

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-DEL-2019/02625

In the matter between:

MICHELLE VAN DER WESTHUIZEN

PLAINTIFF

and

ADRIAAN JANUARIE

1st DEFENDANT

HILLCREST PHARMACEUTICALS CC

2nd DEFENDANT

Neutral Citation *Van der Westhuizen v Januarie* (HC-MD-CIV-ACT-DEL-2019/02625) [2021] NAHCMD 360 (9 August 2021)

Coram Schimming-Chase J

Heard 5 – 7 May 2021

Delivered 9 August 2021

Flynote Negligence – What constitutes – Motorists – Duty of driver travelling on main road towards intersection – Driver must keep a proper lookout and drive at a speed that will enable her to apply brakes if necessary – A driver travelling on a main road is entitled to assume that traffic approaching from a minor crossroad will not enter the intersection unless it is safe to do so. However the assumption does not confer upon such driver the right to drive at such a speed that, despite warning, he or

she is unable to avoid colliding with a vehicle entering the intersection from a minor crossroad.

Witness – Mutually destructive versions – Onus on plaintiff – Where there are mutually destructive stories, plaintiff can only succeed if she satisfies the court on a preponderance of probabilities that her version is acceptable, true and accurate and that the other version advanced by the defendant is therefore false or mistaken.

Evidence – Witness statement – practitioners are reminded of the importance of preparing a complete and comprehensive witness statement in terms of the provisions of Rule 93.

Summary A motor vehicle collision occurred on the morning of 25 September 2018 at the intersection of Schanzen Road and Dr Kenneth Kaunda Street in Windhoek, between vehicles driven by the plaintiff and the first defendant. Plaintiff was driving on Schanzen Road, towards the intersection. First defendant's vehicle sought to cross the intersection after coming to a standstill at the yield sign on Dr Kenneth Kaunda Street. Only the plaintiff and first defendant testified, and their versions were irreconcilable resulting in the court having to evaluate the probabilities.

The plaintiff on her own version testified that she did not observe the defendant's vehicle at any time until a couple of seconds before the collision, when the defendant's vehicle reached the portion of the road in which the plaintiff's vehicle was travelling. She testified that it was not her responsibility to do so, because she had right of way. In addition, the plaintiff's testimony that she was driving at a slow speed was improbable, mainly due to the intensity of the impact between the two vehicles, and the damage occasioned to the defendant's vehicle. In the circumstances the plaintiff's evidence was rejected on a balance of probabilities, and given the plaintiff's onus, she could not succeed on her claim. The court found that the plaintiff was negligent and that her negligence caused the collision.

Held that the plaintiff's claim is dismissed with costs.

ORDER

1. The plaintiff's claim is dismissed with costs.
 2. The matter is regarded as finalised and removed from the roll.
-

JUDGMENT

SCHIMMING-CHASE, J

Introduction

[1] The proceedings before this court emanate from a motor vehicle collision which occurred on 25 September 2018 at approximately 08h02 at the priority intersection of Schanzen Road and Dr Kenneth Kaunda Street in Windhoek.

[2] At the time of the collision, the plaintiff was driving a Mercedes Benz SLK 200 motor vehicle with registration number N6226W and the first defendant was driving a Volkswagen Polo motor vehicle with registration number N152035W. The parties are *ad idem* with respect to these facts.

[3] Initially, the plaintiff sought delictual damages from both the first and second defendants. The plaintiff's claim against the second defendant was based on the ground of vicarious liability, having alleged in her particulars of claim that at the time of the collision the first defendant was acting within the course and scope of his employment with the second defendant.¹ At the onset of the trial, the court was informed that the plaintiff withdrew her claim against the second defendant. The parties also advised the court that they had reached agreement on the quantum of the plaintiff's damages claim. During the course of the trial, the first defendant withdrew his

¹ This allegation was denied by both the first and second defendants in their respective pleas.

counterclaim against the plaintiff. The court therefore need only determine the issue of liability. The parties are referred to in this judgment as the plaintiff and the defendant for ease of reference.

