle went straight into the tree.

[23] During cross-examination, the plaintiff testified that when the vehicle left the road, it went straight into the tree. He neither swerved nor applied the vehicle's brakes before the impact with the tree.

[24] The plaintiff testified that he did not sustain any injuries from the accident. Approximately 10 minutes after the accident, a lady arrived on the scene who had the number of the tow-in services and that of the Namibian Police. The plaintiff called the tow-in service, and the lady called the police to report the accident.

[25] After approximately 30 minutes, the tow-in services arrived who removed the vehicle from the scene of the accident. The plaintiff and the Good Samaritan waited longer for the police to arrive. Still, as the police failed to come, the plaintiff suggested that he would report the accident personally at the police station in Okahandja.

[26] The lady, whom the plaintiff cannot identify or name, took the plaintiff to the police station in Okahandja, where she dropped him off, and he reported the accident accordingly. Once the accident was reported, the plaintiff travelled back to Windhoek via public transport.

[27] The plaintiff testified that shortly after completing the accident report, he contacted his broker, one Mr Pieter Oosthuizen, informing him of the accident, who requested the plaintiff to submit the accident report to him without delay, which the plaintiff did. The broker then proceeded to submit the plaintiff's claim and arrange for car hire to assist the plaintiff in the interim.

[28] The plaintiff testified that on 8 October 2020, he received a call from the assessor asking him why there were no brake marks on the scene, to which the plaintiff informed

him that he attempted to avoid an animal at a short distance and, as a result, he had no time to brake.

[29] According to the plaintiff, he was informed approximately one week later that the claim was under investigation and the car hire was extended. The plaintiff testified that thereafter he was contacted telephonically by a claims adjuster named Mr Leon Wiese, who asked him several questions regarding the condition of his vehicle and about the accident, which he accordingly answered. Some time passed until 12 November 2020, when Mr Oosthuizen contacted the plaintiff to inform him that the defendant rejected his claim citing avoidance of the policy due to fraud that the plaintiff allegedly committed. He also received written confirmation of the rejection of the claim by the defendant.

[30] The plaintiff adamantly denies that there was any justification in the rejection of his claim and testified that the defendant is under contractual obligation to pay out the damages sustained by his vehicle as a result of the occurrence of an insured event. Regarding the counterclaim, the plaintiff testifies that the defendant's counterclaim lacks merit as the defendant was obliged to pay for the tow-in services and the rental vehicle supplied to him. The plaintiff believes the other costs relating to the investigators were self-created, and their appointments were unnecessary as his claim was valid.

[31] During cross-examination, the specific location of the tree where the accident occurred arose. In addition, the plaintiff was confronted with the photographs of the scene as well as with the findings of the experts made from their observations at the scene of the accident, specifically in respect of the finding that the vehicle accelerated from a position of standstill and that there was an intentional collision with the tree.

[32] The plaintiff denied during cross-examination that the photographs of the tree presented to him were the place where the accident occurred. According to the plaintiff, the tree where the accident occurred was different.

[33] As this would logically impact the experts' findings, the parties requested the opportunity to attend the scene in the company of the expert witness.

Agreed findings of the inspection of the scene

[34] Upon the return of the parties, the following observations were recorded by the respective legal practitioners:

- a) The tree pointed out by the plaintiff as the one where the accident occurred is a different tree from the one depicted in the photographs of the defendant and set out in the expert reports.
- b) Although the trees pointed out by the parties are in different locations, it is the same tree species. (I will proceed to refer to the 'plaintiff's tree' and the 'defendant's tree' to distinguish between the two trees)
- c) The parties proceeded to refer to the plaintiff's tree and the defendant's tree in order to distinguish between the two trees.
- d) The plaintiff's tree is located 23.2 kilometres from the Engine Service Station in Okahandja, whereas defendant's tree is located 13.2 kilometres from the said service station.
- e) The plaintiff's tree is located 20.7 kilometres from the outskirts of Okahandja, whereas the defendant's tree is located approximately 10 kilometres from the outskirts of Okahandja.
- f) The defendant's tree is 2 kilometres from the Gross Barmen turn-off. The distance between the two trees is 9.6 kilometres.

