REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGEMENT

Case No: (I) 2499/2014

In the matter between:

ESMAR VON WIELLIGH **PLAINTIFF**

And

HELMUTH SHAUMBWAKO **FIRST DEFENDANT**

RAUNA NDAPEWA KUUTONDOKWA **SECOND DEFENDANT**

Neutral citation: *Von Wielligh v Shaumbwako (I 2499/2014) [2015] NAHCMD 168 (22 July 2015)*

Coram: UEITELE, J
Heard: 30, 31 March 2015 & 12 June 2015
Delivered: 22 July 2015

Flynote: *Evidence* - Onus of proof - When discharged - Versions of plaintiff and defendant mutually destructive - Must be proved that version of party burdened with the *onus* is true and that of the other party false - Estimate of credibility of witness inextricably bound up with consideration of probabilities of case.

Negligence - Motorist executing a left-hand turn - Duties of in relation to following traffic -Duty to ensure neither oncoming nor following traffic will be endangered - Use of rear-view mirror required.

Summary: In this action the plaintiff claims damages in the sum of N$76 850 from both the first and second defendants while the second defendant counter-claims for damages in the sum of N$ 27 293, 04. Both claims are in respect of damages occasioned to each party's motor vehicle in a road collision that occurred on 07 October 2011 in Beethoven Street, Windhoek West, Windhoek.

In essence the plaintiff alleges that the first defendant was the sole cause of the collision. The defendants deny that they were negligent in any of the respects alleged or at all and further deny that they were the sole cause of the collision. The defendants alleged that the sole cause of the collision was the negligent driving of the plaintiff.

At the commencement of the trial the parties had agreed that the only issue for determination was whether the cause of the collision was the negligent driving of the first defendant or the negligent driving of the plaintiff. The evidence demonstrates that the two versions of the protagonists are mutually destructive.

Held that where the two versions of the litigants are mutually destructive the approach which the court may follow is to start from the undisputed facts which both sides accept. Add to them such other facts as seem very likely to be true, as for example, those recorded in contemporary documents or spoken to by independent witnesses like the

policeman giving evidence in a running down case about the marks on the road. A witness is then judged to be unreliable, if his or her evidence is, in any serious respect, inconsistent with those undisputed or indisputable facts, or of course if he or she contradicts himself or herself on important points.

Held further that, where a party alleges negligence on the part of the other, that party must prove what it alleges. The court was satisfied that the plaintiff has failed to discharge that *onus* resting on her and the court accordingly found on the facts that the accident happened when the first defendant was about to turn left into the parking area in front of the college.

Held furthermore that a driver of a motor vehicle who intends to turn out of his or her path of travel, whether to the left or to the right, must look back into to his or her rear view mirrors to establish whether there are other vehicles behind him and what the position of those vehicles is. He must thereafter give sufficient and reasonable warning to the vehicles behind him and in front of him that he intends to turn left out of his or her path of travelling and he must only execute that manoeuvre to turn left when it is opportune and safe to do so. The court was satisfied that, in this matter, the first defendant was entitled to conclude that it was an opportune and safe moment to execute the signaled turn.

ORDER

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1. The plaintiff's claim is dismissed with costs.

2. The defendants' counter claim succeeds and plaintiff must pay to the defendants the agreed sum of N$27 293, 04.

3 The plaintiff must pay the defendants' costs of the counter claim. The costs to include the costs of one instructed and one instructing counsel.

JUDGMENT

UEITELE, J

Introduction

[1] In this action Ms Esmar Von Wielligh (the 'plaintiff') claims damages in the sum of N$76 850 from both the first and second defendants while the second defendant counter-claims for damages in the sum of N$27 293, 04. Both claims are in respect of damages occasioned to each party's motor vehicle in a road collision that occurred on 07 October 2011 in Beethoven Street, Windhoek West, Windhoek.

