

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 429/2012

In the matter between:

MARCIA SMITH

PLAINTIFF

and

MEDIVA FISHERIES (PTY) LTD

FIRST DEFENDANT

JOHANNES SHOMONGULA

SECOND DEFENDANT

Neutral citation: *Smith v Mediva Fisheries (Pty) Ltd and Another* (I 429/2012) [2013]
NAHCMD 152 (06 JUNE 2013)

Coram: UEITELE J

Heard: 27 MAY 2013

Delivered: 06 JUNE 2013

Flynote: Negligence - What constitutes - Motor vehicle collision - Defendant colliding with plaintiff's stationary vehicle - General duties of - Should take account of codes and conventions governing movement of traffic on public roads - Failure to do so

often giving rise to unexpected and dangerous situations - Driving of motor vehicle in modern traffic conditions requiring substantial degree of skill and experience.

Summary: Plaintiff, driving her own vehicle, had been involved in a collision with a truck driven by the defendant. Plaintiff claimed damages in respect of the damage to her motor vehicle. The reason for the accident, the plaintiff says, was that the defendant overtook stationary vehicles and when he had to return to his lane of driving collided with the plaintiff's vehicle which was also stationary and waiting for the dark smoke of cloud hovering in front of her to recede. The defendant's version on the other hand is that the plaintiff overtook stationary vehicles and when she returned to her lane of driving the fire flames were approaching the surface of the road forcing the plaintiff to veer back to the right lane without ascertaining that it was safe for her to do so and in the process she collided with the truck he was driving.

Held that the two versions of the plaintiff and the defendant are mutually destructive. The approach then is that the plaintiff can only succeed if she satisfies the Court on a preponderance of probabilities that her version is true and accurate and therefore acceptable and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities.

Held further that the Court finds the plaintiff's version of the events more probable than the version of the defendant.

Held further that in view of the fact that the Court accepted the plaintiff's version of events the Court concluded that when the defendant overtook the stationary vehicles he either miscalculated the place where he had to return to his lane of driving or his vision was impaired by the dark cloud of smoke hovering over the road and that he did not notice the plaintiff's vehicle. The Court therefore found that the defendant failed to keep a proper lookout on the road ahead of him and that he failed to avoid the collision when it was reasonably expected of him to avoid the collision and that the defendant was negligent and that such negligence was the sole cause of the collision.

ORDER

- (a) The defendant is solely liable for the collision between the plaintiff's motor vehicle and truck driven by the defendant.
- (b) The plaintiff is awarded N\$86 737.12 in damages, plus interest at the rate of 20% per annum reckoned from date of judgment to date of payment.
- (c) The defendant must pay the plaintiff's costs.
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JUDGMENT

UEITELE, J:

[1] In this action plaintiff claims damages in the sum of N\$86 737-12. The plaintiff's claim is in respect of damages occasioned to her motor vehicle in a road collision that occurred on 16 October 2011 on the public road between Otavi and Otjiwarongo.

[2] The plaintiff was driving her motor vehicle, a black Volkswagen Polo Classic, with registration number N 108-614 W, while the defendant, Johannes Shomongula, drove the other vehicle, a truck, with registration number N 232865 SH. The quantum of damages for each party was agreed at a pre-trial conference held on 23 May 2013, this being as alleged in plaintiff's particulars of claim.

[3] The plaintiff alleges, in her particulars of claim that defendant was the sole cause of the collision in that he was negligent in one or more of the following respects:

“4.1 he failed to keep a proper lookout;

4.2 he failed to apply brakes timeously or at all;

- 4.3 he failed and/or neglected to avoid the collision when it was reasonably expected of him to do so, when he could and should have done so under the circumstances”.

[4] In his plea the defendant denies being the sole cause of the accident, he *inter alia* pleaded as follows:

“8.2 The defendant pleads that he did not fail to keep a proper look out, it is in fact the plaintiff who failed to keep a proper look out in that she did not keep a look out for other road users;...

9.2 The defendant furthermore pleads that he did not fail to apply his brakes timeously or at all it is in fact the plaintiff who failed to apply her breaks timeously or at all under the prevailing circumstances;

9.3 The defendant further pleads that the plaintiff was busy overtaking without keeping a proper lookout and neglected to keep proper control of the vehicle, whilst she should not have done so under the prevailing circumstances;...

