REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2354/2014

In the matter between:

WALTER MUNGUNDA **PLAINTIFF**

And

LIEBENBERG WILHELMUS **DEFENDANT**

Neutral citation: *Mungunda v Wilhelmus* (I 2354-2014) [2015] NAHCMD 149 (25 June 2015)

Coram: PARKER AJ
Heard: **20 April 2015; 5 May 2015**
Delivered: **25 June 2015**

Flynote: Evidence – Finding facts or making inferences in civil case – Probabilities – Court may go upon a mere preponderance of probability although its doing so does not exclude every reasonable doubt – In finding fact or making an inference in civil case court may balance the probabilities and select a conclusion which seems to be more natural or plausible.

Summary: Evidence – Finding facts or making inferences in civil case – Probabilities – Court may go upon a mere preponderance of probability although its doing so does not exclude every reasonable doubt – In finding fact or making an inference in civil case court may balance the probabilities and select a conclusion

which seems to be more natural or plausible – In instance case no direct evidence that traffic lights controlling an intersection were in working condition – On the totality of the evidence court balanced the probabilities and concluded that it was more probable than not that the traffic lights were in good working condition when collision of plaintiff's motor vehicle and the defendant's motor vehicle occurred at the intersection.

Flynote: Negligence – Of Motorists – Duty of drivers – One driver travelling on main road across intersection – Other driver travelling on minor road across intersection – Generally, a driver travelling on main road entitled to assume that the driver travelling on the main road will not enter intersection unless it is safe for him or her to do so – Nevertheless the driver travelling on the main road must travel at such speed that he or she is able to apply his or her brakes or reduce speed in good time or swerve his or her vehicle in good time in order to avoid a collision – Court held that failure of either driver to keep proper lookout and travel at such a speed into the intersection as to enable him or her to carry out appropriate manoeuvres in order to avoid a collision constitutes negligence in violation of s 81 of the Road Traffic and Transport Act 22 of 1999 – In such event, court held, both drivers are negligent and apportionment of contributory negligence depends upon which of the two drivers made an attempt and took appropriate action in order to avoid the collision.

Summary: Negligence – Of Motorists – Duty of drivers – One driver travelling on main road across intersection – Other driver travelling on minor road across the same intersection – Generally, a driver travelling on main road entitled to assume that the driver travelling on the main road will not enter intersection unless it is safe for him or her to do so – Nevertheless, the driver travelling on the main road must travel at such speed that he is able to apply his or her brakes or reduce speed in good time or swerve his or her vehicle in good time in order to avoid collision – Failure of either driver to keep proper lookout and travel at such speed into the intersection as to enable him or her to apply appropriate manoeuvres in order to avoid a collision constitutes negligence in violation of s 81 of the Road Traffic and Transport Act 22 of 1999 – In such event both drivers are negligent and

apportionment of contributory negligence depends upon which of the two drivers made an attempt and took appropriate action in order to avoid the collision – In instant case defendant swerved his vehicle in order to avoid the collision – Plaintiff engaged no manoeuvres to avoid the collision although he had just proceeded into the intersection after having stopped to wait for the traffic lights to turn green in his lane of traffic – Consequently, court concluded that plaintiff contributed to the collision to a degree of 60 per cent, and the defendant to a degree of 40 per cent.

ORDER

(a) Judgment for the plaintiff to the extent of 40 per cent of his claim.

(b) Judgment for the defendant to the extent of 60 per cent of his counter claim.

(c) Plaintiff is to pay 60 per cent of the defendant's costs in respect of the defendant's counter claim.

(d) The defendant is to pay 40 per cent of the plaintiff's costs in respect of the plaintiff's claim.

JUDGMENT

PARKER AJ:

[1] The following facts are not in dispute. On 2 April 2013 at the intersection of Bismarck Street and David Hosea Meroro Street, in Windhoek, around about 13h30, a collision took place between a motor vehicle driven by the plaintiff and another driven by the defendant. The plaintiff's motor vehicle was travelling from the south in

a northerly direction on David Hosea Meroro Street. The defendant's motor vehicle was travelling from the west in an easterly direction on Bismarck Street. The locus of the intersection of the two streets is controlled by traffic lights. Bismarck Street is the main street, that is, the advantageous street; and the other street is the minor street. The relevance of these important observations will become apparent in due course.

[2] The Namibia Road Accident Form (completed by a Police official), filed of record, indicates that the plaintiff's motor vehicle sustained 'multiple' damage, while the defendant's sustained damage to the 'right front', 'right mid-front', 'right mid-back', 'left front', 'front centre' and 'bonnet'. These descriptions on the Form turn on nothing, I should say. For instance, they do not indicate sufficiently clearly the precise points of contact on the plaintiff's vehicle and on the defendant's vehicle. Indeed, those entries generate more heat than light.

