NOT REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: I 2543/2010

In the matter between:

RIVA KAMBINDJA NAMENE **PLAINTIFF**

and

ONESMUS JULIUS MHANI **FIRST DEFENDANT**

JOSEPH HAILONGA **SECOND DEFENDANT**

Neutral citation: *Namene v Mhani and another* (I 2543-2010) [2013] NAHCMD 92 (5 April 2013)

Coram: VAN NIEKERK J

Heard: 30 & 31 May 2012

Delivered: 5 April 2013

Flynote: **Civil trial** – Claim for damages arising from motor vehicle collision – Robot controlled intersection – Plaintiff executing right turn when light turned red – Second Defendant failing to stop when light turned red – Duties of drivers in such situation set out – Both drivers held to be negligent and contributing to collision – Apportionment of damages ordered – Plaintiff's claim reduced by 20%.

ORDER

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1. The plaintiff's claim is reduced by 20%.

2. There shall be judgment for the plaintiff against the first and second defendants, jointly and severally, the one paying, the other to be absolved, for:

   (a) Payment in the amount of N$49250.34.

   (b) Interest on the aforesaid amount at the rate of 20% per annum from the date of judgment to the date of payment.

   (c) Costs of suit.

JUDGMENT

VAN NIEKERK J:

[1] The plaintiff instituted action against the defendants jointly and severally for damages arising from a motor vehicle accident which occurred on 8 September 2009 at the robot controlled intersection between Hosea Kutako Drive and John Meinert Street, Windhoek.

[2] In the particulars of claim it is, *inter alia*, alleged that the plaintiff is the owner of a 2007 Mercedes Benz motor vehicle, which he drove on the particular day; that the second defendant drove a Toyota Tazz vehicle during the course and scope of his employment with the first defendant, alternatively within the ambit of risk created by such employment; that a collision occurred between the two vehicles, the sole cause of which was the negligence of the second defendant, who (i) failed to stop at a robot controlled intersection; (ii) failed to take

cognisance of the plaintiff's vehicle; (iii) failed to apply his brakes timeously or at all; (iv) drove at an excessive speed in the circumstances; (v) entered the plaintiff's right of way at a time when it was dangerous and inopportune to do so; and (vi) failed to avoid a collision when he could have and should have done so.

[3] The two defendants, who were originally represented by the same firm of legal practitioners, filed a joint plea in which they denied knowledge of plaintiff's ownership of the vehicle and of the nature and extent of the damages incurred. They further denied that the second defendant was negligent, but pleaded that the sole cause of the collision and damages was the plaintiff, who was negligent in that he (i) failed to keep a proper lookout for other road users; (ii) failed to avoid the collision when he could have done so; (iii) travelled at an excessive speed; (iv) failed to apply his brakes timeously or at all; (v) entered the second defendant's right of way at a time when it was dangerous and inappropriate to do so. In the alternative they plead that, should the Court find that the second defendant was negligent, he did not cause or contribute to the collision and consequent damages. In the further alternative the defendants plead that, should the Court hold that the second defendant caused or contributed to the collision and damages, the plaintiff also contributed and therefore they seek that the liability of the parties be apportioned in terms of the Apportionment of Damages Act, 1956 (Act 34 of 1956), as amended.

[4] As agreed between the parties the issues of fact that have to be resolved during the trial are:

(i) Whether the plaintiff was the owner of the 2007 Mercedes Benz motor vehicle with registration number N4565W, alternatively the *bona fide* possessor of the said vehicle, in respect of which the risk of profit and loss had passed to the plaintiff.

(ii) Whether the sole cause of the collision was the negligent driving of the second defendant.

(iii) Whether the collision and the plaintiff's damages were also occasioned by the contributory negligence of the plaintiff, and if so, to what extent.

(iv) Whether the plaintiff suffered damages in the amount of N$61 562-92 as a result of the negligence of the second defendant.

[5] The following is not in dispute:

That on or about 8 September 2009 and at the intersection of John Meinert Street and Hosea Kutako Drive, Windhoek, a collision occurred between a motor vehicle driven by the plaintiff and a Toyota Tazz vehicle with registration number N63424W, then and there driven by the second defendant acting within the course and scope of his employment with the first defendant, alternatively within the ambit of the risk created by such employment.

