

**REPUBLIC OF NAMIBIA**



**IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case No.: HC-MD-CIV-ACT-CON-2019/03452

In the matter between:

**ALBERTUS BEBE HUSEB**

**PLAINTIFF**

And

**OLD MUTUAL SHORT-TERM INSURANCE  
COMPANY (NAMIBIA) LTD**

**DEFENDANT**

**Neutral citation:** *Huseb v Old Mutual Short-Term Insurance Company (Namibia) Ltd*  
(HC-MD-CIV-ACT-CON-2019/03452) [2023] NAHCMD 466 (4  
August 2023)

**Coram:** PRINSLOO J

**Heard:** 15 – 19 March 2021; 16 April 2021; 14-17 March 2022; 17- 19  
October 2022; 5 April 2023.

**Delivered:** 4 August 2023

**Flynote:** Action – Insurance claim – Repudiation by defendant – Correctly made – Defendant discharged onus – Plaintiff's claim dismissed.

**Summary:** The parties in this matter concluded a written insurance agreement on 24 September 2018. The defendant undertook to insure the plaintiff's motor vehicle, a 2013 Jeep Wrangler Sahara 3.6 litre V6 A/T 2DR with registration number ANTSCC NA against the risks mentioned in the contract, one of them being the prevention of loss. The insured value of the motor vehicle according to the written insurance agreement was N\$291 300. On 17 March 2019, the plaintiff's vehicle was involved in an accident, and the vehicle was damaged beyond economical repair. The defendant was notified of the accident on even date and a written claim was lodged on 19 March 2019. On 20 May 2019, the defendant repudiated the plaintiff's claim in writing on the basis that the defendant regarded the claim as dishonest or misrepresented. Following the repudiation by the defendant, the plaintiff issued summons. The defendant defended the plaintiff's claim.

*Held that* he who alleges must prove and not he who denies.

*Held that* the court is satisfied that Mr Smit conducted his analysis within the limitations and requirements of the Crash Data Retrieval system.

*Held that* Mr Noabeb was not an independent witness in this matter because firstly, he and the plaintiff became friends as a result of their interactions after the accident when Mr Noabeb tried to get his payment from the plaintiff and secondly, although the plaintiff was invoiced for N\$3500, he paid Mr Noabeb N\$10 000 apparently from the goodness of his heart because of the delay in settling the invoice.

*Held that* the vehicle did not swerve to avoid a cow and the plaintiff did not lose control of the vehicle.

*Held further that* according to the data presented the plaintiff stomped on the accelerator pedal, depressing it to 90% of its capacity and ramming the vehicle into a stationary object.

*Held that* the defendant made out a case on a balance of probabilities and it was entitled to reject the plaintiff's claim. The Court expected the plaintiff to testify in response to the case made out by the defendant, but he chose not to.

*Held further that* the Court draws a negative inference given the fact that the plaintiff did not testify about facts that are peculiarly within his knowledge.

*Held furthermore* that in the absence of a reply by the plaintiff the defendant completely discharged its onus of proof, and the claim of the plaintiff stands to be dismissed with costs.

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### **ORDER**

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1. The plaintiff's claim is dismissed with costs.
  2. Such costs include the cost of one instructed and one instructing counsel.
  3. The matter is regarded as finalised.
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### **JUDGMENT**

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PRINSLOO J:

#### Introduction

[1] The plaintiff is Albertus Bebe Huseb, an adult male and insurance broker by profession, residing in Windhoek. The defendant is Old Mutual Short-Term Insurance Company, a company incorporated in terms of the company laws of Namibia with its registered place of business at 223 Independence Avenue, Windhoek.

[2] The plaintiff instituted action against the defendant on 26 July 2019, as a result of the defendant's repudiation of the plaintiff's claim, submitted pursuant to a motor vehicle accident.

#### Background

[3] The parties entered into a written insurance agreement on 24 September 2018 in terms of which the defendant undertook to insure the plaintiff's motor vehicle, a 2013

Jeep Wrangler Sahara 3.6 litre V6 A/T 2DR with registration number ANTSCC NA against the risks mentioned in the contract, one of them being the prevention of loss. The insured value of the motor vehicle according to written insurance agreement was N\$291 300.

[4] On 17 March 2019, the plaintiff's vehicle was involved in an accident, and the vehicle was damaged beyond economical repair. The defendant was notified of the accident on even date and a written claim was lodged on 19 March 2019.

[5] On 20 May 2019, the defendant repudiated the plaintiff's claim in writing, on the basis that the defendant regarded the claim as dishonest or misrepresented.

[6] As a result of the repudiation by the defendant, the plaintiff avers he suffered damages and claims the following from the defendant:

Claim 1: payment in the amount of N\$221 800 being the difference between the insured value of N\$291 300 and the fair and reasonable salvage value of N\$69 500.

Claim 2: The plaintiff hired a tow-in service to transport the damaged vehicle at a cost of N\$9850.

Claim 3: As a result of the collision, the plaintiff hired an assessor to assess the damages to the vehicle for the amount of N\$1000.

Claim 4: Further, as a result of the accident the defendant removed the vehicle of the plaintiff to Pro-Ex Auctioneers and the plaintiff had to pay Pro-Ex Auctioneer N\$10 650 in respect of standing fees before he was to be able to remove the vehicle from the care of Pro-Ex Auctioneers.

[7] The defendant admits that it repudiated the claim of the plaintiff in writing on 20 May 2019, however, pleaded that the defendant was entitled to do so in terms of clause 3 under the heading: 'General Terms, Conditions and Exclusions' of the written insurance agreement. The defendant avers that the plaintiff's claim was rejected on the following basis:

- i) That the plaintiff deliberately caused the insured event, loss and/or damage;
- ii) That the plaintiff failed to provide all the material facts and/or made a misrepresentation in respect of:
  - a. the cause of the accident;
  - b. the place of the accident;
  - c. the object and/or tree pointed out against which the plaintiff allegedly collided;
  - d. the actions taken by the plaintiff to avoid the collision;
  - e. a passenger who travelled with the plaintiff on the date of the accident.

[8] It is further the defendant's case that the plaintiff failed to take reasonable steps to reduce, inter alia, loss and damage to the vehicle as at the time of the accident the plaintiff:

- i) failed to apply his brakes timeously or at all;
- ii) failed to keep a proper lookout;
- iii) failed to avoid a collision when, by exercise of reasonable care, he could and should have done so.

