

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT**

Case no: HC-MD-CIV-ACT-DEL-2017/02447

In the matter between:

WESTERN ADMINISTRATION SERVICES (PTY) LTD

1ST PLAINTIFF

DEON BLAAUW

2ND PLAINTIFF

and

ELIAICHI SHIFOTOKA

DEFENDANT

Neutral Citation: *Western Administration Services (Pty) Ltd vs Shifotoka* (HC-MD-CIV-ACT-OTH-2018/00470) [2019] NAHCMD 103 (16 April 2019)

CORAM: UEITELE J

Heard: 22, 23, 24 & 25 October 2018 and 14 November 2018

Delivered: 16 April 2019

Flynote: *Negligence* - Proof of - Necessity for plaintiff to prove not only that the possibility should have been foreseen but also that there were reasonable steps which should have been taken - Defendant having foreseen the possibility and taken certain steps - Onus on plaintiff to establish further steps he could and should have taken—

Damages - Proof of damage - Assessment of damages - Damage to a motor car - Damages claimed in an amount being the difference between the pre-collision and post-collision value of the car - Failure to establish the pre-collision value.

Summary: The second plaintiff, being a paramedic, was responding to a motor vehicle accident call when the collision occurred between the second plaintiff, driving an emergency response vehicle and the defendant, driving a Nissan X-Trail on the Monte Cristo Road in Windhoek on the evening of 25 March 2017. The second plaintiff claimed from his insurers and his claim was settled. Thereafter the insurer, the first plaintiff, sought to claim against the defendant through the principle of subrogation.

Held – It is now a well-established principle of our law that the plaintiff always bears the *onus* to, on a balance of probabilities, prove negligence on the part of the defendant. This proposition must, however, be clarified, as stated by the Supreme Court in the matter of *Motor Vehicle Accident Fund of Namibia v Lukatezi Kulubone* that even where there is no counterclaim but each party alleges negligence on the part of the other, each such party must prove what it alleges.

Held – the driver of a vehicle stationary at the side of the road who wishes to drive out into the stream of traffic has a particular duty to assure herself that it is safe to do so. This is so more particularly if the driver wishes in driving out to cross the stream of traffic and execute a U-turn. Most importantly, the driver of the stationary vehicle is under a duty not to carry out her intended manoeuvre unless and until it is safe to do so. It is for this driver to assure herself that there is no other vehicle likely to be impeded by it or that the drivers of such vehicles are aware of her intention and are accommodating their movements with her.

Held further – The principle of assessment of damages in delict is that a plaintiff must by monetary compensation be placed in as good a position financially as he would have been in if the delict had not been committed. In order to prove such diminution in value a plaintiff would be entitled to establish the difference between the pre-collision and post-collision value of his damaged property. Plaintiffs have failed to prove what the damages are that they allege the second plaintiff suffered as a result of the collision.

ORDER

- a) The defendant's negligence was the cause of the collision between the a blue Kia Cerato 1.6 sedan motor vehicle with registration number N 156 – 132 W and the Nissan X-Trail with registration number KN NA.
- b) With respect to the quantum of damages the Court absolves the defendant from the instance.
- c) The defendant must pay the plaintiff's costs of suit
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JUDGMENT

UEITELE J:

Introduction

[1] The first plaintiff in this matter is *Western Administration Services (Pty) Ltd*, the insurer of Deon Blaauw, the second plaintiff in this matter, a paramedic, who trades

under the name of AEMS Ambulance Services. (I will, in this judgement for ease of reference, refer to the second plaintiff as '*Blaauw*').

[2] On the evening of 25 March 2017 a motor vehicle collision involving Mr Blaauw's motor vehicle, a blue Kia Cerato 1.6 sedan motor vehicle with registration number N 156 – 132 W (I will, in this judgement for ease of reference, refer to this vehicle as the '*Kia*') and a motor vehicle, a Nissan X-Trail with registration number KN NA (I will, in this judgement for ease of reference, refer to this vehicle as the '*X-Trail*') driven by Ms Eliachi Shifotoka (I will, in this judgement for ease of reference, refer to the defendant, as '*Shifotoka*'), occurred on the Monte Cristo Road in Windhoek.

[3] After the collision, Blaauw submitted a claim to his insurers, *Western Administration Services (Pty) Ltd*. The insurers settled the claim and now claim from the defendant on the basis of subrogation.