[6] The plaintiff called an expert witness, Mr Ronny Vries, who is an insurance assessor in the employ of Hollard Insurance Company in Windhoek. According to his evidence the plaintiff is insured with his employer. The plaintiff submitted a claim after the collision occurred. On 18 September 2009 Mr Vries made an assessment of the damage to plaintiff's vehicle, a 2007 Mercedes Benz with registration number N4565W. The damage was mostly to the right side of the bonnet and the right front bumper and fender. The headlamp on the right side was also broken. At the time he had a quotation for the repairs available from Star Body Works (Pty) Ltd to the value of N$67 555.05. He changed the rates on some of the items listed in the quotation and eventually authorised repairs to be done to the value of N$61 562.92. In his expert opinion the work done and the material supplied were necessary to repair the vehicle and he considered the costs charged as fair and reasonable. Mr Vries confirmed under cross-examination that Hollard paid for the repairs.

[7] Mr Vries handed in a set of 10 photographs which he took on the same day which show the condition of and damage to the plaintiff's vehicle. There is also one photographs of the vehicle licence disk on the windscreen. The photographs are automatically dated by the camera. The first defendant made much of the fact that this date was 10/5/2007 and suggested later in argument that the vehicle on the photographs might be another vehicle, and not the one involved in the collision with the Toyota. This he seemed to do in a bid to strengthen his argument that the plaintiff was not truthful about the nature and extent of the damage to the Mercedes Benz and consequently also not about the cause of the collision. Mr Vries explained that the date is incorrect and that the discrepancy was probably caused by a problem with the battery of the camera. I accept this explanation and hold that the photographs were taken on 18 September 2009 and reflect the damage to the plaintiff's vehicle caused as a result of the collision on 8 September 2009.

[8] The plaintiff testified. He handed in a certificate of registration (Exh "A"), indicating that the relevant Mercedes Benz was registered in his name. He further said that he drove the said vehicle at about 18h00 on the date in question from south to north in Hosea Kutako Drive in the extreme right hand lane. At the robot controlled intersection with John Meinert Street, he wanted to turn right into John Meinert Street in an easterly direction. The traffic was quite busy. The robot was green for him. He waited in his lane in the middle of the intersection for vehicles travelling from north to south to pass. When the traffic light turned red, he turned right. The second defendant drove through the intersection while the lights were red and hit the plaintiff's vehicle on the right front side. My understanding of his evidence is that he had barely commenced driving when the second defendant drove past him, but hit the Mercedes Benz on the right front side and stopped. The plaintiff left his vehicle there and called the police. He tried to speak to the second defendant, but he was only intent on inspecting his own vehicle. The plaintiff testified

that the second defendant was going fast and that the latter could have applied brakes, but that he did not.

[9] Under cross-examination by the first defendant the plaintiff stated that he did not flash his vehicle's lights at the second defendant to warn him. He denied suggestions that the second defendant hooted and applied brakes. The first defendant put it to him that he actually drove into the Toyota's side and caused a 'bump'. This the plaintiff denied and said the Toyota had a scratch because it drove past the right front side of the Mercedes Benz.

[10] Under cross-examination by Mrs Shikale-Ambondo for the second defendant the plaintiff denied that the collision occurred at 18h45; that the robot was still green when he turned; that he actually bumped into the Toyota, which was merely travelling in its lane through the intersection, rather than that the Toyota bumped into the Mercedes Benz. When asked whether he spoke on his cellular phone while driving, he denied it. It is common cause that the plaintiff did speak on his phone after the accident and while he was still sitting in his vehicle. According to the plaintiff, he called the police to the scene. When it was suggested to him that he should have made sure that the oncoming vehicle would stop before turning across its path of travel, he answered that he could not make sure of this as there was very little time before the traffic waiting from the opposite side of the intersection would pull away. In re-examination he stated when the light turned red, he turned his vehicle to the right.

[11] The first defendant, who appeared in person at the trial, testified that he is the owner of the Toyota Tazz, which operated as a taxi. He employed the second defendant as a driver. On the particular day between 18h00 and 20h00 the second defendant reported the collision to him by telephone. He went to the scene but the vehicles had been removed to the service station near the intersection, where a traffic officer was attending to the matter. He inspected his vehicle and saw damage

on the driver's door and on the left front wheel. The second defendant took him to the scene of the collision and pointed out two black lines on the road surface which allegedly were made when he applied the vehicle's brakes when trying to avoid the accident. The second defendant also explained to him that he had flashed the Toyota's lights and pressed the hooter to warn the plaintiff before the collision.