Pleadings

[4] The plaintiff pleaded that on the morning in question and at the priority intersection of Schanzen Road and Dr Kenneth Kaunda Street in Windhoek, a collision occurred between the parties' respective motor vehicles. The sole cause of the collision, according to the plaintiff, was the negligent driving of the defendant, in that he:

- (a) failed to keep a proper lookout for other traffic, particularly the plaintiff's vehicle;
- (b) failed to take cognisance of the plaintiff's vehicle which was travelling straight in Schanzen Road and accordingly enjoyed right of way whilst he was travelling in Dr Kenneth Kaunda Street;
- (c) attempted to cross the intersection at a time when it was dangerous and inopportune to do so, having regard to the close proximity of the plaintiff's vehicle at the time;
- (d) as a result crossed the plaintiff's right of way and collided with her vehicle;
- (e) failed to apply his brakes timeously or at all;
- (f) failed to avoid the collision when he could have and should have done so by the exercise of reasonable care.

[5] The defendant disputed negligence. In his plea, he alleged that the plaintiff was the sole cause of the collision, and that she was negligent in one or more of the following respects:

- (a) she failed to keep a proper look for the defendant's vehicle he was driving;
- (b) she drove at a very excessive speed taking the speed limit and surrounding circumstances into account;
- (c) she failed to apply the brakes timeously or at all to reduce the speed or to prevent a collision when she could clearly see the defendant's vehicle crossing the intersection;
- (d) she failed to exercise the degree of care expected of a reasonable driver under the same or similar circumstances;
- (e) she drove her vehicle without due regard for other road users;
- (f) she failed to take reasonable and necessary steps to avoid the collision when she was able to do so.

[6] The defendant further pleaded that in the event that the court found that his negligence was the cause of the collision, the court should find that the plaintiff too was negligent and that his negligence merely contributed to the collision.

Plaintiff's evidence

[7] Only two witnesses testified in this matter, namely the two drivers of the vehicles, the plaintiff and the defendant.

[8] The plaintiff read her witness statement into the record. The events took place thus on the morning in question: the plaintiff was driving her Mercedes Benz motor vehicle, on her way to work. She drove on Schanzen Road in a westerly direction towards the priority intersection of Schanzen Road and Dr Kenneth Kaunda Street. As she approached the intersection, a Volkswagen Polo R motor vehicle, at the time driven by the defendant, failed to stop at the stop sign for traffic travelling on Dr Kenneth Kaunda Street and attempted to cross the intersection. Despite applying her

brakes, the plaintiff was unable to avoid the collision.

[9] After the collision the plaintiff spoke to the defendant. She testified that he apologised for causing the accident and told her that he was in a hurry to drive to the airport to pick-up his boss. She then completed an accident report.²

[10] The plaintiff concluded her evidence in chief by reiterating that the defendant's negligence was the sole cause of the accident for the reasons alleged in paragraph 8 above.

[11] At the commencement of cross examination, the plaintiff clarified and added to her testimony that from her observations of the road and in line with her hand drawn sketch plan, there was a speed calming hump located on Schanzen Road, about 190m from the intersection and point of collision. She testified that at all times she was driving at a low speed, having cleared the speed calming hump, and because the road she was travelling was uphill.

[12] The plaintiff was questioned about her evidence to the effect that the defendant did not stop at the stop sign. In response to the question as to how she knew that there was a stop sign, the plaintiff testified that she did not know whether it was a stop sign or a right of way sign. However the plaintiff maintained that the traffic rules state that a driver must stop, irrespective of whether there is a stop or a yield sign.

[13] As regards the point of impact, the plaintiff testified that she saw the defendant's vehicle for the first time, a second or two before the impact, and that she immediately applied her brakes. Her Mercedes Benz vehicle is fitted with an anti-lock (ABS) braking system, and at the point of impact her airbags deployed.