[9] The upshot of the defendant's case, therefore, is that it would not honour the plaintiff's claim, as the claim in question constitutes a fraudulent claim.

#### Pre-trial order

[10] On the issue of fact, the parties agreed that the following issues need to be decided:

- 'a) The plaintiff seeks that the following facts be resolved at the trial:

1.1 The defendant to prove that the cause and place of accident as pointed out by plaintiff was false and constituted fraudulent misrepresentation.

1.2 The defendant to prove that the actions taken by the plaintiff in avoiding a collision fell short of the standard required by the terms of the insurance agreement.

1.3 The defendant to prove that there was no passenger in plaintiff's vehicle at the time of the collision.

1.4 The defendant to prove that the plaintiff failed to apply his brakes timeously or at all; failed to keep a proper lookout; and failed to avoid a collision when by the exercise of reasonable care, he could and should have done so; and thereafter, upon proof of the aforesaid allegations, whether same constitute grounds for excluding defendant's liability.

b) The defendant seeks the following facts to be resolved at the trial:

1.5 Whether the plaintiff is entitled to the relief sought in his particulars of claim.

1.6 Whether the plaintiff was dishonest and misrepresented incorrect facts (false information) to the defendant about the insured event which lead to the plaintiff's claim being rejected by the defendant.

1.7 Whether the plaintiff failed to provide the defendant with accurate information in relation to:

1.7.1 Where the accident specifically occurred and the scene of the accident.

1.7.2 Whether the plaintiff's vehicle swerved out for cattle crossing the road?

1.7.3 Whether the plaintiff's vehicle collided with one of the cattle?

1.7.4 Whether plaintiff's vehicle collided with the specific tree as pointed out by the plaintiff to the defendant's experts?

1.8 Whether the plaintiff's aforesaid actions amounted to a material breach of the provision of the insurance policy agreement existing between the parties, as it was relevant and material to the defendant determination of its liability in terms of the insurance policy.

1.9 Whether the defendant was entitled to reject the plaintiff's claim.'

[11] The issues of law to be resolved at the trial was formulated as follows:

'a) The plaintiff wants the following issues of law to be resolved at the trial:

2.1 Defendant's liability vis-à-vis the exclusionary clauses.

b) The defendant wants the following issues of law to be resolved at the trial:

2.2 The principles relating to insurance policy agreements specifically whether the defendant was entitled to reject the plaintiff's claim in light of the breach of the agreement by the plaintiff.'

### Onus to start

[12] It was agreed between the parties that the defendant has the onus to commence with the evidence and the parties also applied that the court attend to an inspection in loco at the scene of the accident.

### Inspection in loco

[13] The scene of the accident is situated on the Groot-Aub road (D1320) close to the T-junction with the B1 main road.

[14] Prior to the accident, the plaintiff was travelling from Groot-Aub towards the T-Junction with the B1 road when the plaintiff's vehicle left the road and collided with a tree standing on the left side of the road. The parties were in agreement with regard to the tree with which the plaintiff's vehicle collided.

[15] The topography in the area of the scene of the accident shows that the road follows an incline where after the road descends towards the B1 road with a slight curve in the road towards the left. The distance from the crest of the rise to the tree in question was 61.4 metres.

[16] Attending the inspection in loco was the plaintiff, Greg Naubeb (tow truck driver), Nathan Jagger (ambulance driver), Detective Warrant Officer (DWO) !Nawatiseb and Sergeant (Sgt) Ndjavera (who attended the scene of the accident) and Mr William Nambahu (accident reconstruction expert).

[17] Each of the witnesses, apart from Mr Nambahu, recorded their observations at the scene of accident whilst the vehicle was still on the scene. Mr Nambahu visited the scene of accident after the fact but had the benefit of the vehicle being brought to the scene of accident to enable him to draft his report. I intend to deal with the witnesses' observations when I discuss their evidence hereunder.

Evidence adduced

[18] The defendant called seven witnesses whereas the plaintiff called one witness only. The evidence of the defendant's witnesses can be summarised as follows:

*Detective Warrant Officer Wilfred !Nawatiseb*

[19] DWO !Nawatiseb is the Unit Commander of the Criminal Investigation Unit at Groot-Aub Police Station with 22 years' experience. For 16 years, the witness was attached to an Anti-Motor Vehicle Theft Unit. The witness testified that he has extensive experience in investigating motor vehicle accidents.

[20] On the evening of 17 March 2019 at 21h18, the charge office at the Groot-Aub Police Station received a report of a motor vehicle accident on the Groot-Aub road. The witness was alerted about the accident and he and Sergeant Vero Ndjavera departed to the scene.

[21] On route, approximately 70 meters before the scene, they passed cattle which were on the right-hand side of the road, making their way to Groot-Aub. The witness further observed that it was a clear night with no precipitation.

[22] When they arrived at the accident scene the witness observed a silver Jeep at a slight angle at a tree on the left-hand side of the road, facing a western direction. The vehicle collided with the tree and was damaged. There were three people in the vicinity of the vehicle. There were two men near the vehicle and a lady in a BMW vehicle on the opposite side of the road facing the B1 road.



[23] Upon closer investigation, the witness determined that the plaintiff was the driver of the vehicle and the other gentleman, who was sitting on stones a few meters away, was a passenger in the vehicle. He did not observe any visible injuries on either the driver or the passenger.

[24] When investigating the immediate vicinity of the vehicle, the witness did not notice any broken glass of the headlights of the vehicle or the windscreen. The lamps and windscreen were intact. The airbags did not deploy, and there was no spillage of water or oil on the ground. The bumper of the vehicle was bent in a V-shape, and although not attached to the tree, there was very little space between the vehicle and the tree. The witness estimated a space of approximately 10 cm between the tree and the vehicle.

[25] The witness and his colleague Sgt Ndjavera spoke to the plaintiff to determine how the accident occurred. The plaintiff explained that he was travelling from Groot-Aub in the direction of the B1 road and when he arrived at the crest of the road, (which is approximately 60 metres from the tree), he hit a cow, and he swerved and collided with the tree in question.

[26] The witness turned his vehicle around and drove up the hill to see if he could find the carcass of the cow with which the plaintiff collided in order to notify the owner of the animal. He got out of the vehicle and walked around in a radius of 10 meters around the vehicle but saw no injured or dead animal. He further did not observe any skid marks where the plaintiff's vehicle had to leave the road.