- g) The plaintiff's tree is 16.7 meters from the edge of the road defendant's tree is 18 meters from the edge of the road.
- h) The circumference of the plaintiff's tree is 144 cm, whereas the defendant's tree is 166 cm.
- i) Both trees had debris from a vehicle in their surroundings. Additionally, more grass surrounded the plaintiff's tree than that of the defendant's.

Cross-examination of the plaintiff

[35] The plaintiff was extensively cross-examined by Mr Pretorius, and the plaintiff remained adamant that the scene at the defendant's tree, investigated by the experts was not the tree where the accident occurred.

Defendant's case

[36] In support of its case, the defendant called five witnesses, i.e.

- a) Michiel Albertyn Laker
- b) Dennis Maletsky;
- c) Leon Wiese;
- d) Martin Graham; and
- e) Johan Joubert.

Michiel Albertyn Laker

[37] Mr Michiel Laker is the defendant's Head Claims: National, a position Mr Laker has held since 2018. Mr Laker confirmed the written policy entered into between the parties wherein the defendant undertook to indemnify the plaintiff for loss or damage sustained by the plaintiff's vehicle. Mr Laker also confirmed the terms of the agreement.

He further testified that the plaintiff was contractually obliged to ensure that all dealings concerning the policy was done honestly and in good faith.

[38] Mr Laker testified that he received the plaintiff's claim for indemnification and noticed that, according to the plaintiff, he collided with a tree next to the road and that no other vehicles were involved. He immediately became suspicious as this accident occurred on a road with few trees and found it strange that the plaintiff collided with a tree.

[39] Mr Laker testified that as a result of his suspicions, instructions were given to Mr Leon Wiese of Surveillance Services to investigate the accident scene. After Mr Wiese studied the accident scene, further instructions were given to Messrs Graham and Joubert of Traffic Accident Reconstruction Services (TAR) to investigate the accident scene and furnish the defendant with an accident reconstruction report. According to the witness, this was done to determine whether or not the information provided by the plaintiff in his claim form submitted to the plaintiff was accurate.

[40] Mr Laker testified that whilst the defendant awaited the investigation report from the experts, there was no reason to repudiate the plaintiff's claim. As a result, the defendant, in compliance with its agreement with the plaintiff, indemnified the plaintiff in the following amounts:

- a) N\$11 820 in respect of the rental of a replacement vehicle for the plaintiff;
- b) N\$1 891.75 in respect of costs incurred to appoint an assessor to assess the damages to the insured vehicle;
- c) N\$4 510 in respect of the tow-in charges and storage fees in respect of the insured vehicle.

[41] Mr Laker testified that once the report from TAR was received, his suspicions were confirmed as TAR's report confirmed that the plaintiff had been dishonest when he submitted his claim as he provided inaccurate/false information and breached the terms of the policy agreement. Mr Laker testified that from TAR's report, it was clear that the plaintiff failed to prevent loss to the insured vehicle but intentionally caused damage to the insured vehicle by colliding with the tree.

[42] As a result of the plaintiff's fraudulent claim, the defendant rejected the plaintiff's claim.

[43] Mr Laker testified to establish the facts to the plaintiff's claim for indemnification, the defendant had to incur the cost of appointing an independent investigator (N\$ 9 200) as well as the cost to appoint expert accident reconstructionists to reconstruct the scene of the accident (N\$28 175).

Dennis Maletsky

[44] Mr Maletsky is the owner of Okahandja Tow-In Services, and he attended the accident scene on 4 October 2020 on the Gross Barmen road.

[45] Mr Maletsky testified that the accident scene was approximately 15 kilometres from Okahandja. When he arrived on the scene, he found two men at a silver Honda Ballade motor vehicle which collided with a tree on the side of the road.

[46] Mr Maletsky testified that he loaded the vehicle onto his truck by first pulling it away from the tree, whereafter he could go around the vehicle and lift the front of the vehicle to transport it to his yard in Okahandja. He stated that he left the gentlemen at the scene when he left with the plaintiff's damaged car.

[47] Mr Maletsky testified that he is well acquainted with the area where the accident occurred as his sister's son resides on an estate in the vicinity of the tree where he

recovered the vehicle. Mr Maletsky testified that the distance to his nephew's place is 15 kilometres from town and the tree where the accident occurred is next to the fence of the said estate. Mr Maletsky testifies that the tree is situated a short distance after the entrance to the estate.

