REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case Number: I 1272/2016

In the matter between:

ZENZI AWASES **PLAINTIFF**

and

JACOBUS SMITH **DEFENDANT**

Neutral citation: *Awases v Smith* (I 1272/2016) [2017] NAHCMD 277 (4 October 2017)

CORAM: **MASUKU J**
Heard: 3-7 April 2017
Delivered: 5 October 2017

FLYNOTE: LAW OF DELICT – Damages occasioned by a motor vehicle collision – standard of skill to be employed by a driver – **LAW OF EVIDENCE** – how to resolve irreconcilable versions before court in a trial.

SUMMARY: The plaintiff sued the defendant for damages occasioned by a motor vehicle collision with the defendant's vehicle and incidental damages sustained and costs. The defendant also filed a counterclaim, alleging that it was the plaintiff who was negligent in the manner her car was driven.

Held – that a driver should keep a proper lookout when driving and that he or she should exercise reasonable skill in driving a vehicle so as not to cause harm to others.

Held – that the defendant drove his vehicle without due care and attention in that he drove his vehicle without lights at some stage and focused his attention on the instruments' panel in his vehicle as result of which he collided with the plaintiff's motor vehicle.

Held further – that the version of events testified to by the defendant was false and did not tie in with the objective facts and the probabilities. The defendant was found to have lied and changed his version a number of times.

Held – that the plaintiff's evidence was credible, consistent and in line with objective facts and the probabilities of the case and hence acceptable.

Held further – that the version of the plaintiff showed on the balance that it was the defendant who drove his vehicle in a manner that was negligent in the circumstances, by driving a vehicle without lights at night and driving without due care and attention, resulting in the accident. It was held also that the evidence adduced by the defendant was false, self-serving and contradictory. It was therefore not in line with the probabilities and showed indubitably that the defendant was negligent and was the proximate cause of the accident.

Held – the plaintiff had proven her case on a balance of probabilities and that the defendant had failed to show that the plaintiff was in any way negligent. The plaintiff's claim was upheld and the defendant's counterclaim was dismissed with costs.

ORDER

The plaintiff's claim is granted as follows:

1. Payment of the sum of N$ 264, 197.37;
2. Payment of N$ 10, 104.94 for rental of a replacement vehicle;
3. Payment of N$ 2, 127.50 for towing fees.
4. Interest on the aforesaid amounts at the rate of 20% from the date of judgment to the date of final payment.
5. The defendant's counter-claim is dismissed with costs.
6. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J.;

Introduction

[1] This is an action for damages arising out of a motor vehicle collision, which occurred on 16 May 2015 at Long beach, between a Honda CRV vehicle bearing registration number N158522W, driven by Mr. Lawrence Ochurub and a Nissan NP vehicle bearing registration number N99825W, driven by the defendant.

[2] In this action, the plaintiff claims payment of an amount of N$ 274 429.81 in damages necessary to restore the vehicle to its pristine condition. The plaintiff also claims payment of an amount of N$ 2 127. 50 in respect of damages suffered as a result of her towing the vehicle. Furthermore, the plaintiff claims payment of N$ 10 104.37 for the amount she spent on securing alternative transportation for a period of 25 days while the vehicle was damaged. Lastly, the plaintiff also claims interest on the aforesaid amounts and costs of suit.

[3] The defendant did not act supinely, in reaction. He returned the fire, as it were, by not only defending the claim but also by filing a counterclaim for payment of N$ 211 217.80 as damages sustained as a result of the accident; interest thereon and costs of suit.

[4] It is fair, having regard to the pleadings filed by both parties, to say that each of the parties claims that the other was responsible for the damages each sustained as a result of the collision. The plaintiff claims that the defendant was negligent in that he failed to keep a proper look-out for other vehicles, particularly the plaintiff's motor vehicle; failed to stop after the accident; failed to exercise a degree of care expected of a reasonable driver in the circumstances; failed to keep the vehicle under proper control and failed to have regard to other vehicles on the road, particularly the plaintiff's vehicle.

[5] The defendant, for his part not only denies the allegations contained in the immediately foregoing paragraph, but also alleged that the plaintiff was negligent in that he failed to take cognisance of the defendant's approaching vehicle; attempted to execute a right hand turn across a road surface at a time when it was dangerous and inopportune to do so and thereby drove into the defendant's lane of travel thus colliding with the defendant's on the right front part; drove at an excessive speed in the circumstances; failed to apply brakes timeously or at all and that she failed to avoid a collision when by the exercise of reasonable care, he could and should have done so.

