



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3821/2013

In the matter between:

1.1.1.1.

HEDWICHT JOSEA
PLAINTIFF

And

EG AHRENS
JANKO TATARIC

1ST DEFENDANT
2ND DEFENDANT

Neutral citation: *Josea v Ahrens (I 3821-2013) [2015] NAHCMD 157 (2 July 2015)*

Coram: Schimming-Chase AJ

Heard: 5 to 8, 13 and 15 May 2015

Delivered: 2 July 2015

Flynote: **Negligence** – What constitutes – Motorists – Duty of driver

wishing to turn right at a robot controlled intersection – should not execute turn unless satisfied that safe to do so. Failure constitutes *prima facie* negligence in the absence of a reasonable and satisfactory explanation for such conduct. Duty of driver when lights turn yellow – A driver who faces a green signal which turns yellow should not enter the intersection unless he is so close to the intersection that he cannot safely stop behind the stop line, in which case he must proceed cautiously through the intersection.

Practice – Pleadings - witness statements - should contain a chronological sequence of all facts to which the witness will testify as if he is giving evidence in chief. In as far as possible, the witness statement must be in the witness' own words and not that of the drafter of the witness statement.

Evidence – Witnesses – calling, examination and refutation of – witness not cross-examined because he collapsed at the beginning of his cross-examination – probative value of such evidence – Court has discretion to accept or reject evidence not tested by cross-examination. Generally, the less the evidence is tested the more the court should lean towards ignoring such evidence for purposes of the determination of the matter.

Summary: When approaching a robot controlled intersection, it is crucial that a motorist intending to turn right should properly indicate his or her intention to do so, but such motorist should not proceed to turn across the path of oncoming traffic unless and until he or she is satisfied that it is safe to do so. A motorist's conduct in executing a right hand turn when it is not safe to do so, is a *prima facie* case of negligence, in the absence of a reasonable and satisfactory explanation for such conduct. The duty of a driver who has a green light in his favour when he approaches an intersection, and the light turns yellow before he crosses the intersection, is to stop behind the stop line and remain stationary: Provided that if he is so close to a stop line when a yellow signal is displayed that he or she cannot stop safely, he may proceed with caution against such yellow light signal.

Witness statements are an important tool in the trial preparation process. By the

time they are prepared, the pre-trial procedure in terms of Rule 26 has generally already taken place, and the parties are required to comply with the terms of a pre-trial order. At this stage discovery and the exchange of discovered documents has generally also already occurred so the parties are apprised of each other's case and are aware of the strengths and weaknesses of their respective cases. Therefore, witness statements should contain a complete version of the evidence in chief that the witness will give, in a chronological and sequenced fashion and in as much as possible in the witness' own words. Short summaries that are substantially amplified with facts and information that should have been contained in the statement are not acceptable, delay the proceedings and defeat the purpose of the witness statement.

If a witness is unable to testify after giving evidence in chief and his evidence is not tested by cross-examination, the court has a discretion whether to accept or ignore his evidence. The less the evidence is tested by cross-examination, the less probative value it has for the court's determination of the matter.

ORDER

1. The plaintiff shall pay the amount of N\$11,600.00 to the defendant.
2. Interest is awarded on this amount at the rate of 20% per annum *a tempore morae* from date of judgment to date of payment.
3. The first defendant shall pay the amount of N\$54,300.00 to the plaintiff.
4. Interest is awarded on this amount at the rate of 20% per annum *a tempore morae* from date of judgment to date of payment.
5. Each party shall pay its own costs.

JUDGMENT

SCHIMMING-CHASE, AJ

(b) The robot controlled intersection linking Robert Mugabe Avenue and Jan Jonker Road, links two important arterial roads in Windhoek. At this intersection, a collision occurred between a Suzuki Swift (“Suzuki”) bearing registration number N137912W (owned by the plaintiff), there and then being driven by the plaintiff’s son and a VW transporter (“VW”) bearing registration number N122120W, there and then being driven by the second defendant, during the course and scope of his employment with the first defendant. The collision occurred at about 16h30 on 17 October 2013. The parties are *ad idem* that traffic was heavy on that day.

(c) The plaintiff instituted action against the defendants, alleging that the second defendant was the sole cause of the collision because he *inter alia* did not keep a proper lookout, and ignored a red traffic light. The plaintiff claimed damages, being the fair and reasonable value of the Suzuki (allegedly damaged beyond economical repair) as well as consequential damages in the amount of “N\$391.00 per day in respect of the needing of alternative transport”.