[4] I indicated above that Blaauw trades as a paramedic. On the evening of 25 March 2017 he was on standby duties. At approximately 00:45, while he was at Riverside Service Station, he received notice of a motor vehicle accident that occurred on the Monte Christo Road, Havana, Katutura, Windhoek. He responded to the notification and drove from Riverside Service Station to the scene of the accident. He never made it to the scene of the accident as the Kia was involved in an accident which resulted in the Kia being damaged. Blaauw alleges that Shifotoka's negligent driving was the sole cause of the accident and, as indicated above on the principles of subrogation, instituted action against the defendant for damages to his vehicle.

[5] Shifotoka entered notice to defendant the action, and also filed a counterclaim. She returned the fire, as it were, by not only defending the claim but by also filing a counterclaim for payment of N\$ 20 000 as damages sustained as a result of the accident; interest on the amount of N\$ 20 000 and costs of suit.

[6] In the pleadings, both parties attribute negligence on the part of the other as the cause of the collision. Blaauw, in his particulars of claim, claims that Shifotoka was negligent in that she failed to keep a proper look-out for other vehicles, particularly his motor vehicle; she executed a u-turn when it was inappropriate to do so; she failed to give an immediate and absolute right of way to a vehicle sounding a device and showing its blue emergency light, particularly the plaintiff's motor vehicle; she failed to apply her vehicle's brakes timeously or at all; she failed to take the reasonable and necessary steps to avoid the collision while she was able to do so and that she failed to exercise the reasonable care to avoid the accident when she was able to do so.

[7] The defendant, for her part, not only denies the allegations contained in the plaintiff's particulars of claim (and quoted in the preceding paragraph), but also alleged that the plaintiff was negligent in that he failed to keep a proper look-out for other vehicles; failed to switch on the siren and blue emergency of the vehicle then driven by the plaintiff; he failed to apply his vehicle's brakes timeously or at all; he failed to take the reasonable and necessary steps to avoid the collision while he was able to do so.

[8] From the brief background that I have set out in the preceding paragraphs, it is clear that the plaintiff accuses the defendant of being, through her negligent driving, the cause of the accident and the resultant damages he says he suffered. The defendant equally accuses the plaintiff of being, through his negligent driving, the cause of the accident and the resultant damages that she says she suffered. This naturally requires this court to determine, whether the plaintiff or the defendant, was the party at fault for the accident and therefor liable to pay the damages claimed and what the quantum of the damages are.

[9] In order to determine who between the Blaauw and Shifotoka, through his or her negligence, caused the collision, a brief outline of the evidence that was presented in court is necessary. I will very briefly narrate the plaintiff's evidence and thereafter the defendant's evidence.

The plaintiff's evidence.

[10] Blaauw testified in his own case and also called a certain Mr. Roan Gideon Swiegers, an estimator and an insurance assessor and a member of Namib Assessing Services Close Corporation, to testify with respect to monetary value of the damages that he alleges he suffered.

[11] Blaauw testified that on 25 March 2017 at about 00h45 he was notified of motor vehicle accident with serious injuries, which occurred on the Monte Christo Road, Havana, Katutura, Windhoek. He further testified that he immediately responded to emergency call and proceeded to the scene of the accident. It was furthermore Blaauw's testimony that the Kia vehicle in which he was traveling was used as a medical emergency response vehicle branded with reflective signage, equipped with a siren device and red emergency lights which were visible at a 360 degree angle affixed to the vehicle.

[12] He testified that as he drove along Monte Christo Road from the easterly direction to the westerly direction, he sounded the siren device and the vehicle's red emergency lights were switched on. He further testified that as he was driving along Monte Christo Road, the vehicles that were also travelling in that road and in the same direction as he was travelling gave him right of way by slowing down and pulling off to the edge of the left side of the road, allowing him to pass safely on the right side of that same road within the same lane.

[13] Blaauw further testified that one of the vehicles that pulled to the left side of the lane, put on its emergency indicators (commonly known as hazard lights) to acknowledge the plaintiff's right of way. He continued and testified that as he approached a bus stop known as the "Matshitshi Bus stop" in Monte Christo Road, a motor vehicle suddenly pulled out from the queue of vehicles on the plaintiff's left side and tried to execute a u-turn in front of him. He further testifies that although he applied

his brakes, the distance was very short and he collided with the right rear side of that vehicle and this is the vehicle that was driven by the defendant, Shifotoka.

[14] Blaauw further testified that at that time of the collision, the Kia was still under a hire purchase agreement with Nedbank. He also stated that he took out a high risk insurance in respect of the motor vehicle with Western Insurance. The plaintiff further testified that the appointed assessor who inspected the plaintiff's motor vehicle came to the conclusion that the motor vehicle was damaged beyond economical repair and communicated same to the plaintiff.

The defendant's evidence.

