# SUMMARY

**CASE NO.: I 417/2005**

**EPHRAIM KASUTO**

and

**TRANSNAMIB HOLDINGS (PTY) LTD**

**BRIAN HARPER**

*SILUNGWE, AJ*

*15/03/2007*

**NEGLIGENCE** - What constitutes – Failure to keep a proper lookout – Meaning of -

- Motorist intending to turn right at a robot – controlled intersection – Duty of -

- Motorist's conduct in executing right – hand turn when unsafe to do so – *Prima facie* case of negligence.

**CASE NO.: I 417/2005**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**EPHRAIM KASUTO** **Plaintiff**

and

**TRANSNAMIB HOLDINGS (PTY) LTD** **1st Defendant**
**BRIAN HARPER** **2nd Defendant**

**CORAM:** **SILUNGWE, AJ**

**Heard on:** 2007.3; 5, 7 & 15

**Delivered on:** 2007.3.15

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**REASONS FOR JUDGMENT:**

**SILUNGWE, AJ:** [1] In this matter, the Plaintiff instituted an action against the first and second defendants for negligence (and damages totaling N$94 985-25), following a collision between his motor vehicle, a Mercedes Benz C220 car (car), Registration No. N 82671 W and a Toyota Hilux bakkie (bakkie), Registration No. N 99356 W, which was being driven by the second defendant at the time of the collision at an intersection of Hosea Kutako Drive and Dr Frans Indongo Street in Windhoek.

[2] It is not in dispute that the first defendant is a limited company whose principle place of business is located in Windhoek. Further, there is no dispute that the second defendant is an employee of the first defendant (as a

technician) and that, at the time of the collision, he was acting within the course and scope of his employment with the first defendant.

[3] At the commencement of the proceedings, both parties were mutually in agreement to initially confine themselves to the question of liability only.

[4] The plaintiff and the defendants are represented by Messrs Vaatz and Maasdorp, respectively.

[5] It is noteworthy that both defendants were duly served with the plaintiff's combined summons; that their joint legal representatives, namely, Shikongo Law Chambers, entered appearance to defend the action; and that they filed their joint plea and counter claim.

[6] The following facts are not in dispute. On March 12, 2003, at about lunch time, the plaintiff was driving his car already referred to (a 1996 model), along Hosea Kutako Drive, southwards from the northerly direction, after having picked up his then ten-year old daughter from Covent Primary School. In the meantime, the second defendant, who was returning to the first defendant's depot to have lunch, was driving the bakkie from the opposite direction of Hosea Kutako Drive (in the northerly direction). When the plaintiff and the second defendant approached the intersection of Hosea Kutako Drive and Dr Frans Indongo Street, which is controlled by traffic lights, the lights were green in favour of both of them, but it was the plaintiff that had the right of way as he was heading straight on across the intersection, whereas the second defendant was turning right at the intersection into Dr Frans Indongo Street in the easterly direction towards the City Centre. There was, at the material time, no other traffic at the intersection or on the roads within the immediate vicinity of the said intersection. Although the plaintiff saw the vehicle driven by the second defendant approaching the intersection from the opposite direction, the second defendant did not see the plaintiff's motor vehicle until he was in the process of negotiating the right-hand turn so as to

enter Dr Frans Indongo Street when he noticed the plaintiff's car with the corner of his eye. As the second defendant was executing his right-hand turn at the intersection into Dr Frans Indongo Street, towards the City Centre, his manoeuvre was one continuous movement. When he tried to accelerate (presumably in an effort to avoid collision), not much happened because "the bakkie doesn't respond quickly, it takes time to build up speed." Ultimately, the car hit the bakkie "behind the rear passenger wheel."

