

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-DEL-2022/03942

In the matter between:

**MIKAEL N EKANDJO**

**PLAINTIFF**

and

**FILLIPUS K E PAULUS**

**FIRST DEFENDANT**

**NDILIMIMANI STORES CARVING CC**

**SECOND DEFENDANT**

**Neutral citation:** *Ekandjo v Paulus* (HC-MD-CIV-ACT-DEL-2022/03942) [2023]  
NAHCMD 701 (3 November 2023)

**Coram:** CLAASEN J

**Heard:** 18 -19 September 2023, 21-22 September 2023.

**Delivered:** 03 November 2023

**Flynote:** Delict – Plaintiff suing for damages – Motor vehicle accident – Negligence – Truck turned left suddenly and failed to indicate that intention – Plaintiff and truck collided – First defendant confirmed that explanation in accident report of Namibian Police – Liability of employer for delictual acts of employee – Objective facts – First defendant drove a truck that belong to second defendant – First defendant was employed by the second defendant – Employer is owner of air-cooled truck – Collision occurred on Monday morning at 8h15 – Vicarious liability – Inference drawn by court.

**Summary:** The plaintiff sued the first and second defendants jointly and severally for damages arising from a motor vehicle collision between plaintiff's motor vehicle and a truck owned by the second defendant. The first defendant did not oppose the claim and default judgment was granted against him. Plaintiff pursued the second defendant on the basis of vicarious liability. Second defendant admitted the accident and that it owns the truck that collided with the plaintiff's vehicle but contended that the first defendant was not acting within the course and scope of his employment at the time.

*Held that* – Based on the plaintiff's oral evidence and the road accident form compiled by the Namibian Police, the first defendant turned left immediately without indicating that intention and collided with the plaintiff's vehicle. It shows in what manner the first defendant deviated from the standard of a reasonable driver, which constitutes negligence on the part of the first defendant. That was not displaced during cross-examination and the plaintiff's version remained unshaken. There is also no doubt that the collision caused the damage to the plaintiff's vehicle.

*Held further that* – The second principle in *Rex v Blom* 1939 AD 188 has been modified for civil cases as follows: the inference to be preferred must be the most plausible and appropriate one to be drawn from all the proved facts.

*Held further that* – In view of the facts herein, I find it to be the most natural and probable inference that indeed the first defendant was acting within the course and scope of his employment on that fateful Monday morning when the second defendant's air cooled truck collided with the plaintiff's vehicle.

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## ORDER

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1. Judgment is granted in favour of the plaintiff against the second defendant in the following terms:
  - 1.1 Payment in the amount of N\$44, 478.94;
  - 1.2 Interest on the aforesaid amount at the rate of 20% per annum from the date of judgment to the date of final payment;
  - 1.3 Cost of suit on a party and party scale.
2. The matter is regarded as finalised and it is removed from the roll.

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## JUDGMENT

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CLAASEN J:

[1] The plaintiff sued the first and second defendants, jointly and severally, for damages arising from a collision between his motor vehicle and a truck owned by the second defendant.

[2] The accident occurred on 07 March 2022, at around 08h15 on the road adjacent to the Select Service Station, in Ipumbu Shilongo Street in Ongwediva. At the material time, the plaintiff drove his vehicle, a Nissan NP 300 with registration no N 40333SH, and the first defendant drove a Powerstar 1756T Deutz Aircooled truck, with registration no N 13903SH, which belongs to the second defendant.

[3] The plaintiff pleaded that the collision was caused by the negligence of the first defendant, who suddenly and without warning veered into the plaintiff's lane and collided with the right side of the plaintiff's vehicle. The plaintiff avers that at the time of the collision the first defendant was an employee of the second defendant. Thus, the first defendant acted within the course and scope of his employment, alternatively, within the ambit of the risk created by such employment and, in the further alternative, acted in the furtherance of the interest and to the benefit of the second defendant.

[4] The claim was defended by the second defendant only, who admitted the accident but denied liability. The second defendant contended that the first defendant was not acting within the course and scope of his employment, nor was he furthering the interests of his employment. Since the first defendant did not oppose the claim, judgment was granted against him on 26 July 2023.

[5] Based on the pleadings and the pre-trial agreement, the following were common cause:

(a) that the accident occurred on the said date and time in the said street;

- (b) that the plaintiff drove his vehicle and the first defendant drove the truck;
- (c) that the second defendant is the owner of the truck;
- (d) that the first defendant was an employee of the second defendant at the time;
- (e) the quantum, being \$44 478.94, was agreed to before the commencement of the trial.

