

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
JUDGMENT

Case No: HC-NLD-CIV-ACT-DEL-2018/00028

In the matter between:

SILVESTER ANDIMA

PLAINTIFF

and

ISAKA LEEVI

FIRST DEFENDANT

ZONG MEI ENGINEERING (PTY) LTD

SECOND DEFENDANT

Neutral citation: *Andima v Leevi* (HC-NLD-CIV-ACT-DEL-2018/00028) [2020]
NAHCNLD 69 (17 June 2020)

Coram: DIERGAARDT, AJ

Heard: 26 - 27 May 2020 and 15 June 2020

Delivered: 17 June 2020

Flynote: Law of delict – Damages occasioned by a motor vehicle collision – standard of skill to be employed by a driver – Law of evidence – irreconcilable versions before court in a trial- most probable version- Plaintiff's version collaborated.

Summary: The plaintiff sued the defendants for damages occasioned by a motor vehicle collision with the defendant's vehicle and damages sustained and costs.

The court held that had the defendant kept a proper look out he would then in all likelihood have seen the plaintiff attempting to overtake. Thus held the defendants liable for the damages occasioned by the collision with costs.

ORDER

Judgment is granted in favor of the Plaintiff against the first and second defendant, jointly and severally the one paying the other to be absolved:

1. Payment in the amount of N\$45 000;
2. Interest on the aforesaid amount at 20% per annum from the date of judgment to the date of final payment;
3. Costs of suit.

JUDGMENT

DIERGAARDT AJ:

Introduction

[1] This is a claim based on a motor vehicle collision wherein the plaintiff claim damages to his motor vehicle in the amount of N\$ 155 000. Mr Andima, the plaintiff and lawful owner of the motor vehicle, issued summons against the first defendant, Mr Leevi who was at the time in the lawful employment of Zong Mei Engineering (Pty) Ltd being the second defendant. The Plaintiff claims from the defendant the amount of N\$45 000, being the reasonable costs to repair his motor vehicle, interests on that amount at the rate of 20% per annum from the date of judgment until the final date of payment and costs of suit. The amount was amended in the amended particulars of claim to N\$

48 600 and later in the Joint pre-trial report to now reflect the amount of N\$ 45 000 which all the parties involved do not dispute.

[2] The First defendant and second defendant have defended the claim and filed a plea to the plaintiff's particulars of claim, no counter claim was received from the defendants.

The plea

[3] In his plea the defendant denies any wrongdoing or negligence on his part but pleaded in the alternative that should the court find that he was negligent, which he denies, then the plaintiff's negligence was a contributing cause of the collision. Further thereto, the defendant pleaded that if the plaintiff has suffered damages then the defendant is not liable for the whole of such damages but only for a portion thereof as may be determined by court in terms of section 2 (a) and (b) of the Apportionment of Damages Act 34 of 1956.

[4] In the pre-trial order the issues of fact the court was called upon to adjudicate were the following:

- '1. Whether the Plaintiff was the owner of a Toyota pick-up motor vehicle with registration number N 2976 EN.
2. Whether the sole cause of the collision was the negligent driving of the First Defendant in that he, inter alia -
 - 2.1. failed to keep a proper lookout;
 - 2.2. failed to apply his brakes timeously or at all;
 - 2.3. failed to drive the vehicle in a manner that a reasonable person under the circumstances would have driven;
 - 2.4. failed to indicate his intention to turn.
3. Whether the sole cause of the collision was the negligent driving of the Plaintiff in that he,
inter alia -

- 3.1. failed to keep a proper lookout for other vehicles and in particular the truck of the Second Defendant;
- 3.2. drove at an excessive speed in the circumstances;
- 3.3. failed to keep a safe following distance behind the Second Defendant's truck;
- 3.4. failed to notice the First Defendant indicating his intention to turn to the right at the oncoming intersection;
- 3.5. attempted to overtake the Second Defendant's truck at a time when it was dangerous, inopportune and unlawful to do so;
- 3.6. failed to apply his brakes timeously or at all and as a result collided with the rear-end of the second Defendant's truck;
- 3.7. failed to avoid a collision when by the exercise of reasonable care he could have and should have been able to do so.

4. Whether the Defendants are liable towards the Plaintiff in the amount of N\$45,000.'

[5] The issues of law to be resolved at the trial is the respective degrees of negligence of the drivers of the respective vehicles.