[15] The defendant, Ms Shifotoka, testified that on the 25th of March 2017, she was traveling towards Havana with her son and nephew in the Monte Christo Road, Windhoek at approximately 01h00 a.m., from the easterly direction to the westerly direction. She further testified that while travelling in the Monte Christo Road approaching a three way intersection, she received a phone call on her mobile telephone. She testified that her son answered the call. The son informed her that the caller indicated that there was an emergency at home and that they needed to turn back and head home.

[16] She further testified that as they passed the three-way intersection, she saw an ambulance coming from the opposite direction (namely from the westerly direction to easterly direction) in a hasty manner with its emergency siren and lights on. She testified that upon seeing the ambulance, she switched her hazard (emergency) lights on to warn the drivers behind her about the oncoming ambulance. After the ambulance had cleared the road, she said, she made her intentions clear to turn right by indicating as such.

[17] While in the process of turning right, she heard a loud noise emanating from the rear right end of her vehicle as the vehicle driven by Mr Blaauw collided with her

vehicle. She testified that she did not hear the siren of the vehicle driven by Mr Blaauw nor did she see the red lights of that vehicle.

[18] On the basis of the above sketched evidence, I must decide whether on the probabilities, the accident more likely happened in the way asserted by plaintiff or in the way described on behalf of the defendant.

Who of the two drivers (i.e. between Ms Shifotoka and Mr Blaauw) was negligent?

[19] It is now a well-established principle of our law that the plaintiff always bears the *onus* to, on a balance of probabilities, prove negligence on the part of the defendant.¹ This proposition must, however, be clarified, as stated by the Supreme Court in the matter of *Motor Vehicle Accident Fund of Namibia v Lukatezi Kulubone* that even where there is no counterclaim but each party alleges negligence on the part of the other, each such party must prove what it alleges.²

[20] For more than 110 years, the courts have consistently stated that for the purposes of liability, *culpa* arises if -

(a) *A diligens paterfamilias* in the position of the defendant -

(i) would foresee the reasonable possibility of his or her conduct injuring another in his person or property and causing him or her patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) The defendant failed to take such steps.³

¹ See *Arthur v Bezuidenhout and Miemy* 1962 (2) SA 566 (AD) at 576G.

² See the unreported judgment of *Motor Vehicle Accident Fund of Namibia v Lukatezi Kulubone* Case No SA 13/2008 (at page 16 – 17, paragraph 24) delivered on 09 February 2009.

³ *Kruger v Coetzee* 1966 (2) SA 428 (A) at p 430.

[21] The requirement set out in paragraph (a)(ii) of the preceding paragraph is sometimes overlooked. Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down, said Justice Homes.⁴ Hence the futility, in general, of seeking guidance from the facts and results of other cases.

[22] In the present case, it cannot be disputed that, a *diligens paterfamilias* in the position of both Blaauw and Shifotoka would have foreseen the possibility of their vehicles causing damage to other motor cars which might collide with them, if they did not have a proper look out and took steps to avoid collision with other vehicles.

[23] The facts of present case that are not in dispute are that both Blaauw and Shifotoka were driving in the same direction, which is from East to West. The collision occurred in the early hours of the morning, at around 01H00. Shifotoka had brought her vehicle to a standstill on the left side of the Monte Christo Road and made a u-turn, in front of vehicles following her in order to return to the easterly direction from where she came. From the photos that were admitted in evidence as exhibits, it was clear that the collision between the Kia and the X-Trial occurred in the left lane of Monte Christo Road and that the vehicle of Blaauw was damaged on the right front and that of Shifotoka damaged to the right rear side.

[24] In view of these facts that are not in dispute, the questions that must be answered are whether it was safe for Mrs Shifotoka to execute the U-turn which she did and whether Blaauw could have foreseen that Shifotoka was intending to execute a U-turn and took measure to avoid the collision.

⁴ *Ibid.*

[25] In an unreported judgement,⁵ Jajbhay J said that the driver of a vehicle stationary at the side of the road who wishes to drive out into the stream of traffic has a particular duty to assure herself that it is safe to do so. This is so more particularly if the driver wishes in driving out to cross the stream of traffic and execute a U-turn. I agree with these sentiments. The driver of the stationary vehicle is under a duty to give a clear and unequivocal signal of her intention in such a manner as to be visible to the other drivers. Most importantly, the driver of the stationary vehicle is under a duty not to carry out her intended manoeuvre unless and until it is safe to do so. It is for this driver to assure herself that there is no other vehicle likely to be impeded by it or that the drivers of such vehicles are aware of her intention and are accommodating their movements with her.