(d) The defendants denied negligence and pleaded that in the event that it is found that the second defendant was negligent and his negligence caused the collision, the driver of the Suzuki was negligent and his negligence contributed to the collision. Accordingly, damages should be apportioned. The defendants also instituted a counterclaim alleging that the sole cause of the collision was the driver of the Suzuki because he failed to keep a proper lookout or have proper regard to oncoming traffic when he executed his turn.

(e) The quantum in relation to the damaged vehicles has been reciprocally

admitted in the amount of N\$108,600.00 for the plaintiff and N\$23,200.00 for the defendants. The parties also do not dispute ownership of the two vehicles. The first defendant's vicarious liability is not in issue.

(f) The parties are also *ad idem* that during 2013, the intersection looked somewhat different than what it does today, and that it was smaller. At that time, there were three lanes for traffic travelling in a south to north direction on Robert Mugabe Avenue, which then merged into two lanes and then one lane after the intersection was crossed. The left lane was for vehicular traffic continuing straight in a south to north direction, with a slipway for vehicles intending to turn left in the direction of Maerua Mall. The middle lane also was for vehicular traffic travelling straight and for vehicles intending to turn right into Jan Jonker Road in the direction of Klein Windhoek. The lane on the right was for vehicular traffic intending to turn right in the direction of Klein Windhoek only. From the opposite north to south direction, there were also three lanes. Two lanes were for vehicular traffic intending to travel straight in the direction of Kleine Kuppe on Robert Mugabe Avenue, with one lane for vehicles intending to turn into Jan Jonker Road in the opposite direction of Maerua Mall, as the driver of the Suzuki intended to do. There was also a slipway for vehicles travelling from north to south for drivers intending to turn left into Jan Jonker Road in the direction of Klein Windhoek.

(g) On the date of the collision the plaintiff's son and driver of the Suzuki had entered the intersection and was waiting for oncoming traffic travelling from south to north to pass before he executed his right turn into Jan Jonker Road in the direction of Maerua Mall. His indicator lights signalling his aforesaid intention were on. The second defendant was in oncoming traffic, travelling in a south to north direction on Robert Mugabe Avenue in the VW. The collision took place at the intersection while the plaintiff's son was intending to turn right into Jan Jonker Road. The VW swerved to the right to avoid a collision but collided with the Suzuki, impacting it on the front left fender. The Suzuki swerved as a result of the impact, resulting in the VW also hitting the left door.

(h) As the collision occurred within a robot-controlled intersection, traffic

approaching, entering and exiting such an intersection, is controlled by light signals designed to regulate vehicular traffic and pedestrians in accordance with prescribed regulations. Thus, most of the rights, duties and obligations of drivers in and approaching such intersections are therefore regulated, and depend on the colour of the light signal at any given time.

(i) The evidence led on behalf of the plaintiff and defendants are diametrically opposed to each other in one material respect. The driver of the Suzuki testified that the second defendant entered the intersection when the traffic light had already turned red. The evidence led by the second defendant is that the light turned yellow about 10 to 15 metres before he entered the intersection, and that according to his recollection, the light was still yellow when he crossed the intersection.

(j) If the light was red, the second defendant had a duty to stop at the robot and remain stationary until the light turned green. If it turned yellow just before the second defendant entered the intersection and it was too late to stop, he would still have to proceed with caution,¹ but the driver of the Suzuki would also have to ensure that it was safe and opportune to turn into the path of oncoming traffic before he proceeded to turn right, alternatively wait for the second defendant to pass through the intersection before executing his right turn. Failure to do so gives rise to a *prima facie* case of negligence in the absence of a reasonable and satisfactory explanation for such conduct².

(k) A court faced with mutually destructive versions must approach them in the manner aptly summarised by Eksteen AJP in National Employers' General Insurance Co Ltd v Jagers³ and consistently relied on in our courts as follows:

¹WE Cooper, Delictual Liability in Motor Law Vol 2 – Revised Edition 1987, published in 1996, Juta & Co at 189.

²S v Desi 1969 (4) SA 23 (T) at 26B-D, Kasuto v TransNamib Holdings (Pty) Ltd and Another 2007 (1) NR 192; Norwich Union Fire Insurance Society v Chiduku 1971(1) SA 599 (RA) at 600 H – 601 E.

