

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1019 /2012

In the matter between:

J D W GERBER

PLAINTIFF

and

**MINISTER OF DEFENCE
S W NEKUNDI**

**FIRST DEFENDANT
SECOND DEFENDANT**

Neutral citation: *Gerber v Minister of Defence and Another* (I 1019/2012) [2013] NAHCMD 250 (23 AUGUST 2013)

Coram: UEITELE, J
Heard: 28 January 2013
Delivered: 23 August 2013

Flynote:

Negligence - What constitutes - Requirement that motorist must keep proper look-out - Such requirement being that motorist must scan road in all directions in order to anticipate and thus avoid imminent danger.

Summary:

The plaintiff claims damages occasioned to his motor vehicle in a road collision that occurred on 27 October 2011 in Post Street, Tsumeb. The plaintiff only called one witness whose evidence was to the effect that the day in question she was travelling from the westerly direction to the easterly direction at a speed of approximately 40 km per hour. She testified that her attention was fully focused on the road especially for the pedestrians crossing the road and for those vehicles that were parked on both sides of the road, and that as she was travelling she just 'suddenly heard a bump on her vehicle.'

The second defendant, who was the driver of the vehicle which was involved in the collision with the plaintiff's vehicle, testified on behalf of the first defendant, his testimony was that on the day in question (ie the 27th day of October 2011) he reversed his vehicle out of a parallel parking into Post Street. He testified that he checked to his right, there was no vehicle on the road, to his left over the vehicles parked next to his vehicle and there was no vehicle on the road and also in his rear view mirror and there was no vehicle on the road, it is only after that that he moved his vehicle out of the parking bay. As he moved out of the parking bay the vehicle he was driving and the vehicle driven by Ms. Gerber collided in the middle of the road.

Held that there is no general rule that a person is entitled to act on an assumption that every driver of a motor-car will always act reasonably and diligently. A reasonable man will base his conduct on the knowledge that drivers of motor-cars are not infrequently guilty of certain classes of negligence or breaches of by-laws.

Held further that a proper look-out entails a continuous scanning of the road ahead, from side to side, for obstructions or potential obstructions sometimes called "a general look-out." It was found that the driver of the plaintiff's vehicle did not observe the vehicle

being driven by second defendant pulling out of the parking bay, she did not observe that vehicle's reversed lights she only 'suddenly heard a bump on her vehicle.'

Held further that Ms. Gerber (the driver of the plaintiff's vehicle) was negligent, she was not entitled to drive as if she was wearing blinkers but should have had regard, not only to the street itself, but also to its immediate environs. She advanced no reasons why she became aware of the second defendant's vehicle for the first time when it had already collided with her vehicle or why she could not have become aware of it earlier.

ORDER

Absolution from the instance is granted with costs.

JUDGMENT

UEITELE, J:

[1] In this action plaintiff claims damages in the sum of N\$33 002-74 plus interest on that amount. The plaintiff's claim is in respect of damages occasioned to his motor vehicle in a road collision that occurred on 27 October 2011 in Post Street, Tsumeb.

[2] The plaintiff's motor vehicle, a 1.6 Ford Focus Ambiente, Registration Number N 132 T, was at the time of the collision driven by a Miss G.E Gerber (the plaintiff's wife), while the second defendant, who is employed by the Ministry of Defence and was acting within the course and scope of his employment with first defendant, drove a Toyota Landcruiser motor vehicle, Registration Number NDF 3457. The Toyota Landcruiser

motor vehicle belongs to the first defendant. The quantum of damages for the plaintiff's motor vehicle was agreed between the parties this being and amount of N\$27,274-22.

[3] The plaintiff's particulars of claim allege that second defendant was the sole cause of the collision in that he was negligent in one or more of the following respects:

- '7.1 he failed to keep a proper lookout;
- 7.2 he failed to take cognizance of plaintiff's motor vehicle before exiting a parking bay;
- 7.3 he failed to apply brakes timeously or at all;
- 7.4 he failed to avoid the collision where a reasonable and prudent driver would have been able to do so.'