[7] The plaintiff's account is that he was travelling at a speed of between 50 and 60 Kilometres per hour (Kph) along lane "E", which is illustrated on exhibit (Exh) "A", as he headed towards the intersection of Hosea Kutako Drive and Frans Indongo Street. Lane "E" on Hosea Kutako Drive is the nearside lane at the said intersection for southbound traffic (just as the plaintiff's car was at the material time). The plaintiff saw the bakkie approaching from the opposite side of the road he was travelling on. Upon entering the intersection, he saw the bakkie some seven to ten metres away, turning right in the easterly direction, towards the City Centre (that is, across his path). The bakkie was fast. The plaintiff then applied breaks and tried to swerve to his right so as to get behind the bakkie in an effort to evade collision; nevertheless, the inevitable occurred, whereupon the front part of his car was damaged. This incident took place sometime between 13h15 and 13h20. When asked during cross-examination about the collision having occurred at 12h55, the plaintiff resolutely sticks to his guns, pointing out that school children (here) are not (normally) released until 13h00. He adds that a traffic officer's reference in his report to 12h55 must have been mistaken.

[8] After the collision, continues the plaintiff, he got out of the car and the driver of the bakkie, who happened to be the second defendant, also did likewise. The second defendant approached him apologetically saying in English how sorry he was – he had not seen the (plaintiff's) car. Consequently, the plaintiff testifies, there was no argument between the two of them because the defendant "was apologetic." The plaintiff walked to a nearby hotel and

telephonically reported the incident to the police. His return to the scene coincided with the arrival of a traffic police officer who asked the two parties what had happened, whereupon both gave their respective versions. According to the plaintiff, the second defendant told the traffic officer in his (plaintiff's) presence that he could not see the (plaintiff's) car.

[9] The plaintiff denies that he was traveling fast and maintains that the second defendant was fast. The plaintiff did not see the second defendant indicating (his intention to turn). An aerial map of the intersection in question (Exh A), produced at the second defendant's instance, towards the conclusion of the plaintiff's cross-examination, shows, *inter alia*, a slip road, marked "K", from Hosea Kutako Drive into Dr Frans Indongo Street. It is that slip road that separates Exh "B" from Exh "A" which is silent about the slip road.

[10] On the other hand, the second defendant's version is that the collision took place before 13h00 (Mr Maasdorp's cross-examination of the plaintiff suggests that the collision occurred at 12h55). As neither case turns on the time that the collision took place, I propose to leave open the variance between the two versions on this score.

[11] According to the second defendant's testimony, as he approached the intersection aforesaid from the southerly direction of Hosea Kutako Drive, he changed into the second gear, reduced his speed to 20 Kph and indicated his intention to turn right into Dr Frans Indongo Street. He checked lanes "D" and "E" for traffic from the northerly (i.e. opposite) direction of Hosea Kutako Drive (which lanes traverse the intersection and proceed southwards) but saw no traffic. During the course of executing the right-hand turn, and while maintaining throughout the speed of 20 Kph, he saw a car (i.e. the plaintiff's car) through the corner of his eye coming towards him; he tried in vain to accelerate so as to avoid collision; nonetheless, the bakkie could not pick up speed and, in consequence, it was hit "behind the passenger's side rear wheel."

[12] The following are some of the exchanges during cross-examination between Mr Vaatz and the second defendant:

*Q.* *And eventually, when you saw the plaintiff, you saw him coming along Lane E …*

*A.* *That's correct, yes.*

*Q.* *So in that respect you actually confirm the evidence of Mr Kasuto that he was driving along Lane E.*

*A.* *He was in Lane E, yes.*

*Q.* *Now your lawyer, when he cross-examined Mr Kasuto, he said that you would say you didn't see the plaintiff's car … before you actually negotiated the turn, you didn't see the plaintiff's car, is that your evidence?*

*A.* *That's correct, yes*

*…*

*Q.* *[Y]ou can see the next intersection of John Meinert Street from there … you can see along this road to the next, intersection. It's so open?*

*A.* *No it's not, the road goes at a bend.*

*Q.* *You say "NO" … at the road is there a bend?*

*A.* *I would say the road rises and falls and it's a bend, I would say you can see for a 120 metres.*

*…*

*Q.* *… Mr Harper, I think you said that you have driven this road for seventeen years or fifteen years?*