³1984 (4) SA 437 (E) at 440E-G, Afrikaner v Frederick, unreported judgment of Maritz J (as he then was), case I 2043/2004 delivered on 18 November 2004 at 10; Maharero v Prizonksy, unreported judgment of Swanepoel J, case 3971/2008 delivered on 11 May 2010 at par 15.

“It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless 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 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 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.”

(l) Before evaluating the evidence led by and on behalf of the parties, it is necessary to deal with what should be contained in a witness statement, so as to meet the overriding objectives of the case management process. The witness statements filed on behalf of both parties leaves much to be desired. They contain summaries of the events that occurred without any form of elaboration, especially taking into consideration that apart from the plaintiff, all witnesses who testified were eye witnesses to the accident. At the trial, most of the witnesses called by the litigants made significant additions to their evidence in chief, when a proper preparation of the witness statements at the outset would make this wholly unnecessary. In effect these additions were not simple amplification (as is permissible during evidence in chief with leave of the court), but related to material aspects observed by the witnesses at the time of the collision.

(m)

(n) In order to make the most opportune use of court time, the amended High Court rules now require the delivery⁴ of a witness statement on a specified date. The names of the witnesses who may be called to testify at the trial and the proposed dates for the filing of their witness statements form part of the information to be contained in the proposed pre-trial order in terms of rule 26(6)(d). This statement essentially constitutes the evidence in chief of the witness and is read into the record at the beginning of the witness' testimony. The rules do not circumscribe the contents of a witness statement apart from the provisions contained in rules 92 and 93. The Rules also do not require the witness statement to be signed, but Rule 92(2) provides that the witness must indicate at the end of the statement that he or she believes that the facts stated in the statement are true to the best of his or her knowledge.

(o) When the parties have reached the pre-trial stage, generally, all pleadings have been filed and discovery has taken place⁵. Thus, at a pre-trial conference, the parties are required to indicate to court *inter alia* which facts are not in dispute, the names of witnesses to be called to testify at the trial and the proposed dates for the filing of witness statements as well as all issues of law and/or fact to be resolved at the trial. The proposed pre-trial order is therefore not a simple document that legal practitioners can gloss over. It is a blue print for trial. By this time, the parties must have engaged in some form of consultation, considered each other's pleadings and discovery and where the onus lies, and would be aware of the strengths and weaknesses of their respective cases. Thus, when the witness statement is delivered it should contain the result of those consultations and preparation for purposes of giving evidence in chief. One can only imagine the saving of time when the evidence in chief (contained in a properly prepared witness statement) is read into the record. For this reason, a witness statement must comply with certain standards. Considering the paucity of information contained in the litigants' witness statements, it is necessary to provide some guidance on what should be contained in a witness statement.

⁴See rules 92 and 93 read with rule 26.

⁵See rules 23 and 25.

(p) As we do not have jurisprudence on this subject, the rules only having come into force on 17 January 2014, I have borrowed some pointers from the United Kingdom (which has a well-established case management process and system) on what should be contained in a witness statement. I believe they are apposite, persuasive and of assistance.

(q)

(r) A witness statement must, if practicable, be in the deponents own words and should be expressed in the first person. The witness' style of speaking should as much as possible be adhered to. For example, words like "*seriatim*" or "*inter alia*" do not belong in the statement of a person who does not know what those words mean or the context in which they are used. A witness statement is not to be used as a vehicle for conveying legal argument, nor should it contain lengthy quotations from documents unless it is necessary in the circumstances of the case. The opening paragraph should give details of the witness' occupation or description and his or her place of residence. If the statement is made in the witness' professional, business or other occupational capacity, the address given may be the address where the witness works, including the name of his or her firm or employer, and the position he or she holds should be given. The statement should also state if the witness is a party in the proceedings or employed by a party. It is advisable to follow the chronological sequence of events and to deal with each factual allegation in such a manner as to enable the reader to understand the evidence that will be given. Each paragraph should be numbered, and, so far as possible, be confined to a distinct portion of the subject. All facts must be set out clearly and with adequate particularity⁶.

(s) I think parties should attempt as much as possible to prepare the witness statement as if the witness is giving evidence in chief already, and telling the story which brought the litigants to court in the first place, in a simple and chronological fashion.

⁶Blackstone's Civil Practice, 2011, Oxford University Press, Chapter 49 par 49.5.