[26] In the present case, Shifotoka testified that when she noticed the ambulance approaching her from the opposite direction (that is, from the Westerly direction to the Easterly direction), she stopped and put on her emergency indicator lights (hazards) to warn the drivers behind her about the oncoming ambulance. It was her evidence that as soon as the ambulance had passed her, she indicated her intention to turn right and did so. What she did not tell the court is what actions she took to ensure that it was safe for her to embark on the manoeuvre she did. She told the court (in cross examination) that she looked in the rear view mirror of her vehicle and did not see Blaauw's vehicle. She also told the court that she did not hear the siren of Blaauw's vehicle nor did she see the flashing red lights of Blaauw's vehicle.

[27] Blaauw's evidence is that as he was driving in Monte Christo Road, he had his vehicle's siren on and had also switched on the emergency red light that was flashing in a 360° rotation and the vehicles in front of him gave him a right of way by moving to the edge of the left lane. When driving in the direction of Shifotoka's motor vehicle, he must have observed Shifotoka's vehicle as one of the vehicles in front of him. Even if I were to accept that Ms Shifotoka had switched on her hazards, this action in itself does not articulate her intention to either join the stream of traffic or engage in a dangerous manoeuvre.

⁵ *De Klerk v Road Accidents Fund*, Case No: 04/17901 delivered on 22 May 2008 of the then Witwatersrand Local Division of the High Court of South Africa.

[28] Ms Ndilula who appeared on behalf of the Shifotoka argued that, the fact that Shifotoka did not see Blaauw's flashing red light and did not hear Blaauw's vehicle siren is testimony of the fact that Blaauw did not have his red lights on and did not activate his vehicle's siren. She argued that Blaauw must have been driving at an excessive speed in hurry to arrive at the scene of the accident to which he was summoned (if he indeed was so summoned) in the minimum possible time.

[29] I do not agree with Ms Ndilula. There is no credible evidence as regards the speed at which Blaauw was driving, secondly the only reasonable inference that I can draw from Shifotoka's failure to explain why she did not see Blaauw's vehicle is that she did not have a proper look out. It must be remembered that it was at night and the collision occurred in the left lane (in which Blaauw was driving) of Monte Christo Road. I accept Blaauw's testimony that Shifotoka executed the U-turn when Blaauw's vehicle was very near hers, leaving him with literally no opportunity to avoid the collision. In those circumstances, I cannot find that Blaauw acted negligently. The cause of the collision is squarely Shifotoka's dangerous manoeuvre. Having found that Shifotoka was negligent, I now proceed to consider the quantum of damages.

The *quantum* of damages.

[30] I find it appropriate to, before I refer to the evidence led at the trial, make a few remarks of a general nature concerning the proof of damages in motor collision cases, where the plaintiff, as I found in this case, has succeeded to establish delictual liability on the part of the defendant.

[31] Where, as in the present case, the *quantum* of damages has been put in issue by the defendant, it is obvious that the *onus* rests upon the plaintiff to establish exactly what, if anything, the patrimonial loss is which he has suffered in consequence of the

mishap. Klopper⁶ argues that damage in the strict sense of the word, refers to the diminution of the estate or patrimony

[32] The principle of assessment of damages in delict is that a plaintiff must by monetary compensation be placed in as good a position financially as he would have been in if the delict had not been committed.⁷ Generally speaking, payment to a plaintiff of a sum representing the diminution in value of his damaged property will place him in such a position. In order to prove such diminution in value, a plaintiff would be entitled to establish the difference between the pre-collision and post-collision value of his damaged property.⁸

[33] A very common and practical method of proving this difference is to establish the necessary and reasonable cost of restoring the damaged property to its pre-accident condition, and, in the majority of cases of vehicles damaged in a collision, success in proving the amount of such cost and consequent payment of such amount to him, would place plaintiff in as good a position financially as he would have been in had the collision not occurred. Evidence of the estimated cost of repairs would, however, not be an appropriate yardstick by which to measure the diminution in value as a result of the damage if the evidence clearly shows that in an economic sense the vehicle is damaged beyond repair - in other words, that the cost of restoring the vehicle to its pre-collision condition would be in excess of the difference between its pre-collision and post-collision values.

[34] In respect of the quantum of damages, Blaauw testified that as a result of the hire purchase agreement between the plaintiff and Nedbank, he testified that Western Insurance first covered the hire purchase settlement amount of N\$ 87 166.96. The plaintiff further testified that he had to pay an excess of N\$12 600 to Western Insurance

⁶ Klopper HB: *The Law of Collisions in South Africa*, Lexis Nexis, 7th Edition at p 13.