[4] The first defendant denied the allegations and pleaded as follows to the plaintiff's particulars of claim;

'These [ie the allegations quoted above in paragraph 3] are denied. In amplification of such denial, defendants aver that it was the driver of plaintiff's vehicle who was negligent and consequently the sole cause of the collision in that:

- 5.1 She failed to keep a proper look out.
- 5.2 She drove at an excessive speed under the circumstances, the area having been overcrowded and there being a lot of activities due to the copper festival;
- 5.3 She failed to avoid a collision where a reasonable and prudent driver would have been able to do so. More particularly defendants aver that:

- 5.3.1 second defendant was reversing out of a parking bay and was already in the road and ready to proceed forward.
- 5.3.2 the driver of plaintiff's vehicle came from behind second defendant driving at an excessive speed and had to attempt overtaking second defendant to avoid a collision as she travelled so fast she could not have stopped to avoid a collision.
- 5.3.3 the driver of plaintiff's vehicle changed lanes (while overtaking) so close to first defendant's vehicle that the back bumper of the plaintiff's vehicle hooked on the defendant's vehicle's tow hinge.'

[5] Defendants pleaded in the alternative that, should the court find that the plaintiff's driver was not the sole cause of the collision then defendants plead that plaintiff's driver significantly contributed to the collision and as such damages should be apportioned to the driver of plaintiff's vehicle. Defendants however still aver that second defendant was not the cause of the collision.

[6] The parties in terms of Rule 37(12) (as amended) filed a draft pre-trial order which I made an order of court on 28 November 2012. In terms of the pre-trial order I was only required to determine:

- '1.2 Whether the sole cause of the collision was the negligent driving of the Second Defendant or plaintiff's driver?
- 1.3 To what extent was their (*sic*) contributory negligence from either Plaintiff's driver or Second Defendant?'

[7] I will now review the evidence in the case. The plaintiff only called one witness namely the driver of the vehicle Ms. Gerber. Her evidence is to the effect that the day in question (ie the 27th day of October 2011) was a day on which the Copper Festival was

being held in Tsumeb and on that particular day the festival was being held at the United Nations Park in Tsumeb. She was travelling in Post Street, Tsumeb. Post Street runs (east to west) between the United Nations Park which is situated to the south of the Street and Minen Hotel which is situated to the north of the Street. She was travelling from the westerly direction to the easterly direction at a speed of approximately 40 km per hour (but in cross examination and re-examination she testified that she actually came from the southerly direction and at the intersection turned into Post Street proceeding into the easterly direction). She testified that her attention was fully focused on the road especially for the pedestrians crossing the road and for those vehicles that were parked on both sides of the road, and that as she was travelling she just 'suddenly heard a bump on her vehicle.' After that testimony Ms Gerber was asked some questions by her counsel and she answered the questions. I will below briefly summarise the said questions and answers.

- Question** And this vehicle with which you collided from where did it come?
Answer: It was standing in the parking area...Right in front of the Minen Hotel.
Question Did you notice that vehicle coming, reversing or coming out of that parking bay? Tell us what happened we were not there. ---
Answer Not at all.
Question So where did it come from?
Answer This vehicle was on the parking right in front of the Minen Hotel. It must have been pushed out from there.'

[8] Part of the cross-examination of Ms. Gerber went as follows:

- Question** So according to you did he bump into you directly when he was reversing?
Answer Yes I mean it is where I heard this bump.
Question Can we try and clarify that. Did you see him bumping you or you just heard the sound?

Answer As I said I was already half past him then I saw on my corner of my eye that he is reversing back and that is where I heard this bump...

Question If you testify the 2nd defendant reversed into you how would you explain how the damage occurred as shown by Exhibit...B2?

Answer When he came, when he scratch me, when he came against me I stopped but I do not know whether his vehicle was still moving.

Question The reason I ask you this question is because it is my instruction that it is your vehicle attempting to overtake my client's vehicle.

Answer I was already past him when I saw that he was in motion. It can be that he did not immediately stop he was still moving, in motion.'