(t) Returning to the evidence, the plaintiff's son who drove the Suzuki testified that he was driving from north to south on Robert Mugabe Avenue on 17 October 2013 when he entered the robot controlled intersection with the intention to turn right into Jan Jonker Road in the direction of Maerua Mall. When he entered the intersection, the lights were green for him and oncoming traffic to proceed. Two other vehicles were in front of him that had also entered the intersection intending to turn right and were stationary at the time, waiting for oncoming traffic to pass. He waited for the first vehicle to turn right and he proceeded forward, coming to a standstill behind a Range Rover Evoque that had moved forward and was waiting for oncoming traffic to pass. Just when the light turned yellow, the Range Rover moved out of the intersection and turned right. The driver of the Suzuki then moved forward to be in front. His indicator was on and he was in a low gear. The light then turned red, but before he could turn, he saw the VW approaching the intersection with speed driving straight at him. Just before the collision, the driver of the Suzuki grabbed his younger brother who was a passenger. The VW swerved to the right to avoid a collision and hit the Suzuki on its left front.

(u) After the collision, the driver of the Suzuki doubled checked that his brother was alright and they exited the Suzuki. He and the second defendant then had words. He specifically asked the second defendant why he jumped the red light which the second defendant denied. Although there is a dispute about what exactly was said, this is not relevant to the question as to who was negligent in the circumstances.

(v) The driver of the Suzuki then called his father who also arrived on the scene and it appears he also had words with the second defendant. The driver of the Suzuki was also injured on his right side as a result of the collision. Eventually he collapsed and was rushed to hospital.

(w) Photographs were then taken by the father of the driver of the Suzuki. The driver of the Suzuki identified skid/brake marks in the photograph taken by his father and attributed them to the VW driven by the second defendant.

(x) The fact that the second defendant was speeding was not contained in his witness statement, nor did the statement contain any mention of the lights turning yellow, that he grabbed his brother just before the collision, that photographs were taken by his father after the collision, that he had words with the second defendant or even that he was injured in the collision and collapsed. In fact, his witness statement comprised some two and half pages.

(y) During cross-examination, the driver of the Suzuki pointed out where his vehicle was and where the VW driven by the second defendant was, both before and after the collision. On this aspect this witness and the second defendant do not differ.

(z)

(aa) It also became apparent that the brake marks pointed out by the driver of the Suzuki did not correspond with where the accident took place, particularly in relation to the point of impact, as testified to by the drivers of both vehicles.

(bb) The witness further testified during cross-examination that when he saw the VW for the first time, it was outside the intersection and whilst he was in the process of executing his turn, he noticed that it was speeding. He was specifically asked why, if he noticed that the VW was speeding, he did not wait and see what the VW would do. He responded that when he saw the VW speeding, he was in the process of turning and he stopped. He was accordingly stationary when the VW bumped into him. This was not part of his evidence in chief. At the end of his cross-examination, the witness conceded that his view could have been obscured by vehicles intending to turn to his left into Jan Jonker Road that were also waiting for oncoming traffic to pass before executing their turn.

(cc) The second witness called to testify on behalf of the plaintiff was the younger brother of the driver of the Suzuki and also the plaintiff's son. He was a passenger in the Suzuki on the date of the collision, and they were on their way home after the younger brother was collected from school. This second witness is 17 years old. After reading his witness statement into the record, his

statement was similarly embellished.

(dd) At the beginning of his cross-examination, it became clear that this witness had not properly consulted with the plaintiff's legal practitioner either before the witness statement was filed or before trial. After approximately 10 minutes of cross-examination, this witness collapsed and was taken to hospital by ambulance. Counsel appearing for the plaintiff requested that the witness be excused because he was no longer in a position to give evidence. The request was not opposed.

(ee) During argument both counsel submitted that the evidence of this witness should not be considered. Counsel for the plaintiff referred me to S v Msimango and Another⁷ where the principle that a trial court has a discretion to accept or reject evidence not tested by cross-examination was discussed. That discretion is exercised based on the nature of the evidence and on the nature of the case. Moshidi J provided helpful guidelines as to the three different approaches adopted depending on the extent of the incomplete or truncated cross-examination⁸. In Engels v Hofmann and Another⁹, the court granted an order that the evidence given by a witness who had suffered a nervous breakdown during testimony and was unable to testify, would be ignored for purposes of the court's determination of the matter. The court approved the following statement in Wigmore on Evidence¹⁰:

“But, where the death or illness prevents cross-examination under such circumstances that no responsibility of any sort can be attributed to either the witness or his party, it seems harsh measure to strike all that has been obtained on the direct examination. Principle requires in strictness nothing less. But the true solution would be to avoid any inflexible rule, and to leave it to the trial judge to admit the direct examination so far as the loss of cross-examination can be shown to him to be not in that instance a material loss. Courts differ in their treatment of this difficult situation.”

