

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-DEL-2020/04887

In the matter between:

JACO SMITH

PLAINTIFF

and

LEON SCHIEFER

DEFENDANT

Neutral citation: *Smith v Schiefer* (HC-MD-CIV-ACT-DEL-2020/04887) [2023]
NAHCMD 374 (4 July 2023)

Coram: RAKOW J

Heard: 13 March 2023

Delivered: 4 July 2023

Flynote: Law of delict – Motor Vehicle Accident – Where there are two mutually destructive versions – principle of *Res Ipsa Loquitur* – Independent witness who saw what happened – The court accepts her evidence for what happened – The claim of the plaintiff succeeds.

Summary: On 4 December 2018 and about 20km from Usakos on the Usakos-Arandis Road, a motor vehicle accident occurred between the plaintiff's vehicle and a black Volkswagen Golf GTi motor vehicle with registration number N21238WB, the latter then and there being driven by the defendant. The parties agreed that the quantum of the damages will not be disputed.

It is alleged that the sole cause of the collision was the negligent driving of the defendant. The defendant denied that he is the sole cause of the accident and pleads that while he was driving, a vehicle unexpectedly stopped in front of him, placing him in a sudden emergency which caused him to swerve into the lane of the oncoming traffic.

Held that: there was an independent witness who saw what happened. The court accepts her evidence for what happened. She testified that they were driving slowly behind some other vehicles when she saw the Black Volkswagen Golf vehicle of the defendant approaching very fast. She saw him veering to the right and the next moment the accident with the plaintiff's vehicle took place.

Held further that: there is no reason to doubt the version of the plaintiff in that he was driving at his side of the road when he saw the vehicle of the defendant coming towards him at a very short distance of about 10 meters. Mrs Fourie had a good lookout at the vehicles in front of her and testified about the pick-up and the red Golf. She never mentioned that she saw the vehicle of the plaintiff moving into the lane she was driving in.

The claim of the plaintiff succeeds.

ORDER

1. The claim of the plaintiff succeeds with costs, such costs include the costs of one instructed and one instructing counsel.
2. The matter is finalised and removed from the roll.

JUDGMENT

RAKOW J

Introduction

[1] The plaintiff is Jaco Smith, an adult male hotel manager, employed by Barnhoff Hotel, Usakos. The defendant is Leon Schiefer, an adult male residing at no 23 Monotoka Street, Ocean View, Swakopmund. At all relevant times hereto, the Plaintiff was the registered owner of a metallic gold Toyota Hilux pick-up vehicle bearing registration number N999U.

[2] On 4 December 2018 and about 20km from Usakos on the Usakos-Arandis Road, a motor vehicle accident occurred between the plaintiff's vehicle and a black Volkswagen Golf GTi motor vehicle with registration number N21238WB, the latter then and there being driven by the defendant. The parties agreed that the quantum of the damages will not be disputed.

The plaintiff's claim

[3] It is alleged that the sole cause of the collision was the negligent driving of the defendant, in that:

- '1. He failed to adhere to the traffic rules and regulations;
2. He attempted to overtake other vehicles when it was unsafe and inopportune to do so;
3. He entered the Plaintiff's lane of traffic when it was unsafe and inopportune to do so;
4. He failed to have a proper lookout, more specifically he failed to take cognisance of the Plaintiff's vehicle traveling towards him in the opposite lane;
5. He failed to apply his brakes timeously or at all; and
6. He failed to avoid a motor vehicle accident when by exercise of reasonable care, he could and should have done so.'

[4] As a result of the accident, the plaintiff's vehicle was damaged beyond economical repair. The fair and reasonable market value of the plaintiff's vehicle before the collision was N\$327 700. The plaintiff's vehicle had to be towed and towing costs amounted to N\$27 011.49. The fair and reasonable market value of the salvage of the damaged vehicle was N\$51 893.75. The Plaintiff has accordingly suffered damages in the amount of N\$302 817.74.

The defendant's plea

[5] The defendant denied that he is the sole cause of the accident and pleads that while he was driving, a vehicle unexpectedly stopped in front of him, placing him in a sudden emergency which caused him to swerve into the lane of the oncoming traffic.

[6] He further pleaded that the sole cause of the collision was the negligent driving of the plaintiff in that:

1. He failed to adhere to the traffic rules and regulations;
2. He failed to apply the brakes of his vehicle timeously or at all;
3. He had driven at an excessive speed that could not afford him enough time to react to the sight of the defendant's vehicle;
4. He failed to avoid the motor vehicle accident when by the exercise of reasonable care, he could and should have done so;
5. He failed to keep a proper lookout.'

