[Not reportable]

REPUBLIC OF NAMIBIA

CASE NO. I 4549/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

PETRUS VILJOEN

Plaintiff

and

GOVERNMENT OF THE REPUBLIC OF NAMIBIA

Defendant

CORAM: **VAN NIEKERK, J**

Heard: 17, 18 November 2011

Delivered: 20 August 2012

JUDGMENT

VAN NIEKERK, J: [1] The plaintiff instituted action against the defendant for damages arising from a motor vehicle accident which occurred on 23 April 2009 in Gevers Street, Windhoek.

[2] The defendant denies that its employee was negligent. In the event that this Court does find that he was negligent, it is denied that the defendant was the cause of the collision and it is averred that it was in fact the plaintiff who was the sole cause of the collision. In the further alternative the defendant alleges that, should it be found that the defendant's employee was negligent and thereby contributed to the collision, then the plaintiff's negligence also contributed to the collision and the defendant therefore prays that the damages be apportioned in terms of the Apportionment of Damages Act, 1956 (Act 34 of 1956).

[3] The defendant instituted a counterclaim for its damages. The plaintiff denies liability on the same legal grounds as the defendant raises to the claim in convention and similarly prays for dismissal of the claim in reconvention, alternatively for an apportionment of damages.

[4] Based on the pleadings, admissions made during the case management stage, the evidence before the Court and observations and measurements recorded after an inspection *in loco*, it is common cause that:

1. On the day of the accident the plaintiff was the driver of a BMW sedan with registration number N8777W.

2. The defendant's vehicle was a Ford Ikon sedan with registration number POL6429 driven by Chief Inspector Joseph Swartz while acting in the course and scope of his employment with the defendant.

3. The plaintiff's damages amount to N$99 994-43.

4. The defendant's damages amount to N$25 037-19.

5. The collision occurred in front of the Chinese Embassy in Gevers Street. This street runs in an east-west direction in front of the Embassy which is on the southern side of the street.

6. At the scene Gevers Street has two lanes, each 5 metres in width, divided by a broken white line in the middle of the two lanes with pavements on the outside edges of the lanes.

7. In the lane on the side of the Chinese Embassy (hereinafter "the southern lane") the pavement makes way for a 2 metre wide parking area for motor vehicles to park one behind the

other and parallel to the street. The point of impact was at a spot about in the middle of the southern lane opposite the place where the pavement makes way for the parking area.

8. In the opposite lane (hereinafter “the northern lane”) slightly to the east of the parking area Ilse Street enters Gevers Street on its northern side.

9. Continuing further east along Gevers Street there is a blind rise if one travels from east to west. On the eastern side of the rise Gevers Street makes an S-bend, followed by a sharp incline towards the crest of the blind rise.

10. At the crest of the blind rise on the southern side of the street there is a bush, which serves as a convenient marker to indicate the point at which a sedan vehicle approaching from east to west (in this case plaintiff’s vehicle) is first visible to a driver sitting in a vehicle similar to that of defendant at the point (hereinafter “the turning point”) where Chief Inspector Swartz began to execute a U turn from the northern lane to the southern lane. The parts of a vehicle which is visible at this point are the roof and front windscreen and the bonnet from the level of where the front indicator lights are located.

11. The turning point is in the same line of direction as the point of impact.

12. The distance between the turning point and the point of impact, on the one hand, and the bush, on the other hand, is 88 metres.

13. From the crest of the blind rise the street declines slightly to the area of the point of impact.

[5] The plaintiff testified that on the particular day between 8h00 and 9h00 he drove from east to west in the southern lane over the blind crest. He knows the route well as he usually drives along it every day to work. As he came over the crest he observed the Ford Ikon approaching from the opposite direction in the northern lane. The vehicle indicated that it intended turning to its right. The plaintiff did not brake, but lifted his foot from the accelerator to slow down slightly as he was not sure whether the oncoming driver intended waiting for him to pass or intended turning. The Ikon came to a near standstill closer towards the pavement on the northern side. From this the plaintiff deducted that the driver would wait for him to pass. However, Chief Inspector Swartz did not wait, but about 6 metres away from the BMW he turned towards his right, across the plaintiff's line of travel. The plaintiff observed that when Swartz commenced to execute the turn, he was talking to his female passenger in front. The plaintiff braked and tried to avoid the collision by swerving slightly to the right, but nevertheless hit the rear left side of the Ikon behind its wheel. The plaintiff's BMW was damaged on its nose slightly more to the left. The plaintiff came to a standstill at about the point of impact and then

moved it slightly forward and out of the way of the line of traffic. Chief Inspector Swartz immediately asked the plaintiff why he was driving so fast, but the latter denied that he was driving fast.