⁷ See: *de Jager v Grunder* 1964 (1) SA 446 (AD) at p. 456.

⁸ See the unreported judgement of this Court of *Nghihepa v Raes Transport and Others* Case No.: I.1621/2000 delivered on 3 November 2000 and also *Builders Supplies (Pty.) Ltd. v South African Railways and Harbours*, 1942 T.P.D. 120 at p.121; *Boshoff v Erasmus*, 1953 (1) SA 103 (T) at p. 106; *Fourie v Coetzee*, 1947 (2) SA 646 (SWA) at p. 650.

in terms of the insurance policy. Lastly, in this respect the plaintiff testified that Western Insurance deducted the excess from the settlement amount and paid to the plaintiff the sum of N\$ 26 233.04.

[35] I indicated above that that the plaintiff's called a certain Mr. Roan Gideon Swiegers, an estimator and an insurance assessor and a member of Namib Assessing Services Close Corporation, to testify with respect to monetary value of the damages that Blaauw alleges to have suffered.

[36] Swiegers testified that on 30 March 2017, he was instructed to assess the damages to a Kia which vehicle was insured by the first plaintiff, Western Administration Services (Pty) Ltd and apparently involved in a motor vehicle collision on 25 March 2017. The witness further testified that he inspected the vehicle at the premises of MRT and that it was obvious that the vehicle had been involved in a collision and was seriously damaged.

[37] Swiegers further testified that he obtained two quotations, one from Auto Exec and the second one from Bluechip Spray painting CC. He further testified that the quotations indicated that the vehicle was damaged to such an extent that it would not be economical to repair it as the repair cost would exceed the retail value immediately prior to the date of the collision. The witness further testified that he completed his assessor's report wherein he advised that the vehicle in question must be treated as uneconomical to repair and that the first plaintiff should consider settling the insurance claim on the sum for which the vehicle was insured for at the time of the collision, being N\$ 126 000.

[38] Mr. Swiegers further testified that he instructed MRT to release the vehicle from their storage and premises and tow the vehicle in question to Pro-Ex Auctioneers. The witness further testifies that the vehicle was sold at an auction for the amount of N\$ 35 000. In Mr. Swiegers' opinion, the total quantum of damages would be N\$ 92 152.30 which would be very fair and reasonable.

[39] In view of the evidence presented on behalf of the plaintiffs, the question to be answered is whether the plaintiffs have discharged the onus resting on Blaauw to prove that the quantum of damages that he alleges he suffered is the amount of N\$ 92 152.30. In my view, the plaintiffs have failed to prove what the damages are that they allege Blaauw suffered as a result of the collision.

[40] My view is based on the following reasons. Swiegers testified that the quotations indicated that the vehicle was damaged to such an extent that it would not be economical to repair it as the repair cost would exceed the retail value of the vehicle immediately prior to the date of the collision. This evidence by Swiegers is nothing but a conclusion (secondary facts) that he has arrived at without placing the primary facts on which he basis his conclusion before court. Swiegers does not tell the court what the repair costs of the vehicle are nor does he tell the court what the pre collision value of the Kia is.

[41] Later in his evidence Swiegers tells the Court that the Kia was insured for an amount of N\$ 126 000. Surely the amount for which the Kia is insured cannot be the pre collision value of that vehicle. Swiegers testified that the 'wreck' was sold at an auction for N\$35 000. This price which was obtained on the open market may give a good indication of the market value of the Kia after the collision. Blaauw's loss will thus be the difference between the pre collision value and post collision value of the Kia. There is evidence of the post collision value but no evidence of the pre collision value of the Kia. It is therefore impossible for this court to determine what the diminution of Blaauw's estate is. I will thus absolve the defendant as regards the claim for the quantum of damages suffered by the plaintiff's.

Costs

[42] It remains to deal with the question of costs. The general rule is that costs are in the discretion of the Court and the costs normally follow the cause. The plaintiffs have been substantially successful. I therefore see no reason and have also not been

presented with any reason why I must not order the defendant to pay the plaintiffs' costs.

[43] In the result, I then make the following order:

- a) The defendant's negligence was the cause of the collision between the a blue Kia Cerato 1.6 sedan motor vehicle with registration number N 156 – 132 W. and the Nissan X-Trail with registration number KN NA.
- b) With respect to the quantum of damages the Court absolves the defendant from the instance.
- c) The defendant must pay the plaintiff's costs of suit.

S F I Ueitele
Judge

APPEARANCES:

FOR THE SECOND PLAINTIFF:

M Rix

Of Delport Legal Practitioners

FOR THE DEFENDANT:

N Ndilula

Of Kadhila Amoomo Legal Practitioners