



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-DEL 2018/00097

In the matter between:

NDAGNDOMWHEHYO SHEYE

PLAINTIFF

and

R FRANCISCO

DEFENDANT

Neutral citation: *Ndagndomwhehyo Sheye v R Francisco* (HC-MD-CIV-ACT-DEL 2018/00097) [2019] NAHCMD 106 (16 April 2019)

Coram: TOMMASI J

Heard: 4 February 2019

Oral Submissions: 5 February 2019

Delivered: 16 April 2019

Flynote: Motor vehicle accident – negligence – a driver turning right ought to do so when it is opportune to do so – defendant clearly negligent having crossed into the lane of the plaintiff who had right of way – A driver entering a busy traffic intersection must approach same with reasonable care to avoid coming into collision with another vehicle.

- plaintiff entered the intersection with clear view of oncoming traffic crossing her lane yet failed to do so with reasonable care – plaintiff also negligent- Damages – proof of quantum – Defendant failed to adduce evidence proving reasonable cost of repair – Counterclaim dismissed with costs.

Summary: Negligence of both drivers. The vehicles of the parties collided at a busy traffic light controlled intersection. The plaintiff had right of way as the traffic light turned green in her favour. Having initially reduced speed and coming almost to a complete standstill, she removed her foot from the brake and accelerated. The defendant was following a queue turning right across the lane of the plaintiff when the traffic arrow sign already turned red. The defendant herein is clearly negligent. The plaintiff however, saw the defendant entering the intersection and turning in her pathway but nevertheless proceeded when it was clearly unsafe to do so.

ORDER

Having heard the evidence and arguments from the respective counsel for the plaintiff and defendant –

IT IS ORDERED THAT:

1. Judgment for the plaintiff to the extent of 70% of her claim;
2. Interest thereon calculated at 20% *per anum* calculated from date of judgment to date of final payment;
3. The defendant is to pay 70% of the plaintiff's costs in respect of the plaintiff's claim;
4. The defendant's counterclaim is dismissed with costs;

JUDGMENT

TOMMASI J:

[1] The plaintiff instituted action against the defendant for damages suffered as a result of a motor vehicle collision which the plaintiff claimed was caused by the sole negligence of the defendant. The defendant in his plea denied that he was negligent and in his counterclaim claimed that the sole cause of the collision was the negligent driving of the plaintiff.

[2] The dispute identified by the parties is whether the plaintiff or the defendant was negligent and the extent to which the party was negligent. The defendant agreed to the quantum of the plaintiff's damages and the only remaining issue was whether the defendant had proven the quantum of damages to his vehicle.

[3] The collision occurred at approximately 14H30 on 20 September 2017 at the intersection of John Meinert Street and Hosea Kutako Drive. The defendant submitted a photograph of the intersection which accurately depicts this intersection.

[4] The intersection is a very busy intersection given the fact that it leads in and out of the Central Business District (CBD). Hosea Kutako Drive is a double carriage road and the intersection is controlled by traffic lights. An arrow sign permits traffic traveling in John Meinert Street from the CBD to turn right into Hosea Kutako Drive. The intersection is clearly visible for traffic traveling in John Meinert Street going into and coming from the CBD.

[5] The plaintiff was driving in John Meinert Street in the direction of the CBD. The road leading into the CBD has three lanes: one lane is dedicated for traffic turning right

into Hosea Kutako Drive, one lane for traffic driving straight into the CBD and one lane for traffic driving straight and turning left into Hosea Kutako Drive. The plaintiff was driving in the latter lane. There were no vehicles in front of her.

[6] The plaintiff, as she approached the intersection, saw the following: the traffic light was red, there was a vehicle in the middle lane waiting for traffic light to turn green; there were vehicles coming from the CBD in John Meinert Street turning right into Hosea Kutako Drive as the arrow permitted them to do so. She reduced speed and was almost at a standstill when the traffic light turned green. At this stage there were no longer vehicles turning to the right. She took her foot off the brake and accelerated. At this point the defendant's vehicle drove into her path. According to her the defendant's vehicle was the only vehicle in the intersection turning right and there were no other vehicles ahead of him. She hooted and applied brakes whilst swerving a little to the right. According to her, she almost avoided hitting the defendant's vehicle but was unable to swerve too much to the right as there was a vehicle in the lane next to her. Presumably the one which was waiting at the traffic light for it to turn green. The left front of her vehicle collided with the rear passenger door of the defendant's vehicle.

[7] The defendant was also traveling in the same road in the opposite direction traveling in the lane dedicated for traffic turning right into Hosea Kutako Drive. Defendant was standing in a queue of cars waiting to turn right into Hosea Kutako Drive. At the time the arrow turned yellow, he was standing perpendicular to the island in the middle of Hosea Kutako Drive. When it turned "red" he continued with the queue turning right and he had almost cleared the lane in which the plaintiff was traveling when the plaintiff's vehicle collided with his vehicle hitting his vehicle on the left rear passenger door. According to defendant, he moved slightly forward as he was unable to move completely out of the way given that there were other vehicles in front of him. He only saw the plaintiff when he was slowly moving forward in the queue in her lane. He saw the plaintiff was talking on her mobile phone whilst driving and was still talking on her mobile when he walked to her car after the collision.

[8] The plaintiff denied that she was on her mobile phone when she drove and testified that she dialled the police after the collision as she had the number on speed dial. I am not entirely persuaded that the plaintiff was honest in this regard. I however conclude that the plaintiff was fully aware of the layout of the intersection and the traffic. It is further noted that both parties acknowledged that there was nothing obstructing their view of the intersection and oncoming traffic. It was common cause that both parties were driving slowly.