⁷2010 (1) SACR 544 (GSJ).

⁸At par [25].

⁹1992 (2) SA 650 (C) referred to in Msimango supra at par 10.

¹⁰4th Ed at par 1390; Msimango supra at par 10; Engels supra at 651.

(ff) A similar situation manifested in this trial. The witness collapsed and was excused shortly after the commencement of cross-examination. The facts and observations of this witness relating to the events preceding and subsequent to the collision were not tested under cross-examination at all. As a result, I exercise my discretion to ignore his evidence for purposes of determining negligence in this matter because the witnesses' evidence has no probative value on the facts relating to the collision. Legal practitioners are reminded that when a minor is called to testify, he or she should be properly prepared for what, even for an adult, is a harrowing and traumatic experience. I think this witness may have had a severe attack of stage fright that cut his testimony short, simply because he was not properly prepared beforehand.

(gg) The next witness called on behalf of the plaintiff, Mr R Philander, gave evidence as an "independent witness" to the collision. In his evidence in chief, he testified that on the date of the collision he was driving in Robert Mugabe Avenue from south to north. As he was driving he observed the VW that was also travelling in the same direction. The VW overtook him at a high speed and then moved in front of him. At the time the vehicles approached the traffic light it was green, but when the VW overtook, the lights turned yellow and then turned red before the VW reached the intersection. This witness also observed the Suzuki in the middle of the intersection waiting to turn right into Jan Jonker Road. He saw the Suzuki turn right and also saw that the traffic lights had turned red for the vehicles driving from south to north, including the VW. Because the VW was speeding, it drove through the red traffic light and collided with the Suzuki.

(hh) This witness also made substantial additions to the contents of his witness statement. In this regard, he testified the following. After the collision occurred, he parked his vehicle on the pavement on the western side of Robert Mugabe Avenue and he approached the scene to determine what happened. He approached the second defendant and told him that he had driven badly¹¹. Apparently the second defendant just looked at him and did not respond. However, he did not talk to the driver of the Suzuki nor to the passenger it

¹¹The language used was much more explicit.

seems. He remained at the scene until the traffic officer arrived and he saw when the licences of both drivers were requested. He also saw that at the time, the second defendant was unable to produce his driver's licence¹².

Mr Philander (an ex policeman) did not speak to the officer who arrived on the scene, who was from City Police. He just walked closer and listened to the exchange relating to the second defendant's driver's licence. He did not give a statement to the officer, nor did he leave any of his details with the officer, because he had to collect his wife. He did however make a statement at the vehicle accident unit in Katutura approximately 3 months after the accident. This apparently happened after the father of the driver of the Suzuki and husband of the plaintiff sent out a local radio alert with his contact details on Kanaal 7 some 2 or 3 months after the accident, requesting the person who had been there and observed the collision, to please to come forward to make a statement. After hearing the broadcast, Mr Philander phoned the father of the driver of the Suzuki. That is when he went to the vehicle accident unit to make a statement and where he met the father of the driver of the Suzuki for the first time. Apparently they did not really talk to each other.

(ii) During cross-examination this witness became belligerent. When he was asked to point out on the sketch plan where his vehicle was in relation to the VW, he pointed to a completely different lane than that pointed out by the second defendant as well as the driver of the Suzuki. In fact, he referred to a lane never travelled by the VW. When the contradiction was shown to him, he responded that it did not matter. What was important was that they were driving in the same direction. His observation of other vehicles, oncoming traffic and other details that he should have seen, considering his crystal clear memory of being overtaken by the VW that jumped the red light and hit the Suzuki, were also naught.

