REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-DEL-2022/02832

In the matter between:

ONESMUS IMBILI **FIRST PLAINTIFF**

SAARA NDALUKA IMBILI **SECOND PLAINTIFF**

and

VEIKO SHATIMWENE HAIMBODI **DEFENDANT**

Neutral citation: *Imbili v Haimbodi* (HC-MD-CIV-ACT-DEL-2022/02832) [2024] NAHCMD 24 (31 January 2024)

Coram: PARKER AJ

Heard: **18, 19, 20, 21, 25, 26, 27, 28 September, 31 October, 1 November, 16 November 2023**

Delivered: **31 January 2024**

Flynote: Motor vehicle accident – Duty of drivers – Intersection controlled by traffic lights – Duty of each driver to drive with due care towards the intersection whether one is travelling on the main thoroughfare and the other on the minor road.

Summary: The second plaintiff was driving a Jeep SUV on a minor road across a major thoroughfare where the intersection of the minor road and the main

thoroughfare is controlled by traffic lights. The defendant was driving a Toyota Sedan on the main road. Even though the defendant saw the Jeep some ten to 12 meters away as he approached the intersection, he made no attempt to reduce his speed. The driver of the Jeep, too, did not approach the intersection with due care and was not prepared to expect traffic on the main thoroughfare. The court found that the Toyota did not suddenly enter the main road from a side feeder road close to the intersection. Each driver owed the other the duty to enter the intersection with due care. On the facts the court found that the incidence of contributory negligence arose. The court rejected the second defendant's evidence on the defence of sudden emergency, because it had not been pleaded.

Held, when drivers are driving in separate motor vehicles in relation to one another towards an intersection controlled by traffic lights so as to involve a risk of collision, each owes the other a duty to drive with care.

Held further, no evidence of matters can, as a rule, be given at the trial if they be not expressively pleaded.

ORDER

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1. Judgment for the plaintiffs to the extent of 55 per cent of the amount claimed under claim 1.

2. Claim 2 is dismissed.

3. There is no order as to costs.

4. The matter is finalised and removed from the roll.

JUDGMENT

PARKER AJ:

[1] The plaintiffs, represented by Ms Fernandes, instituted action proceedings wherein they have made two claims against the defendant, represented by Mr Ipumbu. The cause of action concerns a collision between a motor vehicle ('Jeep') driven by the second plaintiff and another motor vehicle driven by the defendant ('Toyota'). The collision occurred in the evening of 14 December 2021.

[2] The locus of the collision was the intersection of the main road from Ongwediva to the south to Oshikuku to the north and a minor road that cut across the main road near the Okatana petrol service station in Oshakati. The intersection was controlled by traffic lights.

[3] As I have said previously, the plaintiffs have made two claims. Claim 1 is based on allegation of negligence, and claim 2 on alleged injuries suffered by the first plaintiff, who, the plaintiffs alleged, was a passenger in the Jeep at the time of the collision.

[4] The plaintiffs testified and called Mr Erastus Filemon Shilengo to testify in support of their case. The defendant testified and called one witness. I shall consider claim 1 first.

Claim 1

[5] The plaintiffs alleged that the sole cause of the collision was the defendants negligent driving, because as indicated in para 8 of the particulars of claim ('POC') -

(a) he drove at an excessive speed;

(b) he failed to keep a proper lookout;

(c) he failed to apply his brakes timeously or at all; and

(d) he failed to avoid the collision by not exercising reasonable care.

[6] The defendant's specific plea to the allegations in para 8 of the POC is that -

'The two vehicles collided as a result of the second plaintiff's failure to pay heed to traffic lights because she drove through the intersection when the traffic lights at that moment were red against her.'

[7] I shall not embellish this judgment with a consideration of evidence that is not relevant in resolving the only pivotal issue under claim 1, which is this: Between the second plaintiff and the defendant, who caused the collision? In that regard, the conflicting evidence about how the defendant left or fled the scene of the collision unceremoniously and about the fracas between the first plaintiff's brother-in-law and defendant at the hospital has no probative value.

[8] The testimony of Mr Jeremia Nghihalwa (defence witness) stands in the same boat. Nghihalwa testified that he only went to the scene of the collision after the collision had occurred.

