

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: HC-NLD-CIV-ACT-DEL-202/00317

In the matter between:

ASHARAF BAULETH

PLAINTIFF

and

JOB ASHIPALA

1ST DEFENDANT

KRISTOF ANDJAMBA

2ND DEFENDANT

Neutral citation: *Bauleth v Ashipala and Another* (HC-NLD-CIV-ACT-DEL-2021/00317) [2024] NAHCNLD 53 (21 May 2024)

Coram: MUNSU J

Heard: 06 March 2024

Delivered: 20 May 2024

Reasons: 21 May 2024

Flynote: Law of Delict – Motor vehicle collision – Parties alleging negligence – Onus on each party to prove what it alleges.

Summary: A collision occurred between the first defendant and the plaintiff's motor vehicle. Both drivers were heading in the same direction. The plaintiff alleged that the collision was caused by the negligence of the first defendant who was driving at an excessive speed, and failed to keep a proper lookout. Similarly, the first defendant attributed negligence on the part of the driver of the plaintiff's motor vehicle.

Held, that each party bears the onus to prove what it alleges.

Held, that the first defendant was not a credible witness as he developed his case as the matter progressed, and further reneged on some of the claims he earlier on made.

Held, that the plaintiff's case on the other hand was clear and credible. The evidence was that the first defendant was driving at an excessive speed when he struck the plaintiff's motor vehicle from behind.

Held, that the extent of the damage sustained by the plaintiff's motor vehicle supports the version that the first defendant was speeding.

Held, that the first defendant, having collided with the rear of the plaintiff's motor vehicle failed to show that he was not negligent.

Held, that the plaintiff managed to show on a balance of probabilities that the negligence of the first defendant was the sole cause of the collision.

Held, that the first defendant drove at an excessive speed and failed to keep a proper lookout, thus his conduct fell short of the reasonable care expected of a driver on a public road.

Held, that the damages to the plaintiff's motor vehicle were not disputed.

ORDER

Judgment is granted in favour of the Plaintiff against the First Defendant in the following terms:

1. Payment in the amount of N\$ 157, 243.40.
2. Interest on the aforesaid amount at the rate of 20% calculated from the date of judgment to the date of final payment.
3. Costs of suit.
4. The First Defendant's counterclaim is dismissed.
5. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MUNSU J

Introduction

[1] The plaintiff instituted action against the first defendant for damages arising from a motor vehicle collision, which occurred on 31 August 2021.

[2] The plaintiff is Mr Asharaf Bauleth, an adult male person and resident of Oshahati. He was represented by Ms Amupolo.

[3] The first defendant is Mr Job Ashipala, an adult male person and resident of Oshakati. He was represented up to the stage of pre-trial. He however, proceeded to trial without legal representation.

[4] The second defendant is Mr Kristof Andjamba, an adult male person residing in Ongwediva. He is cited merely for the interest he may have in the matter, and no order is sought against him.

The pleadings

[5] The plaintiff alleges that on 31 August 2021, and at or near the Oshakati-Ondangwa main road, a collision occurred between the first defendant's motor vehicle, a black Mercedes Benz bearing registration number N 1385 SH, and the plaintiff's motor vehicle, a Mercedes Benz with registration number N 447 SH. The plaintiff's motor vehicle was being driven at the time by his authorised wife, Ms. Liisa Kaapanda. The second defendant is said to have been operating a red Volkswagen with registration number N 2629 W.

[6] It is further alleged that the first defendant bumped the plaintiff's motor vehicle from the rear, and that the collision was solely caused by the negligence of the first defendant in that:

- a. He drove at an excessive speed;
- b. He failed to keep a proper lookout;
- c. He failed to exercise reasonable care expected of a reasonable driver on a public road;
- d. He failed to apply brakes timeously so as to avoid the accident;
- e. He drove on a public road while he was unqualified, only being in possession of a learner's licence, and without the supervision of a person having a valid driving licence.

[7] Furthermore, it is alleged that, as a result of the collision, the plaintiff's motor vehicle suffered damages in the amount of N\$ 157 243.40, being the reasonable and necessary costs to repair and bring the motor vehicle to its pre-collision condition. Despite demand, the first defendant has failed to pay the aforesaid amount.