The parties

[6] The plaintiff is an adult female geologist in the employ of De Beers, Namibia and residing at 312 Verstaal Street, Okahandja in this Republic. The defendant, on the other hand, is a male adult resident of 14 Opaal Street, Swakopmund.

Common cause facts

[7] It is common cause that on 16 May 2015, at Long Beach, a motor vehicle collision took place between the vehicles described in paragraph 1 above. The collision took place around 22h00. It is common cause that the plaintiff's vehicle was driven by the plaintiff's boyfriend, Mr. Ochurub, at that time and the plaintiff was seating on the passenger seat next to her boyfriend. The defendant, for his part, was driving his motor vehicle at the time of the collision and it appears he was driving alone in the motor vehicle.

Issues in dispute

[8] It is clear from the pre-trial order that two questions were submitted by the parties for the court's determination. First, was whether the plaintiff was the owner of the vehicle in which she and her boyfriend were driving on the fateful night. Second, was which of the parties, in view of the claim and the counterclaim adverted to earlier, was negligent and therefore was responsible for the damages claimed.

[9] I should mention up front that although the issue of the ownership appeared to loom large at the pre-trial stage, it became of no moment during the trial. I say so for the reason that the plaintiff testified that on 7 August 2013, she purchased the vehicle in question through a suspensive sale agreement via the First National Bank of Namibia. This agreement was introduced in evidence as Exhibit "A". Furthermore, the registration of the vehicle in the plaintiff's name was also introduced in evidence as Exhibit "B". The plaintiff's evidence in this regard was not challenged at all by the defendant and must therefore be held to stand. This, in my view puts the issue of the plaintiff's ownership of the vehicle in question at rest and I find for a fact, there being no other contention or evidence to the contrary, that the vehicle in question was in law owned by the plaintiff and no further mention of this issue is necessary in the judgment henceforth.

[10] This naturally leads to only one question remaining alive for the court's determination, namely, whether the plaintiff or the defendant, was the party at fault for the accident and therefor liable to pay the damages claimed. It is to this issue that I now turn.

The plaintiff's case

[11] The plaintiff, Ms. Zenzi Awases testified under oath and her evidence regarding the motor vehicle accident is summarised hereunder: On 16 May 2015, she was travelling from Swakopmund towards Walvis Bay on or about 22h00 on the B2 road with her boyfriend Mr. Lawrence Ochurub. She was a passenger in the front left passenger seat. It was a clear night with no mist or clouds in the sky.

[12] She saw the light of an on-coming vehicle in the far distance and suddenly and without any previous warning, she heard a bang sound which she initially thought was a stone that hit their vehicle. She testified that she did not feel any movement or jerking, of their vehicle, suggesting that their vehicle could not have veered into the opposite lane. It was her evidence that the defendant's vehicle veered into their lane of travel, because she suddenly saw something white crossing the line.

[13] Within moments their vehicle started rolling. In the process, it rolled three to four times until it came to a standstill on the driver's side. It was only then that it suddenly dawned on her that they had been involved in a car accident.

[14] She testified further that Mr. Ochurub did not execute a right turn, because there was no right turn at the point where the accident occurred. It was her evidence that the only turn was at Long beach and they had not reached it at the time of the happening of the accident. She also testified that Mr. Ochurub was not driving at an excessive speed because the traffic towards Walvis Bay was quite heavy, yet the traffic in the opposite direction was much lighter.

[15] It was her further evidence that three ambulances arrived at the scene. She and her companion were transported into one, which took them to Swakopmund State hospital, but because they did not get the assistance they required, they were, upon their request, transferred to Welwitcha Private hospital.

[16] When they arrived at the hospital, she realised that the defendant was not present. It was her evidence that she concluded that the defendant had absconded from the scene because she and her companion were the only occupants in the one ambulance, and the other two, which were following them, were empty.

[17] Under cross-examination, she testified that the defendant's car was damaged on the right hand side door and the right front wheel of the driver's side.