[9] The evidence of Mr Paulus Namwandi, a police official and the first plaintiff witness, who attended at the scene of the collision, also has no probative value and is of no assistance on the consideration of the aforementioned pivotal issue under claim 1. Namwandi presented no documentary evidence such as a sketch map, showing, for instance, the flow of traffic at the time of the collision, the number of lanes flowing into the intersection on the main road and the feeder road travelled on by the Jeep, and tyre marks on the road that could assist the court in determining whether, for instance, the brakes of the Jeep and the Toyota were engaged and engaged on time just before the collision.

[10] What is worse, Namwandi's testimony was that he did not complete the crucial form, the Namibia Road Accident Form. It is a form, as Mr Ipumbu submitted, an investigating officer must complete, recording the officer's observations when he or she attended at the scene of a collision or an accident involving motor vehicles on a public road. Another piece of evidence not having probative value is the conflicting testimony about how the defendant left or fled from the scene of the collision unceremoniously and furtively.

[11] The second plaintiff, who drove the Jeep, testified that as the Jeep approached the intersection from the minor road on which she was travelling. She saw that the traffic lights had turned red and so she stopped until they turned green, giving her a right of way. She looked to her left and to her right and no motor vehicle was approaching the intersection, and so she proceeded to drive through the intersection to the opposite side of the main road. Just as she entered the intersection, she heard a loud sound apparently made by the impact on the Jeep by the Toyota, driven by the defendant.

[12] She testified further that she saw that the first plaintiff's eyebrow and tongue were bleeding. I shall return to this piece of evidence about the first plaintiff's injuries when I consider claim 2.

[13] The testimony of the first plaintiff, who is also the husband of the second plaintiff, corroborated the testimony of the second plaintiff in material respects. It added no new material as regarding events that occurred immediately before the collision.

[14] It would be unsafe to accept the testimony of Mr Erastus Shilengo (the fourth plaintiff witness) as sufficient and satisfactory concerning the speed at which the Toyota travelled. Shilengo testified that the Toyota 'was speeding' towards the intersection and 'did not reduce its speed'. Shilengo did not tell the court the speed limit on the main road for the court to determine whether the Toyota travelled at a speed over the speed limit. He did not tell the court the basis for testifying that the Toyota 'did not reduce its speed'. For instance, evidence that the braking lights at the rear of the Toyota did not light up would have been helpful.

[15] Shilengo's further evidence that as the Toyota approached the intersection, the traffic lights were green in the Toyota's favour. The evidence is not credible. It is not reliable. This is someone who had attempted to cross the main road to the opposite side but retracted his steps because of oncoming traffic involving the Toyota, which was travelling from his right to his left where the intersection was. After the Toyota had passed, allowing Shilengo to cross the main road, he would have had no good reason to look to his left, as Mr Ipumbu submitted. His preoccupation, as he testified, was to cross the main road to the opposite side.

[16] On his part, the defendant testified that as he drove on the main road towards the intersection, he noticed that the traffic lights were green in his favour, and so he proceeded to travel through the intersection. He testified further that the Toyota was obstructed by the Jeep which had proceeded through the intersection when the traffic lights against the Jeep were red.

[17] The defendant testified further that in order to avoid the collision, he 'activated my defensive driving skills to avoid a collision of great impact by swerving to the left of the Jeep'. From the defendant's evidence, it would seem the defendant relies on the defence of sudden emergency.

[18] I find that the evidence does not establish that the defendant was 'suddenly confronted with an unexpected danger'; neither did it establish the presence of 'the spur of the moment' for the defendant.[1] The uncontradicted evidence is that the defendant saw the Jeep entering the intersection from a distance of between ten to 12 meters.

[19] It has been held that it is 'the duty of every driver of a motor vehicle 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.[2] In the instant matter, I find that if the defendant had reduced speed, he would have avoided the collision. As I have found previously, the defendant was not in a situation of sudden emergency. The defendant tried to improve his position by testifying that he swerved 'to the left side of plaintiff's vehicle only hitting the plaintiff's back tyre and colliding with the body of the vehicle'.

[20] This matter was not pleaded, and so no evidence of such matters can, as a rule, be given at the trial if they be not expressively pleaded.[3] If such evidence was allowed to be given it would amount to allowing the pleader to direct the attention of the other party to one issue, and then at the trial, attempt to canvass another.[4]

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[1] *Taapopi v Jason and Another* [2020] NAHCMD 321 (30 July 2020) para 6.
[2] *Robinson Boos v Henderson* 1928 AD 138 at 141, applied by the court in *Marx v Hunze* 2007 (1) NR 228 (HC) para 14.
[3] *Davie v New Merton Board Mills* [1959] AC 604 (HL).
[4] *Shill v Milner* 1937 AD 101.

