'Unreportable'

CASE NO.: I 1885/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

WINDHOEK TOOL CENTRE CC **Plaintiff**

and

ORUUANO OF NAMIBIA **First Defendant**

U P SHEKUPE **Second Defendant**

***CORAM*: PARKER J**

Heard on: 2012 June 11 – 13

Delivered on: 2012 July 17

JUDGMENT

PARKER J: [1] In this matter the plaintiff has instituted action against the defendants jointly and severally, the one paying the other to be absolved, for damages arising from a collision that occurred between the motor vehicle Registration Number N104–719W and the motor vehicle Registration Number N103–477W. The driver of the former motor vehicle at the material time was a Mr Craddock, and the driver of the latter motor vehicle at the material time was the

second defendant, Mr Shekupe. For the sake of clarity, I shall refer to the former motor vehicle as 'the plaintiff's motor vehicle', and the latter as 'the defendants' motor vehicle'.

[2] In his plea, the second defendant not only denies that he was the sole cause of the collision through his negligence as averred in the plaintiff's particulars of claim; but he also pleads that the cause of the collision was the negligence of the Craddock who drove the plaintiff's motor vehicle that caused the collision. The basis of the second defendant's contention is that Craddock failed to avoid the collision while he was in a position to do so.

[3] Ms Rix, counsel for the plaintiff, submits that the second defendant's plea with regard to negligence be disregarded because, according to her, the plea is vague and embarrassing on the basis that second defendant refers to the plaintiff as being negligent, but that the second defendant 'was supposed to refer to the driver of the Plaintiff's motor vehicle and not the Plaintiff'. With respect, I decline Ms Rix's invitation which is given in the late hour of submission by counsel. Counsel ought to have followed the procedure set out in rule 23(1) of the rules of court for relief.

[4] I make the following factual findings; most of which are, in any case, not in dispute. On 8 December 2010 at an intersection of Dr Michael de Koch Street, the main road, and Kallie Roodt Street, the minor, feeder road, Windhoek, at about 09h50 a collision occurred between the plaintiff's motor vehicle and the defendants' motor vehicle. The plaintiff's motor vehicle was travelling on Dr Michael de Kock Street and was turning into the easterly direction. There is a 'Yield' or 'Stop' sign on Kallie Roodt Street at its intersection with Dr Michael de

Kock Street. As I have said previously, compared with Kallie Roodt Street, Dr Michael de Kock Street is the main street, i.e the advantageous route. The defendants' motor vehicle was travelling southwards from the north-eastern direction. Craddock had first pulled away from a Shell petrol service station just across the northern shoulder of Dr Michael de Kock Street. The locus of the collision is in the left lane travelling eastwards on Dr Michael de Kock Street and, therefore, the plaintiff's motor vehicle was travelling in the correct and lawful lane. For the defendant's motor vehicle to travel from the yield or stop position on Kallie Roodt Street to the Shell petrol service station, which was where Shekupe was driving to when the collision occurred, the defendant's motor vehicle must cut across the left lane (in which as I have said previously, the plaintiff's motor vehicle was lawfully travelling in) in order for it to enter its lane, travelling from east to west on Dr Michael de Kock Street and for it to be able to turn into Shell petrol service station.

[5] It was when the plaintiff's motor vehicle and the defendant's motor vehicle were carrying out those separate manoeuvres that the collision occurred in, as I say, the plaintiff's lawful lane. In considering the evidence, I keep in my firm view what I said in *Marx v Hunze* 2007 (1) NR 228 at 230C–H as the guiding principles:

> 'This wise prescript should be the starting point of my enquiry. 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 Company Ltd v Thornton's Cartage Co Ltd* De Waal JP stated that the duties of a driver entering an intersection from a minor road have been stated as follows:
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> > "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. (1931 TPD 516 at 519)"
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> [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 a 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.'

[6] The principle in *Marx v Hunze* are in line with the cases on the point referred to the Court by Ms Shifotoka, counsel for the second defendant. And the principle there must be read in conjunction with the principle that the prudent motorist should appreciate that other road-users enjoy an equal right to use the road and ensure that he or she does not harm other road-users and so the motorist should drive at a speed at which he or she is able to stop within his or her range. In the instant case there are no reliable photographs of the damaged motor vehicles placed before the Court to enable the Court to determine more reliably the real points of impact on the motor vehicles. Such consideration is critical for it assists the Court in determining reasonably how the collision occurred. There is, of course, the evidence of Ronny Vries, a motor vehicle assessor (a plaintiff witness) that the front part of the plaintiff's vehicle was damaged; but it is not sufficient to determine which part of the defendant's vehicle

was damaged to assist in reliably determining the real point of impact of his vehicle.

