CASE NO.: (P) I 679/2006

IN THE HIGH COURT OF NAMIBIA

In the matter between:

IMMANUEL MARX PLAINTIFF

and

JAN JACOB HUNZE DEFENDANT

CORAM : PARKER, A J

Heard on **:** 15, 16 March 2006

Delivered on 31 March 2006

JUDGMENT

PARKER, A J:

[1] In this case, the following facts are not in dispute: On 30 August 2001 at the intersection of Independence Avenue and Omongo Street, Wanaheda in Windhoek District, between 21h00 and 21h15 a collision occurred between the plaintiff's vehicle and defendant's vehicle. The plaintiff's vehicle was travelling northwards from the southern direction along Independence Avenue; Independence Avenue is the main road, i.e. the advantageous route. The defendant's vehicle was travelling eastwards on Omongo Street, from the west. There is a stop sign on Omongo Street at its intersection with Independence Avenue. At the point of the intersection, Independence Avenue has two lanes, and at the time of the accident Independence Avenue was lit with streetlights, and both vehicles had their headlights on. Wanaheda Police Station is situated on the southeastern side of the intersection, and very near the spot where the accident occurred. At the time of the accident, the defendant resided at House No. 17 Omongo Street, in the immediate vicinity of the intersection and the Wanaheda Police Station. At the time of the accident, the defendant had a lady passenger in his vehicle.

[2] The front part of the plaintiff's vehicle collided with the rear right door of the

defendant's vehicle. Therefore, while the plaintiff's vehicle sustained frontal damage, as shown in a photograph (Exh "F"), the defendant's vehicle sustained damage to its rear right door. These two closely related pieces of evidence are crucial and helpful in assisting me to first, determine, of the two parties, whose negligence was at play, and if so, how to apportion blame. I will therefore return to them in due course.

[3] It is also common cause between the parties that while the plaintiff reported the accident at the Wanaheda Police Station the same night, shortly after the accident, the defendant reported the accident the following morning. When the plaintiff, accompanied by a Police Officer, visited the defendant's residence the same night after he had reported the accident, defendant was not at his residence. Fortunately, nobody sustained any injuries as a result of the collision.

[4] By the consent of the parties, the following issues, which are set out in the pleadings, are no longer in dispute, to wit: (1) At the time of the accident, both parties were in possession of valid drivers' licenses. (2) The quantum of damages sustained by the parties as a result of the accident is N$35,787.64 in respect of the plaintiff, and N$15,000.00 in respect of the defendant. Consequently, I am called upon to decide only two issues, apart from the question of costs, namely, (a) the question of negligence, and (b) the alternative plea of the defendant respecting an alleged full-and-final-settlement agreement between the parties. Thus, in my considered view, this case falls within a short and narrow compass, albeit quite a number of authorities have been referred to me.

[5] I will treat the question of negligence first. Section 81 of the Road Traffic and Transport Act, 1999[1] provides: "No person shall drive a vehicle on a public road *without reasonable consideration for any other person using the road.*" (My emphasis) This wise prescript should be the starting point of my enquiry. It has been held that a driver travelling along a main road is entitled to assume that the traffic approaching from a minor crossroad will not enter the intersection unless it is safe to do so. In *Victoria Falls and Transvaal Power v Thorton's Cartage Co*, De Wall, JP stated that the duties of a driver entering an intersection from a minor road have been stated as follows:

[1] Act No. 22 of 1999.

> When a person driving a car approaches a street which is a main thoroughfare, or in which he is aware that there is likely to be a considerable amount of traffic, he must approach the intersecting street with due care and be prepared to expect traffic. His first duty is to see that there is no traffic approaching from his right, and then to look for traffic approaching from his left.[2]

[6] The driver on a main road is entitled to assume that a driver on a minor crossroad will not enter the intersection unless it is safe for him or her to do so. However, this assumption does not confer upon such driver to drive at such speed that, despite warning, he or she is unable to avoid colliding with a vehicle entering the intersection from a minor crossroad. Doubtless, coupled with the duty to travel at a reasonable speed is the duty to keep proper lookout. "Once a driver on a main road becomes aware of a vehicle approaching an intersection along a minor crossroad it is his duty to keep such vehicle under observation, and failure to do so may be negligence."[3] Of course, the duty to keep a vehicle "under observation" does not mean that the driver must keep his eyes upon the approaching vehicle continuously, and ignore other traffic or other parts of the road than the minor crossroad in which the approaching vehicle is travelling.[4]

[7] Keeping these propositions in view, I will now examine the actions and conduct of the parties. Both plaintiff and defendant testified that no traffic police officer came to the scene of the accident, so I have not got the benefit of a police accident report, enclosing sketch drawings made by people who are experienced in these matters. I only have a sketch drawing made by the plaintiff (Exhibit "A"); I will return to Exhibit "A" shortly.