[2] The plaintiff was driving her motor vehicle, a 2005 Opel Tigra 1.8 Sport motor vehicle, registration number N 89621 W, (I will in this judgement refer to this vehicle as the Opel vehicle) while the first defendant, Helmuth Shaumbwako, drove Rauna Ndapewa Kuutondokwa's, (the second defendant) motor vehicle, a 2011 Toyota Hilux 2.0 4x2 single cab motor vehicle bearing registration number N140157 W (I will in this judgement refer to this vehicle as the Toyota vehicle).

Pleadings

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

'8.1 failed to take cognisance of the plaintiff's approaching motor vehicle whilst reversing from a drive way into Beethoven Street;

8.2 moved his vehicle in Respondent's *(sic)* right of way at a time when it was dangerous and inopportune to do so*;*

8.3 he failed to avoid a collision when he could and should have done so;

8.6 he failed to apply his brakes timeously or at all.'

[4] The defendants admitted that on 07 October 2011 and in Beethoven Street, Windhoek West, Windhoek a collision occurred between the Opel vehicle and the Toyota vehicle, but denied that they were negligent in any of the respects alleged or at all and further denied that they were the sole cause of the collision. The defendants alleged that the sole cause of the collision was the negligent driving of the plaintiff who was negligent in one or more of the following respects:

'8.4.1 failed to keep a proper lookout;

8.4.2 travelled at an excessive speed and dangerous speed in the prevailing circumstances, she failed to apply the brakes of the motor vehicle she was driving at the time timeously or at all;

8.4.3 failed to prevent a collision when in a position to do so;

8.4.4 failed to exercise due care for other road users;

8.4.5 failed to keep a safe following distance behind second defendant's vehicle;

8.4.6 failed to apply the brakes of the motor vehicle timeously or at all;

8.4.7 failed to exercise due care and precaution whilst driving the vehicle;

8.4.8 collided with the stationary vehicle of the second defendant.'

[5] The defendants further pleaded in the alternative that, should the court find that the first defendant was negligent and that such negligence caused or contributed to the collision then and in such event the first and second defendants allege that the plaintiff was also negligent as set out above and that her negligence contributed to the collision.

[6] The parties, in terms of Rule 26(6) of the High Court Rules, filed a draft pre-trial order which I made an order of court on 11 February 2015. In terms of the pre-trial order the parties listed about six factual issues which were in dispute between them and on which I had to make a determination. At the commencement of the trial the parties had agreed on further issues and the only issue which remained for determination was whether the cause of the collision was the negligent driving of the first defendant or the negligent driving of the plaintiff.

[7] Prior to hearing the evidence in chief of the plaintiff we held an inspection *in loco*. After the inspection *in loco* the parties produced six photographs which were handed in as Exhibits A1-A6. Beethoven Street (I will in this judgement, where the context so requires, refer to Beethoven Street as the road) runs from south to north, an educational institution known as Tanben College is situated on the eastern side along Beethoven Street (I will in this judgment refer to Tanben College as the college). As the road approaches the college from the northern side there is a slight bent approximately one hundred and ten meters before the road passes the college. The road consists of two lanes only (one lane for vehicles travelling northwards and the other lane for motor vehicles travelling southwards). The width of the road is estimated at six meters from the kerbs on the eastern side of the road to the kerbs on the western side of the road. Between the college and the road there is a sidewalk which is approximately five meters long. Patrons of the college park their vehicles on this sidewalk, mainly facing eastward.

The plaintiff, at the time of the accident, resided at house situated alongside Beethoven Street (to the west Beethoven Street, at the corner of Beethoven and Pasteur Streets). The distance from plaintiff's place of residence to the college was approximately 150 meters.

[8] The observations that we made after the inspection *in loco* were that:

(a) The point of impact, according to the plaintiff, was approximately 1, 5 meters from the eastern kerb of the road. (It was marked as point 2 on Exhibit A1).

(b) The point of impact, according to the defendant, was approximately 0, 5 meters from the eastern kerb of the road. (It was marked as point 5 on Exhibits A5 & A6).

