REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: I 235/2009

In the matter between:

SERGE DU PLESSIS **PLAINTIFF**

and

JANNIE CHRIS NAMENE **DEFENDANT**

Neutral citation: *du Plessis v Namene* (I 235-2009) [2013] NAHCMD 112 (25 April 2013)

Coram: UNENGU, AJ
Heard: 4-5, 15 February 2013
Delivered: 25 April 2013

Flynote: Negligence – failure to keep a proper look out – what constitutes – plaintiff and defendant involved in accident – plaintiff suing for damages – damages – plaintiff contributing to the accident – negligence of defendant greater than that of plaintiff.

Summary: The plaintiff was driving from north to south in a street divided into two lanes – one each going in an opposite direction. He drove a distance of 220 steps without looking in his rear mirrors for traffic behind him. At the intersection, he stopped at a stop sign and indicated that he was turning to the right when the defendant's vehicle hit his vehicle from behind. The defendant drank beer before driving and alleges that the plaintiff's vehicle cut in front of him from the pavement on the right hand side of the street while he was driving from north to south. It happened suddenly giving him no time to apply brakes, and as a result,

therefore, a collision occurred between his vehicle and the vehicle of the plaintiff. Court – rejects the defendant's version and accepts the version of the plaintiff and found in favour of the plaintiff. However, the plaintiff had also contributed to the collision.

ORDER

In the result, I make the following order:

(i) Judgment is for the plaintiff in an amount equal to 90% of N$ 49 333-43, plus interest at the rate of 20% per annum from date of this judgment to date of full and final payment.

(ii) Costs of the suit, which costs to include the costs of one instructing and one instructed counsel.

JUDGMENT

UNENGU, AJ [1] The plaintiff, represented by Ms De Jager, has instituted action against the defendant in which he is claiming damages in the amount of N$49 333-43 and interest thereon. The defendant, represented by Mr Isaacks, has counterclaimed the action of the plaintiff and is claiming damages in the amount of N$40 785-28 and interest thereon.

[2] The suit arises from a collision between a motor vehicle Toyota Corolla, Registration Number N41299W, driven, at the material time, by a Mr Serge Du Plessis ('the plaintiff's motor vehicle') and a motor vehicle, Nissan Hard Body, Registration Number N81324W, driven, at the material time, by the defendant ('the defendant's motor vehicle') on 24 May 2008. The plaintiff's vehicle was travelling from north to south in Iscor Street and turned right into in Van der Bijl Street. There was a ('stop') sign on Iscor Street where it intersects with Van der Bijl Street. Iscor Street is the main street, and therefore, the advantageous route, whilst Van der Byl Street is the minor street. The defendant's vehicle was also travelling in Iscor Street behind the vehicle of the plaintiff, according to the version of the plaintiff

[3] Plaintiff's particulars of claim allege that the collision was caused solely as a result of the negligent driving of the defendant, who was negligent in one or more of the following respects:

2.1 He failed to keep a proper lookout;
2.2 He failed to apply his brakes timeously or at all;
2.3 He drove his motor vehicle at an excessive speed in the circumstances;
2.4 He failed to avoid a collision by the exercise of reasonable care of a natural person, where he could/ should have done so;
2.5 He failed to exercise proper and or adequate control over his vehicle which he had been driving
2.6 At the time of the collision, he drove a motor vehicle bearing registration number N 81324 W while under the influence of an intoxicating substance and or while the concentration of alcohol in defendant's breathe was not less than 0.37 milligrams of breathe exhaled as it was 0.96 milligrams per 1000 milliliters.

[4] Defendant's plea and counter-claim to plaintiff's particulars of claim allege that the collision was caused by the plaintiff's negligence in one or more of the following respects;

3.1 He failed to keep a proper lookout;
3.2 He failed to apply his brakes timeously or at all;
3.3 He failed to avoid a collision by the exercise of reasonable care where he could/ should have done so;
3.4 He failed to exercise proper and or adequate control over his vehicle which he had been driving

[5] The evidence adduced on behalf of the plaintiff's case and that adduced on behalf of the defendant's case on the issue of whose negligence caused the collision are at loggerheads. In such a case, the proper approach is for me to apply my mind not only to the merits and demerits of the two sets of versions but also their probabilities, and it is only after

doing so that I would be justified in reaching the conclusion as to which version to accept and which to reject (*Harold Schmidt t/a Prestige Home Innovations v Heita*[1]).