(jj)

(kk) There are other important features of this witness' evidence that leave much to be desired. Firstly, his name did not appear on the list of witnesses in

¹²The second defendant testified that at the time his licence was stolen and that he had applied for a replacement. The replacement licence was discovered by the second defendant and he was not cross-examined on this aspect.

the pre-trial order. His witness statement was filed as part of the plaintiff's additional discovery. Surely such a stellar independent witness would find himself on a witness list. Secondly, the statement he made to the police (actually some 6 months after the accident) was not discovered at all. It was only made available after the court ordered its presentation. No explanation for this was provided by the witness or by the plaintiff's counsel. On the statement itself, the CR number is different to the CR number with which this matter was registered. It is common cause that there have been no formal criminal proceedings against the second defendant. The statement was commissioned on 16 April 2014 – whereas the date stamp from the accident investigation unit on the second page of the statement shows 15 April 2014. On the front page of the statement another date of 17 April 2014 appears.

(ll)

(mm) The second defendant and his passenger also denied that the second defendant overtook the VW. They also denied that any exchange of words took place between him and second defendant. In fact, they never saw this witness.

(nn) As an ex police officer, he did not even think to give his name or details to the officer who arrived on scene, after he stated that he spent about 20 to 25 minutes on the scene after the collision, and the officer arrived approximately 15 minutes after the collision. He never even approached the driver of the Suzuki or his brother to introduce himself. How a witness who on his own version left at least 5 minutes after the officer arrived, who saw the exchange about the licences of both drivers did not even bother to leave his name and contact details with the officer because he had to collect his wife boggles the mind. Instead, he hears an alert on Kanaal 7 some 3 months after the accident, to which alert a statement at the police station is made, which statement was never mentioned during court connected mediation proceedings, or even discovered. To my mind, this evidence should be viewed with circumspection. I think the reasonable probability exists that he tailored his evidence to suit the plaintiff's case. He was not a credible witness. In the result, the evidence of this witness, similarly, has no probative value and does not assist the plaintiff's case at all.

(oo) Two witnesses testified on behalf of the defendants, namely the second defendant who drove the VW and the passenger who sat in front on the date of

the collision, Mr Geider.

(pp) The second defendant was employed as a sales manager at the first defendant at the time of the collision. On 17 October 2013 at approximately 16h30 he was driving the VW from south to north on Robert Mugabe Avenue. He was accompanied in the vehicle by 3 other employees. Mr Geider was in the passenger seat. The other two employees were seated in the load box of the VW. As he approached the robot controlled intersection of Robert Mugabe Avenue and Jan Jonker Road, the robots were green in his favour. At the time, he was travelling between 60km-70km per hour. He intended to cross over the intersection to drive on further north in Robert Mugabe Avenue. When the nose of VW reached approximately the barrier line of the southern entrance to the intersection, the robots facing him changed from green to yellow and he proceeded to enter the intersection. The second defendant's witness statement was similarly amplified during his evidence in chief and he testified in addition that the lights changed from green to yellow when the VW was approximately 10 - 15 metres behind the barrier line. As he was too close to the barrier line to stop when the lights turned yellow, he proceeded into the intersection. The second defendant did not testify that he slowed down or that he exercised any form of caution when he entered the intersection.

(qq) As he entered the intersection he saw the Suzuki in the intersection intending to turn right. He did not observe any vehicles in front of the Suzuki. According to the second defendant, the driver of the Suzuki appeared to be hesitating as the vehicle moved a little, and then stopped and moved again. His initial impression was that the driver of the Suzuki was trying to position the vehicle so that he could look for approaching traffic because his view might have been obscured by the vehicles in front of him waiting to turn east into Jan Jonker Road in the direction of Klein Windhoek.

(rr) As he took his foot off the accelerator to slow down, the driver of the Suzuki executed the turn to his right across the line of the second defendant's travel. The second defendant immediately applied his brakes and swerved to his right in an attempt to avoid a collision but to no avail as the vehicles then

collided.

(ss) After the collision the second defendant had words with the driver of the Suzuki who was very angry and who blamed the second defendant for the accident. The father of the driver of the Suzuki also arrived later and blamed the second defendant because he was not in possession of his driver's licence at the time. The second defendant had no recollection of seeing Mr Philander and denied that he overtook him.