[48] During cross-examination the witness confirmed that he went to the tree where he loaded the plaintiff's vehicle and pointed the tree out to them. He further testified that he visits his nephew at least once a month and has no doubt that the tree he visited with the experts is where he collected the plaintiff's vehicle.

[49] The witness was confronted with the photographs of the plaintiff's tree and that of the defendant. The witness indicated that, in his view, the photos were not clear but indicated that he did not recognise the tree which was identified as the 'plaintiff's tree'. Nevertheless, the witness was adamant that the accident scene was at the 'defendant's tree' and confirmed that there were no similar trees in the vicinity.

Leon Wiese

[50] Mr Wiese is a private investigator and surveillance consultant trading under the name and style of Surveillance Services. Mr Wiese has 15 years of experience in this field.

[51] Mr Wiese testified that the defendant appointed him in October 2020 to investigate the claim for indemnification submitted by the plaintiff. He received a link to the Hollard system and was able to access all the relevant documentation filed at the time. Mr Wiese stated that he was instructed to attend an accident scene to confirm whether or not the information provided by the plaintiff in his claim was accurate.

[52] Mr Wiese testified that he visited the yard of Mr Maletsky to inspect the damaged vehicle. He also had an interview with Mr Maletsky, who described the scene of the accident to him and informed him that the accident occurred approximately 10 to 15

kilometres from Okahandja on the Gross Barmen road. Mr Wiese testified that as he travelled along the Gross Barmen road, he kept a lookout for a tree which would cause the diameter of the damage he observed on the plaintiff's vehicle. The witness testified that there was one such tree that he saw but travelled up to the 20-kilometre mark from Okahandja to see if he could find another, but as there was none, he turned around and came back to the 'defendant's tree'.

[53] Mr Wiese testified that when he attended the scene on 12 October 2020, he found the plaintiff's car's debris and other motor vehicle parts on the accident scene.

[54] Mr Wiese testified that when he attended the scene, the wheel tracks and the vegetation at the location of the accident were still intact, and he continued to take photographs of the scene with his mobile phone.

[55] Mr Wiese testified that upon inspection of the scene, he found that well-worn tracks were leading from the road surface to the shoulder of the road and passing the tree at an angle on the right-hand side. However, he found other fresh tracks to the left of the existing tracks that did not emanate from the road surface. Additionally, he stated that he observed that there were marks on the ground where the tracks started, showing signs of gravel being thrown backwards, indicating a vehicle accelerating. These tracks led directly into the tree into which the plaintiff's vehicle collided.

[56] Mr Wiese testified that whilst he was on the accident scene, he contacted Mr Graham of TAR and enquired if he could inspect the scene. As it so happens, Mr Graham was available, and the witness and Mr Graham inspected the scene on the afternoon of 13 October 2020. He also provided the photographs he took to Mr Graham.

[57] During cross-examination, it was put to Mr Wiese that he found the wrong tree. However, the witness disagreed with Counsel's statement. Mr Wiese stated that if one has regard to the damage to the plaintiff's vehicle, the diameter of the tree, the debris on the scene and the fact that the plaintiff declared in his papers submitted to the

defendant that the accident happened 15 kilometres outside Okahandja, that there can be no doubt that the tree that he found was the correct one.

[58] Mr Wiese was questioned why he did not take the plaintiff to point out the tree. Mr Wiese indicated that if he could not locate the tree on his own, he would get assistance. However, Mr Wiese further stated that he had to do his 'homework' before interviewing the plaintiff to get his facts straight. Mr Wiese noted that when he had a telephonic interview with the plaintiff on 15 October 2020, he found many discrepancies in the plaintiff's version and from the responses he received from the plaintiff, he was not satisfied that the plaintiff was truthful.

Martin Johannes Graham

[59] Mr Graham is self-employed and consult as a Vehicle Mechanical Analyst. Mr Graham has been in the motor industry since 1969, and in his capacity as Vehicle Mechanical Analyst acted as a consultant for the accident investigation unit of the South African Police Services in Western Cape, analysing major accident causes related to mechanical failure.