[14] The plaintiff conceded when it was put to her that it was a yield sign and not a stop sign, that she did not observe the defendant's vehicle at the intersection, or at any time, until a mere one or two seconds before the impact. She testified in this regard, that she only concentrated on the cars in front of and behind her, and that she did not feel that she was supposed to 'look out for every driver on every road'. She stated that

² Received into evidence as exhibit A2.

it was the defendant's responsibility to stop and look left and right before crossing the yield sign and that if he had done so, he would have seen her vehicle.

[15] Her evidence to this effect was inter alia as follows:

'It is quite a, the width is quite big on my side, but I mean there is, it is, I have the right of way so I keep a lookout for the cars ahead of me, at the back of me, cars approaching in this, in the next lane of me, I did not see him. I did not see him because I was not supposed to look out for him because he is supposed to stop, so no.'

And also:

'Yes, but I have have got the right of way. My street is very long. I am just driving, there is no stop signs for me, there is nothing for me so I have got the right of way, so I drive. Here he comes, skip the stop, the whatever sign it is and he just goes over with speed. So what am I supposed to do? Stop and tell him please do not cross it, I do not know''.

[16] The plaintiff also relied on the defendant's statement after the collision, to the effect that he had apologised to her and admitted that he was in a hurry and on his way to the airport to collect his boss; and further that he would not have told her such a thing if he was not guilty.

[17] The plaintiff tendered her accident report and drawn plan, as well as a post-collision photograph of the two vehicles into evidence.

Defendant's evidence

[18] The defendant read his witness statement into the record. He testified that on the morning in question he was driving in an easterly direction on Dr Kenneth Kaunda Street towards the intersection with Schanzen Road. He stopped at the intersection to yield to the vehicles travelling on Schanzen Road. There were vehicles travelling in both directions and traffic was at its peak. A vehicle travelling on Schanzen Road from his right came to a standstill and flashed its lights at the defendant, which he interpreted to mean that he had been given right of way to cross the intersection. He looked to his left, and he saw vehicles driving downhill, but he did not see any vehicles

approaching from the other direction and in an uphill direction (namely the direction in which the plaintiff was travelling). He did not observe the plaintiff's car. Once he established that it was safe, he entered and crossed the intersection.

[19] As he was in the middle of the intersection, and after he crossed the dividing lines, he suddenly saw the plaintiff's vehicle travelling at an excessive speed from the opposite direction. Due to the speed that the plaintiff's vehicle was travelling, the defendant did not have sufficient time to react to and avoid the collision. As a result, the plaintiff's vehicle collided with his vehicle on the left fender, causing excessive damage to the left fender, suspension and part of the left front door. The airbags similarly deployed in the defendant's vehicle.

[20] The defendant testified that the plaintiff's negligence was the sole cause of the collision because she failed to keep a proper lookout for his vehicle, and because she was driving at an excessive speed. She failed to apply her brakes timeously or to reduce speed or to stop the vehicle in time to avoid the collision. He stated that the plaintiff further failed to exercise the degree of care and skill required of a reasonable driver under the circumstances.

[21] During cross examination, the defendant amplified that he had come to a standstill on the corner of Dr Kenneth Kaunda Street and Schanzen Road, to drop his sister off at work. He confirmed in cross examination that he was on his way to the airport.

[22] He stated that on his left, Schanzen Road continued downhill, and it an was uphill road for those travelling in the opposite direction (such as the plaintiff). He testified that he could see quite far downhill, and that he observed the speed calming hump towards the bottom end of Schanzen Road.

[23] The defendant was not disturbed much on this observation of the road and his actions pre-collision. He maintained that he was given right of way by a vehicle coming from his right, who had flashed him, and that he was satisfied that all vehicles to his left had sufficiently cleared the road, and that there was no vehicle coming from the opposite uphill direction before he entered the intersection.