[18] The second witness called by the plaintiff was Mr. Lawrence Ochurub, who was the driver of the plaintiff's vehicle at the time the collision occurred. Mr. Ochurub

testified that he was driving at the speed of 80 km/hr. It was his evidence that the defendant's motor vehicle moved into their lane (which was the left lane) and bumped into their car.

[19] In his examination-in-chief, it was suggested by Mr. Kauta to Mr. Ochurub that the defendant's case, was that he had veered into the latter's lane. He replied that if he had veered into the defendant's lane, the accident would have occurred in the middle of the road and his car would have been on the right side of the road. He testified that his vehicle landed on the left hand side of the road from Swakopmund to Walvis Bay, which was in his lane, thus rendering the defendant's version a mere fabrication.

[20] It was further suggested to Mr. Ochurub that the defendant's case, was that he failed to take cognizance of the defendant's approaching car. He replied that, then, there must have been something wrong with the defendant's car, hence its invisibility on the road and that is why he did not see the latter's approaching car.

[21] Mr. Ochurub further testified that the accident took place about 200 meters towards Long beach and that there was no turn off to the right at the place where the accident took place.

[22] The cross-examination was short and hardly yielded anything of note for the defendant. It was put to Mr. Ochurub that there was only one closed beer bottle depicted in a picture that was filed an exhibit. He was also asked about where exactly the impact took place on the plaintiff's motor vehicle with a view to suggesting that the witness had crossed the line into the defendant's lane of travel. This Mr. Ochurub emphatically denied.

[23] It was his evidence that he got to learn later that the defendant had a problem with the lights of his vehicle. Mr. Smith taxed him on why this piece of evidence was not included in the statement and Mr. Ochurub testified that he only got to learn of this later and this seems to have been confirmed by the fact that he never saw the defendant's vehicle at any time previous to the collision. It was his evidence that had

the defendant's vehicle's lights been switched on, he would have seen the vehicle and would have taken evasive action.

[24] Lastly, it was put to Mr. Ochurub that the defendant would testify that he had been fishing at Dolphin Beach and that his motor vehicle developed a battery problem requiring it to be jump-started. He testified that he was not aware of that fact. It was also put to him that the defendant would testify that he took one beer with him to the fishing expedition but he did not drink it because it became warm and he left it in the motor vehicle. Mr. Ochurub testified that he had no knowledge of that matter. At that point, the plaintiff's case was closed.

The defendant's case

[25] The defendant, Mr. Jacobus Johannes Smith testified that on 16 May 2015, around 4 and 5 pm, he went fishing with his friends to Dolphin Beach. He took one beer with him, which he did not drink because it got warm. He also testified that his wife was heavily pregnant at the time, so he did not have enough time to spend out with the boys, as it were. He left Dolphin Beach around 10pm.

[26] It was his evidence that he experienced problems with his motor vehicle's battery, which was flat and the car could not start as a result. He asked his friend to help him jump-start his car, which they successfully did. He switched his headlights on and proceeded to Swakopmund from Dolphin beach.

[27] He testified that as he neared the second turn off to Long Beach, he suddenly noticed the approaching vehicle which he later identified as a Honda CRV motor vehicle bearing registration number N 158522 W, which was at the time being driven by Mr. Ochurub. The vehicle he alleged, then moved into his lane and collided with his vehicle. It was the defendant's further testimony that he immediately applied his brakes in an effort to try and avoid the collision, but unfortunately for him, the plaintiff's vehicle was too close to his vehicle. As a result, the vehicles collided and were both extensively damaged.

[28] It was the defendant's further evidence that he sustained a concussion as a result of the collision. He further testified that he was dazed and that he asked people to take him to town. When he got to town, he called his wife who picked him up from there. It was also the defendant's case the following day, i.e. that on Sunday, while on his way to Walvis Bay with his wife in order to complete the accident report, they stopped at the accident scene and inspected it. They noticed brake marks that were left by his vehicle in the left lane towards Swakopmund.

[29] The defendant further testified that when he went to check on his vehicle the following day, he found that certain items that did not belong to him had been loaded on the bakkie, including a tyre and certain body parts of a motor vehicle. It was his evidence that the beer bottle which was depicted in the pictures was the one he had taken with him from home but never drank because it had become warm.

[30] When asked pointedly by his lawyer in the examination-in-chief, the defendant testified that before his accident, he had his car lights on and that the vehicle was jump-started for a period of about thirty minutes before he drove off from the fishing spot. It was his case that before he drove off, the light on the dashboard was on and he waited until it was off before he drove off.