Common cause facts

[6] The following facts appear to be common cause between the parties:

- 1. The citation of both parties.
- 2. The jurisdiction of the court to entertain the matter.
- 3. The identity of the respective vehicles driven by both parties and that both Plaintiff and First Defendant were driving the vehicles at the time of the accident.
- 4. That at the time of the accident, First Defendant was acting in the course and scope of his employment for Second Defendant.
- 5. That, on or about 10 March 2017 and at or near Omungwelume to Oshakati Main Road, Namibia, a collision occurred between the Plaintiff's aforesaid

motor vehicle there and then being driven by the Plaintiff, and a truck with registration number N 185-109 W, there and then being driven by the Plaintiff, and a truck with registration number N 185-109 W, there and then being driven by the First Defendant acting in the course and scope of his employment for the Second Defendant.

6. The quantum of the Plaintiff's claim in the amount of N\$45,000.

Evidence

Plaintiff

[7] The Plaintiff called one witnesses to testify on his behalf, namely, Nelao Shifeni. In support of his claim the plaintiff's witness statement was read into the record and marked as exhibit "A". The plaintiff proceeded to testify that he is the plaintiff and he is the the lawful owner of a Toyota pick up motor vehicle with registration number N 2976 EN. On 10 March 2017 an accident occurred on the Oshakati-Omugwelume main road which involved a truck with registration number N 185190 W belonging to second defendant, being driven by first defendant, employed by second defendant.

[8] In his testimony he indicates that he saw the truck being driven by first defendant enter onto the road some distance front of him. He duly reduced his speed and followed the truck being driven by first defendant for approximately three minutes. He indicated that because the truck was driving slow and at the time he was driving a speed below 60km/h, he decided to overtake the truck. He indicated that he was approximately 20 meters away from the truck when he made his intention to overtake by turning on his indicators. He did not see any "do not over takes signs" on the road. He allegedly made certain that there were no vehicles approaching from the front and that there were no impediments to me overtaking the truck as the road was clear and there were no obstructions and/or impediments on the road and he had a clear field of vision.

[9] The plaintiff allegedly indicated his intention to overtake the truck and moved in to the right hand lane. It was at that time that he saw that the truck was turning into the right hand lane, without indicating, he also did not see any brake lights on the truck before what appeared to be the intention of exiting the road on the right hand side. In an attempt to avoid the collision he allegedly applied his brakes and swerved the vehicle to the left, he was unfortunately unable to avoid colliding with the truck and the collision occurred. Where his vehicle collided with the truck on the left rear side whilst the right front side of my vehicle suffered severe damage.

Nelao Shifeni

[10] Ms Shifeni who testified for the plaintiff corroborated the evidence given by the plaintiff, she indicated that on the day of the collision, she was in the vehicle with the plaintiff along with other friend and family.

[11] She testified that the plaintiff was driving behind the first defendant, he followed the truck for approximately 3 minutes on the Oshakati-Omugwelumbe main road. She testified that the plaintiff was driving at a reasonable speed and he was not speeding. She indicated that the plaintiff made his intentions to overtake by switching on his indicators. In the process of overtaking the truck she noticed that the truck had moved into the right hand lane wanting to exit the road on the right. She did not see the truck indicating to turn.

Defendant

[12] The defendant opened his case and testified that on 10 March 2017 midday, he was travelling on the Omugwelumbe and Oshakati Main Road towards the dumping site from the road construction site where he was working at that time driving the a construction tipper truck which belonged to the second defendant, on the road which was under construction.

[13] He indicated that the truck with registration number N 185-109 W, had a construction vehicle tag on it and had an amber warning light fixed to its roof which was activated warning motorists of its presence on the road. He indicated that.

[14] He narrated that he intended to turn off the road, he extended his right arm to indicate his intention, he slowed down and looked for oncoming traffic and it was clear, he looked into his review and saw the plaintiff's vehicle at the 60km road sign which was 300m away from him when he decided to execute the turn. He proceeded to turn and that is when he saw the plaintiff for the second time accelerating and the collision occurred.

[15] He indicated that there were warning signs along the road under construction and one included no over taking on the road

The law

[16] Prinsloo J in *Ashipala v Hainane* (HC-MD-CIV-ACT-DEL-2017/03739) [2019] NAHCMD 91 (8 April 2019) stated: once the plaintiff proves an occurrence giving rise to an inference of negligence on the part of the defendant, the latter must produce evidence to the contrary, he must tell the remainder of the story, or take a risk that judgment be given against him.