[21] The defendant testified that the plaintiff was driving while holding a cellphone device to her ear. This cannot possibly be true, considering the evidence that the defendant saw the Jeep some ten to 12 meters away; and it was about 20h00. Furthermore, the Jeep had tinted black windows. It would be unsafe to accept that piece of evidence. But that is not the end of the matter.

[22] On the evidence, I find that the second plaintiff made no attempt at all to avoid the collision, even though she was travelling through an intersection controlled by traffic lights from a minor road through a major road. Section 81 of the Road Traffic and Transport Act 22 of 1999 provides:

> 'No person shall drive a vehicle on a public road without reasonable consideration for any other person using the road.'

[23] Thus, when a driver driving a vehicle approaches a road or a street which is the main thoroughfare, he or she must approach the intersection with due care and be prepared to expect traffic.[5]

[24] In the instant proceeding, I find that the second plaintiff did not comply with s 81 of Act 22 of 1999 and she offended *Victoria Falls and Transvaal Power v Thornton's Cartage Co*.[6] She did not give reasonable consideration for the driver driving the Toyota on the main thoroughfare. She did not travel through the intersection, crossing the main road with due care. Accordingly, I find that she did not maintain a proper lookout and she was not attentive, considering the fact that the Toyota did not suddenly appear on the main road from a minor road that is close to the intersection.

[25] By a parity of reasoning, I find that since the defendant had the Jeep under observation from a considerable distance and he was not faced with a sudden emergency, as aforesaid, he had ample time to avoid the collision and the consequences thereof, if he had really reduced his speed. As I have found previously, the second plaintiff also failed to heed the statutory prescription under s

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[5] *Marx v Hunze* 2007 (1) NR 228 (HC) para 5, relying on *Victoria Falls and Transvaal Power v Thornton's Cartage Co* 1931 TPD 576 at 519.
[6] *Victoria Falls and Transvaal Power v Thornton's Cartage Co* footnote 5.

81 of Act 22 of 1999 and she offended *Victoria Falls and Transvaal Power v Thornton's Cartage*[7] because she failed in her duty to ensure that there was no traffic approaching form her right at the intersection controlled by traffic lights before driving through the intersection.

[26] The totality of the evidence drives me to the inevitable conclusion that this is a proper case where the court should find that each driver contributed to the collision. Therefore, the doctrine of contributory negligence arises. Where a person is part author of his or her injury he or she cannot call on the other to compensate him or her in full.

[27] Taking a cue from Ogilvie Thompson JA in *South British Insurance Co Ltd v Smit,*[8] I assess the degree of negligence attributable to the plaintiff to be 45 per cent and to the defendant 55 per cent. I now proceed to consider claim 2.

Claim 2

[28] It appears from Ms Fernandes's written and oral submissions that the plaintiffs have abandoned claim 2. At all events, the court has not received any probative material tending to prove the alleged injuries.[9] In the absence of a credible medical report and medical evidence, the court is unable to determine judicially a claim of bodily injury.[10]

Conclusion

[29] Based on these reasons, I hold that the evidence pointed to the incidence of contributory negligence on the part of the defendant and second plaintiff, as aforesaid. In the result, I order as follows:

1. Judgment for the plaintiffs to the extent of 55 per cent of the amount claimed under claim 1.

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[7] Loc. cit.
[8] *South British Insurance Co Ltd v Smit* 1962 (3) SA 826 (A) at 837 G-H, approved in *Marx v Hunze* footnote 5 para 15.
[9] *Katire v Minister of Safety and Security* [2021] NAHCMD 543 (23 November 2021).
[10] *ML v S* 2016 (2) SACR 160 (SCA).

2. Claim 2 is dismissed.

3. There is no order as to costs.

4. The matter is finalised and removed from the roll.

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C Parker

Acting Judge

APPEARANCES:

PLAINTIFFS:	F Fernandes Of Shikongo Law Chambers, Windhoek
DEFENDANT:	T Ipumbu Of Titus Ipumbu Legal Practitioners, Windhoek