REPORTABLE

CASE NO: I 3554/2009

IN THE HIGH COURT OF NAMIBIA

MAIN DIVISION

HELD AT WINDHOEK

In the matter between:

MR J I MATHEUS **PLAINTIFF**

and

NAMWATER CORPORATION LIMITED **1ST DEFENDANT**

MR WILBARD THOMAS **2ND DEFENDANT**

CORAM: HOFF, J

Heard on: 14 October 2010

Delivered on: 30 March 2012

JUDGMENT

HOFF, J: [1] The plaintiff instituted an action against the first and second defendants for damages suffered by the plaintiff during a collision between two motor vehicles.

[2] It is not disputed that the plaintiff was the owner of a white 1997 Toyota Corolla motor vehicle (the Corolla) with registration number N 31003 W. On 6 January 2009 and on the national road from Ogongo to Oshikuku a collision occurred between plaintiff's vehicle and a 7 ton truck with registration number N 90512 W the property of the first defendant driven by the second defendant.

The particulars of claim alleged that the second defendant was acting in the course and scope of his employment with the first defendant, alternatively within the ambit of risk created by such employment, and that the sole cause of the collision was the negligent driving of the second defendant.

The plaintiff alleged that as a result of the negligence of the second defendant plaintiff's motor vehicle was damaged beyond economical repair and that the plaintiff suffered damages in the amount of N$46 900.00 being the difference between the fair and reasonable value of plaintiff's motor vehicle prior to the collision, less the salvage value thereof, together with the fair and reasonable tow in costs in respect of the plaintiff's vehicle after the collision.

[3] The plaintiff in its particulars of claim alleged that the sole cause of the collision was the negligent driving of the second defendant in that he *inter alia*:

1. failed to take cognisance of plaintiff's vehicle which was executing a right-hand turn;
2. attempted to overtake plaintiff's vehicle at a time when it was dangerous and inopportune to do so;
3. failed to take notice of plaintiff's intention to execute a right hand turn;
4. failed to apply his brakes timeously or at all;
5. drive at an excessive speed in the circumstances;
6. failed to avoid a collision when he could have and should have done so.

[4] Plaintiff claimed for judgment against first and second defendants, jointly and severally the one paying the other to be absolved for:

1. Payment in the amount of N$46 900.00;
2. Interest on the aforesaid amount at the rate of 20% per annum, calculated from date of judgment to date of final payment;
3. Costs of suit.

[5] The second defendant pleaded as follows:

"The second defendant denies that he was negligent but should it however be found that the second defendant was negligent (which is denied) then it is pleaded that such negligence of the second defendant was not the cause or a contributing factor to such collision.

The collision was caused by the sole negligence of the plaintiff who was negligent in one or more of the following respects:

1. he failed and/or neglected to keep a proper look-out;

2. he failed and/or neglected to have due regard to the presence of other motor vehicles on the road, particularly the first defendant's motor vehicle;

3. he failed and/or neglected to remain in his lane, alternatively he failed and/or neglected to indicate his intention to execute a right-hand turn;

4. he drove straight in front of the first defendant's motor vehicle while the second defendant was in the process of over-taking his motor vehicle;

5. he failed and/or neglected to avoid a collision when it was reasonably expected of him to do so and/or when under the circumstances prevailing he could and should have done so.

In the event of it being held by the above Honourable Court that the second defendant was negligent and that his negligence was a cause of the collision, all of which is still denied, then and in that event defendants aver that the plaintiff was also negligent and that his negligence contributed to the collision. Particulars of plaintiff's negligence are set-out in the preceding sub-paragraph."

[6] The parties had agreed that this Court should only consider the issue of negligence and that the issue of quantum would subsequently be considered by the parties.

[7] Julius Matheus testified that he was the owner of the Corolla which was involved in a collision with a truck. On 6 January 2009 he was driving from Outapi to Oshikuku. His father was a passenger. It was about 16h30 and the visibility was good. He indicated his intention to turn to the right since his house was on the right side of the road. On the right hand side of the road were cuca shops. He activated his indicator about one hundred metres prior to his intended turn off point at a gravel road. There were no approaching vehicles but he saw the truck in his rearview mirror. His vehicle was then hit by the truck at the right rear side and damaged all along the right side of the vehicle until the engine compartment – from the right rear bumper, both doors on the right side until the front bumper. The damage was caused by the wheels of the truck which also went over the bonnet of the motor vehicle.

