REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2498/2013

In the matter between:

JOEY JACOBA DELIE **PLAINTIFF**

And

RONNIE MUINJO HOEBEB **DEFENDANT**

Neutral citation: *Delie v Hoebeb* (I 2498/2013) [2014] NAHCMD 271 (18 September 2014)

Coram: PARKER AJ
Heard: **23 June 2014; 25 – 27 June 2014**
Delivered: **18 September 2014**

Flynote: Negligence – Duty of a driver on a public road – Duty to have reasonable consideration for other persons using the road – Court held that s 81 of the Road Traffic and Transport Act 22 of 1999 and other provisions of the Act provide norms according to which the conduct of drivers may be judged and a breach of any of them may be relied on as establishing the delictual liability of parties in a collision.

Summary: Negligence – Duty of a driver on a public road – Duty to have reasonable consideration for other persons using the road – Court held that s 81 of the Road Traffic and Transport Act 22 of 1999 and other provisions of the Act provide norms according to which the conduct of drivers may be judged and a breach of any of them may be relied on as establishing the delictual liability of parties in a collision

– Defendant driving beyond the speed limit and disregarding a double line in the middle of a stretch of the road prohibiting overtaking of traffic – Court found that the defendant drove beyond the speed limit and at excessive speed and he overtook traffic on a stretch of the road where overtaking of traffic is prohibited – Defendant lost control of his motor vehicle and the vehicle slammed into traffic guard-rails and was thrown back into oncoming traffic and thereby hitting the plaintiff's motor vehicle which happened to be in the oncoming traffic – Court found that the cumulative effect of the defendant's actions breached the Act and the defendant was negligent as he drove his vehicle on a public road without reasonable consideration for other persons using the road.

ORDER

(a) Judgment is for the plaintiff in the amount of N$21 000, plus interest at the rate of 20 per cent per annum, calculated from the date of this judgment to the date of full and final payment

(b) The plaintiff is entitled to 60 per cent of her costs

JUDGMENT

PARKER AJ:

[1] In this matter the cause of action arose from a collision of two motor vehicles that occurred in the vicinity of the Windhoek Country Club and Casino on the notorious Western By-Pass; 'notorious' because this road had had more than its fair share of motor vehicle collisions that are quotidian in Windhoek.

[2] From the Pre-Trial Conference Order (issued on 20 March 2014), I note that the following facts are not in dispute. The plaintiff was at all material times the driver of one of the motor vehicles involved in the collision, namely, a Volkswagen City Golf, with registration number N 87471 W. The defendant was the driver of the other motor vehicle, namely, a Range Rover, with registration number N 7725 W. The collision took place at about 22h00 on 11 January 2013. Furthermore, as a result of the collision damage to the plaintiff's motor vehicle was beyond economical repair. The parties agree that quantum of damages should be pegged at N$29 800, less N$8 000 that the plaintiff obtained from sale of the wreck of her motor vehicle, which comes to N$21 800. Moreover, I note that the defendant did not institute a counterclaim.

[3] Since the parties have agreed the quantum of damages this court may award I turn to the issues that still divide the parties; and they are set out in paras 1 and 2 of the Pre-trial Conference Order. They boil down to these issues, that is, whose negligence, the plaintiff's or the defendant's, caused the collision, and whoever was negligent, was it that party's sole negligence that caused the collision or that the other party contributed to the collision.

[4] It is the plaintiff's case that the collision was caused by the sole negligence of the defendant. The defendant's case is that the collision was caused by the negligence of the plaintiff, but if the court found that the defendant's negligence caused the collision, then in that event, the defendant pleads that the plaintiff was also negligent and her negligence contributed to the collision.

[5] On the evidence adduced on both sides of the suit, I do not, as respects the essential aspects of the evidence, find that there are two irreconcilable versions or mutually destructive accounts put forth by the plaintiff (and her witness) on the one hand and by the defendant on the other in relation to the collision of the two motor vehicles. The evidence points to these irrefragable and indubitable facts. The plaintiff was all along driving in her rightful lane of traffic and within the speed limit. She was driving at about 30 kph because she had just turned into the Western By-Pass from the Windhoek Country Club and Casino and so she had not picked up any great

speed. She noticed that the defendant's motor vehicle was driving towards her motor vehicle while she was driving in her rightful traffic lane. Her reaction was to veer her motor vehicle to her right-hand side towards the traffic lane in which the defendant had vacated.

