NOT REPORTABLE

CASE NO: I 2360/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

GERHARDUS STEPHANUS COETZEE **PLAINTIFF**

and

ELVIS MCNAB **DEFENDANT**

CORAM: **SCHIMMING-CHASE, AJ**

Heard on: 30 June 2011

Delivered on: 20 July 2011

JUDGMENT

SCHIMMING-CHASE, AJ

[1] Mandume Ndemufayo Avenue is a long and busy road that runs from Bahnof Street and ends at the intersection after the

University of Namibia. It is one of the main traffic arteries connecting north to south in Windhoek. At various sections of this road, traffic is divided into three lanes in both directions, with an island in the middle.

[2] This is the road on which a collision occurred between vehicles driven by the plaintiff and the defendant at approximately 16h00 on 8 October 2008. The defendant entered Mandume Ndemufayo Avenue from a junction in front of the fast food outlet, Kentucky Fried Chicken. There is a yield sign at this junction. The defendant intended to cross the three lane traffic travelling from north to south, and to turn right and join the traffic travelling from south to north. Between the two streams of traffic is a small area of road approximately the length of a standard size sedan car which allows a vehicle turning in the direction the defendant was, to stop and check for traffic coming from the north before turning right to join that traffic stream.

[3] Whilst executing this turn into Mandume Ndemufayo Avenue, a collision occurred between the plaintiff's Toyota Venture and the defendant's double cab bakkie. At the time of the collision, the plaintiff was travelling in a north to south direction in the far right lane, and the right front side of the plaintiff's vehicle collided with the right rear side (by the wheels) of the defendant's double cab bakkie.

[4] The plaintiff alleges that the collision was caused by the negligent driving of the defendant, who ignored the yield sign and proceeded into oncoming traffic without keeping a proper lookout.

[5] In this regard, the plaintiff testified that he was at all material times in the far right lane of Mandume Ndemufayo Avenue, travelling in a north to south direction. He stated that he is generally very cautious when driving on this road, which he regularly uses to drop his wife at work in the morning, because traffic is usually very heavy on this road.

[6] As he was driving, the plaintiff noticed a green double cab entering from the left at a high speed and crossing over the path he was driving. The plaintiff further testified that when he saw the double cab driven by the defendant, he realised that in order to avoid a collision, he could not veer to the left because another vehicle was in that lane and in his way. He accordingly applied the brakes, but by then it was too late. By this time the defendant's vehicle had almost completed its crossing and the plaintiff's vehicle collided with the right rear of the defendant's bakkie, damaging the right front side of his vehicle. After the collision the plaintiff testified that he could not get out of the driver's side, and climbed over the passenger seat to exit at the other side.

[7] The defendant admits that he entered Mandume Ndemufayo Avenue with the intention to turn right and join oncoming traffic in a

northerly direction, however he testified that he obeyed the yield sign, looked right into the three lane traffic travelling in a north to south direction, and only executed his turn after he was satisfied that it was safe for him to do so. He stated that he did not see the plaintiff's vehicle when he looked right, and that if it was, he would not have proceeded. He further testified that at the time, he was working in that area, responsible for the construction of additions to the premises of Kentucky Fried Chicken. He regularly travelled this route as a result. On the date of the collision, he was driving his employees home from work. The defendant further testified that he always stopped at the yield sign before turning into Mandume Ndemufayo Avenue. After proceeding into the road, when he reached the small area of road where he could safely stop and check for traffic travelling in a north to south direction before entering that stream of traffic, he slowed down slightly because, according to him the double cab, being longer than a normal sedan, would not properly fit in that space. Furthermore, he wanted to make sure that it was safe to enter into the stream of traffic travelling to the north. In response to a direct question from the Court whether he looked right again before slowing down, he responded that he did not look right again to ensure that it was safe to slow down.

[8] The defendant testified that it was the plaintiff's negligence that caused the collision as he travelled too fast in the circumstances. He instituted a counterclaim for the damage caused to the right rear

side of his vehicle. In this regard, the defendant testified that he did not hear any brake marks, nor were there any tyre marks in the road, therefore to his mind the plaintiff's allegation that he applied his brakes should not be believed. He also stated that he believed that the plaintiff was talking on his cellphone at the time. The plaintiff responded that his cellphone was on his lap, and denied that he was using his cellphone while driving. The plaintiff however did not deny that there were no brake marks on the road.