[6] What thus, remains for determination is the issue of negligence on the part of the first defendant and if that is found, whether that caused damage to the plaintiff's vehicle and finally the issue of vicarious liability.

[7] Although the plaintiff initially intended calling the first defendant, as a witness, the plaintiff had a change of heart when he discovered that the first defendant and his employer travelled together or arrived at court together for the trial. Thus, only the plaintiff testified in support of his case. The second defendant brought an application for absolution from the instance, which was refused and thereafter, closed its case without any testimony.

[8] Mr Ekandjo testified that on the given day, he was travelling on the left lane of a dual carriage way and had indicated to turn left towards the Shell Select Service Station. He then noticed the truck, driving almost parallel to his vehicle and at the time that the plaintiff turned off, the truck veered in the path of the plaintiff and collided with the right side of plaintiff's vehicle. That caused damage to the plaintiff's vehicle, from his right tyre to the front bumper.

[9] The drivers reported the accident to the Namibian Police, who compiled a report entitled Namibia Road Accident Form<sup>1</sup>. In relation to the first defendant's explanation as to what happened, the report indicated that when the first defendant approached the Shell Service Station, he turned to his left without indicating his intention to do so and whilst he was moving into the left lane, he collided with the right side of the plaintiff's vehicle.

[10] During cross-examination, counsel for the second defendant tested that version. It was pointed out that the sketch plan on the report did not depict the vehicles in the turning position, as said by the plaintiff. The witness replied that the

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<sup>1</sup> Exhibit A2.

sketches depict the positions of the vehicle and truck at the onset of the accident and not how they were positioned after the accident. He drew attention to the descriptive part next to the sketches, wherein the first defendant described that he turned left without indicating and collided with the plaintiff's vehicle.

[11] During closing submissions, the issue of vicarious liability emerged as the most contentious issue, with both parties citing principles from applicable case law. Counsel for the plaintiff, further developed his initial argument at absolution, namely that the proven facts herein lend themselves to an inevitable inference that the first defendant was indeed acting in the course and scope of his employment at the material time.

[12] On the other side, counsel for the second defendant argued that the proven facts do not lend themselves to that inference. In the course of her argument, counsel sought validation in the two 'cardinal principles of logic' enunciated in *R v Blom*,<sup>2</sup> and contended that the plaintiff does not meet that test, especially in respect of the second leg. She also relied in on the caution expressed in *Caswell v Powell Duffryn Associated Collieries Ltd*,<sup>3</sup> that inferences must be carefully distinguished from conjecture or speculation and that there can be no inference unless there are objective facts from which to infer the other facts. She argued that the plaintiff should have put on record the type of business the second defendant has, whether there were goods in the truck at the said time, the position that the first defendant had, the employment hours and what interests the first defendant was advancing at the time.

[13] Before dealing with the inferential reasoning in relation to vicarious liability, I briefly pause at the negligence issue. The test for negligence is whether a person's conduct complies with the standard of a reasonable person. This court had regard to the oral evidence by the plaintiff and exhibit 'A2.' The report inter alia contains descriptions given by the drivers respectively as well as a section titled 'rough sketch of the accident'. The description given by the first defendant accords with the evidence of the plaintiff and the first defendant even affixed his signature underneath

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<sup>2</sup> *Rex v Blom* 1939 AD 188 at 202–3. (1) The inference sought to be drawn must be consistent with all the proven facts. If it is not then the inference cannot be drawn. (2) The proved facts should be such that they exclude every reasonable inference save for the one to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.

<sup>3</sup> *Caswell v Powell Duffryn Associated Collieries Ltd*, [1939] All ER 722-733.

the description in the report. Additionally, the sketch contains a verbal description next to the sketch with words to the effect that vehicle B, (driven by the first defendant) turned left immediately without indicating that intention.

[14] The explanation that preceded the contact between the vehicle and the truck was not displaced by cross-examination and the plaintiff's version remained unshaken. The evidence clearly shows in what manner the first defendant deviated from the standards of a reasonable driver, which constitutes negligence on the part of the first defendant. There is also no doubt that the collision that occurred damaged the plaintiff's vehicle. All the plaintiff had to establish is any degree of negligence on the part of the first defendant, which onus the plaintiff has discharged.

[15] I now turn to the issue of vicarious liability herein. In general, various tests have been established by our courts in order to establish vicarious liability. Vicarious liability is the legal principle that an employer can be responsible for the action of its employee, even when the employee has committed an action that the employer would not approve of, and where the employer has not committed any wrong itself.<sup>4</sup> In these cases, liability can be imputed onto the employer if certain conditions are met.

