



**CASE NO.: I 1978/2008**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**JOHAN BRANDT**

**PLAINTIFF**

and

**THE MOTOR VEHICLE ACCIDENT FUND**

**DEFENDANT**

**CORAM: MULLER J**

Heard on: 29 March 2011

Delivered on: 8 April 2011

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**JUDGMENT**

**MULLER J**

[1] The plaintiff claims for damages from the Motor Vehicle Accident Fund in respect of his personal injuries caused by a motor vehicle accident.

[2] At the commencement of the trial the parties informed the court that they have agreed to a separation of the merits from the quantum and that only the former issue will be dealt with in this trial. The court agreed to this separation between the merits and quantum and the case proceeded only in respect of the merits.

[3] In his particulars of claim the plaintiff alleged the following in respect of the merits of the case:

*“3.1 On Tuesday 31<sup>st</sup> May 2005 and on the road between Windhoek and Leonardville, approximately 17 km from Leonardville, a collision occurred between a white Toyota Condor motor vehicle bearing the registration letters and numbers N1710GO and a Caterpillar grader bearing the registration letters and numbers N17743W.*

*3.2 The aforesaid collision will be referred to hereinafter as “the collision”.*

*4. At the time of the collision:*

*4.1 The Toyota Condor motor vehicle bearing the registration letters and numbers N1710GO was driven by the plaintiff.*

*4.2 The Caterpillar grader bearing the registration letters and numbers N17743W was driven by one Bernard Hauseb.*

*4.3 The Caterpillar grader was the property of one N Maree who conducted business under the name and style of Maree Road Construction.*

*4.4 The said Bernard Hauseb was employed by Maree Road Construction and was acting in the course and within the scope of that employment.*

5. *The collision was caused entirely by the negligence of the said Bernard Hauseb, alternatively by the negligence of the owner of the grader, further alternatively by the joint negligence of both the said Bernard Hauseb and the owner of the grader.”*

Further particulars were requested and provided. The relevant requested particulars in respect of the merits of the case are the following:

- “1.1 At what time of the day did the collision occur?*
- 1.2 In what manner was Bernard Hauseb, alternatively the owner of the grader, or both Bernard Hauseb and the owner of the grader negligent?”*

The plaintiff answered as follows:

- “1.1 The collision occurred approximately 12h30.*
- 1.2 The owner and/or the driver did not keep a proper look out; placed the grader in a position which was dangerous to the other road users; did not clearly indicate that the grader was operating on that particular stretch of road and/or failed to take the interests of other road users into consideration.”*

The defendant pleaded as follows to the plaintiff’s particulars of claims, as amplified by his further particulars, in respect of the merits issue:

**2.**

**“AD PARAGRAPHS 3&4 OF THE PARTICULARS OF CLAIM**

*The defendant has no knowledge of the allegations contained in these paragraphs but, does for the purposes of this action admit the allegations contained in this paragraph.*

**3.**

**AD PARAGRAPH 5 OF THE PARTICULARS OF CLAIM**

3.1 *The Defendant pleads that the Plaintiff's particulars of claim omit to set out facts which are material to be proven in order to entitle the plaintiff to succeed in his claim*

3.2 *To that extent the Plaintiff is given the opportunity to rectify same. Failure to rectify the particulars of claim within fourteen days from the date hereof the Defendants will except to the particulars of claim.*

3.3 *In the alternative the Defendants deny the allegations contained herein and put the Plaintiffs to the prove thereof.*

3.4 *In amplification of the denial the defendant pleads that the collision occurred solely as a result of the negligent driving of the plaintiff who was negligent in one or more of the following respects:*

3.4.1 *He failed to keep his car under proper control.*

3.4.2 *He drove at a high speed under the prevailing circumstances.*

3.4.3 *He drove the said motor vehicle without care and attention.*

3.4.4 *He failed to properly control the said motor vehicle and to apply the brakes timeously or at all.*

3.4.5 *He failed to avoid the accident when by the application of care could and should have avoided the accident."*

[4] In this court the plaintiff was legally represented by Ms Visser and the defendant by Mr Ueitele.

[5] Two witnesses testified on behalf of the plaintiff and two on behalf of the defendant. The plaintiff and one of his colleagues, Mr Bathlomeus Naobeb, gave evidence for the plaintiff while Mr Bernard Hauseb and Mr Karel Scott testified on behalf of the defendant.

[6] Ms Visser correctly conceded that the onus to prove negligence by the grader operator, Mr Bernard Hauseb, rests on the plaintiff.

[7] It is necessary to refer briefly to the evidence given by different witnesses. According to the plaintiff the accident occurred on the road between Leonardville and Windhoek on the crest of a dune. The plaintiff was driving on his side of the road. He provided a rough sketch of the scene of the accident, which was handed in as exhibit A. According to the plaintiff there was no warning sign of grading being in operation on that road and he did not see any warning sign in that regard. He did not see the camp of the grader operator and did not see any other indication indicating that there was grading in progress, e.g. sand walls in the road. He was prompted by questions in cross-examination in regard to the warning light and the red flag. He testified that after the accident he noticed an orange light on the grader, but cannot say whether it was flashing, or not. He denied that there was a red flag on the grader. In cross-examination

he admitted the correctness of his statement made to the police officer and also that that it differs from his evidence in court. In his police statement the plaintiff said that the grader operator said there **was** a warning sign and not as he testified in evidence in chief that there **should have been** a sign.