[27] The witness went back to the vehicle to enquire from the plaintiff if he should arrange for a tow-in service or whether the police should assist to tow the vehicle in. The witness testified that it was necessary to determine if the vehicle was insured or not as insurance companies have specific directions regarding the tow-in and storage of accident-damaged insured vehicles. As the plaintiff informed the witness the vehicle was not insured he proceeded to contact a tow-in company, namely, Tow-in-Specialists.

[28] Shortly thereafter the tow-in services, the ambulance and an official of the MVA fund arrived. After negotiation between the tow-in service official and the plaintiff, during which conversation the plaintiff repeated that the vehicle was not insured, the vehicle was loaded and transported away from the scene. The plaintiff and his passenger left the scene with the ambulance. The witness testified that he and his colleagues were the last to leave the scene.

[29] During cross-examination, the witness stated that the place where the accident occurred caused him to be suspicious because that specific tree was notorious for accidents and the history of the accidents at the tree gave rise to suspicion of insurance fraud. However, because the plaintiff indicated that the vehicle was not insured prompted him not to investigate the matter. The witness however testified that he found it strange when the plaintiff requested an accident report in respect of the accident a day or so after the accident, despite the fact that the vehicle was not insured. The plaintiff received the accident report, regardless.

*Sergeant Vero Meikopo Ndjavera*

[30] The witness is a Sergeant in the Namibian Police stationed at Groot-Aub. The witness testified that he was on standby on the night of 17 March 2019 at the scene of crime officer. A report of the accident was received by the Charge Office Sergeant, Cst Deforce (now Sgt Deforce), who alerted the witness, Sgt Ndjavera.

[31] Sgt Ndjavera together with DWO !Nawatiseb made their way to the scene of the accident which occurred on the D1320. Upon arriving at the scene they found three persons, two males and one female. The lady was with a BMW at the scene, but the BMW was not involved in the accident. The one gentleman was sitting a short distance away from the scene on a stone. Mr Huseb, the plaintiff, introduced himself as the driver of the vehicle which was involved in the accident.

[32] The vehicle in question was a Jeep motor vehicle, which collided with a tree next to the road and was facing west to the B1 main road.

[33] After he determined that the driver and passenger sustained no injuries the witness questioned the plaintiff on how the accident happened. He was informed by the plaintiff that he collided with a cow after which he lost control of the vehicle and his vehicle veered off the road and collided with the tree.

[34] The witness testified that they then investigated the accident scene and determined that the damage was concentrated in the centre of the vehicle. Although the vehicle was not flush against the tree there was little space between the tree and the vehicle. The damage to the vehicle was a V-shape. The airbags were not deployed, and there was no spillage or leaking of fluids from the vehicle.

[35] During the conversation with the plaintiff, it was determined that the vehicle was not insured. The witness testified that the tow-in services and the ambulance arrived a while later and the plaintiff and his passengers left the scene with the ambulance. The vehicle was removed by the tow-in service. An official from the MVA fund also attended the scene.

[36] According to the witness, the plaintiff arrived at the police station the next day and indicated that he wanted an accident report as the vehicle was insured.

[37] He completed the accident report (POL 66) at the request of the plaintiff and recorded the description of the accident as relayed by Mr Huseb, the driver of the vehicle.

[38] During cross-examination, the witness testified that when they questioned the plaintiff about the accident and how it occurred, the plaintiff indicated to him and DWO !

Nawatiseb the point of impact with the cow. The witness testified that he enquired from the plaintiff where the cows were as they (he and !Nawatiseb) only saw cattle walking towards Groot-Aub when they were driving to the accident scene.

[39] They observed the area where the plaintiff allegedly collided with the cow and then walked back to the Jeep. The witness testified that he did not see any brake or skid marks at the point of impact with the animal. He did, however, observe tracks leading from the tarmac up to the tree in question. The witness testified that he did not observe any brake marks on the gravel where the vehicle left the tarred road either.

[40] He testified that, after the three of them went back to the tree, he went up the tracks again to inspect it and walked the tracks of the vehicle and lit the tracks with the aid of his cellular phone. During the time of this inspection of the track by the witness his colleague DWO !Nawatiseb was busy calling the tow-in service.

[41] The witness was also confronted about the depth of the tracks leading from the tarred road to the tree. The witness stated that he was not an expert in that regard and could only give an estimation. The witness however remained firm on the fact that he did not observe any brake marks.

[42] Sgt Ndjavera submitted to the court the entries made in the Occurrence Book on the night in question as well as the accident report that he completed on 18 March 2019.

*William Onesmus Nambahu*

[43] Mr Nambahu testified in his capacity as an expert witness in the field of motor accident reconstruction and holds a BSc (Hons) degree in Chemistry obtained from the University of Ulster, Northern Ireland in the United Kingdom. The witness testified that he has approximately 23 years' experience in this field and has testified in several

cases in the High Court on accident reconstruction. The majority of the cases were in the context of criminal matters. Apart from his other credentials, Mr Nambahu was the Head of the Physics Section of the National Forensic Science Institute from 1997 to 2016 when he retired and became a private forensic examiner.

[44] On 2 May 2019, the witness was requested by Mr Nico Smith of Specialized Investigation Consultant CC (SICS) to conduct an investigation on a Jeep Wrangler to compare the damage on the vehicle to the alleged object, with which the vehicle collided, and to establish if there was any foul play present.

[45] The witness stated that he was briefed on the circumstances which led to the collision with the tree. Mr Smith expressed his doubt as the damage to the vehicle was inconsistent with the circumference of the tree that the plaintiff collided with.

[46] In order to reach his conclusions, Mr Nambahu did a visual inspection of the damaged vehicle and inspected the scene of accident.

[47] From the visual inspection of the vehicle, Mr Nambahu determined that damage on the vehicle was situated in the middle of the front bumper but slightly more to the right, with an indent of about 0.5 metres in depth and 0.3 metres in width at its widest, but with no noticeable damage to the radiator assembly. The bonnet of the vehicle was found to have slightly curved inward as the locking mechanism was pushed inward, together with the bonnet, during the accident. The damaged area or indent could be associated with a cylindrical object. Wood fibres were found embedded inside the dent, which suggested that the bumper was in contact with a tree trunk.