[7] He pleaded that in the event that it is found that he was negligent and his negligence caused the collision, the plaintiff was also negligent and his negligence contributed to the collision as pleaded above. Damages should therefore be apportioned.

The Pre-Trial order

[8] The parties entered into a pre-trial agreement which was eventually made a pre-trial order regarding the facts that are in dispute as well as not in dispute and the points of law that are disputed. This reads as follows:

'1. RULE 26(6)(A) - ALL ISSUES OF FACT TO BE RESOLVED DURING TRIAL IN RESPECT OF PLAINTIFF'S CLAIM:

- 1.1 The sole cause of the collision was as a result of the sole negligent driving of the defendant, in that:
 - 1.2.1. he failed to adhere to the traffic rules and regulations;
 - 1.2.2. he attempted to overtake other vehicles when it was unsafe and inopportune to do so;
 - 1.2.3. he entered the Plaintiff's lane of traffic when it was unsafe and inopportune to do so;
 - 1.2.4. he failed to have a proper lookout, more specifically he failed to take cognisance of the Plaintiff's vehicle traveling towards him in the opposite lane;
 - 1.2.5. he failed to apply his brakes timeously or at all; and
 - 1.2.6. he failed to avoid a collision when by the exercise of reasonable care, he could and should have done so.
- 1.3 Whether the plaintiff's vehicle was damaged beyond economical repair as a result of the above sole negligent conduct (paragraphs 1.2.1 to 1.2.6 above) of the defendant and that the defendant is fully liable in the circumstances, alternatively whether the defendant contributed to the collision and to what extent, if any.

2. ALL ISSUES OF FACT TO BE RESOLVED DURING TRIAL IN RESPECT OF THE DEFENDANT'S PLEA:

- 2.3 Whether the Defendant had to take evasive action due to the vehicle in front of his vehicle stopping unexpectedly;
- 2.4 Whether the Defendant swerved to take evasive action, due to the vehicle stopping in front of him;
- 2.5 Whether when he swerved into the right lane, the Plaintiff's vehicle was in the oncoming lane;
- 2.6 Whether the Plaintiff's vehicle was in the Defendant's lane and caused the vehicles in front of the Defendant's vehicle to stop suddenly;
The Plaintiff does not agree with this allegation, in that there is no such averment in Defendant's Plea that the Plaintiff was traveling in Defendant's correct lane of traffic (the left-hand lane) and that Plaintiff's actions were the cause of the vehicles traveling in front of the Defendant's vehicle in the left-hand lane to slow down or stop suddenly.
- 2.7 Whether the Defendant's vehicle was nearly off the right-hand side of the road;
- 2.8 Whether the Defendant's vehicle was traveling at a high speed, and whether he could have taken evasive action to avoid colliding with the Plaintiff's vehicle;

- 2.9 Whether the sole cause of the accident was as a result of the negligent driving of the Plaintiff in that:
- 2.7.1. He failed to adhere to the traffic rules and regulations;
 - 2.7.2. He failed to apply his brakes timeously if at all;
 - 2.7.3. He had driven at an excessive speed, that could not afford him enough time to react to the sight of the Defendant's vehicle;
 - 2.7.4. He failed to avoid the Defendant's vehicle when by exercise of reasonable care, he could and should have done so;
 - 2.7.5. He failed to keep a proper lookout.
3. **RULE 26(6)(B) - ALL ISSUES OF LAW TO BE RESOLVED DURING THE TRIAL:**
- 3.3 The aspect of liability as to who caused the collision.
 - 3.4 Who is liable to pay the proven damages.
4. **RULE 26(6)(C) - ALL RELEVANT FACTS NOT IN DISPUTE IN THE FORM OF A STATEMENT OF AGREED FACTS:**
- The following allegations are not in dispute:
- 4.1. The respective identities and addresses of all the parties.
 - 4.2. The jurisdiction of this Honourable Court.
 - 4.3. On 4 December 2018 and about 20km from Usakos on the Usakos-Arandis road, B2 Road, a collision occurred between the plaintiff's vehicle, there and then driven by the Plaintiff, and a black Volkswagen Golf GTi motor vehicle with registration number N21238WB, there and then driven by the Defendant.
 - 4.4. The plaintiff's vehicle was damaged beyond economical repair as a result of the collision.
 - 4.5. The plaintiff is the registered owner of metallic gold Toyota Hilux pick-up vehicle bearing registration number N999U (hereinafter referred to as the "plaintiff's vehicle"), alternative the *bona fide* possessor of such vehicle, in respect of which vehicle the risk of profit and loss has passed to the plaintiff.
 - 4.6. The *quantum* of damages.
 - 4.6.1. As a result of the collision the plaintiff's vehicle was damaged beyond economical repair and suffered damages in the amount of N\$ 302 817.74 consisting off:
 - (a) The fair and reasonable market value of the Plaintiff's vehicle prior to the collision was N\$ 327 700.00;
 - (b) The reasonable and fair towing fees in the amount of N\$ 27 011.49;
 - (c) The reasonable value of the salvage of the Plaintiff's vehicle amounted to N\$ 51 893.75.'