The point of impact was to the right of the line marking the middle of the road. Prior to the collision he had reduced his speed to 20km/h and thereafter he turned to his right. After the collision his vehicle veered to the left, and came to a standstill on the left hand side, off the tarred road. He testified that he overtook the truck about 2 km prior to the turn off where the collision occurred.

[8] During cross-examination he testified that he overtook the truck in Oshitutuma and thereafter the truck followed him for two to three kilometers before the accident. According to him there is a turn off at the bridge across a canal and the cuca shops are situated on the other side once one has crossed the bridge. At this turn off there is no road sign indicating that there is such a turn off. He could not tell how far the truck was behind him when he put on his indicator but he saw the truck in his rearview mirror. He did not see when the truck was overtaking him but the truck was following him for about

two to three kilometers prior to the collision. The witness denied the allegation that he never put on his indicator prior to the collision, denied that he turned in front of the truck which was busy overtaking him, denied that the first point of impact was on the right front door of his motor vehicle, and denied that he neglected to see the truck overtaking him.

[9] The plaintiff closed its case whereafter the second defendant Mr Wilbard Thomas testified.

He testified that he worked for Namwater since 1979 and was employed as a driver at the time of the collision. On 6 January 2009 he was the driver of the truck and was on his way from Ogonga to Oshakati. They left Ogonga at 15h00 and the accident occurred about 15h30. He followed the car of the plaintiff for about three minutes and started to overtake when he was about 20 metres behind plaintiff's vehicle indicating that he was busy overtaking. The vehicle of the plaintiff then started to move into the right hand lane in which he was travelling and he then hit the car of the plaintiff. He denied that the plaintiff had indicated that he was turning right, and denied that he was driving with an excessive speed in the circumstances.

He testified that he saw no roads which turned off from the main road and neither did he see any road signs. He confirmed that there was a canal next to the main road. He testified that the cuca shops were on the left hand side of the main road and that he tried to avoid the accident. He denied that the first point of impact was on the right rear of plaintiff's vehicle.

[10] During cross-examination this witness denied that the plaintiff overtook him two to three kilometers before the point where the accident occurred but confirmed that he had seen the plaintiff's vehicle for about two to three kilometers driving in front of him prior to the accident. Second defendant testified that he did not find it normal for a motor vehicle to proceed at a speed of 20 km/h on a national road. He denied that he failed to keep a safe distance behind the Corolla.

[11] During cross-examination second defendant conceded that he was catching up with plaintiff's vehicle. He could not dispute that there was a gravel road from the tarred road leading towards the bridge across the canal. He testified that he had applied brakes prior to the collision in order to see whether there were any oncoming traffic. His evidence regarding when he applied brakes was inconsistent. He first testified that after he had applied brakes just before overtaking plaintiff's vehicle he never again applied brakes. However later during cross-examination he testified that he had applied brakes continuously until his vehicle had come to a standstill. During cross-examination the second defendant testified that he tried to avoid the accident by swerving to the right prior to the collision. However when he was asked to demonstrate the position of the vehicles prior to impact he indicated that the truck he was driving was travelling in a straight line on the right hand side of the road. Second defendant later conceded that his testimony that he took evasive action prior to the collision was incorrect since he did not take such action but was driving in a straight line prior to the collision. Second defendant also testified that during the accident the left wheel of the truck went over or crawled over the bonnet of plaintiff's vehicle. The second defendant agreed that point "A" on the sketch plan correctly reflected the point of impact on the road.

[12] Mr Nico da Cunha testified that he was employed by Namwater since 1981. He was at the time of the collision a mechanic and was a passenger in the vehicle driven by the second defendant. He first saw the vehicle of the second defendant when it was about 100 – 200 metres in front of them. They were travelling approximately 70 – 80 km/h. The second defendant indicated that he was going to overtake. The vehicle in front of them was driving much slower, but showed no sign that it intended to turn. When second defendant put on his indicators they were about 20 metres behind the Corolla motor vehicle. The vehicle in front of them suddenly turn to the right and the truck hit that vehicle on the driver's door but nearer to the fender. He denied that the truck hit the Corolla at the right rear side of the vehicle as testified by the plaintiff. He explained that

the damage to the rear side of the Corolla was caused *after* the first impact when the rear of the Corolla was thrown against the truck.