[48] During the inspection of the inside of the vehicle, Mr Nambahu found that the airbags did not deploy. The witness further found thorn branches and legumes inside the vehicle, which presumably fell from the tree at the time of impact.

[49] Upon examining the tree in question, Mr Nambahu found that the tree trunk was damaged on one side (eastern side of the tree trunk) possibly by a vehicle, which stood at a maximum height of about 0.80 metres from ground level. Debris and fragments belonging to various vehicles were found around the tree but none belonged to the Jeep of the plaintiff.

[50] Measurements were made of the tree, and the circumference of the tree was found to be 1.35 metres. The width of the tree at the same height where the impact would have occurred was measured at 48 cm.

[51] The vehicle was taken to the accident scene by trailer and once offloaded it was pushed towards the tree in an attempt to fit the dent in the bumper of the vehicle to the trunk of the tree. The witness, however, testified that the tree did not fit into the dent on the bumper. Apart from that, the witness observed white paint on the bonnet of the vehicle, but there were no corresponding white marks found on the tree.

[52] Mr Nambahu made the following findings after his investigation:

- 'a) The vehicle was damaged by a round vertical object;
- b) The suspected tree trunk that caused the deformation on the vehicle's bumper was much smaller in diameter than the tree pointed out by the driver and analysed by a forensic scientist;
- c) The suspected tree trunk that caused deformation to the bumper could not be found for possible matching with the damaged area left on the bumper;
- d) Also based on the strength of evidence collected from both the scene and the vehicle, I can state with confidence that the thorn branches covered (sic) from the vehicle were dissimilar from that collected from the tree, pointed out by the driver;
- e) Ligaments (sic) recovered from the vehicle, were similar to that collected from the tree pointed out by the driver, but chemical analysis were not performed to distinguish them;

- f) Upon physically fitting the dent to the tree trunk it is clear that the tree is too wide for the dent on the front bumper;
- g) The white paint on the bonnet cannot be found at the tree and is therefore a further indication that this vehicle was damaged at another place;
- h) The front screen shows no damage which is clear that there was no passenger on the left front seat as claimed by the driver.'

[53] During cross-examination, the witness was confronted about his opinion on the biological material that was found on the vehicle and the conclusion that he drew from that. Mr Nambahu acknowledged that his expertise is not that botany nor did he do any biochemical tests on the twigs and the legumes. The same applies to the wood fibres recovered from the indent in the bumper of the vehicle.

[54] The witness expressed an opinion that the vehicle travelled at a speed of between 50 to 60 km/h at the time of impact, which he determined from the dent in the bumper of the vehicle. The witness however conceded that he did not do the calculations in respect of the speed or velocity as he was not requested to do such calculations.

[55] The witness further accepted that at the time that the accident scene was recreated with the damaged vehicle neither the plaintiff nor the Groot-Aub Police were present. The purpose of the exercise of fitting the vehicle to the tree was essentially a simulation of the accident, and Mr Nambahu made his analysis and drew conclusions from the exercise.

[56] Mr Nambahu testified that Mr Nico Smith pointed out the principal direction of travel the vehicle travelled in before it struck the tree and attempted to fit the vehicle at the angle as was pointed out to him. The witness further testified that even post-accident the vehicle should fit the tree, if it was the tree where the accident occurred.

*Willie Sowden*

[57] Mr Sowden is self-employed at Peco Trading CC. He testified in the capacity of an expert in the field of information technology/data retrieval/computer software relating to crash data from the OBD Connector of vehicles, which were involved in motor vehicle accidents. Mr Sowden holds a B.Com Degree in Business and Financial Management and has 25 years of automotive experience in repair, sales, diagnostics and panel beating. He became a CDR technician in 2017 and is currently the only person in Namibia who has the expertise to extract data from the OBD connector<sup>1</sup> or airbag module of certain vehicles.

[58] The witness testified that he retrieves the crash data with the Bosch Crash Data Retrieval Tool with software version number 18.0 and the software is registered to Peco Trading.

[59] The witness explained, that in order to access the crash data, a tool is used which acts as an interface or crash data retrieval tool, which is plugged into the vehicle and extracted by means of specialised software. Once the data is retrieved it is transferred to a laptop in a special CDR file which cannot be altered or tampered with.

[60] Mr Sowden testified on 2 May 2019 on instructions of the insurer and the investigator, Mr Nico Smit, he accessed the OBD connector situated under the steering wheel of the plaintiff's Jeep Wrangler. The vehicle was switched on, and the VIN number of the vehicle was inserted manually via his laptop, which communicated with the interface, which in turn communicated with the plaintiff's vehicle. The witness explained that only if the correct VIN number is inserted and only if there is a specific licence for the manufacturer in place, would the CDR technician be able to retrieve the data.

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<sup>1</sup> The OBD port is a universal connector that mechanics can use to tap into a vehicle's computer for running of tests and diagnostics.



[61] In this instance, he was able to retrieve the data successfully, and the data retrieved contains the last 5 seconds prior to impact. Mr Sowden testified that the extract of the data was done to get a true reflection of what happened at the time of the accident. After he retrieved the data, he provided it to Mr Izak Smit for analysis.

[62] During cross-examination, Mr Sowden testified that data retrieval is not new and is done all over the world. In Namibia, there is limited licencing in respect of specific brands of vehicles like Jeep, Toyota and Volkswagen.

[63] According to the witness, certain vehicles provide certain information. In respect of the Jeep, the data extracted did not provide the date of the incident but recorded the most recent event. The data goes according to key cycles and can record up to six key cycles or events. An event would be, for example, when the vehicle was in an accident, repaired and the airbags reset and then involved in a second accident. Each of the accidents would constitute an event, and the information stored would remain until the vehicle is destroyed.

[64] Mr Sowden testified that the limit of recorded events is six, the seventh event will override the last event.

[65] Mr Sowden was confronted with the fact that the report reflects that the data was extracted from the airbag module. He indicated that the vehicle works like a network and all the sensors in the vehicle, like the steering wheel angle sensor, wheel speed sensors, accelerator, engine control unit and the ABS system all report to the airbag control module (ACM). Therefore, from these sensors, it can be determined if the driver and passenger were wearing seatbelts or if there was a passenger in the car, whether the speed of the vehicle increased or decreased or whether the driver of the vehicle changed direction or braked, etc. All systems in the vehicle remain active, and even if nothing untoward happens prior to impact, the system will immediately record the information 5 seconds before impact.