[17] Where two versions are mutually destructive as stated in the case of *Harold Schmidt t/a Prestige Home Innovations v Heita* 2006 (2) NR 555 (HC) at 559D in that

' . . . The correct approach would be for the court to apply its mind not only to the merits and demerits of the two mutually destructive versions but also their probabilities and it is only after so applying its mind that the court would be justified in reaching the conclusion as to which opinion to accept and which to reject'

"...where the onus rests on the plaintiff and there are two mutually destructive stories he (the plaintiff) can only succeed if he satisfies the court on a preponderance of probabilities that

his version is true and accurate and therefore acceptable, and that the version advanced by the defendant is therefore false or mistaken and falls to be rejected. (*National Employers' General Insurance Co. Ltd v Jagers* 1984 (4) SA 437 (E) at 440E)".

[18] The test for determining negligence in motor vehicle collisions, can be seen in the case of *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430) 'were it applied in traffic cases to the driving of a motor vehicle, the concept of negligence takes account of the codes and conventions which normally govern the movement of vehicular traffic on public roads. Users of the road, whether they be vehicle drivers or pedestrians, normally regulate their conduct on the supposition that these codes and conventions will be generally observed by other users. Consequently, a departure from these codes and conventions will often give rise to a situation which is unexpected and dangerous and, in certain circumstances, will amount to negligence. The concept of negligence on the road also takes account of the fact that the driving of a motor vehicle under modern traffic conditions demands a substantial degree of skill and experience and that in certain circumstances *imperitia culpa adnumeratur*'.¹

Analysis

[19] The Plaintiff and Defendant agreed on the quantum of damages claimed. The court should therefore only deal with the issue of liability i.e. whose driving between the Plaintiff and the Defendant was negligent and therefore caused the accident. The party's versions differed greatly with regard to the point of impact to such an extent that the court ordered an examination in loco.

[20] During this examination in loco the court made the following observations in short:

1. The plaintiff pointed out that the defendant joined the road from his right hand side and moved to the left hand side leaving him with a clear view of the truck for approximately 20 meters .Thereafter while he was attempting to overtake the

¹Also see Isaacs and Leveson *The Law of Collisions in South Africa*. 8th edition at p. 92 and *Beswick v Crews* 1965 (2) SA 690 (A) at 705).

defendant decided to turn right without indicating and a collision was unavoidable. He pointed out the point of impact being at the start of a curve.

2. The defendant on the other hand pointed out during the examination in loco that he joined the road coming from the left hand side and the plaintiff was quite a distance from him when he observed him the first time.

3. According to my observations the plaintiff's car was approximately 300metres away from the defendant's truck. When he started indicating to the right the plaintiff was very far and he only saw the plaintiff again when he was already turning and the collisions was imminent.

[21] Despite the contradicting versions especially when the examination in loco was conducted the following facts in common cause prevailed:

- a) That there was a collision between the plaintiff and defendants vehicles.
- b) That the defendant was driving in front of the plaintiff when the defendant decided to turn right.
- c) The plaintiff then whilst overtaking realised that the defendant is turning and swerved to the left attempting to avoid a collision.

[22] In determining the question of negligent driving of motor vehicles on a public road, the interpretation and application of s 81 of the Road Traffic and Transport Act 22 of 1999 is the main key². It provides:

'No person shall drive a vehicle on a public road without reasonable consideration for any other person using the road.'

Application of the law to the facts

[23] It became apparent during the trial that the defendants defence partly rest on the contention that the plaintiff overtook in a curve .This issue was not addressed in the pre-trial conference and can be regarded as a new factual dispute. The court allowed the

² See Marx v Hunze 2007 (1) NR 228, para 5.

defendant to elaborate on the issue on the basis of law that the court must be satisfied that the truth has been told but after an examination in loco the court is convinced that the accident did not take place in a curve and I will not dwell any further on the issue.

[24] There was no proper photo plan or sketch plan to assist the court and corroborate either the plaintiff or defendants versions of how the accident took place. The plaintiff however called a witness who made a favourable impression to the court. The court found that witness Nelao Shifeni to be a reliable and trustworthy witness. Her evidence was clear and concise and without any inherent improbabilities. The witness corroborated the version of the plaintiff.