[13] He testified that he did not see second defendant applying brakes prior to the accident – they did not slow down. He further testified that prior to the impact the driver of the truck *increased* the speed in order to overtake from 75 km/h to 80 km/h.

[14] Mr da Cunha testified that plaintiff's vehicle was driving slowly. When asked whether the second defendant tried to avoid the accident he replied that the collision occurred so fast that second defendant could not control the vehicle and did not even had time to think (to take evasive action). He further testified that he did not see plaintiff's Corolla vehicle overtaking the truck prior to the accident.

[15] He testified that he himself being a motor vehicle driver found it strange that a motor vehicle would be driving at a speed of 20 km/h on that road and that he had thought at the time that the reason for such slow speed could have been that the vehicle had sustained some or other damage and that there was a possibility that the vehicle would try to get off the road.

[16] During the evidence in chief of the second defendant a photograph of a tarred road was shown to him and he was asked to identify the road. He stated that it depicts where the accident occurred. He was asked whether he could see any turn off to the right hand side to which he replied in the negative.

[17] Mr Erasmus objected on the basis that the photograph was never presented to the plaintiff and plaintiff was never afforded the opportunity to express his view on the said photograph. In view of the fact that second defendant was not in a position during cross-examination to dispute the fact that there was indeed at the place where the

accident occurred a gravel road leading to a canal I shall disregard the testimony of second defendant that he couldn't see a turn off on the photograph.

[18] What is common cause is that at that gravel road there are no road signs marking it as a turn off.

[19] Mr Erasmus submitted that this Court should find that the probabilities are in favour of the plaintiff's version in respect of the events prior to the collision and asked this Court to make negative credibility findings in respect of the defendants' version. He referred this Court to the authoritative work of *Cooper on Motor Law 2nd edition* p. 434 where vehicle speed is considered. The leanred author remarked that vehicle speed is commonly indicated by the speedometer in terms of kilometers per hour as these units are appropriate to the distances and times which are involved in the usual car journey. However where events take place over much shorter distances and in much shorter terms as in traffic accidents it is more appropriate and more convenient for calculation, to express vehicle speed in units of metres per second in terms of the following conversion: speed in metres per second is equal to speed in kilometers per hour divided by 3.6.
It was submitted by Mr Erasmus that this conversion entails a simple mathematical calculation and that the evidence of a reconstruction expert is not necessary. In terms of this conversion a motor vehicle which travels at 80 km/h covers a distance of 22 metres in just one second.

[20] It was submitted on this calculation that when the second defendant activated his indicator 20 metres behind the vehicle of the plaintiff when he started to overtake, the plaintiff would not have been in a position to see such an indicator since it would have taken second defendant about one second to cover the distance of 20 metres between the truck he was driving and plaintiff's vehicle.

Mr Erasmus submitted that second defendant drove with an excessive speed in the circumstances and overtook plaintiff's vehicle when it was dangerous or not safe to do so.

[21] Mr Conradie submitted that had plaintiff activated his vehicle's indicator to turn to the right about 100 m before the turn off as testified by plaintiff second defendant would not have overtaken the plaintiff's vehicle. He submitted that since there was from the evidence of second defendant and the testimony of his passenger no reason to suspect that the Corolla would turn to the right, that second defendant was perfectly entitled to overtake plaintiff's vehicle and would have overtaken the vehicle safely had plaintiff remained in the left hand lane and that it was plaintiff's unexpected turn to the right when second defendant was busy overtaking him, which was the sole cause of the accident.

[22] I have indicated *(supra)* that the second defendant had contradicted himself on material aspects during his testimony: he testified that he tried to avoid the accident by swerving to his right but later testified that such testimony was incorrect since he did not swerve to his right. Incidentally in his plea the second defendant also alleged that he tried to avoid the accident by swerving to the right and on to the gravel (next to the road). Second defendant was also inconsistent regarding when he applied his brakes. In his evidence-in-chief he testified that he applied brakes prior to the collision but not thereafter but later during cross-examination he had applied brakes continuously until his vehicle came to a standstill. The second defendant conceded during cross-examination that his truck came to standstill about 150 metres from the point of the collision to the left hand side of the road. There is however no indication on the sketch plan of any brake marks on the tarred road and off the tarred road having regard to the fact that the police arrived on the scene soon after the accident and whilst the second defendant was still on the scene of the accident. Second defendant testified that measurements were taken by the police while he and his supervisor (who travelled in a bakkie behind his truck) were still on the scene.