[2] 1931 TPD 516 at 519.
[3] Cooper, *Delictual Liability in Motor Law*, 1996: 175.
[4] See *Pullen v Pieterse* 1954 (2) SA 195 (T) at 201F.

[8] I draw no inference on the fact that the plaintiff reported the accident the same night, and the defendant the following morning. The reason is that both of them reported the accident within the statutory time limit of 24 hours in terms of s. 78 of the Road Traffic and Transport Act, 1999.[5] I have also disregarded Exhibit "E" (the "Road Traffic Collision Report" by the Police) simply because it constitutes hearsay evidence as the maker or makers of the Report were not called as witness or witnesses to testify.

[9] The plaintiff testified that while driving on Independence Avenue, he noticed that the defendant's vehicle had come to a stop at the stop-sign on Omongo Street at the intersection of Omongo Street and Independence Avenue. He was wondering what was happening because the vehicle had been stationary for a considerable length of time. He, therefore, reduced his speed as he approached the intersection. According to him, defendant's car "jumped" onto Independence Avenue at the moment he got to the intersection. He tried to avoid defendant' car by braking so as "to get off his way." He was doing 55 kph. This the defendant disputes; according to the defendant, the plaintiff was driving very fast. In an answer under cross-examination by Mr. Grobler, counsel for the defendant, plaintiff said he did not swerve his vehicle; he did not say why. He only applied his brakes but the defendant's vehicle was too close, and defendant suddenly drove his vehicle across the road or "jumped on the road" and plaintiff's vehicle collided front-on with the right rear door of defendant's vehicle. The point of impact is not in dispute, as mentioned previously.

[10] The defendant testified that at the time of the impact, his vehicle was already halfway across the road. But, according to the plaintiff, the collision occurred in the left lane as he had indicated on Exhibit "A". When the defendant was asked to indicate, under cross-examination, on the sketch drawing where, in his opinion, the collision occurred, he made a mark on Exhibit "A" to show that the nose of his vehicle was just across the white dividing line marking the middle of the avenue. He also testified that his vehicle was still in first gear when the collision occurred. He also testified under cross-examination that he never looked right again before he drove onto the main road. But he said he had kept a lookout and had seen the plaintiff's vehicle some 100 metres away, but because the plaintiff was driving too fast, his vehicle came into collision with the defendant's vehicle. Under cross-examination, defendant stated that if he had kept a second lookout to his right, the accident might probably not have happened.

[11] In his pleading, the plaintiff pleads that the sole cause of the collision was the

[5] Act No. 22 of 1999.

negligent driving of the defendant. While giving oral evidence, he assigned reasons for his contention, as mentioned previously. This is discussed above. The defendant, on the other hand, while denying the plaintiff's averment, expressly sets up the defence of contributory negligence. In his further alternative plea, the defendant states, "In the event of being held that the defendant was negligent and that his negligence was the cause of the collision …, then in that event the defendant alleges that the plaintiff was also negligent and that his negligence contributed to the collision." Then, in his oral evidence, he gave particulars of the plaintiff's negligence. One of it, as was mentioned above, is that the plaintiff was driving very fast towards the crossing of Independence Avenue and Omongo Street. That statement is wide enough to cover the defence that as a result of driving too fast, the plaintiff had failed to take any steps to avoid the consequences of the defendant's negligence.

[12] The defendant, as I have mentioned earlier, said he was driving along Omongo Street, intending to cross Independence Avenue along which the plaintiff was driving his car, at a speed of 55 kph, according to the plaintiff. I pause here to say that I do not believe the plaintiff can say so with any certainty. Can it be said that he was looking at his speedometer while he was driving and just before the collision? I do not believe he was. In any case, I am of the view that if the defendant had kept a proper lookout he would have seen the plaintiff's car when, according to him, was at a distance of 100 meters away. Indeed the defendant testified that he looked left and right, but did not look to the right again. All he saw was the collision. He did not do anything to avoid the collision. I, therefore, hold that there is ample evidence to support a finding that the defendant was negligent in not keeping a proper lookout when he was entering a main road like Independence Avenue, from a minor crossroad. The question that now arises is whether or not the plaintiff is liable for contributory negligence.