[24] He was cross examined on the point of impact, and specifically asked where the front and rear wheels of his vehicle (a hatchback) were located with reference to the white dividing lines, at the time of the collision. He testified that his rear wheels were past the white lines already, and that he was on the other half of Schanzen Road, having practically completed his manoeuvre across the intersection. He only saw the plaintiff's vehicle at the stage that he had almost completed his manoeuvre when he looked to his left and saw the white car through his left window. He did not see the plaintiff's vehicle before this. He testified that the impact caused the airbags of both vehicles to deploy. He confirmed that the damage to his vehicle was to the left front fender and part of the front left door.

[25] As regards the post-accident apology that the plaintiff testified about in her evidence in chief, the defendant testified that he only informed the plaintiff that he was on the way to the airport. He denied that he informed the plaintiff that he was in a hurry, or that he was on his way to collect his boss.

[26] In re-examination, the defendant, in response to a question by his counsel, testified that he apologised for a completely different reason, the particulars of which are not relevant for the determination of this matter, save to point out that his explanation did not appear in his witness statement. This version was not even put to the plaintiff during her cross examination.

Submissions

[27] Both parties are agreed that the court is faced with mutually destructive versions presented by the two witnesses in this matter, concerning the events leading to and subsequent to the accident, and of course, who was responsible for and caused the collision.

[28] Naturally, Mr Pretorius appearing for the plaintiff, submitted that the facts and evidence pointed towards the defendant being negligent, and that it was generally improbable that the plaintiff would not see a motor vehicle crossing her path of travel at a low speed, and while she was travelling uphill. He also submitted that the plaintiff's

version that the defendant entered the intersection at a high speed and failed to stop at the intersection is highly probable and corroborated by objective facts. This is so, considering that she did not see the defendant until he was already at the intersection.

[29] Mr Nanhapo appearing for the defendant, submitted that the facts and evidence pointed towards the plaintiff as being the sole cause of the collision, especially because on her own version, she failed to keep a proper lookout, and did not even observe the defendant's vehicle until seconds before the collision. The court was also invited to look at the damage to the defendant's vehicle after the collision and it was submitted that it was apparent from the damage to the defendant's vehicle that his version was more probable.

[30] Both parties referred the court to the oft quoted dictum of Eksteen AJP (as he then was) in *National Employers General Insurance Co. Ltd v Jagers*:³

' [W]here the onus rests on the plaintiff . . . and where there are mutually destructive stories, he can only succeed if he satisfied the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'⁴

[31] The guiding principles applied to the evaluation of the evidence when there are two irreconcilable versions was also succinctly set out in *Stellenbosch Farmers' Winery*

³ *National Employers General Insurance Co. Ltd v Jagers* 1984 (4) SA 437 (E). See also inter alia *Burgers Equipment and Spares Okahandja CC v Aloisius Nepolo t/a Double Power Technical Services* (SA 9/2015) delivered on 17 October 2018 at par [112].

⁴ At 440D-G

Group and Another v Martell et Cie and Others ⁵ 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 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 this 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 facts are equipoised probabilities prevail.'⁶

[32] Both counsel for the parties were also *ad idem* on the statutory ⁷ principle that a driver of a vehicle must drive on a public road with reasonable consideration for any other person using the road.

[33] The duties of a driver were in this context, succinctly expressed in *Marx v Hunz*⁸ as follows:

⁵ *Stellenbosch Farmers' Winery Group and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA).

⁶ At 14I-15D. See also *Sakusheka and Another v Minister of Home Affairs* 2009 (2) NR 524 (HC) at 541 par [39].

⁷ S 81 of the Road Traffic and Transport Act 1999, Act 2 of 1999.

⁸ *Marx v Hunz* 2007 (1) NR 228 (HC) at 230D-H par [5] and [6].