[9] The court also had questions for clarification. The exchange with the court was as follows:

'Court: I just have one or two questions for clarity. Did I hear you correctly that you testified that you saw the vehicle coming driven by Mr Nekundi [the second defendant] only after it had bumped you?

Answer That is correct.

Question Did you see his reverse lights on?

Answer I cannot think that I saw his reverse lights were on.'

[10] The second defendant (who was the driver of the Toyota Land Cruiser which was involved in the collision with the plaintiff's vehicle) testified on behalf of the first defendant, his testimony was that on the day in question (ie the 27th day of October 2011) he had taken a patient to the hospital in Tsumeb and also had to pick up something at Pick and Pay. When he got to Pick and Pay the parking there was full and the only parking he got was the parking in front of the Minen Hotel and it is there where he parked the vehicle. He proceeded and testified that as soon as he had finished with his business, he jumped into the vehicle. He checked all his blind spots and indicated and then he moved out of the parking bay. As he moved out of the parking bay the

vehicle he was driving and the vehicle driven by Ms. Gerber collided in the middle of the road.

[11] He further testified that after he realized that he had collided with Ms. Gerber's vehicle, he drove back into the parking bay, got out of the vehicle and walked to where Ms. Gerber had brought her vehicle to a standstill. He estimated the distance that he walked to her vehicle to be approximately 80 meters. On a question from his counsel as to which part of his vehicle collided with Ms. Gerber's vehicle he testified that it was the tow hinge of the vehicle that he was driving and the left side of the rear bumper of Ms. Gerber's vehicle that made contact. He said the vehicle he was driving was not damaged at all.

[12] Part of the cross-examination of Mr Nekundi went as follows:

Question So in your estimation how far would you say was the rear end of your vehicle from the tarred road...?

Answer Half a meter.

Question On your left hand side and on your right hand side there were other vehicles. If you look to your right hand side just both sides but let us just start with the right hand side if you look to your right hand side what could you see in respect of the tarred road? Could you see there?

Answer There was somebody who was indicating for me behind.

Question I am asking did you look to your right hand side towards the tarred road?

Answer Yes.

Question And what did you see?

Answer There was no car.

Question And did you look to your left hand side?

Answer Yes.

Question And what did you see?

Answer There was no car also.

- Question** And did you look through the vehicles next to you?
- Answer** Yes.
- Question** By doing what? How did you manage that? Explain to us how did you check the blind spot on your left hand side?
- Answer** Like if you are on the chair a Cruiser is a bit high...And then some of those cars they are like some of them they are short or let me say then you have to look over them or something....
- Question** And did you see the vehicle of Ms. Gerber before the collision?
- Answer** No.
- Question** So where would you suggest she came from?
- Answer** She came from this turn. That is where I suggest she came from.
- Question** Yes but she was in Post Street at the time of the collision was she not?
- Answer** But meters from this street to where I was parking and that is why I told you that it is only may be six to seven parkings or something.
- Question** ...if you looked in your rear view mirror what would you see?
- Answer** If there was a car then you have to see.
- Question** I am asking you what view would you have from your rear view mirror ...?
- Answer** There is a park or the road.
- Question** But I put it to you only the area directly behind you and on the other side of the road that you would have been able to see, is that not so?
- Answer** Yes.
- Question** And if you looked in your right hand and your left hand rear view mirrors, the side mirrors basically the same?
- Answer** Yes ...That is why I used my blind spots.
- Question** Which are those?
- Answer** Blind spots to look over to the cars like to check.
- Question** And you say you did look but you did not see any vehicle?
- Answer** Yes I did not see any car.'