[66] The OBD connects to the airbag control unit as well, and the data can be retrieved from either the OBD connection or the airbag control unit. In this case, the impact of the plaintiff's vehicle was not severe enough to deploy the airbag module but enough to record the incident.

[67] The allegation that the plaintiff first collided with a cow and then the tree was put to this witness to determine how many events would be recorded. The witness testified that there would be two events, in other words, the collision with the cow and the recording of 5 seconds prior to that, and the second event of colliding with the tree and the 5 seconds recorded prior to that impact.

*Izak Smit*

[68] Mr Smit is employed by Alexander Forbes Insurance Namibia as a senior motor vehicle assessor. He is also an expert motor vehicle crash data retriever and analyst relating to motor vehicle accidents. Mr Smit testified that he holds a Bosch CDR Analyst Certification obtained in 2018 through AITS in the United Kingdom. The witness further testified that he holds a Bosch CDR Technician Certification obtained in 2017 through TR Darts in the Netherlands. The witness further did a Crash Scene Investigation course through TMS in South Africa in 2018.

[69] Mr Smit testified that the data was retrieved from the plaintiff's vehicle using the Bosch Crash Data Retrieval tool by Mr Sowden and this retrieval was done in his presence. As a result, he could also do a visual inspection of the vehicle. Once the data was retrieved he received it and proceeded to analyse it. The witness emphasised that the data is an image of the data stored in the airbag control module (ACM).

[70] Mr Smit also presented the court with an example of an airbag control module. The witness explained that event data recording (EDR) is the function of an ACM. The ACM is akin to the black box of an airplane with the exception that it does not conduct any voice recordings. The ACM monitors the vehicle's motion and manoeuvres to detect a developing crash based on the feedback information received, and determine whether to deploy the airbags and other restraint system components. This module also runs diagnostic checks and tests continually to ensure that the system is operating properly in order to function as designed. Mr Smit explained that the module has a function that records data captured pre-crash and during the crash (crash pulse). The data stored in the EDR is retrievable by the Bosh Crash Data Retrieval tool and analysed by the Bosch EDR software, which translates the data retrieved to a readable form.

[71] Mr Smit testified that when he analysed the data, he determined that only one event was recorded on the EDR of the plaintiff's vehicle and the event type was a non-deployment event, in other words, the event did not cause the airbags of the vehicle to deploy but was of sufficient force to record an event. According to the witness if there was an impact with a cow as reported, two events would have been recorded on the EDR.

[72] During the analyses of the pre-crash data, the witness found the following:

- a) The vehicle was at idle speed and increased in acceleration by up to 90%. From 1.2 seconds before impact the vehicle accelerated sharply. The 90% can be related to depression of the acceleration paddle by the driver of the vehicle. At 5 seconds prior to the impact, the accelerator paddle was only depressed at 4% as opposed to 90% at 0.2 seconds before the impact.
- b) The engine revolutions per minute (rpm) and the engine throttle matched that of a vehicle being accelerated. The engine throttle was open at 53% at the time of impact.

- c) The engine rpm increased from 5 seconds up to 0.1 seconds prior to impact, which indicated the engine was working, which in turn meant that the vehicle was going faster and that the acceleration paddle was depressed to move the vehicle faster.
- d) The service brake was never touched before the crash occurred to indicate a possible crash prevention action.
- e) The overall speed was increased from 14km/h to 31km/h. This does not correspond with the report of the plaintiff that he was driving not more than 120km/h and not less than 60km/h.
- f) The vehicle was not subject to a swerve-out manoeuvre. In the case of the Jeep, there was very little steering input to deviate the vehicle from its path, which means that the vehicle was travelling in a straight line from the start of the 5 seconds to impact.
- g) The stability control of the vehicle, which engages with the vehicle experiences oversteering or understeering causing the vehicle's wheel speed to be different, never engaged. The stability control sensors would record if there was sudden steering input and would engage in order for the vehicle to correct itself. An example would be when the driver of a vehicle executes a sudden swerve action.

[73] Mr Smit provided the court with his report and the graphs and columns containing the data recorded by the ACM for the last 5 seconds prior to impact.

[74] In conclusion, the witness testified that the event recorder's data meet the Frye and Daubert Standards. These standards deal with the admissibility of expert evidence and are predominantly American standards.

[75] During cross-examination, the witness confirmed that the interpretation of the data retrieved is done within the data limitations provided by the specific manufacturers. The witness testified that when he conducts an analysis of the data he would constantly refer back to all the limitations. These data limitation is incorporated in the Bosch Crash Data Retrieval document that was attached to the report of Mr Sowden. The witness

submitted that his report and that of Mr Sowden need to be read in conjunction with each other.

*Denice Dames*

[76] Ms Dames testified that she is a claims negotiator in the employ of the defendant. Ms Dames further testified that at the time of the collision, the plaintiff was insured by the defendant as per the agreement filed of record.

[77] On 19 March 2019, the plaintiff lodged a written insurance claim with the defendant under claim number 12302851, and a case number was issued under number 3574146. Upon receipt of the claim the witness started processing the claim but noted that there was an unpaid premium on the agreement. She then communicated with the underwriting department to authorise the unpaid premium, which is an internal process.

[78] On 20 March 2019, the underwriter informed Ms Dames that case number 3574146 is not authorised and requested that the claim documents be submitted to a certain Sarika. Ms Dames testified that on 20 March 2019, she received an email which read:

'Case 3574146 no authorised

Please submit the claims documents-please send through to Sarika, since I will only be back on Monday.

This policy lapsed due to unpaid WEF 14/12/2018.

We reinstated WEF 28/02/2019, with No Claims Declaration and a few days later there is a claim.

The reinstatement premium was also unpaid and a cash payment was made.

Can we determine if damage was indeed as per date of loss noted?'

[79] Ms Dames testified that the circumstances raised suspicion as to the claim and as a result, the defendant appointed SICS to conduct a detailed investigation of the collision and circumstances leading thereto. She stated that the authorisation of the claim depended on the outcome of the investigation.

[80] After the investigation was completed and based on the outcome thereof the plaintiff's claim was rejected by the defendant and the plaintiff was duly informed of the outcome of his claim.

[81] Ms Dames further testified that the plaintiff's claim was rejected in terms of clause 3.8.42, which states that the defendant would not compensate for claims based on dishonesty or misrepresentation (giving misleading or incorrect facts) including exaggerated claims.