[13] The plaintiff's evidence is that he saw the defendant's car stationary at the stop sign on Omongo Street. He was wondering why the vehicle had been stationary for such a considerable length of time. He then reduced his speed, as he approached the crossroad, then suddenly, the defendant's car "jumped on the road", as he put it during examination-in-chief. I think that the plaintiff was apparently under the impression that since he had the right of way, he was entitled to assume that the defendant would respect his advantageous position, and, therefore, there was no obligation on him to exercise any circumspection. But the question is whether the plaintiff acted reasonably in driving at some considerable speed as he approached the intersection, ignoring the

defendant's car, which was already in his way. The following supports this finding: I do not believe the plaintiff when he says he reduced his speed and tried to brake. Contrary to what the plaintiff's counsel submitted, it is rather my view that the frontal damage to the plaintiff's vehicle is unmistakably consistent with a vehicle travelling at a very considerable speed, making it impossible for the driver to apply brakes timeously, hitting at a vehicle, which was already in its way or lane of locomotion. Indeed, the plaintiff testified that he did not swerve his vehicle. I think he could not do so because he was not travelling at 55 kph, as he said he was doing. At any rate, I have explained above that I do not accept his evidence that his vehicle was travelling at the speed of 55 kph

[14] It has been held that it is "the duty of every driver of a motor car when approaching a crossing, no matter whether he believes he has the right of way or not, to have regard to the traffic coming from a side street."[6] If the plaintiff had the defendant's vehicle under observation, and really reduced his speed, he could have seen in ample time that the whole length of the defendant's vehicle was already in the left lane, along which his vehicle was travelling, and tried to avoid the collision. The plaintiff's duty was, therefore, to avoid the consequences of the defendant's negligence, as he could have done by reducing his speed and swerving his vehicle to his left. On this point, Mr. Erasmus, counsel for the plaintiff, appears to have endeavoured to improve the plaintiff's position by suggesting in his heads of argument that the plaintiff "tried to avoid the collision by swerving." This is in stark contrast to

[6] *Robinson Bros v Henderson* 1928 AD 138 at 141.

what the plaintiff said on the stand. Under cross-examination, he said distinctly that he did not swerve.

[15] That being the case, I have come to the conclusion that the plaintiff is liable for contributory negligence. Guided by the principle enunciated by Oglivie Thompson, JA in *South Brish Insurance Co. Ltd v Smit*[7] I assess the degree of negligence attributable to the defendant to be 60% and to the plaintiff 40%, having regard to the plaintiff's share in the responsibility for the collision and the resultant damage. I think the apportionment of fault in that proportion is just and equitable. The conclusion I made previously to the effect that the defendant was negligent has the effect of dismissing the defendant's counterclaim for N$15,000.00.

[16] I now turn to the defendant's alternative plea concerning an alleged full-and-final settlement agreement between the parties. The long and short of the dispute surrounding this issue is as follows. The defendant pleaded that he and the plaintiff entered into an oral agreement to settle any claims against each other, without admitting liability. In terms of the agreement, the defendant agreed to pay the plaintiff the excess amount the plaintiff has to pay to his insurer. In effect, it is the amount that the insurer will deduct from any amount it would, in terms of the insurance policy, pay the plaintiff to cover the damage he has suffered as a result of the accident. The defendant carried out his part of the agreement. The effect of the agreement was that it was in full-and-final settlement of all claims that the parties may have against each other as a consequence of the collision.

[17] The plaintiff denies there was such agreement. But a proper understanding of the plaintiff's papers filed of record and his counsel's heads of argument do not support this contention. What emerges from the papers and counsel's submission is that the plaintiff accepts there was an agreement between the parties, but the agreement relates only to the payment of the excess amount by the defendant, without admitting liability. Otherwise upon what basis did the defendant pay to the plaintiff and the plaintiff receive from the defendant the N$4,000.00 in the period 14 October 2001 and 8 January 2002 (See Exhibit "C")? This sum represents the excess amount

[7] 1962 (3) SA 826 at 837 G-H.

quoted by Countrywide Assessing Services (See Exhibit "B"), plus N$92.27. The defendant explained that he just decided to pay a round figure, hence the N$4,000.00.

[18] That being the case, I find that the plaintiff and the defendant entered into an oral agreement when the two met at the Wanaheda Police Station the morning following the accident, i.e. 31 August 2001. The agreement has a suspensive condition,[8] namely, the defendant would only pay the excess amount if the amount was what the plaintiff's insurance company determined. When the plaintiff delivered Exhibit "B" to the defendant the contract became enforceable. But, the question is what was either party to gain from the agreement.