*A.* *That's correct, yes.*

*Q.* *How long have you been driving a car?*

*A.* *Altogether like thirty five years.*

*…*

*Q.* *So you probably agree with me that normally speaking a person who wants to cross a robot (sic) controlled intersection, straight on, he's got the right of way?*

*A.* *That will be right, yes.*

*Q.* *It is the duty of … the driver who wants to turn across a lane of traffic to make sure it is safe to do so?*

*A.* *That's right, yes.*

*…*

> *Q.* *But I am sure you would agree with me you said the plaintiff did not do anything to avoid the accident, but he didn't really have to do anything, he was entitled to drive straight on?*
>
> *A.* *I agree with that, … but the main problem is where was he on the road?*
>
> *Q.* *Mr Kasuto?*
>
> *A.* *Mr Kasuto was in the slip road then I will presume that he was taking the slip road and turn down into Bullow or Frans Indongo Street and not come across. My feeling is that, he could have been in that lane and then moved across traffic rights, that's why I didn't see him, because I wouldn't turn in front of somebody … that's driving a car that I can see.*

[13] It is significant to note that there has been no cross-examination of the plaintiff as to whether he was travelling along the lane which ultimately becomes the slip road (lane "K") as he approached the intersection. As I see it, the second defendant's apparent half-hearted allegation that the plaintiff could have been in that lane ("K") is not only an afterthought but also false. The suggestion is nothing less that an attempt by the second defendant to grasp at straws, in the teeth of what is unmistakably overwhelming evidence against him.

[14] Further, it is notable that an inspection *in loco* was undertaken (at the instance of Mr Vaatz, and welcomed by Mr Maasdorp) after the closure of the case for the defence. The purpose of the inspection was essentially to ascertain whether the second defendant's view of Hosea Kutako Drive in the northerly direction could have been obstructed by anything such as a physical object or feature on the road. It is common cause that the road falls and rises as one approaches the intersection from the northerly direction. The second defendant's testimony under cross-examination is that he can see a distance of 120 metres (northwards of the intersection in question). And yet, he failed to see the plaintiff's approaching car until it was so close to him that the collision could not be avoided! It is apparent from the second defendant's testimony that there is no obstruction northwards of the relevant intersection for (at least) 120 metres. Hence, had he kept a proper lookout for traffic whose path he intended to cross, he would, in all probability, have spotted the plaintiff's

approaching car in good time, taken precautionary steps by stopping safely to allow the plaintiff to exercise his right of way and to thereby avert the collision.

[15] The second defendant was not a stranger to the road in question since, in his own words, he had driven thereon for some fifteen to seventeen years. It, therefore, follows that he was, or ought to have been, quite familiar with that road.

[16] When approaching a robot-controlled intersection, it is crucial that a motorist intending to turn right should properly indicate his or her intention to do so, but that such motorist should not proceed to turn across the path of on-coming traffic unless and until he or she satisfies himself or herself that it is safe to do so. A motorist's conduct in executing a right-hand turn when it is not safe to do so, is a *prima facie* case of negligence, in the absence of a reasonable and satisfactory explanation for such conduct. See *Snyman v Van den Berg* 1978 (3) SA 850 at 851D-E. I have no hesitation in finding that the second defendant's testimony *in casu* is devoid of any reasonable and/or satisfactory explanation.

[17] In *Norwich Union Fire Insurance Society Ltd v Chiduku* 1971 (1) SA 599, [R.A.D], Beadle, CJ property observed, at 600H-601E, that:

> *It is well to point out first the 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 case is that a motorist should not proceed to turn across the path of oncoming traffic unless and until it 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 therefore, 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 his 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.*

[18] It was clearly the second defendant's duty to ensure that it was safe for him to commence executing his right-hand turn by keeping a proper lookout for southbound traffic crossing his path and the intersection along Hosea Kutako Drive. But he lamentably failed to live up to such duty. Even if, as he alleges, a signal of his intention to execute the right-hand turn was given (the plaintiff contends he saw no such signal), this could in no way have absolved him from keeping a proper lookout for traffic that had "a special right of way" across his path and the intersection, as was the plaintiff's car. This is so on the basis that a motorist must make sure that he can execute a right-hand turn without endangering either oncoming (or following) traffic.