[82] Ms Dames testified that the plaintiff did not object to the defendant's rejecting his claim but proceeded to issue summons in the current matter.

*Nico Smith*

[83] The final witness called by the defendant was Mr Nico Smith, a loss adjuster and the managing member of SICS. Mr Smith was instructed by the defendant to investigate the circumstances surrounding the accident of the plaintiff. Mr Smith has been involved in insurance investigations for approximately 23 years. Prior to that, from 1978 to 1998 he was a police officer.

[84] Mr Smith testified that since 2016 insurers noted many incidences where vehicles are written off as a result of an accident where no other vehicles are involved, which triggered insurers to request a more thorough investigation in and around the circumstance of these accidents. Mr Smith testified that the two main descriptions given by the insured were a) travelling during the night and animals appeared on the road,

and the driver had to swerve to avoid the collision and ran into a tree, or b) travelling at night and an approaching vehicle was overtaken by another approaching vehicle in the face of the insured vehicle, which had to swerve from the road and ran into a tree.

[85] The witness stated that there was another factor that was very prominent in these cases and in that there were three quiet roads on which these accidents occurred. In all these cases the same tree was the object against which the insured's vehicle would collide. These trees are situated one on the Groot-Aub Road, a very prominent one on the Elisenheim Road and two trees on the Brakwater Service Road. This is a phenomenon which is experienced by all the insurers.

[86] He testified that he conducted the investigation and compiled an assessor's report.

[87] Mr Smith testified that he arranged a meeting with the plaintiff and obtained a statement from him in order to determine the details of the accident. During his interview with the plaintiff, he determined the following:

- a) On 17 March 2019 between about 20h00 and 21h00 in the evening, the plaintiff was on his way back to Windhoek from Groot-Aub driving his Jeep Wrangler, registration number Ants CC NA. With him was a passenger by the name of Leon, who was asleep.
- b) The plaintiff cannot recall the exact speed he drove, but it was not more than 120 km per hour and also not less than 60km/h.
- c) Whilst driving he came to an uphill section of the road, which veered to the left. As he reached the crest of the hill he noticed cattle crossing the road from left to right. The cattle were on the road surface, and he tried to avoid hitting them and swerved to the left.
- d) When he swerved to the left, he hit one of the cattle and his vehicle left the road and he collided with a tree next to the road.

- e) When the vehicle stopped, he got out of the vehicle and called his friend to check if he was okay, he didn't answer so he left him in the vehicle.
- f) Shortly after the accident, a vehicle stopped at the scene to offer assistance. The male persons from that vehicle provided the plaintiff with the phone number of the police in Groot Aub. He called the police and reported the accident, and whilst waiting for them, he phoned the MVA Fund who sent an ambulance to the scene. The ambulance arrived and subsequently transported him and his friend to Katutura Hospital for treatment.
- g) He obtained the number of a tow-in service from a friend and he called them. The tow-in service arrived while the police were still on the scene and the vehicle was removed.
- h) The plaintiff stated that he enquired from the police whether he must be tested for alcohol and the police said they did not have the equipment.

[88] On 10 April 2019, the plaintiff accompanied him and Mr Coetzee to the scene, where the plaintiff gave an explanation from which direction he came, more or less where he swerved out of the road and where he hit the tree. According to the witness the plaintiff made no mention of colliding with a cow when they visited the scene of the accident.

[89] Mr Smith testified that according to his observation, the trunk of the tree against which the plaintiff collided would not fit the indent on the front bumper of the plaintiff's vehicle. He testified that, if one compares the diameter of the dent at the back of the bumper, to the circumference of the tree it is clear that the object that caused the imprint on the bumper is smaller in circumference than the tree in question.

[90] Taking these aspects into consideration, Mr Smith engaged the services of Mr Nambahu to assist with the investigation and the physical fitting of the vehicle to the tree. Mr Nambahu authored a report in this regard. At the time of this exercise, the Jeep was brought to the scene on a trailer. The witness testified that he drove the Jeep from the trailer to the tree and drove it up the trailer again after their investigation.



[91] Mr Smith further raised his concerns about the plaintiff's claim that he was accompanied by a passenger in the vehicle, whereas the crash data indicated that the passenger's seatbelt was not used. This would have resulted in the passenger being flung against the front windscreen, yet there was no damage to the windscreen. Mr Smith further stated that he was unable to obtain a statement from this passenger.

[92] As with Mr Nambahu, Mr Smith made certain observations regarding the biological matter that was found inside and on the vehicle of the plaintiff, which in his view, did not correspond with the tree against which the vehicle collided.

[93] Mr Smith further interviewed DWO !Nawatiseb as to his observations on the scene of the accident and engaged the services of Messrs Sowden and Smit to retrieve the crash data from the EDR and he confirmed the findings that were already placed on record by the respective witnesses.

[94] The witness testified that the plaintiff was also subjected to a polygraph test conducted by Polygraph Industrial Relations, to which he willingly agreed.

[95] The conclusions reached by Mr Smith overlap with that of the other witnesses, and it will not be repeated. However, the recommendation to the defendant pursuant to his investigation was that it should reject the claim of the plaintiff on the basis that he was untruthful in his version of how the accident occurred. The defendant made the final decision on whether to honour or reject the plaintiff's claim.

*Plaintiff's case*

[96] Mr Huseb elected not to testify and called only one witness by the name of Greg Charlton Noabeb.

[97] He testified that he is employed by KTR Breakdown Services (KTR) since October 2018.

[98] Mr Noabeb testified that on Sunday 17 March 2019 at approximately 20h15, he received a phone call from a private number seeking assistance to tow a vehicle which was involved in an accident on the Groot-Aub road. He confirmed the information with the police in Rehoboth and when it was confirmed that there was indeed such an accident he left to pick up the vehicle.

[99] When he arrived on the scene he found two police officers on the scene as well as the plaintiff and bystanders. As the witness was not sure who Mr Huseb was, and since there were a lot of people present, he called Mr Huseb on his cell phone. Mr Huseb saw the witness and the tow truck and called him over to where he and an injured person were. They were in a car, which was parked opposite the tree where the Jeep was.

[100] Mr Noabeb testified that he walked around the vehicle and the tree and determined that the Jeep was stuck to the tree and that the vehicle would have to be pulled away from the tree.