[60] Mr Graham further performs the same duties with inspection and compilation of detailed mechanical analysis reports to the Traffic Accident Reconstruction Services (Pty) Ltd for further legal action. Mr Graham further compiles and present accident reconstruction mechanical inspection training courses at the University of Stellenbosch as a consultant for Traffic Accident Reconstruction Services (Pty) Ltd.

[61] Mr Graham testified that he and Mr Johan Joubert were briefed to investigate and prepare an accident reconstruction report and scale diagrams in respect of the sequence of events that resulted in the accident on 4 October 2020 on the Gross Barmen road towards Okahandja.

[62] Mr Graham testified that he initially attended the scene of the accident on 13 October 2020, together with Mr Leon Wiese and had the opportunity to investigate the vegetation and wheel tracks as the tracks were still clearly visible. Mr Graham testified that he attended the scene again on 14 October 2020, when he took several photographs of the scene. He again visited the location on 4 November 2020 in the presence of Mr Johan Joubert to reconstruct the accident.

[63] Mr Graham testified that he also inspected the damage to the plaintiff's vehicle, which was kept at premises in Windhoek. He then prepared a mechanical analysis of the damage profile of the insured vehicle.

[64] Mr Graham testified that he investigated the tracks and the vegetation and found that from the road surface, there is an S-bend track from the main road ending under the tree. The witness testified that there is a secondary trajectory adjacent to the said track where the vegetation was not flattened.

[65] For reconstruction purposes, the witness and Mr Joubert marked the two sets of tracks out with red and orange cones. The yellow cones depict the trajectory of the tracks that the public use to stop under the tree. Mr Graham testified that the vegetation around the track used by the public was trampled, but the vegetation circle around the tracks of the plaintiff was not disturbed. Mr Graham testified that he walked back to the tar road, following the imaginary line between the tracks of the plaintiff and the tar road. He did not observe any scuff marks indicating a tyre rotating at an angle, which would be indicative of a vehicle where the driver lost control.

[66] Mr Graham testified that when he evaluated the two tracks at the tree, it was clear that soil and stones were projected to the rear at the secondary track, and he could determine where the acceleration started. The witness testified that the stones and gravel would be displaced forward if a vehicle applied brakes harshly. However, there was no evidence of that on the scene.

[67] Mr Graham testified that it is clear that the secondary tracks led into the tree, but slightly to the left-hand side of the tree.

[68] Mr Graham further testified that he did an inspection of the plaintiff's vehicle and stated that the condition of the plaintiff's vehicle was generally good and in his opinion, the indent in the bonnet matched the dimensions of the tree at the scene of accident. Mr Graham testified that the tree penetrated the plaintiff's vehicle on the right side of the chassis beam. According to Mr Graham, the height of the chassis beam off the ground is important as the chassis beam caused significant damage to the tree's trunk.

[69] Mr Graham presented a photograph of the electronic cluster reflecting the ref counter and speedometer to the court. Mr Graham explained that in case of an accident, the vehicle's power is cut, and the power cut to the instrument cluster freezes the readings. In the case of the plaintiff's vehicle, the speedometer stopped at just below 40 km/h, which was the speed at impact.

[70] Mr Graham concluded that there was no evidence found on the scene that correlated with the version of the plaintiff that he was trying to avoid a warthog and lost control. Mr Graham further stated that the damage to the plaintiff's vehicle resulted from a low-speed impact. The witness opined that if the speed were higher, the electronic cluster would reflect same and the damage to the vehicle would have been far worse. According to Mr Graham, the impact did not even move the front wheel of the vehicle back, and the left-hand suspension was also not compromised.

[71] Apart from the findings in the joint expert report, the two experts, together with the plaintiff and the respective counsel, attended an inspection of the scene as the plaintiff denies that the tree upon which all the expert measurements were based is the wrong tree.

[72] Mr Graham remained adamant that the tree depicted in the joint report is correct. He testified that before the trial commenced on Monday, 6 December 2021, he visited

the scene to refresh his memory. He took photographs on the said date at the tree and captured a car part with a bar code. Mr Graham testified that on Wednesday, 8 December 2021, when they attended to the tree, which the plaintiff alleged is the tree he collided in, the exact same part was found at the tree and concluded that the car part was moved from the original scene of the accident to the tree pointed out by the plaintiff.