[8] A colleague of the plaintiff, Mr Bathlomeus Naobeb, testified that after being informed of the accident, he drove with the plaintiff's wife to the scene of the accident. He did not see any warning sign, but did see that the road has been freshly graded and that there were sand walls where the grading operation was in progress. He did not see an orange light on top of the grader or a red flag. Neither did he see the camp of the grader operator and admitted that having been informed of the accident beforehand, he might have concentrated on the accident scene ahead and did not pay attention to observe anything else. Both the plaintiff and Mr Naobeb said the wind was blowing and there was dust. There was no evidence that the wind was blowing so strong that it obstructed the view of oncoming traffic or that it could blow down a warning sign of a grading operation.

[9] Mr Hauseb described how he graded the road and was adamant that warning signs were put up on both sides, namely where he started the grading operation and where he turned around, a distance of approximately 10 kilometres. According to him the first sign on the eastern side, namely in the direction from where the plaintiff drove, was put up where his camp was, a distance of 1.8 kilometres to the top of the dune where the accident occurred. In cross-examination he described how this sign was put

up by his helpers in his presence. In respect of the accident itself, he testified that he just saw a white thing and the next moment he saw a car making a slight swerve, but the front wheel of the car collided with the blade of the grader. The car came to a standstill on the right side of the road. Mr Hauseb switched off the grader, got off and went to inspect the vehicle for possible injured persons. He saw the plaintiff holding his chest. The plaintiff asks him: "*Where is the sign?*" Mr Hauseb went up to the top of the dune and showed the plaintiff the sign on the eastern side of the road. Mr Hauseb denied the plaintiff's version given in court in respect of the sign. He further testified that he then went to phone his employer at a nearby farm, Tripoli, and saw the wife of the plaintiff and Mr Naobeb passing him. When he returned the police were there as well as the plaintiff. He was cross-examined in particular about the sign and the erection thereof, as well as the possibility that it could have been blown down by the wind or hit by a car. He denied those scenarios and on a question of the court, he confirmed that upon his return to his camp afterwards, the sign was still there in the same position. Ms Visser also attempted to make something of the fact that Mr Hauseb only put up the second sign on the western side where he turned around approximately 5-10 kilometres further and that that could have caused danger to traffic driving in a westerly direction before the warning sign was put up. That is totally irrelevant in respect of this accident where the plaintiff came from a westerly direction where there was indeed a sign according to Mr Hauseb.

[10] Mr Scott, a road inspector stationed at Gobabis, was informed of the accident and drove during the same afternoon of 31 May 2005 to the accident scene on that

specific road. He testified that the grader operator was not aware that he was coming. He also took certain photos. The first photo, Exhibit "C", depicts the warning board with an image of a black grader on a yellow background, which he found 1.8 kilometres from the scene of the accident, near the camp of the grader operator. He saw that the grader had been removed just off the road next to the point of impact and took further photos of the road surface where the accident took place as well as two further photos of the plaintiff's damaged vehicle. When put to him whether there is a possibility that the sign might have been erected after the accident, he regarded that as improbable, because he saw no foot prints in the vicinity of the sign.

[11] It is common cause that the point of impact was on or near the crest of the dune. It is also common cause that from the direction of Leonardville the grader was busy grading on the left side of the road, namely its wrong side and in the lane of oncoming traffic. The court also has to keep in mind that the onus to prove negligence rests on the plaintiff.

[12] Ms Visser's first argument is that there was no warning sign put up as Mr Hauseb testified, because neither plaintiff, nor Mr Naobeb, saw it. Secondly, Ms Visser argued that even if a warning sign had been erected 1.8 kilometres before the scene of the accident on the eastern side, that warning was insufficient as a result of the features of the particular road. Ms Visser then also referred to certain legislative requirements of the road traffic regulations, in particular in respect of warning signs which should fulfil the purpose of properly warning oncoming traffic when there may be an obstruction in



the road and the manner in which it should be displayed. Mr Ueitele submitted that both in the plaintiff's pleadings and the evidence on his behalf, the plaintiff failed to substantiate negligence on the part of Mr Hauseb. According to him, the plaintiff's failure to notice the warning sign already constitutes negligence, in particular by driving at a speed of 100 km per hour, without reducing speed, under the circumstances where there was a grading operation in progress and approaching a dune without having a clear vision of what may be behind the dune. In respect of the plaintiff's argument that the warning sign of the grading operation was not a sufficient warning, he submitted that this argument is untenable, namely to require that a grader operator should put up warning signs whenever there may be a dune or other obstacle in the road. He submitted that on the probabilities a warning sign had been placed by the grader operator and that once that was accepted, there could be no negligence on the part of Mr Hauseb.

