CASE NO. I 2417/2010

IN THE HIGH COURT OF NAMIBIA

HELD AT WINDHOEK

In the matter between:

JURGEN ROLF WEISS **PLAINTIFF**

and

GOVERNMENT OF NAMIBIA **DEFENDANT**

CORAM: MILLER, AJ

Heard on: 23 September 2011
Delivered on: 23 September 2011 *(Ex Tempore)*

JUDGMENT:

MILLER, AJ: [1] The facts upon which the issues which arose between the parties are to be decided, are for all practical purposes common cause.

[2] The morning of the 2nd February 2010, was by all accounts a clear, sunny day in the city of Windhoek. On that particular morning Mr. Selatius Fillipus, who is employed by the Namibian Police Force as a driver of heavy vehicles, was instructed to drive a

forklift from the Southern Industrial area to the area of Klein Windhoek.

[3] Whether the nature of the duties he was to perform there, was to remove a guardhouse at the residence of Mr. Justice Hoff or whether he was to remove a guardhouse at the Angolan Embassy, is neither here nor there.

[4] It is plain though that in so doing he acted within the course and the scope of his employment with the Namibian Police Force. The journey from the Southern Industrial area to Klein Windhoek caused him to travel along Heinitzburg Road until the point where it intersects with Sam Nujoma Avenue.

[5] That particular intersection is controlled by a stop sign which obliges drivers travelling in Heinitzburg Road to yield to traffic travelling in Sam Nujoma Avenue.

[6] According to Mr. Fillipus, when he arrived at the intersection he found that his view to the left and right along Sam Nujoma Avenue was to some extent obstructed. This cause him to drive forward coming to a standstill in a position where the forks of the forklift protruded onto the path of travel of traffic travelling from east to west along Sam Nujoma Avenue.

[7] On his evidence, the position in which he again came to a standstill, caused the forks to protrude approximately half a metre into the path of travel on the inner lane of traffic in Sam Nujoma, travelling from east to west.

[8] While he was stationary in that position, a white Corolla vehicle, driven by the wife of the plaintiff, Mr. Weiss approached the intersection from the east, travelling in a western direction.

[9] The driver Mrs. Natalia Weiss states that she was travelling at approximately 60 kilometres per hour in the left hand lane. She was unaware of the fact that the forks of the forklift driven by Mr. Fillipus were protruding into her path of travel. She never

saw them and hence drove into them.

[10] As a result of the collision, the Corolla which became extensively damaged and it is common cause before me that the amount of damages is in the sum of one hundred and three thousand eight hundred and twenty seven Namibian dollars and eighty six cents (N$103 827-86).

[11] The plaintiff, Mr. Jurgen Rolf Weiss in due course issued summons against the Defendant, claiming compensation for the damage he had suffered.

[12] The plaintiff alleges in par. 5 of the Particulars of Claim that the sole cause of the collision was the negligent driving of Mr. Fillipus, who was negligent therein that he stopped his forklift at the intersection over the stop line with his forks protruding into the lane of the plaintiff was travelling in.

[13] The Defendant resisted the claim in the following basis.

[14] It alleged that the sole cause of the collision was the negligence of Mrs. Natalia Weiss and it enumerated certain grounds upon which it contended she was negligent, amongst which was an allegation that she failed to keep a proper lookout in particular for the Defendant's vehicle.

[15] As a fallback position, the Defendant alleges that in the event of a finding that Mr. Fillipus was negligent and that his negligence contributed to the collision, then in that event of the negligence of the driver of the plaintiff's vehicle should be apportioned in terms of the Apportionment of Damages Act, and accordingly damages should be awarded to the plaintiff in accordance therewith.

[16] At the outset of this hearing, Mr. Phatela who appeared on behalf of the plaintiff and Mr. Mutorwa who appeared on behalf of the Defendant, indicated that it was common cause that the vehicle driven by the plaintiff's wife indeed belonged to the

Plaintiff and that he was the owner thereof.

[17] It was likewise conceded that the vehicle driven by Mr. Fillipus was owned by the Defendant.

[18] In the result all that was left for me to determine was the degrees of negligence of the particular parties.

[19] I have to come to the conclusion that by stopping in the position that he did, at the intersection of Heinitzburg Street and Sam Nujoma Avenue, the driver of the Defendant's vehicle was plainly negligent.

[20] The way in which he stopped at the intersection caused his vehicle to become an obstruction in my view, a reasonable driver in the position of the Defendant would not have allowed it to remain there, especially for a period of eight to ten minutes due to the obvious danger that the vehicle constituted, standing in the position that it did at the intersection.

[21] In my view a reasonable driver in the position of Mr. Fillipus, finding his view obstructed would have taken other measures to avoid his vehicle becoming an obstruction to traffic passing in Sam Nujoma Avenue.

[22] This much was in fact conceded by Mr. Mutorwa during the course of argument before me, his contention being that the degree of negligence, if it is to be measured against the degree of negligence of Mrs. Weiss, is 60 percent as to 40 percent against Mrs. Weiss.

[23] The only other issue for me to resolve is whether in the circumstances it is open to me to apportion any negligence on the part of Mrs. Weiss and against the plaintiff.

[24] It is plain to me that I am not entitled to do so.

[25] Cooper in Delictual, Liability of Motor Law, states, defines the position as follows, at page 306:

> "Since 1971 a spouse married in community of property who has contributed to the damages suffered by the other spouse is regarded as joint wrongdoer for the purpose of section 2. The result is that where an injured wife, for example, institutes an action for damages against a third party, insurer, the latter can recover an appropriate contribution from the husband who was partly at fault for the injury to his wife".

See also ***Delport v Mutual and Federal Insurances, 1984 (3) SA 191 (N).***

[26] In summary the position as I understand it from the authorities I have referred to, is the following. If spouses are married out of community of property, the wife for instance would be regarded as a joint wrongdoer and in that event, the husband, if it be the husband who have suffered damages will be entitled to claim a contribution from her.

[27] Conversely where the parties are to be married in of property, the injured spouse would have had a right of action against the negligent spouse because the common law prohibition on actions between spouses married in community of property.

[28] What the amendment to the Act entails is merely that where spouses are married in community of property, a third party may seek from the spouse married in community of property a contribution if it is proved that such spouse was also negligent but the injured spouse has no right of action against the negligent spouse. In the instant case however no steps were taken by the defendant to join the wife of the plaintiff, to the proceedings as a joint wrongdoer.

[29] In these circumstances it would follow that I am not able to apportion any damages as between the plaintiff, the Defendant and the Defendant's wife.

[30] It follows in these circumstances that as against the Defendant, the Plaintiff must succeed to the full extent of his claim.

[31] In the result I grant judgment for the plaintiff in terms of paragraph 1, 2 and 3 of the Particulars of Claim.

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MILLER AJ

ON BEHALF OF THE APPLICANT Dr. Weder, Kauta & Hoveka Inc.
INSTRUCTED BY Mr. Phatela

ON BEHALF OF THE RESPONDENTS Mr. Mutorwa
INSTRUCTED BY Government Attorney