[19] According to the defendant, he felt "sorry for the guy" because of the damage to his vehicle as a result of the collision, that is why he agreed to pay N$4,000.00 to him. However, at the same time he said he paid it on the understanding that it would be a full-and-final settlement of any claims that each might have against the other. There is a contradiction here: either he paid the N$4,000.00 on humanitarian and altruistic considerations – which is honourable – or he hoped to derive a more mundane benefit from parting with N$4,000.00; it cannot be for both reasons, otherwise it does not make sense. Further the defendant did not agree to pay the N$4,000.00 to prevent the plaintiff from instituting criminal proceedings against him. The police were not at the scene of the accident and within a few minutes after the accident both parties left the scene of the accident: a car-breaker company removed the plaintiff's vehicle and the defendant drove his vehicle from the scene of the accident. There would have been no evidence on which to base any criminal charge and both parties knew that. Nobody was injured in the accident.

[19] Defendant's state of mind apparently was that if he paid the excess amount then he would be absolved from all other claims. He knew that the plaintiff's vehicle was insured; a man who has a 40-year driving experience, he knew that the insurance company would pay the plaintiff an amount to cover the damage to his vehicle, less the excess amount. He was prepared to pay only the excess amount which he knew would be by far less than the cover amount, and the insurance company would take care of the rest, and that would be the end of his woes. I think he agreed to the pay the excess amount because he knew he was the negligent party in the collision, and he thought he could end his liability to the plaintiff by paying to him the N$4,000.00.

[8] Christie, *The Law of Contract in South Africa*, 3rd ed, 1996 : 154 ff.

[20] The first point raised by Mr. Erasmus in his submission to support his standpoint that the plaintiff could not have entered into any agreement with the defendant is that on 31 August 2001 the plaintiff had not communicated the excess amount to the defendant. With respect, this is a baseless argument, for the reasons I have explained in the preceding paragraph. Counsel's other argument is that on 27 September 2001, the insurance company succeeded to the rights of the plaintiff when the company paid the plaintiff N$38,195.38 upon the principle of subrogation in insurance law. This argument is also untenable. As Mr. Grobler correctly submitted, Exhibit "B" is not proof of payment of an amount of money: it is only proof of an agreement between the plaintiff and the assessor respecting the amount of money the plaintiff would accept from the insurance company for his damage. Both counsel referred me to a number of authorities on subrogation. There is no need to examine them: they cannot assist the Court in determining the issue at hand. I find that the insurance company did not succeed to the rights of the plaintiff on 27 September 2001. I agree with Mr. Grobler that it was only during oral evidence that it emerged that an amount of N$38,195.38 (see Exhibit "B" was paid to a hire purchase company on behalf of the plaintiff. The plaintiff did not present any proof of payment of the amount to the Court. Thus, at the close of the plaintiff's case the Court was still in the dark as to the date on which this amount was paid. In the result, I find that the plaintiff had the right and the capacity to enter into the oral agreement with Mr. Hunze on 31 August 2001.

[21] The law respects full-and-final settlement agreements, for they can at times settle once and for all disputes outside the surrounds of the courts.[9] But, the problem that comes to the fore *in casu* is that the parties dispute the terms of the agreement. It would have been a different matter if they had entered into a written, not an oral, agreement. The evidence of the burden of proof decides which party will fail on a given issue if, after hearing all the evidence, the court is left in doubt.[10] In the present matter it cannot be decided whether the full-and-final provision was also a term of the oral agreement. The defendant who bears the onus of proving a term on which he wishes to rely has failed to discharge the burden. In *Topaz Kitchens (Pty) Ltd v Naboom Spa (Edms) Bpk*,[11] Muller, JA, relying on *Kriegler v Minitzer and Another*,[12]

[9] See *PPWAU & Others v Delma (Pty) Ltd* (1980) 10 *ILJ* 420 (IC); *Mbome & Another v Foodcon Fishing Product* NLLP 2002.
[10] Schwikkard, *Principles of Evidence*, 1997 : p 401
[11] 1976 Sa (3) 470 (A).
[12] 1949 (4) SA 921 at 826.

held that a party bears the onus of proving the term of a contract which he or she wishes to enforce even if he or she has to prove negative. In the result, it is my conclusion that there was an oral agreement between the parties but it was not a term of the agreement that the payment of N$4,000.00 would constitute a full-and-final settlement of the claims that any party might have against the other as a result of the collision between their vehicles.

[22] The judgment of this Court is that the plaintiff succeeds in his claim but to the extent of 60% thereof. It follows, therefore, that the plaintiff is entitled to his costs, since he has been successful substantially. The counter-claim of the defendant is dismissed with costs. Thus, judgement for the plaintiff in the sum of N$21,472.58, less N$4,000.00, with interest at the rate of 20% per annum calculated from the date of this judgement until the date of payment.

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PARKER, AJ

ON BEHALF OF THE PLAINTIFF	Mr F G Erasmus
Instructed by:	Van der Merwe-Greef Inc
ON BEHALF OF THE DEFENDANT	Adv Z J Grobler
Instructed by:	Grobler & Co