[13] The plaintiff did not deny that there might be a warning sign, although he did not see it. His evidence also differs from his police statement as indicated before. He also did not see any other indication that a grading operation was in progress. Although Mr Naobeb did not deny that there had been a warning sign, he conceded that he might not have paid attention to it and concentrated on the accident scene ahead. However, he did see indications that the road had been freshly graded and he further noticed sand walls in the road. It is also significant that the plaintiff's wife, who was present and could have testified on this crucial issue, was not called to testify. Mr Hauseb remained adamant that he did put up a warning sign, approximately where his camp was, with the

purpose to warn oncoming traffic from the Leonardville side that there was a grading operation in progress. He described how the sign was put up and secured by stones in his presence. The possibility that the wind could have blown it down is refuted by the evidence of Hauseb that he found it intact when he returned. It is further refuted by the evidence of Mr Scott, who saw the warning sign intact before he arrived at the scene of the accident and without any prior knowledge by Mr Hauseb of his approach. Exhibit "C", the photo that Mr Scott personally took of the warning sign in an erect position proves that there was such a sign. The possibility suggested by Ms Visser that the warning sign was erected after the accident by Mr Hauseb is not only denied by him, but his improbable in the light of all the other evidence in that regard. The plaintiff cannot deny that Mr Hauseb did put up a warning sign and that he was busy grading the road. Even the plaintiff's witness, Mr Naobeb, clearly saw indications that there was grading operation in progress. Any reasonable driver should have noticed the warning sign and should have expected that there he or she may find a grader further on operating on any side of the road. That driver should have been even more careful when approaching the crest of a dune where his or her vision was impaired. According to the plaintiff he never reduced his speed. His speed of 100 km per hour may under normal circumstances be adequate, but certainly not in circumstances where he should have been cautious after being warned of a grading operation in progress. Ms Visser pointed out that 100 km/h is the maximum permissible speed on a gravel road. That means that the plaintiff drove, and continued to drive, at the maximum permissible speed in the prevailing circumstances. The plaintiff should have taken more care and should have kept a proper lookout. The fact that he did not even notice a warning sign is already be

an indication of his failure to keep a proper lookout. The fact that he could not avoid the accident, even by swerving out, to my mind proves that his speed was excessive in the prevailing circumstances and that he did not conform to what is expected of a driver in such circumstances. The plaintiff was clearly negligent.

[14] I agree with Mr Ueitele that the submission by Ms Visser that the warning sign put up by the grader operator was insufficient, is untenable. On her suggestion warning signs should have been put up to warn traffic all along the grading operation and before every obstacle in the road, i.e. any turn or dune in the road. This suggestion is not only unreasonable but is so farfetched that it is untenable. Any reasonable driver properly warned by a warning sign as depicted in the photo, Exhibit "C", and observing other indications that there is a grading operation in progress, must be careful and adjust his speed to be able to control his vehicle and to safely avoid any accident with a grader approaching from the front or even other oncoming traffic, that may be swerving out for the grader. Any reasonable driver should expect in those circumstances that there might be a grader or other traffic in his lane and in particular when approaching a dune where his vision is impaired.

[15] The issue whether the orange light on the grader was flashing at the time or whether there was a red flag on the grader, is in my submission not decisive in the light of the finding on the evidence that a warning sign had indeed been erected by Mr Hauseb and his helpers on the eastern side and that there were also other indications that there was a grading operation in progress. The plaintiff only saw the orange light on

the grader after the accident, but he is not sure whether it was flushing. Unfortunately Mr Hauseb failed to give evidence in that regard. However, he did testify that he switched the grader off before he got off it. This issue was not further investigated during the evidence, namely whether the light would still be flashing after the grader had been switched off.

[16] Ms Visser relied on section 174 of the regulations in terms of the Road Traffic and Transport Act, no. 22 of 1999 regarding lights and devices to render objects visible for a certain distance. That section applies to the period between sunset and sunrise. It has nothing to do with situation as the current one. I can also not find any prescription of the manner of displaying the warning sign, such as the one erected Mr Hauseb, in regulation 318, or any other regulation. In my opinion Mr Hauseb did what reasonably could have been expected from him to warn oncoming traffic of the grading operation. It was then up to drivers of vehicles to drive carefully at a reasonable speed in the circumstances, and keep a proper lookout in order to be able to avoid an accident.

[17] On the evidence before me I cannot come to any other conclusion than that the plaintiff failed to discharge his onus to prove that Mr Hauseb was solely negligent or that there was even any contributory negligence on his part. On the evidence the negligent party was the plaintiff, whose negligence caused the accident.

[18] This court only has to make a finding on the merits of the case and it is found that the plaintiff failed to prove that the conduct of the grader operator, Mr Hauseb, was negligent in any way.

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**MULLER J**

**ON BEHALF OF THE APPELLANT:**

**MS VISSER**

**Instructed by:**

**DR WEDER, KAUTA & HOVEKA INC.**

**ON BEHALF OF THE DEFENDANT:**

**MR UEITELE**

**Instructed by:**

**UEITELE & HANS LEGAL PRACTITIONERS**