[9] It was not disputed that the plaintiff had right of way i.e. that at the time she entered the intersection, the traffic light had turned green in her favour. It was further not disputed that the defendant was in the lane of the plaintiff when the arrow sign had already turned red. It is apparent from the undisputed facts that they saw each other. The defendant proceeded to execute his turn when it was inopportune to do so, i.e. when he saw the arrow had turned red and in full view of the oncoming vehicle of the plaintiff. The plaintiff's vehicle was clearly visible as she was coming downhill.

[10] The plaintiff on the other hand was equally aware of the other vehicles turning to the right into Hosea Kutako Drive. It is the duty of the driver entering an intersection to proceed with caution. The defendant's vehicle ought to have been visible in the lane which was dedicated for traffic turning to right if one considers her testimony that the defendant was the only vehicle in the intersection. It was not disputed that the intersection was approximately 30 meters wide leaving the plaintiff ample time to respond to Defendant's slow turn into her lane. The defendant's vehicle had already commenced his turn to the right and had already cleared the lane next to her. The defendant's vehicle was halfway across her lane when she collided with his vehicle. I find it highly unlikely that the defendant's vehicle suddenly appeared from nowhere given the fact that plaintiff acknowledged that the defendant was not driving fast and that there was nothing to obstruct her view of the intersection.

[11] The defendant turned right when the arrow sign no longer permitted him to turn, and he had a clear view of the oncoming traffic. He decided nevertheless to drive into

the face of oncoming traffic. His negligence is clear. Mr Erasmus referred this court to the *Kandenge v Ministry of Works, Transport and Communication and Another 2002 NR 322 (HC)*. Maritz J, as he then was, at page 325, A-C stated the following:

'A driver who decides to cross the path of oncoming traffic at an intersection by means of a right-angle right-hand turn must, amongst others, indicate his intention to do so in a manner clearly visible to other road users and refrain from executing the turn until he or she can do so without obstructing or endangering oncoming traffic - even if it means that he or she must bring the vehicle to a stop without encroaching into the lane of oncoming traffic until an opportune moment arises to safely execute the turn.'

By his own admission the defendant crossed into the lane of oncoming traffic when it was not opportune to do so and executed this turn when the oncoming vehicle of the plaintiff was clearly visible. His conduct is clearly negligent.

[12] The plaintiff on several occasions emphasised that she had right of way. The plaintiff claimed she was hooting, applied brakes and swerved slightly to the right in order to avoid the accident. The plaintiff was traveling at a low speed and vehicles were turning right across her lane into Hosea Kutako Drive. The Defendant was in the lane earmarked for vehicles turning right and she had seen him since he was the only vehicle in the intersection. The plaintiff despite this removed her foot from the brake and accelerated exercising her "right of way". Mr Podelwitz, on behalf of the defendant submitted that it is an accepted practice at these intersections for vehicles to turn right in a queue even after the arrow sign stop flashing in their favour. This indeed is a dangerous practice and should be discouraged. It is however prudent for a driver entering the intersection under these circumstances to proceed with the necessary pater familias care of a diligence. In *Gerber v Minister of Defence and Another 2014 (4) NR 1147 (HC)* Ueitele J, at page 1154, A-D, refers to the following citation from the case of *Robinson Bros v Henderson* where Solomon CJ said:

'Now assuming that, as the defendant himself admitted, the plaintiff in the circumstances had the right of way, the whole question would appear to be whether he acted reasonably in entirely ignoring the approaching car on the assumption that the driver would respect his right of way and would avoid coming into collision with him. In my opinion that was not the conduct of a reasonable man. It is the duty of every director of a

motor car when approaching a crossing, no matter whether he believes he has the right of way or not, to have regard to the traffic coming from a side street. There is necessarily a certain amount of danger in approaching a crossing, and it is the duty of every driver to exercise reasonable care to avoid coming into collision with another car entering the crossing from a side street. Having seen such a car, he is not justified in taking no further notice of it, on the assumption that the driver is a careful man and may be relied upon to respect his right of way. If every driver of a motor car were a reasonable man there would be few accidents; it is against the careless and reckless driver that one has to be on one's guard. The duty of the plaintiff in this case was to keep the car coming down Alice Street under observation, and not to have entirely lost sight of it merely because he had the right of way.' [my emphasis]

[13] The plaintiff indeed had ample opportunity to apply reasonable care by allowing the defendant's vehicle to pass even if he did not have right of way. The plaintiff, having seen the vehicle of the defendant, proceeded regardless of the danger of doing so merely because she had right of way.

[14] The defendant, by turning right when the arrow was not in his favour and in full sight of oncoming traffic, created a dangerous situation. His negligence is undoubtedly considerably more than that of the plaintiff who negligently failed to respond to the danger caused by the Defendant with reasonable care.

[15] In light of the above I assess the degree of negligence attributable to plaintiff in respect of the plaintiff's claim to 70 per cent and the degree of negligence attributable to the defendant in respect of the defendant's claim in reconvention to 30 per cent.

[16] The remaining issue is whether the defendant had proven the quantum of the damage to his vehicle. There is no indication how the amount of N\$4500 was calculated and arrived at. The only evidence is the testimony of the defendant that he obtained a quotation from "Friedels" for the repair of the vehicle. This does not constitute evidence of the reasonable cost of repair to the vehicle and the defendant's counterclaim must therefore be dismissed with costs.

[17] It is furthermore my considered view that plaintiff's costs herein ought to be awarded in proportion to the degree of success.

[18] In the result the following order is made:

- (a) Judgment for the plaintiff to the extent of 70% of her claim;
- (b) Interest thereon calculated at 20% *per annum* calculated from date of judgment to date of final payment;
- (c) The defendant is to pay 70% of the plaintiff's costs in respect of the plaintiff's claim;
- (d) The defendant's counterclaim is dismissed with costs;

M A TOMMASI

Judge