(c) The right hand front side of the Toyota vehicle, according to the plaintiff, was approximately 2.5 meters from the eastern kerb of the road (at the time when the vehicle was stationery) (It was marked as point 3 on Exhibits A2 & A4).

(d) That, according to the plaintiff, a Mercedes Benz C200 class was parked to the left (i.e. north of) the Toyota vehicle. (It was marked as point 6 on Exhibit A6).

(e) The first time when the plaintiff observed the Toyota vehicle she was approximately 14m away from it.

<u>The evidence</u>

The Plaintiff's evidence

[9] I will now turn to the evidence presented in this case. The plaintiff called only one witness, namely the driver of the Opel vehicle, Ms Esmar Von Wielligh. She testified that on Friday 07 October 2011 she left her residence on her way to work driving her motor vehicle (the Opel vehicle) in Beethoven Street at a moderate speed and there were no

vehicles travelling in the lane in front of her. She testified that as she was approaching the college she suddenly noticed a Toyota Hilux motor vehicle with registration number N 140157 W reverse out of the designated parking immediately in front of the college. She testified that despite the fact that she was at the time when the first defendant reversed out of the parking area in a very close proximity to first defendant, the first defendant failed to take cognizance of her vehicle and failed to provide any form of indication or warning that he was of the intention of reversing out of the parking area into the road. When the first defendant so reversed his vehicle he caused his vehicle to enter the plaintiff's right of way at the time when it was dangerous and inappropriate to do so.

[10] The plaintiff furthermore testified that as soon as she noticed the Toyota vehicle entering the road immediately in front of her, she immediately applied the brakes of her vehicle and hooted to the Toyota vehicle in an attempt to warn the first defendant of her presence. But due to the fact that she was very near to the first defendant when he reversed out of the parking area, it was not possible for her vehicle to come to a complete stand still in such a short space of time, and distance. She said that it was further not possible for her to swerve to the left (i.e. the eastern side of Beethoven Street) to avoid the accident as she would have collided with other vehicles parked in the same parking area from which the first defendant had just reversed. As a result the plaintiff's Opel vehicle right front end collided with the left front end of the Toyota vehicle.

[11] In cross examination the plaintiff testified that at the time of the collision it was clear day light, no wind, no clouds, no rain and visibility was good and clear for her. She testified that she was driving at a speed of approximately 50 km/h. She further testified that the road surface type was tarmac and was of good quality. She further confirmed that from the curve on the road to the point of collision (i.e. for a distance of approximately 96 meters) she had an unobstructed view of the parking area of the college and that she could see the defendant's vehicle parked in the parking area in

front of the college. She further stated that when she saw that the Toyota vehicle was reversing into the road a quarter of it was already in the road. In cross examination the following exchange between the plaintiff and counsel for the defendants took place:

> 'Ms. Von Wielligh you testified that you had a none *(sic)* obstructive view of the defendant's vehicle from roughly 96 meters before you started to brake. You said you were travelling at 50km/h and by the time you noticed this vehicle that a quarter of it had left the parking earlier it was too late. So am I correct if I say that, between the time when you notice this vehicle 40 meters [I am sure the record is wrong here it must actually be 14 meters] in front of you, a quarter of it was out protruding from the parking and from then until the time that you bumped him he had reversed completely out of the parking for that matter because you bumped him on his left front hand side. So is that correct? --- Yes I confirm that My Lord…
>
> Now am I correct if I say, when you put the car into reverse the reverse lights turn on? --- Yes that is correct My Lord.
> So on your version the Defendant reversed, so reverse lights had to have come out, correct? --- Yes that is correct My Lord.
>
> Did you see his reverse lights? --- I saw the back side of the vehicle but because his vehicle was reversing not straight towards me but in a different angle, the revers lights were not direct in front of me My Lord…'

