



*'Unreportable'*

**CASE NO.: I 884/2011**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**HENDRIK HAININGA**

**Plaintiff**

and

**MESAG MULUNGA**

**Defendant**

**CORAM: PARKER J**

Heard on: 2012 July 2 – 6

Delivered on: 2012 July 24

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**JUDGMENT**

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**PARKER J:** [1] The plaintiff, represented by Ms Botes, has instituted action against the defendant in which he claims damages in the amount of N\$43, 400-50 and interest thereon. The following relevant facts are either indisputable or undisputed. The suit arises from a collision of a motor vehicle Hyundai Elentra, Registration Number N28659W, driven at the material time by a Mr Shiimi ('the plaintiff's motor vehicle') and a motor vehicle 2000 Daewoo, Registration Number N406550W, driven at the material time by Victor Mulunga ('the defendant's motor

vehicle'). Although at that material time the defendant's motor vehicle was registered in the defendant's name, he had donated it to his brother, Victor Mulunga. And as respects the plaintiff's motor vehicle; the ownership of the vehicle is in the plaintiff. The plaintiff's vehicle was travelling eastwards from the western direction on Brug Street in order to proceed into Florence Nightingale Street. There was a ('stop' or 'yield') sign on Brug Street at its intersection with Florence Nightingale Street. Florence Nightingale Street is the main street, and therefore, the advantageous route, whilst Brug Street is the minor, feeder street. And it was on Florence Nightingale Street that the defendant's vehicle was travelling on.

[2] The evidence adduced on behalf of the plaintiff's case and that adduced on behalf of the defendant's case on the issue of whose negligence caused the collision are mutually destructive to each other. In such a case, the proper approach is for me to apply my mind not only to the merits and demerits of the two sets of versions but also their probabilities, and it is only after so applying my mind that I would be justified in reaching the conclusion as to which version to accept and which to reject (*Harold Schmidt t/a Prestige Home Innovations v Heita* 2006 (2) NR 556). That is the manner in which I approach the resolution of the versions on the opposite sides of the suit given by the witnesses on certain crucial matters.

[3] It was testimony of Haininga (the plaintiff) that at the time the collision occurred the defendant's motor vehicle was being driven without its headlamps switched on. Haininga was riding in the rear seat of the plaintiff's vehicle. Haininga's testimony about the headlamps was repeated by Shiimi, the driver of the plaintiff's motor vehicle, as aforesaid. The version of Victor, the driver of the defendant's motor vehicle was that he had switched on not only the vehicle's

headlamps but also its foglights; and after the collision he came out of the vehicle and he saw that the right headlamp and the foglight were still on. He added that it was not possible for him to have been driving the vehicle for a long distance from his house in Windhoek North in the streets without switching on the lights of the vehicle. The collision occurred in the wee hours, i.e. at about between 12 midnight and 02h00. After having applied my mind not only to the merits and demerits of the two versions about the lights, and also their probabilities, I reject the plaintiff's versions, and I accept Victor's version. I find that on a balance of probabilities, the headlamps and the fog-lights on the plaintiff's motor vehicle were switched on before the collision.

[4] I also make the following factual findings – relying also on the approach set out in *Harold Schmidt t/a Prestige Home Innovations v Heita* supra. Shiimi was travelling on Brug Street. Far away from the 'stop' or 'yield' sign he stopped his vehicle, and after a short moment the vehicle proceeded towards the intersection. I accept that he stopped at the second time; this time at the 'stop' or 'yield' position. His vehicle then proceeded to enter Florence Nightingale Street in order to proceed eastwards thereon in the left lane, in his opposite view, travelling from the west towards the easterly direction. And in order to do that Shiimi's vehicle had to cut across the left lane of the traffic on Florence Nightingale Street, travelling northwards from the south. It is this selfsame left lane carrying traffic on Florence Nightingale, travelling northwards from the southerly direction, that Victor's vehicle had been travelling on, that is, from the south to the north. Victor's evidence was that his vehicle had been travelling at a reduced speed because it had just moved over a speed-calming hump that was in his lane. It was when Shiimi's vehicle was cutting across Victor's lane on Florence Nightingale Street that the collision occurred.