Evidence

For the plaintiff

Haley Maria Fourie

[9] Mrs Fourie was subpoenaed to testify by the plaintiff. She testified that she was driving on the road towards Usakos from Walvis Bay at approximately 10h00 on the morning of 4 December 2018. She was on her way to Keetmanshoop. About 20 km from Usakos, she saw a small pick-up and a red Golf in front of her on a crest and the white pick-up was driving slowly, about 30 to 40 km per hour. The red Golf also slowed down. When she looked back, she saw a white pick-up and a black Golf that overtook the white pick-up. This vehicle was coming closer at a very high speed. The black Golf went back in the lane after passing the white pick-up but saw that it was going to bump the vehicle of Mrs Fourie and then came out of the lane again and hit the pick-up coming from the front.

[10] She further testified that she just saw black pieces in the air. She drove uphill and turned around and came back to the scene where she tried to assist the injured people. The driver of the black Golf never overtook her vehicle. She further testified that she asked him at the accident scene why he did not go off the road on the left side and he said it was too high, to which she replied that it was the same height on both sides. She did not hear him apply his brakes as there was music playing in her vehicle. She only saw him veering to the right.

Sgt. Abed Julius

[11] The witness is employed as a police officer at the Usakos police station in the criminal investigation unit since 2013. He was called out to attend to the scene of the accident. He also completed the police report, which was handed in as exhibit "A". He explained the road conditions and that there was a barrier line at the point where the accident happened, meaning that the black Golf was not allowed to overtake any vehicle at that point. He identified the two vehicles as a Toyota Hilux traveling from Usakos in the direction of Swakopmund and a black Golf traveling from Arandis to Usakos. The accident happened when the driver of the Black Golf changed lanes

and was not in the lane it was supposed to be. The Toyota Hilux was driven by Mr. Smith and the Golf by Mr Scheifer.

[12] He was notified of the accident and went to the scene about 20 km outside Usakos. On the scene, he found the Toyota Hilux still on the road and the black Golf lying next to the road in two parts. Mr Scheifer told him at the scene when asked as to what happened, that whilst driving, he saw a car braking suddenly in front of him and he could not break as he would then have hit that vehicle in front of him. The only option he had was to overtake the vehicle in front of him and in the process of doing so, he noticed a vehicle coming from Usakos. The driver then could not return to his lane on the left side of the road and he decided to remove his vehicle from the road on the right side but before he could completely get off the road, the pick-up came and hit him from the side. His vehicle broke in two parts.

[13] The driver of the Toyota Hilux only spoke to him at the police station. He told him that he was traveling to Swakopmund and noticed a vehicle coming toward him in his lane. He could not avoid that vehicle. He was not at the scene of the crime officer but a certain Shiweda was who arrived after three or four days but after four years he has not received the photo plan back from the scene of the crime.

Jaco Floris Smith

[14] Mr Smith testified that on 4 December 2019 at about 10h00 he was traveling with his father-in-law, Mr McDonald from Usakos to Swakopmund in his Hilux pick-up vehicle bearing registration number N999U. About 20 km outside Usakos towards Swakopmund as they were going over a blind crest, he noticed a string of vehicles coming from the opposite direction towards them. He was driving in the left-hand lane and all the other vehicles were traveling in the right-hand lane. There were about three vehicles, white or light-colored vehicles approaching them in the right-hand lane. As they were to pass these vehicles, a black Volkswagen Golf suddenly pulled out behind them and attempted to overtake them.