The defendants' evidence

[12] The first and second defendants' testified in respect of their defence and the second defendant's counterclaim. The first defendant testified that on Friday 07 October 2011 at around 08h05 he was the driver of a Toyota vehicle. The second defendant is the owner of the Toyota vehicle and he drove the vehicle with the knowledge and consent of the second defendant. He testified that at that time he was driving in Beethoven Street on his way to the college to go and pay school fees for his three

children. He testified that as he approached (after he passed the curve in the road) the college from the northern direction he switched on the Toyota vehicle's left indicator to indicate his intention of turning left into the parking area in front of the college. At that moment the Opel vehicle came from behind and collided with the left front side of the Toyota vehicle. He testified that he got the impression that the plaintiff attempted to overtake the Toyota vehicle on the left hand side but collided with the Toyota vehicle when the first defendant turned left into the parking area in front of the college.

[13] In cross examination he testified that at the time when he activated his left side indicator he looked into all three of his mirrors and he saw no vehicle behind him. He confirmed that he did not see the plaintiff's vehicle approaching him.

The second defendant's evidence

[14] The second defendant testified that she is the owner of the Toyota vehicle and that on Friday 07 October 2011 the first defendant drove the Toyota vehicle with her knowledge and permission. She further testified that on that day (i.e. on Friday 07 October 2011) her husband, (the first defendant) dropped her off at her work. She later received a telephone call from the secretary at the college informing her of the accident. After receiving the telephone call one of her colleagues took her to the accident scene. When she arrived at the accident scene the police officers were not yet there. She also testified that there were no other vehicles parked in the parking area in front of the college. She further testified that the reason why her husband went to the college was to pay the children's school fees. She further testified that when she arrived at the accident scene the school fees had not yet been paid, because she accompanied the first defendant to the college office to pay the school fees. She further testified that after the police took the statements and the cars were removed by the towing services, her colleague dropped them (i.e. her and her husband) home**.**

Discussion

[15] I must decide whether on the probabilities the accident more likely happened in the way asserted by plaintiff or in the way described by the defendant. The Supreme Court of Namibia has said that, even where there is no counterclaim but each party alleges negligence on the part of the other, each party must prove what it alleges[1].

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

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

[17] Mr van Zyl urged me to follow the approach followed by this court in the matter of *Ndabeni v Nandu*[3] where Masuku, AJ, at paragraph [26] said:

> 'The question is, how should the court approach the issues so as to make a finding on the

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[1]See the unreported judgment of *Motor Vehicle Accident Fund of Namibia v Lukatezi Kulubone* Case No SA 13/2008 (at para16 - 17) delivered on 09 February 2009.
[2]1984 (4) SA 437 (E) at H 440E – G; Also see *Harold Schmidt t/a Prestige Home Innovations v Heita* 2006 (2) NR at 556.
[3]An unreported judgment of this court case (I 343/2013) [2015] NAHCMD 110 (delivered on 11 May 2015).

disputed issues? In *SFW Group Ltd and Another v Martell Et Cie and Others* 2003 (1) SA 11 (SCA) at page 14H – 15E Nienaber JA suggested the following formula, which has been adopted as applicable even in this jurisdiction in the case of *Life Office of Namibia Ltd v Amakali* 2014 NR 1119 (LC) page 1129-1130:

> "The technique generally employed by our courts in resolving factual disputes of this nature may conveniently be summarized as follows. To come to a conclusion on the disputed issues, a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour; (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (vi) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra-curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events …". '

[18] I have no qualms with Mr Van Zyl's submissions nor with the approach suggested by Nienaber, JA. I however highlight and prefer to follow what was said by Mtambanengwe, AJA in the matter of *Motor Vehicle Accidents Fund v Kulubone*[4] namely:

'[51] … Levy, J in *S v Martinez* 1993 NR 1 at 18 A-C (1991 (4) SA 741 Nm at 758 A-C) said:

> "This court hesitates and is loath to condemn a witness because of his or her demeanour in a witness-box. Some people follow occupations which frequently expose them to the public eye and they have learnt to speak with conviction, even when they are lying. Others are able to disguise their feelings and emotions and may be so crafty that they can simulate an honest demeanour. On the other hand, some persons who are entirely truthful are shy, withdrawn and nervous by nature

[4] *Supra* footnote 1 at para [51].

and unable to express themselves. They hesitate and sometimes even lean over backwards to be fair".