[13] Having summarized the evidence, I now turn to deal with counsel submissions. Mr Erasmus who appeared for the plaintiff submitted that the probabilities favour the

plaintiff especially with regard to the pleadings. I will briefly repeat the pleadings. The plaintiff alleged in paragraphs 7.1 and 7.2 that Mr Nekundi failed to keep a proper lookout; and that he failed to take cognizance of plaintiff's motor vehicle before exiting a parking bay. Mr Erasmus then submits that on Mr Nekundi own evidence he testified that he jumped into the vehicle looked right, looked left and looked in his rear mirror and saw a guard or somebody to that effect showing him to come and then he went out. Mr Erasmus then submitted that:

'Factually my Lord what happens thereafter my Lord what happens after that his rear end of his vehicle on his own version ends up in the lane of the oncoming traffic and there is a collision. Why was there a collision my Lord because he did not keep a look out. He says I did not see it. He did not even see it until he hit it...If you go to 7.2 my Lord on page 4 he failed to take cognizance of the plaintiff's motor vehicle before exiting the parking bay. My Lord can do nothing else with respect but except (*sic*) that the second defendant was reversing while the plaintiff's vehicle was oncoming. What the second defendant did is what is exactly stated in 7.2 he failed to take cognizance of that vehicle. He cannot now rely that he had a car guard pointing him to come. The obligation remains on him the guy behind the steering you have to look. He did not even see that vehicle until it hit him according to him. He failed to have cognizance of that vehicle my Lord.'

[14] Mr Erasmus furthermore argued that the obligation to have a proper look out is more on the party who is executing a reverse manoeuvre and that Ms. Gerber had the right of way and other drivers should not interfere with that right of way. I must say with respect that I cannot agree that every driver has such a right, a right to assume that all other drivers would observe their duties. Such an assumption is contrary to the law as enunciated by Greenberg, J (as he then was), in *van der Merwe v Union Government*¹, The head-note reads as follows:

¹ 1936 T.P.D. 185.

'There is no general rule that a person is entitled to act on an assumption that every driver of a motor-car will always act reasonably and diligently. A reasonable man will base his conduct on the knowledge that drivers of motor-cars are not infrequently guilty of certain classes of negligence or breaches of by-laws. Thus, a motorist approaching an intersection of streets should allow for the possibility of another motor-car approaching such intersection on the other street at a speed which is dangerous or may give rise to danger of a collision.'

And on page 188 the learned Judge says:

'If it is a matter of common experience that drivers of motor-cars not infrequently are guilty of negligence or of breaches of by-laws, then a reasonable man will base his conduct on this knowledge and will not behave as if he were in a Utopia where infringements of the law are unknown. He will not stake life and limb merely on an implicit faith that such infringements do not occur but will realize that they are not infrequent and will regulate his conduct on that knowledge. This does not mean, e.g. that in driving along a street on his correct side he is not entitled to assume (in the absence of an indication to the contrary) that traffic coming in the opposite direction will not swerve suddenly and without reason into his course; common experience does not show that conduct of this kind is to be apprehended but where a certain class of unlawful conduct is not infrequent, the reasonable man will bear this fact in mind and will allow for it.'

[15] The submission of Mr Erasmus (quoted above in paragraph 13) appears attractive but it overlooks certain aspects. The aspects that it is overlooking are set out in the following cases:

(a) In the matter of *Robinson Bros v Henderson*² where Solomon, CJ said:

'Now assuming that, as the defendant himself admitted, the plaintiff in the circumstances had the right of way, the whole question would appear to be whether he acted

² 1928 AD 138 at 141-2.

reasonably in entirely ignoring the approaching car on the assumption that the driver would respect his right of way and would avoid coming into collision with him. In my opinion that was not the conduct of a reasonable man. It is the duty of every driver of a motor car when approaching a crossing, no matter whether he believes he has the right of way or not, to have regard to the traffic coming from a side street. There is necessarily a certain amount of danger in approaching a crossing, and it is the duty of every driver to exercise reasonable care to avoid coming into collision with another car entering the crossing from a side street. Having seen such a car, he is not justified in taking no further notice of it, on the assumption that the driver is a careful man and may be relied upon to respect his right of way. If every driver of a motor car were a reasonable man there would be few accidents; it is against the careless and reckless driver that one has to be on one's guard. The duty of the plaintiff in this case was to keep the car coming down Alice Street under observation, and not to have entirely lost sight of it merely because he had the right of way.' {My emphasis.}

(b) In the matter of *Nogude v Union and South-West Africa Insurance Co Ltd*³, Jansen, JA said:

'A proper look-out entails a continuous scanning of the road ahead, from side to side, for obstructions or potential obstructions (sometimes called "a general look-out": *cf Rondalia Assurance Corporation of SA Ltd v Page and Others* 1975 (1) SA 708 (A) at 718H-719B). It means -" more than looking straight ahead - it includes an awareness of what is happening in one's immediate vicinity. He (the driver) should have a view of the whole road from side to side and in the case of a road passing through a built-up area, of the pavements on the side of the road as well." (*Neuhaus, NO v Bastion Insurance Co Ltd* 1968 (1) SA 398 (A) at 405H-406A.). Driving with "virtually blinkers on" (*Rondalia Assurance Corporation of SA Ltd v Gonya* 1973 (2) SA 550 (A) at 554B) would be inconsistent with the standard of the reasonable driver in the circumstances of this case.'

³ 1975 (3) SA 685 (A) at 688A-C.

(c) In the matter of *Marine & Trade Insurance Co Ltd v Biyasi*⁴ Trengove, JA (in a judgment concurred in by Rumpff, CJ and Miller, JA) said:

'The legal position in this regard is clear. Although Goliath was proceeding along a through road, he did not, merely on that account, enjoy an absolute right of precedence, and he was not relieved of the duty of keeping what has often been referred to as a general look-out. This Court has, on a number of occasions, said that such a general look-out means more than looking straight ahead - it includes an awareness of what is happening in one's immediate vicinity, viewing the whole road from side to side. A driver on a through road is, of course, not under a duty to keep a cross road under the same careful observation as would be required of him if there was no stop sign.'

(d) Macintosh and Scoble⁵ opine that:

'a driver may regulate his conduct on the general assumption of correct behaviour by others; but that, recognizing the possibility of incorrect behaviour, he will so far as is reasonably possible allow a margin of safety for, and pay regard to, that possibility particularly when approaching danger spots such as intersections.'

[16] In present case the plaintiff's evidence is that the 27th day of October 2011 was a busy day, pedestrians and vehicles alike were moving around, Ms. Gerber joined the Post Street from a side street and was travelling at a speed of 40 km per hour. Her attention was fully focused on the road especially for the pedestrians crossing the road and for those vehicles that were parked on both sides of the road. She did not observe the vehicle being driven by second defendant pulling out of the parking bay, she did not observe that vehicle's reversed lights she only 'suddenly heard a bump on her vehicle'. On the other hand the second defendant's evidence was that at the time when he got into his vehicle he looked to his right, to his left (he looked over the vehicles that were

⁴ 1981 (1) SA 918 (A) at 923H.

⁵ Neethling, Potgieter and Visser Law of Delict (2001) 4th ed at 24.

parked next to his vehicle) and at that moment there were no vehicles travelling in Post Street.

[16] I start with the conduct of Ms. Gerber. I am of the view that, Ms. Gerber was negligent in two respects; first it is her testimony that she did not see the vehicle driven by the second defendant until she collided with that vehicle. She was not entitled to drive as if she was wearing blinkers but should have had regard, not only to the street itself, but also to its immediate environs. She advanced no reasons why she became aware of the second defendant's vehicle for the first time when it had already collided with her vehicle or why she could not have become aware of it earlier. Secondly, she testified that there were vehicles parked on both side of the road and pedestrians moving in the street yet she proceeded to drive at a speed of 40 km per hour (which in my view is excessive in the circumstances). She ought to have seen the second defendant emerging from the parking bay at least if she had been keeping a proper look-out and if she was aware of what is happening in her immediate vicinity. In the English case of *Tart v Chitty and Company Ltd*⁶, Rowlatt, J said:

'It seems to me that when a man drives a motor-car along the road, he is bound to anticipate that there may be people or animals or things in the way at any moment, and he is bound to go not faster than will permit of his stopping or deflecting his course at any time to avoid anything he sees after he has seen it. If there is any difficulty in the way of seeing, as, for example, a fog, he must go slower in consequence. In a case like this, where a man is struck without the driver seeing him, the defendant is in this dilemma, either he was not keeping a sufficient look-out, or if he was keeping the best look-out possible then he was going too fast for the look-out that could be kept.'