[101] Once the witness received clearance from the police on the scene to remove the vehicle, he reversed the towing vehicle to the rear of the Jeep and attempted to pull the Jeep away from the tree with the winch, but the winch had insufficient power to pull the Jeep away from the tree.

[102] Mr Noabeb then unhooked the winch and fitted two chains with hooks to the Jeep and lowered the A-frame of the tow truck at the rear of the Jeep with the assistance of the winch and the A-frame lifted the rear wheels of the vehicle in the air and hooked a safety chain. According to the witness the front wheels of the vehicle were still on the ground as the Jeep was still stuck to the tree but with the aid of the tow truck the Jeep was pulled away from the tree.

[103] Hereafter the witness repositioned his vehicle and lifted the front wheels of the Jeep on the A-frame in order to tow the vehicle back to Windhoek. Once the vehicle was removed from the tree, Mr Noabeb noted that there was a coolant spilt at the base of the tree.

[104] Once the ambulance arrived the plaintiff and his friend left in it but before the plaintiff left he enquired where he would find his vehicle again and Mr Noabeb handed him a business card. The plaintiff came to TKR the next day, and a job card was completed which had to be taken to the plaintiff's insurer. Mr Noabeb testified that he and the plaintiff did not have a conversation on the scene on whether the Jeep was insured or not because when the plaintiff arranged for the tow-in he also arranged a price with the witness for the tow-in. According to the witness, the agreed price was N\$1500, but the invoice was issued for N\$3500. However, the plaintiff did not pay the day when he went to TKR. This sum was paid months later after the wreck of the Jeep was sold.

[105] This concluded the case for the plaintiff.

[106] Save for the viva voce evidence tendered by the defendant's witnesses a large portion of the evidence relied upon by the defendant constitutes real evidence, the crash data of the vehicle as contained in the reports of Messrs Sowden and Smit which are based on the data retrieved and accompanied by an authentication affidavit.

## Onus

[107] He who asserts proves, and not he who denies, since a denial of a fact cannot naturally be proved, provided that it is a fact that is denied and that the denial is absolute.<sup>2</sup>

[108] In *Sprangers v FGI Namibia Ltd*<sup>3</sup> 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 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."

[109] It is common cause between the parties that the onus is on the plaintiff to prove that his claim was brought within the four corners of the insurance agreement, more particularly that the agreement covered the losses for the Jeep. It is further common cause that 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.

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<sup>2</sup> (Voet (22.3.10).

<sup>3</sup> *Sprangers v FGI Namibia Ltd* 2002 NR 128 (HC) at 131 G-H.

[110] The onus is thus on the defendant to show that it was entitled to reject the plaintiff's claim on the basis of the relevant clauses of the agreement, more in particular that:

- a) The plaintiff made a misrepresentation to the defendant in respect of any details relating to the occurrence of the event claimed by the plaintiff to have caused the damage.
- b) The plaintiff wilfully caused damage to the Jeep.

[111] As a result, the parties agreed that the defendant would have the onus to first adduce evidence. It was further agreed that the court would first deal with the issue of liability and depending on the outcome the issue of quantum will be considered.

#### Analysis of the evidence

[112] The court had the benefit of hearing eight witnesses in this matter of which three testified as expert witnesses. This court, however, did not hear the evidence of the most critical witness who knew exactly what happened on the evening in question. This person is the plaintiff, who chose not to testify, and as a result, the court must rely on the evidence of the witnesses who either arrived on the scene after the accident occurred or those who attempted to reconstruct the accident as well as those who retrieved and interpreted crash data from the vehicle.

[113] What is of great importance in the evaluation of evidence is that the evidence of the witnesses must be considered in its totality and not in a piecemeal fashion.

[114] In *New Zealand Construction (Pty) Ltd v Carpet Craft*<sup>4</sup> Leon J stated:

'If the party, on whom lies the burden of proof, goes as far as he reasonably can in

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<sup>4</sup> *New Zealand Construction (Pty) Ltd v Carpet Craft* 1976 (1) SA 345 (N) at 349A-E.

producing evidence and that evidence 'calls for an answer' then, in such case, he has produced prima facie proof, and in the absence of an answer from the other side, it becomes conclusive proof and he completely discharges his onus of proof. If a doubtful or unsatisfactory answer is given it is equivalent to no answer and the prima facie proof being undestroyed, again amounts to full proof.

One of the dangers in this approach is that it may in some cases come perilously close to placing an onus upon a defendant.

It is clear, however, that the modern tendency has been to move away from this piecemeal form of reasoning. In *R. v. Sacco*, 1958(2) SA 349 (N) at p. 352, HOLMES, J. (as he then was), suggested that the proper approach is to look at all the facts at the end of the case, including, if it be one of the facts, the absence of an explanation. But the fundamental question is still whether the party who bears the onus has discharged it, the absence of an explanation being no more than a circumstance to be taken into account in arriving at a conclusion. Sacco's case has been followed in a number of cases including some in the Appellate Division. Among these may be cited: *Arthur v. Bezuidenhout and Mieny*, 1962(2) SA 566 (AD) at p. 574A; *S. v. Sigwahla*, 1967(4) SA 566 (AD) at p. 569H; *Norwich Union Fire Insurance Society Ltd. v. Tutt* (2), 1962(3) SA 996 (AD); *S. v. Snyman*, 1968(2) SA 582 (AD) at p. 589H, and *Levy, N. O. v. Randalia Assurance Corporation of South Africa Ltd.*, 1971(2) SA 598 (AD) at p. 600H.'

[115] All the witnesses for the defendant, except for Ms Dames, were taken under extensive cross-examination by Mr Diedericks. If each witness's evidence is considered in isolation certain degrees of criticism can be levelled against their evidence however if the evidence is considered as a whole a very definite picture emerges.

[116] I will start with the evidence of the two police officers who arrived first on the scene on the night in question and will tie their evidence to that of the other witnesses.

[117] Both police officials in my view should be regarded as independent witnesses. Neither of these witnesses has any interest in the outcome of the case.