The sentiment expressed in this passage was, more pertinently, in my opinion, expressed by Mr. Justice MacKenna (in a paper read at the University College, Dublin on 21 February 1973 and printed in the Irish Jurist Vol IX new series P.1) which was concurred with in its entirely by Lord Devlin at P.63 in his Book entitled "The Judge" 1979:

"I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help.

This…

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

[19] It is against the above background that I now have to decide as I said above whether the accident more likely happened in the way asserted by the plaintiff or in the way described by the defendant. Mr. Van Zyl who represented the plaintiff urged me to accept the evidence of the plaintiff and he said:

> '…this Honourable Court should make the following findings on the credibility of the respective witnesses, namely;
>
> 6.5.1 That the plaintiff as a witness was forthcoming and frank in her evidence had a good demeanour in the witness box, showed no bias, there were no internal and or external contradictions in her evidence, the probability of her version of the circumstances of the collision were not rebutted by any expert evidence, the caliber and cogency of her performance in the witness box cannot be faulted on any valid ground, she was never unwilling to answer any questions in cross examination and she never evaded any questions under cross examination.
>
> .
>
> 6.5.2 In contrast the first defendant as witness was at times very evasive and suffered from a selective memory and in general was not candid on various pertinent issues relevant to the matter, did not have a good demeanour in the witness box, had various internal contradictions in his evidence, being contradictions in respect of his Plea, Witness Statement and Testimony.
>
> 6.6 Furthermore, part of the plaintiff's evidence was left unchallenged under cross examination, thus, the plaintiff is entitled to assume that the unchallenged testimony is accepted as correct being in respect of her testimony that there was in fact another motor vehicle parked on the pavement at the scene of the collision, being the "Mercedes Benz C Class".

[20] I do not, agree with Mr Van Zyl. I say so for the following reasons. It is not possible for me to discern from the first defendant's demeanour in the witness box, or the tone of his voice, whether he was trying to deceive me. I carefully listened to the first

defendant when he presented his evidence, his command of the English language was poor, he was nervous and had difficulties to express himself that I had to ask him to repeat himself for me to establish exactly what he was trying to convey. I thus attribute his performance in the witness box to these factors. I can therefore not find that the first defendant was an unreliable or that his evidence was calculated to disguise the truth.

[21] The alleged internal contradictions in the first defendant's evidence alluded to by Mr. Van Zyl I cannot find. I will in detail and verbatim quote one aspect relied on by Mr. Van Zyl as being the internal contradictions in the first defendant's evidence. In cross examination the following exchange took place between Mr. Van Zyl and the first defendant:

> '…I want to take you back to the accident how it happened and with reference to your Witness statement. In the first instance if you look on paragraph 5 of your Witness statement at the bottom there Mr. Shaumbwako do you have it? --- Yes My Lord.
> You see there I switch on my left indicator to indicate my intention of turning left to enter into parking lot of Tanben College you see? --- That is correct.
>
> Okay, the next paragraph the 2.5 Opel (Indistinct) 1.8 motor vehicle registration number so and so I am not going to repeat that, you see that you confirmed maybe I should not even read it Mr. Shaumbwako but you confirm that that is correct that paragraph 6? --- That is correct My Lord.
>
> So you said you put on your indicator to turn left?
> --- That is correct My Lord.
>
> That is what you said. At any stage did you look in your review mirrors before turning? --- The time I review both my mirrors the time I put my indication to turn left there is no car behind me. There is no car.
> There is no car? --- There is no car.

How do you know that? --- The time I put my indication to turn left there is no car behind me My Lord.

Mr Shaumbwako maybe my question was not clear. I hear what you are saying but I am asking you why you are saying that?