[6] The plaintiff's account should be the truth because that lane was at that point in time empty of immediate oncoming traffic. It should be true also because the defendant who was driving beyond the speed limit on that stretch of the road and at an excessive speed and had been weaving and bobbing his way across lanes. It was during one such manoeuvre that the defendant lost control of his motor vehicle; whereupon his motor vehicle slammed into the traffic guard-rails to his right, that is, to the left of the plaintiff's traffic lane, and his vehicle was thrown back. It was when the defendant's motor vehicle was thrown back from the rails that it collided with the plaintiff's motor vehicle. The defendant's motor vehicle impacted the plaintiff's motor vehicle on or near the dividing double lane separating the plaintiff's traffic lane and the defendant's traffic lane. This further supports the plaintiff's evidence that when she saw the defendant's motor vehicle driving in her traffic lane towards her motor vehicle she attempted to avoid a collision by moving into the traffic lane to her right which, as I have found, was at that point in time empty of immediate oncoming traffic.

[7] This evidence, which I accept, belies Ms Shifotoka's submission that when the plaintiff was 'faced with an imminent danger, she did nothing to avoid the collision'. The plaintiff swerved into a lane to her right which, as I have said more than once, was empty of immediate oncoming traffic. To the plaintiff, at the spur of the moment and in the circumstances, that was the best manoeuvre she could execute in order to avoid the collision; and I cannot fault it. In this regard, it must be remembered that what happened was not a head-on collision. The plaintiff's motor vehicle was impacted by the defendant's at its left side which is consistent with the defendant's motor vehicle slamming into the traffic guard-rails and being thrown back into the way of oncoming traffic.

[8] With the greatest deference to Ms Shifotoka, I cannot accept counsel's submission that the defendant took reasonable steps to avoid the collision. The evidence is clear that, contrary to what Ms Shifotoka submits, the defendant did not swerve his vehicle to avoid the collision. He rather lost control of his motor vehicle when he was driving at an excessive speed and executing the aforementioned reckless and illegal weaving and bobbing manoeuvre across major lanes at the stretch of the road where overtaking of traffic is prohibited by law. And there and then the defendant's motor vehicle was thrown by momentum, as the vehicle was travelling at great velocity, against the traffic guard-rails and was thrown back into the lane of oncoming traffic. The plaintiff's motor vehicle happened to be in the oncoming traffic.

[9] The evidence is overwhelming, therefore, that the defendant drove not only beyond the speed limit but he also drove at an excessive speed when at the same time he was executing the illegal and reckless weaving and bobbing manoeuvre. The defendant's motor vehicle was travelling at such excessive speed that when it hit the traffic guard-rails it did not come to a stop. Moreover, not only did the defendant drive at an excessive speed, he overlook traffic in front of him at points where, as I have said more than once, there was a double line separating the main lanes, indicating that overtaking was prohibited. Indeed, the weaving and bobbing manoeuvre executed by the defendant was illegal; and the defendant was negligent in his actions.

[10] Thus, the defendant should not have overtaken the traffic in front of him for reasons I have put forth previously. The defendant should not have driven beyond the speed limit and to the extent that he lost control of his motor vehicle. The cumulative effect of the actions of the defendant was that he drove his motor vehicle on a public road without reasonable consideration for other persons using the road in contravention of s 81 of the Road Traffic and Transport Act 22 of 1999. As I said in *Simon Ileni v Stefanus Shifuka* Case No. I 1272/2006 (judgment delivered on 5 March 2007) (Unreported), para 8, section 81 and other provisions of the Act 'provide norms according to which the conduct of a motorist may be judged, and breach of any of them may be relied on as establishing the delictual liability of the parties'. The

defendant was, therefore, negligent in his actions which caused the collision. The plaintiff, on the other hand, took reasonable steps in the circumstances in an attempt to avoid the collision.

[11] Based on the evidence and the aforegoing reasoning and conclusions I hold that the plaintiff has established that the defendant was negligent and his negligence alone caused the collision. Accordingly, I hold that no culpa attaches to the plaintiff, and so I find that she did not contribute to the collision. The judgment of the court is, therefore, that the plaintiff succeeds in her claim.

[12] What remains is the matter of costs. Since the parties agreed the quantum of damages the court may award, the plaintiff was not put to the task and expense of proving the amount of damages claimed. This settlement should perforce affect costs that the plaintiff may have.

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

(a) Judgment is for the plaintiff in the amount of N$21 000, plus interest at the rate of 20 per cent per annum, calculated from the date of this judgment to the date of full and final payment.

(b) The plaintiff is entitled to 60 per cent of her costs.

C Parker

Acting Judge

APPEARANCES

PLAINTIFF :	C Geingos Of J R Kaumbi Inc., Windhoek
DEFENDANT:	E Shifotoka Of Conradie & Damaseb, Windhoek