(tt) The evidence of the passenger in the VW tells a similar story to that of the second defendant. His statement was also amplified. He confirmed that as the VW approached the robot controlled intersection the lights were green in the second defendant's favour, but he stated that at the time, the second defendant was driving 70km per hour. He also observed stationary vehicles intending to turn right (eastern direction – Klein Windhoek) into Jan Jonker Road that were waiting for oncoming traffic to pass. When the nose of the VW reached approximately the barrier line the lights changed from green to yellow, and the second defendant proceeded to enter the intersection. He also estimated this distance at approximately 15m from the barrier line. He could not recall the colour of the lights at the time of the impact as he was focused on the red Suzuki intending to turn right, which he saw when the second defendant commenced entering the intersection. This witness also testified that the driver of the Suzuki appeared to be hesitating as he stopped and moved again. His impression was that the driver of the Suzuki was trying to position the vehicle so that he could look for approaching traffic because his view may have been obscured by the vehicles intending to turn east into Jan Jonker Road. As he was not the driver of the VW, he observed the Suzuki better than the second defendant.

(uu) Just as he told the second defendant to watch out, the driver of the Suzuki executed the turn to his right across their line of travel. The second defendant immediately applied the brakes of the VW and swerved to his right in an attempt to avoid the collision.

(wv) He recalls that after the collision the second defendant had words with

the driver of the Suzuki and later his father, who was the more aggressive of the two. He did not recall any other person approaching the second defendant to tell him about his bad driving, nor does he recall the second defendant engaging in any manoeuvre to overtake another vehicle.

(ww) He and the second defendant also tested how long it took for the traffic light to turn from yellow to red at the same intersection on the day before they gave testimony. But no evidence was produced indicating that it took the same time for the lights to change from yellow to red on 17 October 2013, and no evidence was produced indicating that it was the standard time frame for all traffic lights in Windhoek.

(xx) It is necessary to mention that the cross-examination of the second defendant and his witness lasted about 10 minutes each. They were not tested on their observations to any meaningful extent.

(yy) Having dealt with the evidence led, the question to be determined first is whether the lights were red or yellow when the second defendant crossed the intersection. In light of the mutually destructive versions, the court has to evaluate the evidence led, taking into consideration the plaintiff's onus to prove on a balance of probabilities that the light was red when the second defendant crossed the intersection and that the other version advanced by the second defendant is false or mistaken.

(zz) The evidence of the driver of the Suzuki only is considered. This is because his younger brother's evidence has no probative value, and because Mr Philander did not come across as an honest witness for the reasons mentioned above. It is also important to mention that the witness' father was observed on a number of occasions gesticulating to the witness whilst he was being cross-examined, giving the impression that he was being coached by his father. This did not create a good impression.

(aaa) The driver of the Suzuki was adamant that the light turned red while he was in the middle of the intersection. In cross-examination he testified for the first time that the Suzuki was stationary when the VW collided with it, but he also testified that he was slowly moving forward and that he was moving in a low gear at the time. He conceded that his view of oncoming traffic was partially obscured by the stationary vehicles intending to turn to his left into Jan Jonker Road, which were also waiting for oncoming traffic to pass.

(bbb) The point of impact shows that the Suzuki was already in the lane in which the VW was travelling (which was for vehicles travelling straight in a northerly direction only) at the time the collision occurred. This could only mean that either he was already in the process of finalising his move through the intersection, or that he came to a standstill whilst already in the line of oncoming traffic, after having seen the VW. In both scenarios the front of the Suzuki was already in the path of oncoming traffic when the collision occurred, because the VW was forced to veer towards the right to avoid the collision.

(ccc) The evidence of the second defendant as well as his passenger corroborated each other in material respects on most of the issues, although the evidence of the passenger is preferable with regard to the speed that the second defendant was travelling, namely 70km per hour, as well as his observation of the hesitation of the driver of the Suzuki and the presence of stationary vehicles intending to turn in an eastern direction into Jan Jonker Road. This is because he had more opportunity to observe as the passenger in the vehicle. The concession by the driver of the Suzuki that his view may have been obscured to an extent by the other stationary vehicles intending to turn in an eastern direction into Jan Jonker Road in the direction of Klein Windhoek ties up with Mr Geider's observation of his hesitation. At a busy intersection such as this, it stands to reason that one's view would be obscured by vehicles travelling in opposite directions, intending to turn in opposite directions that meet in the middle of an intersection to wait for oncoming traffic travelling in both directions.

(ddd) Having evaluated the evidence and on the probabilities I therefore find

that the light turned yellow at the time that the VW entered the intersection.

(eee) This now brings me to the question of who was negligent in those circumstances.