[12] Under cross-examination by the plaintiff he admitted that the second defendant drove the Toyota that day with his authority and consent and that the black marks could possibly have been made by another vehicle.

[13] The second defendant also testified. He said that he approached the intersection in Hosea Kutako Drive from north to south at a speed of 60 km per hour. He was travelling in the extreme left lane. From a distance of about 16 paces he noticed that the lights were green. He noticed the plaintiff's vehicle turning right. The second defendant flashed the Toyota's lights and then hooted to warn the plaintiff, but the latter continued driving. The second defendant said that he then applied brakes and stopped 'in the blink of an eye', as he put it. The plaintiff's vehicle then bumped into the Toyota's driver's door. The second defendant could not get out on the right side. He disembarked on the left front side and found the plaintiff sitting in the Mercedes Benz, talking on his cellular phone. He asked the plaintiff four times, 'Uncle, how are you driving?', but the latter did not answer. Eventually the plaintiff only said that the second defendant should speak to his (the plaintiff's) lawyers. The second defendant observed brake marks on the road surface caused by the Toyota. These marks started on the solid white line painted at the intersection. As I understand it, this is the line behind which a vehicle should stop if the traffic light is red. The traffic officer arrived and ordered them to move the vehicles to a nearby service station. The plaintiff never got out from his vehicle until then. According to the second defendant the plaintiff's vehicle was never stationary and waiting at the

intersection for vehicles to pass, rather, it was moving all the time, through the intersection, albeit slowly.

[14] As to the first issue to be decided (see para. [4] *supra*), the defendants conceded during the submission stage of the trial that the plaintiff has proved that he is the owner of the Mercedes Benz. This concession was properly made on the evidence presented.

[15] Regarding the quantum of the damages suffered, it was properly conceded on behalf of the second defendant that the plaintiff has proved the damages he suffered.

[16] If I understood his argument correctly, the first defendant submitted that the plaintiff did not suffer any damages because he did not pay for the repairs to be done. He further submitted that there was no evidence that Hollard paid for the repairs. However, in this last submission the first defendant was clearly mistaken, as Mr Vries testified that Hollard paid for the repairs. Furthermore, there is abundant evidence that the plaintiff did suffer damage, even though the insurer paid for the repairs, apart from the excess, which was paid by the plaintiff. The suffering of damages is, in any event, not dependent upon actual payment for any repairs. Clearly the plaintiff was injured in his patrimony, as the value of his vehicle was diminished. It is an accepted method to use the reasonable costs of repairs to assess the damage caused. This method is based on the assumption that such costs represent the diminution in value of the plaintiff's patrimony (See Cooper, *Motor Law*, (Vol Two), p388; Klopper, *The Law of Collisions in South Africa* (7th ed), p13).

[17] The only remaining issues to be decided are those set out in para [4] *supra,* namely (ii) whether the sole cause of the collision was the negligent driving of the second defendant; or (iii) whether the collision and the plaintiff's damages were also occasioned by the contributory negligence of the plaintiff, and if so, to what extent. It

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is trite that in respect of issue (ii) the onus is on the plaintiff to prove his claim upon a balance of probabilities. In respect of issue (iii) the onus is on the defendant (*Vitoria v Union National South British Insurance Co Ltd* 1980 (4) SA 406 (T) at 413A-B; *Union National South British Insurance Co Ltd Vitoria* 1982 (1) SA 444 (A)).

[18] In order to assist in arriving at a decision on these matters it is necessary to determine whether the traffic light was red or green when the plaintiff executed the turn to the right. On this issue the version of the plaintiff and the second defendant are diametrically opposed and irreconcilable. In such a case the approach to be followed has been set out in *Stellenbosch Farmers' Winery Group Ltd v Martell et Cie* 2003 (1) SA 11 (SCA) at 14I-15E:

> "[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in

> question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[19] In considering the demeanour of the plaintiff and the defendant in the witness box, I must say that they were not there for very long. In general I would say that their demeanour did not reveal anything of significance which would assist me in coming to any conclusion.

[20] As to bias, I did not detect any overt signs on the part of the plaintiff. It could be that he might be inclined to present a version favourable to himself, being the plaintiff. However, it must be remembered that he is insured against his own negligence. There is no suggestion in the evidence that he stands to benefit if the cause of the damages incurred is ultimately shown to be someone other than he.