[16] The first component of the test is, whether there is a relationship between the employer and the wrongdoer<sup>5</sup>, and secondly, the key question being "was it a wrongful act authorised by his employer or a wrongful and unauthorised mode of doing some act authorized?" In other words, was there sufficient connection between the wrong committed and the employee's employment, role and duties such as to make it fair to hold the employer vicariously liable?<sup>6</sup> (Own emphasis).

[17] In this matter, the plaintiff relies on inferential reasoning to establish vicarious liability, but the second defendant's contends that it will fail the principles set out in the renowned *Blom* case. In *Govan v Skidmore*<sup>7</sup> the cardinal principles of the *Blom* case came up and Selke J explained that:

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<sup>4</sup> *Blaauw v Pallais and Another* 2021 (1) NR 64 (HC) para 12.

<sup>5</sup> *Van der Merwe-Greeff Inc v Martin and Another* 2006 (1) NR 72 (HC).

<sup>6</sup> *Nghihepavali v Ministry of Agriculture Water and Forestry* [2016] NAHCNLD 51 (I 26/2014; 30 June 2016).

<sup>7</sup> *Govan v Skidmore* 1952 (1) SA 732 (N)

'*Rex v Blom* ... was a criminal case, and in my opinion, it is a fallacy to suppose that the second principle in *Blom's* case represents the minimum degree of proof required in a civil case, for, in finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on Evidence (3<sup>rd</sup> ed., para.32), by balancing probabilities select a conclusion which seems to be more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion may be not the only reasonable one... I do not regard myself as bound, in the present case, to apply the second of the principles set out in *Blom's* case in the way in which I should be bound to apply it were the case a criminal one.'

[18] Consequent to *Govan v Skidmore*<sup>8</sup> the second principle in the *Blom* case has been modified for civil cases as follows: the inference to be preferred must be the most plausible and appropriate one to be drawn from all the proved facts. See *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159C-D; *AA Bpk v De Beer* 1982 (2) SA 603 (A) at 614G - 615A; *Parents' Committee of Namibia and Others v Nujoma and Others* 1990 (1) SA 873 (SWA) at 887 C-D.

[19] Having said that, I return to the matter at hand. In the present matter, the following facts are either proven, admitted or cannot be disputed:

- (a) The second plaintiff is the owner of the truck;
- (b) The first defendant is employed by the second defendant;
- (c) It is an air-cooled truck;
- (d) The accident occurred on a Monday morning at around 8h15.

[20] In view of these objective facts, the inference that the first defendant was driving in the course and scope of his employment is hard to resist. In fact it has to be remembered that the inference need not be the only one. In view of these surrounding facts, I find it to be the most natural and probable inference that indeed the first defendant was acting within the course and scope of his employment on that Monday morning.

[21] It is not an untenable proposition to assume that where an employee drives

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<sup>8</sup> Ibid.

a vehicle of his employer on a Monday morning at 8h15, it is within the course and scope of his or her employment. This presumption can be displaced by evidence pointing to the contrary, but the second defendant who is the only other person that can displace it, opted not to give evidence. That silence in its own is inexplicable, it not being in dispute that the first defendant works for the second defendant and that the air-cooled truck belongs to the second defendant. There is authority for the proposition that where a party fails to testify about facts peculiar to him or her, a negative inference may be drawn in suitable circumstances. See for example *Galante v Dickinson* 1950 (2) SA 460 (A) at 465; *Potchefstroom se Staadsraad v Kotze* 1960 (3) SA 616 (A) at 637A-C; *New Zealand Construction (Pty) v Carpet Craft* 1971 (1) SA 345 (N).

[22] At the end of the day I am satisfied on a balance of probabilities that the plaintiff's evidence has proven that a delict was committed, that caused damage to plaintiff's vehicle and that the delict was committed whilst the first defendant was acting within the course and scope of his employment.

[23] In the result, the plaintiff's claim stands to succeed against the second defendant and costs are to follow the event.

[24] I make the following order:

1. Judgment is granted in favour of the plaintiff against the second defendant in the following terms:
  - 1.1. Payment in the amount of N\$44, 478.94;
  - 1.2. Interest on the aforesaid amount at the rate of 20% per annum from the date of judgment to the date of final payment;
  - 1.3. Cost of suit on a party and party scale.
2. The matter is regarded as finalised and it is removed from the roll.

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C CLAASEN



APPEARANCES

PLAINTIFF:

Mr. Pretorius

Francois Erasmus & Partners

SECOND DEFENDANT:

Ms Inonge Mainga

Inonge Mainga Attorneys