10.2 The defendant furthermore pleads that he did not fail and or neglect to avoid the collision when it was reasonably expected of him to do so, when he could and should have done so under the circumstances; and

10.3 The defendant further pleads that he did all he could to avoid the collision, however the plaintiff overtook at such an inopportune time that all his efforts where in vain”.

THE EVIDENCE

The plaintiff's version

[5] I will now summarise the plaintiff and defendant's respective versions of how the accident happened. According to the plaintiff, it was just after 12H30 on 16 October 2011 when she was driving her motor vehicle on the road between Otavi and Otjiwarongo (she was travelling from the northerly to the southerly direction). As she left

Otavi she could see that there was a veld fire on both sides of the road. There was a dark cloud of smoke (caused by the ragging fire) on the road. As the smoke cloud became darker she stopped in front of the cloud of smoke and switched on the hazard lights of her vehicle. She testified that she did that in view of the potential danger that the poor visibility could pose. Her plan was to wait for the cloud to recede before she could proceed.

[6] She further testified that in her rearview mirror she saw two vehicles which also came to a complete stand still behind her. She, in her rearview mirror also saw a truck coming from behind and overtaking the two stationary vehicles (she testified that the truck was driving in the lane of oncoming vehicles as it was overtaking the two stationary vehicles). She testified that as she saw the truck approaching she was under the impression that the truck would pass her vehicle and proceed to drive, despite the thick dark cloud of smoke. However, the next moment the truck slammed into the right hand side of her vehicle. The greatest impact was from the truck's left side into her right front door. The windscreen of her motor vehicle was smashed with the impact. The impact caused her motor vehicle to be swept along for a couple of meters after which the vehicle came to a standstill closer to the edge of the middle white line that separates the two lanes.

[7] The truck veered to the right side and drove on for a further, approximately 50 meters from where it hit her, and came to a standstill. She then ran to the truck and took pictures of the truck. In cross examination Mr Conradie who appeared for the defendant suggested to her that she overtook the two stationary vehicles, attempted to return to her lane of driving, but at that moment the fire's flames were on the road surface and she attempted to avoid the flames and moved from her lane of travelling into the lane of oncoming vehicles (it is vehicles travelling from south to north) without her having observed the truck behind her and thus collided with the truck being driven by the defendant. She denied the suggestion and maintained that she never attempted to overtake at the relevant time, she stood by her evidence that there was no vehicle in front of her and that she had brought her vehicle to a complete standstill.

The defendant's version

[8] The defendant testified that he was coming from the North, travelling to Windhoek. From Otavi he was following the plaintiff's vehicle and in front of the plaintiff's vehicle there was another truck. His truck's speed was limited to 80km/h but he was driving at approximately 60km/h behind the plaintiff's vehicle. He testified that he maintained that speed. He did not decrease or increase that speed at all. Approximately ten or twenty kilometers outside of Otavi there was a fierce veld fire raging. He found two vehicles stationary on the road.

[9] He testified that the truck that was in front of the plaintiff's vehicle overtook the stationary vehicles and disappeared. The plaintiff then also followed suit and overtook the stationary vehicles, as she returned to her lane of driving the fire that was raging from the eastern side of the road was now reaching the surface of the road, the plaintiff then veered back to the lane of the oncoming vehicles and at that time the defendant had caught up with the plaintiff's vehicle and wanted to overtake the plaintiff's vehicle. It was at that moment that the plaintiff collided into the defendant's truck.

[10] Under cross examination the defendant testified that the plaintiff must also have been driving at about 60 km per hour and that he was approximately 40 meters behind the plaintiff's car, and he estimated that the plaintiff was also driving at approximately 60 km/h. It is appropriate for me to pause here and observe that I find the defendant's estimates of distances reliable and I do consider his estimate of the distance between his vehicle and the plaintiff's vehicle, as being 40 meters, to be an accurate assessment of the actual distance between the two vehicles. When it was put to him that it was practically impossible for his vehicle and plaintiff's vehicle to meet if both he and the plaintiff were travelling at 60km/h and there being a 40 meters distance between two vehicles he replied that he thinks the plaintiff must have slowed down. He further testified in cross examination that he literally moved to the shoulder of the road on the side of the oncoming vehicles, when he was confronted about the fire he said the fire on the right side of the road was extinguished by that time.