[6] The plaintiff telephoned Mr Manfred Mansfeld, a loss adjustor, and called him to the scene to take photographs and measurements. He arrived shortly afterwards. He observed that the BMW's brake marks were 4,2 metres up to the point of impact, which he marked with a brick. The Ikon came to a standstill with its nose facing in a south-eastern direction into the parking bay. The front half of the vehicle was in the parking bay and the back half was in the street. The force of the impact had moved the rear end of the Ikon 2.5 metres from the point of impact. The distance between the point of impact and the place where he found the plaintiff's BMW was 10 metres.

[7] Chief Inspector Swartz told the Court that he had to visit the Chinese Embassy that morning. He was accompanied by Sgt Amakali. He drove in Gevers Street in the northern lane, slowed down and signalled with the vehicle's indicator that he intended turning right to park in the parking bay on the southern side. He waited for two vehicles to pass from the eastern direction. He was virtually at a standstill and specifically looked for any other vehicles from the front. The road was clear and he proceeded to turn to the right, entering the southern lane. When the Ikon's front wheels and part of its front were over the middle line, he observed the plaintiff's vehicle approaching very fast from the east. The BMW was about 65 metres away when he

first saw it. Swartz stated that he was driving slowly at about 10 – 20 kph because the space in which to move the Ikon into the parking space was narrow. When the Ikon was halfway into the parking space he heard the sound of brakes. He looked, saw the BMW and the next moment it bumped into the Ikon. He estimated that the BMW was about 6 - 7 metres away when he heard the sound of braking. The BMW passed his car and came to a standstill at the place where Mr Mansfeld later observed it. He denied that the plaintiff came to a standstill at the point of impact and later moved his vehicle out of the way.

[8] It is essentially the plaintiff's case that the defendant was negligent because he did not keep a proper lookout and turned right when it was unsafe and inopportune to do so. The defendant's case is that the plaintiff drove at an unreasonably high speed in the circumstances by not adhering to the speed limit of 40 kph.

[9] The duties of a driver executing a turn to the right and those of following and oncoming drivers have been authoritatively stated in *Sierborger v South African Railways and Harbours* 1961 (1) SA 498 (A) at 505A-D as follows:

> "The heavy flow of urban traffic would be seriously interfered with if, on each occasion when a signal is exhibited by a motorist intending to turn across the line of traffic, such traffic were required to come to a stop or slow down. Such signal is of course a notification to following and oncoming traffic that the driver intends to turn across the line of traffic, but equally implicit in it is that he intends to do so at an opportune moment and in a reasonable

manner. It is also, more particularly, a signal to following traffic that the driver in question intends to move over towards the middle of the road preparatory to choosing the opportune moment to cross over on to that half of the road being used by traffic coming in the opposite direction. A driver of a vehicle proceeding in this latter direction does not, with reference to a vehicle whose driver has signalled an intention to turn across his path and who is directing his vehicle towards the middle of the road preparatory to doing so, incur an obligation to stop or slow down. Certainly he must keep such vehicle under observation and as soon as it is clear that, despite the inopportuneness of the moment, it intends to cross in front of him, he must take all reasonable steps that may be necessary to avoid colliding with it."

[10] In *Kühne v Simon and another* 1995 NR 139 (HC) at 145C – 146B this Court stated:

"Mr *Heathcote* relied on *S v Olivier* 1969 (4) SA 78 (N) at 83B-D where Miller J said *inter alia*:

'. . . Nor do I think it is practicable to require of a driver that, before executing the turn, he must satisfy himself that his signal has been observed by other drivers whose vehicles may be endangered thereby.'

I have no quarrel with this part of the dictum of the learned judge provided it is understood that the caution expressed is against accepting as a general rule that the driver turning to his right must first satisfy himself that his signal had been observed by other drivers whose vehicles might be endangered.

It must be noted that the learned judge also expressed himself against accepting as a general rule that a driver who has properly and timeously signalled his intention to turn to his right across a stream of traffic, may assume that '*his signal has been observed and will be heeded*'. I agree with this statement. (See 83A of the judgment.)

I also agree with the learned Judge where he said:

'A proper lookout has ever been regarded as essential equipment for every driver on the roads, it is not lightly to be discarded for or relegated to a position subordinate to any system of signals, however helpful that system might be.'

(My emphasis.)