--- I am saying, My Lord I am saying that because when I put my indication to turn left the thing I see only the car shaking and the sound of collision My Lord.

Only shaking and the sound of collision? --- That is correct My Lord.
But why did you now say earlier that at the time when you turn there was no vehicle behind you? --- My Lord I am saying there is no car at the time of the accident. I mean there is no car behind. The time I put my indication to turn there is no car behind me.

And now I am asking you Mr Shaumbwako why are you saying based on what? --- Yes My Lord the thing is the time I put my indication there is no car behind me then I turn left the thing I see only is shake of the car and the sound of the collision My Lord.
How did you know that there was no vehicle behind you in your version? Your version I will get to that your version is disputed. We have two different versions about the accident happening between the Plaintiff and your version on how it happened but what I am asking you now is how did you know that there was no vehicle behind me? --- Yes My Lord the time I put my indication I check both three mirrors, my mirror there is no car behind me.

Both three mirrors? --- I first check I mean left and right and the middle one which is the rear the one My Lord.

So first the right one and then the left one and then the middle one or in which order? --- No, no, no.

Which one first Mr. Shaumbwako? --- I check both of them left and right and the rear one the time I put my indication to turn left.

You did that? --- I did that.
And you told your Instructing Attorneys on that at the consultation before drafting the Witness statement? --- That is correct.

You did? --- I did My Lord.

Do you find it in paragraph 5? What you just told the Court Mr Shaumbwako do you find it in paragraph 5? --- Yes My Lord.

Yes. --- Yes My Lord.
So you see in paragraph 5 that you check all three review mirrors before turning? --- The time I put my indication I check then I see there is no car behind me My Lord.

What you just said Mr Shaumbwako do you find it in paragraph 5? --- Paragraph 5 yes it is correct.
Sorry Mr Shaumbwako I am struggling to understand your answers. Paragraph 5 do you find any reference, words in paragraph 5 referring to you checking the review mirrors to make sure that there is no vehicle behind you? Do you find it there?

--- No.
No and paragraph 6. --- Paragraph 6.
Do you find any words or references to that in your Witness statement? --- No.

Sorry Mr Shaumbwako what is your answer? --- No.

Now Mr Shaumbwako you said now that you check in your all three mirrors of the vehicle and you saw no vehicle behind you? --- That is correct.

Okay. Look at paragraph 6 of your Witness statement and I am referring specifically to the second sentence. It starts off with I got the impression that the Plaintiff tried to overtake on the left hand side and collided with me when I turned back into the parking

area in front of Tanbeni College at Beethoven Street, Windhoek West you confirm that? --- That is correct.'

[22] From the evidence quoted above it is clear that in his evidence in chief, the first defendant did not mention the fact that when he indicated to turn left into the parking area in front of the college he first looked into his mirrors and that he did not see any vehicle. That part of the evidence (i.e. that when he indicated to turn left into the parking area in front of the college he first looked into his mirrors did not see any vehicle) only comes out in cross examination when the first defendant is probed by Mr. Van Zyl. I am of the view that the evidence elicited in cross examination does not in any way contradict his evidence in chief that he did not reverse out of the parking area, it is in my view consistent with his evidence that he was turning into the parking area. That cannot be classified as contradictions in his evidence. I am of the further view that the testimony of the first defendant is not so ludicrous and improbable as to be entirely incredible. I therefore cannot reject the version of the first defendant.