[21] There were no internal contradictions in his testimony, short as it was. I could also not detect any external contradictions. Counsel for the second defendant put it to the plaintiff that he had indicated a certain 'accident type' on the Namibia Road Accident Form completed by the traffic officer, which 'accident type' allegedly did not fit the general description given by the plaintiff in the witness box. Counsel sought to discredit the plaintiff on this basis. However, the plaintiff denied that he specified the so-called 'accident type' and testified that the traffic officer completed this part of the form of his own accord. In my view no reliance can be placed on the description of

the ‘accident type’ in this form as the officer who completed the form was not called as a witness.

[22] As far as the probability of his version is concerned, I cannot say that it is inherently more probable than not, as far as the colour of the light is concerned. An aspect of his evidence which I find improbable arises from his testimony that he wanted to speak to the second defendant at the scene, but that he could not because the second defendant was only intent upon inspecting the damage. The plaintiff did not dispute that he never alighted from his vehicle at the scene. I think it is more probable that he did not attempt to speak to the second defendant as he stayed in his vehicle the whole time. However, I must observe that this aspect is not material in the context of the case.

[23] The plaintiff stated that he did not hear the Toyota’s brakes being applied and denied that the second defendant in fact applied his vehicle’s brakes. I do not think that the plaintiff was in any position to deny the application of brakes as such, as this can be done without making a sound and without necessarily being noticeable to an oncoming driver in the position of the plaintiff who is executing a right turn. He also denied that there were any brake marks on the road surface left by the Toyota. Yet, he never got out of his vehicle at the scene or inspected the road surface. Apart from basing his denial on the fact that he did not hear the sound of brakes, he therefore is not in my view in a position to deny the second defendant’s version that the act of braking left marks of about 1.5 metres in length on the road surface. For reasons to which I shall return later, it is on the evidence more probable than not, to my mind, that the second defendant did apply the brakes sharply, leaving marks on the road surface.

[24] As to bias, it seems to me that the second defendant has more reason to favour himself in his testimony than does the plaintiff. This is so by nature of the fact that he drove the Toyota as a taxi in the course of his employment with the first defendant.

A finding of negligence on his part probably would impact negatively on his current or future suitability as a driver employee. Moreover, the defendants are not insured. A finding against the second defendant of negligence causing the plaintiff's damages would potentially have considerable financial implications for the second defendant.

[25] There were several internal contradictions in the second defendant's evidence. Throughout cross-examination of the plaintiff, evidence-in-chief by the defendants and cross-examination by counsel for the plaintiff, the second defendant's version was that he drove at 60 km per hour before the collision and that he braked sharply on entering the intersection. He denied suggestions by plaintiff's counsel that this speed was too fast in the circumstances by pointing out that the speed limit is 60 km per hour at that place and that that is the speed he maintained. I had the impression at times that he seemed to think that he had a right to drive at 60 km per hour because it was the maximum limit. It was only during re-examination and upon a leading question by his counsel that the second defendant contradicted himself by saying that he did reduce his speed the closer he came to the intersection and when he observed the plaintiff not heeding his other warning signals. By this time the second defendant obviously realized the importance of such testimony for his case. However, in view of the belated nature of the evidence and the manner in which it was elicited, I have little hesitation in rejecting it as an expedient afterthought.

[26] In the presentation of his case the second defendant blew hot and cold about the stage at which the second defendant allegedly spoke on his cellular phone. In his witness summary he stated that before the plaintiff turned right he was talking on his phone. When he testified, he did not mention this, but stated that after he disembarked from his vehicle after the collision he went around to the side where the damage was and found the plaintiff talking on his phone. He said he then thought that the plaintiff had not noticed his prior warning signals (i.e. the flashing and hooting) because he had been talking on his phone. Significantly also, his counsel

never put it as a fact to the plaintiff that the second defendant's instructions were that the plaintiff was using his phone before and during the collision. However, when he was being cross-examined by plaintiff's counsel, he stated for the first time that the plaintiff had indeed already been talking on his phone before the collision. The first defendant also did not mention it in his witness summary or in his testimony and did not confront the plaintiff with this fact during cross-examination. If the second defendant had really seen the plaintiff using his phone while driving just before the collision, he surely would have mentioned this fact to the first plaintiff, which he clearly did not. This fact would surely also have been pleaded, but the plea is silent on this material allegation.