Johan Badenhorst Joubert

[73] Mr Joubert testified that he is the managing director of TAR and is an expert in accident reconstruction, accident analysis and cause analysis. Mr Joubert testified that he has more than 27 years of specialist experience in traffic accident reconstruction, including analysis of speed trends, accident rates, and correlation between speed and The Road Accident Fund has appointed Mr Joubert as an expert in accident reconstruction for the fund. Mr Joubert is also a guest lecturer in the field of accident reconstruction at the University of Stellenbosch.

[74] Mr Joubert confirmed that he attended the accident scene with Mr Graham and received copies of the photographs taken by Mr Wiese and Mr Graham.

[75] Mr Joubert testified that he took measurements at the scene and confirmed that there were two tracks with different trajectories. The witness testified that the tracks were clear and that he could do measurements. Mr Joubert testified that there were well-worn tracks, often used by the public and then a set of secondary tracks to the left of the well-worn tracks where there was no disturbance in the vegetation. Mr Joubert testified that this second track was relatively straight into the tree and showed an acceleration scuff mark. The witness explains that when the vehicle accelerated, it caused the gravel to be displaced in a V-form to the rear of the vehicle.

[76] Mr Joubert testified that he investigated the surrounding area and found no skid marks caused by braking, nor could he find any scuff marks caused by the rotating of the wheels when the vehicle skids sideways.

[77] Mr Joubert further testified that if the plaintiff's vehicle followed the regular track, it would not collide with the tree as it was not the principal direction of force of the vehicle.

[78] Having made the measurements at the scene, Mr Joubert testified that he could determine the speed of the vehicle at the time of impact by mathematical calculations.

[79] Mr Joubert testified that if the starting point of the calculations is 120km/h, which was the speed travelled by the plaintiff just prior to the accident, then the speed at the time of impact would have been 101 km/h.

[80] Mr Joubert testified that he factored in the drag factor, which would cause a more significant reduction of speed causing the speed at impact to be lower. The drag factor is affected by the roughness of the road and brake application. Mr Joubert testified that where there is more friction, there would be more deceleration. Having factored that into the equation, the speed at impact would still be approximately 80 km/h, which is not in line with the damage profile of the vehicle.

[81] Mr Joubert supported the findings by Mr Graham that the plaintiff's accident was a low-impact accident and the damage profile of the vehicle supports this contention. In addition thereto, it is clear that the vehicle accelerated from the point of standstill. Mr Joubert testified that the marks made by the plaintiff's vehicle do not link up with the road. The witness testified that the vehicle did not go off the road in a straight line. This means that the plaintiff had to stop at the tree and reverse to get the vehicle to the starting point of the acceleration marks.

Arguments advanced on behalf of the parties

[82] Mr Ntinda and Mr Pretorius furnished this court with comprehensive heads of arguments at the close of proceedings, and the court thank them for their industry

herein. Accordingly, I do not intend to repeat the arguments as they are on record but will refer to it where relevant during the discussion of the evidence hereunder.

Discussion

Onus

[83] Due to the intrinsic nature of the matter before me, this Court is required to determine the general principles applicable to the law of contract in general and insurance agreements.

[84] If one considers the pleadings, I am satisfied that the plaintiff and the defendant had a valid insurance agreement and that the specific terms of the agreement were properly pleaded. The defendant explicitly pleaded the terms of the contract and the manner in which the plaintiff failed to comply with his contractual duty.

[85] There is further no dispute that considering the evidence adduced the vehicle of the plaintiff was involved in an accident and that the vehicle was damaged beyond economical repair and as a result, the plaintiff indeed suffered the losses that are envisaged in the insurance agreement.

[86] In *Sprangers v FGI Namibia Ltd*¹ this Court per Maritz J considered where the onus would lie in an insurance agreement where the insurer denies liability and stated as follows::

'In its plea the defendant denies that the plaintiff has complied with his obligations in terms of the insurance agreement. In the context of insurance claims, litigants will be well advised to bear the remarks of Hoexter JA in *Resisto Dairy (Pty) Ltd v Auto Protection*

¹ *Sprangers v FGI Namibia Ltd* 2002 NR 128 (HC) at 131 G-H.