[9] The defendant admitted that he was under the influence of alcohol at the time and that he tested above the legal limit for alcohol after the collision. He was apparently not aware that he was over the limit. He further confirmed that he was later convicted for the offence of driving under the influence of alcohol.

[10] 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 Company Ltd v Thornton's Cartage Co Ltd 1931 TPD 516, the duties of a driver entering an intersection from a minor road were summarised at page 519 as follows:

> *"When a person driving a car approaches a street which is a main throughfare, 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."

[11] 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 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 a concomitant duty to keep a proper lookout. Once a driver on a main road becomes aware of a vehicle crossing the intersection, it is his or her duty to keep such vehicle under observation, and failure to do so may be negligent. 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.

See: Marx v Hunze 2007 (1) SA 228 (HC) at para [6] and the authorities referred to

[12] I point out that the facts in the above two cases are different, from the facts of this case, however, in my opinion the principles are

apposite with regard to the duties placed on the drivers of both vehicles in this matter.

[13] In light of the above authorities, and after evaluating the evidence of the parties, I hold the view that the defendant's negligence caused the collision. Firstly, the defendant sought to drive a bakkie, carrying two employees in the back whilst under the influence of alcohol and while his faculties would have been impaired. In fact it was reckless of him to drive a vehicle when he was in that state in the first place. More importantly, the defendant, on his own version, not only slowed down while executing his right turn in the face of oncoming three lane traffic, he further did not even look right for a second time to ensure that it was safe to do so.

[14] On the other hand, in my opinion, the plaintiff is also not entirely blameless. Two aspects of his evidence are noteworthy. The plaintiff testified in chief that he was travelling at 40 kilometres per hour because he was especially cautious. But it is not disputed that there were no brake marks on the road. Considering this aspect, together with the damage to the plaintiff's vehicle depicted in photographs provided to the Court, I am of the view that either the plaintiff was not travelling at that speed, or himself did not keep a proper lookout and did not timeously apply his brakes. Furthermore, the vehicle that was allegedly in the lane next to the plaintiff was not even involved in the collision. If the plaintiff saw the defendant's

vehicle coming at a *"high speed"* and had time to consider that he would not be able to change lanes in time to avoid a collision, he must have been able to apply his brakes in time to avoid a collision, considering the speed at which he testified he was driving, unless he too failed to keep a proper lookout.

[15] In light of the foregoing, the plaintiff's evidence must be viewed with some circumspection. After all, the plaintiff is also required to have kept a proper lookout, and should have taken steps to avoid a collision when he could have. It appears on a balance of probabilities that the plaintiff did not do so, and as a result he was also negligent, and his negligence contributed to the collision.

[16] It is now necessary to determine how to apportion the negligence to the parties which I do in accordance with the provisions of the Apportionment of Damages Act, 34 of 1956.

[17]

[18] In my view, the defendant's failure to look right, as well as slow down in the middle of oncoming traffic while driving under the influence of alcohol should be viewed in a serious light. I hold the view that he should carry the majority of the blame. As previously mentioned, the plaintiff is however not entirely blameless and was unable to prove, in my view, that he kept a proper lookout.

[19] In the result I find that the defendant was 90% negligent and

the plaintiff 10% negligent. The plaintiff's damages should be reduced accordingly. As the plaintiff obtained substantial success, costs of suit should be awarded to him.

[20] As regards the question of costs, it was submitted by counsel for the plaintiff that should he succeed, costs should follow the event and that the costs should include the costs of one instructing and one instructed counsel. This is a simple matter involving mainly factual considerations. There are no complex issues whatsoever that arise. In fact, counsel for the plaintiff did not find it necessary to refer to any authorities in his argument. In my view, I do not see why the costs of two legal practitioners should be paid in the circumstances.

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

(a) The defendant is 90% liable for the collision between his vehicle and the plaintiff's vehicle, while the plaintiff is contributorily liable to the extent of 10%;

(b) The defendant shall pay to the plaintiff 90% of the damages claimed by the plaintiff;

(c) The plaintiff shall pay to the defendant 10% of the damages claimed by the defendant;

(d) The defendant shall pay the plaintiff's costs of suit, such costs to include the costs of one instructing counsel only.

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SCHIMMING-CHASE, AJ

ON BEHALF OF PLAINTIFF	Adv A Small
Assisted by:	Mrs M Rix
Instructed by:	Rix & Company
ON BEHALF DEFENDANT	Mr E McNab
Instructed by:	In person