[31] Cross-examination was a brutal affair for the defendant. He was completely unhinged by Mr. Kauta's pointed, searching and incisive questions. He was completely left disheveled as a witness of truth once Mr. Kauta was done with him in cross-examination. Whereas he exuded confidence in his evidence-in-chief, cross-examination painted a different picture of a sorrowful figure, with his credibility as a witness torn to tatters that could not be salvaged by even by re-examination. I will deal with some of the over-heating tendencies exhibited by the defendant in his sojourn in the witness box when I draw my conclusions on the issue of credibility in the ensuing paragraphs of this judgment.

Onus of proof

[32] The plaintiff bears the onus of proving that the defendant driver was negligent, that is, a reasonable person in the position of the defendant could have reasonably foreseen the ensuing harm and the reasonable person would have taken reasonable steps to prevent harm from occurring.

[33] It is the plaintiff's case that the collision was caused by the sole negligence of the defendant. She in her particulars of claim, alleges that the defendant driver was negligent in one or more or all of the following respects:

'33.1 He failed to keep a proper lookout for other vehicles on the road and especially the Plaintiff's vehicle;

33.2 He failed to stop after an accident occurred involving his car and that of the Plaintiff;

33.3 He failed to exercise the degree of care expected from a reasonable driver under the same circumstances;

33.4 He failed to have regard to other vehicles on the road, in particular, the Plaintiff's vehicle'.

[34] In his defence and counterclaim, the defendant alleged that it is indeed the plaintiff's driver who was negligent and the sole cause of the collision. It is further alleged that the plaintiff's boyfriend, was negligent in that he inter alia:

35.1 Failed to take cognizance of the defendant's approaching vehicle;

35.2 Attempted to execute a right hand turn across the road surface at a time when it was dangerous and inopportune to do so, thereby entering the defendant's right of way and colliding with the right front of the defendant's vehicle;

35.3 Drove at an excessive speed in the circumstances;

35.4 Failed to apply his brakes timeously or at all;

35.5 And lastly, failed to avoid a collision when he could have and should have done so by exercise of reasonable care.

Disparate versions

[36] It is common cause that there are two different and mutually destructive versions before the court. In such instances, the plaintiff can only succeed if she can satisfy the court, that her version is probable, accurate and hence acceptable, and that the defendant's version is therefore false and falls to be rejected. This then brings me to the issue of credibility and probabilities, which I shall discuss below.

The approach to disparate versions by the respective parties

[37] Counsel for the plaintiff referred the court to the case of *Von Wielligh v Shaumbwako,*[1] where Ueitele J outlined the approach to be adopted by the courts, when faced with two different versions, 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 the consideration of the probabilities of the case and, if the balance of probabilities favour the plaintiff then the Court will accept his version as being probably true.'

[38] The above case carefully and comprehensively sets out the proper approach to cases where the versions sworn to by the parties are mutually destructive. I shall, for that reason, call in aid the said principles in order to arrive at a decision regarding which of the two divergent versions before court is probable and therefor worthy of belief in the eyes of the court.

Analysis of the evidence and findings of fact

[39] The plaintiff was a credible witness who remained steadfast in her version of events and did not contradict herself even under cross-examination by Mr. Small. The plaintiff's driver, on the other hand, also corroborated the plaintiff's version in

[1] (I 2499/2014) [2015] NAHCMD 168 (22 July 2015) at 16.

material terms regarding the version that the defendant veered into the driver's lane, and subsequently bumped their vehicle. There were no inherent improbabilities in the evidence of the plaintiff and her witness. Their evidence was without contradictions, was entirely coherent and consistent. As indicated above, both pieces of evidence dovetailed in material respects and they were unshaken in cross-examination.

[40] I should also say that on the balance, the plaintiff's version is corroborated by objective facts, which seem to conspire and cast a serious doubt on the correctness, truthfulness and therefor the reliability and acceptance of the defendant's version of events. For starters, the version contained in the defendant's plea suggests that the plaintiff was at fault because he executed a right turn when it was inopportune and unsafe to do so. It now appears as a fact, and I find as such, that the accident did not occur in a place that had a right turn which the plaintiff's vehicle attempted to execute. It became common cause that the accident occurred rather at a bend.