[11] The defendant made a statement after the accident to a Namibian Police Officer who was detailed to take particulars of the accident. At the trial the defendant confirmed having made the statement and that the statement was in material respects what he said to the officer. The statement was received as “exhibit B” and it amongst others reads as follows:

“...he [the defendant] was travelling from Oshakati to Windhoek. He was driving at a speed of 40km/h. On his way on the road there was a vehicle (Polo) in front of him, he was driving behind, there was a fire burning next to the road. He started to overtake the vehicle in front, while I was overtaking the vehicle in front. The vehicle in front started to overtake to the road lane to the right side of the road. He drove off the road one side but there was fire to the right side of the road. He tried to avoid the collision he collided against the vehicle...”

DISCUSSION

[12] I must decide whether on the probabilities the accident more likely happened in the way asserted by plaintiff or in the way described by the defendant. The Supreme Court of Namibia has said that, even where there is no counterclaim but each party alleges negligence on the part of the other, each party must prove what it alleges¹.

[13] In this matter the evidence demonstrates, that the two versions of the protagonists are mutually destructive. The approach then is that set out in *National Employers' General Insurance Co Ltd v Jagers*² as follows:

(The plaintiff) can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility

¹Motor Vehicle Accident Fund of Namibia v Lukatezi Kulubone Case No SA 13/2008 (unreported) at 16 - 17 para 24).

²1984 (4) SA 437 (E) at H 440E – G: Also see Harold Schmidt t/a Prestige Home Innovations v Heita 2006 (2) NR at 556.

of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

[14] The reason for the accident, the plaintiff says, was that the truck driver (who is the defendant) proceeded to overtake vehicles which were stationary and when he had to return to his lane of driving collided with the plaintiff's vehicle which was also stationary and waiting for the dark smoke cloud hovering in front of her to recede.

[15] The defendant's version on the other hand is that the plaintiff overtook stationary vehicles and when she returned to her lane of driving the fire was approaching the surface of the road forcing the plaintiff to veer back to the right lane without ascertaining that it was safe for her to do so and in the process she collided with the truck he was driving.

[16] In the matter of *Motor Vehicle Accidents Fund v Lukatezi Kulubone*³ Mtabanengwe, JA outlined the approach he adopts in determining which of two conflicting versions to believe as the approach advocated by Mr. Justice MacKenna⁴ when he said:

"I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of

³ *Supra* footnote 1.

⁴ Mtabanengwe JA says (at para 51) in a paper read at the University College, Dublin on 21 February 1973 and printed in the Irish Jurist Vol IX new series P.1) which was concurred with in its entirety by Lord Devlin at 63 in his Book entitled "The Judge" 1979.

his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help.

This is how I go about the business of finding facts. I start from the undisputed facts which both sides accept. I add to them such other facts as seem very likely to be true, as for example, those recorded in contemporary documents or spoken to by independent witnesses like the policeman giving evidence in a running down case about the marks on the road. I judge a witness to be unreliable, if his evidence is, in any serious respect, inconsistent with those undisputed or indisputable facts, or of course if he contradicts himself on important points. I rely as little as possible on such deceptive matters as his demeanour. When I have done my best to separate the truth from the false by these more or less objective tests I say which story seems to me the more probable, the plaintiff's or the defendant's".

[17] Applying the legal principles I outlined above, I find the plaintiff's version of the events more probable than the version of the defendant. I say so for the following reasons: Both the plaintiff and the defendant made statements to the Namibian Police Officer. I have quoted details of the defendant's statement above. The plaintiff's statement to a Namibian Police Officer who was detailed to take particulars of the accident *inter alia* reads as follows:

"...She was travelling from Tsumeb to Windhoek, she was driving on a speed of 80 Km/h. She observed a field fire on both sides of the road very thick clouds of smoke were moving in air and visibility to proceed was difficult. She witted hazard on and brought my car to a stop. There were two cars behind who also stopped a green and white truck with registration number N 232865 SH overtook on the ride side of the road when he reached my car he perhaps thought it was safe to return to the left side of the road and slammed into my car dragging my car a few meters on the road before he brought the truck to a stop..."