[25] This Ms Shifeni testified that she was a passenger in the plaintiff's vehicle sitting on the left hand side. The court is satisfied that she had a clear and proper vision of what transpired in front. She was very sure that the plaintiff indicated his intention to overtake when the defendant started turning to the right without indicating. She also did not see any road signs prohibiting over taking on the road. The issue of a curve was not put to the witness by the defence. The court accepts her testimony.

[26] As per the courts observation during examination in loco the point of impact was at the end of a curve not inside the curve as the defendant would like the court to believe. The visibility was good on that day and there was no obstructions between the two vehicles. The defendant drove a huge truck that was high and visible.

[27] Common sense dictates that if the defendant indeed indicated and the plaintiff was at the distance as indicated by the defendant which was approximately 200metres, the plaintiff would have seen the indicator in time and not overtake the defendant.

[28] I respectfully agree that the timing of the indicator is of vital importance for the court in ascertaining if any negligence on the part of the plaintiff, however there is no evidence from first defendant, of how long after he allegedly indicated to turn, he decided to move his vehicle to the right. The defendant's version was tainted with contradictions as pointed out by the defence. I am thus not convinced that the defendant indeed indicated.

[29] In *R v Miller* 1957 (3) SA 44 (T) Dowling J stated the following in regard to the same situation (at 50A-E): 8 ' . . . Generally speaking, the motorist may not assume that his signal for a right-hand turn has been observed simply because he has given an adequate signal. In my opinion this is correct in principle. The motorist must make sure that he can execute a right-hand turn without endangering either oncoming or following traffic. Generally speaking he can only do this by properly satisfying himself that such traffic has observed and is responding to his signal, or that it is sufficiently far away or slow-moving not to be endangered. . . . "It is in my opinion quite practicable for a motorist by the use of a properly adjusted rear-view mirror to notice whether a following car was close behind and travelling at such a speed that it may be endangered by a right hand turn and whether it was responding to a signal either by moving to the left or by decelerating, while at the same time keeping a safe look-out in respect of oncoming and other traffic. If this cannot be done in particular circumstances, the turn should not be executed at all. It is a manoeuvre inherently dangerous in its nature unless executed with scrupulous care".'

[30] I am further of the view that had the defendant kept a proper look out he would then in all likelihood have seen the plaintiff attempting to overtake. I also doubt whether the defendant indeed looked back for a second time to make sure where the plaintiff's vehicle was.

[31] I fully agree with the principle adopted in the *Miller* case as mentioned above that even if the defendant indicated, which was decided was not the case there was a duty on him to satisfy himself that such traffic has observed and is responding to his signal, or that it is sufficiently far away or slow-moving not to be endangered.

[32] Having regard to the submissions before me and the evidence tendered, I am of the view that the version of the plaintiff is more probable than that of the defendant for the reasons as mentioned above.

Conclusion

[33] I accept the version of the plaintiff as the probable version, in that the accident is attributable to the negligent driving of the defendant. The defendant did not show reasonable consideration to the plaintiff who was driving on the same road. Furthermore, the defendant did not in the circumstances keep a proper look out and

drove onto the lane whilst the plaintiff was busy overtaking, failing to indicate his intention to turn. He thus failed to drive the vehicle in a manner that a reasonable person under the circumstances would have driven. The defendant thus causing the accident and the defendant's negligence was the sole cause of such accident.

Agreement on issue of quantum

[34] I refer to the case of *Awases v Smith* (I 1272/2016) [2017] NAHCMD 277 (4 October 2017) Masuku J said:

'I should, at this juncture mention that the parties agreed during the course of the trial that there was no need to prove the damages sustained by each. The effect of this agreement was that whichever way the court found, whether for the plaintiff or the defendant, the court would grant damages as claimed.'

[35] In *casu* the parties agreed on the quantum at case management stage, thus no need to prove the damages sustained by the plaintiff. The effect of this agreement is that court would grant damages as claimed. It is in the light of this agreement that I make the order that follows below in favour of the plaintiff.

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

Judgment is granted in favour of the Plaintiff against the first and second defendant, jointly and severally the one paying the other to be absolved:

1. Payment in the amount of N\$45 000;
2. Interest on the aforesaid amount at 20% per annum from the date of judgment to the date of final payment;
3. Costs of suit.

A DIERGAARDT

ACTING JUDGE

APPEARANCES

PLAINTIFF: Mr P Greyling
 Of Greyling and Associate, Oshakati

RESPONDENT: Ms W Horn
 Instructed by Francois Erasmus & Partners, Windhoek