[7] Be that as it may, what is undisputed or indisputable is that the plaintiff's motor vehicle had right of way. But, upon the authorities, that does not mean that the plaintiff could proceed at such a speed that he was unable to prevent his vehicle from colliding with the defendant's motor vehicle or without a proper lookout. It was Craddock's testimony that he was just pulling away from the Shell petrol service station and just picking up speed. If that was the case, it is inexplicable that he did not see the second defendant's motor vehicle until the collision occurred. With respect, I do not accept Ms Rix's argument – which is a rehearsal of Craddock's testimony – that 'The driver of the plaintiff's motor vehicle on the other hand had no obligation to stop or slow down. Therefore the allegation that the driver of the plaintiff's motor vehicle was speeding is irrelevant as he had (did) not have any obligation to slow down if he was indeed speeding'. On the contrary, in my opinion and upon the authorities, Craddock had an obligation to keep a proper look out. He did not.

[8] If Craddock was just picking up speed, as he testified, then in my opinion, he should have seen the defendant's oncoming vehicle if he had kept a proper lockout; and he should have then taken reasonable steps to avoid the collision. In this regard, Craddock testified that if he had swerved to his right, his vehicle would have collided with oncoming traffic; but Craddock does not say why he did not swerve to his left so as to make his vehicle avoid the second defendant's vehicle. It was Shekupe's evidence which stood unchallenged at the close of his case that the point of impact was at the driver's side of his vehicle. And it was Vries's evidence, as I have said previously, that the damage to the plaintiff's motor vehicle

was to the front of the plaintiff's motor vehicle. All this is consistent with the fact that the second defendant's motor vehicle was already in the plaintiff's lane, trying to cut across it, and so it was the plaintiff's motor vehicle that hit into the second defendant's vehicle; whose driver's side was already in Craddock's lane. From all this, I find that Craddock contributed to the collision through his negligent driving.

[9] But that is not the end of the matter. The defendant's motor vehicle was entering a main road, as I have said more than once, I accept Shekupe's evidence that he stopped at the 'Yield' or 'Stop' sign, and looked to his left and to his right and to his left and to his right once more. Thereafter he proceed to drive into the main street. As it turned out the stopping and looking to his left and to his right and to his left and right once more did not help Shekupe or Craddock who was driving on the main street. Shekupe should not have proceeded into the main street since he was not joining it to drive in the same direction as Craddock, but he was, as I have said previously, cutting across Craddock's lane of traffic. I accept Craddock's testimony, as I have done, that he had just pulled his motor vehicle from the Shell petrol service station and it was just picking speed. Taking that into account together with the fact that the locus of the collision was at a point on the main street opposite the 'Yield' or 'Stop' sign, I firmly reject Shekupe's version that Craddock was driving at such a speed that Shekupe could not take any reasonable steps to avoid his vehicle and the plaintiff's vehicle colliding. It is my view, therefore, that Shekupe, contributed in a grater measure to the collision through his negligent driving; for since Shekupe's vehicle was entering the main, advantageous street from a minor, feeder street, Shekupe was expected to take due care and be prepared to expect traffic on the main road. All this, he did not do, resulting in the collision. In fact, Shekupe took no steps to avoid the collision; and I have rejected his testimony that he could not do anything because the

plaintiff's motor vehicle was speeding, which according to him, he 'saw and heard'.

[10] From all the aforegoing, I conclude that it is just and reasonable to grant judgment for the plaintiff. However, because of Craddock's own contributory negligence, the plaintiff succeeds in its claim to the extent of 55% of the claim. And since the plaintiff has not been successful substantially, it is fair and reasonable that the plaintiff is not awarded costs. On the facts and in the circumstances of the case, this is a proper case where it is fair and reasonable that each party pays its own costs. (See *Hydraulic Brokers Truck & Trailer CC v Mutual & Federal Insurance Co. of Namibia Ltd* Case No. I 1923/2006 (judgment delivered on 26 March 2007 (Unreported).)

[11] In the result, I make the following orders:

1. Judgment is for the plaintiff in an amount equal to 55% of N$97, 899-00, plus interest at the rate of 20% per annum from date of this judgement to date of full and final payment.

2. There is no order as to costs, including qualifying fees.

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PARKER J

COUNSEL ON BEHALF OF THE PLAINTIFF:

Ms M D Rix

Instructed by: Rix & Co.

COUNSEL ON BEHALF OF THE SECOND DEFENDANT:

Ms Shifotoka

Instructed by: Diedericks Inc.