[41] In this regard, it must also be borne in mind that the impact on the plaintiff's vehicle, considered *in tandem* with the defendant's version, all point inexorably in the direction of the correctness of the plaintiff's version. If the defendant's version was true, namely, that the driver of the plaintiff's vehicle executed a right turn and thus veered into the defendant's lane of travel, then the plaintiff's vehicle would have been damaged on its left as it would have been in the defendant's lane of travel and would have collided with the defendant's frontal parts. This is evidently not so.

[42] This is another objective fact that cements and renders the plaintiff's version not only plausible but also correct. That is not all, it contemporaneously detracts from the correctness of the defendant's version, in that the plaintiff's vehicle, from the pictures, lost control and landed on its left side. There is no evidence, as suggested by the defendant, that it crossed its lane into the defendant's lane of travel. To the contrary, the more probable version, and I find this for a fact, is that it was the defendant's vehicle which veered into the plaintiff's lane of travel and suddenly, when the latter had no time to properly react to the defendant's driving.

[43] The version of both the plaintiff and her witnesses shows that they were on their correct lane and suddenly and without warning, the defendant's vehicle collided with their vehicle. I will deal with the latter aspect when I consider the defendant's version in greater detail below. In any event, to buttress this, the defendant conceded under pressure exerted in cross-examination by Mr. Kauta that his vehicle crossed into the plaintiff's car's lane and then stopped.

[44] The defendant, on the other hand, struck me as a witness not worthy of much credit. For starters, his evidence was at odds with the pleadings and during the case, he changed his version a number of times, which Mr. Kauta pounced on and exploited to the fullest. In this regard, as earlier mentioned, his evidence differed materially from the version put up in the plea about how and where the accident occurred. The proverbial milk was in this regard spilt and could not be redeemed for consumption even using the cleanest mop. A party cannot send the adversary on a wild goose chase by pleading one case and then testifying to a totally different case in evidence when the case pleaded proves to be crumbling to smithereens viewed in contradistinction to objective facts as I stated earlier.

[45] The defendant kept on changing his versions and there were various inconsistencies between his plea, the police report and his witness statement and later his evidence under cross-examination. The defendant also struck me as an evasive witness. He chose to answer certain questions put to him in cross-examination by Counsel for the plaintiff and blamed his failure to properly answer other to the loss of memory – a convenient escape route, which the court saw through, as it was as transparent as a water glass.

[46] In examination-in-chief, Mr. Small asked the defendant if he left the scene of the accident and he stated 'Not really. I cannot recall what happened. During the accident I knocked my head.' This was nothing but selective memory as in his witness' statement he appeared very clear as to the fact that he left the scene of the accident and suggested that he was concussed. In any event, the court cannot, in the absence of any medical evidence, accept the defendant's *ipse dixit* that he was concussed as he claimed. He who alleges must prove. Making mere allegations in the absence of evidence in proof thereof does not assist the defendant at all.

[47] Furthermore, he testified that during the drive before the accident, he had his lights on and he was positive about this. His undoing, however, his evidence that his vehicle had a battery problem before he left the fishing site and had to have his vehicle jump-started. The following exchange ensued in the battle of wits with Mr. Kauta:

Q: You looked down at the light whilst driving and not at the road?
A: Yes.

Q: When you checked the road again, you saw the lights of another car and the collision took place?
A: Yes.

Q; The plaintiff never drove into your lane?
A: Yes.

Q: You were looking down and then saw lights?
A: No. It is like that in the statement.

Q: Your vehicle had electrical problems?
A: Yes.

Q: The battery was flat?
A: Yes.

Q: Lights showed a weak battery?
A: Yes.

[48] This exchange nailed the defendant's colours to the mast. It is clear that his vehicle had a battery problem and that the lights of his vehicle were weak. As a result, he further testified, he saw a red signal on the dashboard, which he kept looking at as he drove when he suddenly collided with the plaintiff's motor vehicle. It was when he saw the lights of the plaintiff's lights that he applied his brakes and the vehicle veered into the plaintiff's lane as aforesaid.