[19] On the evidence adduced, I find that the plaintiff was using lane "E" as he approached the intersection where the collision occurred. The second defendant concedes that a motorist who wants to cross a robot-controlled intersection and to proceed straight on (when green lights are in his or her favour) has the right of way. Furthermore, he concedes that it is the duty of a motorist who wishes to cross a lane of traffic to make sure it is safe to do. This is in line with what Beadle, CJ observed in *Norwich Union Fire Insurance* case, *supra*.

[20] In *Brendall v Benjamin 2006 (1) NR. 16,* Mtambanengwe, AJ quoted with approval at 29 the following observations of Jansen, JA in *Nogude's* case:

> In *Nogude v Union and South-West Africa Insurance Co. Ltd* 1975 (3) SA 685 (A) at 688A-C, Jansen JA said:

> *"A proper look-out entails a continuous scanning of the road ahead, from side to side, for obstructions or potential obstructions (sometimes called ''a general look-out'': cf Rondalia Assurance Corporation of SA Ltd v Page and others 1975 (1) SA 708 (A) at 718H-719B). It means:*
>
> *'…more than looking straight ahead – it includes an awareness of what is happening in one's immediate vicinity. He (the driver) should have a view of the whole road from side to side and in the case of a road passing through a built-up area, of the pavements on the side of the road as well.'"*

[21] The second defendant concedes that he did not see the plaintiff's car when he started to execute the right-hand turn in the intersection. He then proceeds to testify: *"… but the main problem is where was he on the road?''*

In my view, this speaks volumes about the second defendant's lack of proper look out at the time that he started to execute the right-hand manoeuvre.

[22] On the basis of the evidence given by the second defendant as well as that given by the plaintiff, it is manifest that the only inference reasonably feasible is that, when the second defendant approached the intersection and commenced to execute the right-hand turn, he was wholly oblivious of the imminent presence of the plaintiff's car in lane "E" of Hosea Kutako Drive; and that when he first saw it, it was virtually upon him and, therefore, too late for him to take any meaningful preventive action. Accordingly, his claim that he checked lanes "D" and "E" before he embarked upon the right-turn manoeuvre is false, and I so find. Morever, I find that no fault is attributable to the plaintiff for the resultant collision between his car and the bakkie which the second defendant drove. I accept the plaintiff's evidence that the second defendant was apologetic to him for the collision.

[23] In the final analys, the circumstances of this case clearly demonstrate that the second defendant was unobservant and so he failed to keep a proper look-out as he entered the intersection and commenced to execute his right-

hand turn (at a dangerous and/or inopportune moment,) across the path of on coming traffic which had "a special right of way" to enter and cross the intersection, namely, the plaintiff's car. In any event, the fact that the bakkie driven by the second defendant collided with the plaintiff's car whilst he (the second defendant) was executing his right-hand turn across the path of the plaintiff who enjoyed the right of way, is "virtually a case of *res ipso lequitur*." See *Norwich Union Fire Insurance* case, *supra*, at 601H. I am, therefore, satisfied that the plaintiff, upon whom the initial *onus* rests, has proved that the second defendant was guilty of negligence in that he failed to act with proper care and attention when he encroached upon the plaintiff's path and thereby occasioned the collision.

[24] This being so, my finding is that the second defendant is liable in damages suffered by the plaintiff; and that the first defendant is *ipso facto* vicariously liable as it is common cause that the second defendant was, at the time of the collision, acting within the course and scope of his employment. Since this finding and the second defendant's counter claim are mutually exclusive, the counter claim fails and it is accordingly dismissed. The plaintiff is entitled to the costs of these proceedings.

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**SILUNGWE, AJ**

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