[5] In determining whose negligent driving caused the collision I rely on the principles I set out in *Marx v Hunze* 2007 (1) NR 228 at 230 C-H, which in turn are distilled from the authorities:

‘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:

“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)”

[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 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] I accept Victor’s evidence that when he realized that Shiimi’s vehicle was entering his lane, denying him his right of way, he swerved his vehicle to his right

into the oncoming lane in which Shiimi's vehicle was attempting to enter; whereupon the collision occurred. From the totality of the evidence I find that when the collision occurred Shiimi's vehicle had not completed the manoeuvre that would have placed his vehicle completely in the left lane on Florence Nightingale, with the vehicle clearly facing the easterly direction. It is the left front part of Victor's vehicle that was damaged because, according to Victor's evidence, which I have accepted previously, when he alighted from his vehicle after the collision he saw that the right headlamp and fog-light on his vehicle were working and they were on. Besides, the locus of the collision was not completely in the left lane but slightly on the dividing line. Accordingly, I reject Shiimi's evidence that the point of impact was directly on the front of his vehicle and that of Victor's vehicle and completely inside the left lane.

[7] I have found previously what Victor did to avoid the collision even though – as I say – his vehicle had right of way on Florence Nightingale Street. What steps did Shiimi take to avoid the collision, seeing that his vehicle was entering a main, advantageous route? From his own evidence, I find that he did nothing to avoid the collision. He might have had the presence of mind to brake his vehicle; but he did not. And on this point I accept submission by Ms Sikongo, counsel for the defendant, that Shiimi did not brake his vehicle. Shiimi should not have proceeded, without a proper lookout, into the main street since he was not joining the main street in order to drive in the same lane and in the same direction as Victor on Florence Nightingale Street. He was, as I have found previously, cutting across Victor's lane of traffic on Florence Nightingale. And I have also rejected Shiimi's version that Victor's vehicle was speeding and its headlamps were not switched on. Shiimi had the duty to take due care and be prepared to expect traffic on the Florence Nightingale Street, being the main street and the

advantageous route. All this Shiimi did not do, resulting in the collision. In that regard, Shiimi was negligent in his driving, and contributing to the collision.

[8] But that is not the end of the matter. I have previously accepted Victor's evidence that he braked and swerved into the lane to his right, that is, the left lane into which Shiimi was attempting to gain entry. If Victor was not driving fast and had just passed over a speed-calming hump, as I have found previously, there would have been no need for him to apply the brakes of his vehicle and swerve the vehicle at the same time. He could have braked the vehicle and pulled it unto the shoulder of the lane he was driving in, without driving his vehicle dangerously into the oncoming lane to his right, which was apparently the same lane Shiimi was attempting to drive his vehicle into. Thus, Victor should have kept a proper lookout and be prepared to expect approaching traffic in that lane. For all the above about Victor's driving, I find that Victor was also negligent in his manoeuvres, and his negligence, too, contributed to the collision of the two vehicles.

[9] For the foregoing reasoning and conclusions, I conclude that in virtue of the factual findings I have made and considering them against the backdrop of the principles enunciated in the authorities, it is fair and just to grant judgment for the plaintiff. However, because of Shiimi's own contributory negligence, the plaintiff succeeds in his claim to the extent of 51% of his claim. As respects costs, since the plaintiff has not been successful substantially, it is reasonable that the plaintiff is not awarded costs. (See *Hydraulic Brakes Trucks & Trailer CC v Mutual & Federal Insurance Co. of Namibia Ltd* Case No. I 1923/2006 (Judgment delivered on 26 March 2007) (Unreported).) The result is that, in my opinion, each party should pay his own costs.

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

1. Judgment for the plaintiff in an amount equal to 51% of N\$43, 400-50, plus interest at the rate of 20% per annum from date of this judgment to date of full and final payment.
2. There is no order as to costs.

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**PARKER J**

**COUNSEL ON BEHALF OF THE PLAINTIFF:** Ms A Botes

Instructed by: Francois Erasmus & Partners

**COUNSEL ON BEHALF OF THE DEFENDANT:** Ms N E M Sikongo

Instructed by: Nambahu & Uanivi Attorneys