[6] It was the testimony of Du Plessis (the plaintiff) that around 18:00 he was coming from Namwater's premises when he made a left turn into Iscor Street; that he looked to the right and left, saw no cars from the right when he made a left turn into Iscor Street. It is further his testimony that he made the left turn and proceeded in Iscor Street, he did not see defendant's vehicle. He proceeded in Iscor Street in the southerly direction and brought his vehicle to a standstill at the intersection of Iscor and Van der Bijl Street. It is again his testimony that his vehicle indicator to the right was on; and decided to make a right turn. Just as he was about 1m beyond the stop line, defendant's vehicle hit his motor vehicle from behind. The impact of the collision was so hard that his vehicle spinned around and the defendant's vehicle came to a standstill approximately 80 metres away from his vehicle in the southern direction, in Iscor Street.

[7] Plaintiff further testified that the distance from the exit of the Namwater parking area up to the stop sign, is approximately 220 meters; that he made a left turn as he accelerated towards the stop sign, driving at approximately 50km/h and that he applied his breaks as he was coming towards the stop sign. The plaintiff testified that he was driving at 50km/h, and that the defendant was not driving slowly, he testified that if one looks at the distance his vehicle travelled up to when it came to a standstill as well as the damage to his vehicle, will clearly indicate that the defendant was far above the speed limit. Not only the plaintiff's vehicle was badly damaged in the collision but the defendant's vehicle also.

[8] Defendant's evidence was that his vehicle was travelling at a reduced speed because it was approaching a stop sign which was in his lane. It was when plaintiff's vehicle cut across defendant's lane in Iscor Street that the collision occurred. The entire plaintiff vehicle's boot was smashed in to a point that it was level with the rear tyres of the vehicle, according to the plaintiff.

---

[1] 2006 (2) NR 556

[9] I have indicated previously how the plaintiff drove his motor vehicle. What steps did the defendant take on his part to avoid the collision, seeing that his vehicle was moving in Iscor Street. From his own evidence, he did nothing to avoid the collision. He might have had the intention to brake his vehicle; but he did not. I accept the submission by Ms De Jager, counsel for the plaintiff, that the defendant did not brake his vehicle. I further accept the submission made by Ms Jagger that on defendant's own version he did not apply brakes when he saw plaintiff's vehicle. Defendant testified that it was too sudden and he could therefore not brake. It is his evidence, that as he approached the stop sign at the intersection, he took his foot off the accelerator, he must have already been in the process of preparing to brake as he knew the stop sign was ahead. I find that if he was not driving fast, when he saw plaintiff's vehicle for the first time, he could have completed the braking process and so, he could have avoided the accident. I also find that defendant did not take reasonable steps to avoid the collision when he could and should have done so. No attempt was made by the defendant to avoid the accident. I accept plaintiff's version that defendant was driving fast, and reject defendant's version that plaintiff's vehicle cut across defendant's lane from the parking area. I agree with Ms De Jager's submission that defendant had the duty to take care and be prepared to expect traffic when approaching an intersection and he should have foreseen the possibility of encountering stationary, slow or fast moving traffic at such intersection. In that regard, the defendant was negligent in his driving, and contributed to the collision, enormously.

[11] *In Nogude v Union and South-West Africa Insurance Co Ltd*[2] , Jansen J A said:

> ' A proper look-out entails a continuous scanning of the road ahead, from side to side, for obstructions or potential obstructions (sometimes called "a general look-out": cf. *Rondalia Assurance Corporation of SA Ltd. V Page and Others,* 1975 (1) SA 708 (AD) at pp. 718H-719B). It means - "…..more than looking straight ahead-it includes an awareness of what is happening in one's immediate vicinity. He (the driver) should have a view of the whole road from side to side and in the case of a road passing through a built-up area, of the pavement on the side of the road as well.'