[5] ... It has been held that a driver travelling along a main road is entitled to assume that the traffic approaching from a minor crossroad will not enter the intersection unless it is safe to do so. In *Victoria Falls and Transvaal Power v Thorton's Cartage Co*, De Wall, JP stated that the duties of a driver entering an intersection from a minor road have been stated as follows:

“When a person driving a car approaches a street which is a main thoroughfare, or in which he is aware that there is likely to be a considerable amount of traffic, he must approach the intersecting street with due care and be prepared to expect traffic. His first duty is to see that there is no traffic approaching from his right, and then to look for traffic approaching from his left.”

[6] The driver on a main road is entitled to assume that a driver on a minor crossroad will not enter the intersection unless it is safe for him or her to do so. However, this assumption does not confer upon such driver to drive at such speed that, despite warning, he or she is unable to avoid colliding with a vehicle entering the intersection from a minor crossroad. Doubtless, coupled with the duty to travel at a reasonable speed is the duty to keep proper lookout. “Once a driver on a main road becomes aware of a vehicle approaching an intersection along a minor crossroad it is his duty to keep such vehicle under observation, and failure to do so may be negligence.” Of course, the duty to keep a vehicle “under observation” does not mean that the driver must keep his eyes upon the approaching vehicle continuously, and ignore other traffic or other parts of the road than the minor crossroad in which the approaching vehicle is travelling’.

[34] It was submitted on behalf of the defendant, that a driver who has right of way is not excused from exercising the necessary care and diligence expected of a reasonable person. In *Gerber v Minister of Defence and Another*⁹ Ueitele J referred to the following explanation of the applicable law in *Robinson Bros v Henderson* where Solomon CJ said:

‘Now assuming that, as the defendant himself admitted, the plaintiff in the circumstances had the right of way, the whole question would appear to be whether he acted reasonably in entirely ignoring the approaching car on the assumption that the driver would respect his right of way and would avoid coming into collision with him. In my opinion that was not the conduct of a reasonable man. It is the duty of every director of a motor car when

⁹ *Gerber v Minister of Defence and Another* 2014 (4) NR 1147 (HC).

approaching a crossing, no matter whether he believes he has the right of way or not, to have regard to the traffic coming from a side street. There is necessarily a certain amount of danger in approaching a crossing, and it is the duty of every driver to exercise reasonable care to avoid coming into collision with another car entering the crossing from a side street. Having seen such a car, he is not justified in taking no further notice of it, on the assumption that the driver is a careful man and may be relied upon to respect his right of way. If every driver of a motor car were a reasonable man there would be few accidents; it is against the careless and reckless driver that one has to be on one's guard. The duty of the plaintiff in this case was to keep the car coming down Alice Street under observation, and not to have entirely lost sight of it merely because he had the right of way.' ¹⁰ [my emphasis]

Evaluation of the evidence

[35] Before dealing with the evaluation of the evidence, it is necessary to deal with a broader description of Schanzen Road and Dr Kenneth Kaunda Street. Neither of the witnesses dealt with a description of the road in their witness statements. In fact, the evidence on the description of the road was not in dispute between the parties, yet it was only revealed during cross examination of the witnesses, and even for the first time in re-examination of the plaintiff.

[36] Had the witness statements been properly prepared, this evidence would not only have been led in chief, but would have formed part of the facts not in dispute in the pre-trial report. The court marks its disappointment with the paucity of information contained in the witness statements of both parties, especially given that the contents of the witness statements stand as the oral evidence in chief of the witnesses called to testify in terms of Rule 93(2).

[37] Schanzen Road is quite a busy road, linking Klein Windhoek / Eros to central Windhoek. It is wider than Dr Kenneth Kaunda Street. It is especially busy during peak hours and was busy on the morning of 25 September 2018 at 08h02, when the plaintiff entered Schanzen Road from Nelson Mandela Avenue to go to work. The direction that the plaintiff was travelling on Schanzen Road was uphill. In fact, the intersection and crossing where the collision took place was near the peak of the hill. At the

¹⁰ At 1154A-D

beginning of Schanzen Road, and about 190m from the intersection at the bottom of the hill, is a speed calming hump. Therefore, the route that the plaintiff travelled, was at all material times a gradual uphill road preceded by a hump.