Insurance Co Ltd 1963 (1) SA 632 (A) at 645A-B in mind before pleading a denial of contractual compliance in such sweeping terms:

"There are many cases in our reports in which it has been held or assumed that, if an insurer denies liability in a policy on the ground of a breach by the insured of one of the terms of the policy, the *onus* is on the insurer to plead and to prove such breach."

[87] Considering the *Sprangers* matter, it is thus clear that once the court finds that the plaintiff has placed himself within the four corners of the insurance contract and that he has duly observed compliance with the terms and conditions as set out in the contract, then the onus is on the defendant to prove that it was entitled to repudiate the plaintiff's claim.

As I am satisfied that the plaintiff brought his claim within the four corners of the insurance agreement, I will proceed to determine whether the defendant, has on a balance of probabilities proven that it was entitled to repudiate the plaintiff's claim.

[88] The defendant's reasons advanced for the rejecting/repudiation of the plaintiff's claim is based on the fact that according to the defendant, the plaintiff failed to comply with his contractual duty, i.e.:

- a) The plaintiff submitted a fraudulent claim for indemnification;
- b) The plaintiff failed to provide the defendant with truthful and accurate information upon submitting its claim for indemnification, and;
- c) That the plaintiff provided the defendant with false information as to how the accident occurred.

Mutually destructive versions

[89] Considering the reasons advanced by the defendant for the repudiation as adduced during the trial, it is clear that there are two mutually destructive versions before me, which are literally as far removed from each other as the North Pole from the South Pole. It is therefore necessary to deal with this aspect before applying the law to the facts.

[90] In *First National Bank of Namibia Ltd v du Preez*² this court held as follows:

[84] It is trite law that a party who asserts has a duty to discharge the onus of proof. In *African Eagle Life Assurance Co Ltd v Cainer*³, Coetzee J applied the principle set out in *National Employers' General Insurance Association v Gany*⁴ as follows:

"Where there are two stories mutually destructive, before the onus is discharged the Court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false. It is not enough to say that the story told by Clarke is not satisfactory in every respect, it must be clear to the Court of first instance that the version of the litigant upon whom the onus rests is the true version"

[85] The approach to be adopted when dealing with the question of onus and the probabilities was outlined by Eksteen JP in *National Employers' General v Jagers*⁵, as follows:

'It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal

²*First National Bank of Namibia Ltd v du Preez* (HC-MD-CIV-ACT-CON-2017/01020) [2019] NAHCMD 360 (06 September 2019).

³ *African Eagle Life Assurance Co Ltd v Cainer* 1980 (2) SA 234 (W) at 237D-H.

⁴ *National Employers' General Insurance Association v Gany* 1931 AD 187. Also see *Sakusheka and Another v Minister Of Home Affairs* 2009 (2) NR 524 (HC) at 37.

⁵ *National Employers' General Insurance v Jagers* 1984 (4) SA 437 (E) at 440D. See also *Stellenbosch Farmers' Winery Group Ltd v Martell et cie* 2003 (1) SA 1 (SCA) para 5 and *Dreyer v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA) at 558E-G. Cited with approval in the matter of *Prosecutor-General v Hategekimana* [2015] NAHCMD 238 (POCA 5/2014; 8 October 2015) and *Prosecutor-General v Kennedy* 2017 (1) NR 228 (HC).

case, but nevertheless 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 satisfied the Court on a preponderance of probabilities 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. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

Was the scene of accident correctly identified?

[91] The plaintiff is a single witness and the only person who knows what occurred on 4 October 2020, when the accident occurred, which gave rise to the claim submitted to the defendant.

[92] What put the versions before the court even further apart is the fact that the plaintiff mid cross-examination denied that the tree at which the defendant's experts recorded all their observations on which they premised their report, was the wrong tree. This completely changed the landscape of the trial.

[93] This change of stance by the plaintiff brought about an inspection at two different scenes by the parties and the legal practitioners, and the recordal of this inspection by the legal practitioners caused the accident report submitted by the plaintiff and the report to the defendant as well as his witness statement to be contradicted in certain aspects.

[94] This change of stance of the plaintiff, unfortunately, brought about a number of further complications. The first of which is the question of whether the tree and the

surrounding area inspected by Mr Wiese and the experts, Messrs Graham and Joubert was the correct scene.