[8] In his plea, the first defendant denied liability for the collision. He filed a counterclaim in which he alleged that the collision was caused by the sole negligence of the driver of the plaintiff's motor vehicle Ms Kaapanda, in one or more of the following ways:

- a. She drove recklessly and negligently without due regard to the other road users;
- b. She overtook the second defendant's motor vehicle while it was inopportune to do so;
- c. She 'entered' the first defendant's lane when it was dangerous and inopportune to do so and as a result collided with the first defendant's motor vehicle;
- d. In the process of overtaking the second defendant's motor vehicle which was travelling in front of her, she failed to indicate her intention to change lanes and made a sudden change to the inside lane without allowing sufficient distance between her motor vehicle and that of the first defendant;
- e. She drove at an excessive speed under the circumstances;
- f. She failed to take cognisance of the first defendant's approaching motor vehicle;
- g. She failed to stop the motor vehicle she was driving or reduce speed to avoid the collision;
- h. She failed to avoid the collision in the circumstances where a reasonable driver would and could have done so.

[9] The first defendant alleges that, as a result of the collision, his motor vehicle suffered damages in the amount of N\$ 273 526.01, being the reasonable costs of restoring the motor vehicle to its pre-collision condition.

[10] In his plea to the counterclaim, the plaintiff maintained that the plaintiff's motor vehicle safely overtook the second defendant's motor vehicle and drove a safe distance

from the second defendant's motor vehicle before the first defendant suddenly appeared and collided into the plaintiff's motor vehicle from behind.

[11] The plaintiff further pleaded that his motor vehicle did not enter the first defendant's lane but that it was already in that lane before the first defendant's motor vehicle suddenly appeared.

[12] In addition, the plaintiff pleaded that the driver of his motor vehicle kept a proper lookout of the traffic and that it is the first defendant that was driving excessively and collided into the plaintiff's motor vehicle. He further pleaded that the driver of his motor vehicle could not avoid the collision as she was on the inside lane with traffic in front and on the outside lane.

The issue for determination

[13] In terms of the pre-trial order, this court has to determine whether the sole cause of the collision was the negligent driving of the first defendant or that of the driver of the plaintiff's motor vehicle. Also, the court has to determine whether there was any contributory negligence.

The plaintiff's evidence

[14] Three witnesses testified on behalf of the plaintiff's case. The testimony of Ms Liisa Kaapanda was that she is married to the plaintiff, and is employed as a lecturer at the University of Namibia. She was the driver of the plaintiff's motor vehicle on the date of the incident.

[15] She testified that she was driving on the outside lane of the dual carriageway between Ongwediva and Oshakati. She changed lanes before she drove past the Natis three way. Near the vicinity of Tafel Bar, she drove past one motor vehicle which was

on the outside lane. Shortly thereafter and without any warning, she felt a huge impact and her vehicle jerked forward. She proceeded to park the motor vehicle and remained seated to gather her thoughts. She testified that the first defendant approached her motor vehicle and enquired if she was okay. She further narrated that she phoned her husband.

[16] The witness went on to say that a police officer, one Inspector Amupolo phoned Ongwediva traffic officers. She claims that when Inspector Amupolo asked the first defendant why he was driving too fast, the latter was unable to provide a clear response.

[17] It was her testimony that she observed that the motor vehicle she was driving had been struck from behind and that the entire rear of the motor vehicle had been forced forward, squeezing the back doors to the extent that they could not open. Furthermore, the back window and one of the tyres had also been damaged.

[18] She attributed the cause of the collision to the negligence of the first defendant who was driving at an excessive speed; failed to keep a proper lookout; failed to exercise reasonable care expected of any reasonable driver on a public road; failed to apply brakes timeously so as to avoid the accident, and drove on a public road without a driving licence.

[19] Mr Asharaf Bauleth is employed as a Manager at Texco Trading CC, Oshakati. He testified that he is the lawful owner of the motor vehicle, a blue Mercedes Benz C320 bearing registration number N 4447 SH that his wife Ms Kaapanda was driving on the date of the incident.

[20] He further testified that he was called by Ms Kaapanda who informed him of the collision and he quickly drove to the scene. There he observed that his vehicle was

bumped from behind and the whole backside was squeezed forward causing the rear doors not opening.