[38] At the intersection between Dr Kenneth Kaunda Street and Schanzen Road is a yield sign for vehicles that want to cross Schanzen Road and continue on Dr Kenneth Kaunda Street in a south bound direction, and for vehicles that wanted to turn left into Schanzen road, in a downhill direction. The plaintiff was travelling in a west bound direction, towards Robert Mugabe Avenue. The defendant was at the yield sign and intended to cross Schanzen Road, and continue on to Dr Kenneth Kaunda Street. The collision took place at the crossing between these two streets.

[39] The first glaring aspect for the court in the evaluation of the evidence led, is that the plaintiff made it very clear that she did not keep a proper lookout according to the standards required of a reasonable driver. She looked in front of her, behind her and to her left. She did not look at or consider traffic coming from the intersection to her right. Her reason was that she was not responsible to do so as she had right of way.

[40] In addition, the plaintiff's evidence in cross examination was to the effect that as a result, she never saw the plaintiff's vehicle at any point until a couple of seconds before the impact. She therefore did not even observe the defendant's vehicle, or observe the defendant commence his trajectory across Schanzen Road. This on its own is a breach of the responsibilities of a reasonable driver on a road. It is the duty of every director of a motor car when approaching a crossing, no matter whether he believes he has the right of way or not, to have regard to the traffic coming from a side street.

[41] Her only explanation for her testimony that the defendant did not stop and ensure that it was safe for him to enter the road, was that the defendant had apologised to her after the accident. She had no sight or observation of the defendant's vehicle beforehand.

[42] There are other aspects to be considered. The plaintiff testified that she was driving very slowly on an uphill road after passing a speed calming hump, yet, she did

not, in spite of driving slow on a wide road, see the vehicle of the defendant at any time before the collision.

[43] Added to this, is the photograph of the vehicles after the collision. The damage from the photographs is to the left front fender and to the left front door. This was also testified to by the defendant when he was cross examined on this aspect. It is also consistent with the defendant's evidence to the effect that his vehicle was already at the tail end of his manoeuvre, past the dividing line and directly in the plaintiff's lane when the collision occurred.

[44] The position post collision, both in terms of where the impact occurred, and the intensity of the impact, resulted in the airbags of both vehicles deploying. This, given the plaintiff's ABS brakes on her Mercedes, is noteworthy.

[45] An evaluation of the evidence shows that it is improbable that the plaintiff was driving slowly as she testified. Had her speed been as slow as testified, and had she kept a proper lookout for vehicles coming from the direction of the defendant's vehicle, she would have been able to see the defendant's vehicle well in time, to be able to take evasive action.

[46] The impact of the collision resulting in the deployment of her airbags, also makes the plaintiff's version improbable. If the plaintiff's vehicle was travelling uphill and slowly as testified, she would have been able to apply her brakes in time and avoid a collision. The fact that the plaintiff saw the defendant's vehicle literally two seconds before impact, shows that the plaintiff did not keep a proper lookout.

[47] The court concludes therefore that the plaintiff did not discharge her onus. She did not keep a proper look out, and the speed she was travelling under the circumstances was not slow. The plaintiff was negligent, and her negligence was the sole cause of the collision.

[48] In the result, the following order is made:

1. The plaintiff's claim is dismissed with costs.

2. The matter is regarded as finalised and removed from the roll.

EM SCHIMMING-CHASE

Judge

APPEARANCES

FOR PLAINTIFF

Mr F Pretorius
Francois Erasmus & Partners

FOR DEFENDANT

Mr T Nanhapo
Brockhoff & Associates