[95] The plaintiff is adamant that it was not, although, this was never raised at any stage during the proceedings prior to the hearing of the matter, bearing in mind that the plaintiff and his legal practitioner were in possession of the expert report and photographs for the longest time prior to the commencement of the trial.

[96] I am therefore perplexed as to why the plaintiff chose to deny the 'identity' of the tree if one can call it that, at such a late stage of the proceedings, given the fact that the case of the defendant was from the onset that the plaintiff intentionally collided with the tree in question. I further find it odd that in spite of the findings of the experts, the plaintiff chose not to present any expert evidence of his own.

[97] On the plaintiff's own version, the accident happened approximately 15 kilometres from Okahandja, and it took him approximately 10 minutes to drive from the point where he turned around to go back to Okahandja when the accident occurred. The plaintiff was travelling within the legal speed limit of 120km/h, and although the plaintiff was not willing to commit himself to a specific speed I am confident that unless he travelled at an extremely low speed, it would not take 10 minutes to travel 2 kilometres. I say this because the tree which the plaintiff identified as the tree against which he collided is approximately 2 kilometres away from Gross Barmen and approximately 23 kilometres away from Okahandja. There is a 9.6-kilometre distance between the two trees in question.

[98] I find it highly improbable that the plaintiff would travel at such a low speed if he had to turn around to fetch his girlfriend and then return to Gross Barmen as they intended.

[99] The only real independent witness in this matter, Mr Dennis Maletsky, was adamant that the tree where the experts did their investigation was the correct one. Mr

Maletsky knows that area well as he frequented the house of his nephew on a monthly basis and the estate where his nephew resided at the time is adjacent to the tree where he removed the plaintiff's vehicle. Although Mr Maletsky had some difficulty identifying the fence that runs next to the respective trees from the photographs presented to him. I am however satisfied that he was in an excellent position to identify the tree from where he removed the vehicle.

[100] The next important issue is debris from the plaintiff's vehicle found by Mr Wiese and Mr Graham at the tree, which they investigated. An interesting piece of information was that a specific car part, which belongs to the plaintiff's vehicle, was observed and photographed by Mr Graham at the 'defendant's tree'. Two days later, that same part was found at the tree of the plaintiff. It is undisputed that it is the same part, just cleaner. Yet no other parts of the plaintiff's vehicle were found at the 'plaintiff's tree'.

[101] Much was made by the plaintiff's legal practitioner about the fact that the plaintiff was not taken to identify the tree prior to drafting the expert report and how the defendant's witnesses could be positive that they identified the correct tree. The fact of the matter is that the evidence is that there are very few trees along that stretch of road that could be one where the accident took place. Mr Wiese testified that he drove approximately 20 kilometres on that road to see if any other trees with the circumference would match the damage to the plaintiff's vehicle. There was only one between the 10 kilometre mark and the 20 kilometre mark, where he found the debris belonging to the plaintiff's vehicle.

[102] For these reasons I am satisfied that the tree investigated by the experts and Mr Wiese was the correct tree.

How did the accident occur?

[103] The plaintiff's version is that he swerved for a warthog that unexpectedly crossed the road, lost control of the vehicle and crashed into the tree.

[104] At first glance, this explanation does not appear to be improbable. However, the plaintiff's version of how the accident occurred is questionable, to say the least.

[105] The plaintiff apparently lost control over his extremities when the warthog unexpectedly appeared as his hands were off the steering wheel, and his feet were off the vehicle pedals as he had no control over his legs. The plaintiff did nothing to gain control over the vehicle or take evasive action. As a result, the plaintiff cannot say at what speed he travelled before losing control nor at what angle his vehicle left the road.

[106] The evidence of Mr Joubert is that if no brakes were applied and if the plaintiff travelled at or within the speed limit at the time when he lost control over the vehicle his speed at impact would be approximately 101 km/h and if the drag factor is considered, the speed at impact would still be approximately 81 km/h.

[107] It is therefore interesting that not only did the plaintiff suffer no injuries but the electronic cluster of his vehicle indicates a speed of just under 40 km/h.

[108] Given all these question marks, it would appear that Mr Laker was suspicious of the plaintiff's claim with good reason and that it was necessary to appoint experts to reconstruct the accident scene.