[2]1975 (3) SA 685(A) at 688

(*Neuhaus N.O. v Bastion Insurance Co Ltd*[3].

[12] I further agree with Ms De Jager's submission that when a vehicle collides with another vehicle head on or with a vehicle in a stationary position, there is *prima facie* proof of negligence. In such circumstances it is inferred that the driver travelled too fast and did not keep a proper look-out.

[13] What is significant is that defendant's evidence regarding the emergency that suddenly confronted him, was disputed; or shown to be untrue, and that on the evidence as a whole, his version of the events is not a true reflection of what happened, especially if one takes into account his testimony when he testified that it was too sudden and that he could, therefore, not brake. Moreover, in cross examination he conceded that he was travelling about 60 to 50km/h as he approached the stop street. When he saw plaintiff's vehicle for the first time, he travelled at a speed of about 50km/h; the plaintiff's vehicle was about 3 steps from the stop street and his vehicle was about 10 steps from the stop street, and about 7 steps from the plaintiff's vehicle.

[14] In determining the defence of sudden emergency, I rely on the principles set out in *Palm v Elsey*[4] (Headnote)

> 'Held, on the evidence, that if defendant had been keeping a proper look-out he should have seen the rock earlier than he said he did and, therefore, that, if he was faced with a sudden emergency, it was of his own making. Held, further, on the other hand, if he had seen the rock earlier, that the evidence indicated that he had had sufficient time in which to decide how far to his left it was necessary to swerve and that, had he driven as a reasonably careful and skilful driver would have done, he would have avoided the rock without any difficulty. Held, accordingly, that defendant was liable for the damages'.

[3] 1968 (1) SA 398 (A8) at pp 405H-406A

[4] 1974 (2) SA 381 (C)

> He continued[5] 'The defendant is faced with a dilemma. If he saw the rock at a stage when he was only eight paces from it, he was not keeping a proper look-out. In that event the "sudden emergency" with which he was faced was one of his own making, and, therefore, does not provide him with a lawful excuse for the collision. On the other hand, if he saw the rock sooner, he did not, in taking avoiding action, act as a reasonably competent and skilful driver would have acted and his misjudging of the situation was therefore culpable. Defendant appears to have had sufficient time to elect whether to pass the rock on the left or the right, and he decided to pass it on the left. His evidence further indicates that he had sufficient time in which to decide how far to his left. It was necessary to swerve and that, had he driven as a reasonably careful and skilful driver would have done, he would have avoided the rock without any difficulty. Moreover, when his car left the road, defendant abandoned his efforts to control the car and merely "relaxed over the steering wheel" while the car travelled across the road and collided with the protective barrier. Defendant was an inexperienced driver. He had had a driver's licence for just over a month before the accident and that to my mind accounts for the manner in which he drove.'

The Court concluded that the accident was attributable to the negligent driving of the defendant and that he was liable for the damages suffered by the plaintiff as a result of the injuries the latter sustained in the accident.

[15] In the present matter, I agree with Mr Isaacks' concession that if the defendant had indeed looked on the side of the pavement, there was that possibility that he could have seen the plaintiff's vehicle, and as such could have avoided the collision between his vehicle and that of the plaintiff.

[16] If defendant had been keeping a proper look-out he, could have seen plaintiff's motor vehicle earlier than he said he did, and, therefore, that, if he was faced with a sudden emergency, it was of his own making. Defendant said that he was travelling at about 60 to 50km/h as he approached the stop street. When he saw plaintiff's vehicle for the first time, he travelled at about 50km/h, plaintiff's vehicle was about 3 steps from the stop street and his vehicle was about 10 steps from the stop street, thus his vehicle was about 7 steps from the

[5] At 383

plaintiff's vehicle. If he had seen the plaintiff's motor vehicle earlier, he could have had sufficient time to decide how far to apply his breaks, had driven as a reasonably careful and skilful driver would have done, and he would have avoided plaintiff's motor vehicle without any difficulty which he did not do. Accordingly defendant was negligent.