[15] He immediately slammed on the brakes but the Volkswagen was too fast and could not return to its lane but continued traveling in the lane of the witness' vehicle. In an attempt to avoid an accident, the driver tried to drive off the road on the left-

hand side of the witness' vehicle. Mr Smith swerved to the right as close to the white solid line as was reasonably possible, trying to avoid a head-on collision with the Volkswagen Golf and the other vehicles traveling in the right-hand lane. An accident could not be avoided and his Hilux Pick-up vehicle collided with the Volkswagen Golf in my lane of traffic. His vehicle bumped the Volkswagen Golf on the left front area and the left front passenger door.

[16] Because of the impact, the Hilux pick-up vehicle rolled over and landed on its left side, trapping the witness' father-in-law inside the pick-up. He kicked out the windshield of the vehicle and when he got out he noticed that the Volkswagen Golf was in two pieces. Mrs Fourie attended the scene of the accident immediately after the accident and was traveling from Swakopmund to Usakos when the black Volkswagen Golf overtook her vehicle on the downhill before he attempted to avoid the accident with his vehicle by moving onto the right shoulder of the road. With the help of some bystanders, they rolled the Hilux pick-up back on its wheels to gain access to his father-in-law. Two ambulances collected the seriously injured persons from the scene. The driver of the Volkswagen Golf remained at the scene.

[17] The witness further handed up some photos which were entered into the record as exhibits. They depict the road and the spot of the accident, showing the double barrier line on the road as well as the incline with the crests at both sides. These photos were taken on 17 November 2021.

[18] During cross-examination, he explained that he drove about 110 to 120 km per hour and that he estimated that there was about 10m between him and the black Volkswagen Golf when the Golf came into his lane.

For the defendant

Leon Schiefer

[19] The defendant testified that he was driving a Golf GTI hatchback on 4 December 2018 and was together with his family driving on the B1 highway. He was driving between Arandis and Usakos. He was in a line of cars with several vehicles behind and in front of him. He testified that the vehicle in front of him stopped

unexpectedly, coming to a dead stop and placing him in an emergency where he had to take evasive action and make a choice whether to go off on the left-hand side of the road and probably roll the vehicle or swerve into the unoccupied right lane.

[20] He saw no vehicle in the right-hand lane and swerved across the right lane intending to go off the road to avoid a collision with the vehicle in front of him. He swerved to the edge of the road with the rear left side of his vehicle on the edge of the road. The plaintiff's vehicle which was traveling at extremely high speed, drove into his vehicle and hit his vehicle on the left rear side and his vehicle was damaged beyond repair. His fiancé who was pregnant and his son died in the accident. At the time he swerved into the right-hand lane, the plaintiff's vehicle was not in the right lane, it was in the left lane which is why the vehicle in front of him had to stop so suddenly.

[21] The accident occurred as a consequence of the plaintiff's negligent and reckless driving in that he failed to keep a proper lookout, he did not brake or drove at such excessive speed that he could not brake sufficiently and he did not take evasive action or drove at such an excessive speed that he could not take evasive action. He testified that he was not overtaking any vehicles but was taking evasive action when he moved into the lane of the oncoming traffic.

[22] In his police statement, he said he was with his family on their way from Swakopmund to Windhoek. At the point of the accident, he told the police official, that he was following another vehicle which braked suddenly and he tried to avoid hitting that vehicle from behind and decided to get out of the road on the right side.

[23] During cross-examination, he explained that he saw two vehicles in front of him, approximately at a vehicle's length. He overtook this vehicle but it was at an area where he could. Then he was driving behind a small cooler truck, which he also overtook as he could not remember seeing a vehicle in front of that truck and he suspects that it was before the crest. The vehicles were not traveling very fast. When he passed the cooler truck the vehicle in front of that truck came closer very fast and he saw that it was braking, he also braked and saw that the vehicle came to a dead stop. He checked on the left and realized he could not go off there, so he drove into the other lane as he tried to cross the lane to go off the road.

[24] He also testified that he saw the plaintiff's Hilux pick-up coming from the left and it was not in its lane. Then he was confronted with Mrs Fourie's version but he could not answer that.

Legal principles

Res Ipsa Loquitor-principle

[25]

[26] Having dealt with the evidence adduced by the parties, I now turn to deal with the applicable legal principles and applying them to the facts in deciding whether on the probabilities the accident most likely happened in the manner asserted by the plaintiff or in the manner described by the defendant. The Supreme Court of Namibia has said that even where there is no counterclaim but each party alleges negligence on the part of the other, each party must prove what it alleges¹.