[109] The evidence obtained from the accident scene is most interesting, and a layperson would not have seen the telltale sign that the experts noticed.

[110] At this stage, I must interpose and point out that I am satisfied with the credentials of Messrs Graham and Joubert; both these witnesses are experts in their field. However, Mr Ntinda argued that it could not be established what expert evidence these witnesses could tender. It would appear that this argument is based on the plaintiff's evidence that the scene investigated is at the wrong tree.

[111] I believe that the argument regarding the mistaken identity of the tree can be laid to rest.

[112] Apart from the cross-examination of the expert witnesses, there is nothing to contradict their findings. I am of the view that the argument by Mr Ntinda that the defendant simply relies on speculations and drew inferences that are not supported by facts is without merit. One would have expected the plaintiff to call his expert to gainsay the evidence of the two experts, but he did not.

[113] If the evidence of Messrs Graham and Joubert is considered, it is clear what their methodology was to reach the damning conclusion that they did. That is, the plaintiff accelerated from a standstill position and collided with the tree in question.

[114] Mr Ntinda, during cross-examination, attempted to cast doubt regarding the evidence of Messrs Graham and Joubert regarding the fact that no tracks led to the starting point of the acceleration of the vehicle. However, Mr Joubert clearly explained that the only way the vehicle could reach this point was to reverse from the normal track used by the public to where the vehicle accelerated from.

[115] If one considers the evidence of all the witnesses as a whole, the observations made on the scene, and the conclusions reached, this court can make no other finding but to conclude that the plaintiff intentionally drove his vehicle into the tree.

[116] Mr Ntinda contended during argument that there was not a shred of evidence to show that the plaintiff intentionally wrote of his vehicle. I beg to differ with that contention, and that is clear from the evidence of the experts.

[117] The plaintiff, mid his cross-examination made an about-turn in respect of the scene of the accident because the shoe started pinching. I must also remark that apart from the contradictions and improbabilities pointed out above, the plaintiff's version was fraught with improbabilities and inconsistencies, which I will not list at this point, but the

record in this regard is clear. As a witness, the plaintiff was also argumentative and evasive.

[118] As pointed out by Ueitele J in *Don v Hollard Insurance Company of Namibia Ltd*⁶ an insurance contract is based on utmost good faith. He further refers to *Wilke No v Swabou Life Insurance Co. Ltd*⁷ wherein the Full Bench of our High Court stated as follows:

'The contract of insurance is the primary illustration of a category of contracts described as *uberrimae fidei*, i.e. of utmost good faith. Misrepresentation made by an insured when claiming entitles an insurer to repudiate a claim.'

[119] I can do no better than that. Therefore for the reasons set out above I am satisfied that the defendant discharged the onus resting on it on a balance of probabilities and I find that the plaintiff breached the clauses in the agreement on which the defendant relied to repudiate the plaintiff's claim. I am satisfied that the defendant showed that the plaintiff failed to provide truthful and accurate information upon submitting its claim for indemnification and that the plaintiff provided the defendant with false information on how the accident occurred.

[120] For these reasons, the plaintiff's claim must fail and I dismiss it. On the other hand, as for the counterclaim, I am satisfied that the defendant should succeed and the counterclaim should be granted.

[121] My order is as follows:

1. The plaintiff's claim is dismissed with costs.
2. The defendant's counterclaim is granted in the following terms:
 - 2.1. Payment in the amount of N\$18 221.75 and N\$37 375.

⁶ *Don v Hollard Insurance Company of Namibia Ltd* (HC-MD-CIV-ACT-OTH-2019/02372) [2020] NAHCMD 217 (10 June 2020) at para 61.

⁷ *Wilke No v Swabou Life Insurance Co. Ltd* 2000 NR23 (HC).

- 2.2. Interest on the aforesaid amounts at a rate of 20% per annum calculated from 12 November 2020.
- 2.3. Cost of suit.
- 3. The matter is regarded as finalised.

JS Prinsloo
Judge

APPEARANCES

PLAINTIFF:

M NTINDA

Of by Sisa Namandje & Co Inc
Legal Practitioners, Windhoek

DEFENDANT:

F PRETORIUS

Of by Francois Erasmus and Partners
Legal Practitioners, Windhoek