



## HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

## JUDGMENT

Case no: I 574/2011

In the matter between:

**WILLEM VAN DER BERG****PLAINTIFF**

and

**KLEOPHAS N ASHILUNGU****DEFENDANT**

**Neutral citation:** *Van der Berg v Ashilungu* (I 574/2011) [2013] NAHCMD 151 (6 June 2013)

**Coram:** PARKER AJ

**Heard:** 27 – 28 May 2013

**Delivered:** 6 June 2013

**Flynote:** Negligence – Motorists – Statutory duty of driver driving on a road to show reasonable consideration for other persons using the road.

**Summary:** Negligence – Motorists – Duty of a driver under s 81 of the Road Traffic and Transport Act 22 of 1999 – A driver driving on a road has a duty to show reasonable consideration for other persons using the road – In the instant case, while the plaintiff took reasonable evasive measures to avoid the collision while driving in his rightful traffic lane the defendant had no such presence of mind and took no such evasive measures – Defendant breached his statutory duty under the Act 22 of 1999 – Court accordingly found that the negligence of the defendant was the sole cause of the collision and dismissed the defendant's counterclaim – Accordingly judgment granted for the plaintiff with costs.

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**ORDER**

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- (a) Judgment is for the plaintiff in the amount of N\$347 100,00 with costs.
- (b) The defendant's counterclaim is dismissed.

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**JUDGMENT**

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PARKER AJ:

[1] This action arises from a collision of two motor vehicles, namely, a motor vehicle (registration number N 26280 J), driven at all material times by the plaintiff, and a motor vehicle (registration number N 3465 S), driven at all material times by the defendant. The plaintiff avers in his particulars of claim that the collision was caused solely by the negligent driving of the defendant, and he claims payment of damages in the amount of N\$347 100,00, plus interest thereon at the rate of 20 per cent per annum calculated from the date of judgment.

[2] In his plea the defendant denies the plaintiff's averment and contends that the sole cause of the collision was the negligent driving of the plaintiff. He also denies that the plaintiff suffered damages in the amount of N\$347 100,00. In the alternative; the defendant pleads that should the court find that the defendant was negligent and the plaintiff suffered damages then the defendant pleads that the plaintiff was also negligent; and to that end the defendant makes a counterclaim in which he avers contributory negligence on the part of the plaintiff and claim damages in the amount of N\$120 000,00, plus interest thereon at the rate of 20 per cent per annum calculated from the date of judgment.

[3] The pre-trial order sets out the issues of fact that the court should resolve at the trial. The first is whether the defendant was negligent in his driving and it caused or contributed to the collision. The second is whether the plaintiff was negligent in his driving and if he was, whether it caused or contributed to the collision. And the issue of law that the court should resolve at the trial is whether the court should make a determination in terms of s 1 of the Apportionment of Damages Act 34 of 1956, as amended.

[4] It is recorded in the parties' joint case management report under 'Admissions' in para 2.4.1 thereof that the plaintiff's quantum of damages in the amount of N\$347 100,00 is admitted for trial purposes, and in para 2.4.2, the defendants' quantum of damages in the amount of N\$120 000,00 is also admitted for trial purposes. Mr Slabber, counsel for the plaintiff, accordingly drew my attention to the pre-trial order where it is recorded that the damages suffered by the parties individually are not in dispute. Thus, what remains to be resolved in this proceeding are the issues of fact and the issues of law set out in para 4 which concern the question of whose negligence caused the collision.

[5] At the commencement of the trial Mr Grobler, the erstwhile legal representative on record for the defendant, drew the courts attention to his Notice of Withdrawal as the defendant's legal practitioner of record. Attached to the notice is NAMPOST's receipt indicating that the notice of withdrawal had been sent by registered post to the defendant. The defendant did not appear in court in person or by counsel. As is the practice of the court, the name of the defendant was called three times by the court orderly through the corridors of the court building up to the main gate and it was reported by the orderly that there was no response.

[6] I took into account the fact that summons in the action was filed in March 2011, that is more than one year ago. Furthermore, I took into account the fact that the plaintiff's witnesses had come to attend the trial. I, therefore, found it would be unfair and unreasonable to delay the trial, particularly in circumstances where no explanation is placed before the court as to why the defendant did not appear in

court in person or by counsel, as aforesaid. For all these reasons, I exercised my discretion to proceed with the trial.

[7] From the evidence I make the following factual findings. While the plaintiff was driving the plaintiff's motor vehicle on the gravel road between Khorixas and Uis and as his motor vehicle was descending a declivity defendant drove the defendant's motor vehicle from the opposite direction into the plaintiff's rightful traffic lane. The plaintiff applied his brakes and swerved his motor vehicle to his left in an attempt to avoid the defendant's oncoming motor vehicle which was travelling in the wrong traffic lane, as the plaintiff's pregnant wife was a passenger in the plaintiff's motor vehicle. Thus, the plaintiff took those evasive measures in his attempt to avoid the collision. The defendant, on the other hand, made no attempt to control his motor vehicle and steer it back to his rightful lane of traffic so as to avoid the collision. Moreover, while the tyre marks of the vehicles on the road indicated that the marks made by the plaintiff's motor vehicle extended for some 60m away from the point of impact, the marks made by the motor vehicle driven by the defendant extended for about only five metres away from the point of impact. I accept that this differentiation indicates that while the plaintiff kept a proper lookout for oncoming traffic and was able to brake well in time and also swerve his motor vehicle to his left before the impact so as to avoid the collision, the defendant did not have any such presence of mind and he did not take any evasive measures to avoid the collision which – significantly – occurred in the plaintiff's rightful traffic lane.

[8] The evidence of the plaintiff is corroborated in material respects by Mr Murorua, the second plaintiff witness. He was, as Mr Slabber put it, an independent observer; and I find his evidence to be credible and weighty. When he came across the point of impact of the two motor vehicles a couple of moments after the collision had taken place he observed that while the plaintiff drove in his rightful traffic lane, the defendant did not. From his observation of the road surface he gathered from the tyre marks left on the road by the two vehicles that the point of impact was in the plaintiff's rightful traffic lane, thus, corroborating the plaintiff's evidence thereanent.

[9] Section 81 of the Road Traffic and Transport Act 22 of 1999 provides: 'No person shall drive a motor vehicle on a public road without reasonable consideration for any other person using the road.'

[10] From the evidence I conclude that the defendant did not show reasonable consideration to the plaintiff who was also driving on the same road as the defendant. The defendant did not keep a proper lookout for other users of the road and he did not take any evasive measures – as the plaintiff did – to avoid the collision, particularly when it was the defendant who, in the first place, drove in the wrong traffic lane towards the plaintiff who drove in his rightful traffic lane, thus causing the collision. Accordingly, I find that the defendant breached his statutory duty under the Road Traffic and Transport Act. I therefore dismiss his counterclaim. And I hold that the plaintiff has proved on a balance of probabilities that the defendant's negligent driving was the sole cause of the collision. For these reasons, I grant judgment for the plaintiff; whereupon, I make the following order:

- (a) Judgment is for the plaintiff in the amount of N\$347 100,00 with costs.
- (b) The defendant's counterclaim is dismissed.

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C Parker  
Acting Judge

APPEARANCES

PLAINTIFF :                   A Slabber  
                                  Of Dr Weder, Kauta & Hoveka Inc., Windhoek

DEFENDANT:                   No appearance