[23] Mr Conradie objected to evidence in respect of information contained in the key to the sketch plan on the basis that such evidence is inadmissible because the author thereof did not testify. The sketch plan and key thereto were discovered in terms of Rule 36.10 of the Rules of the High Court and the sketch plan was received as evidence and marked as exhibit "A".

In *Shield Insurances Co. Ltd v Hall* 1976 (4) SA 431 (AD) at 438 E Galgut JA referred with approval to the case of *Mabalane v Rondalia Assurance Corporation of SA Ltd* 1969 (2) SA 254 (W) where Hiemstra J with reference to Rule 36.10 said:

> "I am of the opinion that the words 'plan, diagram, model or photograph' only apply to representations of physical features of the relevant place or object which can be objectively determined."

[24] The Court in *Shield Insurance (supra)* at 438 F remarked as follows:

> "I found myself in agreement with the above-mentioned learned author and with the *dictum* of Hiemstra J. It follows that I am of the view that, if the pre-requisites are established Rule 36(10) creates an admission only (i) as to the authenticity of the document, i.e. it dispenses with the need to call the author of the plan or to provide other proof of its authorship, and (ii) as to the physical features actually found by the author."

and continues at 439 A

> "It follows from what has been said above that regard can only be had to the physical features depicted on the plan, viz. the road, the earthbank, the gap, the position of the vehicles and tracks as depicted by the policeman. Physical features would, in my view, include the measurements relating to these features."

[25] It should be apparent that it was not necessary to call the police officer who drafted the sketch plan to testify regarding the sketch plan and the key thereto.

Nevertheless the second defendant did not dispute the measurements in particular that the truck driven by him came to a standstill 150 m from the point of collision.

[26] On the issue of braking prior to the collision second defendant is contradicted by his passenger, Mr da Cunha, who testified that prior to the collision the truck never slowed down, on the contrary the speed of the truck increased from 75 km/h to 80 km/h in order to overtake plaintiff's vehicle.

[27] If one has regard to the testimony of Mr da Cunha regarding the increase of the speed of the truck together with the evidence that the truck came to a standstill about 150 metres from the point of collision the probabilities are, and it is safe to accept, that the second defendant at no stage prior to the collision applied the brakes in order to slow down the truck. In fact the second defendant conceded during cross-examination that prior to the accident he travelled at about 80km/h and continued to travel at this speed until the point of impact.

[28] The concession made by the second defendant during cross-examination that he never swerved to his right in order to avoid the accident is supported by his passenger Mr da Cunha who testified that when second defendant overtook plaintiff's vehicle he was driving in a straight line in the right hand lane and that the collision occurred so suddenly and unexpectedly that there was no time for the second defendant to react. The evidence of the second defendant that he tried to avoid the collision is therefor rejected.

[29] A bone of contention between the plaintiff and the defendants was exactly where on plaintiff's motor vehicle the truck first struck plaintiff's motor vehicle. The plaintiff testified that his vehicle was first hit on the right rear side and that in the process of overtaking, the truck damaged the whole right side of his vehicle including the right front fender and the bonnet when the left wheel of the truck went over the bonnet.

The second defendant and his passenger Mr da Cunha disagreed. They testified that the first point of impact was on the right front door or on the right front tyre and that the damage to the rear of the car was caused after the initial impact when the rest of the car collided with the overtaking truck. Mr Conradie referred to it as the primary and secondary points of damage. I agree with the submission by Mr Conradie that the primary point of damage must have been as testified by second defendant and Mr da Cunha. If one has regard to the damage to the Corolla as it appears on photographs taken after the accident had the truck first hit the car at the right rear end one would have expected far greater damage at that section of the car. If one has regard to the fact that the right rear lights of the vehicle on one of the photographs were undamaged this tends to support the evidence that plaintiff's vehicle was not first struck as testified by plaintiff.