[49] In this regard, I am of the considered view that the defendant's version on the battery problem corroborates the plaintiff's version that the lights of the defendant's vehicle were not on when the collision occurred. It is for that reason, and I find this for a fact, that the defendant's lights, because of the battery problem, could not be seen by the plaintiff and her partner until the collision took place. The defendant has nothing to show or back the truthfulness of his version that his lights were on all the time.

[50] It is also clear from the defendant's version under cross-examination that he did not drive the vehicle with due care and attention. In this regard, it is proven that the defendant drove the vehicle in such a manner because he had his eyes fixed at times, on the red light in the dashboard of his vehicle. He therefore failed to keep a proper lookout and did not exercise the degree of skill and care expected of a reasonable driver in the circumstances. He should have stopped the vehicle when he saw the red light on the dashboard, particularly because the problem of the battery was at that stage well documented to him.

[51] It is also fitting to mention that under cross-examination by Mr. Kauta, the defendant conceded that he would never agree that he was in the wrong and caused the collision, because if he did, then he would be liable for the damages claimed by the plaintiff. The defendant further admitted to stay clear of liability, he could go to the extent of putting up versions that are inconsistent with his current situation. He clearly painted himself as a witness as far from the truth as the east is from the west. In this regard, the only inference that can be drawn is that he gave evidence that was self-serving, geared to exculpating himself, even if he parted ways with the truth he knows in the process.

[52] The defendant testified that the plaintiff's car veered into his lane, when he saw that, he immediately applied his brakes but the plaintiff's car was too close and therefore the two vehicles collided. When it was put to the defendant that if that version is correct, how was it that there was no head on collision. The defendant replied that luckily there was none. This version, I must say is improbable and cannot

be true. It is common sense that when one vehicle driving at an excessive speed veers into the lane of an oncoming vehicle that applied its brakes, the impact would most likely be a head on collision. The defendant could not explain how this did not happen given his version of events.

[53] The defendant further testified that after the accident, he was dazed and that he left the accident scene. Then he asked people to take him to Swakopmund, he was dropped off in town and he called his wife. The defendant was asked under cross-examination why he did not stay at the accident scene, if he was so dazed. The defendant replied that he did not have a clear recollection of what happened after the accident. What I find astonishing is that, in that dazed state, the defendant chose to get away from the accident scene, had the presence of mind to ask people to drop him off in town and called his wife to pick him up from town.

[54] When he was asked why he did not go to the hospital in the ambulances, he did not have a satisfactory answer. All he conveniently said was that he did not remember. A reasonable man, who was just involved in an accident would have stayed at the scene and gone to the hospital in the ambulances that came to the scene, as that was the whole purpose of ambulance services, to provide medical assistance to those injured and take them to a hospital if need be. This in my view attracts a negative inference from the defendant's actions.

[55] The plaintiff's evidence that when they inspected the defendant's vehicle the following day, they found many beer bottles remains unchallenged. The fact that only one bottle was captured in the picture does not in any way serve to dislodge the plaintiff's version that she saw a number of beer bottles in the vehicle the following day. This fact ties neatly with what was put to the defendant in cross-examination that he was inebriated as he drove the vehicle on the fateful night and that explained why he ran away from the scene of the accident to avoid being charged for drunken driving.

[56] I accordingly draw that inference in the light of the plaintiff's vehicle of the beer bottles she had seen in the defendant's vehicle. His version that he had taken only one beer bottle but did not drink it is in my view false and is self-serving. Seen in

the light of all the events, I find that the defendant was not candid with the court. He was visibly shaken when put to him that he was drunk and that was the sole reason why he escaped from the scene. His wife, who must have been sober would, in all probability, have asked the defendant to go to the police that very night as his leaving the scene is a criminal offence. There was an impelling force that pushed him away and I find that it was his inebriation, which must have, to some extent, also affected his proficiency and decision-making as a driver.

Conclusion

[57] The question that now needs to be answered is whether the plaintiff proved her case on a balance of probabilities. I am of the view that the plaintiff's version that the defendant veered into their lane and collided with their vehicle is more plausible than the defendant's version. I am also of the view that the defendant did not take reasonable steps that a reasonable and careful driver in those circumstances would for the following reasons:

(a) He failed to keep a proper look out for other vehicles on the road and especially the plaintiff's vehicle, when he looked down on his dashboard. He did not see the approaching vehicle because he was worried about the electrical condition his car.

(b) He failed to stop after the accident occurred when he absconded from the accident scene. This concession was admitted by the defendant himself under cross-examination by counsel for the plaintiff.