[17] I agree with Ms de Jager's submission that defendant's version is not probable in the circumstances of this matter, for the mere fact that the defendant's vehicle hit the plaintiff's vehicle directly from behind, and at the moment of the impact the plaintiff's vehicle was in a straight line in a north south direction in Iscor street. So, if the defendant's version is to be believed, why did the defendant hit the plaintiff's vehicle from behind, and not on the side? The only explanation in those circumstances will be that the plaintiff must have made the turn entirely, came from the pavement across the right hand lane in Iscor Street and that his vehicle was in the left hand lane in a north south direction. Then there must have been definitely enough time for plaintiff to do so. Otherwise if there was no time, and he was still crossing from the west to the left side line, then the vehicles would have collided at that point or there must have been some angle of an impact.

[18] But that is not the end of the matter. The plaintiff's evidence is that from the exit of the Namwater parking area up to the stop sign, is approximately 220 meters, that he saw no cars from the right when he made a left a turn into Iscor Street, he did not see defendant's vehicle. He proceeded in Iscor Street in the southerly direction when he brought his vehicle to a standstill at a stop sign at the intersection of Iscor and Van der Bijl Street while his vehicle indicator to the right was on. He proceeded to make a right turn and just as he was about 1m beyond the stop line, defendant's vehicle hit his motor vehicle from behind. It is also the testimony of the plaintiff that at the time the collision occurred, his motor vehicle's headlamps were not on. He testified that the collision occurred at about between 18h00pm and 18h10, when it was still day light and that the municipal street lights were still not switched on. However, the plaintiff, by failing to check his rear view mirrors, did not keep a proper and a safer look out, and because of that I find that the plaintiff was also negligent in his driving, and his negligence, too, contributed to the collision of the two vehicles.

[18] In *R v Miller*[6] it was held that:

> 'it is in my opinion quite practicable for a motorist by the use of a properly adjusted rear-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.'

I agree and approve of the principle in *R v Miller* supra that the plaintiff had a duty to check his rear-mirror to notice whether a following car was close behind and was travelling at a speed that might endanger his right-hand turn and whether it was responding to a signal. If this could not be done in the circumstances, the turn should not have been executed at all. I take into account the fact that the plaintiff has been driving for the past 22 years, but still failed to utilize his rear mirrors.

[19] It is common cause that a few minutes after the accident a traffic officer arrived at the scene and conducted a breathalyzer test on both the parties. The plaintiff's reading was 0.00 and 0.96 for the defendant. Mrs Claasen testified that she was the presiding officer in a criminal matter in which the now defendant was the accused who pleaded guilty to a charge of driving with an excessive blood alcohol level. The defendant pleaded guilty and a statement in terms of section 112 (2) of the Criminal Procedure Act, 1977[7], was handed up in court. Defendant denied that his driving skill and judgment were impaired by the intake of the alcohol. He further testified that he was not aware that he was above the legal limit. I take it as a factor, when considering who was the cause of the collision. In my opinion there is sufficient link between the alcohol level in the defendant's blood and the accident aggravated

---

[6] 1957 (3) SA 44 (T) at 48

[7] Act No 51 of 1977

by other factors, like not keeping a proper and safe look out, failure to apply brakes, speeding, etc. I find that he was the cause of the collision, although not 100%.

[20] For the aforegoing conclusions, I shall grant judgment in favour of the plaintiff. However, because of the plaintiff's own contributory negligence, the plaintiff succeeds in his claim to the extent of 90%. As regard costs, since the plaintiff has been substantially successful, it is reasonable and fair that the plaintiff be awarded costs.

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

(i) Judgment is for the plaintiff in an amount equal to 90% of N$ 49 333-43, plus interest at the rate of 20% per annum from date of this judgment to date of full and final payment.

(ii) Costs of the suit, which costs to include the costs of one instructing and one instructed counsel.

_____

E P Unengu

Acting Judge

APPEARANCES

PLAINTIFF: Ms B de Jager

Instructed by Du Toit Associates: Windhoek

DEFENDANTS: Mr BB Isaacks

Of Isaacks & Benz Inc, Windhoek