[17] I say the speed of 40km per hour is excessive in the circumstance for the following reasons. There was evidence that Ms. Gerber joined Post Street from a side

⁶ 1933 (2) K.B. 453).

street and there was also evidence (contrary to what Mr Erasmus content in his submission that there was no evidence) that the distance from the intersection where Ms. Gerber joined Post Street to the parking bays in front of Minen Hotel was approximately 40 meters. W E Cooper⁷ argues that:

'Vehicle speed is commonly indicated to the driver, by the speedometer to the distance, in terms of kilometer per hour, as these units are appropriate to the distance and times which are involved in the usual car journey. Where events take place over much shorter distances and in much shorter times as in traffic collision it is more appropriate, and more convenient for calculation to express vehicle speed in units per second. The conversion is as follows: Speed in units per second = speed in kilometers per hour ÷ 3,6.'

From the above it is clear that to be able to determine the distance which a vehicle travelling at 40 km per hour would cover in a second one must divide the 40 km travel per hour by 3.6 and that gives us an answer of 11.1. It follows if a vehicle is travelling at 40 km per hour will cover a distance of 40 meters in just 3.6 seconds. Surely to cover 40 meters in 3,6 seconds in an area where there are movements of pedestrians and vehicles that may exit parking bays is grossly negligent. See the comments of Van den Heever, JA in the matter of *Manderson v Century Insurance Co Ltd.*⁸

'In our law a man is bound to guard against dangers which he could or should have foreseen. What is reasonably 'foreseeable' will depend upon surrounding circumstances. If, say, he drives across one of the huge even pans on the borders of South West Africa where human beings rarely make their appearance, he may perhaps reasonably assume that his vehicle is the only one within a radius of many miles and if, relying upon that

⁷W E Cooper Motor Law '*Principles of Liability for Patrimonial Loss*' vol 5 (1987) at 434.

⁸ 1951 (1) SA 533 (A) at 540.

reasonable assumption, he drives at a speed which does not allow him to pull up within the limits of his vision and collides with some obstruction the presence of which he could not reasonably have anticipated, he may very well be held to be free from blame. On the other hand when travelling along a frequented road he may meet with an obstruction which so blends with the surrounding scene that he misinterprets the significance of the light impulses conveyed to him through his eyes, and he may perhaps be excused if he fails to pull up before he collides with it. If, however, he travels along a frequented road upon which he should have foreseen the likelihood of there being animals, pedestrians or stationary vehicles and he takes the risk of travelling through a section of the road which he has not probed with his eyes, at a speed which does not permit of his drawing up before reaching any object which suddenly appears within the range of his vision and an accident results, I have difficulty in seeing how - as a matter of reasoning, not law - he can escape from the dilemma. Of course when other factors, which such a person cannot reasonably have foreseen, contribute towards the collision, other considerations will enter into the inquiry. Here there were no such factors and to my mind Verster was negligent in that he drove the car at a speed which did not permit of his pulling up before colliding with an object the possible presence of which he should have foreseen.'

[18] I now turn to the defendant's case the second defendant's evidence is that that at the time when he got into his vehicle he looked to his right and to his left and he did not see any vehicle and proceeded to move out of the parking bay, his evidence is not that he reversed his vehicle into the street at a time when there was a car approaching and either at such a short distance away or going so fast that he should have foreseen that his obstruction into its path might lead to a collision. I therefore find that the second defendant acted in a manner every reasonable driver would do in the circumstances.

[19] In the circumstances, therefore, I come to the conclusion that the plaintiff has failed to prove that the accident is to be attributed to the negligent driving of the first defendant's driver.

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

I grant absolution from the instance with costs.

SFI UEITELE
Judge

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APPEARANCES

PLAINTIFF:

F G Erasmus

Of Francois Erasmus & Partners

FIRST AND SECOND DEFENDANTS:

M Ndlovu

Of Government Attorneys