The learned Judge continued to quote with approval from *Negligence on the Highways* by Mazengarb where the learned author said:

'There is also a mistaken idea that after a driver had given a signal of intention to turn across the route of traffic, the obligation to avoid other users of the road ceases, and that the duty of avoidance is on the oncoming traffic. This is not so. The driver who is changing direction and turning across the usual route of traffic, *must always wait for a reasonable opportunity to cross safely*.'

(My emphasis.)

The learned Judge then continued:

'. . . The driver intending to turn to the right, across a route which may be taken by other traffic, must necessarily bear in mind that he will be undertaking a potentially dangerous operation (See eg *R v Miller supra* at p 50) and he must therefore be careful to ''choose an opportune moment to cross . . . and do so in a reasonable manner''. (Per Van Winsen AJA in *Sierborger v South African Railways and Harbours* 1961 (1) SA 498 (A) at 504.)

This seems to me to be the ultimate test to apply in deciding whether a right-hand turn of the kind now under consideration was legitimately or culpably undertaken; the enquiry is: was it opportune and safe to attempt the turn at that particular moment and in those particular circumstances? Whether it was opportune and safe, or not, will depend upon whether a *diligens paterfamilias* in the position of the driver at that time and in the circumstances then prevailing would have regarded it as safe. (Cf *Kruger v Coetzee* 1966 (2) SA 428 (A) at p 430).'

(See at 83G-84B of judgment.).”

See also *Kandenge v Ministry of Works, Transport and Communication* 2002 NR (HC) at 325A-F).

[10] Chief Inspector Swartz estimated that he drove about 2 – 2.5 metres from the time that he first observed the plaintiff's vehicle until the collision. He further estimated that he drove at about 10 – 20 kph. As Mr *Slabber* for the plaintiff demonstrated during cross-examination, Chief Inspector Swartz would have covered 2.8 metres per second at 10 kph, which is a comfortable walking speed. Bearing in mind that Chief Inspector Swartz said he was carefully executing the U-turn because the space in which to do it was narrow, a speed of about 10kph seems probable. If he saw the BMW for the first time at about 65 metres as he testified, it necessarily means that the plaintiff travelled 65 metres in the one second it took for Chief Inspector Swartz to travel 2.8 metres. This would mean that the plaintiff must have travelled at 216 kph. Clearly this was impossible. As was established during the test runs made during the inspection *in loco*, the maximum speed at which a sedan comparable to the BMW could travel along the twists and turns in Gevers Street, execute the S-bend and travel up the blind rise without discomfort to the driver and passengers was about 60 kph. Even so, one clearly sensed that a speed of 60kph was too fast in the circumstances, given the fact that it is a street in a residential area where there are several concealed exits and Ilse Street entering Gevers Street after the blind rise.

[11] The plaintiff estimated that he drove, at most, 60kph. He was frank when he admitted that he was not sure whether the speed limit at the time was 40kph or 60kph. His frankness made a good impression on me. He made it clear, though, that it was not really

possible to go fast because of the physical features of the street. For purposes of the case it was accepted on behalf of the plaintiff that at the time the speed limit at the incline to the blind rise and further west along Gevers Street was 40kph and that he transgressed by exceeding the speed limit. Mr *Mutorwa* on behalf of the defendant submitted during argument that the plaintiff could have driven at any speed up to 80kph. While it is not impossible I agree with Mr *Slabber* that it is improbable given the fact that this speed would have been distinctly uncomfortable. Besides, the figure of 80kph was not based on any evidence by either of the parties. The only thing Chief Inspector Swartz said was that the plaintiff drove “very fast”.

[12] In my view it is improbable that the plaintiff only came to a standstill for the first time 10 metres away from the point of impact as this would have meant that the BMW’s left side must have come into contact with the Ikon’s bumper. However, it is common cause that there was no damage on the BMW indicating that it’s left side scraped past the Ikon’s bumper. The fact that the plaintiff was able to stop his vehicle within a relatively short distance at the point of impact and that fact that the damage was not that severe are further indications that the plaintiff’s speed was probably not high.