[27] I should also mention that, when the plaintiff's counsel explained to the second defendant that the plaintiff did use his cellular phone after the collision and while he was still sitting in his car to call the police, the second defendant obstinately and unreasonably denied that this could have happened. The reason he gave was because it was too soon for the plaintiff to have already been calling the police. Yet he testified that it took him about two minutes to get out of the Toyota because he had to climb over to the passenger side to leave the car via the front passenger door before he approached the plaintiff. In that time it was quite possible for the plaintiff to have started calling the police. Furthermore, the second defendant was unable to explain who called the traffic police to the scene. On the probabilities it must have been the plaintiff, which lends credence to the latter's version.

[28] The defendants were insistent that the plaintiff bumped into the Toyota's right front door. Their case is that the collision did not occur in that the Toyota passed against the front right and side of the Mercedes Benz in a sidelong fashion as the plaintiff described. However, when one has regard to the photographs handed in by Mr Vries, the damage visible does not fit in with the defendants' description. The damage looks more like something hard scraped past the right front side of the

Mercedes Benz's bumper and fender, causing elongated horizontal marks as well as holes which were torn open, leaving flaps which appear to have been caused by an object passing the vehicle from front to back.

[29] Another respect in which the second defendant's witness summary differs from his testimony is this. In the summary his version is that the plaintiff's vehicle was facing north and then turned right across his path 'out of the blue' and bumped the Toyota. The impression is created of a sudden change of direction which occurred so quickly that the next thing that happened was that the plaintiff's vehicle bumped into the Toyota. However, when one considers the second defendant's evidence, a completely different picture is painted in which the second defendant had time to observe the plaintiff's vehicle the whole time moving from the opposite robot in a northern direction and then beginning to turn right while moving slowly further into the intersection in an easterly direction. The second defendant had time to first flash the Toyota's lights and then to hoot. When there was no reaction from the plaintiff, he decided to brake and succeeded in bringing the vehicle to a standstill, before the Mercedes bumped into the driver's door.

[30] In his evidence (and also in the version put to the plaintiff by the first defendant on the second defendant's say so) much was made of the fact that the second defendant first flashed his vehicle's lights and then hooted at the plaintiff, but that the plaintiff paid him no heed. These are material allegations indicating important steps taken by the second defendant to warn the plaintiff of his approach and to indicate danger. If established, these allegations would show that the second defendant acted carefully in an attempt to avoid the collision and would highlight the fact that the plaintiff did not pay attention to these signals. Yet no word was mentioned of these important signals in the defendants' plea or in the second defendant's summary of evidence, the latter of which was filed on 24 May 2012. It is only in the first defendant's witness summary filed belatedly on 28 May 2012, the first day of the

week in which the matter was set down for trial the floating roll, that it was mentioned that the second defendant allegedly explained to the first defendant on the day of the collision that he gave these warning signals. In my view the probabilities are in favour thereof that, if these signals were indeed given, the second defendant would have pleaded same or, at least have mentioned them in his witness summary.

[31] To sum up, the overall impression I have of the second defendant's evidence is that he was inclined to embellish and exaggerate his version where it suited his case. Another example that affords further confirmation of this impression is his evidence that while he was driving towards the intersection and saw the plaintiff moving through the intersection without heeding his warning signals, he thought by himself in respect of the plaintiff, 'Does he know how to drive?' and 'Does he even have a licence?'. He then decided that he should rather stop. I find it improbable that a driver would think such thoughts merely because of the plaintiff's alleged conduct, which is not unusual in busy inner city traffic.

[32] Upon a question by plaintiff' counsel the second defendant also glibly stated without any hesitation that the last service of the Toyota before the collision occurred on 15 August 2009 and could rattle off all the tasks that had been performed by the mechanic during the service. That he should have immediately remembered the precise date and the rest of the details while testifying nearly three years later is cause for suspicion as to his veracity.

[33] Based on the above analysis and reasons, the credibility of the plaintiff and the second defendant is such that, on the essential disputes of fact, I prefer to accept the version of the plaintiff, except where the probabilities indicate otherwise. There is nothing improbable in the version of the plaintiff that he was waiting in the intersection while the lights were green for an opportunity to turn right; and that when the lights had turned red, he proceeded from the extreme left hand lane across two lanes and entered the extreme right hand lane (viewed from his position initially

facing south-north) where he collided with the vehicle of the second defendant, who failed to stop at the red light. In my view it is more probable than not that the second defendant who was travelling at 60km per hour, braked at the last moment when he was crossing over the white line and into the intersection when he realized that a collision was imminent. However, he should have reduced speed long before already when he observed the plaintiff in the intersection and when the light turned amber.