[23] The plaintiff on the other hand was very fluent and emphatic but does that mean that her evidence was more reliable than that of the first defendant? I do not think so. I say so for the following reasons. The plaintiff testified (particularly in cross examination) that she at all times had a clear view of the road in front of her and she confirmed in cross examination (in response to a question whether she could see the Toyota vehicle from the curve in the road) that she could see the vehicles parked in front of the college. In response to a further question in cross examination whether she saw the Toyota vehicle from a distance of 110 meters she said. *'I saw vehicles parked at the parking, unfortunately I did not know that this was going to happen that specific day so I did not take note on exactly the Defendant's vehicle, but I saw vehicles parked there My Lord.*'

[24] The plaintiff in her evidence in chief testified that as she neared the college she *suddenly* noticed a Hilux motor vehicle with registration number N 140157 W reversed out of designated parking and immediately in front of the college. She clarified and

testified that the first time she saw the Toyota vehicle, that vehicle was approximately 14 meters from her. That evidence was as follows:

> 'On A3, you will see that is point 4, you observe that that is approximately between 13 and 14 meters from the point of impact being point 1 and 2? --- Yes.
> I apologise Ms Von Weilligh, do you conform that that point 4 is a point at which you saw the Defendant's vehicle for the first time? --- Yes I confirm that My Lord.'

[25] In my view the plaintiff's evidence (when she testified that she, at all times, had a clear view of the road in front of her and that she could see the vehicles parked in front of the college) in cross examination contradicts her evidence in chief (namely that she suddenly noticed the Toyota vehicle reverse out of the parking area). I find it improbable that she saw the Toyota vehicle from a distance of approximately between 96 and 110 meters parked in front of the college but did not noticed that that vehicle was reversing out of the parking area until when she was only 14 meters near that vehicle. In my view the plaintiff faced a dilemma, if she saw the Toyota vehicle at a stage when she was only fourteen meters from it, she was not keeping a proper look-out. In that event the fact that the Toyota vehicle 'suddenly emerged' from the parking area was one of her own making, and, therefore, does not provide her with a lawful excuse for the collision. On the other, if she saw the Toyota vehicle sooner, she did not act as a reasonably competent and skillful driver would have acted. I am thus of the view that the plaintiff's insistence that she had a clear view of the road ahead of her was obviously intended to deny the allegation that she did not have a proper look out. For these reasons I find the plaintiff's evidence to be unreliable.

[26] The *onus* of proof, when she alleges that the first defendant was negligent, is upon the plaintiff. I am more than satisfied that the plaintiff has failed to discharge that onus. But it goes further. I believe the evidence of the first defendant. Counsel for the plaintiff urged on me the improbability that, with a Mercedes parked on the eastern side of Beethoven Street in the parking area in front of the college, the accident would not

have occurred in the manner described by the first defendant. As I have observed I believe the evidence of the first and second defendants, I therefore find that there was no vehicle parked in the parking area in front of the college. I accordingly find on the facts that the accident happened when the first defendant was about to turn left into the parking area in front of the college. The question thus is remains whether on those facts was the plaintiff or the first defendant or were both of them, negligent causally?

[27] Generally the law places a stringent duty on motor vehicles that turn out of their path of travel, whether to the left or to the right, and a less onerous duty upon the following motorist who wishes to overtake.[5] The duty of the motorist ahead who wants to make a turn has been the subject of many decisions of the courts in South Africa, not all of which have been harmonious.[6] Despite the discord in the decisions the courts have formulated the test which may be applied to determine whether a driver of a motor vehicle that turns out of his or her path of travel has complied with the obligations generally applicable to him or her. In the case of *S v Olivier*[7] Miller J (as he then was) formulated the test as follows:

> '…the inquiry is: was it opportune and safe to attempt the turn at that particular moment and in those particular circumstances? Whether it was opportune and safe, or not, will depend upon whether a *diligens paterfamilias* in the position of the driver at that time and in the circumstances then prevailing would have regarded it as safe. (Cf. *Kruger v Coetzee,* 1966 (2) SA 428 (AD) at p. 430). In that inquiry, assumptions which may have been made by the driver and the extent to which the driver kept under observation other vehicles, are together with other incidents relevant to the occasion, factors to be taken very much into account, but no one of these factors will necessarily or even probably provide the answer to the ultimate question.'

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5 See Cooper W E *Motor Law* Volume 2 at 87-9.