[13] The preceding discussion in paragraphs [10] to [12] *supra* indicates that the version by Chief Inspector Swartz is not reliable, because he clearly exaggerated the speed at which the plaintiff drove. He had the opportunity at the inspection *in loco* to correct his

estimations, but did not. It is common cause that at the time of the trial he was still involved as an accused in a criminal trial arising from this collision. He clearly had reason to colour his evidence in a manner favouring his innocence. While I accept the probability that he did look for oncoming traffic at some stage before he started turning right, the fact that he only saw the BMW for the first time at a distance of about 65 metres indicates that he did not keep a proper lookout. The fact that the front wheels of the Ikon were already over the middle line when he first noticed the plaintiff is further evidence that he did not keep a proper lookout before he started to execute the turn. The plaintiff's evidence that he was speaking to his passenger was never disputed in cross-examination of the plaintiff, nor was it addressed in the evidence-in-chief by Chief Inspector Swartz. It was only denied when he was cross-examined by plaintiff's counsel. In the circumstances the denial does not carry much weight. The impression I have is that his attention was not fully on the road as he was chatting to his passenger. Clearly Chief Inspector Swartz did not execute the turn at an opportune moment. In my view he was negligent and contributed to the collision.

[14] I now turn to a consideration of whether the plaintiff was negligent. Mr *Slabber* submitted that the plaintiff kept a proper look-out. As he came over the blind crest the plaintiff had a clear view of the road ahead and immediately saw the defendant's vehicle approaching. He slowed down slightly keeping the Ikon under observation and immediately applied the brakes when he realized that

that vehicle was turning right. He submitted that the plaintiff's actions were in keeping with the duty of a driver in his position as set out in *Sierborger's* case. Up to this point I agree with the submissions made.

[15] Counsel further submitted that, although the plaintiff exceeded the speed limit, this did not contribute to the collision, as (if I understood him correctly) the plaintiff would not have been able to evade the collision even if he drove at 40kph.

[16] Mr *Mutorwa*, on the other hand submitted that the plaintiff was indeed negligent as he drove in an unreasonable manner when he exceeded the speed limit. He relied on the following passage from *Kandenge's* case:

> "Mr *Marcus* persuasively argues with reference to *Sierborger v South African Railways and Harbours* 1961 (1) SA 498 (A) at 504G and *Moore v Minister of Posts and Telegraphs* 1949 (1) SA 815 (A) at 826 that
>
> '(g) Generally one expects and is entitled to expect reasonableness rather than unreasonableness, legality rather than illegality, from other users of the highway.'
>
> I agree with the statement as a general proposition, without for any moment suggesting that such expectation diminishes the duty of other road users to remain alert and exercise the care expected from reasonable drivers in the same circumstances."

[16] In my view Mr *Mutorwa* is correct in this sense that Chief Inspector Swartz was entitled to assume that users of that part of the road would be adhering to the speed limit. I think it is reasonable to assume that at least part of the reason why the speed limit is set at 40 kph is because there are concealed exits ahead when one travels from

east to west. The blind rise means that a driver travelling in this direction would have a limited look out. But that is not all. Such a driver would not be visible to other drivers e.g. intending to enter Gevers Street from Ilse Street, or intending to enter Gevers Street from their premises, or, as in this case, turning right from north to south to park in front of the Embassy. Part of the purpose of the low speed limit is surely to allow such drivers some opportunity to execute their manoeuvres in safety by not having a vehicle suddenly bearing down upon them. The plaintiff, knowing the physical features of the street very well, should have been particularly aware of the danger posed by speeding there and adjusted his speed at least to the legal limit. If the plaintiff had not exceeded the speed limit, he would have been visible for a longer period of time to Chief Inspector Swartz who may very well have noticed him earlier or who may very well have been able to take evasive action, e.g. by braking instead of continuing to travel forward. The plaintiff would also probably have been able to swerve more to the right or do so earlier than he was able to do in this case, thereby avoiding the collision. The conclusion is that the plaintiff was also negligent and indeed contributed to the collision.

[17] In my view the plaintiff's degree of fault should be placed at 20% and the defendant's at 80%. Based on this assessment their respective claims should be reduced accordingly. I also intend adjusting the costs payable according to this assessment.

[18] In the result the following order is made:

Ad the claim in convention:

1. The plaintiff is awarded damages in the sum of N$79 995.51 with interest on this amount, subject to the automatic set-off which will operate as a result of paragraph 3 of this order, at the rate of 20% per annum calculated from date of judgment.
2. The defendant shall pay 80% of the costs of the claim in convention.

Ad the claim in reconvention:

3. The defendant is awarded damages in the sum of N$5 007.44. Since an automatic set-off will operate there is no order for payment of interest.
4. The plaintiff shall pay 20% of the costs of the claim in reconvention.

[signed]

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VAN NIEKERK, J

Appearance for the parties

For the plaintiff: Mr A Slabber

Dr Weder, Kauta and Hoveka Inc

For the defendant: Mr N Mutorwa

Office of the Government-Attorney