[18] I regard the statement taken down by the by the Namibian Police Officer as a contemporary document. The plaintiff's evidence under oath at the trial and the statement in the contemporary document were substantially the same, there were no

contradictions. The plaintiff was not discredited in any manner during cross-examination and answered questions with ease and in a manner consistent with what one would expect of an honest witness.

[19] On the other hand the defendant's evidence under oath at the trial differs in material respects from the statement contained in the contemporary document and also from the pleadings. These contradictory versions were put to the defendant in cross examination and he could not explain the discrepancies and contradictions. I furthermore find that, on the defendant's version that he was driving at approximately 60 km/h and the plaintiff was also driving at the same speed and that she was approximately 40 meters ahead of him, it was highly improbable that the defendant 's truck could have caught up with the plaintiff's vehicle to overtake it.

[20] The test for determining negligence has been clearly set out in a number of cases, Muller, AJ (as he then was) in the matter of *Beukes v Mutual & Federal Insurance Co Ltd*⁵ adopted the test enunciated by Holmes, JA⁶ as follows:

“Generally, culpa, or negligence, arises if a *diligens paterfamilias* in the position of the party concerned would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss, and would take reasonable steps to guard against such occurrence, and the party concerned in fact fails to take such steps. (See *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430) Applied in traffic cases to the driving of a motor vehicle, the concept of negligence takes account of the codes and conventions which normally govern the movement of vehicular traffic on public roads. Users of the road, whether they be vehicle drivers or pedestrians, normally regulate their conduct on the supposition that these codes and conventions will be generally observed by other users. Consequently, a departure from these codes and conventions will often give rise to a situation which is unexpected and dangerous and, in certain circumstances, will amount to negligence. The concept of negligence on the road also takes account of the fact that the driving of a motor vehicle under modern traffic conditions demands a substantial degree of skill and experience and that in

⁵ 1990 NR 105 (HC).

⁶ *Griffiths v Netherlands Insurance Co of SA Ltd* 1976 (4) SA 691 (A) at 695G-H.

certain circumstances *imperitia culpa adnumeratur*. (Beswick v Crews 1965 (2) SA 690 (A) at 705)'.

[21] Having accepted the plaintiff's version of the events, I must conclude that, had the defendant kept a proper look-out, he would have noticed the plaintiff's stationary vehicle which had its hazard lights on. Bearing in mind that the fire and smoke hovering over the road had created dangerous circumstances, one would have expected the defendant to drive his truck in such a manner that he could avoid any danger created by the circumstances. In view of the fact that I accepted the plaintiff's version of events I conclude that when the defendant overtook the stationary vehicles he either miscalculated the place where he had to return to his lane of driving or his vision was impaired by the dark cloud of smoke hovering over the road and that he did not notice the plaintiff's vehicle.

[22] Accepting, as I must, that the plaintiff's vehicle was stationary and that the defendant's truck collided with the plaintiff's stationary vehicle as he was attempting to return to his lane of driving, I must reject the suggestion that the plaintiff's vehicle either overtook at an inopportune moment and bumped against the truck as pleaded by the defendant or that the plaintiff was attempting to avoid the ragging fire flames and moved into the path of the truck as testified by the defendant. I therefore find that the defendant failed to keep a proper lookout on the road ahead of him and that he failed to avoid the collision when it was reasonably expected of him to avoid the collision. In my view the defendant was negligent and that such negligence was the sole cause of the collision.

[21] In the result I make the following order:

- (a) The defendant is solely liable for the collision between the plaintiff's motor vehicle and truck driven by the defendant.

- (b) The plaintiff is awarded N\$86 737.12 in damages, plus interest at the rate of 20% per annum reckoned from date of judgment to date of payment.
- (c) The defendant must pay the plaintiff's costs.

SFI Ueitele

Judge

APPEARANCES

PLAINTIFF:

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DEFENDANT:

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