[30] I can understand why Mr Erasmus strongly argued that the first point of impact on the plaintiff's vehicle must have been on the right rear side. It was to lay a factual foundation for his submission (in support of plaintiff's evidence) that the second defendant drove with an excessive speed in the circumstances especially if one has regard to the extensive damage to the plaintiff's vehicle.

[31] I have indicated earlier that it is not in dispute that the collision occurred on the right hand lane of the road. In view of my finding that the second defendant prior to the accident travelled approximately 80 km/h and never reduced speed but continued to overtake plaintiff's vehicle, is a clear indication of excessive speed in the circumstances. Second defendant found the slow moving vehicle as unusual and in those circumstances should have been alerted that plaintiff's vehicle might be turning off the road and should have reduced his speed to such an extent to anticipate to any eventuality. There was a gravel road leading from the tarred road and second defendant must have realised that the Corolla could turn onto that road.

I say this even if it is accepted, as testified on behalf of the defendants, that the plaintiff never activated his right indicator prior to the collision.

[32] Defendants pleaded should this Court find second defendant was negligent that plaintiff's negligent conduct contributed to the collision.

[33] The plaintiff testified that he gave notice of his intention to execute a turn to the right by indicating about 100 metres prior to his intended turn off and that he reduced his speed from 120 km/h and eventually to 20 km/h.

The second defendant and his passenger, Mr da Cunha, denied that the plaintiff had activated his indicator at any stage. It was submitted by Mr Erasmus this Court should reject the evidence of the defence witnesses since both of them were not credible witnesses.

I have *(supra)* indicated contradictions regarding the evidence of second defendant in his *viva voce* evidence, and certain contradictions between his evidence and the evidence of Mr da Cunha. These related to the question whether evasive action had been taken and whether second defendant had reduced speed prior to the collision. Does it mean that this Court must therefore reject their version regarding the issue whether or not the plaintiff had timeously, or at all, activated his indicator prior to the collision ? I do not think that the plaintiff has a greater claim to credibility than the two defence witnesses on this point. This is so because the plaintiff during his evidence-in-chief testified that he saw the truck overtaking his vehicle. However during cross-examination he repeatedly denied that he had seen the truck overtaking his vehicle. The two versions are mutually destructive and I cannot find that the plaintiff has succeeded in proving on a preponderance of probabilities that he has given timeous notice of his intention to turn right.

Furthermore, what are the probabilities that the second defendant would have overtaken the vehicle of the plaintiff, had the plaintiff indicated a 100 metres prior to the point of the

collision of his intention to do so ? I am of the view that it is highly unlikely that the second defendant would have proceeded to overtake the plaintiff. It is on this basis that I am of the view that the plaintiff's manoeuvre to turn to his right constituted negligence on his part in the circumstances.

[34] In *Cooper Motor Law 2nd edition Volume 2* on p. 88 the learned author remarks that there is a "judicial conflict on the assumptions a driver who is about to execute a right-hand turn is entitled to make *vis-à-vis* following traffic. One view is that such a driver, who has given adequate signal timeously, is, in the absence of special circumstances, entitled to assume that his signal has been seen and will be heeded. The other view is that such a driver may not make that assumption, but must satisfy himself that the following traffic has seen his signal and is reacting to it".

[35] In *S v Olivier* 1969 (4) SA 78 NPD Miller J (as he then was) considered this judicial conflict in a full bench decision and remarked as follows on 81 H:

> "When considering the validity of the proposition that a driver is entitled, in the absence of special circumstances, to assume that his signal has been observed and will be heeded by other users of the road likely to be affected by the movements of his vehicle, it is necessary to bear in mind that, as Schreinder, JA pointed out in *Moore v Minister of Posts and Telegraphs,* 1949 (1) SA 815 (AD) at p. 825.
> " … every driver whenever he drives along thoroughfares frequented by other vehicles and pedestrians is constantly and legitimately making assumptions as to their probable behaviour." "

and continues at 82 B – G as follows:

> "It seems to me that, with reference to the assumption with which we are now concerned, there is a vital difference, for example, between the case where a motorist is driving, of necessity very slowly in a traffic-laden street and the case where he is driving at speed on an open highway. In the former case, where vehicles are proceedings almost as in a procession, only a few feet or yards

separating each vehicle from the one behind it, a driver who wishes to turn to his right down a street intersecting the one along which he is travelling, may well be entitled, in regard to the vehicles coming on slowly behind him, to do so. If he assumes that his signal will be seen by the driver of the vehicle behind him who will accommodate his progress to the turn of the vehicle ahead and not run into it as it turns, such assumption may well, in the vast majority of cases, be held to be a legitimate one. But not so, I think, in the case of a motorist who is travelling along a national road on which it is a common experience to be overtaken at high speed by other vehicles. Such a motorist would, I think, if he were reasonably diligent, before or at the time of giving a signal of his intention to turn right, make a special point of ascertaining, with the aid of his rear-view mirror, or otherwise, whether there were any vehicles coming on behind him. And, *a fortiori*, he would also keep a keen look-out ahead for vehicles approaching from the opposite direction and into whose line of travel the proposed right-turn would necessarily take him. If the road ahead were entirely free of danger but a vehicle were to be seen by him approaching from behind at no great distance but at speed, he would in my opinion be taking an unjustifiable risk if, without paying any further attention to the movements of that vehicle, he were simply to execute his right-hand turn on the blithe assumption that the driver thereof had seen and understood his signal and would heed it**."**

[36] The learned judge concluded at 83 H – 84 A as follows:

"The driver intending to turn to the right, across a route which may be taken by other traffic, must necessarily bear in mind that he will be undertaking a potentially dangerous operation … and must therefore be careful to "choose an opportune moment to cross … and do so in a reasonable manner". (Per VAN WINSEN, AJA in *Sierborger v South African Railways and Harbours,* 1961 (1) SA 498 (AD) at p. 504)

This seems to be the ultimate test to apply in deciding whether a right-hand turn of the kind now under consideration was legitimately or culpably undertaken; the inquiry is: was it opportune and safe to attempt the turn at that particular moment and in those particular circumstances ? Whether it was opportune and safe, or not, will depend upon whether a *diligens paterfamilias* in the position of the driver at that time and in the circumstances prevailing would have regarded it as safe.

(CF *Kruger v Coetzee* 1966 (2) SA 428 (AD) at p. 430)."

[37] I have found that plaintiff did not prove on a preponderance of probabilities that he had activated his indicator timeously. Even if it is assumed that he did so the test is: was it opportune and safe to make a right hand turn in those circumstances ?

[38] What were the circumstances ? On plaintiff's version he overtook the truck 2 – 3 km prior to point where the collision occurred. He was thereafter aware of the truck behind him. He testified that before he turned he looked in his rearview mirror and reduced speed eventually to 20 km/h. The evidence is not clear what a distance and for how long he was driving at this speed. It is common cause that the truck quickly closed the distance between the two vehicles and plaintiff must have been aware of this. The plaintiff testified that he had expected the truck to stop behind him prior to him making the right-hand turn. This in my view would have been a reasonable assumption had the incident occurred in an urban area. In my view as stated in *Olivier (supra)*, the common experience is that a slow moving vehicle travelling along a national road is more often than not overtaken at high speed by other vehicles.

The plaintiff must shortly after overtaking the truck have started to reduce speed in order to make the intended right-hand turn. The vehicle driven by the second defendant was a distance behind him and was closing in. The plaintiff was unable to say how far the truck was behind him when he activated his indicator.

There is no evidence how often the plaintiff looked in his rearview mirror whilst driving in front of the truck. In my view the plaintiff ought to have ascertained in whichever manner whether the truck was still behind him prior to executing the right-hand turn since this is what the reasonable driver on a national road in the circumstances would have done. The plaintiff did not pay further attention to the truck when he was about to make the right-hand turn. This conduct in the circumstances constitutes negligence since it was not opportune and safe to do so in those circumstances.

[39] My finding is thus that both the plaintiff and the second defendant were negligent in equal measure in the circumstances and that plaintiff is only entitled to half the damages suffered (such damages still needs to be proved).

In respect of the issue of costs since the plaintiff was not substantially successful in his claim for damages it is ordered that each party pays its own costs.

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HOFF J

ON BEHALF OF THE PLAINTIFF: **MR ERASMUS**

Instructed by: **FRANCOIS ERASMUS & PARTNERS**

ON BEHALF OF THE 1ST AND 2ND DEFENDANTS **MR CONRADIE**

Instructed by: **CONRADIE & DAMASEB**