[21] It was his testimony that he could tell from the extent of the damage that the motor vehicle was damaged beyond economic repair. He stated that he paid a breakdown company which towed the vehicle to his house.

[22] The witness further stated that he visited Owen's Trading Enterprises CC, a panel beater, accompanied by his spouse and the first defendant, who at the time promised to cover the cost of repairs. He related that he was provided a quote of N\$ 157, 243.40.

[23] He further narrated that he approached 'Professional' vehicle repairs which also assessed the motor vehicle and determined that it was beyond economic repair. Additionally, he recounted that eventually the negotiations with the first defendant failed hence the institution of this action.

[24] Inspector Jutty Amupolo works at the Oshana Police Regional Headquarters as a police officer. She testified that on the day of the incident, she was driving from Ongwediva to Oshakati when she was alerted by her passenger of a sedan motor vehicle that was approaching from behind at a high speed. She related that suddenly she heard a sound. It was the motor vehicle that overtook her that bumped into the plaintiff's motor vehicle.

[25] She added in her testimony that she pulled out of the road and parked her motor vehicle. She then walked to the motor vehicle that was bumped and found a woman shivering. She approached the man who was driving the motor vehicle that bumped the woman's motor vehicle and asked him why he was driving so fast. According to her, the man was just quiet and did not say anything. She further testified that she said to the

man 'look at what has just happened'. She related that she called traffic officers and left. It is common cause that the woman and the man referred to by the witness is Ms Kaapanda and the first defendant.

[26] According to the witness Ms Kaapanda was driving on the inside lane, while the first defendant was driving on the outside lane. She testified that when the first defendant overtook her on the left lane, he swerved to the inside lane where he went to bump the plaintiff's vehicle. She confirmed that the plaintiff's motor vehicle was damaged on the rear.

[27] Mr Norman Mouton of Owens Trading Enterprises CC informed the court that he has 25 years' experience in panel beating and spraying. He narrated that he was approached by the plaintiff in order to assess his motor vehicle.

[28] He related that the plaintiff's motor vehicle was damaged on the rear. It was his testimony that ordinarily a detailed quotation would not be prepared as the amount would exceed the value. However, in this case, he made a detailed quotation because he was asked to. He recounted that he quoted both new and second hand parts from the scrap yard and the amount totalled N\$ 157, 243.40.

[29] In cross-examination, the witness stated that he also assessed the first defendant's motor vehicle, which was beyond economic repair.

The first defendant's evidence

[30] The first defendant confirmed the date of the collision and the particulars of the motor vehicles involved. He also confirmed that he was driving in the same direction on a dual carriageway as the driver of the plaintiff's motor vehicle.

[31] He testified that the driver of the plaintiff's motor vehicle was driving in front on the outside lane while he was driving on the inside lane. He stated that the collision was caused by the driver of the plaintiff's motor vehicle who overtook the second defendant's motor vehicle after colliding into him. He further narrated that it was inopportune for the driver of the plaintiff's motor vehicle to overtake the second defendant as the first defendant's motor vehicle was not far from her. He also testified that the driver of the plaintiff's motor vehicle was driving at a high speed when she veered into his lane causing the collision.

[32] Furthermore, the first defendant presented two quotations in respect of his motor vehicle with the amounts of N\$ 273, 526.01 and N\$ 276, 696.22. He further narrated that he obtained a valuation report of his motor vehicle from M+Z Motors Ondangwa which indicated that the value of his motor vehicle as at 04 April 2020 was only N\$ 101, 100. After becoming aware of the value of his motor vehicle, Owen's Trading Enterprises CC that had provided him the first quotation gave him another quotation indicating that his motor vehicle was damaged beyond economic repair.

Evaluation of the evidence

[33] In the present matter, each party alleges negligence on the part of the other. Thus, each party must prove what it alleges.¹

[34] The first defendant was not a credible witness in my opinion. The reason is that he appeared to develop his case as the matter progressed. The driver of the plaintiff's motor vehicle gave testimony that she was initially driving on the outside lane and then switched to the inside lane in order to avoid the stopping vehicles, which included taxis.