[34] The second defendant was clearly negligent in the respects alleged by the plaintiff in his particulars of claim, especially when he observed the plaintiff in the intersection intending to execute a right turn.

[35] However, this is not the end of the matter. There is a general duty of care upon a motorist who turns across the path of oncoming traffic at an intersection. The fact that the light has turned red in the road from which he is turning is no reason to absolve him of any duty to take care that it is safe to do so, although this fact would impose a lesser duty on him than if the light were green in the road from which he intends to turn. This is the clear implication of the following *dictum* in *Norwich Union fire Insurance Society Ltd v Chiduku* 1971 (1) SA 599 (RAD) at 600H-601E:

> "It is as well to point out first the high duty of care that rests upon a motorist who turns across the path of oncoming traffic in an intersection.
>
> This high duty of care has been stressed in a number of cases referred to by the learned trial Judge, one of the more recent of which is the case of *R. v. Clarke* (Judgment No. AD 174/68). The general principle laid down in the cases is that a motorist should not proceed to turn across the path of oncoming traffic unless and until he is quite satisfied it is safe to do so. That duty of care, I think, is greater at an intersection which is controlled by traffic lights, where the motorist commences to execute his right-hand turn while the traffic lights are still on green in the road from which he is turning, because if he executes his turn while the lights are still on green

> he is turning at a time when the traffic in the road from which he is turning still has the special right of way, given by the green light, to proceed across the intersection. It is otherwise if he waits until the lights turn to red, because he then knows that the through traffic has been stopped and that there is then less danger of collision with such traffic. It must be remembered that, while it is permissible to turn across a green light, when the motorist turns across such a green light he turns into a red light controlling traffic in the street into which he is about to enter. Where there is a fair amount of traffic using such an intersection, the normal and reasonable practice for a motorist who wishes to turn to his right, is to enter the intersection when the lights are on green in his favour, then pause at the centre of the intersection and remain there until the lights change and the traffic using the road he is in is stopped by the red light. He then knows that the traffic which would normally cross his path is stopped by the red light from doing so and he can then safely proceed to execute his right-hand turn, and furthermore, in doing so, he turns into a green light and not into a red one. As I have said, though it is perfectly permissible for a motorist to execute this manoeuvre while the lights are still on green in the road from which he is turning, he must remember that, when he is doing this, the green lights are giving the traffic crossing his path a special right-of-way, and it is his duty, in these circumstances, to be particularly careful that he does not impede this traffic."

(See also the unreported judgment of this Court in *Kruger v Naboto* Case No. (P) I 2693/06, delivered on 29 May 2009).

[36] In my view the reasonable driver intending to execute a right turn at a robot controlled intersection where the lights have turned red would take care to keep a proper lookout for traffic from the opposite direction and would make sure that vehicles moving in close proximity towards the intersection come to a standstill or at least slow down to such an extent that it can be safely assumed that they are in the process of coming to a standstill before he or she executes the turn. The plaintiff said in evidence that he did not make sure of this because there was no time, he had to clear the intersection for vehicles coming from the other direction and for which

the traffic lights would be turning green. It is so that he also had a duty to clear the intersection, but it must be accepted that there is some delay before the lights do turn green. His first duty was to make sure that he could execute the right turn safely. This the plaintiff did not do. It is clear from his evidence that when the lights turned red, he just turned. In this respect he was also negligent.

[37] The negligence of both drivers contributed to the collision. In my view the degree of fault should be apportioned at 20% on the side of the plaintiff and 80% on the side of the second defendant. The first defendant is of course vicariously liable to the plaintiff for the second defendant's negligence. This means that the plaintiff's claim should be reduced by 20%. As the plaintiff was substantially successful, the defendants should pay his legal costs.

[38] I therefore make the following order:

1. The plaintiff's claim is reduced by 20%.
2. There shall be judgment for the plaintiff against the first and second defendants, jointly and severally, the one paying, the other to be absolved, for:
   (a) Payment in the amount of N$49250.34.
   (b) Interest on the aforesaid amount at the rate of 20% per annum from the date of judgment to the date of payment.
   (c) Costs of suit.

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K van Niekerk

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Judge

APPEARANCE

For the plaintiff: Ms A Botes

of Francois Erasmus & Partners

For the first defendant: In person

For the second defendant: Mrs L Shikale-Ambonde

of Kaumbi-Shikale Inc