6 See *AA Mutual Insurance Association Ltd v Nomeka* 1976 (3) SA 45 (A), *R v Miller* 1957 (3) SA 44 (T); *Sierborger v SA Railways and Harbours* 1961 (1) SA 498 (A); *R v Cronhelm* 1932 TPD 86; *Johannesburg City Council v Public Utility Transport Corporation Ltd* 1963 (3) SA 157 (W), *R v Fratees* 1932 CPD 308; *Hobbs v Guthrie* 1938 CPD 410; *Davidson v Cape Town City Council* 1965 (2) SA 559 (C) and *Kruger v Coetzee 1966* (2) SA 428 (A).

7 1969 (4) SA 78 (N).

[28] The test laid down by Miller, J in the *Olivier's* case, was again applied in the case of *Boots Co (Pty) Ltd v Somerset West Municipality*[8] where Comrie, AJ said the test is:

> '…whether it was opportune and safe to attempt the turn at that particular moment and in those particular circumstances and whether the *diligens paterfamilias* in the position of the driver at that time and in those circumstances would have regarded it as safe..'

[29] I return to the facts of this case. The first defendant testified that he at the curve (the undisputed evidence is that the curve testified to by the first defendant is approximately 110 meters from the point of collision) he switched on the vehicle's left indicator to signify his intention to turn left into the parking area in front of the college. In cross examination he testified that before he switched on the indicator he looked into his left mirror, his right mirror and the rear mirror. From where he turned on the indicator, he drove slowly close to the dividing line and slowly started to turn left when he just heard the sound of the collision. It emerges from his evidence that, at the time when he first gave the signal, he looked to the rear and there were no vehicles coming on behind him. It further emerges from his evidence that there were no vehicles approaching from the opposite direction. There is no evidence to suggest that he took a final look in his left , right or rear-view mirror as he was about to commence the turn.

[30] In all these circumstances can it be said that the first defendant took the precautions which could reasonably be expected of the reasonable man. In my view a driver of a motor vehicle who intends to turn out of his or her path of travel, whether to the left or to the right, must look back into to his or her rear view mirrors to establish whether there are other vehicles behind him and what the position of those vehicles is. He must thereafter give sufficient and reasonable warning to the vehicles behind him and in front of him that he intends to turn left out of his or her path of travelling and he must only execute that manoeuvre to turn left when it is opportune and safe to do so.

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8 1990 (3) SA 216 (C).

[31] Having said that the next question I need to answer is whether it was opportune and safe, or not for the first defendant to turn left. As I have indicated above it will depend upon whether a *diligens paterfamilias* in the position of the driver at that time and in the circumstances then prevailing would have regarded it as safe and opportune to do so (Cf. *S v Olivier* and *Boots Co (Pty) Ltd v Somerset West Municipality**)***. In this matter the first defendant looked to his left and right mirrors and to his rear view mirror, and observed no vehicle he thereafter commenced to turn. It cannot, in my view, be found that he was not entitled to conclude that this was an opportune and safe moment to execute the signaled turn. It cannot be said that he acted on an assumption that, because he had given timeous warning, it was safe to turn; his conclusion that it was safe was, in the circumstances as I have outlined them, based on what he observed rather than a mere assumption. By far too heavy a burden would be placed upon the driver in those circumstances to expect him to again look into his rear mirror before he executed his left turn.

[32] In the circumstances, therefore, I come to the conclusion that the accident is to be attributed to the negligent driving of the plaintiff and that plaintiff is liable for the damages suffered by the defendant. I accordingly make the following order:

1. The plaintiff's claim is dismissed with costs.

2. The defendants' counter claim succeeds, and plaintiff must pay to the defendants the agreed sum of N$27 293, 04.

3 The plaintiff must pay the defendants' costs of the counter claim. The costs to include the costs of one instructed and one instructing counsel.

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Judge

APPEARANCES

PLAINTIFF:	Mr. C J VAN ZYL Instructed by Francois Erasmus and Partners
DEFENDANT:	Mr. SJ Jacobs Instructed by P D Theron & Associates

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