[3] The instant proceeding concerns the plaintiff's claim (in convention) and the defendant's claim (in reconvention). The plaintiff pleads that the cause of the collision was the negligent driving of the defendant. The plaintiff puts forth the following as the basis of his averment, namely that the defendant (a) failed to stop when a red traffic light was in his lane of traffic; (b) failed to take reasonable and necessary steps in order to avoid the collision 'while he was able to'; and (c) failed to exercise the degree of care normally expected from a reasonable driver under similar circumstances.

[4] The defendant, on his part, denies each averment of the plaintiff, and institutes a counter claim wherein he avers that the sole cause of the collision was the negligent driving of the plaintiff. The defendant sets out the following as the basis of his averment, that is to say, the plaintiff (a) failed to keep a proper look out, (b) ignored and/or disregarded the red traffic light; (c) failed to apply the brakes of the vehicle he was driving timeously or at all, (d) failed to exercise proper or adequate control over the vehicle he was driving; (e) failed to have adequate regard for defendant's moving vehicle; and (f) failed to avoid the collision when by exercise of

reasonable care he could and should have done so. The plaintiff denies these allegations.

[5] The plaintiff claims damages in the amount of N$71 511,38, and the defendant in the amount of N$70 000. At the commencement of the trial both counsel, Ms Ntelamo for the plaintiff, and Mr Visser for the defendant, informed the court that the court should deal with the issue of liability only. Thus, the burden of the court is to determine whose driving, between the plaintiff's and the defendant's, was negligent and caused the collision.

[6] Only the parties gave evidence in support of their individual versions. No evidence was adduced to show that at the moment of the collision the traffic lights that controlled traffic through the intersection were in good working condition. That was one of the points Mr Visser raised in his submission. This submission, with respect, turns on nothing. The evidence establishes that there were motor vehicles that had just driven through the intersection and there were others that were waiting to drive, including the plaintiff's vehicle, through the intersection. It is, therefore, more probable than not that the traffic lights were in good working condition at the time of the collision.

[7] In determining the question of negligent driving of motor vehicles on a public road, the interpretation and application of s 81 of the Road Traffic and Transport Act 22 of 1999 is the main key. (See *Marx v Hunze* 2007 (1) NR 228, para 5.) It provides:

'No person shall drive a vehicle on a public road *without reasonable consideration for any other person using the road*.'

[Emphasis added]

[8] It follows that the burden of the court is to determine who, between the plaintiff and defendant, drove his vehicle through the intersection 'without reasonable consideration for any other person using the road', that is, the intersection in the

instant case. In this regard and on the facts of the case, the following words of De Waal JP in *Victoria Falls and Transvaal Power Company Ltd v Thornton's Cartage Co Ltd* 1931 TPD 516 at 519 are apposite:

'When a person driving a car approaches a street which is a main thoroughfare, or in which he is aware that there is likely to be a considerable amount of traffic, he must approach the intersecting street with due care and be prepared to expect traffic. His first duty is to see that there is no traffic approaching from his right, and then to look for traffic approaching from his left.'

[9] But, of course, as I said in *Marx v Hunze*, para 6 -

'The driver on a main road is entitled to assume that a driver on a minor crossroad will not enter the intersection unless it is safe for him or her to do so. However, this assumption does not confer upon such driver the right to drive at such speed that, despite warning, he or she is unable to avoid colliding with a vehicle entering the intersection from a minor crossroad. Doubtless, coupled with the duty to travel at a reasonable speed, is the duty to keep a proper lookout. Once a driver on a main road becomes aware of a vehicle approaching an intersection along a minor crossroad it is his duty to keep such vehicle under observation, and failure to do so may be negligence. Of course, the duty to keep a vehicle "under observation" does not mean that the driver must keep his eyes upon the approaching vehicle continuously and ignore other traffic or other parts of the road than the minor crossroad in which the approaching vehicle is travelling.'

[10] The plaintiff's evidence is simply briefly this. As he drove northwards on the minor road, he stopped at the 'stop-lines' at the intersection because the traffic lights in his lane of traffic were red. When the lights turned green he proceeded to drive through the intersection. As his vehicle was about to exit the intersection, the defendant's vehicle hit into his vehicle at its 'front side'. He testified further that when he stopped his vehicle, three other vehicles were in a queue in front of his vehicle (which was the fourth) in the lane of traffic.

[11] The defendant's evidence is also simply briefly this. While driving his vehicle from the west at a speed of some 60 km per hour eastwards, the traffic lights in his

lane of traffic turned green as he approached the intersection, and the plaintiff's motor vehicle appeared 'almost in front' of his vehicle. He attempted to avoid a collision between his vehicle and the plaintiff's by swerving his vehicle to his left but his effort was fruitless, and it could not avoid the collision.

[12] In *National Employers' General Insurance v Jagers* 1984 (4) SA 437 (…) at 440E-F, Eksteen AJP states thus about the approach courts ought to follow in civil proceedings where there are two mutually destructive accounts:

'In a civil case … where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probability 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.'