¹ The court is mindful of what has been stated in *National Employers General Insurance Co. Ltd v Jagers* 1984 (4) SA 437 (E); *Stellenbosch Farmers' Winery Group and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA); *Von Wielligh v Shaumbwako* (I 2499/2014) [2015] NAHCMD 168 (22 July 2015) at 16; *Awases v Smith* (I 1272/2016) [2017] NAHCMD 277 (4 October 2017); *Motor Vehicle Accident Fund of Namibia v Lukatezi* Case No SA 13/2008 (at para16 - 17) delivered on 09 February 2009; *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159.

Her evidence was that after she changed lanes, she drove for a considerable distance before the collision. But during cross-examination, the first defendant misrepresented the facts, and incorrectly built his case on the witness's testimony. He vaguely asked the witness how she knew that it was not because of the motor vehicles that were in front of her that she was afraid of bumping and decided to change lanes. The first defendant did not seriously challenge the plaintiff's evidence, and also did not put forth a clear case.

[35] The first defendant further reneged on claims or assertions he earlier on made. For instance, he put to the driver of the plaintiff's motor vehicle that she was driving at an excessive speed, which was one of the causes of the crash. However, when he was cross-examined, he denied having said so, even though this was his pleaded case. Furthermore, the first defendant claimed that in the process of changing lanes, the driver of the plaintiff's motor vehicle bumped the second defendant's motor vehicle. There was no evidence to support this claim, prompting the first defendant not to pursue this claim.

[36] On the other hand, the plaintiff's case was clear and credible. It was also supported by evidence of an independent witness. The driver of the plaintiff's motor vehicle gave testimony that she was driving on the inside lane when the first defendant bumped her motor vehicle from behind.

[37] Inspector Amupolo who was also driving on the same road informed the court that the first defendant overtook her while he was driving at an excessive speed, prompting the witness to remark that such type of driving is what leads to accidents. Contrary to the first defendant's evidence, Inspector Amupolo stated that the first defendant was driving on the outside lane. According to her, she observed the first defendant's motor vehicle swerve from the outside to the inside lane, and shortly thereafter the witness heard a collision sound. Although Inspector Amupolo did not specifically witness the impact, as she was not paying close attention to the other motor vehicles, her evidence is consistent with the proven facts. Also, it was not disputed that Inspector Amupolo questioned the first defendant why he was driving too fast.

[38] Inspector Amupolo's testimony that the first defendant was speeding is supported by the extent of the damage to the plaintiff's motor vehicle. It is worth noting that both vehicles were travelling in the same direction, yet the impact was so significant.

[39] There was further evidence of text messages between the plaintiff and the first defendant, which the first defendant confirmed, indicating that the first defendant had committed to repair the plaintiff's motor vehicle, and had begun soliciting for spare parts. Such evidence is circumstantial and shows that the first defendant admitted his wrong to the plaintiff.

[40] Counsel for the plaintiff cogently submitted that a driver who collides with the rear of a vehicle in front of him is prima facie negligent unless he or she can give an explanation indicating that he or she was not negligent. This is a well-established principle in motor vehicle collisions. I find that the first defendant failed to show that he was not negligent. It is my considered view that the plaintiff managed to show on a balance of probabilities that the negligence of the first defendant was the sole cause of the collision. The first defendant drove at an excessive speed and failed to keep a proper lookout, thereby falling short of the reasonable care expected of a driver on a public road.

[41] The damages to the plaintiff's motor vehicle were not disputed. According to the expert witness, he sourced both new and old spare parts.

Costs

[42] There is no reason why the general rule that costs follow the event should not be applicable.

The order:

[43] For these reasons, I make the following order:

Judgment is granted in favour of the Plaintiff against the First Defendant in the following terms:

1. Payment in the amount of N\$ 157, 243.40.
2. Interest on the aforesaid amount at the rate of 20% calculated from the date of judgment to the date of final payment.
3. Costs of suit.
4. The First Defendant's counterclaim is dismissed.
5. The matter is removed from the roll and is regarded as finalised.

D C MUNSU
JUDGE

APPEARANCES

PLAINTIFF:

M Amupolo
Of Jacobs Amupolo Lawyers & Conveyancers
Ongwediva

1ST DEFENDANT:

In Person.