

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: I 3903/2015

In the matter between:

GOTLIEB J J MILJO

PLAINTIFF

and

DANIEL NDIVAYELE

DEFENDANT

Neutral citation: *Miljo v Ndivayele* (I 3903/2015) [2018] NAHCMD 263 (30 August 2018)

Coram: UNENGU, AJ

Heard: 06 August 2018

Delivered: 30 August 2018

Flynote: Motor vehicle accident – Defendant makes U-turn in front of the plaintiff's vehicle and colliding with it – Defendant failed to exercise care to avoid the accident happening.

Summary: The defendant's vehicle collided with the plaintiff's vehicle when defendant made a U-turn in front of the plaintiff's vehicle. He hit the left front side of the plaintiff. *Held:* Defendant was a poor witness while plaintiff gave acceptable and credible explanation of how the accident happened. *Held:* That it is a notorious fact and common knowledge how taxi drivers operate on public roads. They have no regard of safety of other motorists, pedestrians and own passengers. Court granted judgment with costs of suit in favour of plaintiff.

ORDER

- (i) Judgment is granted in favour of plaintiff for payment in the amount of N\$128 622.82.
- (ii) Interest on the aforesaid amount at the rate of 20% per annum, calculated from the date of judgment until date of final payment.
- (iii) Costs of suit.

JUDGMENT

UNENGU AJ:

Introduction

[1] The plaintiff in the matter, Mr Gottlieb Miljo has issued combined summons against the defendant, Mr Daniel Ndivayele residing at erf no. 99, Walvis Bay Street, Havana and claims from the defendant an amount of N\$128 622.82 for reasonable costs to repair his motor vehicle to its pre-collision condition and assessment fees with

interests on the amount at the rate of 20% per annum from the date of judgment until the final date of payment with costs of the suit.

[2] The defendant has defended the claim and filed a counter-claim. However, when the trial of the matter started, the defendant abandoned his counter-claim and admitted the *quantum* of the plaintiff's claim.

Background

[3] On or about 4 May 2015 at approximately 15h00 at the intersection of Florence Nightingale Street and Pasteur Street Windhoek West, a collision occurred between the plaintiff's motor vehicle a 2012 BMW X3 with registration number N143112W and a 2000 white Toyota Corolla motor vehicle with registration number N133511N of which the defendant was the driver. In the particulars of claim, the plaintiff alleged that the defendant was the sole cause of the collision for he was negligent in his driving as he, amongst others, failed to take cognisance of plaintiff's oncoming vehicle which was travelling in the opposite direction and collided with the plaintiff's vehicle when he made an illegal U-turn; entered the plaintiff's right of way at a time when it was dangerous and inopportune to do so; failed to apply his brakes timeously or at all; drove at an excessive speed in the circumstances and failed to avoid a collision when he could have and should have done so by exercise of reasonable care.

Judicial Case Management

[4] A reading from the papers filed, shows that the matter was case managed by a managing judge who referred it to mediation. The parties, however, failed to reach a settlement during the mediation proceedings. That being the case, the parties drafted a proposed pre-trial report which they filed on 29 November 2017 and made an order of court on 4 December 2017.

Pre-trial order

[5] The pre-trial order of 4 December confirmed what the parties agreed in their proposed pre-trial report filed on 29 November 2017. Issues of facts agreed to be resolved at the trial contained in para 1 of the report are issues already summarised in para 3 above. Other issues raised in the proposed pre-trial are common cause between the parties. The *quantum* of the claim is no longer in dispute. It follows, therefore, that the only issue the court is called upon to resolve, is the issue of who caused the accident.

Evidence and assessment

[6] Both the plaintiff and the defendant testified and called no other persons as witnesses to support their testimonies. This despite the fact that the defendant's vehicle was a taxi and he had a passenger in his vehicle whom he picked up from the nurses home a few meters from where the collision occurred. Be that as it may. It was not a good day for the defendant to be in a witness box to face an experienced a cross-examiner in the person of Mr Erasmus, counsel for the plaintiff. The defendant in his testimony relied on the accident report compiled by the Police Officer who attended to the scene of accident. However, during cross-examination, it was pointed out to him that the accident report contained wrong information, therefore it had to be disregarded by the court. The report, amongst others, indicated that the plaintiff and defendant's vehicles were moving from east to west before colliding, contrary to the testimonies of the plaintiff and the defendant that they were driving from west to east in Pasteur Street and Florence Nightingale Street respectively.

[7] In general, the defendant was a poor witness to the extent that even his counsel, Ms Gaes did not know how to assist him further. Even though Ms Gaes did not say so in so many words, from her reaction and conduct, I could gather that she had accepted a defeat in the matter.

[8] On the other hand, the plaintiff, Mr Miljo was coherent and sure when testifying. He testified that he approached a yield sign on his left side at the intersection of Pasteur and Florence Nightingale Streets driving from west to east. He said that at the yield sign, he reduced speed, looked to the left in Florence Nightingale Street, saw no vehicle therefore proceeded into the junction to turn into the left lane at a low speed of between 15 and 20 kilometres per hour when the defendant attempted to make a U-turning into Pasteur Street. According to him, he was 35 yards in the intersection when his vehicle was hit on the left front side by the defendant's vehicle.

[9] Ms Gaes cross-examined the plaintiff but was not shaken. He maintained his original position and version of the events. His explanation of how the collision happened in my view, is the true version of what happened. It would seem, therefore, that the defendant was speeding and carelessly made a U-turn in front of the plaintiff's vehicle.

[10] The plaintiff's version of the collision sounds probable and credible if regard is had to the fact that the defendant was driving a taxi. It is not only a notorious fact how taxis are operated on public roads, but is also common knowledge that taxi drivers do not care with safety and security of other motorists using the same public roads, safety and security of pedestrians and not even safety of their own passengers. They stop at any part of the road without warning other traffic when they see a customer standing next to the road or cut in front of another vehicle when it is unsafe to do so when they overtake.

[11] There are good taxi drivers. But a few who could be regarded as careful drivers. The majority, do not care about how they should operate their taxi's on public roads. In the present matter the defendant in my view, caused the accident due to failure to comply with one or all what plaintiff had alleged in the particulars of claim as the cause of the collision.

[12] Therefore, and for reasons stated above, I am persuaded by the plaintiff and conclude that he had proven his claim on a balance of probabilities that the defendant is the sole cause of the accident and will grant judgment with costs of suit in his favour.

[13] That being the case the following order is made:

- (i) Judgment is granted in favour of plaintiff for payment in the amount of N\$128 622.82.
- (ii) Interest on the aforesaid amount at the rate of 20% per annum, calculated from the date of judgment until date of final payment.
- (iii) Costs of suit.

EP Unengu
Acting Judge

APPEARANCES

APPELLANT: F G Erasmus
of Francois Erasmus and Partners, Windhoek

RESPONDENT: F F Gaes
of Uanivi Gaes Incorporated, Windhoek