[118] DWO !Nawatiseb and Sgt Ndjavera are policemen with many years' worth of experience in investigating scenes of accidents. They were first on the scene of the accident as a result, their observations are of great value in this matter. The evidence of these two witnesses is not free from contradictions, however, the question is whether the extent of the contradictions is of such a nature to negate the value of their evidence

[119] Witnesses would very rarely give the exact evidence, and I am of the view that the contradictions that may exist in the evidence of these witnesses are not critical in nature. What is clear from the evidence of the two police officials is the following:

- a) There was no debris or spillage on the scene of the accident.
- b) There were no brake marks either on the tarmac or on the gravel leading up to the tree.
- c) The airbag did not deploy as a result of the impact.
- d) The plaintiff informed them that he collided with a cow and lost control of his vehicle and collided with the tree, however, they attended the scene within 15 minutes of getting the report, and the only cattle they came across on route to the accident was a substantial distance away from the accident scene walking towards Groot-Aub.
- e) There was no injured or dead animal found in the general vicinity of the accident scene.
- f) The plaintiff told the witnesses that his vehicle was not insured and no docket was opened and no further investigation was conducted in respect of the incident.
- g) The Jeep was not stuck to the tree.

[120] The evidence of the police officials ties in with the evidence of Mr Sowden and Mr Smit (more particularly that of Mr Smit) who testified that upon analysis of the EDR device:

- a) There was no swerving manoeuvre executed, which one would expect if the plaintiff swerved to avoid the animal in the road.
- b) If the plaintiff struck the animal as he reported to the police and to the defendant, there would have been two events recorded instead of one. This explains the fact that the police were unable to locate an injured or dead animal as there is no evidence of an impact with a cow.
- c) At no stage prior of the impact did the plaintiff apply his service brake nor did the stability control system of the vehicle engage. This explains why the police found brake marks or skid marks on the tarmac or on the gravel leading up to the tree.
- d) The airbags did not deploy on impact which in turn correlates with low-speed collision.
- e) The driver of the vehicle sharply accelerated prior to the accident, instead of applying his brakes prior to impact.

[121] The argument advanced against the evidence of Messrs Sowden, and Smit is that they obtained their qualifications online. Mr Smit, however, physically attended training in the United Kingdom. Mr Diedericks attempted to downplay the qualifications of the witnesses in respect of data retrieval from the EDR device. However, it is not in dispute that these witnesses have been trained to retrieve and analyse the data and received the relevant certification to do so. It is further not in dispute that these witnesses have been involved in data retrieval and analysis since 2017. Some opposition was raised in respect of the EDR device, but this opposition had no foundation in my view. Even though the plaintiff had the opportunity to call an expert to refute the evidence of Messrs Sowden and Smit, he did not do so.

[122] The data is retrieved via an interface and recorded in a CDR file which these witnesses could not have overwritten or tampered with. The analysis of the data had to be done within the data limitations set out by the manufacturers. I am satisfied that Mr Smit conducted his analysis within the limitations and requirements of the Crash Data Retrieval system.



[123] The evidence of Mr Smith and Mr Nambahu is largely based on the information disclosed by the plaintiff as to how and where the accident occurred, which led to them attempting to recreate the accident. Both these witnesses were of the opinion that the tree in question was not the tree where the accident took place, due to the circumference of the tree in question compared to the dent in the bumper of the vehicle. There were however no mathematical calculations in respect of speed of impact and other secondary factors like drag factor and brake application, etc.

[124] Mr Nambahu applied a non-scientific method in order to reconstruct the accident, but one cannot lose sight of kinetic and momentum force that was involved at the time of the accident causing damage. I am not sure if the witnesses expected that the dent in the vehicle and the tree will fit like hand in glove.

[125] If this court accepts in favour of the plaintiff that the tree on the Groot-Aub road is the tree where the accident occurred, it does not bring an end to the matter as there is no explanation for the data retrieved from the EDR of the Jeep and this data tells a different story. I am of the view that the data retrieve strengthens the observations of the police officers who attended the scene.

[126] The only witness that the plaintiff relies on is Mr Noabeb, who retrieved the vehicle from the scene of the accident this does not take this matter much further but his evidence does impact on his credibility and impartiality.

[127] He found the Jeep at the same tree where the police officers were. I take no issue with the place where the vehicle was removed from but Mr Noabeb's evidence stands in stark contrast to that of the two police officials. Mr Noabeb's evidence is that the Jeep was stuck to the tree and not just close to the tree. The Mr Noabeb's recollection of the surrounding area was that the grass stood half a meter high with lots of debris around the tree and coolant on the tree itself. The police officers testified that

the accident occurred during a drought period and there was no grass in the vicinity of the tree, nor was there any spillage or debris of the plaintiff's vehicle as everything was intact.

[128] Mr Noabeb explained to this court how he battled to extract the vehicle from the tree, again in contrast with the evidence of the police officers, who did not observe this even though they were on the scene.

[129] Mr Noabeb was adamant that the vehicle was unable to drive after the accident and could not explain how Mr Smith was able to drive the vehicle off the trailer and back on again when he and Mr Nambahu visited the scene with the vehicle.

[130] Mr Noabeb was not an independent witness in this matter, and I say so as he stated that, firstly, he and the plaintiff became friends as a result of their interactions after the accident when Mr Noabeb tried to get his payment from the plaintiff and secondly, although the plaintiff was invoiced for N\$3500, he paid Mr Noabeb N\$10 000 apparently from the goodness of his heart because of the delay in settling the invoice. I find this to be telling.

### Conclusion

[131] As stated earlier, if one considers the conspectus of the viva voce evidence and the real evidence presented in this court an inference can be drawn from the evidence. That inference is that the plaintiff's vehicle did not swerve to avoid a cow nor did he lose control over the vehicle. In fact, according to the data presented, the plaintiff literally stomped on the accelerator pedal, depressing it to 90% of its capacity ramming the vehicle into a stationary object. Whether it is the tree in question is debatable but I am inclined to give the plaintiff the benefit of the doubt in that regard.

[132] There are a number of other secondary issues that raise questions, but I do not deem it necessary to discuss those. Suffice it to say that defendant made out a case on a balance of probabilities that it was entitled to reject the plaintiff's claim. I would have expected the plaintiff to testify in response to the case made out by the defendant, but he chose not to do so. I must draw a negative inference from the fact that the plaintiff did not testify about facts that are peculiarly within his knowledge and his knowledge alone.

[133] In the absence of a reply by the plaintiff, the defendant completely discharged its onus of proof, and the claim of the plaintiff stands to be dismissed.

[134] My order is therefore as follows:

1. The plaintiff's claim is dismissed with costs.
2. Such costs include the cost of one instructed and one instructing counsel.
3. The matter is regarded as finalised.

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JS Prinsloo

Judge

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