[13] And what is more; in *DM v SM* 2014(4) NR 1074, para 26, I cited with approval the following principle enunciated by the Supreme Court in *M Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz Megabuild v Kurz* 2008 (2) NR 775 (SC) at 790B-E:

'Now it is trite law that, in general, in finding facts and making inferences in a civil case, the Court may go upon a mere preponderance of probability, even although its so doing does not exclude every reasonable doubt … for, in finding facts or making inferences in a civil case, it seems to me that one may … by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one.'

[14] On the evidence I make the factual findings that follow. I have also applied the principles enunciated in *Marx v Hunze*, *DM v SM* and *Jagers* to arrive at conclusions thereanent those factual findings. To start with; the defendant was entitled to assume that the plaintiff on a minor crossroad would not enter the intersection unless it was safe for him to do so. The plaintiff says he entered the intersection when it was safe for him to do so. I find that defendant made an abortive attempt to avoid the collision by swerving his vehicle to his left. The plaintiff, on the other hand, made no attempt

at all to avoid the collision. He did not undertake any manoeuvre by, for instance, braking or swerving his vehicle to his right into the north-south bound lane of traffic on which, as the evidence indicates, no vehicle was travelling, seeing that his vehicle was entering a main, advantageous street.

[15] The plaintiff had a duty to keep a proper look-out and expect traffic on Bismarck Street, being the main and advantageous street. As I say, the plaintiff did nothing to avoid the collision. If he had just driven his vehicle from a stop position at the southern part of the intersection, as he stated, the speed of his vehicle should have been so minimal that if he kept a proper lookout he could have engaged the brakes of his vehicle or reduced its speed to enable him to swerve his vehicle to his right, as I have said previously. I find that the plaintiff did not drive his vehicle with reasonable consideration for persons using the intersection in violation of s 81 of Act 22 of 1999. Nevertheless, I am not prepared to hold that the defendant did not contribute to the collision.

[16] If the defendant was driving at a speed below 60 km per hour, as he testified he was, he should have been able to engage the brakes of his vehicle or reduce its speed before swerving his vehicle to his left, as Ms Ntelamo appeared to submit. The defendant made no attempt to engage the brakes of his vehicle or reduce its speed. It should be remembered that it is the duty of every driver of a motor vehicle when approaching a crossing, no matter whether he or she has a right of way, as is in this proceeding, to have regard to the traffic coming from a minor street. (*Marx v Hunz*, para 14) In the instant case, if the defendant had the plaintiff's vehicle under observation, and had engaged the brakes or really reduced speed, he would have seen in ample time that he plaintiff had entered the intersection. The defendant had a duty to avoid the consequences of the plaintiff entering the intersection in a negligent manner, as I have found.

[17] I respectfully reject submission by Mr Visser, counsel for the defendant, that this court should follow the decision in *The Motor Vehicle Accident Fund of Namibia v Lukatezi Lennox Kulobone* and come to the conclusion, as the Supreme Court did,

that ‘the liability for the causation of the collision is apportioned equally between the plaintiff and the defendant’. *Kulobone* is distinguishable. In *Kulobone* the collision occurred not at an intersection controlled by traffic lights: it occurred some few metres from the locus of a T-Junction. Besides, that was an appeal, and the Supreme Court did not accept as correct the trial court’s factual findings on some aspects of the evidence which are not similar to the facts in the instant case.

[18] Based on the foregoing factual findings and conclusions thereanent, I consider that the defendant, too, contributed to the collision by his own measure of negligent driving, described previously, in violation of s 81 of Act 22 of 1999. Consequently, guided by the principle in *Marx v Hunze*, para 15, relying on *South British Insurance Co Ltd v Smit* 1962 (3) SA 826 (A) at 837G-H, I assess the degree of negligence attributable to plaintiff in respect of the plaintiff’s claim to 60 per cent and the degree of negligence attributable to the defendant in respect of the defendant’s claim in reconvention to 40 per cent.

[19] It follows that the plaintiff succeeds in his claim, but to the extent of 40 per cent; and the defendant succeeds in his counter claim, but to the extent of 60 per cent. Costs are also awarded in proportion to the degree of success chalked by the plaintiff in his claim, and by the defendant in his counter claim. Pursuant to the agreement between the parties mentioned previously, I have determined the issue of liability only.

[20] The result is, accordingly, the following:

(a) Judgment for the plaintiff to the extent of 40 per cent of his claim.

(b) Judgment for the defendant to the extent of 60 per cent of his counter claim.

(c) Plaintiff is to pay 60 per cent of the defendant’s costs in respect of the defendant’s counter claim.

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(d) The defendant is to pay 40 per cent of the plaintiff's costs in respect of the plaintiff's claim.

C Parker

Acting Judge

APPEARANCES

PLAINTIFF : H N Ntelamo
Of Muluti & Partners, Windhoek

DEFENDANT: C H J Visser
Of ENSafrica Namibia (incorporated as LorentzAngula Inc.), Windhoek