(fff) On the facts, it appears to me that the driver of the Suzuki did make attempts to ensure that it was safe for him to proceed, but he did not succeed in doing so and effectively proceeded to execute his turn when it was inopportune to do so, and when there was insufficient room between his vehicle and the approaching vehicle to execute the manoeuvre safely. He saw the VW, but more importantly, the point of impact shows that the Suzuki was already in the line of the VW at the time the collision occurred.

(ggg) The second defendant was driving over the speed limit when the lights turned yellow. In fact he only appears to have applied his brakes when he saw the Suzuki move and when he was warned by his passenger. He testified that he saw the driver of the Suzuki hesitate before he took his foot off the brakes, but he continued on because he had right of way. This does not show the action of proceeding with caution when the lights turned yellow. Even if it is accepted that had he stuck to the speed limit the collision could still not be avoided, the damage caused would have been significantly less.

(hhh) The drivers of both vehicles testified that they travel through this intersection on regular occasions. They were also aware that this was a busy intersection. The collision took place during peak traffic. There is that split second at intersections where a failure to keep a lookout on both sides can cause a collision and caution needs to be exercised at all times. The second defendant should have stuck to the speed limit at all times and he should have slowed down when the light turned yellow in order to be prepared for the possibility that someone would attempt to cross the intersection. Even if he could not have avoided the collision whilst travelling under the speed limit, the second defendant did not exercise proper caution. In the circumstances of this case, both parties are to my mind equally negligent. Both failed to fully obey the rules of the road, resulting in a collision.

(iii) In light of foregoing, each party is liable to the other party for half their claims in relation to the damage to their respective vehicles only.

(jjj) As regards the consequential damages claimed by the plaintiff, she testified that she is a housewife. She used the Suzuki for her daily needs such as running errands, collecting her son from school, church, meetings, etc. The plaintiff testified that she is married to her sons' father in community of property. Her husband assisted her in getting quotations for the rental of a vehicle that she could use until such time as she acquired another vehicle. Her consequential damages for the rental of a vehicle were set at N\$391 per day based on a quotation from "Clear View Car Hire". The plaintiff testified that this amount was too expensive, so she concluded a written agreement with her other son (who does not reside in Namibia) for the rental of his vehicle (a Golf) in the amount of N\$600.00 per day. The agreement was concluded on 18 October 2013 (one day after the collision) and rental commenced from that date until such time as she secured another vehicle. She realised then that the amount of N\$600.00 was still too much. So during February 2014 she agreed on a rental of N\$200.00 per day with her son. When asked in cross-examination why she concluded a rental agreement at N\$600.00 per day from her son as opposed to the N\$391.00 per day from Clear View, it became clear that her calculation of the Clear View daily rental amount included the deposit and the fuel deposit (both refundable). The plaintiff had not paid any amounts in terms of the "rental agreement" to her son at all.

(kkk) Furthermore, during cross-examination the plaintiff testified for the first time that she does needlework at home as a business, but she was unable to produce any documentation to prove this, or any other expenses for her business. Interestingly, the plaintiff also produced a tax invoice dated 17 October 2013 (the date of the collision) from "N.C.J. Mechanical Maintenance CC" for storage fees for the Suzuki from 17 October 2013 to 1 October 2014 in the amount of N\$41,182.65. It transpired that this entity is actually the business of her husband, to whom the plaintiff is married in community of property. Furthermore, the Suzuki has been stored at their common home from 17 October 2013 to date. When this was pointed out in cross-examination, the plaintiff replied that their erf is a business erf.

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(III) On the evidence the plaintiff has not laid any basis for her claim for consequential damages. No documentation showing any expenditure by the plaintiff in support of her consequential damage was produced either. Accordingly this claim is dismissed.

(mmm) In the result, the following order is made:

1. The plaintiff shall pay the amount of N\$11,600.00 to the defendant.
2. Interest is awarded on this amount at the rate of 20% per annum *a tempore morae* from date of judgment to date of payment.
3. The first defendant shall pay the amount of N\$54,300.00 to the plaintiff.
4. Interest is awarded on this amount at the rate of 20% per annum *a tempore morae* from date of judgment to date of payment.
5. Each party shall pay its own costs.

SCHIMMING-CHASE
Acting Judge

APPEARANCES

PLAINTIFF

E Shifotoka
Instructed by Conradie & Damaseb

DEFENDANTS

A Slabber

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Instructed by Weder, Kauta & Hoveka Inc