(c) He veered into the plaintiff's lane and thereby causing the collision with the plaintiff's vehicle. This was supported by the evidence adduced by the plaintiff, in the form photographs and the brake marks left by the defendant's vehicle that was discovered at the accident scene.

(d) He failed to prove that the plaintiff's driver was the sole cause of the collision, when he attempted to execute a right hand turn off Long beach. It is common cause

that where the accident happened, there is no right hand turn. The only turn is a left one and that is not where the accident occurred.

(e) The fact that he is held to have been inebriated also cements the finding that he did not drive the vehicle with the requisite degree of skill. It is a notorious fact that drinking alcoholic drinks ordinarily impairs the driver's ability to drive in a proper manner and is likely to impair the judgment of the driver. The evidence points ineluctably to the conclusion that the defendant's vehicle was in any event not road-worthy, particularly to drive at night because of the problems with the battery.

[58] In his closing argument, Counsel for the plaintiff also referred the court to the so-called *res ipsa loquitor* principle, which was enunciated in the case of *Road Contractor Company Limited v Jorge*[2], as follows:

> 'Where a motor vehicle drove on the incorrect side of the road and collided with an approaching vehicle, it has been held *res ipsa loquitor* because the only reasonable inference was that the defendant's driving onto the incorrect side of the road at an inopportune moment was due to his failure to exercise proper care. Proof that a vehicle was on the incorrect side of the road at the time of the collision is *prima facie* proof of the driver's negligence'.

It was established in evidence that it was the defendant's vehicle that was at the stage of the accident, being driven on the incorrect side of the road. As a result, the *res ipsa loquitor* principle must return to haunt the defendant in this case. As such, this neatly seals the proof of the defendant's negligence in this case.

[59] Lastly, the court was referred to the case of *Nogude v Union and South –West Africa Co Ltd,*[3] where Jansen JA held that a proper look-out entails a continuous scanning of the road ahead, from side to side for obstructions or potential obstructions. This, he further held, includes an awareness of what is happening in one's immediate vicinity.

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[2] (I 3287/2014) [2016] NAHCMD 296 (30 September 2016) at 35.
[3] 1975 (3) SA 685 (A) at 688 A-C.

[60] It is clear as noonday from the evidence adduced that the defendant was far from that high level of a proper look-out as his eyes were at times fixed, if not transfixed to the red light of his dashboard. To his further disadvantage, he was driving at night where the conditions are more treacherous than during the day, thus calling for a higher and sustained degree care of and attentiveness. The inescapable finding in the result, is that the defendant failed to keep a proper lookout, which, with other factors mentioned earlier, resulted in the collision.

[61] In the circumstances, I find that the plaintiff has established on a balance of probability that she suffered damage and that the defendant's actions were the cause of the collision as held above. Conversely, I find that the defendant has failed to take his case in proof of the averrals in the pleadings off from the starting blocks in attempting to show that the plaintiff was the one at fault. In all the circumstances, there is only one reasonable and plausible conclusion that can be drawn and it is that the defendant is the party that was at fault. To put the blame at the door of the plaintiff in the circumstances would be nothing short of the perverse.

Agreement on issue of quantum

[62] I should, at this juncture mention that the parties agreed during the course of the trial that there was no need to prove the damages sustained by each. The effect of this agreement was that whichever way the court found, whether for the plaintiff or the defendant, the court would grant damages as claimed. It is in the spirit of this agreement that I make the order that follows below in favour of the plaintiff.

Order

[63] In the premises, the plaintiff's claim is granted as follows:

63.1 Payment of the sum of N$ 264, 197.37;

63.2 Payment of N$ 10, 104.94 for rental of a replacement vehicle;

63.3 Payment of N$ 2, 127.50 for towing fees.

63.4 Interest on the aforesaid amounts at the rate of 20% from the date of judgment to the date of final payment.

63.5 The defendant’s counter-claim is dismissed with costs.

63.6 The matter is removed from the roll and is regarded as finalised.

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T. S. Masuku

Judge

APPEARANCES:

PLAINTIFF:	P. Kauta
Instructed by:	Dr Weder, Kauta & Hoveka Inc.
DEFENDANT:	A. B. Small
Instructed by:	Francois Erasmus & Associates