[27] What we started with, in this trial, is the principle of *Res Ipsa Loquitor*. The fact that the defendant drove on the wrong side of the road and caused the accident, is prima facie proof of the negligence of the said driver. The learned author Cooper in *Delictual Liability in Motor Law*² said the following:

'Where a motor vehicle drove onto the incorrect side of the road and collided with an approaching vehicle, it has been held *res ipsa loquitur* because the only reasonable inference was that the defendant's driving onto the incorrect side of the road at an inopportune moment was due to his failure to exercise proper care. Proof that a vehicle was on its incorrect side of the road at the time of the collision (it is held) is prima facie proof of the driver's negligence.'

[28] In *Road Contractor Company Limited v Jorge*³ this approach was also followed where a motor vehicle swerved into the lane of an oncoming truck and caused an accident whilst in the lane of the oncoming truck.

¹ *Motor Vehicle Accident Fund of Namibia v Lukatezi Kulubone* Case No SA 13/2008 (unreported) at 16 - 17 para 24).

² W.E. Cooper, *Delictual Liability in Motor Law*, Juta & Co, 2006 at p 101 (together with authorities therein referred).

³ *Road Contractor Company Limited v Jorge* (I3287/2014) [2016] NAHCMD 296 (30 September 2016) at 35.

[29] The duty to disprove this allegation, therefore, rests with the defendant. Cooper in *Delictual Liability in Motor Law* (supra) further continued and states:

'The explanation expected of the defendant will depend upon the nature of the case and the relative ability of the parties to contribute evidence on the issue. Mere theories or hypothetical suggestions will not avail the defendant. A defendant must do more than merely show that his explanation may reasonably possibly be true. His explanation must be supported by a substantial foundation of fact and be sufficient to destroy the probability of negligence presumed to be present before the testimony adduced by him.'

[30] The principle in the current matter can find application in that it is the opinion of the court that unless the defendant can show that she was not negligent when she bumped into the vehicle of the plaintiff, which was driving in its correct lane, it must be accepted that the defendant was indeed negligent and therefore caused the said accident. The defendant's defense is based on the fact that a sudden emergency occurred when she was faced with a truck that partly encroached on her lane which caused her to partly leave the road surface and then return onto the road, causing her to swerve into the lane of the oncoming traffic and then causing the accident with the vehicle of the plaintiff.

Two mutually destructive versions

[31] The evidence demonstrates, that the two versions of the protagonists are mutually destructive. The approach then is that as set out in *National Employers' General Insurance Co Ltd v Jagers*⁴ as follows:

'(The plaintiff) 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 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 any more than they do the defendant's, the plaintiff can only

⁴ *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E).

succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

[32] In a South African case, *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*⁵, which has been quoted in this jurisdiction with approval, Nienaber JA explained the process that must be used to assess the evidence as follows:

'On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on

- (a) the credibility of the various factual witnesses;
- (b) their reliability; and
- (c) the probabilities..

As to (a), the court's finding on the credibility of a particular witness will depend on its impression of the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as

- (i) the witness' candour and demeanour in the witness box,
- (ii) his bias, latent and blatant,
- (iii) internal contradictions in his evidence,
- (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions,
- (v) the probability or improbability of particular aspects of B his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events.

As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on

- (i) the opportunities he had to experience or observe the event in question and
- (ii) the quality, integrity and independence of his recall thereof.

As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its

⁵ *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* (427/01) [2002] ZASCA 98 (6 September 2002).

evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'

Conclusions

[33] In this matter, there was an independent witness who saw what happened. The court accepts her evidence for what happened. She testified that they were driving slowly behind some other vehicles when she saw the Black Volkswagen Golf vehicle of the defendant approaching very fast. She saw him veering to the right and the next moment the accident with the plaintiff's vehicle took place.

[34] There is further no reason to doubt the version of the plaintiff in that he was driving on his side of the road when he saw the vehicle of the defendant coming towards him at a very short distance of about 10 meters. Mrs Fourie had a good lookout at the vehicles in front of her and testified about the pick-up truck and the red Golf. She never mentioned that she saw the vehicle of the plaintiff moving into her line of driving.

[35] The court, therefore, finds the versions presented by Mrs Fourie and the plaintiff as truthful and dismisses the evidence of the defendant.

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

1. The claim of the plaintiff succeeds with costs, such costs include the costs of one instructed and one instructing counsel.
2. The matter is finalised and removed from the roll.

E RAKOW
Judge

APPEARANCES

PLAINTIFF: M Boonzaier
Instructed by Dr Weder, Kauta & Hoveka Inc., Windhoek

DEFENDANT: B Isaacks
Of Isaacks & Associates Inc., Windhoek